

Up in smoke: new law favours non-smokers in pub over workplace

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Introduction

Although banned in public buildings and on public transport, smoking is still allowed in restaurants and bars and, surprisingly, in the workplace.

As of May 1 2018 smoking in restaurants and bars will be prohibited. The restrictions on smoking in the workplace will also be tightened – although the new law does not impose an outright ban on smoking at work.

Existing law

Smoking at work is regulated in the Employee Protection Act. Under its existing provisions, smoking in the workplace is prohibited if, for operational reasons, smokers and non-smokers must work in the same office space or a comparable enclosed indoor workplace.

Therefore, under existing legislation, a smoker-employee who has a room to him or herself is not banned from smoking. Likewise, if all of the employees in a shared room are smokers, they can smoke in the workplace. However, if one of them quits smoking (eg, a pregnant employee), all of his or her co-workers in that specific room or comparable indoor workplace are prohibited from smoking in that space.

This statutory ban on smoking in the workplace does not apply with respect to enclosed indoor workplaces that are not comparable to an office space. Therefore, a work space with a low density of employees and without seating capacity (eg, a factory hall) does not qualify as an 'enclosed indoor workplace' within the meaning of the act. Workers in a production hall are therefore allowed to smoke throughout their shifts, regardless of whether non-smoking co-workers are present.

Further, the smoking ban does not apply to offices or comparable indoor workplaces that are used or visited by external persons (eg, customers or patrons). Thus, employees in restaurants and bars are still unprotected. There is no prohibition on employing non-smoking waiters and waitresses to work in a restaurant or bar that is also frequented by smokers.

Regardless of the exceptions to the statutory smoking ban in the workplace, employers can prohibit smoking as a general policy. However, if a works council has been elected, the employer must conclude a works agreement and seek the works council's consent. If negotiations fail, both the employer and the works council can take the dispute to the conciliation board of the competent labour court. The employer and works council can therefore each seek to enforce an agreement on the issue by calling a special tribunal.

Unless the works council succeeds in enforcing a non-smoking work environment, employers are

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free to provide a smoking breakroom, provided that there are technical and organisational safeguards in place to protect non-smoking personnel from the impact of tobacco smoke.

New law

As of May 1 2018 there will be a full ban on smoking in restaurants and bars. This ban is set out in the Tobacco and Non-smoker Protection Act. It has caused considerable concern among restaurateurs for fear of lost business and was widely discussed in the media. The restaurant sector was the last bastion against an outright smoking ban in public spaces.

In parallel, the provisions on smoking under the Employee Protection Act will also be tightened as of May 1 2018.

While the existing law refers to the presence of a non-smoking employee in a private room or comparable workplace to determine smoking rights, the new law prohibits smoking in the entire operation or business where at least one non-smoking employee is present. This means that as of May 1 2018 smokers who share an office space with non-smokers will be prohibited from smoking.

Employers cannot validly permit smoking in the workplace, and a works agreement to this effect would be unlawful.

However, options remain for smokers: a manager or employee who wants to smoke in his or her private office could dedicate the room as a smoking breakroom, as organising smoking breakrooms remains admissible if non-smokers also have enough breakrooms.

Alternatively, smoking is still allowed outside enclosed work areas (eg, by the front entrance, in parking lots or in other open spaces between office buildings).

Smoking outside enclosed work areas would be the last resort for smokers if the works council refuses to consent to smoking breakrooms, but instead insists on a non-smoking work environment and, absent an agreement with the employer, convinces the conciliation tribunal that this is the better alternative for the workforce.

Comment

Austria is one of the last European countries not to have fully banned smoking in public spaces. Arguably, public health will benefit from the full ban coming into force on May 1 2018.

Likewise, the increased workplace protection for non-smokers was long overdue, although the new provisions still afford some leeway to employers in that they can organise smoking breakrooms. As a consequence, the workplace may be more smoker friendly than pubs – who would have imagined that.

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