



Law Notes

How to Prohibit Smoking in “Enclosed” Places

April 2004

Problem

California Labor Code section 6404.5, the state’s smoke-free workplace law, prohibits smoking in “enclosed” workplaces, but this term is not defined in the law. While common sense may suggest that the existence of four walls and a roof makes a workplace enclosed, a long narrow place with an open front (found at some restaurants) can trap smoke in the back as effectively as if a front wall existed.¹ Similarly, a patio surrounded by four high walls but open to the sky may still trap smoke, especially if the air does not move. Existing legal commentary would not consider these places “enclosed” under state law. Under such an interpretation, the state smoke-free workplace law would not apply to these places.

Existing Law and Interpretations

Because *enclosed* is not defined in Labor Code section 6404.5, local jurisdictions seeking to enforce the Labor Code’s smoking prohibitions may refer to several legal analyses for guidance.

- The City Attorneys of San Francisco, Los Angeles, and San Jose interpreted *enclosed* as “generally understood to mean a space surrounded by four walls, a floor and a ceiling.”²
- The California State Attorney General issued an opinion that an owner of a bar, restaurant, or tavern may not allow smoking in his or her establishment merely by opening all the doors and windows.³ Courts have agreed with this opinion.⁴

Discussion

The existing law and authority share a similar interpretation of *enclosed* that would not apply to an establishment with one open wall, such as a patio with four walls but no ceiling, or a restaurant open to the street. This interpretation may lead local jurisdictions to find that such areas are not “enclosed”—even if smoke gets trapped within—, and therefore that smoking is permitted.

Policy Solutions

The easiest way for a local community to prohibit smoking in these places is to use a broad definition of *public place* in the local ordinance, so that outdoor dining areas and bar patios would be included in the places where smoking is prohibited.

Another approach is to develop an empirically measurable definition of *enclosed areas* that includes open-ended spaces that still trap smoke. Creating a definition that is easy to measure is important to ensure that business owners will know whether their establishment is subject to the law and that enforcement of the ordinance is straightforward. ChangeLab Solutions' *Model Comprehensive Secondhand Smoke Ordinance* defines *enclosed* as

- any covered space having more than 50% of its perimeter area walled in or otherwise closed to the outside, such as, for example, a covered porch with more than two walls; or
- any space open to the sky having more than 75% of its perimeter area walled in or otherwise closed to the outside, such as, for example, a courtyard;
- except that a space open to the sky consisting of a sports or playing field with permanent spectator seating, as in an open-air sports arena, is not enclosed. (This exception is included because communities often have found it politically necessary to exclude such open-air sports arenas from a smoking prohibition. It is not legally necessary and can be deleted.)

Protection from exposure to secondhand smoke is most important when smoke is trapped. Smoking in places where this occurs can be prohibited through carefully designed local ordinances. For more information, or for help in drafting ordinance language, visit www.changelabsolutions.org/tobacco-control.

This document is one in a series of *Law Notes* discussing issues around California's smokefree workplace law. All of the *Law Notes* are available at www.changelabsolutions.org/tobacco-control.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

© 2004–2016 ChangeLab Solutions

¹ Scientific studies indicate that smoke-filled air is heavier than clean air, and is thus not likely to disperse without air circulation. See James Repace, “Banning Outdoor Smoking Is Scientifically Justifiable,” 9 *Tobacco Control* 98 (2000).

² Solomon, Barbara, Deputy City Attorney, San Francisco, Evan Braude, Special Assistant City Attorney, Los Angeles, Brian Doyle, Senior Assistant City Attorney, San Jose, “Legal Parameters of the California Smoke-Free Workplace Law (Labor Code 6404.5)” in *Legal Resource Guide to California’s Smoke-Free Restaurants, Bars and Gaming Clubs*, BREATH (2001), 9.4 [“Legal Resources Guide”].

³ California State Attorney General’s Opinion, March 17, 1998, in *Legal Resource Guide* at 13.5.

⁴ *People v. Reaves*, March 27, 1998, in *Legal Resource Guide* at 4 (“four walls and a roof are an enclosed space irrespective of the doors and windows”).