



**Office of the City Attorney**

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## MEMORANDUM

TO: Grant Langley, City Attorney  
Linda Uliss Burke, Deputy City Attorney  
Kurt Behling, Assistant City Attorney

Richard Withers, Legislative Reference Bureau

FROM: Robin Pederson, Assistant City Attorney *RP*

DATE: June 9, 2010

RE: Enforceability of existing city ordinances regulating smoking after amended state law goes into effect.

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The amended state smoking ban law, Wis. Stat. § 101.123, goes into effect on July 5, 2010 (full text attached to the end of this document). Any local ordinance in conflict with it is potentially unenforceable. The distinction to be made depends on a number of factors, such as whether the city is pre-empted by the state, and whether the city is more or less stringent than the statute.

The statute specifically addresses the scope of local authority at § 101.123 (4m) (all references to § 101.123 are to the version effective July 5, 2010). Based upon this subsection, it appears clear that the state has only pre-empted local authority in relation to the designation of outdoor smoking areas by taverns, restaurants, private clubs and retail establishments, and has limited other outdoor regulation of smoking to property owned by the enacting authority. The city would be free to otherwise enact or maintain ordinances that either mirror the state law or provide more stringent regulation, provided that the ordinance did not conflict with another statute.

I believe I have identified all the local ordinances below that involve the regulation of smoking. I have included the text of those ordinances, in pertinent part, and examine each individually.

### MILWAUKEE CODE OF ORDINANCES § 105-48

#### 105-48. Smoking in City Buildings.

1. DEFINITION. In this section, "city building" means any building or portion thereof owned or leased by the city, including any enclosed walkway connecting such structures.

2. SMOKING PROHIBITED. No person may carry a lighted cigar, cigarette, pipe or any other lighted smoking equipment in any enclosed, indoor area of a city building, including any hallway, waiting area, rest room, cafeteria, meeting room, lobby or reception area or private, enclosed office of any employe or elected official or in any city-owned or leased vehicle.

3. POSTING OF SIGNS. Persons in charge of city buildings or areas where smoking is prohibited shall post or cause to be posted in a clear and conspicuous manner in all entrances and areas of city buildings "no smoking" signs or international "no smoking" symbols consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.

4. ENFORCEMENT. The police department shall enforce this section.

5. PENALTY. Any person who willfully violates sub. 2 after being advised by a city employe that smoking is prohibited in the area shall be punished by:

a. A forfeiture not less than \$25 nor more than \$100 for a first violation.

b. A forfeiture not less than \$100 nor more than \$200 for a second violation within 1 year.

c. A forfeiture not less than \$200 nor more than \$500 for each additional violation within 1 year.

Smoking in city buildings is prohibited by § 101.123 (2)(a)(8r). This ordinance is generally in accord with the statute and is enforceable; however there are some areas of concern, which may make amendment prudent.

In § 105-48-1, enclosed walkways are included in areas where smoking is prohibited. This may, by extension, be interpreted to mean that smoking is permitted in unenclosed walkways. Enclosed is not defined by the ordinance, and it seems likely that the statute's definition at § 101.123 (1)(ak) would be used as a matter of statutory construction.

\* Similarly, § 105-48-2 includes an enumeration of enclosed places that, under the new statutory scheme, are superfluous.

\* The signage requirements under § 105-48-3 may or may not comport with § 101.123 (6), where the Wisconsin Department of Commerce is required to set uniform signage rules.

Subsection 105-48-5 contains a penalty provision that escalates based on the number of violations. The penalties for first and second violations are lower than the statutory penalty which specifies that any person who smokes in a city building "shall" be subject to a forfeiture range of \$100-250. § 101.123 (8)(a). This may be a conflict.

## MILWAUKEE CODE OF ORDINANCES § 105-49

### 105-49. Smoking in Theaters.

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1. CERTAIN AREAS ONLY. It shall be unlawful to light a match or other flame producing device or to smoke, carry a lighted cigar, cigarette or pipe in any theater or motion picture theater except in areas approved by the commissioner of neighborhood services, provided such areas are free from all inflammable or combustible floors, walls, furniture, fixtures and decorations. It shall be the duty of the operator of such theater or motion picture theater before the beginning of each performance to announce from the stage or by projection on the screen that smoking is prohibited by ordinance except in the approved area, if any there be, and further to erect approved signs as directed by the commissioner of neighborhood services stating smoking is prohibited by ordinance except in approved areas. Whenever a patron is observed smoking in violation of this section, the operator or employe shall notify such person of the violation. This section shall not be construed to prohibit the use of a cigar, cigarette or pipe upon the stage of any such theater when used in connection with any performance.

2. PENALTY. Any person violating this section upon conviction thereof, shall be punished by a fine not to exceed \$10 for each and every offense and in default of payment thereof by imprisonment in the house of correction of Milwaukee county for not less than 30 days in the discretion of the court.

\* This ordinance is almost certainly in conflict with § 101.123 (2)(a)(4) where theaters are specifically enumerated as a place where smoking is prohibited.

Smoking by patrons in a designated enclosed area appears to be contemplated by the ordinance, and perhaps more interestingly, the statute provides no exception for smoking in connection with performances.

\* The signage requirement may or may not comport with administrative rules, and the ordinance penalty is lower than the statutory penalty.

## MILWAUKEE CODE OF ORDINANCES § 105-50

### 105-50. Smoking, Drinking and Music Playing on Buses.

1. UNLAWFUL. It shall be unlawful for any person in a public bus operated in the city to:

a. Smoke or hold a lighted cigar, pipe, cigarette or other lighted material.

2. PENALTY. Any person who shall violate this section shall be fined not less than \$10 nor more than \$50 and in default of payment thereof by imprisonment in the house of correction or county jail for not more than 10 days.

The statute prohibits smoking on any "public conveyance." § 101.123 (2)(e)(3). Subsection 1 of the ordinance is therefore enforceable; however, there is the continuing issue related to the penalty being lower than prescribed by the statute.

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Needed*

**MILWAUKEE CODE OF ORDINANCES § 214-25**

**214-25. Smoking Regulations.**

1. WHOLESALE AND RETAIL ESTABLISHMENTS. It shall be the duty of the person in charge (operator, licensee, owner or manager) of such establishment to post or affix and maintain approved signs bearing the words "NO SMOKING" at every entrance door and in prominent locations throughout the building, and such person shall be held responsible for enforcement of the regulations of s. 310 of the Int. Fire Code.

2. ELEVATORS. No person may light a match or any other flame-producing device or smoke or carry a lighted cigar, cigarette or pipe into any passenger elevator, or any elevator used as a passenger freight elevator. The person in charge of the structure containing the elevator shall post or affix and maintain approved signs bearing the words "NO SMOKING" in or at the entrance to the elevator, and such person shall be held responsible for enforcement of this subsection.

This ordinance is not in conflict with the statute and is enforceable.

**MILWAUKEE CODE OF ORDINANCES § 100-59**

**100-59. Operating Regulations for all Public Passenger Vehicles.**

9. PROHIBITED ACTIVITIES. The following activities are prohibited:

e. Carrying or permitting any person to carry a lighted cigar, cigarette, pipe or any other lighted smoking equipment in any vehicle, regardless of whether the vehicle is transporting a passenger or a passenger has granted the driver permission to do so.

**100-62. Penalty.**

1. Any person who violates any provision of this chapter shall, where no other provisions are expressly made for the enforcement of any forfeitures or penalties under this chapter, upon conviction forfeit not less than \$25 nor more than \$500 together with the costs of prosecution, or in default of payment may be imprisoned in the county house of correction for a period not to exceed 20 days.

\* Section 100-59 is not in conflict with the statute and is enforceable; however, there is the continuing issue related to the penalty (prescribed in § 100-62) being lower than prescribed by the statute.

## **MILWAUKEE CODE OF ORDINANCES § 236-31**

### **236-31. Fireworks.**

#### **1.5. STORAGE AND WHOLESALING.**

c. Fire extinguishers approved by the commissioner shall be provided where fireworks are stored or handled. Smoking shall not be permitted where fireworks are stored or handled.

#### **6. FIREWORKS CONTRACTORS.**

a. Fireworks contractors shall comply with the following safety regulations:

a. Post "No Smoking" signs at the fireworks storage area and launching site.

This ordinance is not in conflict with the statute and is enforceable.

## **MILWAUKEE CODE OF ORDINANCES § 275-20**

### **275-20. Licensing Of Licensed Dwelling Facilities.**

#### **7. REGULATIONS.**

o. Negligence By Smokers. In each sleeping room of all hotels, rooming houses, and other places of public abode, a plainly printed notice shall be posted in a conspicuous place advising residents and guests of the following regulations: Any person who, by smoking, or attempting to light or to smoke cigarettes, cigars, pipes or tobacco, in any manner in which lighters or matches are employed, shall, in a careless, reckless or negligent manner, set fire to any bedding, furniture, curtains, drapes, house or any household fittings, or any part of any building so as to endanger life or property in any way or to any extent, shall be guilty of violating this section and shall upon conviction be subject to penalties provided in s. 200-19.

This ordinance does not appear to be in conflict with the statute. While it contemplates smoking in a lodging establishment, which is prohibited by § 101.123 (2)(a)(8g), this ordinance can be interpreted as being an additional regulation and consequence of not merely smoking, but careless, reckless or negligent handling of burning materials.

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**Wis. Stat. § 101.123 Smoking prohibited.**

(1) DEFINITIONS. In this section:

(ab) “Assisted living facility” means a community-based residential facility, as defined in s. 50.01 (1g), a residential care apartment complex, as defined in s. 50.01 (1d), or an adult family home, as defined in s. 50.01 (1) (b).

(abm) “Child care center” has the meaning given in s. 49.136 (1) (ad).

(ac) “Correctional facility” means any of the following:

1. A state prison, as defined or named in s. 302.01, except a correctional institution under s. 301.046 (1) or 301.048 (4) (b) if the institution is the prisoner’s place of residence and no one is employed there to ensure the prisoner’s incarceration.

2. A juvenile detention facility, as defined in s. 938.02 (10r), or a juvenile correctional facility, as defined in s. 938.02 (10p), except a juvenile correctional facility authorized under s. 938.533 (3) (b), 938.538 (4) (b), or 938.539 (5) if the facility is a private residence in which the juvenile is placed and no one is employed there to ensure that the juvenile remains in custody.

3. A jail, as defined in s. 165.85 (2) (bg), a Huber facility under s. 303.09, a work camp under s. 303.10, a reforestation camp under s. 303.07, or a lockup facility under s. 302.30. (ae) “Educational facility” means any building used principally for educational purposes in which a school is located or a course of instruction or training program is offered that has been approved or licensed by a state agency or board.

(aj) Notwithstanding s. 101.01 (5), “employment” means any trade, occupation, or process of manufacture or any method of carrying on such trade, occupation, or process of manufacture in which any person may be engaged.

(ak) “Enclosed place” means a structure or area that has all of the following:

1. A roof.

2. More than 2 substantial walls.

(ar) "Immediate vicinity of the state capitol" means the area directly adjacent to the state capitol building, as determined by rule of the department of administration. "Immediate vicinity of the state capitol" does not include any location that is more than six feet from the state capitol building.

(b) "Inpatient health care facility" means a hospital, as defined in s. 50.33 (2), a county home established under s. 49.70, a county infirmary established under s. 49.72, a nursing home, as defined in s. 50.01 (3), a hospice, as defined in s. 50.90 (1), a Wisconsin veterans home under s. 45.50, or a treatment facility.

(bn) "Lodging establishment" means any of the following:

1. A bed and breakfast establishment, as defined in s. 254.61 (1).
2. A hotel, as defined in s. 254.61 (3).
3. A tourist rooming house, as defined in s. 254.61 (6).

(d) "Person in charge" means the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a public conveyance or at a location where smoking is prohibited or regulated under this section.

(dj) Notwithstanding s. 101.01 (11), "place of employment" means any enclosed place that employees normally frequent during the course of employment, including an office, a work area, an elevator, an employee lounge, a restroom, a conference room, a meeting room, a classroom, a hallway, a stairway, a lobby, a common area, a vehicle, or an employee cafeteria.

(dn) "Private club" means a facility used by an organization that limits its membership and is organized for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose.

(e) "Public conveyance" means a mass transit vehicle as defined in s. 340.01 (28m), a school bus as defined in s. 340.01 (56), or any other device by which persons are transported, for hire, on a highway or by rail, water, air, or guidewire within this state, but does not include such a device while providing transportation in interstate commerce.

(eg) "Public place" means any enclosed place that is open to the public, regardless of whether a fee is charged or a place to which the public has lawful access or may be invited.

(f) "Restaurant" means an establishment as defined in s. 254.61 (5).

(g) "Retail establishment" means any store or shop in which retail sales is the principal business conducted.

(gg) "Retail tobacco store" means a retail establishment that does not have a "Class B" intoxicating liquor license or a Class "B" fermented malt beverages

license and that generates 75 percent or more of its gross annual income from the retail sale of tobacco products and accessories.

(h) "Smoking" means burning or holding, or inhaling or exhaling smoke from, any of the following items containing tobacco:

1. A lighted cigar.
2. A lighted cigarette.
3. A lighted pipe.
4. Any other lighted smoking equipment.

(hm) "Sports arena" means any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held.

(i) "State institution" means a mental health institute, as defined in s. 51.01 (12), a center for the developmentally disabled, as defined in s. 51.01 (3), or a secure mental health facility at which persons are committed under s. 980.06.

(id) "Substantial wall" means a wall with no opening or with an opening that either does not allow air in from the outside or is less than 25 percent of the wall's surface area.

(im) "Tavern" means an establishment, other than a restaurant, that holds a "Class B" intoxicating liquor license or Class "B" fermented malt beverages license.

(in) "Tobacco bar" means a tavern that generates 15 percent or more of its annual gross income from the sale on the tavern premises, other than from a vending machine, of cigars and tobacco for pipes.

(io) "Tobacco product" means any form of tobacco prepared in a manner suitable for smoking but not including a cigarette.

(ip) "Treatment facility" means a publicly or privately operated inpatient facility that provides treatment of alcoholic, drug dependent, mentally ill, or developmentally disabled persons.

(j) "Type 1 juvenile correctional facility" has the meaning given in s. 938.02 (19).

## (2) PROHIBITION AGAINST SMOKING.

(a) Except as provided in sub. (3), no person may smoke in any of the following enclosed places:

- 1g. The state capitol.



1m. Residence halls or dormitories owned or operated by a college or university.

1r. Child care centers.

2. Educational facilities.

3. Inpatient health care facilities.

4. Theaters.

5m. Correctional facilities.

5t. State institutions.

7. Restaurants.

7m. Taverns.

7r. Private clubs.

8. Retail establishments.

8d. Common areas of multiple-unit residential properties.

8g. Lodging establishments.

8r. State, county, city, village, or town buildings.

9. All enclosed places, other than those listed in subds. 1. to 8r. [subds. 1g. to 8r.], that are places of employment or that are public places.

**Note: The correct cross-reference is shown in brackets. Corrective legislation is pending.**

(d) No person may smoke at any of the following outdoor locations:

1. In the immediate vicinity of the state capitol.

2. Anywhere on the premises of a child care center when children who are receiving child care services are present.

3. Anywhere on the grounds of a Type 1 juvenile correctional facility.

4. A location that is 25 feet or less from a residence hall or dormitory that is owned or operated by the Board of Regents of the University of Wisconsin System.

(e) No person may smoke in any of the following:

1. A sports arena.
2. A bus shelter.
3. A public conveyance.

**(2m) RESPONSIBILITY OF PERSONS IN CHARGE.**

(a) No person in charge may allow any person to smoke in violation of sub. (2) at a location that is under the control or direction of the person in charge.

(b) A person in charge may not provide matches, ashtrays, or other equipment for smoking at the location where smoking is prohibited.

(c) A person in charge shall make reasonable efforts to prohibit persons from smoking at a location where smoking is prohibited by doing all of the following:

1. Posting signs setting forth the prohibition and providing other appropriate notification and information concerning the prohibition.
2. Refusing to serve a person, if the person is smoking in a restaurant, tavern, or private club.
3. Asking a person who is smoking to refrain from smoking and, if the person refuses to do so, asking the person to leave the location.

(d) If a person refuses to leave a location after being requested to do so as provided in par. (c) 3., the person in charge shall immediately notify an appropriate law enforcement agency of the violation.

(e) A person in charge may take measures in addition to those listed in pars. (b) and (c) to prevent persons from being exposed to others who are smoking or to further ensure compliance with this section.

**(3) EXCEPTIONS.** The prohibition against smoking in sub. (2) (a) does not apply to the following:

(h) A private residence.

i) A room used by only one person in an assisted living facility as his or her residence.

(j) A room in an assisted living facility in which 2 or more persons reside if every person who lives in that room smokes and each of those persons has made a written request to the person in charge of the assisted living facility to be placed in a room where smoking is allowed.

(L) A retail tobacco store that is in existence on June 3, 2009, and in which only the smoking of cigars and pipes is allowed.

(m) A tobacco bar that is in existence on June 3, 2009, and in which only the smoking of cigars and pipes is allowed.

**(4m) LOCAL AUTHORITY.** This section does not limit the authority of any county, city, village or town to enact ordinances or of any school district to adopt policies that, complying with the purpose of this section, protect the health and comfort of the public. If a county, city, village, or town enacts an ordinance, or if a school district adopts a policy, regulating or prohibiting outside smoking in certain areas as authorized under this subsection, the ordinance may apply only to public property under the jurisdiction of the county, city, village, town, or school district. Such ordinance shall provide that the person in charge of a restaurant, tavern, private club, or retail establishment located in an area subject to the ordinance may designate an outside area that is a reasonable distance from any entrance to the restaurant, tavern, private club, or retail establishment where customers, employees, or persons associated with the restaurant, tavern, private club, or retail establishment may smoke. Such ordinance may not define the term "reasonable distance" or set any specified measured distance as being a "reasonable distance."

**(6) UNIFORM SIGNS.** The department shall, by rule, specify uniform dimensions and other characteristics of the signs required under sub. (2m). These rules may not require the use of signs that are more expensive than is necessary to accomplish their purpose.

**(7) SIGNS FOR STATE AGENCIES.** The department shall arrange with the department of administration to have signs prepared and made available to state agencies for use in state facilities that set forth the prohibition against smoking.

**(8) PENALTIES.**

\* (a) Any person who violates sub. (2) shall be subject to a forfeiture of not less than \$100 nor more than \$250 for each violation.

\* (d) Except as provided in par. (dm) or (em), any person in charge who violates sub. (2m) (b) to (d) shall be subject to a forfeiture of \$100 for each violation.

(dm) For violations subject to the forfeiture under par. (d), if the person in charge has not previously received a warning notice for a violation of sub. (2m) (b) to (d), the law enforcement officer shall issue the person in charge a warning notice and may not issue a citation.

\* (em) No person in charge may be required under par. (d) to forfeit more than \$100 in total for all violations of sub. (2m) (b) to (d) occurring on a single day.

**(9) INJUNCTION.** Notwithstanding s. 165.60, state or local officials or any affected party may institute an action in any court with jurisdiction to enjoin repeated violations of this section.

**Note: This section is shown as affected eff. 7-5-10 by 2009 Wis. Acts 12 and**

185.

1049-2009-2974:158665