

**This guidance note will apply to TEi workplaces**

**HEALTH ACT 2006 WORKPLACE SMOKING BAN**

**IMPLICATIONS FOR ENGINEERING CONSTRUCTION**

## Contents

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## Introduction

Workplace smoking ban legislation is already in place in Scotland. It comes into force in Wales on 2 April 2007 and in England on 1 July 2007.

Although these implementation dates are different the requirements in Scotland England and Wales are in practice the same. Thus the information in this guidance is relevant for each country.

The purpose of this note is to provide information on the nature of the new law, particularly with respect to some issues of special significance to engineering construction.

### **1. The offence: smoking in smoke free premises or letting other people do so**

The provisions in the Health Act 2006 ban smoking in public places and most workplaces.

This does not mean any public place or anywhere where work is going on. It refers only to 'smoke free premises'. (See Section 3 for what smoke free means).

Under the Act it is normally an offence for anyone to smoke in 'smoke free premises'. However, anyone who does contravene this has a legal defence if:

- The person did not and could not reasonably have been expected to know that the premises were smoke free; or
- That he did not and could not reasonably have been expected to know that no smoking signs should have been displayed; or
- There were other 'reasonable grounds'

Similarly it is an offence for those who control or manage smoke free premises not to stop anyone who does smoke there doing so. In other words those in charge of premises must

not allow or permit it to happen. Employers should not 'turn a blind eye'. However they have a legal defence if;

- Reasonable steps were taken to try and stop the person smoking; or
- He did not know and could not reasonably have been expected to know the person was smoking; or
- There were other 'reasonable grounds'

All the above point to the clear need for employers to have explicit policies, effectively implemented to achieve compliance, particularly in circumstances where there is a likelihood that individuals may be tempted to flout the ban.

It is particularly important that all employees (both staff and site workers) are clearly informed of the employer's smoking at work policies. Staff induction is an excellent opportunity for this. Not only will this make it more likely that the policy will work in practice. It also makes it difficult for those who flout the policy to claim a defence that they 'could not reasonably be expected to know that the premises were smoke free'.

Many employers will be concerned about civil litigation potential eg 'could I be sued by a non-smoker if a smoker lights up in my workplace against company policy?' The outcomes of such cases turn on individual detailed circumstances beyond the scope of this guidance. However, employers who have effectively implemented appropriate policies (and inducted their employees into them) will be less vulnerable to civil compensation cases.

## **2. Practical enforcement of compliance by employers**

Employers are required to take reasonable steps to ensure that staff, customers and visitors are aware that premises and vehicles are smoke-free. They must also ensure that no-one smoke in a smoke-free area. Employers that fail in their responsibilities or 'turn a blind eye' will be liable to a fine of up to £2500.

Disciplinary rules should be reviewed to ensure that they are amended to refer to the 'no smoking' rule, breach of which could give rise to disciplinary action including dismissal. Whether or not dismissal is the appropriate sanction for breach of the 'no smoking' rules is likely to turn on a number of factors, such as the nature of your business and the location of the breach. For example, if the employee was smoking near flammable materials, dismissal may well be warranted and such failures could be particularly relevant in engineering construction. We suggest an 'example policy statement' (See section 10 below) It highlights how seriously unauthorised smoking should be taken and the need to ensure that the position is reflected in the disciplinary rules. Any circumstances where breach of the smoking rules will result in dismissal should be set out very clearly.

A phased implementation of the policy, i.e. before 1 July, will give smokers time to adjust to the new regime before it becomes law. If so, you could deal with any initial breaches of the policy via counselling or education. Once the law is in force, normal disciplinary procedures should be followed.

## **3. Where smoking is not permitted: 'smoke free premises'**

The definition of what are smoke free premises includes any premises used as a place of work where;

- More than one person works at any time; or

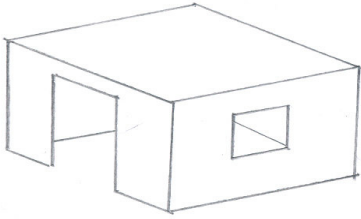
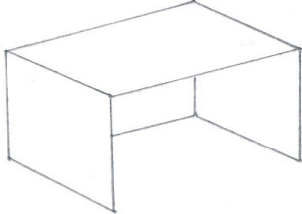
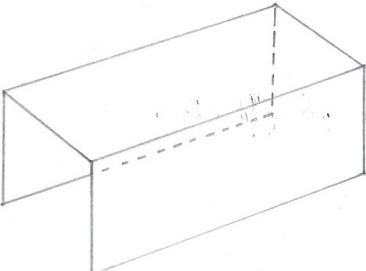
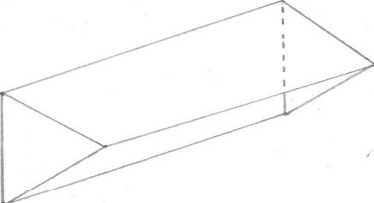
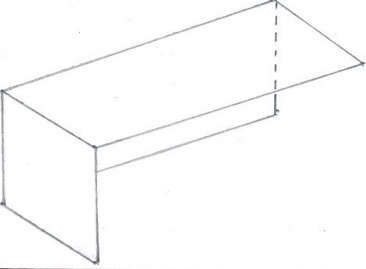
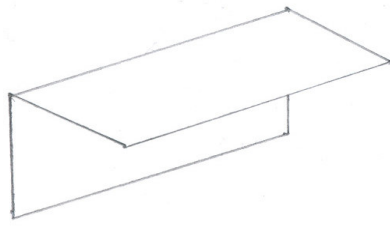
- Where members of the public might be present.

Note that the Act specifically states that premises are smoke free if they are ‘used as a place of work by more than one person (even if the persons who work there do so at different times or only intermittently)’. To be exempt from restrictions, premises would genuinely have to be the sole preserve of a single person with no likelihood of anyone else ever going there. In practice this is impossible to achieve in most engineering construction circumstances and should not be relied on as a means of avoiding the restrictions.

Premises are only smoke free in those areas which are enclosed or substantially enclosed.

- Enclosed means something with a ceiling/roof and wholly enclosed except for doors or windows. (Essentially any indoors workplace from small offices to large factories will fall into this category)
- Substantially enclosed means something with a ceiling/roof but with open sides extending less than  $\frac{1}{2}$  the perimeter not counting doors or windows. (If the open sides are exactly  $\frac{1}{2}$  the perimeter it is substantially enclosed) – see attached illustration

The Act clearly states that “In any case, premises are smoke free only in those areas which are enclosed or substantially enclosed”. If a place is either enclosed or substantially enclosed it becomes illegal to smoke there. But if certain areas contained in larger premises are not enclosed or substantially enclosed they are not ‘smoke free’ as per the above definition and the Act does not prohibit smoking in those areas. So for instance smoking is not permitted inside offices. But if the offices are built around a central open-air courtyard, the Act does not prohibit smoking in the courtyard.

1		<ul style="list-style-type: none"> <li>• This shelter is 'ENCLOSED'</li> <li>• It is illegal to smoke in it</li> </ul>
2		<ul style="list-style-type: none"> <li>• More than <math>\frac{1}{2}</math> the perimeter of this shelter is enclosed</li> <li>• This shelter is 'SUBSTANTIALLY ENCLOSED'</li> <li>• It is illegal to smoke in it</li> </ul>
3		<ul style="list-style-type: none"> <li>• More than <math>\frac{1}{2}</math> the perimeter of this shelter is enclosed</li> <li>• This shelter is 'SUBSTANTIALLY ENCLOSED'</li> <li>• It is illegal to smoke in it</li> </ul>
4		<ul style="list-style-type: none"> <li>• <math>\frac{1}{2}</math> the perimeter of this shelter is enclosed</li> <li>• This shelter is 'SUBSTANTIALLY ENCLOSED'</li> <li>• It is illegal to smoke in it</li> </ul>
5		<ul style="list-style-type: none"> <li>• <math>\frac{1}{2}</math> the perimeter of this shelter is enclosed</li> <li>• This shelter is SUBSTANTIALLY ENCLOSED</li> <li>• It is illegal to smoke in it</li> </ul>
6		<ul style="list-style-type: none"> <li>• Less than <math>\frac{1}{2}</math> the perimeter of this shelter is enclosed</li> <li>• It is neither 'enclosed' or substantially enclosed</li> <li>• It is legal to smoke in it.</li> </ul>

#### 4. Working from home

Some managers often work from home. If the only people who are exposed to smoking are ones that live in the house, the Health Act restrictions do not apply. But if any other people visit for work purposes a room which is set aside for work (eg a converted office) that room will be required to be smoke free.

#### 5. Smoking rooms

Indoor smoking rooms will no longer be permitted. They are clearly enclosed or substantially enclosed, work related and used by more than one person. Thus they are defined as smoke free and smoking is not permitted in them because of it.

Employees who previously used a smoking room will have to go outside, or some form of non enclosed or non substantially enclosed shelter will need to be provided instead. Such shelters need to be little more than a simple 'bus shelter' type single wall with a cantilevered roof. Anything more elaborate than this is likely to constitute substantially enclosed

#### 6. No smoking signs

Those who occupy or manage smoke free premises must make sure that appropriate no smoking signs are displayed.

The Act allows for regulations to provide more detail on the type and number of signs required. So far these regulations have not been published, but they are unlikely to differ much from current drafts as described below.

No smoking signs will need to look like this



**No smoking.  
It is against the law to smoke in these premises.**

Both the sign and the statement are required. These signs need to be displayed in a prominent position at all entrances to smoke-free premises. The no smoking sign must be at least A5 size.

Where an entrance is a secondary entrance to smoke-free premises used only by staff, such as the back door, then displaying the no smoking symbol alone (without the statement) is sufficient, provided that you also display a sign showing the no smoking symbol and relevant wording at the main entrance.

A suitable no smoking symbol must also be displayed in a prominent position in smoke-free vehicles. It is the prominence of the sign that is important rather than its size.

## 7. Vehicles

Regulations made under the Act dictate that enclosed vehicles are smoke free if they are used

- By members of the public; or
- In the course of paid work by more than one person (even if those persons use the vehicle at different times or only intermittently)

There is no doubt that vehicles such as crew buses, lorries and vans fall into 2 above. They are therefore smoke free and thus it is an offence to smoke in them or for employers to allow people to smoke in them.

There is an exception to this. A vehicle is not considered to be used in the course of paid work, where it is used primarily for the private purposes of a person who owns it or has a right to use it which is not restricted to a particular journey. If these conditions are satisfied the vehicle is not smoke free and the smoking ban does not apply to it.

This would appear to apply to company cars provided for employees' personal use or when employees use their own cars.

ECIA has some questions on the meaning of this exception. For instance it is not clear whether the ratio of work miles to private miles travelled has any bearing on 'used primarily for the private purposes'. We are also uncertain whether the exception would still apply if a company car user gave a lift to a work colleague during a work journey.

ECIA is seeking clarification on these matters from the Dept of Health, but still awaits a reply. In the meantime guidance from the Scottish Parliament is as follows.

Vehicles used for business purposes will also be affected by the new law. These include light and heavy goods vehicles, and public transport such as taxis, buses, trains and ferries. However, if you use a car (your own or company car) for business purposes, it will be exempt.

This seems to suggest that company cars fall outside scope of the regulatory ban and requirements for the display of no smoking signs, whether or not they are being used for a work related journey.

ECIA considers that employers need not impose a mandatory smoking ban on drivers of personally issued company cars, or require that no smoking signs are displayed. We do though recommend that company policies should include a ban on smoking in company cars when passengers are being carried during work related journeys.

## 8. Offshore installations

Designated smoking rooms in offshore installations are not smoke free and therefore smoking is permitted in them.

Designated room means a room only used for smoking which;

- Has been designated in writing as such by the person in charge of the installation

- Has a ceiling and except for doors and windows is completely enclosed by solid floor to ceiling walls
- Does not have a ventilation system that ventilates into any other part of the premises
- Does not have any door opening onto smoke free areas that does not mechanically close immediately after use
- Is clearly marked as a permitted smoking room

### **9. Particular implications for engineering construction**

The new law is clear with respect to normal offices and enclosed buildings such as workshops. They are enclosed or substantially enclosed spaces and it will become an offence to smoke inside them or to permit/allow others to do so.

Smoking is largely banned on many open air and potentially volatile engineering construction sites such as oil refineries for obvious safety reasons. Effective implementation of such policies in such places is undoubtedly required under the Health and Safety at Work Act. However, on such sites it has been common practice to provide dedicated shelters where smoking can be indulged in safely, rather than attempting to apply a blanket ban throughout the entire site – which could be a substantial challenge to reliably enforce on large sites with large and diverse workforces.

The Health Act does not necessarily preclude this practice. If smoking shelters are such that they are neither ‘enclosed’ nor ‘substantially enclosed’ (eg a simple bus shelter type structure) they would not be a smoke free area and thus the prohibition of smoking in a smoke free place would not apply. However, if the shelter is such that it is enclosed or substantially enclosed the Health Act would prohibit smoking in it at any time. In practice this will be the case for many of the type of smoking shelters commonly seen in engineering construction environments.

### **10. ‘To ban or not to ban – that is the question!’**

Employers and operators may decide to carry on as now permitting smoking in smoke shelters in open air sites, providing that they are neither enclosed or substantially enclosed; or

They may choose to impose a universal ban on all smoking throughout such sites.

Either is capable of reconciling the requirements of the Health Act and Health and Safety at Work Act requirements

Imposing a universal ban on smoking will undoubtedly generate substantial health benefits and almost certainly persuade many smokers to kick the habit. It is an approach that has the benefit of being simple and easy to understand. However it must be carefully drawn up and implemented if it is to be reliably followed in practice. In this respect the following are important.

- Seeking the views of the workforce before drawing up and implementing a new policy;
- Making sure that the workforce knows what the policy is when (and preferably before) it is implemented;
- Monitoring compliance after the policy has been implemented;
- Responding positively when non-compliance is noted.

A policy statement issued to all staff (eg at induction) is a useful way of informing employees. A suggested statement is reproduced below (which allows for situations where smoking is permitted in the square brackets).

### **Example Policy Statement**

[*Name of employer*] is legally required to ensure that [all of] our workplace[s] [is/are] smoke-free. Therefore, smoking is prohibited throughout the entire workplace with no exceptions. Smoking is also forbidden in company vehicles [unless they are used mainly for private use or only ever used by one employee]. This policy applies to all employees, consultants, contractors, customers and visitors. Responsibility for this policy rests with [*insert name of person*].

[Smoking is only permitted during official breaks and only outdoors in the designated areas. These are [...]] [*If there are any external areas where employees, visitors or customers are able to smoke they should be set out, for example, the car park and delivery yard, as indicated*]. Appropriate 'no smoking' signs are clearly displayed at all entrances.

#### Non compliance

Any breach of this policy will be taken seriously and will lead to disciplinary action being taken in accordance with the Company's disciplinary policy [which may, depending on the circumstances, include dismissal]. [*You may want to highlight here how seriously you will take an episode of unauthorised smoking and ensure that the position is reflected in the disciplinary rules.*]

[*If there are any areas where it is particularly dangerous to smoke, such as where there are flammable materials, you should spell out that dismissal will result, if that is in accordance with your disciplinary rules.*]

[*You should follow the procedure in [insert name of policy/guidance note/training] if a customer, visitor or supplier does not comply with this policy.*].

## **11. General employment issues**

The Health Act and its Regulations deal only with the prohibition of smoking in smoke-free premises and vehicles. They do not address the issue of whether or not employers should actively discourage employees from smoking at work.

Where you are simply implementing the smoke-free legislation but not seeking to prevent employees from smoking during working hours, no specific contractual issues arise. You will, though, have to assess any health and safety risks attached to employees smoking outside the premises. Equally, you need to consider whether your outdoor smokers will cause any interference or obstruction to others, such as to members of the public if they will be congregating outside on the pavement.

Alternatively, you may choose to adopt a pro-active approach to health, safety and employee well-being and use the legislative ban as a vehicle for ending smoking at work. You could opt for a total ban at work or restrict smoking to official breaks only.

If you are introducing a change to work smoking rules, you will need to assess whether or not your existing arrangements confer any contractual rights on employees. Generally, we would not expect a smoking policy to form part of the contract of employment, but instead would regard any such arrangements as 'works rules' or standards of good practice. If so, a

change in policy can be put in place without the need for employees' agreement to the change.

Although consent is not required, you must nevertheless have regard to your duty to maintain the relationship of trust and confidence when bringing about the change to avoid a potential claim for constructive dismissal arising. This will involve effective consultation with affected staff, (see above).

If existing smoking arrangements do give rise to contractually enforceable rights, perhaps, for example, where employees are expressly allowed to take short 'smoke breaks' during working hours if they clock on and off, then before ending this arrangement you will need to try to obtain employees' consent.

## **12. Further information (including practical advice on making smoking policies work)**

Detailed guidance is available from the **Welsh Assembly** at this link

<http://www.smokingbanwales.co.uk/english/index.php?nID=18>

When the page opens click on the 'detailed guidance' link. The resulting pdf document can be downloaded and contains useful practical advice on effectively implementing smoking policies.

Similarly detailed guidance is also available from the **Scottish Parliament** at this link

<http://www.clearingtheairscotland.com/faqs/guidance.html>

When the page opens click on the pdf 'English Brochure' link

Information is also available from the Department of Health at the following website, although it is perhaps more promotional in style than the two above.

<http://www.smokefreeengland.co.uk/>

Text of the Health Act 2006 at this link

<http://www.opsi.gov.uk/acts/acts2006/60028--b.htm>

Text of the Smoke-free (Exemptions and Vehicles) Regulations 2007 at this link

<http://www.opsi.gov.uk/si/si2007/draft/20075735.htm>

Text of the Smoke-free (Premises and Enforcement) Regulations 2006 at this link

[www.opsi.gov.uk/si/si2006/uksi\\_20063368\\_en.pdf](http://www.opsi.gov.uk/si/si2006/uksi_20063368_en.pdf)

The NHS Smoking helpline (tel 0800 169 0 169) offers advice and support on stopping smoking along with a website at [www.givingupsmoking.co.uk](http://www.givingupsmoking.co.uk)

Some useful practical detail on effectively implementing policies and what needs to be done depending on what your situation is now, is available to those with access to the EEF website at this link

<http://www.eef.org.uk/UK/whatwedo/hrlegal/briefings/default.htm>