

Chapter 250: RULES RELATING TO SMOKING IN THE WORKPLACE

1. Purpose

The Maine Center for Disease Control and Prevention has been authorized by 22 M.R.S.A. §1580-A to assist businesses in developing written smoking policies and to enforce provisions of the Workplace Smoking Act of 1985.

2. Definitions

As used in this section, unless the context indicates otherwise, the following terms and phrases have the following meanings.

- A. "Business facility" means a structurally enclosed location or portion thereof, including vehicles used in the course of work and outdoor areas under the control of an employer at which employees perform services for their employer. A business facility does not include any workplace or portion of a workplace that also serves as the employees' or employer's personal residence. A "business facility" is a place of employment. Notwithstanding this paragraph, a personal residence or unit or apartment in a residential facility is a business facility only during the period of time that an employee is physically present to perform work there. A residential facility, nursing home or a hospital is a business facility.
- B. "Club" means a reputable group of individuals, including a veterans' service organization chartered under 36 United States Code, Subtitle II, Part B (2004), incorporated and operating in a bona fide manner solely for purposes of a recreational, social, patriotic or fraternal nature and not for pecuniary gain, which by indicia of permanent status has:
- 1) Been in continuous operation and existence;
 - 2) Regularly occupied, as owner or lessee, a suitable clubhouse or facility for use of members;
 - 3) Held regular meetings;
 - 4) Conducted its business through regularly elected officers;
 - 5) Charged and collected dues from members;
 - 6) Adopted a charter and bylaws clearly defining the purpose of the organization; and
 - 7) Operated with selective membership criteria.
- C. "Common Area" a portion of a business facility into which employees, business and social invitees and members of clubs or the public have access, including but not limited

to break rooms, cafeterias, conference or assembly rooms, enclosed patios, entryways, reception areas, hallways, kitchens, restrooms, vehicles and storage closets.

- D. "Designated Smoking Area". means an outdoor area where smoking is permitted, which must be at least 20 feet from windows, entryways, vents, doorways or other openings and must be designed to prevent smoke escaping from the designated smoking area into an enclosed area of a workplace or public place or other areas where smoking is prohibited.

Note: See Section 3(C)(1) for information on permitted outdoor smoking areas.

- E. "Employee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied. Employee includes a person employed by the State or a political subdivision of the State.
- F. "Employer" means a person who has one or more employees. Employer includes an agent of an employer and the State or a political subdivision of the State.
- G. "Enclosed area" means a space between a floor and a ceiling that is demarcated on all sides by walls, windows, shutters, doors or passageways. A partition or partial wall is a demarcation of an enclosed area if it extends from the floor to within 4 feet of the ceiling or from the ceiling to within 4 feet of the floor.
- H. "Environmental tobacco smoke" is tobacco smoke given off by the burning end of a cigarette, pipe, or cigar, a mixture of smoke from a combination of these sources, and smoke that is exhaled by a smoker.
- I. "Invited guest" means an individual who is 1) a relative or established acquaintance of a member of a club and who is continuously accompanied by the member; or 2) a relative, established acquaintance, or friend or relative of an established acquaintance of the host of a private function.
- J. "Member" means a person who, whether as a charter member or admitted in accordance with applicable bylaws, is a bona fide member of a club and who maintains membership in good standing by payment of dues in a bona fide manner in accordance with bylaws and whose name and address are entered on the list of members. A person who does not have full membership privileges may not be considered a bona fide member.
- K. "Not open to the public" means open only to: 1) employees; 2) invited guests of private functions, e.g., wedding receptions; and 3) members or invited guests of members, accompanied by a member, of a club. Note: A club holding a public function is considered to be open to the public.
- L. "Places of employment" means any area or portion of an area where people work including, but not limited to, correctional facilities, storage rooms in restaurants: and vehicles used in the course of work.
- M. "Protect the employer and employees from the detrimental effects of smoking by others" means to prevent the involuntary exposure to environmental tobacco smoke of employees and employers within the business facility from any source except in a Designated Smoking Area.

- N. "Qualifying club" means a veterans' service organization chartered under 36 United States Code, Subtitle II, Part B (2004) that is not open to the public or to any other club that was not open to the public and that was in operation prior to January 1, 2004.
- O. "Residential facility" means a facility with one or more residential units or apartments that is licensed by the Department of Health and Human Services.
- P. "Smoking" means carrying or having in one's possession a lighted cigarette, cigar, pipe or other object giving off or containing any substance giving off tobacco smoke.
- Q. "Ventilation" means a process of supplying and removing air by mechanical means.
- R. "Written policy" means a written statement in which the employer states how the employees and employer will be protected from involuntary exposure to environmental tobacco smoke within the business facility from any source and specifically describes the location of any permitted Designated Smoking Area(s) and outdoor areas designated for smoking.

3. Smoking Policies

A. Required Contents and Use of Smoking Policies

- 1) Each employer shall establish, or may negotiate through the collective bargaining process, a written policy concerning smoking and nonsmoking by employees in that portion of any business facility for which the employer is responsible.
- 2) The employer's policy shall prohibit smoking except in Designated Smoking Areas in order to protect the employer and employees from the detrimental effects of environmental tobacco smoke.
- 3) Smoking in workplaces shall only take place in Designated Smoking Areas. Designated Smoking Areas shall be described within the written policy.
- 4) Smoking in the business facility must be in accordance with the written policy.
- 5) The employer shall post and supervise the implementation of the written policy.
- 6) The employer shall provide a copy of this policy to any employee upon request.
- 7) All areas of a business facility into which members of the public are invited or allowed are governed by the provisions of 22 M.R.S.A. §§ 1541-1548 and 10-144 CMR c. 249.

B. Permissible Contents of Smoking Policies

The employer's written policy may prohibit smoking throughout the entire business facility.

4. Requirements and Guidelines for Smoking Outdoors

An employer may designate an area outdoors for smoking provided that is a minimum 20 feet from windows, entryways, vents, doorways or other openings and it is not in a location that will allow circulation of environmental tobacco smoke into the enclosed areas of the business facility, or a public place, in any way, e.g., through the ventilation system, open windows, and open doors, or any outdoor area where smoking is prohibited by law. An area for smoking outdoors may be constructed to protect employees from the weather as long as it is not an “enclosed area” within the meaning of Section 2(G) of these Rules.

Smoking is prohibited in enclosed areas of business facilities.

5. Discharge, Discipline or Discrimination Against Employees

It is unlawful for any employer to discharge, discipline or otherwise discriminate against any of its employees because that employee has assisted in the supervision or enforcement of the Workplace Smoking Act or these Rules.

6. Assistance

The Maine Center for Disease Control and Prevention shall accept inquiries from employers and employees and shall, when requested, assist employers in developing a written policy. An employer may request from the Maine Center for Disease Control and Prevention approval of a written policy. Approval will be granted upon a satisfactory showing of compliance with these Rules and 22 M.R.S.A. §1580-A.

7. Enforcement and Violations

- A. Any violation of 22 M.R.S.A. §1580-A or these Rules is a civil violation for which a fine of not more than \$100 may be adjudged, except that a fine of not more than \$1,500 may be adjudged for each violation in cases in which the employer has engaged in a pattern of conduct that demonstrates a lack of good faith in complying with the requirements of 22 M.R.S.A. §1580-A or these Rules. The Maine Center for Disease Control and Prevention has authority to enforce provisions of 22 M.R.S.A. § 1580-A and these Rules. Each day any employer fails to establish, post, or supervise the implementation of a written policy or meet any other requirements of 22 M.R.S.A. §1580-A or these Rules shall constitute a separate offense.
- B. Citations for violations of the Workplace Smoking Act or these Rules shall be processed in accordance with Rule 80H of the Maine Rules of Civil Procedure. In accordance with that rule, citations shall be filled out and served upon an employer who has allegedly violated the statute or these Rules, by a representative of the Maine Center for Disease Control and Prevention and any other officer also authorized to enforce the statute or these Rules.
- C. The Attorney General may bring an action to enforce 22 M.R.S.A. §1580-A or these Rules in either District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction and fines, penalties and equitable relief, and may seek to prevent or restrain violations of 22 M.R.S.A. §1580-A or these Rules by any person.

8. Exception

Pursuant to 22 M.R.S.A. §1580-A(9), a qualifying club may allow smoking:

A. If policies concerning smoking have been mutually agreed upon by the employer and all the current employees.

1) **Employee Voting – Procedures Required**

Each qualifying club must adopt and implement written policies and procedures that:

a. Provide for a secret ballot vote of employees. The secret ballot votes shall:

- i. assure that each employee casts a single vote;
- ii. assure the anonymity of each vote; and,
- iii. assure the voting process is free of any attempt to influence any individual vote or voter.

b. Provide for the appointment of an individual to oversee the secret ballot vote. The overseer may be an officer, manager, member or non-member of the club.

c. Provide written notice of the vote to each employee that:

- i. is printed in a legible type with a font size of at least 12;
- ii. is neutral with respect to the subject matter of the vote;
- iii. clearly states the time and place of the voting, and the time and place of counting of votes;
- iv. provides clear instruction on how to mark the ballot;

d. Allow employees to observe conduct of the voting and the counting of the ballots;

e. Provide for posting or other notice of the result of the vote;

f. Provide a procedure for employees to challenge individual ballots for cause.

2) The qualifying club has documented the agreement of all current employees on a smoking policy by the written secret ballot taken under procedures for employees adopted in accordance with the above subsection 8(A)(1) of these Rules.

3) All employee ballots shall be kept on file and made available to the Maine Center for Disease Control and Prevention upon request.

- 4) The smoking policy must be reviewed within 60 days of the hiring of new employees or at the time a complaint, oral or written, is received by the employer or the employee's agent to ensure mutual agreement by all employees;
 - 5) The qualifying club must provide written notice to the Maine Center for Disease Control and Prevention of the results of the employee vote within 30 days of the vote.
 - 6) A written secret ballot vote of employees, conducted by a qualifying club, which has failed to adopt and implement the above required policies and procedures is presumed invalid. An invalid vote does not demonstrate that all employees of a qualifying club have agreed to allow smoking.
- B. If the qualifying club has implemented written policies and procedures ensuring that only the employer and employees, members, and invited guests accompanied by a member are allowed entry to the premises; and
- C. If the qualifying club demonstrates by a written secret ballot vote taken at least once every 3 years that a majority of the members voting have voted to allow smoking. The date of the vote must be announced to all members as provided below at least 30 days prior to the vote. All ballots cast in the vote must be kept on file for at least 3 years and made available to the Maine Center for Disease Control and Prevention upon request.

1) **Member Voting – Procedures Required**

Each qualifying club must adopt and implement written policies and procedures that:

- a. Provide for a secret ballot vote of members. The secret ballot vote shall:
 - i. assure that each voting member casts a single vote;
 - ii. assure the anonymity of each vote;
 - iii. assure the voting process is free of any attempt to influence any individual vote or voter.
- b. Provide for the appointment of an individual to oversee the secret ballot vote. The overseer may be an officer, manager, member or non-member of the club.
- c. Provide written notice of the vote to each member at least 30 days prior to the vote that:
 - i. is printed in a legible type with a font size of at least 12;
 - ii. is neutral with respect to the subject matter of the vote;
 - iii. indicates that any member may request and cast an absentee ballot that will be included in the final vote count;

- iv. clearly states the time and place of the voting, and the time and place of counting of votes;
 - v. provides clear instruction on how to mark the ballot;
 - vi. when the notice and absentee ballots are provided in one mailing provides an absentee ballot and other materials that assure anonymity;
 - vii. is sent in sufficient time to be received by the member for the return of absentee ballots prior to the due date for submission of votes.
- d. Upon request of any member, provide an absentee ballot and other materials, when such were not included with the notice required above, that ensures anonymity and is mailed or delivered in sufficient time to be received by the member for the return of absentee ballots prior to the date of the vote;
 - e. Allow members to observe conduct of the voting and the counting of the ballots;
 - f. Provide for posting or other notice of the result of the vote;
 - g. Provide a procedure for members to challenge individual ballots for cause.
- 2) The qualifying club must provide written notice to the Maine Center for Disease Control and Prevention of the results of the vote within 30 days of the votes.
 - 3) A written secret ballot vote conducted by a qualifying club which has failed to adopt and implement the above required policies and procedures is presumed invalid. An invalid vote does not demonstrate that the members of qualifying club have voted to allow smoking.
 - 4) Upon request, the Maine Center for Disease Control and Prevention will provide a qualifying club with a model policy and procedures for conducting votes on smoking. Any balloting conducted in accordance with the model policy and procedures provided by the Maine Center for Disease Control and Prevention will be presumed to be in compliance with these Rules.
- D. A qualifying club that held a vote in favor of smoking by a majority of all members pursuant to law between July 1, 2005 and September 1, 2006 may allow smoking under authority of that vote until September 1, 2008.

9. Severability

Should any provision of these Rules be declared unconstitutional by a court of competent jurisdiction, such a declaration shall not invalidate any provision of these Rules not affected by the court's ruling.

STATUTORY AUTHORITY: 5 M.R.S.A. §8054; 22 M.R.S.A. §§ 3, 42, 1580-A(9); Pub. L. 2005 ch. 581, 683 §G-1; Resolve 2007 ch. 4; Resolve 2008 ch. 149

EFFECTIVE DATE:

January 28 ,1990

EFFECTIVE DATE (ELECTRONIC CONVERSION):

May 5, 1996

AMENDED:

August 5, 1997

June 21, 2006 – filing 2006-271, major substantive language (EMERGENCY)

October 2, 2006 – filing 2006-427, routine technical language

October 2, 2006 – filing 2006-428, major substantive language in Section 8 (EMERGENCY)

May 21, 2007 – window for filing with the Secretary of State, 60 days from the effective date of the Resolve 2007 ch. 4, expired without Final Adoption

April 27, 2008 – Section 8, filing 2008-131, Final Adoption (major substantive) following Resolve 2008 ch.149

July 1, 2010 – filing 2010-191, routine technical language