

Common Mistakes in Drafting Smokefree Indoor Air Ordinances

- 1) *Defining a term without using it in the substantive provisions of the ordinance.* Examples of this include the terms “bar” and “place of employment.” Defining such terms without actually using them creates confusion as to what the ordinance really covers. Thus, if you define “bar” and the ordinance makes public places smokefree without specifically indicating that bars are public places, there will be uncertainty as to whether the ordinance makes bars smokefree. The same problem arises if the term “public places” is defined to include bars but the specific list of public places that the ordinance makes smokefree does not include bars.
- 2) *Failing to define important terms.* Certain key terms in the ordinance must be defined so as to avoid ambiguity. First, because the ordinance prohibits “smoking” in specified instances, that term must be defined. All the principal places that are intended to be made smokefree — places of employment, restaurants, bars, and public places — should be defined, so as to make clear what the ordinance covers. Similarly, places that are exempted should be defined, so that the exemptions cannot be given an overly broad interpretation. Generally speaking, any important term in the ordinance that could be considered to have more than one meaning should be defined.
- 3) *Using ambiguous or contradictory language.* This leads to enforcement problems and makes it more likely that the ordinance can be challenged in court. Examples of this include making restaurants smokefree but exempting bars without clearly indicating whether the exemption includes bar areas within restaurants, and both including a place under the smoking restrictions and exempting it from those restrictions. Also, when intending to make all public places smokefree, the ordinance should state that smoking is prohibited “in all enclosed public places, *including but not limited to*, the following places,” rather than just specifying the places where smoking is prohibited. This eliminates any ambiguity as to whether all public places or just the enumerated places are covered. When in doubt, spell it out.
- 4) *Amending an ordinance without carrying forward all the provisions from the old ordinance that are meant to be kept in the new ordinance.* An example of this problem is strengthening an ordinance to make workplaces and public places 100% smokefree, but failing to include coverage of workplaces in the operative provisions of the new ordinance.
- 5) *Providing for separately ventilated smoking rooms.* There is no safe level of exposure to secondhand smoke, and there is no known ventilation system that will prevent secondhand smoke from permeating nonsmoking areas and adversely affecting people in those areas. Moreover, separately ventilated smoking rooms offer no protection for employees who work in those rooms and may even exacerbate their situation by concentrating all the smoking into one place. Even if no employee is required to work in a separately ventilated smoking room, the people who clean the room will be exposed to the secondhand smoke. Further, allowing ventilation systems makes it difficult to strengthen the law in the future, because places that have installed them will complain that their investment in the systems will have been lost if the law is changed.
- 6) *Exempting factories, warehouses, etc. from the workplace smoking restrictions.* All employees, not just those who work in an office or in a business open to the public, should be protected from the health hazards of secondhand smoke. There is no safe level of exposure to secondhand smoke, so the argument that, because of their large size, factories and

warehouses should be exempt from the law is not valid. Nor should there be any distinction in protecting people from secondhand smoke between blue-collar and white-collar workers.

7) *Allowing smoking in private offices in the workplace.* Because most buildings have shared ventilation systems, smoke from a private office can travel throughout the building, exposing everyone in the building to the health hazards of secondhand smoke. Further, nonsmokers who must enter the private offices for business purposes will also be exposed to secondhand smoke.

8) *Allowing smoking in the workplace if all persons are smokers or consent to smoking.* This kind of provision is unacceptable because it creates a situation in which peer pressure, rather than an enforceable law, is the determining factor as to whether smoking is allowed. A nonsmoker who is outnumbered by smokers in a small office, or whose supervisor smokes, may believe that he will be subject to harassment, or even termination, if he complains about others' smoking. Even some smokers may prefer to have a smokefree office, but would feel the pressure from fellow smokers to allow smoking in the office. Further, once an office develops a "smoking allowed" policy, it will be difficult for a nonsmoker to be hired without agreeing to that policy.

9) *Allowing smoking in common work areas or offices as long as nonsmokers are not present.* This is a corollary to the above provision and is unacceptable for the same reasons. Again, such a provision puts peer pressure on nonsmokers either not to work in the same areas as smokers or to declare that they don't mind the smoking. Further, because smoke lingers in places for as long as two weeks, allowing smoking in a work area or office during certain times will result in exposure to secondhand smoke by employees who enter those areas or offices during other times.

10) *Giving nonsmokers preference in workplace disputes only if that does not interfere with normal business operations.* This provision gives employers a free pass to say that any rule limiting smoking in a particular area of the workplace will interfere with business operations and, therefore, is not feasible. To the extent that smoking is permitted in any workplace, nonsmokers should be provided every opportunity to avoid being exposed to secondhand smoke, and that should not be dependent on any perceived problems with business operations.

11) *Providing that employees may not be required to work in a smoking room or area without signing a consent form.* This kind of provision, usually used in connection with restaurants and bars that allow smoking in separate rooms or areas, puts undue pressure on employees, particularly new employees, to either agree to endanger their health or risk losing their jobs. If a smoking room or area is created and service must be provided there, then *some* employee or employees will have to work there, and the employer will expect that one or more employees will volunteer for the job. If nobody volunteers, the employer will necessarily have to replace one or more employees with people who are willing to risk their health to get a job. Also, consent forms are a means for employers to evade their liability for work-related health hazards.

12) *Providing that restaurants, bars, or other places can comply with the law by simply posting their smoking policy.* Such a provision (generally referred to as a "Red Light/Green Light" policy) does not result in any protection for nonsmokers, but merely gives the impression that something has been done to solve the problem, thus encouraging lawmakers to claim that no further legislation is necessary. Moreover, even if customers can choose between smoking and nonsmoking establishments, employees cannot.

13) *Allowing restaurants to choose to be bars and, thus, be exempt from the smoking restrictions.* This is sometimes done in one of two ways: a) providing that restaurants may be bars during certain hours of operation, or b) providing that restaurants may choose to be bars during any particular licensing period, usually one year. Such provisions allow places that are, in reality, restaurants to skirt the intent of the law. They also cause confusion among the public as to what smoking restrictions are applicable in a given restaurant and add to enforcement problems.

14) *Establishing separate rules for restaurants and bars, based on the date that they obtained their operating permit.* By grandfathering in establishments that already have a permit as of a particular date, this provision locks in a two-tier system of smoking regulations. It is unfair to both employees and customers of older establishments not to allow them to benefit from the same smokefree air enjoyed in newer establishments. Since there is no real cost for a restaurant or bar to go smokefree, there is no legitimate economic argument for permitting older establishments to avoid the smoking regulations.

15) *Restricting smoking in specified places only during certain hours of operation.* Such provisions are generally found with respect to restaurants and bowling alleys, usually in an attempt to make a distinction in the law with respect to when minors are present. First, smokefree laws are meant to protect employees as well as members of the general public, and allowing smoking at any part of the day will expose employees to secondhand smoke. Second, smokefree laws are important for everyone, not just minors. Third, because smoke lingers in places for as long as two weeks, allowing smoking in a restaurant or bowling alley at night, but not in the morning, will result in exposure to secondhand smoke by both the morning and evening workers and customers. Lastly, these provisions create confusion and are very difficult to enforce.

16) *Providing that smoking is permissible so long as minors are not allowed on the premises.* Smokefree laws are meant to protect employees as well as members of the general public, and allowing smoking when minors are not present does not fulfill that objective. Moreover, smokefree laws are important for everyone, not just minors. Adult customers of businesses deserve to be protected from the health hazards of secondhand smoke as much as children. And, as is true with #14 above, these provisions create confusion and are very difficult to enforce.

17) *Allowing restaurants or other places to permit smoking on the premises upon payment of a licensing or other fee.* Such an arrangement is nothing more than granting an establishment a license to pollute and harm the health of its employees and customers. 100% smokefree laws are meant to protect all employees and customers, not merely those in businesses that can't afford to pay a pollution fee.

18) *Giving tax incentives for businesses that ban smoking.* This is the converse of the rule that an ordinance should not permit smoking on the premises upon payment of a licensing or other fee, and is equally wrong. First, such a provision does not actually require businesses to prevent smoking on their premises. In this respect, it is like a "Red Light/Green Light" provision (see #11 above). Tax incentives merely reward businesses for doing something that they should be required to do in any case — protecting the health of their employees and customers. It would be like giving tax incentives for restaurants that have clean kitchens. Further, such a provision does not result in any protection for nonsmokers, but merely gives the impression that something has been done to solve the problem, thus encouraging lawmakers to claim that no

further legislation is necessary. 100% smokefree laws are meant to protect all employees and customers, not merely those in businesses that can't afford to forego a monetary incentive.

19) *Granting exemptions for particular places, which are inconsistent with the objectives of the ordinance.* Smokefree ordinances are intended to protect employees and customers of all businesses, not just some. Although there are some standard exemptions to ordinances that are consistent with this objective (such as private residences and retail tobacco stores), exemptions that try to single out specific businesses are not. Examples of this include truck stops, bowling alleys, and bingo halls.

20) *Making a "reasonable distance" provision unreasonable.* Smokefree ordinances generally contain a "reasonable distance" provision, requiring that a certain number of feet around building entrances, windows, and ventilation systems be smokefree so that smoke is not allowed to drift into the building. It is important not to make the distance so great that it is impractical to enforce and appears to be unreasonable. Although there is no specific number of feet that is best for all purposes, 10 to 20 feet is recommended.

21) *Including overly long phase-in provisions.* Except under unusual circumstances, ordinances normally become effective sometime within 30-90 days of enactment. Smokefree ordinances typically provide for some phase-in period so that the employers and businesses subject to the law can prepare for its implementation and so that the authorities can adequately prepare for enforcement procedures. But, at the behest of restaurant and bar owners, ordinances sometimes provide for overly long phase-in periods, even for as long as two or three years. Such a long period serves no purpose other than to postpone implementation of the law as long as possible or even to allow for the possible repeal of the law before it goes into effect. Restaurants and bars can fully prepare for a smokefree law by simply putting up a few signs and removing their ashtrays. If the sense of the community is that restaurants and bars should be smokefree, then there is no reason to postpone that from happening.

22) *Including a so-called "sunset provision," allowing the ordinance to expire as of a certain date.* This kind of provision carries with it the inference that there is some reason to doubt the validity of the law and puts the burden on the public health community not only to prove that the law is working successfully after a specified period, but also to work for its renewal. A law that is enacted to protect the public health should be permanent and not subject to political pressures to let it expire.

May be reprinted with appropriate attribution to Americans for Nonsmokers' Rights, © 2006.