

**REVISED GUIDELINES FOR THE IMPLEMENTATION AND  
ENFORCEMENT OF BOSTON PUBLIC HEALTH COMMISSION'S  
CLEAN AIR WORKS WORKPLACE SMOKING RESTRICTIONS  
REGULATION**

*(Effective August 7, 2003)*

APPROVED: \_\_\_\_\_ /s/

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Executive Director  
August 7, 2003

**Section I. Purpose**

The Boston Public Health Commission has determined that the use of tobacco is dangerous and life threatening, not only to the person smoking but also to the nonsmoking person who is required to breathe air contaminated by environmental tobacco smoke in the work place and public areas. These guidelines are promulgated to enforce the intent of the Board of the Boston Public Health Commission to protect the health and welfare of all individuals by regulating smoking in the workplace and the discomforting and dangerous effects it creates.

**Section II. Authority**

These guidelines are promulgated by the Executive Director of the Boston Public Health Commission, pursuant to paragraph 2 of Section I of the Boston Public Health Commission Clean Air Works Workplace Smoking Restrictions Regulation (herein after "Regulation".)

**Section III. Definitions**

1. **Conspicuous:** Obvious, prominent, capable of being seen. Signs that are too small, obstructed, not adequately lighted, within 3 feet of the floor or over 7 feet off the floor will be considered *per se* not conspicuous.
2. **Customer service area:** Any area of the workplace that a business invitee can access.
3. **Employee:** Any individual who performs services for an employer in return for wages or profit at a workplace of an employer who has two (2) or more employees.

4. **Employer:** Any individual, partnership, association, corporation, trust, school, college, university or other educational institution or other organization, including any public or private authority or municipal or other governmental agency, which regularly uses the services of two (2) or more employees, in one or more workplaces.
5. **Lodging Home:** Any dwelling or part thereof which contains one or more rooming units in which space is let or sublet for compensation by the owner or operator to four or more persons. The residential portion of boarding houses, rooming houses, dormitories, convalescent or nursing homes and other similar dwelling places are included. Hospitals, sanitariums, jails, houses of correction, homeless shelters, and assisted living homes are not included in this definition.
6. **Outdoor space:** An outdoor area, open to the air and not capable of being enclosed.
7. **Statement of complaint:** Any oral or written statement regarding a violation of the Regulation.
8. **Smoking bar:** An establishment whose business is primarily devoted to the serving of tobacco products for consumption by guests on the premises, in which the serving of food or alcohol is only incidental to the consumption of such tobacco products and prohibits the entry of persons under the age of eighteen (18) at all times. The establishment must annually demonstrate that revenue generated from the serving of tobacco products must be equal to or greater than sixty percent (60%) of the total combined revenue generated by the service of such tobacco products, beverages and food. Revenue figures to be considered as evidence for the purpose of this regulation shall be those used in calculating the meal tax amount filed on Massachusetts Department of Revenue Form MAB-4, Line 1 for the preceding four filings and those used in calculating the cigar and smoking tobacco excise tax amount filed on Massachusetts Department of Revenue Form Cigar-1 for the preceding four filings.
9. **Workplace:** Any enclosed indoor area, structure or facility or any portion thereof, at which one (1) or more employees perform services for their employers, including but not limited to: retail food services; retail stores; restaurants; bars; cafes; and bowling alleys. If the employer has less than two (2) employees, the enclosed area shall not be considered a workplace.

#### **Section IV. Application of Regulation**

##### **A. General Application**

1. The Regulation applies to all enclosed workplaces, as defined in the Regulation, including but not limited to bars, restaurants, offices, private clubs, government buildings, public transportation, taxi cabs, hotels and motels.
2. All office space is included under the provisions of the Regulation unless specifically exempted by Section III g of the Regulation, which provides for an exception of certain office space covered by City of Boston Ordinance 16-35. In order to qualify for the exception, an office must apply to the Tobacco Control Program of the Boston Public Health Commission (herein after “Tobacco Control Program”) and comply with all the provisions set forth in Section VIII 5 of these guidelines.

## **B. Outdoor Spaces**

1. Outdoor spaces of a workplace that are not enclosed are not covered by the Regulation. This type of space includes outdoor: porches; patios; yards and, sidewalks.
2. Outdoor spaces may be covered with an awning or other overhead covering.
3. Outdoor spaces must remain open to the air at all times and cannot be enclosed by any sort of wall or side covering.
4. If the outdoor space is capable of being enclosed by walls or covers, regardless of the materials or the removable nature of the walls or covers, the space will be considered enclosed for the purposes of the Regulation when such walls or covers are in place.
5. All outdoor spaces must be physically separated from an enclosed workspace. If doors, windows, sliding or folding windows or doors or other fenestrations form any part of the border to the outdoor space, all such openings must be closed so as to prevent the migration of smoke into the enclosed workspace. If the windows, sliding or folding windows or doors or other fenestrations are opened or otherwise do not prevent the migration of smoke into the workspace, the outdoor space shall be considered an extension of the enclosed workspace and subject to all provisions of the regulation.

## **C. Employee**

1. The term employee includes contract employees, temporary employees and vendors who perform services in the workplace for more than a *de minimis* amount of time. For example, a large building management company has an office within an apartment building to process new applications and receive calls regarding maintenance issues. The office manager, who is the only on-site employee, works an eight-hour shift, five days a week in the building.

For the purposes of this regulation, the office manager is considered an “employee” of the building management company, which is responsible for providing a smoke free workplace.

2. In order to be considered an employee, a person must perform services in the workplace. Employees who do not perform any work functions or only *de minimis* work functions in the workplace shall not be considered employees for the purposes of determining whether an enclosed area is a workplace. For example, a neighborhood association rents office space. The board of directors and officers are all volunteers who receive no compensation. The only person who receives any compensation is the person who maintains the books for the association. This person does not maintain an office in the association’s rented space, only visits the office once a month to pickup paperwork and performs all book keeping functions in her private residence. This person would not be considered an employee for the purposes of the regulation. Since the association does not have any other employees, the association’s rented offices would not be considered a workplace.
3. In order to qualify as an employer under the regulation, the business or other entity must have more than one employee performing services in the workplace. Persons who spend a *de minimis* or trivial amount of time in the workplace are not considered employees. For example, an attorney maintains an office and has no other employees. On a daily basis a delivery company picks-up and drops off packages. The delivery company’s person unloads the packages, picks-up the packages and fills out paper work in the office. While the deliveries occur on a daily basis, the total amount of time the delivery person spends in the office per delivery is only approximately 30 minutes. In this instance, the delivery person’s time spent in the office is only *de minimis* and the delivery person would not be considered an employee of the attorney for the purposes of this regulation. Therefore the attorney would not be considered an employer and the regulation would not apply to his office. In another example, a private club operates a member’s only recreation room within the building that it operates. Three nights a week, members gather for various social activities. On those nights a part-time employee works to serve refreshments to the members and clean up before locking the building. There are no other employees of the private club, although there is considerable turnover in the part-time employee position during the year. Since the club only employs one person at any time it is not considered a workplace under this regulation.

#### **D. Workplaces**

1. All enclosed areas of the workplace including function rooms, halls and other enclosed spaces rented to the public, shall be considered workplaces under the Regulation.

2. If a function room, hall or other enclosed area rented to the public, is operated by an entity not considered an employer because it does not have two or more employees, the rented function room, hall or other enclosed rented space, shall not be considered a workplace. However, if an employee, of any employer as defined by the regulation, is hired to perform services as part of the function, the rented area shall be considered a smoke free workplace for the duration of the rental period. For example if a function room or hall is rented for a wedding, party or other event in which food and beverage services or entertainment is provided by a company that qualifies as an employer under the regulation, the function room or hall would be a workplace and smoking would be prohibited during the rental period. It is the responsibility of the establishment to ensure that the appropriate signage is displayed and the individual or group renting the space enforces the prohibition against smoking.
3. If an entity believes that it does not qualify as an employer or a workplace under the Regulation, it can request a ruling by the Executive Director. The Tobacco Control Program shall provide a suitable form, setting forth the supporting documentation that needs to be filed with the request.

## **Section V. Smoking Bar and Retail Tobacco Store Permits**

### **A. Smoking Bars**

1. Smoking Bars as defined in the Regulation, are required to obtain a permit from the Tobacco Control Program of the Boston Public Health Commission on an annual basis.
2. All Smoking Bars must prohibit entry and access to the premises to persons under 18 years of age at all times.
3. All Smoking Bars must be clearly labeled as “Smoking Bars” and must have the following notices on all entrances to the establishments open to the public:

**“WARNING! This establishment may contain tobacco smoke. Exposure to secondhand smoke is known to cause cancer and heart disease. No person under the age of eighteen may enter the premises.”**

### **B. Permitting Procedure**

1. All Smoking Bars must annually obtain a Permit for Location and Sales of Tobacco from the Tobacco Control Program pursuant to City of Boston Ordinance 16-40.

2. With the application for the Permit for Location and Sales of Tobacco, the applicant must provide the following:
  - a. A completed application for a permit for the operation of a Smoking Bar from the Tobacco Control Program;
  - b. A floor plan of the premises or a statement that the floor plan has already been filed and has not changed;
  - c. Copies of the establishment's four (4) preceding filings of the Massachusetts DOR form MAB-4 demonstrating compliance with the requirements of the regulation;
  - d. Copies of the establishments four (4) preceding filings of the Massachusetts DOR form Cigar-1 demonstrating compliance with the requirements of the regulation; and,
  - e. A \$150.00 filing fee in the form of a check made out to the "Boston Public Health Commission."
3. Each establishment will be required to submit, to the Tobacco Control Program, a copy of every Massachusetts DOR form MAB-4 and Massachusetts DOR form Cigar-1, demonstrating compliance with the requirements of the regulation, for the duration that the establishment holds a permit for the operation of a smoking bar. Failure to submit the documentation within ten (10) days of filing with the DOR or failure of the documentation to demonstrate compliance with the terms of the regulation will result in automatic revocation of the Smoking Bar Permit.
4. If the application is for a new establishment that has never filed a Massachusetts DOR form MAB-4, the applicant must submit the following additional information:
  - a. A copy of the establishment's business plan and/or business contracts including a brief description of the operations of the business, any promotional material and/or advertising for the establishment;
  - b. A copy of establishment's price list/menu for all food, liquor, tobacco products or other merchandise offered for sale;
  - c. Proof of membership or an application for membership in a national tobacco retail association or equivalent business organization;
  - d. A copy of each license the establishment is required to obtain by the Commonwealth of Massachusetts and the City of Boston for the operation of said establishment; and,
  - e. A sworn statement from the business operators that to the best of their information and belief, the establishment will meet the terms and conditions of the regulation and the guidelines with regards to the operations of a smoking bar.

5. Upon the submission of the documentation listed above, a satisfactory inspection of the premises by the Tobacco Control Program and upon approval by the Director of the Tobacco Control Program a permit or provisional permit for Operation of a Smoking Bar shall be issued.
6. A provisional permit shall be reviewed on a quarterly basis, for one (1) year. Provisional permits may not be renewed.
  - a. New establishments will be monitored by unannounced quarterly inspections of the establishment by the Tobacco Control Program.
  - b. Each establishment will be required to submit a copy of their first quarter Massachusetts DOR form MAB-4 & Massachusetts DOR form Cigar-1 and all other subsequent filings up until 1 year, within ten (10) days of filing with the DOR.
  - c. Upon submission of documentation demonstrating compliance with the terms of the regulation for four (4) consecutive quarters, the establishment may apply for a full permit, pursuant to section 2 above.
7. All permits shall be displayed in a conspicuous manner, visible at all times to patrons of the establishment.

### **C. Retail Tobacco Stores**

1. All Retail Tobacco Stores must annually obtain a Permit for Location and Sales of Tobacco from the Tobacco Control Program pursuant to City of Boston Ordinance 16-40.
2. In addition, a retail tobacco store, on an annual basis, must obtain a permit for the operation of a retail tobacco store.
3. Applications for a permit shall be available from the Tobacco Control Program and shall be substantial the same as for a Smoking Bar, as set forth above in Section III. B except the following:
  - a. In lieu of the form MAB-4 required by the Section, an establishment may submit any document signed under the pains and penalties of perjury and submitted to the Massachusetts Department of Revenue, detailing the operating revenues for the establishment
  - b. The establishment must be clearly labeled as a retail tobacco store.
  - c. Instead of a menu, a price list of all non-tobacco products sold in the establishment.

### **Section VI. Nursing Homes**

1. Any nursing home, licensed pursuant to MG.L. c.111 section 71, may apply to the Director for designation of a part of the nursing home as a residence.

2. All applications must designate the residential area of the facility. The residential area cannot contain any employee workspace, such as offices, restrooms or other areas used primarily by employees.
3. The entire facility may not be designated as a residence.
4. The designated residential area must be for the sole use of permanent residents of the facility. No temporary or short-term residents may reside in the residential portion of the facility.
5. All areas in the designated residential area in which smoking is allowed must be conspicuously designated as smoking areas and be adequately ventilated to prevent the migration of smoke to non-smoking areas.
6. The facility must provide suitable documentation, acceptable to the Director, that the facility is the permanent domicile of the residents residing in that portion of the facility, that information on the hazards of smoking and second hand smoke have been provided to all residences and that smoking cessation aids are available to all residences who use tobacco products.
7. The designated residential area must be in conformance with the smoking restriction requirements of M.G.L. c.111 section 72X and 105 CMR 150.015 (D)(11)(b). All residential areas must be clearly designated as such and cannot be altered or otherwise changed without the express approval of the Director.
8. All areas of a nursing home not designated, as a residence must comply with all provisions of the regulation.
9. The nursing home must make reasonable accommodations for any employee, resident or visitor who does not wish to be exposed to tobacco smoke.
10. Upon compliance with the terms of this section, submission of the required documentation and satisfactory inspection by the Tobacco Control Program, the Director shall certify the designated portion of the facility as a residence. Such certification shall be valid for one year from the date of issuance. Thirty (30) days prior to the expiration of the certification, the facility may apply for re-certification, in accordance with the terms of this section, on a form provided by the Tobacco Control Program.

## **Section VII. Signage**

1. A “No Smoking” sign shall be posted and visible at the entrance to all workplaces, restrooms and break rooms.

2. Every workplace shall have “No Smoking” signs conspicuously posted so that the signs are clearly visible to all employees, customers, or visitors while in the workplace.
3. Additionally the Commission recommends that signs be posted in public areas such as, the following areas:
  - a. Lobbies;
  - b. Hallways;
  - c. Cafeterias;
  - d. Kitchens;
  - e. Locker rooms;
  - f. Customer service areas;
  - g. Offices where the public is invited;
  - h. Conference rooms;
  - i. Lounges;
  - j. Waiting areas; and,
  - k. Elevators.
4. All signs necessary to comply with paragraph 1 of this section and at least one (1) sign in each of the designated areas in paragraphs 2, and 3 of this section, must be permanently attached, at eye level, to a wall or permanent fixture.
5. All “No Smoking” signs must:
  - a. Be made of durable material;
  - b. Be red and white;
  - c. Contain the words “NO SMOKING,” at least 2 inches in height;
  - d. Contain the international symbol for no smoking, a lighted cigarette in a red circle with a red line through it; and,
  - e. Contain the words: “IT IS ILLEGAL TO SMOKE IN THIS ESTABLISHMENT. TO REPORT A VIOLATION CALL THE BOSTON PUBLIC HEALTH COMMISSION AT 617-534-4718.”
6. Approved signs and templates for signage design may be obtained from the Tobacco Control Program of the Boston Public Health Commission at 774 Albany Street, 2<sup>nd</sup> floor in Boston.
7. A workplace may post alternative signage that is conspicuous and has been approved, in advance, by the Director. Proposed signage should be submitted to the Tobacco Control Program, 774 Albany Street, 2nd Floor, Boston, MA 02118 or by e-mail at tobaccocontrol@bphc.org.

## **Section VIII. Employer policy**

1. Each employer who operates a workplace in the City of Boston must implement, distribute, maintain and conspicuously post, for all employees to see a written smoking policy. The policy must be adopted, implemented and conspicuously posted in all workplace locations within thirty (30) days of becoming an employer.
2. A model smoking policy for employers is attached to these Guidelines.
3. The policy shall contain a statement advising all employees of their right to work in a smoke free environment, information on how to file a complaint with the Boston Public Health Commission and information on how to obtain help quitting smoking.
4. The Employer's policy must be distributed to all employees on an annual basis. The Employer must maintain written records of all distributions of the policy.
5. All employers who intend to promulgate a policy that significantly differs from the model policy shall submit for approval, along with a form provided by the Tobacco Control Program and \$25.00 processing fee, a copy of the employer's proposed policy, at least fifteen (15) days prior to implementation of the policy.

## **Section IX. Enforcement**

1. Owners, managers, or other persons having control of a workplace are encouraged to seek the assistance of the Tobacco Control Program of the Boston Public Health Commission for advice or with questions regarding enforcement of the Regulation within the workplace.
2. The following are considered to be reasonable steps to prevent smoking in the workplace in violation of this Regulation:
  - a. Posting required signage;
  - b. Removing ashtrays and other like receptacles;
  - c. Informing any person smoking in the workplace that he/she is in violation of the Regulation;
  - d. Requesting any person smoking in the workplace to extinguish his/her smoking material;
  - e. Requesting that a smoker leave the work place if he/she refuses to extinguish his/her smoking materials; and,
  - f. Self-reporting violations to the Tobacco Control Program of the Boston Public Health Commission.

3. The Tobacco Control Program shall enforce the provisions of the Regulation through:
  - a. Investigation of any complaints filed; and,
  - b. Unannounced inspections of the premises and records regarding compliance with the regulation.
4. The issuance of a Smoking Bar Permit shall be conditional on an applicant's consent to unannounced, periodic inspections of the retail establishment to ensure compliance with this regulation.
5. Owners, managers, or persons having control of a workplace who observe or are made aware of a violation of the Regulation should take all reasonable steps to ensure that the violation is not repeated.
6. Any one or more of the following shall be considered evidence of a violation of this regulation:
  - a. Statement of complaint;
  - b. Observation of an individual smoking in the workplace by an enforcement officer;
  - c. Ashtrays or other cigarette/cigar receptacles in the workplace;
  - d. Serving individuals smoking in violation of this regulation;
  - e. Cigarette butts in the workplace;
  - f. Visual smoke in the air;
  - g. Odor of tobacco smoke; or,
  - h. Observation of an employer, manager, employee or other person having control of the workplace, knowingly or intentionally permitting smoking in the workplace or providing service to an individual smoking in the workplace.
7. Fines shall be paid within twenty-one (21) days of the date of the issuance of the citation by the Tobacco Control Program.
8. Notice of a citation may be provided in the following manner:
  - a. In hand service to the owner, the employer, business agent, manager or other person having control of the workplace;
  - b. First class mail to the owner, business agent, manager or other person having control of the workplace; or,
  - c. In hand service or service by first class mail to any other person violating the provisions of this regulation.

9. Fines may be paid by mail or in person at the Boston Public Health Commission Tobacco Control Program, 774 Albany Street, 2nd Floor, Boston, MA 02118.
  - a. Checks or money orders, should be made payable to the “Boston Public Health Commission.” Do not send cash when paying by mail.
  - b. If a check is returned for insufficient funds or closed account, there will be an additional \$25.00 fee associated with fine. All subsequent fines levied against a workplace will need to be paid by money order.
10. Failure to pay a fine within 21 days will result in an additional \$50.00 late payment penalty. This penalty should be added to all fines paid after 21 days.
11. Complaints under the non-retaliation section of this regulation should be addressed to the Tobacco Control Program of the Boston Public Health Commission, 774 Albany Street, 2nd Floor, Boston, MA 02118, (617) 534-4718.
12. All citations and fines issued pursuant to the regulation may be appealed in accordance with the Boston Public Health Commission’s Administrative Appeal Procedures. A copy of these procedures is available on the Commission’s website at [www.bphc.org](http://www.bphc.org) or at the Tobacco Control Program of the Boston Public Health Commission, 774 Albany Street, 2nd Floor, Boston, MA 02118, (617) 534-4718.

#### **Section X. Waivers**

1. Only one waiver, for up to and not to exceed ninety (90) days, may be issued per workplace. At the end of the waiver period, the workplace must comply with all applicable provisions of the regulation.
2. Requests for waivers of any provision of this Regulation must be submitted to the Executive Director of the Boston Public Health Commission, 1010 Massachusetts Avenue, 6<sup>th</sup> Floor, Boston, MA 02118.
3. The \$100.00 filing fee for waiver applications can be paid by check or money order, made payable to the “Boston Public Health Commission.”
4. Questions regarding waivers should be addressed to the Tobacco Control Program of the Boston Public Health Commission.

#### **Section XI. Exceptions**

1. In order to be covered by the exceptions to the Regulation set forth in Section III Subparagraphs b, c, d, and g of the Regulation (hereinafter referred to as

“Section III”) the individual or business entity claiming the exception must maintain documentary evidence, as further set forth below, of compliance with the terms of the regulation and these guidelines. This documentary evidence must be produced, upon request, to an inspector of the BPHC Tobacco control program or such other enforcing officer.

2. Hotel, motel, inn, bed and breakfast and lodging home rooms – Regulation Section III b.
  - a. Only residential rooms may be designated as smoking.
  - b. All designated residential smoking rooms must be clearly marked as such in the following locations:
    - i. On the exterior of all entrances from a public hallway and public spaces; and,
    - ii. In all interior rooms.
  - c. In lieu of marking each room, an establishment may designate an entire floor of residential rooms as smoking. The floor must be conspicuously designated as smoking at each entranceway on to the floor. Smoking shall not be allowed in the common areas of the floor, such as halls, vending areas, ice machine locations and exercise areas.
  - d. Signs must include the universal smoking symbol and the words “Smoking Allowed” and all signs must be clearly visible and permanently affixed to a wall, door or other visible permanent surface.
3. Retail tobacco stores – Section III c. – All documentation required by the Guidelines Section III.
4. Smoking bars – Section III d. – All documentation required by the Guidelines Section III.
5. Business Office Space covered by Ordinance 16-35 – Section III g.
  - a. The ordinance covers office space of private or public business entities that primarily provide clerical, professional or business services. “Primarily” shall mean that more than ninety percent of a business’ revenue is derived from the provision of clerical, professional or business services.
  - b. This exception also covers the business office space of medical treatment facilities and manufacturing plants. The portion of these facilities that are not exclusively devoted to the provision of clerical, professional or business services are not exempted for coverage by the Regulation.

- c. Banks and financial service institutions are specifically excluded from coverage under the Ordinance and must be in compliance with the Regulation.
- d. In order to obtain coverage under this exception, an employer must provide the BPHC with documentation of compliance with the terms and conditions of the Ordinance, including the following:
  - i. A letter from the owner, business agent, manager or other person having control of the workplace requesting that the workplace be excepted from coverage of the Regulation due to its compliance with City of Boston Ordinance 16-35. This letter must be received by the Director of the Tobacco Control program within six months of the effective date of the Regulation or within ninety days of the start of business.
  - ii. A certified copy of a license issued by the City of Boston or the Commonwealth of Massachusetts indicating that their primary business is clerical, professional or business services or medical treatment facilities or manufacturing; and,
  - iii. Documentation that the required provisions of the Ordinance were implemented and have been continuously maintained in the workplace within three months of the start of business or 1993 whichever is later. Such documentation shall include, but is not limited to, a copy of the smoking policy of the employer, a document indicating its promulgation date and a sworn statement, signed by owner, business agent, manager or other person having control of the workplace, that the workplace has been in compliance with the provisions of the Ordinance within three months of the start of business or 1993, whichever, is later.
  - iv. Such other documentation that may be required by the BPHC Guidelines for enforcement of City of Boston Ordinance 16-35.