



Attorneys At Law

Joel L. Aberg*
John Robert Behling
Tanya M. Bruder
Mindy K. Dale
Richard D. Duplessie
Christine A. Gimber
Thomas J. Graham, Jr.
Anders B. Helquist
Melissa A. Kirschner*
M. Laurie Klinkhammer*
Donald R. Marjala
William S. Milne
Thomas J. Misfeldt
G. Scott Nicasastro
Brian M. Nodolf
Michael F. O'Brien
Jack A. Postlewaite
Kathryn J. Prenn
Thomas B. Rusboldt
Ryan D. Schuetz
Victoria L. Seltun*
William J. Spangler
Ryan J. Steffes
Daneille M. Strong
William H. Thedinga
William G. Thiel
Jacob P. Torgerson
Andrea M. Voelker
James M. Ward
Paul H. Weinke
Stephen L. Weld
William J. Westerlund

Of Counsel:
Frederick W. (Ted) Fischer
Thomas J. Sazama

Emeritus:
Geo. Michael Carroll
Richard J. Ricci

Stevens L. Riley, 1932-2000

Weld, Riley,
Prenn & Ricci, S.C.

A Wisconsin Limited
Liability Entity

3624 Oakwood Hills Pkwy.
P.O. Box 1030
Eau Claire, WI 54702-1030
715-839-7786
FAX 715-839-8609
Menomonie: 715-235-4216

www.wrpr.com

*Also licensed to practice
in Minnesota

LOOKING THROUGH THE HAZE: WISCONSIN'S NEW SMOKING BAN

July 2010

Presented by:

Mindy K. Dale

These materials should serve as a guide and do not purport to cover every requirement of these laws. These materials should not be construed as legal advice or legal opinion on any specific facts or circumstances. These materials are intended for general informational purposes only, and you are urged to consult with your own legal counsel concerning your own situation and any legal questions you have.

I. 2009 Wis. Act 12 as amended by 2009 Wis. Act 276 – Smoking Ban.
On May 18, 2009, Governor Doyle signed 2009 Wis. Act 12 into law to address the growing concern over the health hazards associated with tobacco use and the effects of secondhand smoke. 2009 Wis. Act 276 was enacted May 12, 2010, to close a loophole in the law, discussed *infra*.

A. The law took effect July 5, 2010, and generally prohibits smoking in public places and workplaces, whether publicly or privately owned. “Smoking” is defined as “burning or holding, inhaling or exhaling smoke from any of the following items containing tobacco: (1) a lighted cigar, (2) a lighted cigarette, (3) a lighted pipe, or (4) any other lighted smoking equipment.”

B. Prohibited Places to Smoke.

1. Smoking will be prohibited in the following enclosed places:

a. Places of employment.

(1) A “place of employment” means “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. Stats. § 101.123(1)(dj).

b. Are all vehicles covered?

(1) The Wisconsin Legislative Council issued a revised memorandum on July 1, 2010 to address questions regarding vehicle coverage. The memorandum states:

“Place of employment’ is defined by the Act as any enclosed place that employees normally frequent during the course of employment. . . . The definition explicitly includes vehicles, so vehicles are considered to be a place of employment if employees are using them during employment.

The term ‘enclosed place’ means a structure or area that has a roof and more than two substantial walls. While the interior sides, front, and back of a vehicle are not typically referred to as walls, the only way to give meaning to the listing of vehicles in the definition of ‘place of

employment' is to treat them as walls. Even if the windows on both the driver's side and passenger's side are fully open, it is possible that they are less than 25% of the walls' surface area in most vehicles. If that is the case, then the sides would be substantial walls of the vehicle, and smoking would not be permitted in the vehicle."

- (2) Employer-owned vehicles. The Act is intended to protect employees from secondhand smoke. Employers clearly have a right, and now an obligation, to prohibit smoking in employer-owned vehicles that an employee normally frequents during the course of employment.
 - (3) Employee-owned vehicles. The statute does not specify whether employee-owned vehicles are covered. Arguably, an employee, using his or her personal vehicle, by himself or herself for the employer's business, could argue he or she should be allowed to smoke; that a personal vehicle is akin to a private residence which is not covered by the law. Conversely, a "person in charge" must not allow a person to smoke in violation of the law at the prohibited places *if* it is "under the control or direction of the person in charge." Wis. Stats. § 101.123(2m)(a). Clearly, if the employee is transporting a non-smoking co-worker, smoking must be banned.
 - (4) The safest practice from a liability standpoint is to prohibit smoking in all employer-owned vehicles and in employee-owned vehicles used during the course of employment. Those bans would apply at all times an employee is in the vehicle.
- c. Public places.
- (1) "Public place" is defined as "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."
- d. State or local government buildings.
- e. Taverns and restaurants.

(1) The exception under the old law for taverns and restaurants (and other buildings) to designate rooms for smoking was repealed.

f. Other areas including: bowling centers, theaters, lodging establishments, retail establishments, day care centers, educational facilities, correctional facilities, state institutions, college residence halls or dormitories, hospitals and clinics, assisted living facilities, common areas of multiple-unit residential properties, sports arenas, bus shelters, public conveyances, and private club facilities.

2. Smoking is prohibited in the following outdoor locations:

a. In the immediate vicinity of the state capitol.

b. Anywhere on the premises of a child care center when children who are receiving child care services are present.

c. Anywhere on the grounds of a Type I juvenile correctional facility.

d. A location that is 25 feet or less from a residence hall or dormitory that is owned or operated by the Board of Regents of the University of Wisconsin System.

C. Exceptions.

1. Unenclosed places.

a. An "enclosed place" is defined as a structure or area that has a roof and more than two (2) substantial walls.

(1) In the original legislation signed by Governor Doyle, there was a *substantial* loophole in the definition of "substantial wall," which was defined 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." (Emphasis added.)

(2) The amendment changed the definition of "substantial wall" to mean "a wall with no opening or with an opening that either does not allow air in from the outside or that is less than 25% of the wall's surface area."

(3) Under the revised definition of a "substantial wall" certain types of patios or side rooms could still fall outside the ban. Some taverns are creating screen rooms where a majority of the walls have open screen windows that cover 25 percent or more of the surface area of the walls.

2. Other enclosed areas not covered by the law:

- a. A private residence.
- b. A room used by only one person in an assisted living facility as his or her residence.
- c. A room in an assisted living facility in which two (2) or more persons reside if every person who lives in that room smokes and each of those persons has made a written request to the person in charge of the assisted living facility to be placed in a room where smoking is allowed.
- d. Retail tobacco stores that are in existence on June 3, 2009 and in which only the smoking of cigars and pipes is allowed.
- e. Tobacco bars that are in existence on June 3, 2009, and in which only the smoking of cigars and pipes is allowed.

(1) This "tobacco bar" must be a tavern that generates 15 percent or more of its annual gross income from the sale on the tavern premises, other than from a vending machine, of cigars and tobacco for pipes.

D. Local Ordinances.

- 1. Local governmental units (county, city, village, town, school district) are still permitted to enact ordinances or policies that comply with the law and protect the health and comfort of the public. This could include restrictions on outside smoking for "public property under the jurisdiction of the local governmental unit."
- 2. The ordinances must also provide that the person in charge of a restaurant, tavern, private club, or retail establishment located in an area subject to the ordinance may designate an outside area that is a reasonable distance from any entrance to the restaurant, tavern, private club, or retail establishment where customers, employees, or persons associated with the establishment may smoke.

3. However, the ordinance cannot define the term “reasonable distance” or set any specified measured distance as being a “reasonable distance.”

E. Training for Employees.

1. Under the law, the “person in charge” at the appropriate establishment or location is given responsibility to uphold the smoking ban.
 - a. A “person in charge” is defined as “the person, or his or her agent [employee] who ultimately controls, governs or directs the activities aboard a public conveyance or at a location where smoking is prohibited or regulated under [the law].”
2. Specifically the “person in charge”:
 - a. May not allow any person to smoke in or at the prohibited places listed above that is under the control or direction of the person in charge;
 - b. May not provide matches, ashtrays, or other equipment for smoking at the location where smoking is prohibited;
 - c. Shall make reasonable efforts to prohibit persons from smoking at a location where smoking is prohibited by doing *all* of the following:
 - (1) Posting signs setting forth the prohibition and providing other appropriate notification and information concerning the prohibition. The Department of Commerce may, by rule, specify uniform dimensions and other requirements of the sign. [Until then, a sample sign can be found at www.WIBetterSmokeFree.com]
 - (2) Refusing to serve a person, if the person is smoking in a restaurant, tavern, or private club; and
 - (3) Asking a person who is smoking to refrain from smoking and, if the person refuses to do so, asking the person to leave the location. If the person refuses to leave after being requested to do so, the person in charge shall immediately notify an appropriate law enforcement agency of the violation.

- d. May take measures in addition to those listed above to prevent persons from being exposed to others who are smoking or to further ensure compliance.
3. These responsibilities will require employers to train employees about the smoking ban, including how to interact with smokers who enter the premises.

F. Penalties.

1. The "person in charge" who violates the law shall be subject to a fine of \$100 for each violation, but if the person in charge has not previously received a warning notice for a violation of the law, the person in charge is issued a warning notice and may not be issued a citation.
2. No person in charge may be required to forfeit more than \$100 in total for *all* violations of the law occurring on a single day.
3. If violations are repeated, a party can institute an action for an injunction to prevent repeated violations of the law. (In other words, an employer cannot agree to pay \$36,500 per year in fines to allow employees or patrons to smoke.)