

**COMPENDIUM TO THE TOBACCO CONTROL STATUTE LAW AMENDMENT
ACT, 2004
(THE SMOKE-FREE ONTARIO ACT)**

Background

This government has made a number of commitments regarding tobacco control including:

- "Your government ... will make cigarettes more expensive to prevent young people from lighting up, and it will make public and work places in Ontario smoke-free within three years." (2003 Throne Speech)
- "We will introduce legislation that would make all workplaces and public places smoke-free by 2007." (2004 Ontario Budget speech)
- The Budget supports healthy living and health promotion initiatives by "committing to providing a smoke-free environment in workplaces and public places within three years." (2004 Ontario Budget speech)
- "We will address the number one killer in Ontario with an aggressive plan to reduce smoking." (Liberal platform)

The government has committed to embarking on an aggressive tobacco control strategy that will significantly improve the health of Ontarians. Smoking is the number one preventable cause of premature death and illness in Ontario. Ontario has the opportunity to re-establish itself as a leader in tobacco control and to reduce tobacco use and exposure to second-hand smoke by passing legislation that will protect Ontarians from the effects of second-hand smoke through the creation of a smoke-free public environment.

When the existing Tobacco Control Act, 1994 was proclaimed 10 years ago, it was well ahead of other jurisdictions in recognizing and challenging the effects of tobacco on public health. Over the past decade, other North American legislators responded to this challenge and produced stronger and more comprehensive legislation that reflects the concerns that society now associates with tobacco use and exposure to environmental tobacco smoke. In Ontario, municipalities have passed a series of smoking control by-laws.

The Smoke-Free Ontario Act takes a big step forward from the existing provincial tobacco control legislation by banning smoking in public places and workplaces. The Smoking in the Workplace Act will be repealed and the responsibility for enforcing a workplace smoking ban will be transferred to the new Act. New responsibilities will be assigned to employers and proprietors to ensure that their premises are smoke-free. Employees will continue to be protected when they exercise their right to complain about non-compliance as they were under the Smoking in the Workplace Act. Home health care workers will be able to refuse to enter into a premise or residence if smoking is occurring. The new Act includes an exemption to the workplace ban that allows for scientific research and testing facilities to conduct research on tobacco products. In addition, the Smoke-Free Ontario Act does not extend the ban on smoking to a private dwelling, with the exception of a private home day care within the meaning of the Day Nurseries Act and the smoking ban is not required in a residential care setting. Therefore, the operators of hotels and residential care facilities have the option of allowing smoking in these residential settings.

The legislation will make the prosecution of tobacco sales offences easier by repealing existing statutory defences as well as making business owners, who allow the sale of tobacco to those under 19 by their employees, vicariously liable for these illegal sales.

Summary

The Act begins with a series of new definitions. The most significant of these definitions are for "enclosed public place" and "enclosed workplace". It also contains definitions of "employee" and "employer".

The existing sales provisions dealing with persons under 19 are amended to ensure that all tobacco vendors are required to request photo identification from any person who appears to be under age 25. (A consequential amendment is made to the Ontario Human Rights Code to reflect this change in the Act.) This will ensure that there is no question that the individual to whom the tobacco is sold is 19 years or older. This section of the Act will also make the owner of a business that sells tobacco liable for the action of any employee who sells tobacco to someone under 19.

A new section is included in the Act, making it an offence to allow countertop displays and any other displays of tobacco products that allow the purchaser to handle the tobacco product prior to purchase. Regulations can be drafted that govern the display of tobacco products or material promoting tobacco products. The Act will also prevent the promotion of tobacco in places of entertainment. However, as similar provisions in Saskatchewan legislation are the subject of a challenge before the Supreme Court of Canada, Ontario will wait for the outcome of the court decision before deciding whether to proclaim this section. Ontario has intervened in this case to support the province of Saskatchewan.

Section 9 of the Act has been completely revised by replacing the list of specific places where smoking is prohibited with a broad prohibition against smoking in any enclosed public place or enclosed workplace (both of which are defined in section 1). The smoking ban is extended to encompass schools (public and private); common areas of condominiums, apartment buildings, as well as college and university residences; day nurseries within the meaning of the Dav Nurseries Act; a place where private home daycare is provided within the meaning of the Dav Nurseries Act; and reserved outdoor seating areas in sports arenas and entertainment venues.

Further to the prohibitions cited in this section are a series of obligations on employers and proprietors of public places to ensure that their environments are smoke-free. These obligations include the posting of signs; notifying people within the space that smoking is prohibited; ensuring no ashtrays are available, and reacting to anyone who is violating the smoking ban. Employees will be protected by a list of employer prohibitions aimed at preventing any retaliation against them should they seek enforcement of the workplace smoking ban.

There is an exception to the ban on smoking within an enclosed workplace that allows scientific research and testing facilities to conduct research on tobacco products. In addition, the smoking ban does not extend to private dwellings and is not required in residential care settings. Therefore, an operator of a long-term care facility, as defined by statute, and/or an operator of a residential care facility that operates as a retirement home or supportive housing residence linked to the Ministry of Health and Long-Term Care or the Ministry of Community and Social Services has the option of establishing a controlled smoking area within the residence. A hotel operator has the option of allowing smoking within a specifically designated guest room, provided that the hotel operator meets specific criteria listed in the Act.

Home health care workers will be able to ask a person not to smoke in their presence while they are providing health care services, and will be permitted to leave if the person refuses to comply. Designated inspectors under the Act have been given strengthened inspection powers to allow them to direct employers to immediately comply with their obligations under the Act. The offence

section has been revised to reflect the changes being made to the Act, and the table of fines attached to this section has been amended accordingly.

The section dealing with the traditional use of tobacco by aboriginal persons will remain unchanged. However, the offence section has been amended to specify that violation of this section is an offence. The section dealing with the issuance of an automatic prohibition has been modified to deal with the questions which have arisen over the past decade as to when and where such a prohibition can occur.

Section 1

Title

The title of the Tobacco Control Act, 1994 is repealed and the Act with the current amendments being made to it will be called the Smoke-Free Ontario Act.

Section 2

Amendment to the term "Minister of Health"

The outdated term "Minister of Health" will be replaced in each place that it appears within the Act.

Subsection 3(1)

Definitions

The terms "employee", "employer", "enclosed public place", "enclosed workplace" and "Minister" are defined.

"Employee" is defined to include a person who performs work for or supplies any services to an employer and a person receiving instruction or training in a business, profession or trade.

"Employer" is defined as owner, operator, proprietor, manager etc. of an activity, business, work, trade, etc., who has control or direction of the employment of a person in it.

"Enclosed public place" is the inside of any place, building, structure, vehicle, or any part of any of them, that is covered by a roof and to which the public is normally invited.

"Enclosed workplace" is the inside of any place, building, structure, vehicle, or any part of any of them, that is covered by roof and that employees work in and frequent during their employment. "Enclosed workplace" does not include a place that is primarily a private dwelling.

"Minister" means the Minister of Health and Long-Term Care.

Subsection 3(2)

Private Dwelling

"Private dwelling" is further defined to allow the private living quarters of a residential care setting, if so designated by the operator of a residence, to not be considered an enclosed workplace. The Act identifies two types of residential care settings that can be considered private dwellings. Private living quarters in retirement homes and in supportive housing residences funded by the Ministry of Health and Long-Term Care or the Ministry of Community and Social Services can be designated as private dwellings by the operators of these facilities. Other private dwellings can be specified in regulation.

Section 4

Apparent Age

This strengthens the requirement of tobacco vendors to ensure that the individuals to whom they are selling tobacco are 19 years of age or older by requiring the vendor to request photo identification from anyone who appears to be under 25 years of age.

Vicarious Liability

The owner of a business will be vicariously liable when their employees sell tobacco to people who are under 19, or under 25 without photo identification.

Section 5

Display, Handling, Promotion

This section will ban the display of tobacco products in a retail store by means of a countertop display and by any means that permits the purchaser to handle the tobacco product before purchasing it. In addition, the Act prohibits the display of tobacco products and material promoting tobacco products except in accordance with regulations. The Act will also prevent the promotion of tobacco in places of entertainment.

This section will come into force on proclamation since similar provisions in Saskatchewan legislation are the subject of a challenge before the Supreme Court of Canada. Ontario has intervened in this case to support the province of Saskatchewan.

Subsection 6(1)

Updating Terms

This section is updated to now refer to an approved charitable home for the aged under the Charitable Institutions Act so as to reflect current language.

Subsection 6(2)

Deletion of Obsolete Provision

A spent provision of the Act, which delayed a prohibition on sales of tobacco in pharmacies, is repealed.

Section 7

Deletion of Obsolete Provision

Subsection 7(3) of the Act makes reference to a particular provision with respect to vending machines not coming into effect until December 31, 1994. The date has passed and it is not necessary for the section to remain in the Act.

Section 8

Repeal of Section 9

Section 9 of the current Act is repealed and substituted with a new prohibition section. The current prohibition on smoking and holding lighted tobacco is limited to a listed group of facilities. The new prohibition is broader.

Subsection 9(1)

General Prohibition

This section contains the general prohibition in the Act against smoking or holding lighted tobacco in an enclosed public place or enclosed workplace.

Subsection 9(2)

Other Prohibitions

In addition to the general prohibition, there are several other areas where smoking and holding lighted tobacco is prohibited. It is prohibited to smoke or hold lighted tobacco in several outdoor areas including a school (and its grounds) as defined in the *Education Act*, the building and grounds of a private school (within certain parameters), and the reserved seating area of a sports arena or entertainment venue.

The general prohibition is expanded to include other indoor areas. It is prohibited to smoke or hold lighted tobacco in the common areas of an apartment building, condominium, university and college residence. The prohibition also extends to a day nursery within the meaning of the Day Nurseries Act as well as to places where private-home day care is provided, within the meaning of the Day Nurseries Act.

Other places or areas may be prescribed by regulation.

Subsection 9(3)

Employer Obligations

This section lists several obligations of an employer under the Act. Every employer has an obligation to ensure compliance with the section, including the general prohibition against smoking. An employer is required to give notice to each employee that smoking is prohibited in an enclosed workplace. The employer must post required signs and ensure that no ashtrays and similar equipment remain in an enclosed workplace. The employer is also responsible for ensuring that no one remains in an enclosed workplace who refuses to comply with the prohibition against smoking, including persons who are not employees.

There is an ability to prescribe other requirements by regulation.

Subsection 9(4)

Prohibition

This section is taken from the Smoking in the Workplace Act and serves as a protection for an employee who acts in accordance with, or seeks enforcement of, the Act. The section states that an employer cannot take action against an employee who acts in accordance with the Act or seeks enforcement of the Act. An employer cannot dismiss, threaten to dismiss, discipline, suspend, penalize, intimidate or coerce an employee.

Subsection 9(5)

Complaint

A regulation can be drafted specifying that the provisions of another Act apply, where an employee complains that subsection 9(4) has not been complied with.

Subsection 9(6)**Proprietor Obligations**

This section lists several obligations under the Act of a proprietor of an enclosed public place or any place mentioned in subsection 9(2). Every proprietor has an obligation to ensure compliance with the section, including the general prohibition against smoking. A proprietor is required to give notice to each person in the enclosed public place that smoking is prohibited. The employer must post required signs and ensure that no ashtrays or similar equipment remain in an enclosed public place. The proprietor is also responsible for ensuring that no one remains in an enclosed public place who refuses to comply with the prohibition against smoking.

There is an ability to prescribe other requirements by regulation.

Subsection 9(7)**Exception, residential care facility**

This section allows for the creation of a controlled smoking area in residential care facilities that are specified in the Act. A proprietor can designate a controlled smoking area in: a long term care facility as defined by one of the three LTC facility statutes, a retirement home that provides care to residents in addition to accommodation, and a supportive housing residence funded or administered through the Ministry of Health and Long-Term Care or the Ministry of Community and Social Services.

The Act sets out that smoking is permitted in a room that has been designated as a controlled smoking area. The room must be an enclosed space that is fitted with the proper ventilation as prescribed by regulation and is in compliance with other prescribed requirements. The room is to be identified by signs as prescribed. A resident who desires to use the room must be able to smoke without assistance from an employee and smoking in the room is limited to residents of the residential care facility only.

An employee who does not desire to enter the room shall not be required to do so.

Subsection 9(8)**Hotels, motels, inns**

A registered guest, and invited guests of the registered guest, can smoke in a guest room of a hotel, motel or inn if certain conditions are met. The room must be designated primarily as sleeping accommodation and must be designated by the management of the hotel, motel or inn as a guest room that accommodates smoking. The room must be fully enclosed by floor-to-ceiling walls, a ceiling and doors that separate it physically from areas where smoking is prohibited. Other requirements can be prescribed by regulation.

Subsection 9(9)**Scientific research and testing facilities**

The general prohibition of smoking in an enclosed workplace and enclosed public place does not apply to a person who holds lighted tobacco in a scientific, research facility for the purpose of conducting research concerning tobacco or tobacco products.

Subsection 9(10)**Definition of Proprietor**

"Proprietor" is defined for the purposes of this section.

Section 9.1

9.1 (1) Protection for home health-care workers

A home health-care worker will have the right, while providing health care services, to request that a person not smoke in his or her presence.

9.1 (2) Right to Leave

If the person refuses to stop smoking, the health-care worker has the right to leave without providing further services unless doing so would present an immediate danger to the health of any person.

9.1 (3) Restriction

A home health care-worker cannot exercise the right to leave unless regulations have been made under this subsection and the worker has complied with them.

9.1 (4) Regulations

Regulations may be made prescribing a procedure for home health-care workers to follow in exercising their rights in this section.

Section 9

Section 11 of the Tobacco Control Act, 1994 is repealed. This section dealt with the establishment of smoking areas in places where a general prohibition existed under the former section 9 of the Tobacco Control Act, 1994.

Section 10

Traditional Use of Tobacco by Aboriginal Persons

Subsection 3(2) is amended to prohibit the supplying of tobacco to anyone purchasing tobacco who appears to be under 25, unless photo identification is provided to prove that the person is 19 or older. Subsection 13 (2) is amended to permit a person to give tobacco to an aboriginal person who appears less than 25 years of age, if the gift of tobacco is made for traditional aboriginal purposes.

Section 11

Powers of Inspectors

The word "document" is being struck out and replaced with the word "record", which is defined within this section. In addition to existing powers given to inspectors, a further power to direct an employer to comply with their employer obligations has been added.

Section 12

Offences

This section has been amended to add offences for violation of the new subsection 9(4), which protects employees against reprisals for whistle blowing, and of subsection 13(4), which relates to the traditional use of tobacco by aboriginal persons. All other offences that are continued under the Act remain. The accompanying table of maximum fines has also been amended to reflect the new offences. On conviction for committing either of the new offences, an individual could be fined up to \$4,000 and a corporation up to \$10,000.

Offences under sections 3.1 and 3.2, relating to display and promotion of tobacco products, and related penalties, will come into force when those sections are proclaimed. On conviction for committing offences under either of these sections, a range of penalties is proposed, varying depending on whether the offence is committed by an individual or a corporation, and on the number of earlier convictions.

Section 13

Automatic Prohibition - Notice

The conditions which must be met for the Minister to send a notice to the person who owns or occupies a place where two specified offences occurred have been amended to reflect the new liability of the owner or occupier of a place for the actions of an employee.

Section 14

Regulations

Amendments have been made to the regulation making powers under the Act to reflect the changes to the overall structure of the Act. References to arcades, shopping malls and designated smoking areas have been repealed.

Regulation making authority governing the giving of notice to people in enclosed public places and enclosed workplaces, and governing the proper ventilation of hotels, has been included.

Section 15

Repeal of Smoking in the Workplace Act

The Smoking in the Workplace Act is repealed.

Section 16

Human Rights Code amended

A complementary amendment (exemption) is required to the Human Rights Code to ensure that the provision in this Act concerning the apparent age of an individual required to provide identification for the purchase of tobacco products does not conflict with the age discrimination provisions of the Code and to change the reference in the Code from the Tobacco Control Act, 1994 to the Smoke-Free Ontario Act.

Section 17

A complementary amendment is required to the Provincial Offences Act, to change the reference in the Act from the Tobacco Control Act, 1994 to the Smoke-Free Ontario Act.

Section 18

Commencement

This Act comes into force, with the exception of the Display, Handling, Promotion sections and related offence and penalty provisions, on May 31, 2006.

Section 19

Short Title

The short title of this Act is the Tobacco Control Statute Law Amendment Act, 2004