

SMOKE-FREE WORKPLACES

As of 1 July 2015, the [Tobacco Act 1987 \(Vic\)](#) ("the Act") has required all "enclosed workplaces" to be smoke-free.

What is an 'enclosed workplace'?

An "enclosed workplace" is a workplace where an area, room or premises is substantially enclosed by a roof and walls, regardless of whether the roof or walls are permanent, temporary, open or closed.

In instances where the roof or walls are temporarily open, they are to be considered closed for the purpose of establishing whether that area, room or premises is 'substantially enclosed'. The height of the roof does not affect the status of whether a workplace is 'enclosed' – even large workplaces with high roofs are required to be smoke free.

Who do the restrictions apply to?

The restrictions apply to all individuals who enter an enclosed workplace, being employers, employees, voluntary workers, customers and members of the public.

Who is exempt from the restrictions?

The following 'enclosed' areas and premises are exempt from the legislative requirements of the Tobacco Act 1987:

- > Residential premises, other than a part of residential premises being used for carrying on a business; and
- > Part of residential premises that are used for carrying on business, and the people carrying on that business reside at the premises (i.e. no non-resident employees or members of the public are present in that part of the premises); and
- > A place of business occupied by a sole operator and which is not for use by the public; and
- > Outdoor dining and drinking areas; and
- > Vehicles ; and
- > Personal sleeping or eating areas of premises that provides accommodation to members of the public for a fee; and
- > Personal sleeping or eating areas of residential care facilities, which include types of residential care services, supported residential care services and aged care services; and
- > Areas in an approved mental health service declared by the Secretary of the Department of Human Services; and
- > Prison cells and exercise yards within prisons; and
- > Detention centres established for the purpose of the Migration Act 1958 (Cth); and
- > High-roller rooms at the Casino. the employee is covered by a modern award;

Methods to ensure compliance with the restrictions

Employers operating an enclosed workplace are advised to take reasonable measures to ensure their staff, customers and visitors are aware of the smoke-free workplace laws. Accordingly, employers are advised to take note of the following:

- > Do not provide ashtrays, matches, lighters or other apparatuses that facilitate smoking within enclosed areas.
- > Implement a smoke-free policy that reflects the legislative requirements of the Act to ensure employees are clear about their obligations in maintaining a smoke-free workplace.
- > Communicate to staff about where they can and cannot smoke.
- > Display 'No Smoking' signs that are clearly visible to employees, customers and visitors at entrances to the premises, within toilet facilities and in staff rooms. Acceptable *No Smoking* signs are signs that either:
 - Circular and depict a black image of a cigarette and smoke, with a red diagonal line printed over the image; or
 - Contain the phrase 'No Smoking' or 'Smoking Prohibited' (or other words that indicate that smoking is not allowed) in letters that are at least 20mm in height.
- > In appropriate circumstances, employers can provide external stubbing bins at building entrances and designated smoking areas.
- > Employers should monitor the smoking ban to ensure compliance.

Penalties for non-compliance with the restrictions

An individual who smokes in an enclosed workplace can be fined or prosecuted. Additionally, penalties may also apply to the occupier of the enclosed workplace. The occupier is the person in control of the enclosed workplace at a given time. For an occupier to avoid liability they need to take reasonable measures to ensure their staff, customers and visitors are aware of the smoking restrictions, and that they do not smoke in the premises. (Refer to 'Methods to ensure compliance with the restrictions' above, for suggestions on how to increase awareness and limit liability.)

The following table reflects the current penalties that apply for breach of tobacco laws:

| Breach of tobacco laws | Infringement Notice penalties (in penalty units) | | Maximum penalties in the Magistrates' Court (in penalty units) | |
|---|--|----------------|--|-----------------------------|
| | Natural Person | Body Corporate | Natural Person | Body Corporate |
| Section 5A: Person smoking in an enclosed workplace | 1 penalty unit - \$222 | N/A | 5 penalty units - \$1,110 | N/A |
| Section 5B: Occupier of the enclosed workplace at the time of smoking | 2 penalty units - \$444 | N/A | 10 penalty units - \$2,220 | 50 penalty units - \$11,100 |

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|---|----------------------------|------------------------------|-------------------------------|--------------------------------|
| Section 5F, 5G, 5H, 5K: Occupier of a retail shopping centre, bingo area or centre, casino or an enclosed restaurant or cafe, where acceptable No Smoking signs are NOT displayed. | 2 penalty units - \$444 | 5 penalty units - \$1,100 | 10 penalty units - \$2,220 | 50 penalty units - \$11,100 |
|---|----------------------------|------------------------------|-------------------------------|--------------------------------|

***Monetary figures correct as of July 2020 and are subject to legislative amendment.*

Defences that can prevent an employer from being liable if smoking occurs within their 'smoke-free' workplace:

While employers can be held liable in instances where their staff, customers or visitors breach no smoking restrictions within enclosed workplaces, there are ways in which they can reduce their liability. In order to eliminate liability the employer or occupier at the time the smoking occurs must prove:

| | | |
|---|------------|--|
| They did not provide an ashtray, matches, lighter or any other apparatuses that facilitates smoking | AND | <p>They were unaware, and could not reasonably be expected to have been aware, that smoking was taking place;</p> <p>OR</p> <p>They requested the person to stop smoking and informed the person they were committing an offence.</p> |
|---|------------|--|

How can I monitor the amount of smoking breaks my employees take?

An easy way to monitor staff smoking breaks is for employers to design a policy which specifies a 'designated smoking area' in a location in view of managements' office. This will allow management to monitor who takes breaks when, and the length and frequency of those breaks. If smoking was to occur outside the designated smoking area, employees could be disciplined for breach of a workplace policy.

Alternatively, management can discuss the issue of taking breaks with their staff. Together they can arrange an effective solution that results in smoking breaks not interfering with workplace productivity. For example, if an employee is entitled to a one hour lunch break, arrangements could be made with that employee to take a reduced lunch break (say, 30 minutes) and split the additional 30 minutes across the day and use that time for smoking. The result of this arrangement would be that the employee is not using 'work time' to smoke. Of course such an arrangement would be in addition to paid breaks employees are entitled to in their agreements or under their awards.

Can I make my workplace completely smoke-free?

The National Occupational Health and Safety Commission (now Safe Work Australia) advise that in order to achieve complete elimination of environmental tobacco smoke from the workplace, smoking should be prohibited in areas where

smoke can drift into the workplace (i.e. outside entrances and near windows and ventilation ducts). This means employers can place restrictions on where smoking can take place, regardless of whether it is an 'enclosed' space or not.

In addition, employers are also entitled to implement a policy that prohibits smoking within their entire workplace, inside and out. This means that employers can insist that employee's step off the premises should they wish to smoke. In order to enforce such policy, employees would need to be made aware of the policy's existence, and the policy itself would detail all the obligations the employees have in relation to complying with the smoke-free workplace legislation and the additional requirements requested of them by their employer.

It may also be beneficial for employers to offer employees access to information and resources regarding smoking cessation programs to further enhance their commitment smoke-free workplaces and to support their promotion of smoke-free environments.

Recent amendments to the legislation in Victoria

The Tobacco Amendment Act 2016 came into force 1 August 2017. This Act tightened the restrictions on smoking, including the use of e-cigarettes and shisha tobacco. Both are now banned in areas where traditional cigarette smoking is banned and are subject to the same legal requirements including only being sold to persons 18 years and over. Likewise, the advertising of both products is subject to the same restrictions as traditional cigarettes and regulated by the Tobacco Advertising Prohibition Act 1992. Smoking (of any kind) is now banned in outdoor dining areas including cafes, restaurants, fairs, and street festivals, where food is consumed.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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