

## Clearing the air in the workplace: The Tobacco Act's new provisions and the implementation of employer's policy

Enacted in June 1998, the *Tobacco Act* (the «Act») is a major component of the Government of Quebec's strategy to fight smoking.

In June 2005, Quebec's legislature reinforced the Act by adopting the *Act to amend the Tobacco Act and other legislative provisions*<sup>1</sup> (the «Amending Act»). The amendments, which came into force on May 31, 2006, are primarily intended to further restrict the use of tobacco in certain locations, including workplaces, and enhance compliance with the Act.

Now, more than ever, an employer needs to adopt and implement an anti-smoking policy because of the new requirements under the Amending Act, but also to protect its employees from the harmful effects of tobacco. Indeed, studies have shown that tobacco smoke represents the most important source of air pollution in interior workplaces<sup>2</sup>. Employees and customers of an organization are exposed to cancer-causing pollutants and second-hand smoke may interact with other dangerous substances in the workplace.

By **Isabelle Marcoux**



### 1. The amendments to the Act

**First objective:**  
**restrict smoking in certain locations**

**- Enclosed spaces where it is prohibited to smoke**

Prior to May 31, 2006, Subsection 2(9) of the Act prohibited smoking in workplaces (except workplaces situated in a dwelling), but allowed the operator of the workplace, under certain conditions, to set up closed smoking rooms (Section 3).

Effective May 31, 2006, the prohibition against smoking in workplaces remains the general rule, but is subject to two noteworthy exceptions.

First, it remains permissible to set up smoking rooms for persons lodged in the workplace.<sup>3</sup>

Secondly, under a transitional measure provided for in the Amending Act, the operator of a workplace may set up closed smoking rooms<sup>4</sup> until May 30, 2008, and only for officers or employees, provided that these smoking rooms meet the conditions now imposed by the Amending Act.

#### - **Setting up a smoking room**

The Amending Act regulates the setting up and use of a smoking room when one is permitted (Section 5).

The smoking room must be reserved exclusively for the use of tobacco (and not be used as a dining room, game room or meeting room etc).

<sup>1</sup> S.Q. 2005, c. 29.

<sup>2</sup> Health Canada (2003), «Towards a Healthier Workplace: A Guidebook on Tobacco Control Policies», p. 3

<sup>3</sup> Unless the place in question is a childcare centre, day care centre, a nursery school, a primary or a secondary school or a recreational or a community centre for young people, a tourist accommodation establishment or an outfitting operation.

<sup>4</sup> Unless the place in question is a childcare centre, day care centre, a nursery school, a primary or a secondary school or a recreational or a community centre for young people.



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With regard to setting up the smoking room, the following standards and conditions must be met:

- it must have floor-to-ceiling partitions or walls so as to be fully enclosed;
- it must be equipped with a ventilation system that maintains negative air pressure at all times and exhausts smoke directly out of the building; and
- its door must be equipped with a properly functioning self-closing device so that it closes after each use.

Section 12 of the Act continues to allow the government to further clarify these conditions set out in Section 5 of the Amending Act by adopting, by regulation, standards related to the construction and layout of a smoking room and its ventilation system. To date, the government has not used its regulatory power in these matters.

Although the Act permits the setting up and use of a smoking room by officers or employees in a workplace until May 30, 2008, this is totally at the discretion of the employer. Thus, even though an employer has, in the past, made a smoking room available to its employees, it can cease to do so at any time before that date.<sup>5</sup>

#### **- Smoking prohibited in a vehicle carrying two or more persons**

Subsection 2(10) of the Amending Act prohibits smoking in a vehicle carrying two or more persons and which must be used in the course of employment.

<sup>5</sup> *L'Unique, Compagnie d'assurances générales and Syndicat des salarié(e)s de l'Unique, Compagnie d'assurances générales, SA 97-05046* (arbitrator Claude Rondeau).

#### **Second objective: enhance compliance with the Act**

**- It will be presumed that an operator tolerates a person smoking in an area where smoking is forbidden, if it is proved that a person smoked there.**

Prior to the Amending Act, Section 11, Paragraph 1 of the Act provided that the operator of a place covered by the Act shall not tolerate smoking in an area where smoking is prohibited. Failure to comply with this obligation could lead to the filing of penal proceedings and the payment of a fine (Section 39 and Section 43, Paragraph 3).

This provision was amended so that, from now on, the operator of a place shall be presumed to have tolerated a person's smoking in a location where it is prohibited to do so if it is proved that someone actually smoked in that location. The burden of proof is thus reversed and the onus is on the employer to prove that it did not tolerate the smoking.

For example, an employer can no longer defend itself by simply saying that signs were posted prohibiting smoking in the location; the employer must also show that it took concrete measures such as imposing disciplinary measures on an employee who smokes or implementing an anti-smoking policy in the organization.

Although an employer's responsibility to not tolerate smoking in a prohibited area is expressed primarily by its representatives, all of its employees should be invited and encouraged to perform continuous monitoring, for example, by reporting to its representatives any breach of discipline related to prohibited use of tobacco in the workplace. This collaborative involvement should be part of the employer's anti-smoking policy. In addition, it becomes especially important to implement this collaborative involvement because the Amending Act makes an officer or employee who has ordered, authorized, counselled or consented to an offence committed against the Act personally responsible for this offence.

#### **- Personal responsibility of an officer in the case of an infraction committed by a legal person**

A director, officer, partner, employee or agent of a legal person, partnership or association who ordered, authorized or counselled the commission of an infraction against the Act, or who consented thereto, is a party to the infraction and becomes liable for the same penalties as those imposed on the person who committed the infraction and on the legal person, partnership or association (whether or not they are prosecuted or found guilty).

The penalties that may be imposed have not been amended and the fines range from \$50 to \$300 (\$100 to \$600 for a repeat offence) for the smoker and from \$400 to \$4,000 (from \$1,000 to \$10,000 for a repeat offence) for the operator of a place.

## **2. Adoption and implementation of an anti-smoking policy**

Ultimately, the use of tobacco by an employee remains a personal choice and, it is not because it was allowed at work that it constitutes, in itself, a working condition. Case law acknowledges that an employer, by virtue of its management rights, may adopt an anti-smoking policy aimed at restricting or prohibiting the use of tobacco in the workplace.

### **The benefits of an anti-smoking policy in the workplace**

In addition to its legal responsibilities, an employer may take into consideration various factors in favour of the adoption and implementation of an anti-smoking policy in the workplace:

- an anti-smoking policy is a means of promoting and protecting the health of its employees because of the known harmful effects of second-hand smoke;

- studies<sup>6</sup> show that an anti-smoking policy in the workplace generates substantial savings and results in reduced absenteeism, lower health and disability insurance costs and significant improvements in productivity;
- according to certain researchers, the implementation of an anti-smoking policy in the workplace results in a higher number of employees who stop smoking and a reduction in the use of tobacco by smokers;<sup>7</sup> and
- by offering their employees a smoke-free environment, employers are also protecting themselves against lawsuits based on exposure to tobacco smoke.

### **The ABCs of adopting and implementing an anti-smoking policy**

The anti-smoking policy must be adapted to the reality of the organization. This means that it is important to take into account its resources, size and structure.

The policy expresses the employer's firm will to provide its employees with a smoke-free environment and not tolerate any violations.

The policy must also identify the respective responsibilities of the various internal interveners (employees, their representatives, union, managers and officers), as well as of visitors.

An anti-smoking policy should also set out the consequences of a breach of the policy (investigation and possibility of administrative and disciplinary measures) and the prohibition of retaliation against the persons reporting a breach of the policy.

The path to adopting and implementing an anti-smoking policy involves various steps including, without limitation:

#### **Step I - Preparation**

- set up a working group which includes representatives of the employer, the health and safety committee, and the employees or the union, as appropriate;
- gather the employees' comments and meet with the employees' representatives and the union, as appropriate;
- set a work schedule for the preparation, adoption, distribution and implementation of the policy.

#### **Step II - Implementation**

- determine the date on which the policy will come into force and make the employees aware of its contents (meetings with all employees and employer's representatives and distribution of the policy throughout the organization);
- implement an assistance program to help employees quit smoking;
- train the staff responsible for enforcing the policy (analysis of complaints, investigations etc);
- launch the policy.

#### **Step III - Follow-up**

- monitor implementation of the policy and assess the employees' compliance and satisfaction levels; and
- assess the short-term and long-term results.

#### **Conclusion**

Since the coming into force of the Amending Act, all employers must take the necessary measures to ensure a smoke-free workplace in areas in which smoking is prohibited. These measures may vary depending on the situation existing in the organization.

#### ***If there is already a smoking room in the organization:***

- ensure that the smoking room complies with the new requirements under the Amending Act if it is available for persons lodged in the workplace;
- close smoking rooms which do not comply or, alternatively, make them compliant with the transitional measures in force until May 30, 2008; and
- reiterate the prohibition against smoking in the workplace, except in a smoking room set up under the Amending Act (awareness-raising meetings and posting of new signs in the workplace).

#### ***If an anti-smoking policy is already in force in the organization:***

- verify that the anti-smoking policy complies with the provisions of the Amending Act;
- regularly distribute the anti-smoking policy to all the employees (awareness-raising meetings and posting of new signs in the workplace); and
- remind everyone of the prohibition against smoking in the workplace.

#### ***If there is no anti-smoking policy:***

- Adopt, implement and regularly distribute an anti-smoking policy; and
- remind everyone of the prohibition against smoking in the workplace (awareness-raising meetings with employees and posting of new signs in the workplace).

It should be noted that, since the adoption of the amendments, employers are required to put in place and use tools which will enable them to prove, as may be required from time to time, that they diligently and consistently do not tolerate smoking in areas in which smoking is prohibited.

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<sup>6</sup> As indicated by the Conference Board of Canada, the costs related to smoking in the workplace may reach up to \$2,500.00 per year for each employee who is a smoker (higher absenteeism rate, lower productivity, higher life insurance premiums and the cost of smoking rooms).

<sup>7</sup> Moskowitz, J.M. (2001), «The impact of smoking ordinances in California on smoking cessation,» *American Journal of Public Health*, 90: 757-6,

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