



Ways & Means

**Tobacco-Free Outdoor Spaces:
Buffer Zones & Other Hazy Issues**

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Public Health and Tobacco Policy Center

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The Public Health and Tobacco Policy Center is a resource for the New York Department of Health. It is funded by the New York State Department of Health and works with the New York State Tobacco Control Program, the New York Cancer Prevention Program, as well as the programs' contractors and partners to develop and support policy initiatives that will reduce the incidence of cancer and tobacco-related morbidity and mortality.

This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.

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Tobacco-Free Outdoor Spaces: Buffer Zones & Other Thorny Issues

Introduction

Tobacco-free is increasingly the norm, as evidenced by use restrictions in some public spaces by federal, New York State, and local law. However, involuntary exposure to toxic secondhand smoke,¹ e-cigarette emissions,² and tobacco waste³ remains problematic in many public and private outdoor areas, particularly in areas with lower incomes.⁴ In addition to presenting serious health risks, public tobacco use is inconsistent with tobacco-free norms; it models unhealthy conduct for youth in areas where kids play, and triggers tobacco cravings and increased use by those who want to quit. Widespread public tobacco use makes it seem desirable and socially acceptable (factors in use rates).⁵

There is no legal “right” to use tobacco,⁶ and local governments in New York have broad authority to regulate use of tobacco products in both indoor and outdoor areas, including private spaces, within their jurisdictions.⁷ Additionally, private entities are permitted to adopt tobacco-free policies on their properties.

There is no safe level of exposure to secondhand smoke,⁸ yet avoiding unwanted exposure can be difficult: Smoke drifts up to 25 feet and evidence shows that even outdoors secondhand smoke can reach concentrations similar to levels found in indoor smoking areas.⁹ Further, local governments, colleges, employers, and other private entities may wish to limit tobacco use to reduce tobacco waste and litter and its associated costs,¹⁰ prevent fires,¹¹ create healthy workspaces (particularly for lower-income employees often not covered by smoke-free workplace laws)¹² and promote tobacco-free norms and community wellness.¹³

Federal and State Law

In addition to indoor use restrictions, federal and state law currently restrict outdoor use of some tobacco products. For example, federal law prohibits smoking in certain outdoor areas, including, but not limited to:

- On the property of correctional facilities;¹⁴ and
- Within 25 feet of doorways and windows to most federally-controlled buildings.¹⁵

The New York Clean Indoor Air Act (CIAA) prohibits smoking in certain outdoor areas, including, but not limited to:

- Train platforms;¹⁶
- The grounds of hospitals and residential health care facilities, including within 15 feet of building and ground entrances and exits;
- Within 100 feet of school building entrances or exits, and outdoor areas of schools or after-school programs;¹⁷ and
- Playgrounds during daylight when children under age 12 are present.¹⁸

Additionally, smoking is prohibited in designated areas of state parks.¹⁹

Note that neither federal nor state law broadly regulates the use of non-combustible tobacco products, including e-cigarettes.²⁰ However, federal public health experts recommend state and local governments include e-cigarettes in smoke- and tobacco-free laws.²¹

Frequently Asked Questions

We have an issue with people clustering to smoke immediately outside our tobacco-free property. Litter and smoke drift back onto our property, and also onto our neighbors' properties. May private entities enforce a tobacco-free buffer zone around entrances or property boundaries if that buffer zone will extend into public or private property?

Maybe. Property owners may control the property they own, as well as certain activities of persons under their control or responsibility. How far a private policy may extend beyond the private property boundary depends on the relationship with the persons engaged in the activity, the specifics of property ownership, and local law.

Special rights to adjoining public property

In some cases, the property owner and/or lessee may have special rights to public property (such as a walkway) abutting her property, permitting the owner limited use of or control over that area (provided there remains free access for public travel).²² A local law may authorize control over abutting public property, or it could prohibit tobacco use a certain distance from commercial properties or their entryways. Less likely, a deed or lease to a commercial property may outline whether and how property owner's rights extend to abutting public property. If an owner's use rights do extend to the abutting sidewalks, she may have authority to enforce a buffer zone around her property.

No special rights to adjoining property

Without clear authority over adjoining property, it may be challenging for a business to legally enforce a buffer zone that includes the abutting sidewalk. While signs requesting "no tobacco use" can nevertheless serve to dissuade tobacco use (*i.e.*, become self-enforcing),²³ a business may be unable to truly enforce the rule and force an individual to vacate the area. A property owner may reasonably argue she may rightfully prevent tobacco use on abutting sidewalks when such use harms patrons,²⁴ impedes entry,²⁵ or otherwise negatively affects her business.²⁶ However, it's unclear whether such a right would be recognized and supported by local authorities; in general, a buffer zone will be clearly enforceable only if it is located wholly within the owner's property.

Policies affecting persons with relationship to property owner

Employers, educational institutions, and others may prohibit tobacco use by employees, visitors, volunteers, or students—essentially anyone over which the entity has control or responsibility—on and off the property. An institution's tobacco-free policy may require a tobacco-free work day²⁷ (see below), and may apply to events or activities attended by persons for whom the institute is responsible that take place off the property (*e.g.*, school sporting events, remote work placements, or other official or sponsored off-property activities). Enforcement may include the imposition of fines, disciplinary action, or prohibiting readmittance to the property.

Designated tobacco use areas on property

Property owners could provide a designated tobacco use area on the property. Note that doing so undermines the goal of maintaining a healthy environment for everyone—reducing unwanted exposure to secondhand smoke and aerosol emissions, tobacco litter, and reducing smoking cues—and is therefore not an ideal solution. However, for those establishments experiencing significant intrusion on neighboring property, and who have the square footage to accommodate a designated smoking area with minimal intrusion on accessible open space and the character of the organization, it may be a useful compromise. Such a designated area should be located a reasonable distance (25 to 50 feet) from entrances, windows, and vents, and, to the extent possible, out of public view.²⁸ Additionally, the area should include appropriate waste receptacles (and be regularly maintained).

Our employees comply with our tobacco-free policy, but continue to use tobacco in view of clients, affecting our public image. May an employer maintain a tobacco-free workforce?

No, but employers may maintain a tobacco-free work day. New York employers are prohibited from discriminating against employees based on tobacco use outside working hours (*i.e.*, employers cannot fire or refuse to hire based on smoking status).²⁹ However, employers may prohibit tobacco use by employees during the work day or when using the employer's property (*e.g.*, when wearing official uniform or in company vehicle). Note that the work day encompasses unpaid breaks and meals, and the policy could be applied even when employees are working off-site during the work day.³⁰

Employers subject to a collective bargaining or other workplace agreement may have to negotiate a policy change impacting employee tobacco use.³¹

We are considering a tobacco-free campus policy but are concerned about student and employee safety now that they must leave the property. Must public or private entities include special safety measures for employees or students leaving campus to use tobacco?

It depends. Property owners (and occupants) are responsible for maintaining all property in a safe condition for those who use it.³² This responsibility includes remediating any foreseeable harmful consequence of the owner's actions or negligence.³³ Importantly, creating a tobacco-free environment fits squarely with this responsibility by creating a safer and healthier environment for employees, residents, students, or visitors using the property.

A tobacco-free policy does not change the relationship between nor duties owed by public or private entities and those engaging in off-campus activities. If, however, the policy creates a **new** foreseeable harm (*e.g.*, it's known that students are complying by smoking in a dark public alley abutting a campus building) the owner may be required to act to reduce the risk to those students (*e.g.* install lighting). The bottom line is that a tobacco-free policy is no different from any other rule that identifies permissible and impermissible activities on a property, and institutions should approach it in a similar manner.

Employees from a nearby business are not permitted to use tobacco on their company grounds; they instead congregate in an area abutting my property. What recourse do I have to address their intrusive smoke and aerosol drift or tobacco product litter?

Potential “non-legal” approaches

If neighbors have a common landlord, the affected tenant may work with the landlord to make the entire property and entryways tobacco-free.³⁴ If no common landlord exists, entities may work with neighboring businesses or the municipality to coordinate tobacco-free policies to reduce loopholes that undermine a private policy (and public health).

Potential “legal” approaches

The outcome of litigation is always uncertain, but if affected businesses or property owners cannot resolve the issue with their neighbors, the affected owner may be able to bring a legal claim against the offending neighbor. The following suggestions are not exhaustive, are provided only for educational purposes, and are further described in other publications.³⁵ Importantly, property owners should consult an attorney to prior to filing a claim.

If a common landlord exists, an affected individual or business might have a claim against the landlord.³⁶ Tenants have certain rights connected to their use of leased property; some of these rights may be spelled out in the lease agreement, while other rights exist whether or not they are explicitly mentioned in the lease. Property owners, or landlords, have certain responsibilities to ensure their property is safe and that tenants may exercise their rights, even if it means landlords must restrict the activities of other tenants or third parties on the property.³⁷ Specifically, a landlord has a duty to prevent harmful conditions or activity on the property; if a landlord fails to take reasonable action, a tenant could sue under legal claims of constructive eviction, violation of right to quiet enjoyment of the property, or nuisance, among others.³⁸

If no common landlord exists, an individual or business harmed by ongoing tobacco use on or near her/its property (e.g., drifting smoke and aerosol interferes with use of dining patio) may be able to pursue a claim against the neighboring property owner allowing the tobacco use. For example, a person may sue a business permitting tobacco use or failing to curb tobacco use for harassment or creating a nuisance.³⁹ Alternatively, affected businesses or individuals may be able to directly sue the individuals engaging in the activity under legal theories of trespass, battery, or harassment.⁴⁰

Conclusion

Creating tobacco-free spaces through policy is effective in reducing tobacco use and improving public health. There is no safe level of exposure to secondhand smoke,⁴¹ and evidence shows that secondhand smoke is harmful even in outdoor spaces.⁴² While state and federal law regulate tobacco use in limited areas, New York local governments and private entities possess authority to impose more stringent tobacco use restrictions in both indoor and outdoor areas. This fact sheet aims to answer some common questions about developing, implementing and enforcing local and private tobacco-free policies. For more information about tobacco-free policies and other public health interventions, visit our website at tobaccopolicycenter.org.

¹ David M. Homa et al., *Vital Signs: Disparities in Nonsmokers' Exposure to Secondhand Smoke — United States, 1999–2012*, 64 MMWR MORB. MORTAL. WKLY. REP. 103–108 (2015) (finding one in four nonsmokers remain exposed to SHS; exposure remains higher among children, non-Hispanic blacks, those living in poverty, those who rent their housing).

² U.S. DEP'T OF HEALTH & HUMAN SERVS., E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL, FACT SHEET 2 (2016) *available at* https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Fact_Sheet_508.pdf.

³ John E. Schneider et al., *Tobacco litter costs and public policy: a framework and methodology for considering the use of fees to offset abatement costs*, 20 TOB. CONTROL i36–i41, i36 (2011) (finding substantial costs of tobacco product litter and tobacco product litter typically comprises 22 to 36 percent of all visible litter in U.S. cities).

⁴ See, e.g., Nancy E. Hood, et al., *Community Characteristics Associated with Smokefree Park Policies in the United States*, 16 NICOTINE & TOBACCO RESEARCH 828 (2014) (finding likelihood of a county smoke-free park policy higher in counties with higher socioeconomic status versus low-socioeconomic status).

⁵ See Xueying Zhang et al., *The impact of social norm change strategies on smokers' quitting behaviours*, 19 TOBACCO CONTROL Suppl 1, i51 (2010) (finding reduced access and smoke-free spaces reduce social norms around tobacco use and support quit attempts); WORLD HEALTH ORGANIZATION EUROPE, TOBACCO USE IN ADOLESCENTS 1, 3 (March 15, 2016) (noting that normalizing tobacco use can encourage youth use); ASS'N FOR NONSMOKERS-MINN., PLAYING TOBACCO FREE: MAKING YOUR COMMUNITIES OUTDOOR RECREATION FACILITIES TOBACCO FREE 2 (2010).

⁶ SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE 2-4 (2008), *available at* <http://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1144005> (last visited Nov 1, 2016).

⁷ See N.Y. CONST., art. IX, § 2(c) (granting local governments in New York State the authority to regulate with respect to the “safety, health and well-being” of their residents, so long as local laws do not conflict with state laws); see also *Boreali v. Axelrod*, 518 N.Y.S.2d 440, 442 (1987) *aff'd*, 523 N.Y.S.2d 464 (1987) (finding that the New York State Clean Indoor Air Act does not preempt local smoking regulation).

⁸ Homa et al., *supra* note 1 at 107; U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 65 (2006).

⁹ Collin D. Schueler, *Not Out There: Why Outdoor Smoking Bans Finally Pass Constitutional Muster*, 15 QUINNIPIAC HEALTH LAW J. 127, 137 (2011) (citing Neil E. Klepeis, Wayne R. Ott & Paul Switzer, *Real-time measurement of outdoor tobacco smoke particles*, 57 J. AIR WASTE MANAG. ASSOC. 1995 522–534 (2007)).

¹⁰ Michael L. Tyler, *Blowing Smoke: Do Smokers Have a Right-Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO LJ 783, 791 (1997).

¹¹ *Id.*

¹² See Jidong Huang et al., *Sociodemographic Disparities in Local Smoke-Free Law Coverage in 10 States*, 105 AMERICAN JOURNAL OF PUBLIC HEALTH 1806 (2015). (finding lower-educated workers less likely to be covered by smoke-free workplace laws); California Youth Advocacy Network, *Tobacco-Free Policy Rationale*, 2 (2014), *available at* <http://cyanonline.org/wp-content/uploads/2010/08/CYAN-Tobacco-Free-Policy-Rationale-2015-Update.pdf>

¹³ TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING TOBACCO USE OUTDOORS 1 (2014), *available at* <http://publichealthlawcenter.org/sites/default/files/tclc-guide-tobacco-use-outdoors-2014.pdf> (last visited Jan 11, 2017).

¹⁴ U.S. DEPT. OF JUSTICE, SMOKING/NO SMOKING AREAS PROGRAM STATEMENT No.1640.05, 2-3 (January 7, 2015), *available at* http://www.bop.gov/policy/progstat/1640_005.pdf; 28 C.F.R. § 551.160 (2014).

¹⁵ 41 C.F.R. § 102–74.330 (2016).

¹⁶ NY PUBLIC HEALTH LAW §1399-o. Platforms are defined as “ticketing, boarding and waiting areas in public transportation terminals”.

¹⁷ NY PUBLIC HEALTH LAW §1399-o. “Hospital” and “residential health care facility” are defined by New York Public Health Law § 2801.

¹⁸ NY PUBLIC HEALTH LAW § 1399-o-1 (defining “Playground” as “any improved area which is equipped, designed and set aside for the play of at least six children” along with “all internal pathways and land formations, vegetation, play equipment, surfacing, fencing, signs, and any other related structures” within the play area).

¹⁹ N.Y. COMP. CODES R. & REGS. tit. 9 § 386.1(a) (2016); *see also* N.Y. DEP'T OF PARKS, RECREATION AND HISTORIC PRESERVATION, POLICY ON NO SMOKING AREAS AT STATE PARKS AND HISTORIC SITES, *available at* <https://parks.ny.gov/inside-our-agency/documents/GuidancePolicies/PolicyNonSmokingAreasStateParksHistoricSites.pdf>.

²⁰ Some state and federal agencies narrowly regulate the use of e-cigarettes and other tobacco products on agency property. *See, e.g.* N.Y. COMP. CODES R. & REGS. Tit. 21 § 1151.9 (2016) (prohibiting the use of e-cigarettes and smoking on Niagara Frontier Transportation Authority property).

²¹ CTRS FOR DISEASE CONTROL & PREV., ELECTRONIC NICOTINE DELIVERY SYSTEMS: KEY FACTS 3 (2016), <https://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts-oct-2016.pdf> (last visited Feb 1, 2017).

²² *See* 10A MCQUILLIN MUN. CORP. §30:53 (3d ed. 2016); James H. Stethem, *Abutting Owner's Liability for Special Use of Sidewalk*, 16 CLEV-MARSHALL REV 291 (1967).

²³ Smoke-free outdoor policies are largely self-enforcing (representing a “soft” enforcement approach that relies on signs, social pressure, and denormalizing tobacco use rather than increased policing). *See e.g.,* Dong-Chul Seo et al., *The effect of a smoke-free campus policy on college students' smoking behaviors and attitudes*, 53 PREV. MED. 347–352, 352 (2011).

²⁴ *See* 15 N.Y. PRAC. SERIES, N.Y. LAW OF TORTS § 12:12 (August 2016) (recognizing landowner's duty to control actions of persons on her land to protect others on or near the property).

²⁵ *See Id.*

²⁶ Drifting tobacco smoke may cause a nuisance or comprise a trespass, injuring a property owner and/or her business. *See* 85 N.Y. JUR. 2d Premises Liability § 249 (describing nuisance and trespass).

²⁷ *See e.g.* NY SMOKEFREE, TOBACCO FREE WORKPLACE POLICY STATEMENT, *available at* http://www.nysmokefree.com/NYSAction/downloads/Corningtoolkit/01_Tobac-free_Workplace_Policy_Statement_D3.doc (last visited Jan 11, 2017).

²⁸ Tobacco smoke has been documented to drift eight meters from a group of burning cigarettes. *See* Schueler, *supra* note 8 at 137; citing Klepeis, Ott, and Switzer, *supra* note 8 at 191. Note also that the federal Housing and Urban Development Dep't imposes a 25-foot buffer from entrances and windows, even if the perimeter around the building is less than 25 feet. 24 C.F.R. §965.653(a) (2017).

²⁹ N.Y. LABOR LAW § 201-d (2016).

³⁰ *Id.*

³¹ TOBACCO LAW CENTER, AN EMPLOYER GUIDE TO TOBACCO 14 (2004), <http://publichealthlawcenter.org/sites/default/files/resources/ws-guide-employer-2004.pdf> (last visited Jan 11, 2017).

³² *See* 85 N.Y. JUR. 2D PREMISES LIABILITY, § 1 (2017) (recognizing property owners have a reasonable duty of care to protect entrants to the property from foreseeable harm).

³³ *Id.* at 132. (“Legal duties typically emanate from positive actions [i.e., what one does] and sometimes from omissions [i.e. what one fails to do].”).

³⁴ *See generally*, PUBLIC HEALTH AND TOBACCO POLICY CENTER, NEW YORK LANDLORD SMOKE-FREE HOUSING TOOLKIT; PUBLIC HEALTH AND TOBACCO POLICY CENTER, NEW YORK TENANT'S GUIDE TO SMOKE-FREE HOUSING (Sept 2011); TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 13.

³⁵ *See generally* TOBACCO CONTROL LEGAL CONSORTIUM, DRIFTING TOBACCO SMOKE & LEGAL SOLUTIONS FOR BUSINESS OWNERS (2010), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-driftingsmokebusinessowners-2010.pdf> (last visited Jan 11, 2017); *see also* Public Health Law and Policy Technical Assistance Legal Center, LEGAL OPTIONS FOR TENANTS SUFFERING FROM DRIFTING TOBACCO SMOKE (2008), http://www.sandiegocounty.gov/hhsa/programs/phs/documents/TobLegal_OptionsforTenantsSufferingfromDriftingTobaccoSmoke.pdf (last visited Jan 11, 2017).

³⁶ TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 13 at 4.

³⁷ *Id.* at 4.

³⁸ *Id.* at 4–5.

³⁹ *Id.* at 1–2.

⁴⁰ *Id.* at 1–3.

⁴¹ Homa et al., *supra* note 1 at 107.

⁴² Schueler, *supra* note 9 at 127 (citing Klepeis, Ott, and Switzer, *supra* note 9 at 191).



Providing legal expertise to support policies benefiting the public health.

The **Public Health and Tobacco Policy Center** is a legal research Center within the Public Health Advocacy Institute. Our shared goal is to support and enhance a commitment to public health in individuals and institutes who shape public policy through law. We are committed to research in public health law, public health policy development; to legal technical assistance; and to collaborative work at the intersection of law and public health. Our current areas of work include tobacco control and childhood obesity and chronic disease prevention. We are housed in Northeastern University School of Law.

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- provide the latest news on tobacco and public health law and policy through our legal and policy reports, fact sheets, quarterly newsletters, and website

Policy Development & Technical Assistance

- respond to specific law and policy questions from the New York State Tobacco Control Program and its community coalitions and contractors, including those arising from their educational outreach to public health officials and policymakers
- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

Education & Outreach

- participate in conferences for government employees, attorneys, and advocates regarding critical initiatives and legal developments in tobacco and public health policy
- conduct smaller workshops, trainings webinars, and presentations focused on particular policy areas
- impact the development of tobacco law through *amicus curiae* ("friend of the court") briefs in important litigation

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The Center's website provides information about recent tobacco news and case law, New York tobacco-related laws, and more. Current project pages include: tobacco-free outdoor areas; tobacco product taxation; smoke-free multiunit housing; and retail environment policies. The website also provides convenient access to reports, model policies, fact sheets, and newsletters released by the Center.

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The Center is funded to support the New York State Tobacco Control Program, the New York State Cancer Prevention Program and community coalitions and educators. The Center also assists local governments and other entities as part of contractor-submitted requests. If we can help with a tobacco-related legal or policy issue, please contact us.

The Center provides educational information and policy support. The Center does not represent clients or provide legal advice.



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