

## Smoking — the end of the road?

Alison Wallace Mar 09 2006

The smoking ban in England in all pubs, clubs, restaurants and workplaces takes effect in the summer of 2007. It will, however, come into force in Scotland this month and it has been in effect in the Republic of Ireland since March 2004. The Irish Government has hailed the ban as a success and many think that bars and restaurants are more pleasant places than they used to be. There has been no significant fall-off in business for bars; neither has there been a rise in business failures. Clearly, the smoking ban in England will also bring benefits to workers in pubs, clubs and workplaces, and will create a better atmosphere for everyone.



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The Department of Health plans a three-month consultation period to examine the issues once the legislation passes through the House of Lords this summer. At present, it is intended that smoking will still be allowed in the home and places considered to be homes, such as prisons, care homes and hotels. The Health Bill allows for special exemptions from “substantially enclosed provisions”, since it is not necessarily the case that smoking outside will still be permitted.

Business owners should be thinking about the changes they need to put in place now in preparation for the ban next summer. There is already an implied duty on employers to provide a suitable working environment for employees that is free from cigarette smoke; passive smoking has been a health concern for many years. Smokers are often relegated to the status of modern day outcasts, huddled outside an office building to smoke, but they attract little sympathy. Employers should now carefully consider the consequences of recruiting smokers.

### Spark the debate

What is the position of workers who have smoked for years in their workplace only to be faced with a smoking ban or smoking restriction next summer? Do they have any rights that will be infringed? No employee has the right to smoke unless his or her terms of employment state this. So if employers now decide to impose a ban on smoking in preparation for the summer of 2007, can employees who have been smoking for many years complain? Although the consequence of a smoking ban may make life harder, if the legitimate purpose is for the health and safety of the majority of its non-smoking employees, an employee would not be able to complain.

Passive smoking cases in the last ten years have led to smoking in the workplace being almost a thing of the past, as non-smokers are well aware of their employment rights and are willing to exercise them.

Many employers, rather than face expensive potential negligence, breach of contract and constructive dismissal claims, have already taken steps to ban smoking from the workplace. Those businesses that still allow smoking should treat this issue seriously now rather than wait until 2007. If a business is considering introducing a policy, then it should:

- consult its workforce
- explain why the proposal is necessary
- consider issuing a questionnaire or conducting a survey to ascertain attitudes

- give at least three months' notice of any new rules after consultation has been completed
- consider possible alternatives
- consider a gradual introduction
- offer counselling and support to employees who will be compelled to give up
- ensure that new rules and the consequences of breaking them are clear
- ensure that any new policy applies to everyone
- monitor and review the policy in operation, particularly when the ban is in effect

It may be necessary to dismiss employees who continue to smoke after restrictions have been introduced and after the law changes. The general law of unfair dismissal will apply. Here, the potential for a reason for dismissal will be one related to the conduct of the employee in question, but the employer must have acted reasonably in all the circumstances. If the smoking restrictions have been properly introduced, clearly explained and uniformly enforced, there should not be a problem. Breach of the ban can be treated like any other disciplinary matter with warnings leading to dismissal for persistent offenders and, after a proper investigation, an opportunity for the employee to put forward his or her case.

### **Lights out**

Employers will find it easier to enforce anti-smoking policies once the total ban comes into force but dismissals must still be fair. What may be more difficult is where business owners, such as those that run bars, clubs and pubs, put pressure on staff not to complain about smokers, or persecute staff that report the employer to the authorities for allowing smoking. These employers may find themselves subject to unfair dismissal or detriment claims under the whistle-blowing or health and safety provisions of the Employment Rights Act 1996. Additionally, if a business fails to enforce the total ban on workplace smoking, there are fines of up to £2,500 — the consequences could, therefore, be expensive.

Smoking in relation to home-workers is a grey area. The aim of the legislation is to protect all workers but what is the situation for private caterers who attend a function at a private home? Must the hostess ban her guests from smoking?

Smoking will be banned in all offices, shops and other workplaces, but music teachers or hairdressers who receive clients in their homes may also be exempt. Smoking will be allowed in private cars but banned in taxis. Company cars are another grey area yet to be decided. It is likely that smoking in lorry cabs owned by haulage companies will be banned but allowed in cabs owned personally. Smoking will be banned in hospitals, although there may be exemptions for mental health institutions, hospices and care homes. Surprisingly, smoking will not be banned in hotel bedrooms, halls of residence and army barracks. Workers involved with these businesses will remain unprotected.

Employers need to take this issue seriously now rather than wait for the ash to settle in 2007.

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