



September 18, 2008

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Dear Kathi,

Thank you for inviting our comments on whether a West Virginia county board of health can pass a regulation to ban all smoking on hospital campuses and college campuses, as well as other outside areas, such as playgrounds, outdoor stadiums, and parks. I apologize for not being able to respond to your questions sooner. As you know, the Tobacco Control Legal Consortium does not provide legal representation or advice, and is not authorized to practice law in West Virginia. If you require a legal opinion, we encourage you to consult with local legal counsel. That said, we are pleased to offer our comments, based on our experiences with many smoke-free laws and policies in other states.

Smoke-free laws in outdoor areas, such as parks, recreational facilities, beaches, and patios, have proliferated throughout the U.S. over the last ten years. Many nonsmokers exposed to outdoor tobacco smoke suffer immediate symptoms including breathing difficulties, eye irritation, headaches, nausea, and asthma attacks. Several recent studies have assessed the toxic health risks from exposure to secondhand outdoor tobacco smoke.<sup>1</sup>

Since your question addresses several areas, I've divided this memo into three parts, which cover the authority of West Virginia boards of health to restrict smoking (1) in outdoor areas; (2) on hospital campuses, and (3) on college campuses.

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<sup>1</sup> See, for example, Neil E. Klepeis et al., *Real-time Measurement of Outdoor Tobacco Smoke Particles*, 57 J. AIR & WASTE MGMT. ASS'N 522 (2007), and James Repace, *Benefits of Smoke-free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles*, 34 WILLIAM MITCHELL LAW REVIEW 4 (2008), a paper presented at a 2007 tobacco law symposium hosted by the Tobacco Control Legal Consortium, which summarizes many of these scientific studies.

## Do West Virginia local boards of health have the authority to restrict smoking in outdoor areas?

Outdoor smoke-free (or tobacco-free) ordinances are typically enacted by city councils, county boards of commissioners, and local boards of health, which exercise their common authority to regulate smoking on public property, such as parks and playgrounds. Under West Virginia law, local boards of health have the express authority to promote and maintain clean and safe air in their counties. This authority includes the requirement to adopt and promulgate rules consistent with state public health laws and the rules of the West Virginia State Department of Health and Human Resources “that are necessary and proper for the protection of the general health of the service area and the prevention of the introduction, propagation and spread of disease.” W. Va. Code § 16-2-11(ii). West Virginia’s code does not restrict boards of health to regulating clean and safe air in indoor areas alone. Moreover, the code details the duties of local boards for “environmental health protection, including the promoting and maintaining of clean and safe air, water, food and facilities.” W. Va. Code § 16-2-11(a)(1)(ii).

Not only has the West Virginia Legislature given local health boards the authority to pass such regulations, but in 2003, the state Supreme Court upheld their authority to develop and implement regulations to restrict smoking in enclosed public places. *Foundation for Independent Living v. Cabell-Huntington Board of Health*, 591 S.E. 2d 744 (W. Va. 2003). Although the regulations in this case restricted smoking in **indoor** public places, the court found that the regulatory purpose of the regulations corresponded with the broader legislative goal of providing a state “citizenry free from the use of tobacco.” The court stated that “there is an enhanced need for local boards of health to consider the unique concerns and characteristics within the confines of their jurisdiction in order to meet the overriding goal of a smoke-free society.” Finally, the court noted that since 1993, when the first smoke-free regulation in West Virginia was adopted, “the Legislature has taken no steps to define any specific limitations on the power and discretion of the county boards of health to adopt orders restricting smoking in various public places.”

West Virginia local boards of health and county commissions are also authorized to enact ordinances and take other appropriate and necessary actions to eliminate hazards to public health and safety, and to abate or cause to be abated anything that a majority of the governing body determines to be a public nuisance. W. Va. Code § 7-1-3(kk); § 16-3-6; § 8-12-15(23). In light of the overwhelming evidence that exposure to secondhand smoke is a health hazard,<sup>2</sup> and that cigarettes are the leading cause of residential fire fatalities in the United States,<sup>3</sup> a strong argument can be made that smoking in public places, both indoors and outdoors, is a public nuisance.

Based on our reading of the West Virginia code, the Supreme Court’s ruling in *Foundation for Independent Living*, and its finding that the legislation has not limited the authority of local boards of health in regulating smoking in public places, we believe West Virginia boards of health do have the authority to restrict smoking in outdoor public areas.

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<sup>2</sup> U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

<sup>3</sup> John R. Hall, Jr. “**Smoking-Material Fire Problem**” Report, National Fire Protection Association (Nov. 2007) (statistical analysis of U.S. fires started by “smoking materials”).

An attorney versed in West Virginia law would be best able to identify any political or legal difficulties that local boards of health might experience in enacting specific outdoor smoke-free regulations. A publication prepared by the Tobacco Control Legal Consortium that summarizes the challenges to the legal authority of regulatory agencies, such as boards of health, to enact smoke-free policies, as well as other common legal threats and challenges, is available at <http://tclconline.org/resources/Sbarra.pdf>.<sup>4</sup> A few other excellent sources of information on this topic, including sample smoke-free outdoor policies, are:

- California’s Clean Air Project, which has a website of material on outside smoking policies, including information on outdoor dining, beaches, entryways, and parks:  
CCAP: SHS Resources-Outdoor Tobacco Smoke:  
<http://ccap.etr.org/index.cfm?fuseaction=resources.outdoor>
- Americans for Nonsmokers’ Rights, which has resource material on outdoor smoke-free policies, as well as several current maps of smoke-free outdoor areas throughout the U.S.:  
<http://www.no-smoke.org/goingsmokefree.php?id=519#maps>
- Association for Nonsmokers – Minnesota’s Tobacco Free Youth Recreation Program, which includes sample policies and ordinance language used in Minnesota that covers smoke-free parks, zoos, fairgrounds, and rodeos. Check out, in particular, Playing Tobacco Free: Making Your Community’s Outdoor Recreational Facilities Tobacco Free:  
<http://www.ansrmn.org/TFYR03Resources.htm>

### **Can West Virginia local boards of health ban smoking on hospital campuses?**

A growing number of U.S. hospitals have adopted smoke-free and tobacco-free campus-wide policies. As health care organizations committed to the health and safety of their patients and employees, they have set themselves up as models of good health practices. These policies range from prohibiting smoking within a certain number of feet of an entryway, window, or ventilation system to covering all hospital grounds, including parking lots, and apply to staff, patients and guests. Policies typically cover all hospital facilities and property, whether owned, leased or rented, and often include business vehicles. The facilities also generally make smoking cessation products or services available for all patients, visitors and employees.

A common concern among those adopting these smoke-free policies is effective enforcement. Enforcement of smoke-free hospital policies typically entails removal of smoking sheds and similar facilities from the outside premises, placing signage at strategic points on the grounds, communicating the hospital’s smoke-free campus-wide policy to all staff, patients and visitors, monitoring the premises, and ensuring compliance. Like any employer, hospitals have the legal

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<sup>4</sup> One issue that has proven challenging in many smoke-free ordinances has been the definition of “indoor” vs. “outdoor” spaces. Although on the face of it, the distinction between “indoor” and “outdoor” would seem obvious, many jurisdictions have interpreted indoor spaces differently, resulting in definitions that range from totally enclosed, to partially or substantially enclosed, to areas where there is a roof and more than half of the perimeter is covered by walls or other barriers to the movement of outside air. I flag this issue merely to point out the importance of clear definitions in any smoke-free ordinance covering outdoor, as well as indoor, settings.

right to restrict or eliminate smoking in the workplace, including campus grounds. Employees who violate workplace policy are subject to various sanctions, including termination. Patients and visitors, however, are typically expected to comply with these policies voluntarily,<sup>5</sup> and visitors who violate these policies may be asked to leave the premises.

In your message, you said that hospital administrators in some counties are encouraging local boards of health to amend their smoke-free laws to include hospital campuses, so the boards would have the responsibility of enforcement. The difference here would be that instead of a smoke-free campus policy, which is not legally enforceable, the hospitals would rely on outside agencies designated by the local boards of health to monitor the premises and enforce the law. While the violation of a smoke-free policy could result in disciplinary measures for employees, or eviction for visitors, the violation of a smoke-free ordinance (regulation or law) could result in civil penalties.

As mentioned above, based on West Virginia law, we believe local boards of health have the authority to restrict smoking in outdoor public areas. Such areas would include the campuses of public hospitals and clinics. Still, even though West Virginia boards of health may have the legal authority to restrict smoking in these areas, they may want to consider whether they have the time and means to enforce such regulations effectively, and whether compliance with an ordinance will be any greater than compliance with a policy.

Finally, it is interesting to note that West Virginia's Division of Personnel Policy DOP-PI prohibits state employees from smoking in "state residential facilities, including but not limited to, hospitals, group homes, and prison." The individuals responsible for these facilities are required to enforce the smoke-free policy "actively." **Smoking Restrictions in the Workplace (2006)**. The reason for this West Virginia Personnel Policy is presumably the same reason why the vast majority of smoke-free and tobacco-free campus-wide hospital policies are implemented by hospitals or hospital associations, rather than municipal or local board of health authorities: ease and effectiveness of internal enforcement.

For more information on smoke-free and tobacco-free hospital policies around the U.S., along with information about the transition process and various implementation tactics and approaches, you might want to check out **The Smoke-free Hospital Campuses Toolkit**, an excellent resource on smoke-free hospital campuses compiled recently by a group of Maryland Hospitals.

[http://www.mdhospitals.org/mha/Community\\_Health\\_Resources/Smoke\\_Free\\_Hospital\\_Campuses.shtml](http://www.mdhospitals.org/mha/Community_Health_Resources/Smoke_Free_Hospital_Campuses.shtml)

### **Can West Virginia County Boards of Health ban smoking on college campuses?**

As you know, along with a trend toward smoke-free hospital campuses, the U.S. has also seen a rise in smoke-free college and university campuses. According to the Americans for Nonsmokers' Rights Foundation, at least 131 U.S. college and universities have adopted smoke-

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<sup>5</sup> See Maggie Mahoney's memo to Christina Mickey, Smoke-Free Initiative of West Virginia, addressing the side issue of whether a hospital with a smoke-free policy can be liable for injuries a patient suffers when leaving the hospital to smoke. Tobacco Control Legal Consortium (Mar. 22, 2007).

free policies on all their campus grounds, both indoors and outdoors, with no exemptions.<sup>6</sup> A list of these schools is available at <http://no-smoke.org/pdf/smokefreecollegesuniversities.pdf>. The ANR website ([www.no-smoke.org](http://www.no-smoke.org)) contains other news and resources on smoke-free schools that may be of interest to you (see “[Model Policy for a Smoke-free University](#)”), as does the American Lung Association’s website (<http://www.lungusa.org/>), and the Campaign for Tobacco-Free Kids (<http://www.tobaccofreekids.org/research>; see in particular, “[How Schools Can Help Students Stay Tobacco-free](#)” and [Resource Guide for Smoking and Nonsmoking Policies at Major U.S. Professional and Intercollegiate Sports Stadiums, Arenas and Race Tracks](#)).

While most public and private schools and colleges have policies banning indoor smoking, not all have policies prohibiting the use of tobacco products off-campus, including outdoor areas, sporting events, and school-sponsored activities. West Virginia state law does not address the use of tobacco products on outdoor school grounds.

Typically, smoke-free college campus-wide policies are implemented by local school administrators or school districts themselves, rather than by local municipalities or boards of health. Along that line, the West Virginia Board of Education has adopted a tobacco control policy that prohibits smoking or the use of other tobacco products at any property owned, leased or operated by the West Virginia Department of Education, West Virginia Board of Education, a county board of education or Regional Education Service Agency. This policy includes any education or school-sponsored activity or event, whether these activities or events are held on or off school grounds. WV CSR § 126-23-3.1.<sup>7</sup> As I mentioned earlier, this type of smoke-free campus-wide policy, adopted by the local board of education, is far more common than comprehensive smoke-free ordinances that include hospital and college outside grounds.

In sum, based on our reading of West Virginia law, along with the state’s legislative mandate to boards of health to promote clean air, we believe West Virginia boards of health have the authority to restrict smoking on college and university campuses. As with smoke-free hospital campuses, West Virginia boards of health could amend any existing smoke-free ordinance to expand coverage to campus grounds. Again, the issue seems to rest on the feasibility of enforcement, and whether a policy (where noncompliant students, faculty and staff could face

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<sup>6</sup> A recent article in the PITTSBURGH POST-GAZETTE, “Smoking banned entirely at colleges,” reports that all of Pennsylvania’s fourteen state-owned universities now prohibit smoking inside buildings and on all outdoor grounds. Leaders of the State System of Higher Education based this policy on their interpretation of Pennsylvania’s new smoke-free law, which covers all public educational facilities. Bill Schackner (Sept. 13, 2008), available at <http://www.post-gazette.com/pg/08257/911949-85.stm>. As another example, Iowa’s Smoke-free Air Act, which took effect July 1, 2008, prohibits smoking at all public and private educational institutions, including colleges and universities, and covers campus grounds, athletic venues, parking lots and inside vehicles in parking lots.

[http://www.iowasmokefreeair.gov/common/pdf/hf2212\\_smokefree\\_air\\_act.pdf](http://www.iowasmokefreeair.gov/common/pdf/hf2212_smokefree_air_act.pdf)

<sup>7</sup> This policy applies to any private building, or other property, including automobiles or other vehicles used for school activities when students or employees are present. Individuals supervising students off school grounds are prohibited from distributing or using any tobacco product while in the presence of students or while engaged in any activities directly involving students. WV CSR §126-66-1 et seq. (1998).

disciplinary measures), is likely to be more effective than a law (where noncompliance could result in civil penalties).

I hope this information is helpful, Kathi. Again, I apologize for taking so long to get back to you. Please let us know if we can provide you with any additional information or if you have any other tobacco law-related question.

Best regards,

Kerry Cork  
Associate Counsel