

# SMOKE-FREE OUTDOOR AREAS ENFORCEMENT GUIDE

## Overview

This guide is designed to help decisionmakers and stakeholders enacting or modifying clean outdoor air policies in determining the best options for equitable enforcement against the use of commercial<sup>1</sup> tobacco products in protected areas. Because it is best practice to exempt the sacred use of traditional tobacco from clean air policies to protect the right of Indigenous communities to maintain cultural practices, the enforcement practices described below contemplate such an exemption. This guide is meant to be used as a companion to the Partnership's model ordinance, which contains more detailed language and explanation of various enforcement choices.

Not all jurisdictions have the same resources or community preferences, so we have included a range of enforcement options and provided context for the pros and cons of each from an equity perspective. We have provided recommendations as to which enforcement options are considered best practices and more equitable (**coded green** ✓), which options might require some more caution or consideration (**coded yellow** ⚠), and the options that the Partnership recommends against (**coded red** ✖). Some of these options have





been used across many jurisdictions, while others are emerging strategies. The Partnership stands ready to provide legal technical assistance on questions related to a particular jurisdiction or enforcement strategy.

Enforcement of smoke-free or tobacco-free outdoor area policies is important because there is no risk-free amount of exposure to secondhand tobacco smoke and because we know that even outside, secondhand tobacco smoke can reach hazardous levels. But enforcement should balance the goal of protecting the public from secondhand smoke exposure with the knowledge that punitive measures are unlikely to help those struggling with tobacco addiction to end their tobacco use. Research tells us the best approaches to help those confronting tobacco addiction are a combination of counseling, education, and nicotine replacement therapies. It's also important to consider how smoke-free or tobacco-free outdoor area policies might impact people experiencing homelessness, how feasible an enforcement approach might be, and how it might impact the ability to find stable housing or shelter.

Since most people will refrain from smoking if they see signage and know a smoke-free or tobacco-free policy is in place, the best way to improve enforcement is to educate the public and local businesses about the policy before and throughout the implementation process. Greater community compliance will be achieved if the policy is easy to understand, the boundaries and areas covered under the policy are clearly identified, active steps are taken to communicate its impact to all affected groups, and the policy applies to everyone.

Part of the consideration for equitable enforcement should also involve determining which entity (e.g., code enforcement, business owners, city or county attorneys, the public, police) is best positioned to effectively enforce and will result in the fewest potential negative collateral consequences. Also pertinent is when to enforce a policy on private property, such as a restaurant, event space, or private recreation area.

✓ Most preferred/most equitable

⚠ Proceed with caution

✗ Not recommended by the Partnership

## Enforcement Options

✓ Civil penalties against property owners

### Benefits

- Holding private property owners accountable for any failure to enforce the ordinance can be effective, while limiting the potential negative consequences of fines or criminal enforcement against individuals
- Can require property owners to request compliance with non-smoking ordinances, and to refuse service and ask violators to leave if they do not comply, which can be an effective way to motivate compliance

### Cautions

- Property owners may resist being put in the role of enforcing the policy
- If there is not strong buy-in, there may be poor compliance from property owners

✓ Community service

### Benefits

- As an alternative to civil fines, community service can limit the financial hardship on individuals and can be tailored to assist tobacco cessation or tobacco waste cleanup efforts

### Cautions

- Community service may still pose a financial hardship to some, if (for instance) they are required to miss work or arrange for childcare
- If enforced by police, may open the door to other collateral consequences
- May require community to invest in new resources or programs



### ✓ Nuisance<sup>2</sup>

#### Benefits

- Permits a range of nuisance abatement tools commonly used by city or county attorneys, such as restraining orders or preliminary or permanent injunctions

#### Cautions

- May require too many local government resources to be widely used

### ◆ Civil fines against tobacco users

#### Benefits

- Relying on civil public employees like recreation center staff removes the potential collateral consequences from police/criminal enforcement
- Recreation center or other public staff, to the extent they are decentralized, may be in the best location to observe non-compliance with the policy
- Could include alternatives to civil fines such as community service

### Cautions

- May impact a jurisdiction's budget by adding new duties to city or county employees
- May result in resistance from city or county staff unused to serving an enforcement role
- May cause financial hardship depending on a resident's financial circumstances
- Risk of discriminatory/unequal enforcement
- Unpaid civil fines may lead to misdemeanor charges or warrants in some jurisdictions

### ⚠ Ejection

#### Benefits

- Can be a strong motivator to comply, particularly in an event setting
- Can incorporate graduated enforcement, such as requiring a request to comply by public employees before any ejection occurs

#### Cautions

- If enforced by public staff, there may be resistance to being in this role
- If enforced by property owners, there may be poor compliance if not strong buy-in
- Potential for discriminatory use against people experiencing homelessness
- Displacement of people experiencing homelessness who reside in parks or other public spaces

### ⊗ Private right of action<sup>3</sup>

**No benefits recognized.**

#### Cautions

- Risk of discriminatory/unequal enforcement
- Harm to an individual of a single interaction may not be severe enough to warrant involvement of the court system
- May burden the judicial system
- Litigants may struggle to prove smoking occurred

## Criminal enforcement

### No benefits recognized.

#### Cautions

- Often disproportionately targets Black, Indigenous and other people of color and can lead to collateral consequences including impact on immigration status, triggering a probation or parole violation, a summons leading to a criminal record or a warrant, or increased distrust of law enforcement.
- If an enforcement action triggers more severe criminal sanctions, this could potentially jeopardize housing, benefits, education, and employment.
- If includes use or possession penalties, does not help those with nicotine dependence or addiction get on a path to recovery.

Also, engaging in an education campaign such as providing educational materials or presentations to the public, staff training, and signage or public notices could reduce the number of tenants in violation of any policy. Signage could also include information on cessation hotlines. See our [model ordinance](#) for more.

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## Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit: <http://www.keepitsacred.itcml.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 A public nuisance is a legal doctrine that applies when a person unreasonably interferes with a right that the general public shares in common. Local ordinances can declare violations of the smoke-free ordinance to be a public nuisance, opening up this enforcement option.
- 3 A private right of action is when a person is entitled to file a lawsuit or take legal action to enforce legal rights under a statute.