

# K&LNG Alert

NOVEMBER 2006

## Labor and Employment Law Employer Responsibility in the Allegheny County No Smoking Ordinance

### INTRODUCTION

On October 4, 2006, Allegheny County Executive Dan Onorato signed a No Smoking Ordinance (“Ordinance”) broadly prohibiting smoking in job sites and public places in Allegheny County. At the request of Executive Onorato, the County Council passed and Executive Onorato signed several amendments to the Ordinance. The Ordinance as amended takes effect January 2, 2007, and will have far-reaching consequences within Allegheny County. The Ordinance can be found at the Allegheny County website [www.county.allegheny.pa.us](http://www.county.allegheny.pa.us).

### Summary

The Ordinance is extremely broad. Smoking is prohibited in almost all enclosed public areas and within 15 feet of the entrance of most public buildings, including health care facilities. Health care facilities also have the option to extend the distance or to ban smoking altogether on their property. Smoking will still be permitted in specialty tobacco establishments, the sleeping quarters of a limited number of rooms in lodging establishments, and in private residences unless that residence is used as a business.

The sweeping scope of this Ordinance requires employers and those in control of buildings and other non-smoking premises to take an active role in the enforcement of the Ordinance. Employers subject to the Ordinance must have a written no smoking policy in place by the effective date of the Ordinance. Employers and others in control of non-smoking premises are also required to take “reasonable measures” to enforce the Ordinance, including posting no smoking signs, removing ashtrays, and telling people found smoking to either stop or immediately leave the

premises. Monetary fines and other penalties will be levied against employers, and those in control of premises and, possibly individual smokers who violate the Ordinance, including individuals. In approximately 18-24 months, the county will review the economic and health consequences of the Ordinance to determine the impact of its passage on Allegheny County.

### Locations Where Smoking is Prohibited

The Ordinance prohibits smoking in almost all enclosed public areas and in some public outdoor areas located in Allegheny County. Enclosed public areas include, but are not limited to, workplaces, retail or wholesale stores, most food and beverage establishments, sports or recreation facilities, theater or performance establishments, galleries, libraries, museums, any school, educational, or vocational facility, any county owned or leased building, any public transportation vehicle or fare-paid area of any Port Authority facility, and service establishments such as office buildings, banks, or other financial institutions. The Ordinance also prohibits smoking in all elevators, restrooms, lobbies, and other common use areas in enclosed buildings, including apartments, condominiums, retirement facilities, nursing homes, and lodging establishments. Smoking is also prohibited at any unenclosed sport or recreation facility or theater or performance establishment. Smoking is not, however, prohibited at unenclosed, non-public work places. Allegheny County included licensed gaming facilities in the list of prohibited locations and the recently passed amendments to state gaming laws will allow that prohibition to take effect. Finally, smoking is also prohibited within 15 feet of the entrances and exits of all non-smoking buildings.

Smoking is prohibited in all health care facilities including hospitals, clinics, physical therapy facilities, doctors' offices, and any private home used as a health care facility during the hours it is used as such. Smoking is also not permitted in any vehicle owned or leased by these facilities. Smoking is prohibited within 15 feet of the entrances of all health care facilities and the operators of those facilities may choose to increase the distance or ban smoking on all property owned by the facility.

### Exceptions to the Prohibitions

Four exemptions from the Ordinance were created. These include:

- Specialty Tobacco Establishments (businesses where at least 85% of their sales are tobacco or tobacco related);
- Lodging Establishments (all hotels, motels, inns, resorts, bed and breakfasts, guest houses, or any business or building providing overnight lodging to customers) may choose to designate up to 25% of their sleeping quarters as smoking rooms;
- Private residences, except during the period when the private residence is being used as a childcare, adult daycare, or other business facility where smoking would be prohibited by the Ordinance; and
- Bars where 10% or less of their revenue is from food sales and that employ less than 10 people are allowed to apply for a waiver that will permit smoking in the establishment until January 1, 2009.

Events held by volunteer organizations are also exempted from the Ordinance, if minors are not allowed to attend the event.

### Responsibilities of Employers and Others in Control of Premises

Employers have significant enforcement responsibilities under the Ordinance. All employers subject to the Ordinance must create, implement, communicate, and maintain a written policy that prohibits smoking in any area of the workplace subject to the Ordinance. All employees must be notified of this policy within 30 days of its adoption and copies of the policy must be made available to all employees and prospective employees. This written policy must be implemented by the effective date of the Ordinance. Employees who are covered under a current collective bargaining agreement that includes

provisions regarding covered employees' right to smoke in the workplace are not covered by the Ordinance, but instead are governed by the applicable provisions of the bargaining agreement.

The Ordinance also includes a provision prohibiting retaliation against employees, applicants for employment, or customers for reporting any violation of the Ordinance. Employees who choose to work in an environment where their employer allows smoking do not surrender any legal rights they may have against their employer or other parties. Any violation of this retaliation provision is considered a violation of the Ordinance and is punishable by the same penalties as outlined below.

Owners, operators, managers, employers, or other persons in control of non-smoking locations must take reasonable care to ensure that no person smokes in violation of the Ordinance. This includes posting "No Smoking" signs that are no less than 6" in height with lettering no less than 4" in height throughout the premises and on all entrances. The symbol of a lit cigarette with a line going through it is acceptable as long as it meets the required dimensions. All entrances and exits must contain signs indicating "No Smoking within 15 Feet of this Sign." All ashtrays must be removed from regulated areas. People who are found smoking in regulated areas must be told to immediately stop smoking or leave the premises. Owners and operators of non-smoking buildings also must provide written notice of all violations, including the potential penalties to lessees, within two business days of receiving complaints. An owner, operator or employer will not be cited for a violation if the foregoing steps are taken.

### Enforcement and Penalties

This Ordinance is enforced by the Allegheny County Health Department and by municipal law enforcement agencies. Citizens can report Ordinance violations to a telephone hotline that will be administered by the Health Department. The Health Department will also keep records of all violations and impose fines on all violators. There is a specific provision that prohibits any private right of action.

For the first 180 days the Ordinance is in effect, the first violation of the Ordinance will result in a warning. All subsequent violations will be a \$250 fine. After the first 180 days, the first two violations result in a \$250 fine. The third violation (and all subsequent violations thereafter) in addition to more fines

could lead to a suspension of any licenses or permits granted to the violator by the Allegheny County Health Department for up to 180 days. Each lit cigarette, pipe, cigar, or other smoking instrument is considered an individual violation.

### Potential Issues

The breadth of this Ordinance has raised a number of potential issues and problems. The County Council has promised to complete a health and economic impact study within 18-24 months after the passage of the Ordinance to analyze the effect the Ordinance is having on the county, but there are more immediate issues.

- By prohibiting smoking within 15 feet of the entrances of all buildings where smoking is not permitted, the Ordinance effectively bans smoking altogether in some areas.
- The Ordinance also exempts workers covered under a current collective bargaining agreement that addresses smoking in the workplace, but what happens when that bargaining agreement expires? Are those employees then free to renegotiate the issue or does the Ordinance then supersede the bargaining agreement?
- The Ordinance states that it does not create any private rights of action but does not clarify the exact meaning of that provision.

- It is unclear whether employees of volunteer organizations or employees of locations where the fundraising event is held are covered by the Ordinance.
- Finally, may an individual smoker be fined for smoking in a no smoking area? Fines may be levied against “individuals” and that may include smokers.

The biggest issue, however, is the responsibility that the Ordinance places on businesses and others in control of non-smoking premises to enforce the Ordinance. Within a very short time frame, businesses are expected to create written smoking policies and take reasonable efforts to ensure compliance with the Ordinance by not only their employees, but also visitors and others on their premises. With its comprehensive scope and numerous requirements, the Allegheny County No Smoking Ordinance goes beyond merely bars and restaurants and requires many people and businesses in Allegheny County to become an active part of Ordinance enforcement.

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