TOBACCO IN THE WORKPLACE

March 2007

Initiated with the *Loi Evin*[1] and upheld by the Employment Division of the *Cour de cassation* in a ruling of 29 June 1995,[2] smoking prevention efforts are stepped up with the Decree of 15 November 2006[3] amending Articles R.3511-1 *et seq.* of the Public Health Code ("PHC") and are completed by several circular memos, specifically that of 24 November 2006[4] on the fight against smoking, in particular in the workplace.

In application of these provisions, since 1 February 2007 smoking is, in principle, prohibited in all workplaces, subject to criminal prosecution.

As with any rule **(I),** this ban has certain exceptions that will be outlined below **(II)**, before examining the tools made available to the employer, who becomes the main enforcer **(III).** Lastly, failure to comply with the ban on smoking exposes both the employer and the employee to sanctions **(IV)**.

I - Principle

Since 1 February 2007, the ban on smoking applies (i) in all public or working places, (ii) that are closed and (iii) covered (art. R.3511-1 of the PHC); these three conditions being cumulative.

This ban therefore applies not only to premises open to all staff (reception, front office, eating areas, rest areas, corridors, etc.) but also to working areas and meeting or training rooms.

The circular memo of 24 November 2006 further specifies that since individual offices are never occupied by just one employee (since his or colleagues, clients, cleaning and maintenance staff have access), the ban applies to both shared and individual offices.

II - Exceptions

There are two exceptions to the ban on smoking in the workplace pertaining to its scope of application **(1)** and a waiver **(2).**

1. Exceptions pertaining to its scope of application

In view of the conditions of application of the ban, the ban does not apply:

- On building sites for public works,
- At the residence of individuals even if they have persons in their employment (i.e. child carers, maintenance staff, custodial staff, etc.).

2. Waiver to the principle

The only waiver to the principle of the ban consists in introducing *"places reserved to smokers"* which must be *"closed rooms, designated for tobacco consumption, and in which no service is provided"* (art. R.311-3 of the PHC).

Such locations must also respect the following technical standards:

- their surface area may not exceed 35 sq. m., or more than 20% of the total surface area of the establishment,
- they must have automatic closing mechanisms without the possibility of unintentional opening and not constitute a place of passage,
- an air extraction device must be installed and its compliance with the legal provisions must be certified by the installer or the person in charge of maintenance (art. R.3511-3 and R.3511-4 of the PHC).

It should be specified that in no event may minors under the age of 16 who are present at the workplace have access to such locations.

The creation of such spaces is in no way mandatory for the employer.

Any project to introduce a space reserved to smokers must be submitted for prior consultation of the hygiene, safety and working conditions committee (CHSCT) or, if no such committee exists, to the staff delegates and to the occupational health doctor (art. R.3511-5 of the PHC), and be the subject of new consultation every 2 years.

In addition, pursuant to the provisions of Article L.236-2-1 of the Labour and Employment Code, two members of the CHSCT may also request an extraordinary meeting to consider the introduction of such spaces.

[1] Law no. 91-32 of 10 January 1991 on the fight against smoking and alcoholism - JO of 12 January 1991.
[2] Regulation no. 1698 – cf. our newsletter issue no. 17 of May 2006.
[3] Decree no. 2006-1386 of 15 November 2006 on the conditions of application of the ban on smoking in places designated for collective use – JO of 16 November 2006.
[4] Circular memo of 24 November 2006 on the fight against smoking – JO of 5 December 2006.

III - Tools available to the employer

The legislator seeks to make the employer the main enforcer of this ban on smoking.

To that end, several tools are made available to enforce this ban:

- a specific sign should be visibly posted in the company's premises (art. R. 3511-6 of the PHC):
  - 2 health warnings:
    - one recalling the ban on smoking to be displayed at the entrances of buildings and outside, in visible and apparent locations (passageways, entrance halls, meeting rooms, etc.)
    - a health warning to be displayed, if applicable, at the entrance of the spaces reserved to smokers along the model set by regulation of the Health Minister,
  - a poster to increase awareness of the new ban.
- Companies having installed – some for many months now – signposting that is in harmony with their decorative schemes must nonetheless display the regulatory posters. In practice, these can be downloaded from www.tabac.gouv.fr.
- Disciplinary action may be taken against employees violating the ban on smoking, by ensuring respect of the principle that the sanction should be commensurate with the fault committed and by taking into account, *inter alia,* the level of responsibility of the employee and the existence of prior warnings or calls to order.

  On this basis, it might be advisable to update the company's internal rules in view of the new regulation so as to specify the scope of the ban on smoking and to update the range of associated disciplinary measures.

  It has already been held that an employer is acting within his rights by dismissing for serious misconduct an employee who does not respect the ban on smoking existing within the company.[1] The circumstances surrounding these dismissals shared a point in common, however, in that the behaviour of the employees concerned exposed the company as well as the other staff members to significant security risks.

  Conversely, the *Cour de cassation* found that an employee who had smoked in the corridor of a company, in breach of the internal rules, could not be dismissed on the basis of serious misconduct but could on the basis of real and serious cause.[2]

IV - Sanctions

Smoking in the workplace is now a misdemeanour (art. R.3512-1 and R.3512-2 of the PHC):

- for the smoker, who is punished for smoking in a *"lieu à usage collectif",* i.e. places of collective use, by a 3rd class fine, consisting in a flat fine of EUR 68, but which may be brought up to EUR 450 in case of non-payment within a specific time limit (art. 131-13 of the Criminal Code),
- for the employer who:
  a) has not put up the required signposting, or
  b) who has introduced a space reserved to smokers that is not compliant, or
  c) intentionally facilitates, in any way whatsoever, the violation of this ban,

by a 4th class fine, consisting in a flat fine of EUR 135, but which can be brought up to EUR 750 in case of non-payment within a specific time limit (art. 131-13 of the Criminal Code).

Aside from these criminal fines, the employer also faces the risk of paying damages. In effect, an employee who considers that he or she is the victim of passive smoking can now rely on a statutory provision and not only on case law[3] setting forth the employer's strict safety obligation (as opposed to a best efforts obligation) when filing civil proceedings against the employer to obtain damages. However, the employee would still have to prove the causal relationship between the employer's negligence and the harm sustained by the employee.

Several persons can ascertain and sanction these violations. These are the officers of the judicial police force, civil servants and agents in the employ of the Ministry of Health or local government bodies, doctors who are public health inspectors, sanitary engineers, sanitary inspectors, and labour inspectors and controllers (art. L.3512-4 of the PHC).

[1] Cass. Soc. 11 July 1998, no. 96.42.244; CA Bourges 6 February 2004, no. 03.01.087; Cass. Soc. 7 July 2004, no. 02.43.595.

[2] Cass. Soc. 31 March 1999, no. 97.41.220.

[3] Cass. Soc. 29 June 2005, no. 03.44.412.

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