



August 31, 2007

## **Information on Outdoor Dining Areas and Smoking Shelters**

Several employers and public officials have contacted the Tobacco Law Center with questions about outdoor dining or bar areas and smoking shelters. Specifically, they would like to know if smoking can occur in these locations under the “Freedom to Breathe” (FTB) amendments to the Minnesota Clean Indoor Air Act, which become effective on October 1. This fact sheet is intended to provide information on these issues.

### **Outdoor Dining or Bar Areas**

FTB does not regulate smoking in outdoor areas. In fact, the law specifically states that “smoking is permitted outside of restaurants, bars, and bingo halls” unless a local ordinance is in place that restricts the practice. FTB does prohibit smoking in *indoor* public places and places of employment.

Most outdoor dining or bar areas are part of the service area of a bar or restaurant and would be considered places of employment or public places. As such, for smoking to be allowed in these areas, the area must truly be “outdoors.”

Under FTB, “indoor” has a very specific meaning:

*“Indoor area” means all space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A 0.011 gauge window screen with an 18 by 16 mesh count is not a wall.*

In lay terms, any area with a ceiling and more than 50% of the “wall space” covered by something other than a screen is considered “indoors.” If this indoor area is part of a restaurant or bar (or any other workplace or public place), no smoking can occur in it.

Therefore, a restaurant owner is mistaken if she is building an area with a roof and 60% of the perimeter covered by a wall, under the assumption smoking can occur there. Assuming the area is a public place or a place of employment, which most outdoor dining areas will be, then no smoking can occur there, even if the owner refers to the area as a “patio” or “deck.”

Additionally, several Minnesota cities and counties prohibit or limit smoking in some or all outdoor dining areas. Any public official or business owner should be aware of local restrictions before proceeding.

## Smoking Shelters

Some employers have indicated that they would like to build an indoor structure separate from the employer's main building to accommodate smokers. Under FTB, smoking cannot occur in these structures.

In determining whether these buildings can allow smoking after October 1, there are two questions to ask. First, does it meet the above definition of "indoor"? If it does not, then it is an outdoor area which FTB does not regulate. However, if it is an indoor area, there is an additional question.

The second question is whether the structure is a "place of employment" or "public place." Under FTB, a "place of employment" is "any indoor area at which two or more individuals perform any type of a service for consideration of payment under any type of contractual relationship, including, but not limited to, an employment relationship."

Assuming that the structure in question is truly "indoor" and is used by employees during the course of their work days, it is a "place of employment" in which no smoking is allowed. The Minnesota Department of Health (MDH), the agency in charge of enforcing FTB, has concluded that such a structure is "a place of employment if employees were on the job and smoking there."

FTB also prohibits smoking in public places, which are defined as "any enclosed, indoor area used by the general public." A small structure in which employees or members of the public smoke would also likely be considered a "public place," although we are not aware of any MDH determination on this issue.

FTB makes no exceptions, and it does not "grandfather" in existing structures, so any structure currently in use as a smoking shelter will have to go smoke-free as of October 1.

Please contact the Tobacco Law Center at (651) 290-7506 with any questions.

***The Tobacco Law Center provides information and technical assistance on issues related to tobacco and public health. The Tobacco Law Center does not provide legal representation or advice. This brief fact sheet should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. If you have specific legal questions, we recommend that you consult with an attorney familiar with the laws of your jurisdiction.***