Workplace Smoking & Vaping: Smoke-Free Workplace Laws & the 5 Things You Must Do to Comply



Employees who smoke in the workplace are a perennial headache for the co-workers who have to breathe in their fumes as well as the HR manager entrusted with ensuring a healthy and pleasant work environment. But while the challenge remains, at least the laws on how to deal with it have become infinitely clearer. Simply stated, you not only can but must ban workplace smoking or risk significant penalties and fines.

The Rise of Smoke-Free Laws

If you've been doing HR for a long time, you may remember a shocking 2000 case in which a BC arbitrator ruled that smoking is a disability and banning it was disability discrimination banned by human rights laws [*Cominco Ltd. v. U.S.W.A., Local 9705*]. The law has done a 180⁰ turn since then. What's illegal today isn't *banning* workplace smoking but *tolerating* it. What changed?

Answer: Every jurisdiction in Canada except Sask. now has a law, typically referred to as a smoke-free places, non-smokers' protection or tobacco-control act (which we'll refer to collectively as "smoke-free") that doesn't simply ban smoking in indoor workplaces but holds employers liable for failing to enforce no-smoking bans in the areas they control. The rules are the same in Sask. and the only difference is that they're contained in the OHS regulations rather than a separate piece of smoke-free legislation.

Vaping & Cannabis

The original smoke-free laws prohibited smoking of tobacco products. But all jurisdictions have (or are in the process of) extending them to include:

- E-cigarettes and vaping; and
- Smoking of non-tobacco products, including cannabis.

Defining Our Terms
For the rest of this article, when we use the term "smoking" we mean both smoking and *vaping.*

THE 3 THINGS YOU MUST KNOW TO COMPLY

Although the laws are similar across the country, there are also significant differences by jurisdiction. As HR director, there are 3 crucial things you need to know to enforce and avoid penalties under the law:

1. **Where Exactly Is Smoking Banned?**

Answer: The smoking ban applies to “workplaces” or “places of employment,” generally defined as an indoor or enclosed space or part of a space where employees do their job duties, including stairways, corridors, lobbies, elevators, cafeterias, washrooms and other indoor places workers frequent. In 5 jurisdictions, the smoking ban zone extends beyond the building to a halo or periphery area of a specific distance from building doorways, windows and air intakes, as shown in Table 1:

Table 1: No-Smoking Zone Halo

Jurisdiction	Halo Radius (within doorway, window, air intake)
Nunavut	3 metres
Alberta	5 metres
Yukon	5 metres
BC	6 metres
New Brunswick	9 metres

2. **Does Smoking Ban Cover Work Vehicles?**

Answer: In all but 3 jurisdictions (FED, NL and PEI) the ban on workplace smoking applies to vehicles used for employment—although some jurisdictions limit the vehicle ban to situations where there are multiple occupants.

Table 2: Smoking Ban in Work Vehicles

No Ban in Vehicles	Ban in Vehicles	Ban if Vehicle Is:
FED, NL, PEI	AB, ON, SK, NT, NU	*Carrying 2 or more employees: MB, NB, NS, QC *Carrying 2 or more persons: YK *Enclosed: BC

3. **Is a Designated Smoking Room/Area (“DSR/DSA”) Allowed?**

Answer: In 7 jurisdictions (AB, BC, MB, NB, SK, NU and YK), the workplace must be completely smoke-free. But the other 7 jurisdictions (FED, NL, NS, ON, PEI, QC, NT) water things down by allowing employers to establish DSRs/DSAs in the workplace as long as they meet specific conditions, which typically include ensuring that the DSR/DSA:

- Is structurally separate from building areas where smoking is banned;
- Independently and effectively ventilated—ON, NS, NL and NT require DSR/DSA ventilation systems to meet rigorous standards;
- Isn’t located in a thoroughfare or place that non-smokers need to occupy or access to do their job duties.

THE 5 THINGS YOU MUST DO TO COMPLY

Your basic obligation under the smoke-free laws is to ban smoking and ensure that people don’t smoke where they’re not allowed to. If a violation occurs, e.g., an inspector catches somebody smoking in your workplace, it’s evidence that you tolerated smoking. To avoid penalties, you’d have to rebut this presumption by

showing that you didn't actually know about the offence and exercised due diligence, i.e., took all reasonable steps, to prevent it. At a minimum, there are 5 "reasonable steps" you must take.

1. **Notify People of Smoking Ban**

First, you must notify people in the building, including employees, contractors and visitors, that the workplace is totally smoke-free or limited to DSRs/DSAs, as the case may be, by:

- Posting the required signs (to be discussed immediately below);
- Creating a clear written smoke-free policy for your workplace; (Click here for a Model Policy)
- Distribute the policy to employees, supervisors and management;
- Make sure the policy also applies to contractors, clients, guests and other people who visit your workplace; and
- Have each employee sign an acknowledgement of having received, read and understood the policy.

2. **Post Required No-Smoking Signs**

Smoke-free laws (BC is the lone exception) specifically require employers to post signs at entrances to and in strategic places inside the workplace using text and/or the universal no-smoking symbol, i.e., red circle around cigarette bisected diagonally against a white or clear background. to make it clear that smoking is prohibited. Many jurisdictions also list detailed specifications for the size of the sign and lettering, the diameter of the red circle, the background colour, etc.

Signs also must be posted at entrances to DSRs/DSAs (assuming DSRs/DSAs are allowed) indicating that the location is a DSR/DSA. No-smoking signs are *not* required inside company vehicles. Employers must also ensure signs are:

- Posted in conspicuous locations where people are likely to see them;
- Unobstructed by other signs, ads or notices;
- Not defaced; and
- Removed only by authorized personnel.

3. **Strictly Enforce Your Smoking Ban**

Enforce your ban and discipline employees that commit violations. Important caveat: Human rights laws require you to accommodate employees with disabilities to the point of undue hardship. While smoking itself isn't generally considered a disability, employees may need to smoke to treat a condition that is. Thus, for example, a doctor may authorize an employee to use medical cannabis to treat PTSD.

Result: You may have to make exceptions to your smoke-free workplace policy. But you can and should require employees to verify the disability. If employees want permission to use medical cannabis for a disability, you should also require them to provide a copy of the written physician record authorizing the particular use. If the use isn't legally authorized, you don't have to accommodate it. You also don't have to make accommodations that subject other employees to second hand smoke. Imposing a health risk on a third party, in other words, is undue hardship.

4. **Get Rid of Ashtrays**

Ensure that there are no ashtrays, receptacles, lighters or other smoking equipment in areas where smoking is banned. This is something you should specifically instruct JHSC members, supervisors and employees to check while conducting workplace

inspections.

5. **Avoid Reprisals**

You’re not allowed to retaliate or take reprisals against employees for doing things the smoke-free law allows them to do, including asking a supervisor or manager to enforce it. Protection against reprisal (aka, “discrimination), is expressly spelled out in 6 jurisdictions (MB, NL, ON, PEI, NU, YK) and implied in the rest. Accordingly, make sure your smoke-free workplace policy includes a non-reprisal statement.