



Comprehensive Secondhand Smoke Model Ordinance for California Communities (with Annotations)

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This model is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised.

INTRODUCTION

The Technical Assistance Legal Center (TALC) drafted this model ordinance to help California cities and counties that wish to limit exposure to secondhand smoke in public places.¹

As the dangers of secondhand tobacco smoke become increasingly well documented, one of the most important steps a community can take to improve the health of its residents is to create more smoke-free spaces. The U.S. Environment Protection Agency has identified secondhand smoke as a Type A carcinogen—the most dangerous class of carcinogen, for which there is no safe level of exposure—and the California Air Resources Board has classified secondhand smoke as a toxic air contaminant. Despite California’s prohibition on smoking in most workplaces, the physical and monetary costs of exposure to secondhand smoke continue to be enormous. Local ordinances limiting exposure to secondhand smoke are the most direct and effective way to improve the public’s health.

To assist cities and counties in creating smoke-free communities, the model ordinance consists of the following:

- Extensive findings based on the latest statistical and scientific information documenting the dangers and impact of secondhand smoke;
- Prohibitions on smoking in enclosed workplaces that are not covered by the state smoke-free workplace law;
- Prohibitions on smoking in many outdoor places frequented by the public, like public parks, recreation areas, and restaurant patios;
- A prohibition on smoking in the enclosed and unenclosed common areas of multi-unit residences;
- A prohibition on smoking within twenty feet of places where smoking is already prohibited;
- Requirements for clear signs to be posted in smoke-free areas; and
- Options for individuals and organizations to enforce the provisions of the ordinance in small claims court.

This version of the model ordinance contains annotations to the legal provisions with comments describing the provisions in lay language and providing additional information to municipal attorneys. In some instances alternate language is offered or blanks have been left for customization to fit the needs of a specific community. Options and exceptions to the general provision are placed in brackets. Some degree of customization will be necessary in order to correlate the provisions of the ordinance to local municipal code.

If you have questions about how to adapt this ordinance for your community, please contact TALC for assistance.

¹ TALC has developed model ordinances on other tobacco issues, such as regulating the location of tobacco retailers and regulating smoking in multi-unit housing. For copies of TALC publications or questions about this ordinance, please contact TALC at (510) 444-8252 or by e-mail: talc@phi.org. Additionally, all materials are available on our website at <http://talc.phi.org>.

**AN ORDINANCE OF THE [CITY / COUNTY OF ____] PROHIBITING THE USE OF
TOBACCO PRODUCTS IN OR AROUND WORKPLACES AND PUBLIC PLACES
AND AMENDING THE [____] MUNICIPAL CODE**

The [City Council / County Board of Supervisors] of the [City / County of ____] does ordain as follows:

SECTION I. FINDINGS.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

WHEREAS, scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys;² and

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;³ and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide;⁴ and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke;⁵ and

WHEREAS, the United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;⁶ and

² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Highlights Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999* (2002) MORBIDITY AND MORTALITY WEEKLY REPORT, available at http://www.cdc.gov/tobacco/research_data/economics/mmwr5114.highlights.htm (last accessed August 15, 2003).

⁴ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General*, 437 (2001).

⁵ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed Sept. 19, 2006).

⁶ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. 23, 2003).

WHEREAS, the California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant;⁷ and

WHEREAS, the California Office of Environmental Health Hazard Assessment has included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm;⁸ and

WHEREAS, exposure to secondhand smoke is the third leading cause of preventable death in this country, killing over 52,000 non-smokers each year,⁹ including 3,000 deaths from lung cancer;¹⁰ and

WHEREAS, secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke;¹¹ and

WHEREAS, secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis,¹² exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children;¹³ and

WHEREAS, the total cost of smoking in California was estimated to be \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁴ and

WHEREAS, the medical and economic costs to nonsmokers suffering from lung cancer or

⁷ Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006), available at <http://www.arb.ca.gov/regact/ets2006/res0601.pdf> (last accessed Sept. 19, 2006).

⁸ Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity* 17, (Aug. 11, 2006), available at http://www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf (last accessed Sept. 19, 2006).

⁹ S.A. Glantz & W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83(1) *Circulation* 1 (1991) and California Environmental Protection Agency, Office of Env'tl. Health Hazard Management, *Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (1997).

¹⁰ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

¹¹ Cal. Env'tl. Prot. Agency, Office of Env'tl Health Hazard Assessment, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report ES-5* (1997).

¹² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

¹³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. 23, 2003).

¹⁴ Max W, Rice DP, Zhang X, Sung H-Y, Miller L., *The Cost of Smoking in California, 1999*; California Department of Health Services (2002).

heart disease caused by secondhand smoke are nearly \$6 billion per year in the United States;¹⁵

WHEREAS, almost 90% of adult smokers started smoking at or before age 18;¹⁶ and

WHEREAS, it is estimated that 13.2% of California high school students smoke¹⁷ and [number / percentage] youth residing in [your region] smoke; and

WHEREAS, with certain exceptions, state law prohibits smoking inside an enclosed place of employment;¹⁸ and

WHEREAS, state law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees;¹⁹ and

WHEREAS, state law prohibits smoking in playgrounds and tot lots and within twenty feet of the main entrances and exits of public buildings while expressly authorizing local communities to enact additional restrictions;²⁰ and

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of tobacco use around non-tobacco users; by protecting children from exposure to smoking and tobacco while they play; by reducing the potential for children to associate smoking and tobacco with a healthy lifestyle; by protecting the public from smoking and tobacco-related litter and pollution; and by affirming and promoting the family atmosphere of the [City's / County's] public places.

SECTION II. [Article / Section] of the [City / County of ____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Business” means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes or that has an Employee, as defined in this section.

(b) “Dining Area” means any area available to or customarily used by the general public,

¹⁵ American Academy of Actuaries, *Costs Associated with Secondhand Smoke*, October, 2006, available at http://www.actuary.org/pdf/health/smoking_oct06.pdf (last accessed October 11, 2006).

¹⁶ National Household Surveys on Drug Abuse, unpublished data, 1998. See also, U.S. Dep’t of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 101 (1994).

¹⁷ Tobacco Control Section, Cal. Dep’t of Health Servs., *Youth Smoking* (November 2005), at <http://www.dhs.ca.gov/tobacco/documents/pubs/YouthSmoking.pdf> (last accessed November 7, 2006).

¹⁸ Cal. Lab. Code § 6404.5 (West 2003).

¹⁹ Cal. Educ. Code § 48901(a) (West 2003).

²⁰ Cal. Health & Safety Code § 104495 (West 2003) and Cal. Gov’t Code § 7596 (effective January 1, 2004).

that is designed, established, or regularly used for consuming food or drink.

(c) “Employee” means any person who is employed; retained as an independent contractor by any Employer, as defined in this section; or any person who volunteers his or her services for an Employer, association, nonprofit, or volunteer entity.

COMMENT: This definition makes clear that volunteers and independent contractors are considered Employees for purposes of this section.

(d) “Employer” means any person, partnership, corporation, association, nonprofit or other entity who employs or retains the service of one or more persons, or supervises volunteers.

(e) “Enclosed” means:

(1) any covered or partially covered space having more than 50% of its perimeter area walled in or otherwise closed to the outside such as, for example, a covered porch with more than two walls; or

(2) any space open to the sky (hereinafter “uncovered”) having more than 75% of its perimeter area walled in or otherwise closed to the outside such as, for example, a courtyard;

(3) except that an uncovered space of three thousand (3000) square feet or more is not Enclosed, such as, for example, a field in an open-air arena.

COMMENT: This definition goes beyond state law and better reflects the fact that two or more walls with a roof or four walls without a roof can still prevent smoke from venting. It is designed so that compliance can be empirically measured in every situation, and the percentages listed can be changed to fit a community’s desire to limit smoking in areas with reduced air circulation. The exception for larger unenclosed places reflects the fact that the danger from secondhand smoke is greatest in smaller spaces where there is no breeze to disperse the smoke. As an alternative, a broad definition of “public place” could cover many of the same places this definition covers.

(f) “Multi-Unit Residence” means a building or portion thereof that contains more than one dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living, sleeping, eating, cooking, and sanitation. [A single-family house shared by roommates is not Multi-Unit Residences for purposes of this section.]

(g) “Multi-Unit Residence Common Area” means any indoor or outdoor common area of a Multi-Unit Residence accessible to and usable by more than one residence, including but not limited to halls, lobbies, laundry rooms, outdoor eating areas, play areas and swimming

pools.

COMMENT: This definition does not include balconies of individual units.

(h) “Nonprofit Entity” means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A public agency is not a nonprofit entity within the meaning of this section.

COMMENT: This definition is broader than the IRS designation of a nonprofit organization in order to cover more informal groups and associations.

(i) “Place of Employment” means any area under the legal or de facto control of an Employer, Business or Nonprofit Entity that an Employee or the general public may have cause to enter in the normal course of operations, but regardless of the hours of operation, including, for example, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, employee lounges, conference and banquet rooms, bingo and gaming facilities, long-term health facilities, warehouses, and private residences that are used as child care or health care facilities subject to licensing requirements.

COMMENT: Most of the enumerated exceptions in Labor Code section 6404.5(d) are listed here as examples of places that would be designated as nonsmoking in this Model Ordinance. Theatrical production sites (LC 6404.5(d)(9)), medical research or treatment sites (LC 6404.5(d)(10)), and most private residences (LC 6404.5(d)(11)) are exceptions under state law and remain exceptions in this model. Note that while state law prohibits smoking in private residences *when* used as day care facilities, this language prohibits smoking in private residences *if* used as day care facilities. In other words, smoking would be prohibited at all times in private residences used as daycare facilities, no matter whether children are present.

(j) “Playground” means any park or recreational area designed in part to be used by children that has play or sports equipment installed or has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds, or on [City / County] grounds.

COMMENT: The phrase “has been landscaped for play or sports activities” makes this broader than the state law that prohibits smoking in playgrounds by including playing fields.

(k) “Public Place” means any place, public or private, open to the general public

regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

COMMENT: This is a very broad definition of “public place.” As currently written, it covers almost everything (including sidewalks and streets) except some private property. Some communities will not want to prohibit smoking so broadly. In such cases, a practical approach may be to delete this definition and, in the prohibition section below, list only those places where smoking is to be prohibited. Of course, the extent of protection would be reduced, as would the simplicity of the ordinance. Communities interested in modifying this definition are encouraged to call TALC at 510-444-8252 for assistance in drafting alternative language.

(l) “Reasonable Distance” means a distance that ensures that occupants of an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area. This distance shall be a minimum of twenty (20) feet.

(m) “Recreational Area” means any area, public or private, open to the public for recreational purposes regardless of any fee requirement, including, for example, parks, gardens, sporting facilities, stadiums, and playgrounds.

COMMENT: As written, this definition is quite broad and would include the play area of a fast food restaurant. It could be narrowed, for example, by limiting it to public areas, instead of both public and private areas.

(n) “Service Area” means any area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction whether or not such service includes the exchange of money including, for example, ATMs, bank teller windows, telephones, ticket lines, bus stops, and cab stands.

(o) “Significant Tobacco Retailer” means any tobacco retailer that derives seventy-five percent (75%) or more of gross sales receipts from the sale or exchange of tobacco products and tobacco paraphernalia.

(p) “Smoking” means possessing a lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant.

COMMENT: This definition would include marijuana, even if smoked for medicinal purposes. The prohibition can be limited to tobacco by eliminating the phrase “including, but not limited to, tobacco, or any other weed or plant” and adding in its place the words “containing tobacco.”

(q) “Tobacco Product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

Sec. [____ (*2)]. PROHIBITION OF SMOKING IN PUBLIC PLACES, PLACES OF EMPLOYMENT, AND CERTAIN OTHER AREAS

COMMENT: This section addresses the actual areas in which smoking is prohibited. Subsection A expands the kinds of enclosed places that must be smoke-free beyond the state smoke-free workplace law (Labor Code 6404.5). Subsection B prohibits smoking in many outdoor areas. Subsection C prohibits littering in smoke-free areas.

(a) Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the [City / County of ____] except in places listed in subsection (d) below, and except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

COMMENT: The “except in such places as” language avoids potential preemption issues by making clear that the local ordinance is not duplicative of existing law, but rather “fills in” gaps in existing state or federal law.

- (1) Public Places;
- (2) Places of Employment;
- (3) Multi-Unit Residence Common Areas;

COMMENT: By including any place accessible to or used by the public in the definition of “public place,” this section requires all bars, including those that are owner-operated, to be smoke-free. The broader definition of “place of employment” also removes many exceptions to the state smoke-free workplace law. Note that the state exceptions are the source of almost all enforcement difficulties and confusion and that there is no legal reason a jurisdiction must include any exceptions at all. Finally, this section extends the protection that state law provides for the common areas of workplaces to the common areas in multi-unit residences that are not considered workplaces under the state law.

(4) Enclosed areas adjacent to an Enclosed area in which smoking is prohibited by any other [article / section] of this code, state law, or federal law and that have a common or shared air space such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space;

COMMENT: This provision ensures that enclosed areas adjacent to smoke-free enclosed places must be smoke-free in order to protect against smoke drifting into

smoke-free areas. An enclosed area not adjacent to an enclosed area where smoking is prohibited under some other section of the local ordinance or state or federal law is not required to be smoke-free unless it shares a ventilation system with a smoke-free area, as described in the next provision.

(5) Enclosed areas that have a common or shared ventilation, air conditioning or heating system with an Enclosed area in which smoking is prohibited. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space.

(b) Unenclosed Places. Smoking shall be prohibited in the following Unenclosed places within the [City / County of ____] except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

COMMENT: The “except in such places as” language avoids potential preemption issues by making clear that the local ordinance is not duplicative of existing law, but rather “fills in” gaps in existing state or federal law.

(1) Places of Employment;

(2) Service Areas;

(3) Public Places including Dining Areas [except Unenclosed areas of a bar that does not serve food. If smoking is permitted in the Unenclosed area of a bar that does not serve food, the entire smoking section must be limited to one clearly designated area prominently marked with signs, and must be located at least five (5) feet from any doorway or opening into an Enclosed area. Smoking in an Unenclosed area of a bar is only permitted provided the smoke does not enter adjacent areas in which smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property.];

COMMENT: The optional exception compromises the scope of the ordinance by allowing smoking in outdoor patios of bars, provided that no smoke drifts into the enclosed bar or any other area where smoking is prohibited. Some communities find this type of exception necessary when balancing the need for smoke-free air with the demand for some area in which smoking is permitted. Make sure that “bar” is defined in the existing ordinance if this exception is to be used, or call TALC for assistance.

(4) Multi-Unit Residence Common Areas;

(5) Ticket, boarding, and waiting areas of transit depots; and

(6) The sites of public events including, for example, sports events, entertainment, speaking performances, ceremonies, pageants, and fairs.

COMMENT: Most of these outdoor prohibitions can be modified to allow a designated smoking area by inserting, after the place for which an exception is to be created, “provided however that this prohibition shall not prevent the establishment of a separate, designated smoking area set apart from the primary event area and no larger.”

(c) No person shall dispose of Smoking waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this [article / chapter].

COMMENT: The following section (d) is not required. It is included as an option to aid those communities that are required to compromise the scope of secondhand smoke regulation.

[(d) Unless otherwise prohibited by law, smoking is permitted in the following Enclosed places:

(1) Significant tobacco retailers, if at all times minors are prohibited from entering the store;

COMMENT: This narrows the exemption in the state law that allows smoking in retail tobacco stores. Here, only businesses that derive three-fourths of their profits from the sale of tobacco products are exempted.

(2) By performers during theatrical productions, if smoking is an integral part of the story in the theatrical production;

COMMENT: The ordinance could require the use of smoke-free devices in theatrical productions, rather than provide an exemption.

(3) Private residential units, except those used as a child care or health care facility subject to licensing requirements; and

(4) Up to [twenty-five percent (25%)] of hotel and motel guest rooms, if the hotel or motel permanently designates particular guest rooms as nonsmoking rooms such that [seventy-five (75%)] or more of its guest rooms are nonsmoking and ashtrays and matches are permanently removed from such nonsmoking rooms. Permanent “no smoking” signage shall be posted in nonsmoking rooms.]

COMMENT: These exceptions are designed to be very limited. Of course, broader exceptions are possible if needed to meet community needs. Note that unless exception (4) is included in the ordinance, all hotel and motel guest rooms must be smoke-free.

Sec. [____ (*3)]. REASONABLE SMOKING DISTANCE REQUIRED—20 FEET

(a) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any entrance, opening, crack, or vent into an Enclosed area in which smoking is prohibited, except while actively passing on the way to another destination and so long as smoke does not enter any Enclosed area in which smoking is prohibited.

COMMENT: This creates a buffer zone around enclosed smoke-free areas, allowing smoking only if passing through the zone. Note that “Reasonable Distance” is defined in this ordinance as a minimum of twenty feet, although that definition can be altered.

(b) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any Unenclosed area in which smoking is prohibited under Section [____ (*2)] of this [article / chapter] except while actively passing on the way to another destination.

COMMENT: As written, this would prohibit smoking on private property and in private residences within twenty feet of an Unenclosed area in which smoking is already prohibited under the preceding section. If necessary to compromise on this point, private property can be exempted by inserting: “(c) The prohibitions in subdivisions (a) and (b) shall not apply to areas of private property that are not part of a Multi-Unit Residence Common Area, Place of Employment, Public Place, Playground, Recreational Area, or Service Area.”

Sec. [____ (*4)]. DUTY OF PERSON, EMPLOYER, BUSINESS, OR NONPROFIT ENTITY

(a) No person, Employer, Business, or Nonprofit Entity shall knowingly permit the Smoking of Tobacco Products in an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited by law and the person, Employer, Business or Nonprofit Entity is not otherwise compelled to act under state or federal law.

COMMENT: This section makes the business owner or employer responsible for any violation of existing laws prohibiting smoking. Thus, enforcement actions can be taken against the business rather than just the individual smoker.

(b) No person, Employer, Business, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this [article / chapter].

(c) Notwithstanding any other provision of this [article / chapter], any owner, landlord, Employer, Business, Nonprofit Entity, or other person who controls any property, establishment, or Place of Employment regulated by this chapter may declare any part of such area in which smoking would otherwise be permitted to be a nonsmoking area.

COMMENT: This would permit landlords to prohibit smoking in residential buildings. Note that a landlord wishing to designate residential units smoke-free should give adequate notice because such a designation could be a material change in the terms of the lease.

(d) “No Smoking” or “Smoke Free” signs, with letters of no less than one inch in height or the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every Enclosed and Unenclosed place in which Smoking is prohibited by this chapter, by the person, Employer, Business, or Nonprofit Entity that has legal or de facto control of such place. [At least one sign with the [City / County] phone number where complaints can be directed must be conspicuously posted in every place in which smoking is prohibited.] For purposes of this chapter, the City Manager or designee shall be responsible for the posting of signs in regulated facilities owned or leased in part by the [City / County]. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this [article / chapter].

COMMENT: Communities concerned about enforcement, and with the funds to print local signs, may wish to include the bracketed sentence, which requires signs to have the phone number for complaints. Note that this will be more expensive than using standard signs.

Sec. [____ (*5)]. PENALTIES AND ENFORCEMENT.

(a) Violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors.

COMMENT: Sometimes called a “wobbler,” this provision gives the prosecuting attorney discretion on whether to pursue a violation as an infraction or a misdemeanor. Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

(b) Violations of this [article / chapter] are subject to a civil action brought by the [City Prosecutor / District Attorney] or the [City Attorney / County Counsel], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating

the ordinance. It requires that the city or county file a traditional civil suit. The fine amounts can be adjusted but cannot exceed \$1,000 per violation. Government Code section 36901.

(c) Any person who Smokes in an area where Smoking is prohibited is guilty of trespass and, if the area is accessible by the public or any Employee during the normal course of operations, such Smoking constitutes a public nuisance.

COMMENT: This provides additional remedies available to the City/County. For example, the City/County could seek a court-ordered injunction, preventing the violator from continuing the behavior that created the nuisance.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall also constitute a violation.

COMMENT: This makes clear that the passive behavior of a business owner or employer still constitutes a violation of any of the ordinance's provisions.

(e) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedy available at law or in equity.

(f) Enforcement of this chapter shall be the responsibility of [____]. Any peace officer or code enforcement official also may enforce this chapter.

COMMENT: Identifying a specific enforcement agency, such as law enforcement and/or the Health Department, in the ordinance is a way of ensuring that enforcement actually occurs. However, it would be wise to discuss this in advance with the designated agency. If circumstances require that the duty of designating the enforcement agency be assigned to the City Manager or County Administrative Officer, the following may be substituted: "Enforcement of this chapter shall be implemented by the [City Manager / County Administrative Officer]." Permitting any peace officer or code enforcement official to enforce the law provides the maximum flexibility that is a key component to meaningful enforcement.

Sec. [____ (*6)]. PRIVATE ENFORCEMENT.

COMMENT: For further explication of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from TALC at (510) 444-8252 or by e-mail at talc@phi.org or from our website at <http://talc.phi.org>.

(a) Any person acting for the interests of itself, its members, or the general public

(hereinafter “the Private Enforcer”) may bring a civil action to enforce this chapter. Upon proof of a violation, a court shall award the following:

COMMENT: It is likely that “person” is defined in the Municipal Code or in the ordinance to which this is being appended. If not, the following definition could be added here: “‘Person’ means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.”

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[250] for each violation of this chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this chapter if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages that resulted from the given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation counts as a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$7,500. So, when considering the amount at which to set statutory damages in a given ordinance, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$7,500. Note that this provision protects a retailer from being sued multiple times on behalf of the general public for the same violation.

(2) Restitution of the gains obtained in violation of this chapter.

COMMENT: This provision can prevent a person operating illegally from keeping the profits of the illegal acts. Restitution is a remedy that entails “making good,” in that it forces the defendant to give the plaintiff an equivalent value for any loss, damage, or injury. (See 1 Witkin, *Summary 9th Contracts* § 91 (1990).)

(3) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as “punitive damages.” They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Private Enforcer may also bring a civil action to enforce this chapter by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the latter, the defendant is not directly ordered to do something (or to refrain from doing something). Rather, the defendant is given a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) §§ 12.32-12.34.) A conditional judgment could serve as an alternative to damages or restitution, or it could be in addition to damages or restitution. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between ceasing the violations or paying even more money.

(c) Notwithstanding any legal or equitable bar against a Private Enforcer seeking relief on its own behalf, a Private Enforcer may bring an action to enforce this chapter solely on behalf of the general public. When a Private Enforcer brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Private Enforcer from bringing a subsequent action based upon the same facts but seeking relief on its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Private Enforcer with a special relationship to a particular defendant to sue the defendant even though the Private Enforcer might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as “legal and equitable bars.” For example, an employee may be required to arbitrate—not litigate—any employment dispute, such as a dispute involving smoking in the workplace. Under this clause, such an employee may be required to arbitrate any *personal* claims (e.g., damages for personal injury from secondhand smoke) but can nevertheless sue the employer in court as a representative member of the general public. In such a circumstance, the Private Enforcer could only make the claims that *every* member of the general public could make (e.g., sue for Statutory

Damages on behalf of the general public for the employer's violation of a workplace smoking law).

Second, the clause permits a Private Enforcer who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms "res judicata," "issue preclusion," and "collateral estoppel" for such prohibitions. Under this clause, however, an employee subjected to smoking in the workplace can first sue her employer solely on behalf of the general public, receiving the Statutory Damages amount for each violation. If the employee is made ill by the secondhand smoke, she can sue the employer later for personal injury.

This clause is not intended to modify well established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply incorporates the logical line of reasoning that when a Private Enforcer brings a claim *solely* on behalf of the general public, the plaintiff is acting as a "private attorney general;" thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this chapter shall prohibit the Private Enforcer from bringing a civil action in small claims court to enforce this chapter, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

COMMENT: This clause is legally superfluous, but it serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

SECTION III. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County of _____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof is declared invalid or unenforceable.