

## **THE SMOKING BAN**

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### **A WISCONSIN DEPARTMENT OF JUSTICE ADVISORY MEMORANDUM ON 2009 WI ACT 12 (July 2, 2010)**

#### **I. INTRODUCTION**

This Wisconsin Department of Justice (DOJ) memorandum (the “Advisory”) is intended to assist law enforcement and other groups in addressing the new requirements established by 2009 Wisconsin Act 12 that relate to smoking in public places. The Advisory summarizes the requirements of Act 12 and how the Act is enforced. Finally, the Advisory concludes with some frequently asked questions about the Act.

#### **II. SUMMARY OF THE LAW**

Act 12, which takes effect July 5, 2010, amends the current law restricting smoking under Wis. Stat. § 101.123. Act 12 expands the breadth of the prohibition against smoking and limits the exceptions where smoking is prohibited. In particular, Act 12 lists fifteen specific enclosed places where smoking is prohibited and then includes a catch-all provision that prohibits smoking in all other “enclosed places” that are “places of employment” or that are “public places.” Act 12 removes the general exception for designated smoking areas. It also retains from current law the four specific outdoor areas where smoking is prohibited. Additionally, Act 12 specifically prohibits smoking in sports arenas, bus shelters and public conveyances, even if those places don’t meet the definition of “enclosed place.”

Act 12 provides that any local ordinance regulating or prohibiting outside smoking must comply with Act 12, applies only to public property under the municipality’s jurisdiction, and must allow a “person in charge” of restaurants, taverns, private clubs, or retail establishments to designate an outside smoking area within a reasonable distance from any entrance to the establishment.

Finally, Act 12 requires a “person in charge” of a place subject to Act 12 to take the necessary steps to ensure compliance with the Act. Act 12 creates a legal obligation on smokers and persons in charge of places where smoking is prohibited and increases the penalty for violations of the Act. The Wisconsin Department of Justice and local law enforcement are authorized to enforce Act 12.

### III. IMPORTANT DEFINITIONS

**“Smoking”** – burning or holding, or inhaling or exhaling smoke from, any of the following items containing tobacco:

- A lighted cigar.
- A lighted cigarette.
- A lighted pipe.
- Any other lighted smoking equipment.

Wis. Stat. §101.123(1)(h)

**“Enclosed place”** – a structure or area that has all of the following:

- A roof.
- More than 2 substantial walls.

Wis. Stat. §101.123(1)(ak)

**“Place of employment”** – any enclosed place that employees normally frequent during the course of employment, including

- an office;
- a work area;
- an elevator;
- an employee lounge;
- a restroom;
- a conference room;
- a meeting room;
- a classroom;
- a hallway;
- a stairway;
- a lobby;
- a common area;
- a vehicle; or
- an employee cafeteria.

Wis. Stat. §101.123(1)(dj)

**“Public place”** – any enclosed place that is open to the public, regardless of whether a fee is charged or a place to which the public has lawful access or may be invited.

Wis. Stat. §101.123(1)(eg)

**“Person in charge”** – the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a public conveyance or at a location where smoking is prohibited or regulated under this section.

Wis. Stat. §101.123(1)(d)

**“Substantial wall”** – a wall with no opening or with an opening that either does not allow air in from outside or is less than 25 percent of the wall’s surface area.<sup>1</sup>

Wis. Stat. § 101.123(1)(id)

#### **IV. THE PROHIBITION ON SMOKING**

Starting July 5, 2010, smoking is not permitted in “enclosed places” that are “places of employment” or “public places.” Wis. Stat. § 101.123(2)(a)(9). Additionally, smoking is specifically prohibited in the following enclosed places and outdoor areas:

- State Capitol and immediate vicinity;
- Residence halls of colleges and universities (including any location 25 feet or less from a residence hall or dormitory owned or operated by the Board of Regents of the University of Wisconsin System);
- Day care centers (including outdoor premises when children are present);
- Educational facilities;
- Correctional facilities (and anywhere on the grounds of a Type 1 juvenile correctional facility);
- State institutions (mental health, developmentally disabled persons);
- All restaurants and taverns;
- All retail establishments;
- Private clubs (any facility used by an organization that limits membership and is organized for recreational, social, political etc. purposes);
- Common areas of multi unit residential properties;
- Hotels, motels, bed & breakfasts, and tourist rooming houses;
- All municipal buildings;
- Sports Arenas of all kinds including Lambeau Field, Miller Park, stadiums, pavilions, gymnasiums, swimming pools, or other buildings where spectator sporting events are held (whether or not they fit the definition of an enclosed space);
- Health and medical centers including hospitals, physician’s offices, treatment centers;
- Inpatient health care facilities (county home, nursing homes, hospice, veteran’s home); and
- Theaters.

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<sup>1</sup> Originally the Act defined “substantial wall” as “a wall with an opening that may be used to allow air in from the outside that is less than 25 percent of the wall’s surface area.” However, this definition was revised on May 11, 2010, by 2009 Wis. Act 276.

Additionally, no person may smoke in any of the following, regardless of whether they constitute an “enclosed place:”

- Sports arenas (defined as any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held);
- Bus shelters, public transit.

## **V. EXEMPTIONS**

Act 12 has limited the exemptions to the smoking ban. Smoking is allowed in private residences and certain residence rooms in assisted living facilities. There is a limited exemption for retail tobacco stores or tobacco bars that were in existence prior to June 3, 2009, and only the smoking of cigars or pipes is allowed in such establishments.

Notably, Wisconsin law previously provided exemptions to bowling centers, taverns, halls used for private functions, certain restaurants, rooms where the main occupants are smokers, and areas of facilities used for manufacturing or assembly. Now, all of these types of businesses must be smoke-free under Act 12. Furthermore, Act 12 eliminates the general exception for designated smoking areas and the ability to designate smoking areas in enclosed indoor locations.

## **VI. RESPONSIBILITIES OF PERSONS IN CHARGE**

Act 12 requires persons in charge of places where smoking is prohibited to take steps to ensure compliance with the Act. A person in charge of a location where smoking is prohibited under Wis. Stat. §102.123 may not allow any person to smoke at the location. Wis. Stat. §102.123(2m)(a). A person in charge may not provide matches, ashtrays, or other equipment for smoking at a location where smoking is prohibited. Wis. Stat. §102.123(2m)(b). And, a person in charge shall make “reasonable efforts” to prohibit persons from smoking by:

- Posting signs;
- Refusing to serve a person smoking in a restaurant, tavern, or private club; and
- Asking a person who is smoking to refrain and, if the person refuses to do so, asking the person to leave.

Wis. Stat. §102.123(2m)(c).

If the person who smokes refuses to leave, the person in charge shall immediately notify an appropriate law enforcement agency of the violation. Wis. Stat. §102.123(2m)(d). Finally, a person in charge may take measures other than those listed

in the statute to prevent persons from being exposed to smoking or to further ensure compliance with the law. Wis. Stat. §102.123(2m)(e).

Notably, Act 12 does not require that a person in charge be onsite; however, certain responsibilities created by Act 12 seem to apply to onsite actions of a person in charge. *See* Wis. Stat. § 101.123(2m)(b). For example, the Act sets forth minimum requirements for a person in charge to ensure compliance, including “Asking a person who is smoking to refrain and, if the person refuses to do so, asking the person to leave.” Other requirements, such as the signage provisions, appear to impose a statutory duty on a “person in charge,” regardless of the person’s presence onsite.

## **VII. PENALTIES**

**Individual smokers** – A person smoking in a place where smoking is prohibited may be required to pay a forfeiture of \$100 to \$250. Wis. Stat. §101.123(8)(a).

**Persons in charge** – If a person in charge fails to meet his/her responsibilities under Act 12, the person in charge must receive a warning notice for the first offense; however, subsequent offenses shall receive a citation and forfeiture of \$100 for each violation. No person in charge may be required to forfeit more than \$100 in total for all violations occurring on a single day. Wis. Stat. § 101.123(8)(dm)-(d).

## **VIII. ENFORCEMENT**

Pursuant to Wis. Stat. § 165.60, both the Wisconsin Department of Justice and local law enforcement are authorized to enforce the provisions of the smoking ban. The Wisconsin Department of Justice’s authority is to enforce, not prosecute, the Act. Wis. Stat. § 165.60 (providing that enforcement power is the same as those “powers conferred by law upon sheriffs and municipal police officers”). Primary enforcement authority lies with local law enforcement; and the Wisconsin Department of Justice will only lead enforcement efforts on violations that are statewide in nature, importance or influence.

District attorneys are responsible for prosecuting forfeiture actions for violations of the Act. Wis. Stat. § 778.12. In addition, state or local officials or any affected party may institute an action to enjoin repeated violations of the statute. Wis. Stat. § 101.123(9).

Act 12 does not authorize the use of citations by law enforcement as a mechanism to enforce the smoking ban. Citations are an exception to the general rule that civil complaints are used to enforce violations of civil duties where forfeitures are authorized. *See* Wis. Stat. §§ 778.02 and 778.25. Notably, Act 12 did not revise Wis. Stat. § 778.25, which authorizes the use of citations with regards to certain limited violations.

Since Act 12 does not preclude enactment of local ordinances that are consistent with state law, depending on the circumstances, a municipality can enact an ordinance incorporating the terms of the smoking ban and authorizing use of citations to enforce the local ordinance. *See* Wis. Stat. §101.123(4m). Such ordinances may be enforced and prosecuted consistent with the enforcement and prosecution of other local ordinances.

Finally, individuals wishing to report violations should be directed to local law enforcement for follow-up. A statewide complaint phone line (1-800-NO-SMOKE) and website ([www.WIBetterSmokeFree.com](http://www.WIBetterSmokeFree.com)) will also be available to collect and forward complaints to local law enforcement.

## **IX. LOCAL AUTHORITY**

Act 12 specifically preserves the authority of a county, city, village or town to enact ordinances, or of any school district to adopt policies, that protect the health and comfort of the public. Wis. Stat. §101.123(4m). Under Act 12, however, county, city, village, or town ordinances and school district policies regulating or prohibiting outside smoking may apply only to public property under the jurisdiction of the county, city, village, town, or school district and:

- Such ordinances shall allow a restaurant, tavern, private club, or retail establishment to designate an outside area that is a “reasonable distance” from any entrance for smoking; and
- The ordinance may not define the term “reasonable distance” or set any specified measured distance as being a “reasonable distance.”

Wis. Stat. §101.123(4m)

A municipality seeking to enact an ordinance regulating or prohibiting smoking, however, will also have to consider whether it has authority independent of Act 12 to enact such an ordinance and whether the ordinance is preempted by Act 12. Villages and cities have constitutional “home rule” powers pursuant to Article XI, Section 3 of the Wisconsin Constitution; and statutory home rule authority to act for the health, safety, and welfare of the public pursuant to Wis. Stat. §§ 61.34(1) and 62.11(5). Counties possess similar statutory home rule authority pursuant to Wis. Stat. §§ 59.03; and towns that have adopted village powers have home rule authority pursuant to Wis. Stat. § 61.34(1).

Even where a municipality has home rule authority to enact an ordinance, however, if an ordinance addresses a matter that is solely or chiefly of state-wide concern, a municipality’s regulatory powers are limited. *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770, 773 (1996). In areas of state-wide concern municipalities may enact ordinances in the same field and on the same subject covered by state legislation only where such ordinances do not conflict with, but rather complement, the state legislation. *Id.* Factors to consider in analyzing preemption are: whether the legislature has expressly withdrawn the power of municipalities to act;

whether the ordinance logically conflicts with state legislation; whether the ordinance defeats the purpose of the state legislation; or whether the ordinance violates the spirit of state legislation. *Id.* at 651-652.

#### **FREQUENTLY ASKED QUESTIONS:**

**Q1:** *Can a municipality enact an ordinance that defines the term “enclosed place” or “substantial wall” in a manner that allows it to prohibit smoking in places that are not subject to the prohibitions in Act 12?*

**A:** A municipality may not restrict outside smoking except on public property under its jurisdiction and so long as such ordinances allow a restaurant, tavern, private club, or retail establishment to designate an outside smoking area that is a “reasonable distance” from any entrance. With respect to indoor smoking prohibitions, Act 12 does not limit a municipality’s authority to enact an ordinance that protects the health and comfort of the public. Wis. Stat. §101.123(4m). Act 12 does not expressly define “outside smoking” or “inside smoking.” To the extent a local ordinance defines “enclosed place” or “substantial wall” in a manner that is expressly preempted by the state law, logically conflicts with state law, defeats the purpose of the state law, or violates the spirit of the state law, it would be preempted.

**Q2:** *Does a wall with a window or door that makes up more than 25% of the surface area of the wall constitute a “substantial wall” if the window or door is closed?*

**A:** Yes. Act 12 defines “substantial wall” as “[1] a wall with no opening or [2] with an opening that either does not allow air in from outside or is less than 25 percent of the wall’s surface area.” Thus, the opening must be larger than 25% of the wall’s surface area *and* allow in air from the outside if the wall is not to be considered a substantial wall. Closing all openings or partially closing some or all openings, such that less than 25% of a wall’s surface area is allowing in air from the outside, makes the wall a “substantial wall” for purposes of the Act.

**Q3:** *Can a municipality regulate outside smoking?*

**A:** To a limited degree. Under Act 12, municipal ordinances regulating or prohibiting outside smoking would need to satisfy the following requirements:

- Comply with the purpose of Act 12 and protect the health and comfort of the public;
- Apply only to public property under the jurisdiction of the county, city, village, town, or school district;
- Allow a restaurant, tavern, private club, or retail establishment to designate an outside area that is a “reasonable distance” from any entrance for smoking; and

- Refrain from defining the term “reasonable distance” or setting any specified measured distance as being a “reasonable distance.”

**Q4:** *Who has the authority to enforce the smoking ban pursuant to Act 12?*

**A:** Both local law enforcement personnel and the Wisconsin Department of Justice have authority to enforce Act 12. Prosecution of forfeiture actions rests with the district attorneys; though local officials may prosecute municipal ordinances that are not preempted. All affected individuals may bring a civil action to enjoin violations of the Act.

**Q5:** *Can a municipality adopt an ordinance giving authority to a person or agency other than the police department to enforce a smoking ban?*

**A:** Act 12 does not prohibit municipalities from enacting local ordinances that vest enforcement authority in an agency other than law enforcement. However, no ordinance may regulate subject matter preempted by state law.

**Q6:** *Who is a “person in charge” and does such a person include any employee of a bar or restaurant who is working at the time of the smoking incident?*

**A:** Act 12 defines “Person in charge” as the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a form of public transportation or at a location where smoking is prohibited or regulated. Because an employee of a restaurant is an agent of the restaurant owner, an employee may be a “person in charge.” Enforcement authorities have discretion when determining who should be referred to a district attorney for a forfeiture action.

**Q7:** *Can enforcement be done through a citation?*

**A:** Act 12 does not authorize the use of citations by law enforcement as a mechanism to enforce the state smoking ban. District attorneys, therefore, will have to use a civil complaint when bringing forfeiture actions to enforce Act 12.

Citations may be used to enforce local ordinances that are not preempted by state law, should the ordinance provide for such an enforcement mechanism.

**Q8:** *Who provides the smoke-free signage required by Act 12?*

**A:** Persons in charge are obligated to comply with the signage provisions of Act 12. However, the Department of Commerce shall, by rule, specify uniform dimensions and other characteristics of the signs required under Act 12. Resources for businesses and employers, including signs, are already available at: [www.WIBetterSmokeFree.com](http://www.WIBetterSmokeFree.com)

**Q9:** *Are bleachers used for watching softball games and tournaments at village, city and county parks to be smoke-free?*

**A:** It will depend on the circumstances, but Act 12 does not prohibit smoking in such places unless the bleachers are in a sports arena or some enclosed place. Act 12 defines “sports arena” as any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held.

**Q10:** *Are there any guidelines as to how local law enforcement should deal with complaint calls and letters?*

**A:** No. Local law enforcement must use its discretion as to how to handle complaints and what resources and protocols it will establish to enforce Act 12. This is no different than enforcing laws (and often complementary ordinances) that provide for forfeitures in other circumstances.

**Q11:** *Will someone else (other than local law enforcement) be coming out to tell an operator if their structure is in compliance with the Act or not? Or will that be the role of local law enforcement?*

**A:** It is an operator’s responsibility to comply with state law. Nothing in Act 12 imposes a duty on law enforcement to inform an operator whether smoking is permitted at a facility, except that a forfeiture action for certain violations of the Act may not be initiated against a “person in charge” unless that person has received a prior warning notice.

**Q12:** *Where do complaints get collected?*

**A:** Individuals wishing to report violations shall be directed to local law enforcement for follow-up. A statewide complaint phone line (1-800-NO-SMOKE) and website ([www.WIBetterSmokeFree.com](http://www.WIBetterSmokeFree.com)) will also be available through the Department of Health Services to collect and forward complaints to local law enforcement. When a complaint is received through the phone line or through the website, a letter will be sent to local law enforcement with a copy going to the establishment about which the complaint was filed. Local law enforcement will have to use its discretion in responding to complaints.

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