



## *Law Notes*

# How to Prohibit Smoking in Places Operated by Volunteers

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### **Problem**

The state smoke-free workplace law (California Labor Code section 6404.5) applies only to an enclosed place of employment. Some have questioned whether the law applies to places where only volunteers are working, if no employees are present. For example, is smoking allowed at a private club when the workers are volunteers or at a church fund-raiser run by volunteers?

### **Existing Law and Interpretations**

Volunteers are employees for purposes of Labor Code section 6404.5 if they are either (1) volunteering in an enclosed area that is ordinarily a place of employment, or (2) receiving any sort of benefit for their services, and someone has the authority to direct and control their activities.

*Place of employment* is defined in Labor Code section 6303(a) as “any place, and the premises appurtenant thereto, where employment is carried on.” There is nothing in this definition to suggest that a particular place ceases to meet that definition when employees are not present.<sup>1</sup> In support of this interpretation, some provisions of Labor Code section 6404.5 apply regardless of whether employees are present. For example, under Labor Code section 6404.5(d)(1), a certain percentage of hotel and motel rooms are required to be smoke-free regardless of whether a hotel employee is present. The rooms are places of employment so long as an employee must enter the room as part of his or her job duties.

Many volunteer activities will fall under this interpretation because they are held in places of employment. For example, volunteers and patrons of a bingo fund-raising event held in a school facility are prohibited from smoking in the facility because the school is a place of employment.<sup>2</sup> The same goes for volunteers using church facilities for fund-raising activities and members of fraternal organizations operating the bar at their lodge or meeting site, so long as a paid staff person cleans or maintains the site.

Even if the enclosed space fails to meet the definition of a place of employment as discussed above, unpaid services still may be considered employment for purposes of Labor Code section 6404.5. Though no California court has considered whether the smoke-free workplace law protects volunteers at an all-volunteer establishment, California courts and legal opinions in other contexts have established that an employment relationship exists when both of the following exist:

1. Some sort of benefit is exchanged for the performance of the services. A benefit has been broadly interpreted to include things such as the privilege of membership, a discount on food or drink, or the use of an establishment's assets. In fact, the services would have to be "entirely gratuitous" for the person to be a volunteer.<sup>3</sup>
2. The "employer" has the right to control and direct the activities of the persons performing the services, whether or not that right is exercised.<sup>4</sup> Courts have found that the right to control exists when, if instructions were given, those instructions would have to be obeyed.<sup>5</sup>

Virtually all organizations utilizing volunteers expect them to follow basic instructions or procedures, so the two-part test would bring almost all situations involving volunteers under Labor Code section 6404.5. However, no California court has ruled on this issue.

### **Policy Solution**

For communities concerned that volunteers may not be protected from secondhand smoke, a local ordinance that defines *employee* to include volunteers and independent contractors would protect those individuals not covered by the Labor Code. For example, the following definition could be inserted into a local ordinance:

*Employee* means any person who is employed; hired as an independent contractor by any Employer, as defined in this section, in consideration for direct or indirect wages or profit; or any person who volunteers his or her services for an association, nonprofit, or volunteer entity.

Similarly, an ordinance that prohibits smoking in "places used by, or open to, the public" would provide a smoke-free environment in all places used by the public regardless of the employment or volunteer status of any individual working there.

For more information, or for help in drafting ordinance language, visit [www.changelabsolutions.org/tobacco-control](http://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](http://www.changelabsolutions.org/tobacco-control).

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- <sup>1</sup> See Cal. Legis. Counsel, “Smoking in the Workplace - #16332” Question 14, May 12, 1995. Available at: [www.phlpnet.org/sites/phlpnet.org/files/Cal\\_Legis\\_Counsel\\_Smoking\\_in\\_the\\_Workplace\\_No\\_16332\\_Question\\_14\\_May\\_12\\_1995.pdf](http://www.phlpnet.org/sites/phlpnet.org/files/Cal_Legis_Counsel_Smoking_in_the_Workplace_No_16332_Question_14_May_12_1995.pdf).
- <sup>2</sup> See Cal. Dep’t of Edu., Letter to TEROC Chairperson Jennie Cook, May 18, 1998. Available at: [www.phlpnet.org/sites/phlpnet.org/files/Cal\\_Dept\\_of\\_Edu\\_Letter\\_to\\_TEROC\\_Chairperson\\_Jennie\\_Cook\\_May\\_18\\_1998.pdf](http://www.phlpnet.org/sites/phlpnet.org/files/Cal_Dept_of_Edu_Letter_to_TEROC_Chairperson_Jennie_Cook_May_18_1998.pdf).
- <sup>3</sup> *Id.*
- <sup>4</sup> See Cal. Legis. Counsel, “Smoking Ban: Bars - #24807” Question 3, December 20, 1997. Available at: [www.phlpnet.org/sites/phlpnet.org/files/Cal\\_Legis\\_Counsel\\_Smoking\\_Ban\\_Bars\\_No\\_24807\\_Question\\_3\\_December\\_20\\_1997.pdf](http://www.phlpnet.org/sites/phlpnet.org/files/Cal_Legis_Counsel_Smoking_Ban_Bars_No_24807_Question_3_December_20_1997.pdf); *Tucker v. Cooper*, 172 Cal. 663, 668 (1916) (payment of wages for services is not essential to one’s status as an employee).
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