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## WISCONSIN'S CLEAN INDOOR AIR ACT AND OTHER SMOKING AND TOBACCO REGULATION

The Wisconsin Legislature has enacted a number of laws regulating smoking and the purchase, possession, or use of cigarettes and other tobacco products in Wisconsin. This brief discusses the Clean Indoor Air Act, the prohibition of the possession of tobacco by minors, and various laws pertaining to tobacco use. It also describes the Statewide Tobacco Control Program, which is funded by moneys received from the 1998 settlement of the state's lawsuit against the tobacco industry.

### CLEAN INDOOR AIR ACT

Wisconsin's Clean Indoor Air Act, Section 101.123, Wisconsin Statutes, was created by 1983 Wisconsin Act 211 and has been amended several times. This law restricts smoking in certain public and privately owned buildings and on most types of public transportation. Smoking is defined by the law to mean "carrying a lighted cigar, cigarette, pipe or any other lighted smoking equipment." In places covered by the law, smoking is not allowed unless the area has been designated a smoking area and signs have been posted to that effect. Listed below are places where smoking is never permitted; permitted only if the location has been declared a designated smoking area; or generally permitted.

#### A. Places Where Smoking is Completely Prohibited

1. Physicians' offices, which are defined as places, other than residences or hospitals, that are primarily used to provide medical care and treatment.
2. Motor buses.
3. Day care centers when children are present. Smoking is not permitted on either the indoor or outdoor premises of a day care center when children receiving services are present.
4. In the State Capitol or the immediate vicinity of the building.

#### B. Places Where Smoking is Prohibited Except in Designated Areas

1. Government buildings. Restriction applies to any enclosed, indoor area of a state, county, city, village, or town government building. (Smoking areas may not be designated in the State Capitol.)
2. Offices. Restriction applies in public or privately owned offices that serve as workplaces in which the principal activities are professional, clerical, or administrative services. (See C-2 exception below.)
3. Educational facilities, such as public or private elementary schools, high schools, colleges, or facilities used for state-licensed or state-approved instructional programs.

4. Hospitals. The only part of a hospital that may be designated as a smoking area is a room so designated for use by adult patients who are housed in a hospital or hospital unit intended for the care and treatment of mental illness, alcoholism, or drug abuse. The room must have outside ventilation; patients must have the written permission of a physician; and only authorized patients may smoke in this designated room.
5. Retail establishments. Owners of enclosed shopping malls may designate certain portions of common areas (not retail stores) as smoking areas or may prohibit smoking entirely.
6. Indoor movie theaters.
7. Passenger elevators.
8. Public waiting rooms.
9. Restaurants, except those holding alcohol beverage licenses as described in C-6.
10. Certain inpatient health facilities, including community-based residential facilities and nursing homes.
11. Public conveyances (except motor buses).

**C. Places Where Smoking is Specifically Permitted**

1. Areas that have been designated as smoking areas.
2. Offices or rooms in which the main occupants are smokers, even if non-smokers are occasionally present. There is no requirement that rooms or the entrances to rooms occupied exclusively by smokers be officially designated as smoking areas or posted with warning signs.
3. Taverns operating under a "Class B" intoxicating liquor license (allowing sale of liquor by the glass for on-premises consumption) or Class "B" fermented malt beverage license (allowing consumption either on or off premises of beer-type alcohol beverages).
4. Bowling centers.
5. Entire rooms or halls used for private functions if the arrangements for the function are under the control of the function's sponsor.
6. Restaurants holding a "Class B" intoxicating liquor license or a Class "B" fermented malt beverage license if the sale of liquor, beer, or both, accounts for more than 50% of the total receipts of the business.
7. Any area of a facility used primarily to manufacture goods, products or merchandise for sale.
8. A correctional institution established under Section 301.046 (1), Wisconsin Statutes, if the institution is the prisoner's residence.
9. Certain "Type 2" prisons covered under the Wisconsin Department of Corrections' Intensive Sanctions Program.

**Designation of Smoking Areas.** In the case of facilities where designated smoking areas may be created, the general rule is that smoking is prohibited unless an indoor space has been designated a smoking area by the person in charge or by his or her agent. Usually, an entire room or building cannot be designated a smoking area, and an area cannot be designated if a fire marshal or local ordinance prohibits smoking. Owners or managers of private buildings

may choose to completely prohibit smoking in facilities under their ownership or control, thus making an entire business or building smoke-free.

In establishing smoking areas, the law does not require the construction of new physical barriers or ventilation systems, but existing physical barriers and ventilation systems must be used to the extent possible. Seating arrangements must be planned to accommodate non-smokers if smoking areas are adjacent to nonsmoking areas.

Signs saying "Smoking Allowed" or "Smoking Permitted" that conform to the Wisconsin Administrative Code must be posted in or near designated smoking areas. (Signs stating that smoking is not allowed in nondesignated areas are optional.)

**Enforcement and Penalties.** Any person who "willfully" smokes in an area where smoking is not permitted after being advised of the prohibition by an official or employee of the facility is subject to a \$10 fine. Prior to December 19, 1989, there was no penalty for smokers who violated the act. 1999 Wisconsin Act 72, which made the State Capitol off-limits for smoking, also provided a \$50 forfeiture for persons who smoke in the building or its immediate vicinity after being advised by an employee of the facility that smoking in the area is prohibited.

A \$10 forfeiture also can be assessed any person in charge (or his or her agent) who fails to properly post signs designating smoking areas or who fails to arrange seating to accommodate non-smokers if smoking areas are adjacent to nonsmoking areas.

Sheriffs, constables, or other local law enforcement officers have the duty to enforce the Clean Indoor Air Act, and the Wisconsin Department of Justice is specifically authorized to take enforcement action. In addition, any state or local official or any affected person may request a court injunction against a person who commits repeated violations of the act.

The Clean Indoor Air Act does not limit school district policies or county or municipal ordinances that are as strict as or more restrictive than the state law and which "protect the health and comfort of the public", provided they comply with the purpose of the state law. If a municipality enacts such an ordinance, violations may be punishable by fines imposed by and payable to a municipal court. For example, the City of Madison has largely incorporated the text of Section 101.123 into the Madison General Ordinances and provided for a \$10 municipal fine for smoking in prohibited areas. Madison not only restricts smoking in certain places but also prohibits the "use" of tobacco products in these areas, including the chewing, swallowing, snorting, inhaling, or ingesting of any tobacco product. In addition, a Madison ordinance mandates that, in general, restaurants were required to be totally smoke-free by July 3, 1995. However, patrons may smoke in bar areas, and restaurants may designate rooms equipped with separate ventilation as smoking areas. Customers who smoke in areas not designated as smoking areas are subject to a \$50 fine (\$100 for the second or subsequent offenses within a year).

**Judicial Affirmation of the Clean Indoor Air Act.** On September 12, 1986, the Wisconsin Court of Appeals reviewed an action brought by Richard Rossie, an employee of the Wisconsin Department of Revenue (DOR), who claimed the department could not lawfully discipline him for smoking his pipe at work. He attacked the Clean Indoor Air Act on the grounds that it denied him his constitutional right to equal protection of the laws and impaired his right to contract with his employer.

The appellate court ruled that the law did not deny equal protection to Rossie, and it concluded that there was reasonable basis for the distinctions between areas where smoking was

permitted and not permitted, based on the health and safety risks. Responding to Rossie's claim that his contract, which predated enactment of the law, implied permission to smoke at his desk, the court pointed out that the Clean Indoor Air Act (as then written) still permitted DOR to designate Rossie's work area as a smoking area, so the law itself had not impaired any existing contract rights.

The Wisconsin Supreme Court sustained the appellate court in *Rossie v. Department of Revenue*, 133 Wis. 2d 341 (1987).

## **SMOKERS' RIGHTS: NONDISCRIMINATION IN EMPLOYMENT**

It has been alleged that some employers, prompted by rapidly escalating health care costs, discriminate against current and potential workers who smoke, even if they smoke only outside the workplace. Smokers' rights advocates assert that what employees do on their own time is up to them as long as the behavior does not adversely affect job performance. Sections 111.31 (1) to (3), and 111.321, Wisconsin Statutes, as amended by 1991 Wisconsin Act 310, while not specifically mentioning smoking or tobacco products, make it illegal to fire, refuse to hire, or fail to promote an employee or potential employee solely on the basis of that person's use or nonuse of lawful products off the employer's premises during nonworking hours. The law does permit an employer to discriminate against the use of lawful products during off-duty hours if such action impairs the individual's ability to adequately perform job-related responsibilities. It also allows an employer to charge higher premiums for life, health, or disability insurance coverage if justified because the individual uses a legal, but demonstrably harmful, product.

The law provides an exception for a nonprofit corporation that, as one of its primary purposes or objectives, discourages the general public from using a lawful product. In such cases the employer may prohibit a worker's use of the product even during off-duty time. (For example, the Wisconsin chapter of the American Cancer Society may legally refuse to hire or promote persons who smoke because of the organization's active campaign against tobacco use.)

## **TOBACCO LAWS RELATING TO CHILDREN**

**Possession and Purchase of Tobacco by Children Prohibited.** It is illegal for persons under the age of 18 to possess cigarettes or tobacco products unless possession is for the purpose of resale by a licensed retailer in the course of the minor's employment or if a child not under age 15 is participating in an official tobacco law enforcement investigation. Section 254.92 (2), Wisconsin Statutes, does not specifically ban minors from smoking cigarettes or using tobacco products. However, smoking or other use raises the obvious question of illegal possession.

Purchase of cigarettes or tobacco products by children is also outlawed by Section 254.92 (2). Under the law, those under age 18 may not buy or attempt to buy cigarettes or tobacco products, and it is illegal for a child to falsely represent his or her age in attempting to receive cigarettes or tobacco products. Purchase of tobacco products by children was originally prohibited by 1987 Wisconsin Act 336 and possession was originally prohibited by 1991 Wisconsin Act 95.

**Sale or Gift of Tobacco to Children Prohibited.** Section 134.66, Wisconsin Statutes, provides that no retailer may sell cigarettes or tobacco products to any person under the age of 18. Under this law, created by 1987 Wisconsin Act 336, retailers must post signs on premises where cigarettes or tobacco products are sold, warning consumers that the sale of any cigarette or tobacco product to a child is unlawful.

In addition, retailers, manufacturers, and other persons engaged in distributing tobacco products (including jobbers, subjobbers, and agents) are prohibited from giving cigarettes or tobacco products to children at no charge or for a nominal fee. As amended by 1997 Wisconsin Act 214, the law allows providing free or low-cost cigarettes or tobacco products to adults for promotional purposes only in a place, such as a tavern where no person under the age of 18 is permitted to enter unless accompanied by a parent or guardian or a spouse who is at least 18 years old.

**Vending Machine Restrictions.** Under Section 134.66 (2), Wisconsin Statutes, retailers may not sell cigarettes or tobacco products from a vending machine unless the machine is located in a place where the retailer or an employee can ensure that no person under the age of 18 is present or permitted to enter unless accompanied by a parent or guardian or by a spouse who is at least 18 years old. The vending machine operator must post a notice in a conspicuous place on the front of the machine stating that the purchase of a cigarette or tobacco product from the machine by a child is illegal and the purchaser is subject to a forfeiture of not to exceed \$25. Vending machines are not allowed within 500 feet of a school.

**Penalties and Enforcement.** Minors who possess, buy, or attempt to buy cigarettes or tobacco products in violation of state law can be issued a citation by a law enforcement officer under Section 778.25, Wisconsin Statutes. In addition, under Section 254.92 (3), the officer is required to seize any cigarette or tobacco product that has been sold to and is in the possession of anyone under 18 years of age. Children cited for violating this law fall under the jurisdiction of the juvenile court. Section 938.343, Wisconsin Statutes, authorizes a juvenile court judge to impose one or more of the following dispositions:

1. Counseling of the juvenile or the juvenile's parent or guardian.
2. A forfeiture not to exceed \$50. If a juvenile fails to pay the fine within 12 months, the court may suspend any hunting or fishing license held by the juvenile for not less than two years.
3. Participation in a teen court program, if one is available, provided the juvenile pleads "guilty" or "no contest" to the violation and has not participated in a teen court program within the preceding two years.
4. Participation in a supervised work program or other community service work.

Municipalities may also enact ordinances in conformity with the state statutes prohibiting possession or purchase of tobacco products by children and may impose a municipal forfeiture of not to exceed \$50, but state law prohibits local ordinances stricter than state statutes. This prohibition was upheld by the Wisconsin Court of Appeals on January 10, 1996, when the court struck down a City of Fond du Lac ordinance which banned self-serve cigarette sales and required tobacco products to be displayed behind a counter and sold only with the assistance of a clerk.

As provided in Section 134.66 (4), Wisconsin Statutes, a retailer, manufacturer, or distributor convicted under state law or a strictly conforming local ordinance of selling or giving cigarettes or tobacco products to a minor may be subject to a forfeiture of up to \$500. Vending machine operators who fail to comply with restrictions on the location and supervision of cigarette vending machines are also liable for this penalty. Additionally, a violator's license or permit to sell or distribute cigarettes or tobacco products may be suspended for up to 30 days, depending upon the number and frequency of violations. Retailers or vending machine

operators are subject to a forfeiture not to exceed \$25 for failure to post the required warning signs stating that children may not purchase cigarettes or tobacco products.

As a defense against prosecution for sale of cigarettes or tobacco products to a child, a retailer must prove all of the following: 1) that the purchaser presented an identification card and falsely represented his or her age; 2) that the purchaser's appearance was such that an ordinary and prudent person would believe that the purchaser was 18 years old; and 3) that the sale was made in good faith, in reasonable reliance on the identification card and the purchaser's appearance, and in the belief that the purchaser had attained the age of 18. If an underage person buys tobacco from a vending machine, the operator is not liable for prosecution if the operator was unaware of the purchase.

**Compliance Checks.** Under federal law, states were required, as of September 1, 1996, to compile a list of all stores that sell tobacco products and have a plan, approved by the U.S. Department of Health and Human Services, providing for random, unannounced inspections of retail establishments to evaluate the extent of illegal tobacco sales to minors. Beginning in 1998, states with inadequate programs risk losing up to 40% of their allotted federal substance abuse grants.

1999 Wisconsin Act 9 authorized the Wisconsin Department of Health and Family Services to contract with local health departments or local law enforcement agencies to conduct unannounced investigations of retail outlets to survey levels of compliance with the prohibitions against selling tobacco products to minors. Act 9 permits minors who are at least 15 years of age to buy, or attempt to buy, tobacco products as part of an investigation if certain conditions are met, such as receiving parental permission, not lying about his or her age if questioned by a retailer, and not materially altering the minor's appearance to indicate greater age. Investigations conducted under Subchapter IX of Chapter 254, Wisconsin Statutes, must be based on statistically sound random sampling techniques to reflect the distribution of both minors and appropriate retail outlets throughout the state. No retailer may be subject to unannounced inspections more than twice annually unless the retailer has been found to have violated the law during each investigation.

#### **SALE OF SINGLE CIGARETTES PROHIBITED**

Pursuant to Section 134.66 (2)(e), Wisconsin Statutes, no retailer may sell cigarettes in a form other than as a package or container on which a tax stamp is affixed, thus prohibiting the sale of unpackaged cigarettes.

#### **TOBACCO USE ON SCHOOL GROUNDS PROHIBITED**

Section 120.12 (20), Wisconsin Statutes, prohibits the use of all types of tobacco products on school grounds, including cigarettes, cigars, pipes, and chewing tobacco or snuff. This prohibition applies to all premises under the control of the school board, whether owned or rented. Presumably it covers faculty, staff, students, and all other persons who enter school buildings or grounds. The prohibition applies at all times and covers school-sponsored athletic or extracurricular events. The only exception is that school boards may allow the use of tobacco products on school property that is rented to a person or group for noneducational purposes.

State law does not provide specific penalties for violations of the ban on tobacco use on school property. Individual school boards must develop enforcement policies. Violations by school faculty and staff may be handled through the school district's disciplinary process.

Violations by students may result in penalty actions such as detention, suspension, or expulsion. It is assumed the civil penalties previously mentioned under the Clean Indoor Air Act or the law prohibiting tobacco possession by minors would also apply.

### **FIRES CAUSED BY SMOKING**

Section 50.58, Wisconsin Statutes, provides penalties for negligently causing a fire in a hotel, motel, or other similar facility. The law applies to any person who by smoking, or attempting to light or to smoke, cigarettes, cigars, pipes, or tobacco, carelessly, recklessly, or negligently sets fire to any bedding, furniture, curtains, drapes, household fittings, or any part of the building so as to endanger life or property.

A person convicted of negligently setting a fire may be penalized by a fine of \$50 to \$250 or imprisonment of 10 days to 6 months, or both. Lodging establishments are required to post notices in each sleeping room advising tenants of the law.

### **TOBACCO LAWSUIT SETTLEMENT FUNDS**

**Settlement of Litigation Against Tobacco Companies.** Efforts by states to recover the medical assistance (Medicaid) costs of treating tobacco-related illnesses culminated on November 23, 1998, when attorneys general and other representatives of 46 states (including Wisconsin), the District of Columbia, and four territories signed the master tobacco settlement with the five major tobacco companies (Brown and Williamson, Lorillard, Philip Morris, R. J. Reynolds, and Liggett & Myers). Four other states (Mississippi, Florida, Minnesota, and Texas) had previously settled separate lawsuits.

These cases, beginning with Mississippi's filing in 1994, were based on allegations that the companies had: concealed the harmful effects of tobacco and the addictive nature of nicotine; manipulated the levels of nicotine and suppressed research relating to manufacturing safer cigarettes; and targeted advertising at children. The master settlement granted the companies' immunity from further state claims in return for payments to the states in perpetuity, largely financed by the companies' price increases on tobacco products. Initial payments under the master settlement will reach a total of about \$206 billion through 2025. The other four states will receive a separate overall total of about \$40 billion, but they were not awarded payments in perpetuity. The tobacco industry agreed to specific marketing and lobbying restrictions including:

- no targeting of youth in advertising, marketing, and promotions, including a ban on cartoon ad characters like "Joe Camel";
- restrictions on specific sponsorships of sports and other events with significant youth audiences;
- a ban on billboard advertising;
- no free samples for minors;
- restrictions on the sale of tobacco brand-name apparel and merchandise;
- and elimination of paid tobacco-product placements in movies, on television, or in video games.

An attempt by the U.S. Department of Health and Human Services to seek a share of state settlement moneys based on the joint federal-state nature of Medicaid funding awaits settlement of the federal government's independent suit against the companies.

**Wisconsin's Share of Settlement.** Wisconsin expects to receive almost \$6 billion from the tobacco settlement through 2025, and about \$160 million annually thereafter. The fees for the

private lawyers hired by the state to pursue the case were paid separately by the industry and do not affect the size of the state's award.

As authorized by the settlement, Section 895.10, Wisconsin Statutes, created by 1999 Wisconsin Act 122, requires tobacco companies that did not participate in the national master settlement agreement to place into an escrow account an amount of money that is based on the number of cigarettes sold in Wisconsin. If the nonparticipating companies increase their market share as a result of the master settlement restrictions on the participating tobacco companies, the amount placed in escrow is paid to the state.

**Tobacco Control Program Grants.** 1999 Wisconsin Act 9 created the Statewide Tobacco Control Program (Section 255.15, Wisconsin Statutes), administered by the Tobacco Control Board, created in Section 15.195 (1). The governor appoints an unspecified number of members to the board, which is staffed by an executive director and attached to the Department of Health and Family Services for administrative purposes.

During the 1999-2001 biennium, the state expects to receive \$334 million from the tobacco settlement. Of that amount, \$23.5 million will be placed in a segregated fund with the remainder going into the state's general fund. The board will provide grants for smoking cessation and education, and operate as a public policy forum for smoking prevention and cessation.

During the 1999-2001 biennium, the segregated fund will be used for grants for the following purposes:

- The Tobacco Research and Intervention Center at the University of Wisconsin-Madison (\$1 million in each fiscal year).
- Smoking prevention and cessation activities at the Medical College of Wisconsin, including assisting individuals to quit smoking (\$500,000 every year).
- The Thomas T. Melvin Youth Tobacco Prevention and Education Program (\$1 million in FY 1999-2000 and not less than \$1 million in each FY thereafter).
- A youth smokeless tobacco cessation and prevention campaign in the Department of Health and Family Service's Division of Health (\$92,000 in FY 1999-2000).
- Various programs aimed at law enforcement, marketing, education, and treatment, as well as other projects designed to prevent and reduce tobacco use and allay its health effects among children, minorities, pregnant women, and the general public.

**Contact.** Further information about the Statewide Tobacco Control Program is available by telephone at (608) 267-0944 or on the Internet at [www.wtcb.state.wi.us](http://www.wtcb.state.wi.us).