

SMOKEFREE COMPLIANCE PROCEDURE

Effective Date: 1st September 2012

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1. AIM

1.1. This procedure relates to the enforcement of legislation that is designed to protect people from exposure to second hand smoke. The Health Act 2006, and subsidiary regulations, aims specifically to protect people in the work place and people who visit public places, where those premises/places are enclosed or substantially enclosed.

All such premises/places (enclosed or substantially enclosed) must be smoke free.

2. PURPOSE

2.1. This procedure outlines how smoke free legislation relating to contraventions of the Health Act 2006 is enforced and will aim to:

- a) Protect public health;
- b) Provide a service to Luton residents and businesses;
- c) Provide advice and information to the businesses in Luton in order to raise and maintain standards of compliance with the Health Act 2006
- d) Prevent future complaints.

2.2. The procedure is designed to help promote greater consistency and a continued professional approach and should be read in conjunction with the Health Act 2006, (Part 1, Chapter 1), LACORS guidance “Implementation of smoke free legislation in England” and other centrally-issued guidance.

3. SCOPE

3.1. The procedure describes the sequence of actions to be taken in response to requests for advice on smoke free legislation from the first discovery of smoking in a premises that is required to be smoke free, through to the final decision on the preferred response and/or method of enforcement.

3.2. All appropriately authorised officers are competent to carry out this procedure.

3.3. Officers authorised to carry out this procedure who are not fully qualified will be provided with the training necessary to ensure that they are competent to carry out any duties assigned to them under the Act.

4. REFERENCES

4.1. The Health Act 2006 – Part 1, Chapter 1

4.2. The Smoke-free (Premises and Enforcement) Regulations 2006

4.3. The Smoke-free (Signs) Regulations 2007

4.4. The Smoke-free (Exemptions and Vehicles) Regulations 2007

4.5. The Smoke-free (Penalties and Discounted Amounts) Regulations 2007

4.6. The Smoke-free (Vehicles Operators and Penalty Notices) Regulations 2007

4.7. LACORS guidance “Implementation of smoke free legislation in England” (as amended).

5. DEFINITIONS

5.1. Smoking – Smoking refers to smoking tobacco or anything that contains tobacco, or smoking any other substance, and includes being in possession of lit tobacco or anything lit which contains tobacco or being in possession of any other lit substance in the form in which it can be smoked.

Smoking means the practice of burning tobacco or any other material and the tasting or inhalation of the associated smoke.

Smoking includes the smoking of manufactured cigarettes or hand-rolled loose tobacco, and also includes Shisha smoking using water-pipes (also known as hookahs, hubble-bubbles, bongos).

Note: Electronic cigarettes can be confused with normal smoking of tobacco. If smoking is observed, officers use guidance that advises them on how to differentiate smoking of normal and electronic cigarettes to obtain evidence.

5.2. Smokefree premises : A smokefree premises is a place

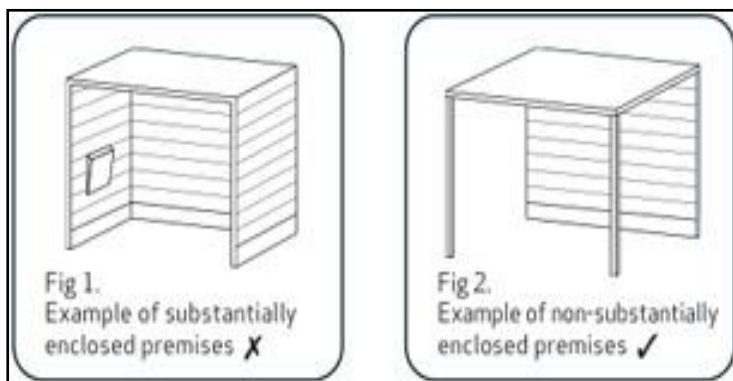
- a) used as a place of work by more than one person (even if persons who work there do so at different times, or only intermittently)
- b) open to members of public and
- c) in either case is enclosed or substantially enclosed.

5.3. Enclosed premises – are premises/structures/vehicles consisting of a ceiling or roof (and except for doors, windows or passageways), are wholly enclosed (whether on a permanent or temporary basis).

5.4. Substantially enclosed premises are premises/structures/vehicles consisting of a ceiling or roof, and have permanent openings in the walls that are less than 50% less of the total areas of the walls or other structures that serve as walls and constitute the perimeter of the premises, namely the '50% Rule'.

5.5. The 50 % Rule :

- a) If 50% of the total area of the walls, or more, is missing then it is **legal** to smoke in the area: or
- b) If more than 50% of the total area of the walls are present then it is **illegal** to smoke in the area.



Nb. There is no legal distance the open sides of shelters must be away from a wall or a solid fence. However if the shelter is built with the open sides too close it may not comply with the 50% rule. Shelters should be a reasonable distance away from any other buildings or walls to allow adequate ventilation. To comply, any gaps must be far enough away from any other buildings, wall or structure to avoid trapping smoke.

5.6. Authorised Officer is an Officer authorised in writing, to act in matters arising under the Health Act 2006, Chapter 1.

5.7. A roof includes any fixed or moveable structures or device which is capable of covering all or part of the premises as a roof such as canvas awnings and marquees.

Note: Tents, marquees or similar structures are considered enclosed premises if they fall within the above definition. Note: Marquee/tent side-panels are considered rolled down and closed even when rolled up for the purposes of the Act.

5.8. A Fixed Penalty Notice (FPN) - is a notice that offers a person the opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty.

6. OFFENCES

6.1. It is an offence under section 8.4 of the Act for:

a) a person who controls or is concerned in the management of smoke free premises or vehicle to fail to cause a person to stop smoking therein;

b) a person to smoke in a smoke free premises or vehicle;

c) a person who occupies or is concerned in the management of smoke free premises or vehicles to fail to ensure that no smoking signs are displayed in accordance with the regulations;

d) any person who intentionally obstructs an authorised officer in the exercise of his functions under the Act:

e) any person without reasonable cause fails to give an authorised officer any facilities, assistance or information he/she reasonably requires.

7. DEFENCES

It is a defence under section 8.5 of the Act for:

7.1. A person charged with smoking in a smoke free place to show that he did not know, and could not reasonably have been expected to know, that it was a smoke free place.

7.2. a person charged with failing to stop a person smoking in a smoke free place to show that:

a) He/she took all reasonable steps to cause the person in question to stop smoking;
or

b) He/she did not know and could not reasonably have been expected to know, that the person was smoking; or

c) On other grounds that it was reasonable for him/her not to comply with the duty.

8. SMOKE FREE ENFORCEMENT FRAMEWORK

8.1. In determining the enforcement action taken, regard must be taken in line with the Enforcement Concordat and the Regulator's Compliance Code.

8.2 The Council aims to adopt an educative and advisory approach to enforcement by providing advice and guidance to persons in control of premises, their representatives, the public and any duty holders as to the requirements regarding smoke free premises. However, where necessary, when the seriousness of the situation warrants it, more formal enforcement options will be adopted including the issuing of Cautions and Prosecution.

8.2. Guidance and advice regarding the smoke free legislation will be provided to those persons proposing to start up a new business, and to new businesses and new employers at the planning stage of the venture.

8.3. Complaints will be investigated in accordance with Section 11.2.

8.4. Assessment of compliance with the Act will be undertaken as part of programmed interventions/inspections in respect of food safety and health and safety legislation. Visits will also be made to premises where there has been a history of non-compliance with smoke free law or previous enforcement action under smoke free legislation has been undertaken.

8.5. Authorised Officers will assess whether premises comply with the legislation, and will do so by determining whether the premises is required to be smoke free under the terms of the Health Act 2006 and whether owners, occupiers, managers, or persons in control of premises comply with their legal duty to stop any person smoking in their premises.

9. ENFORCEMENT PRINCIPLES

9.1. Proportionality

Considerations include:

- a) The degree of any risk posed by the action of smoking and any other actions directly associated with smoking
- b) Seriousness of any breach of the law
- c) Compliance history
- d) Relevant good practice
- e) How the public interest would be best served

9.2. Consistency

Authorised Officers will take a similar approach in similar circumstances to achieve similar ends. Businesses and the public can expect consistency from officers when providing advice on compliance or when enforcement action is required. Consistency will be achieved through training of staff, quality monitoring procedures, and participation in liaison arrangements with other Services, Local Authorities,

Government Departments and other Agencies. Officers will also have regard to this procedure and any recognised guidance when providing advice or considering enforcement action.

9.3. Transparency

All enforcement action will be transparent so that businesses and individuals understand what is expected of them and what they should expect from officers. To that end officers will explain the following to any person on contemplating formal action against them. Their intention to take formal action

- a) The reason why enforcement action is considered
- b) Suggested remedial action including an explanation of any immediate action necessary
- c) Their rights to appeal

9.4 Targeting

Enforcement action will be targeted so that priority is given to premises posing the greatest risk of non-compliance, where a comparatively large number of people may be exposed or where complaints are received. Any intervention will be focused on the owner or person in control of the premises.

10. ENFORCEMENT OPTIONS

The following options are available;

10.1. No Action

- a) In exceptional circumstances, contraventions may not warrant any action.
- b) This may be appropriate when there is a genuine misunderstanding or ignorance of the law.
- c) No action may also be appropriate when any non-compliance is rectified immediately.

10.2. Informal Action

This includes:

- a) Verbal or written Advice
- b) Verbal Warnings
- c) Written Warning Letters

10.21 Informal action may be appropriate in the following circumstances:

- a) The first offence;
- b) The offence was minor with no risk to public health;
- c) The past history of the individual/premises concerned indicates that informal action will achieve the required result;
- d) The Investigating Officer has a high level of confidence in the management of an organisation;

10.3. Fixed Penalty Notice (FPN)

Persons witnessed smoking in a smoke-free place under Section 7 of the Health Act 2006 will be served a fixed penalty notice of £50; discounted to £30 if payment is made within 15 days of the date of the notice.

10.4. Use of the review process for the Licensing Act 2003

- a) The responsible Authority for Health and Safety may request a review under the Licensing Act 2003 for breach of statutory requirements under the Health Act 2006.
- b) This action will normally only be considered where there is a continued failure to comply with 'No Smoking' signs requirements, or continued failure to prevent smoking offences.

10.5. Prosecution

In deciding whether or not to institute legal proceedings the following factors must be considered:

- a) Whether there has been a blatant or systematic disregard for the law;
- b) The company's/individual's general record and approach to implementing smoke free legislation, including previous offences at a premises or at other premises under the same control
- c) Whether it is in the public interest to prosecute;
- d) Whether the evidence available provides a realistic prospect of conviction;
- e) Whether the IO has been obstructed in the course of their duties;
- f) Whether the company/individual has taken all necessary steps to prevent a recurrence of the problem;
- g) The reliability of any important witnesses and their willingness to co-operate.

10.6. Simple Cautions

The use of simple cautions will be in accordance with the Home Office Circular 30/2005, LACORS guidance and internal guidance on issuing Simple Cautions.

11. PROCEDURE

11.1 Inspections

Although the Council will not embark on a rigid proactive inspection programme under this legislation, the following approaches will be available for Authorised Officers:

- a) Announced or unannounced inspection – whereby Authorised Officers identify themselves to the person in control on entering a premises prior to assessing compliance with smoke-free legislation.
- b) Overt surveillance - whereby the Authorised Officers will assess compliance by observation within a premises, and subsequently announce themselves and show appropriate identification to the person in control of the premises at the end of the period of the inspection/visit.
- c) Covert surveillance (including covert human intelligence source (CHIS)). - This approach must only be considered necessary and proportionate in the circumstances and where such action is appropriately authorised under the Regulation and Investigatory Powers Act 2000 (RIPA). For this course of

action to be considered appropriate, there will need to be good reason to suspect that an offence is being committed and evidence of that offence cannot be gathered in any other way.

- d) Vehicles – assessment for compliance in vehicles used in connection with work or for public service will be carried out at the operator's base or where the vehicle is stationary. This will be announced or unannounced dependent upon the circumstances.

11.2 Investigation of complaints

The response to complaints received about non-compliance with smokefree legislation will be prioritised taking into account the following factors:

- a) The number of complaints received about a particular premises
- b) The number of people likely to be affected if the complaint is about smoking in smoke free premises
- c) Whether the alleged offender has been previously warned, convicted or subject to a simple caution regarding non-compliance with smoke-free legislation.

11.21

All complaints will be acknowledged within 5 working days, either by a telephone call, visit or letter.

11.22

If the investigation of a complaint reveals non-compliance with the law, the Investigating Officer will select the most appropriate enforcement response, taking into account the options described above, the Enforcement Concordat and the Regulator's Compliance Code.

11.23

The complainant will be advised of the outcome of the investigation.

11.24

Where preliminary investigations reveal that the complaint is not within the scope or remit the service, the matter will be referred to the appropriate Service and the complainant advised of this action.

Examples of this would be:

- a) Littering of cigarette ends on the footpath (refer to Waste Services for enforcement action)
- b) A cigarette bin attached to the front of a building (refer to Development & Building Control, Planning Enforcement Team for enforcement)
- c) Noise from smokers outside the premises (refer to Community Safety, Environmental Protection Team for enforcement)

- d) Complaints about smoking shelters and structures, other than matters regarding being substantially enclosed (refer to Health and Safety, Building Control, and or Planning for enforcement)
- e) In relation to premises falling within the scope of the Licensing Act 2003, any offences under the Health Act 2006 will be brought to the attention of the Licensing Team to consider any action under the Licensing Act.
- f) Smoking in food work places will be referred to the Food Safety Team.

11.3 Receipt of a complaint and subsequent actions

On receipt of a complaint, the Investigating Officer should ensure that they have as much detail as possible about the alleged offence this may require further contact with the complainant. The following information should be obtained when a complaint is made:

Does the complaint concern:

- a) Failure to display the correct no-smoking sign (section 6(5) offence)
- b) Someone smoking in a smoke free place (section 7(2) Offence)
- c) An owner, occupier manager or any other person in charge allowing smoking in a smoke free place (section 8(4) offence).
- d) Where the alleged offence took place (premises or vehicle)
- e) When did the alleged offence take place

This information will then be entered on the Uniform database for allocation to an Investigating Officer.

11.31

The Investigating Officer should then visit the business to give verbal advice about the alleged offence and any other issues relating to the Health Act 2006. The visit is to be confirmed in a letter: The letter should give details of any legislative breaches observed or thought to have occurred and any advice given at the time of the visit.

11.32

If a visit is not possible, telephone or e mail contact should be made with the person in control of the premises to advise them of the complaint and to give any advice or guidance on the provisions of smoke-free legislation. This advice should be confirmed by letter.

11.33

In many circumstances and in particular when responding to complaints about shisha establishments, direct liaison will take place between the Health and Safety Team and other Council departments with an involvement in issues directly related to shisha establishments. In the first instance this will be:

- a) Trading Standards for issues relating to the sale of tobacco products to underage customers of shisha establishments and offences under the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002.

- b) Development & Building Control, Planning Enforcement Team for issues relating to planning issues and change of use of premises and/or the construction of smoking shelters that would require planning permission.
- c) Property and Development for shisha establishments operating within premises where the London Borough of Luton is the landlord.
- d) The Licensing Team for issues relating to premises with a premises licence.
- e) Community Safety, Environmental Protection Team for issues relating to noise or other disturbance from shisha establishments.

11.34

Following the initial visit or telephone or e-mail contact a visit should be made to the premises within an appropriate period from the sending of the advisory letter to check compliance. If the premises are still noncompliant, a verbal warning must be given, followed by a further written warning letter detailing any offences witnessed or believed to be being committed and remedial action necessary to prevent further offences.

If there is previous move straight to formal enforcement options.

11.35

Investigating Officers should obtain evidence of alleged smoke-free legislation offences at any visits made to premises to investigate complaints. This might include photographs of the following:

- a) Entrances not displaying no smoking signs
- b) Work vehicles not displaying no smoking signs
- c) Ashtrays on the tables inside premises
- d) A person smoking/holding a lit cigarette and/or using shisha smoking apparatus.
- e) Shisha equipment including hookah pipes, charcoal burners and storage containers of shisha "flavours".
- f) The use of "body cameras" that record both images and sound may also be used to gather evidence of breaches of smoke-free legislation at visits.

11.36

At an appropriate period after the written warning at 11.34 above, a further visit must be made to the premises to check compliance.

If offences under the smoke-free legislation are still being committed, then legal proceedings should be considered.

11.4 Joint Enforcement visits

In some circumstances and in particular when dealing with premises where there are issues associated with breaches of smoke-free legislation that impact in to other service areas joint visits/enforcement will be made with other services.

11.41

Health and Safety will be the lead on these visits and co-ordinate the other services involvement.

11.42

Bedfordshire Police may be requested to act in support of these visits in order to ensure that there is not a breach of the peace.

11.43

Along with the gathering of evidence as described in 11.35 above the removal of evidence may be carried out in accordance with the provisions of the Police and Criminal Evidence Act 1984, Code B.

Evidence may include shisha apparatus, shisha flavours and anything else directly connected to breaches of smoke-free legislation. A receipt will be provided to the person in control of the premises for any evidence removed.

12 DEPARTURES FROM THE SMOKEFREE COMPLIANCE AND ENFORCEMENT PROCEDURE

All officers are expected to make enforcement decisions in accordance with this Procedure. Any departure from the procedure must be discussed with the Service Manager before the decision is taken to deviate from this procedure.

13 MONITORING

Smoke-free compliance data return will be provided to the Department of Health every 6 months.

14 REVIEWS

The Smoke free procedure will be reviewed annually and/or as a result of any changes in legislation or centrally-issued guidance.