

# PARTICIPATOR

February 2013

## MEASURE 4: “WHAT DO YOU MEAN I CAN'T SMOKE HERE ANYMORE?”

*In November, North Dakotans were asked to vote on a number of initiated measures. Four measures were approved, including Measure 4, which provides significant changes to the state law governing smoking in public places and worksites. The measure, known as the “smoking ban,” expands the definition of “smoking” and the prohibitions against smoking in public places and worksites – with strong support by state voters. Additionally, it creates new notice obligations and enforcement requirements on building owners and employers. The measure took effect December 6. Read on to see if you’re in compliance – and what to do if you’re not.*

### First Things First

Before you do anything else, we recommend that you review the full text of the measure. It is available online at <https://vip.sos.nd.gov/pdfs/portals/fulltextofmeasure4-smoking-nov6,2012.pdf>. It’s only a few pages long and is fairly easy to read. Although this article discusses the highlights of the new law, we hope you read through the text of the measure at least once.

### New and Expanded Definitions and Prohibitions

The term “smoking” has been redefined to include more than just tobacco products. It now includes any plant product intended for inhalation – even if the substance inhaled is believed to be healthy or beneficial. In addition, in public places or worksites, the use of e-cigarettes or electronic devices that look like cigarettes and produce a vapor of nicotine or other substance is prohibited.

The term “place of employment” has been expanded to include not only physical areas under the control of the employer but also temporary offices, vehicles, and stairs. That means smoking is prohibited in any employer-owned or leased vehicle.

Private residences are not included in the “expanded workplace” definition unless the residence is a licensed childcare, adult daycare, or healthcare facility. Does that mean employees who telecommute can puff away during work hours? The answer to that question is unclear based on the plain language of the measure, but the answer may depend on (1) whether the employee’s home is considered a temporary office and/or (2) the degree of control the employer has over the employee’s working conditions.

Under Measure 4, smoking is prohibited within 20 feet of workplace entrances, exits, operating windows, and air intakes and ventilation systems. In other words, smoking is prohibited within 20 feet of any location where smoke-filled air might filter into the workplace.

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## **Your To-Do List**

North Dakota employers must take action to comply with the new legal requirements that took effect on December 6. The necessary steps are set forth in the text of Measure 4 and are summarized as follows:

- Clearly and conspicuously post “no smoking” signs or the international no-smoking symbol in places where smoking is prohibited. That means you must post signs at all workplace entrances. The posted signs are intended to notify potential smokers both inside and outside the building, so it makes sense to post notices inside and outside your establishment.
- Clearly and conspicuously post on every vehicle that constitutes a place of employment at least one sign visible from the vehicle’s exterior stating that smoking is prohibited.
- Remove all ashtrays from areas where smoking is prohibited. You need not remove ashtrays that are displayed for sale and not for use on the premises.
- Communicate to all current and prospective employees (upon their application for employment) that smoking is prohibited. Work with employment counsel to draft a policy to comply with the smoking prohibitions in Measure 4. Distribute a copy to every employee, and hold meetings with all workers to inform them of the new smoking prohibition.
- Direct anyone who is smoking in violation of the law to extinguish the product being smoked. “Anyone” includes customers, patrons, and employees. If the individual doesn’t stop smoking, then you immediately must ask him to leave the premises.
- If a smoker refuses to leave, you must report the violation to local law enforcement. In other words, if a customer or one of your employees refuses to put out his smoking materials, you must escort him off the property. If he refuses to leave, then you must call local law enforcement officers.

## **Stiff Penalties for Noncompliance**

Measure 4 sets out additional penalties for employers in noncompliance. A willful failure to comply earns employers harsh and escalating fines (\$100 to \$500). In addition, noncompliance may result in loss of operating licenses or permits necessary to operate the business. Violations are considered a public nuisance and can be abated with a restraining order, a temporary or permanent court order, or other means permitted under the law. In other words, continued noncompliance could result in your organization being closed.

## **Whistleblower Protections Expanded**

In addition to the increased penalties, fines, and prohibitions against smoking, it should be no surprise that Measure 4 prohibits you from discharging, refusing to hire, or retaliating against any employee or applicant who (1) asserts or exercises his antismoking rights, (2) reports a violation, or (3) attempts to prosecute an individual or organization for a violation.

## **Bottom Line**

Measure 4 is a call to action. If you have questions or concerns about complying with some or all of the new provisions, adapting your policies and procedures, or implementing the law’s requirements, we strongly encourage you to seek help from a qualified employment law attorney.

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# RISK SERVICES

## RISK MANAGEMENT THOUGHTS FOR THE NEW YEAR

- Review your policies and procedures and bring them up to date.
  - Safety and evacuation drills. Conduct one unannounced and see what happens.
  - Make sure your volunteers are instructed in the proper way to complete the task(s) they are assigned. Training is the key.
  - Have your attorney review all contracts and agreements. If you do not have an attorney, READ them yourself. You don't want to be assuming the liability of another party. If you do assume the liability of another party, they may not be afforded NDIRF liability coverage to the extent required in the contract or agreement. Know what you sign.
  - To properly protect your volunteers, contact Workforce Safety and Insurance to have your volunteers added to current coverage. It's what they deserve.
  - Remember if you loan your equipment to another party to use, including employees for their personal use, and it is damaged, that party may be liable for the damage. If the NDIRF pays for the damage under your Public Assets Coverage, we have a right of subrogation against the party or parties that caused the damage. Consider providing a waiver of subrogation.
  - Follow your personnel policies to the letter. Remember, no good deed goes unpunished.
- Make sure all your buildings and facilities are Americans with Disabilities Act (ADA) compliant.
  - All entrances and exits must be kept clear of obstructions, including snow.
  - Exits must be properly marked. If it's not an exit, sign it NOT AN EXIT.
  - Fire extinguishers and fire and smoke alarms must be checked monthly.
  - Wet and slippery floors are part of the season. Sign them Slippery When Wet.
- Have waivers signed by any participant in events your entity organizes and runs. Every participant injury should not cause you pain.
- If your entity sponsors an event but does not organize and run the event, have your entity's name included in participants' waivers for the event. Don't be sued for being helpful.
- Where you typically assist other entities in providing operations, have a mutual aid agreement in place. If a mutual aid agreement does not seem appropriate, it is likely a Joint Powers Agreement is the proper document. Define your duties and liabilities.
- Schedule a defensive driving class for your employees and their dependents. We require 10 attendees per class. If you cannot meet this minimum, let us know and we will advise you of a class in your area. Training is time well spent.
- If you have playground equipment, complete an inspection early in the season. Next fall is a little late.
  - It is important to look for damaged or deteriorated equipment, worn chain links, open S-hooks and concrete footings, that have heaved from the winter frost.
  - Add play equipment rules signs. Include the intended age user of the equipment. Always recommend adult supervision. Include a contact number to report damage to the equipment.
  - Check for adequate surfacing material under playground equipment. If the depth is not adequate, get additional material on order.

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## FROM THE CEO

### LEGISLATIVE MATTERS

If it's February, and an odd-numbered year, legislative activity in North Dakota must be on the front burner - and indeed it is.

Perhaps a better title would be "legislation matters". As this is written, approximately 600 bills have been introduced so far (the normal total for a legislative session would be in the range of 1,000 bills and that will likely happen again this year).

As I've looked at the proposed legislation brought forward so far, it seems there are more bills dealing with local government issues than usual – though I've not actually counted since the faucet is not yet closed. I really encourage you to take advantage of the information provided by your state associations concerning issues or bills that may affect your political subdivision and lend your voice to the process if (or, more likely, when) asked. It will matter. ■



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### RISK SERVICES

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- Check your roads, highways and byways. Look for the hazards that are so familiar you miss them.
  - Inventory your road signs. Replace those that are damaged, lost or stolen or have seen better days.
  - Are signs retro-reflectivity compliant? [Check www.fhwa.dot.gov/retro](http://www.fhwa.dot.gov/retro) for information.
  - Look for foliage blocking the view of road signs.
  - Identify pothole locations. Don't overlook parking lots.
- While you are out and about, look for damaged sidewalks.
- Review the open records and meetings statute. An excellent guide can be found at: <http://www.ag.nd.gov/Brochures/FactSheet/FactSheet.htm>.
- If you have identified a need for new equipment and can't afford it, consider a joint purchase. Other communities in your area may have the same need and same lack of finances. A joint powers agreement to purchase the equipment may just be the ticket.
- Road maintenance equipment must display a rotating strobe light or Slow Moving Vehicle (SMV) emblem. See NDCC 39-21-50. We prefer both. The belt and suspenders approach. Highway department vehicles need to display rotating or flashing lights.
- Senior transit services must have a written safe passenger handling policy. Trained staff will ensure your restricted mobility passengers are safely assisted and transported.
- For NDIRF member entities, log into the NDIRF website [www.ndirf.com](http://www.ndirf.com) and check out the NDIRF video library. There are many useful topics to choose from. Best of all, it's FREE!

If you have questions on risk management issues, please contact Mark Verke [mark.verke@ndirf.com](mailto:mark.verke@ndirf.com) , Doug Griffin [doug.griffin@ndirf.com](mailto:doug.griffin@ndirf.com) or Ross Warner [ross.warner@ndirf.com](mailto:ross.warner@ndirf.com). ■

## Mark CALENDAR

April 2013

29: NDLC Regional Meetings,  
Mandan

30: Veva

May 2013

1: NDLC Regional Meetings,  
Lakota

2: Mapleton

8: NDIRF Annual Meeting  
Ramkota Inn, Bismarck

8: NDIRF Board of Directors Meeting  
NDIRF offices, Bismarck