Office of
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Frequently Asked Questions Regarding I-901

A guide for State Agencies and Employees

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In November 2005, Washington voters passed Initiative 901 (I-901), as an amendment to the Washington Clean Indoor Air Act. I-901's stated purpose is to protect the citizens of the State of Washington from the effects of second-hand smoke. Consistent with this goal, I-901 expanded the non-smoking provisions of the Clean Indoor Air Act. For instance, restaurants, bars, bowling alleys, and skating rinks must now completely prohibit smoking.

This document is intended primarily to provide guidance on I-901 to state agencies and officials. The answers set forth below provide general guidance and analysis of the provisions of I-901, as they relate to frequently asked questions. Many questions regarding the interpretation of I-901 can best be addressed in the context of specific facts and circumstances. State agencies should continue to address specific questions to the Assistant Attorneys General assigned to their agency or program.

Local governmental entities should consult their attorneys with questions about the interpretation or implementation of I-901 or the other provisions of the Clean Indoor Air Act. Although the Attorney General's Office can provide general guidance on the likely interpretation of I-901, the initiative gives enforcement authority to local law enforcement and local health departments. Private citizens and private entities should make decisions about their own responsibilities on the basis of guidance and direction from these local authorities.

It is important to remember that I-901 amended an existing law; while certain provisions of the Clean Indoor Air Act were amended or repealed, other provisions remained the same. This document does not provide a complete analysis of the Clean Indoor Air Act as it existed before the passage of I-901. It focuses on ways that I-901 changed the Clean Indoor Air Act.

General Questions about I-901

What is the Stated Purpose of I-901?

To protect the citizens of the State of Washington, including workers, from the risks of second-hand smoke.

What does I-901 do?

I-901 imposes prohibitions against smoking in all "Public Places" and "Places of Employment" and requires those who own and control such places to take certain steps to ensure compliance.

I-901:

1. Prohibits any person from smoking in a public place or place of employment.
2. Requires owners, lessees, or other persons in charge of a public place or place of employment to:
   a) Prohibit smoking in those places.
   b) Post signs prohibiting smoking "as appropriate" under the initiative. For retail stores and retail service establishments, signs must be posted at each entrance and prominently throughout the establishment. I-901 did not change signage requirements for facilities that were required to be non-smoking prior to the passage of I-901.

Can a Place be Both a Public Place and a Place of Employment?

Yes. Restaurants, retail stores, hospitals, buses, schools, and many state facilities are examples of buildings and vehicles that are both public places and places of employment because they are open to the public, and people work in them.

What is a Public Place?

1. *General Definition:* That portion of
   a) any building or vehicle,
   b) used by and open to the public (regardless of ownership or fee for admission).
   (I-901 did not change this basic definition of a public place. The initiative did add additional locations to the definition of public place and removed certain exceptions to the definition.)
2. *Presumptively Reasonable Minimum Distance:* "Public place" also includes an area twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited.
3. *Inclusive but not Limited List of Public Places:* Public places include, but are not limited to: schools, elevators, public conveyances or transportation facilities, museums, concert halls, theaters, auditoriums, exhibition halls, indoor sports arenas, hospitals, nursing homes, health care facilities or clinics, enclosed financial institutions, educational facilities, ticket areas, public hearing facilities, state legislative chambers and immediately adjacent hallways, public restrooms, libraries, restaurants, waiting areas, lobbies, bars, taverns, bowling alleys, skating rinks, casinos, reception areas, and no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests.
4. *Exclusions:* "Public place" does not include:
   a) A private residence unless the private residence is used to provide licensed child care, foster care, adult care, or other similar social service care on the premises.
   b) Private facilities which are only occasionally open to the public, except upon occasions when the facility is actually open to the public.
   c) Up to twenty-five percent of the sleeping quarters in a hotel or motel rented to guests.

What is a Place of Employment?

1. *General Definition:* any area,
   a) under the control of a public or private employer,
   b) which employees are required to pass through during the course of employment, including, but not limited to, entrances and exits to the place of employment.
2. Presumptively Reasonable Minimum Distance: "Place of employment" also includes a reasonable minimum distance of "twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited."
3. Inclusive but not Limited List of Places of Employment: Work areas; restrooms; conference and classrooms; break rooms and cafeterias; and other common areas.
4. Exclusions: "Place of Employment" does not include:
   a) A private residence,
   b) A home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social services on the premises.

Are Persons or Entities in Charge of Public Places or Places of Employment Required to Remove Ashtrays that are Located Within Twenty-five Feet of the Entrance or Exit?

No, the initiative does not have a requirement related to ashtrays. However, the law does place responsibility on owners, lessees and employers to prohibit smoking. If smokers congregate around the entrance to a building, it may be prudent to remove the ashtray.

What are the Requirements for Placing No-Smoking Signs?

Signs must be placed at each entrance to a building. Signs also must be placed in prominent places throughout retail stores and retail service establishments. These signage requirements were in existence prior to the passage of I-901, but I-901 has increased the number of facilities that are subject to the requirement.

May the Owner or Person in Charge of a Public Place or Place of Employment Impose Additional Restrictions on Smoking?

In general, yes. Owners and employers may choose to impose additional restrictions on smoking on their premises or smoking by employees. In some instances, however, employees may have rights under employment agreements or collective bargaining agreements limiting the employer's right to impose restrictions greater than those required by I-901.

Can local law enforcement or local health departments enforce additional restrictions imposed by owners or employers?

If an employer or owner chooses to impose restrictions that are greater than the restrictions in I-901, local law enforcement and local health department officials may not enforce those greater restrictions under the authority of I-901. However, law enforcement may have authority to enforce these additional restrictions under laws relating to trespass or other subject areas. Still other laws may contain additional restrictions on smoking in certain facilities or certain types of businesses. These laws are enforceable by state and local officials.

What Responsibility does a Regulatory Agency have to Report Violations of the Law to the Agencies Responsible for Enforcing the Law?

I-901 does not require state regulatory agencies to report non-compliance with the Clean Indoor Air Act to law enforcement or the local health department. However, many entities regulated by the state are required to comply with all state and federal laws. Consequently, some state regulatory agencies will have an obligation to monitor compliance with the smoking prohibitions to the same extent they monitor compliance with other state and federal laws. Some state agencies may require inspectors to report observed violations of state law to local law enforcement for appropriate action.

Can a Regulatory Agency Revoke a License for Failure to Comply with I-901?

Local jurisdictions have the authority to adopt regulations conditioning licensure on compliance with I-901. Some local jurisdictions currently have ordinances that allow business and occupation licenses to be conditioned on compliance with a broad range of regulations relating to health and safety; these ordinances may encompass smoking restrictions. As referenced above, certain state issued licenses or permits may be conditioned on compliance with all applicable state and federal laws. In such cases, violation of the provisions of I-901 may result in state regulatory action affecting the license or permit.

Questions Specifically Related to Public Places

How does RCW 70.160 Apply to Businesses on Tribal Lands and to Businesses Owned and Operated by Tribal Members?

In Washington, all lands within Indian reservations, as well as off-reservation trust homesteads, allotments, and "in lieu" fishing sites, are referred to as "Indian country." 1

The question of how the Clean Indoor Air Act (including the provisions of I-901) applies in Indian country and to tribal businesses is complex and somewhat fact specific. There are, however, some general jurisdictional rules that will provide some guidance.

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1 - 18 U.S.C. § 1151 provides: "Except as otherwise provided in sections 1154 and 1156 of this title [relating to liquor], the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

- *Within Indian country, state law generally does not apply to tribal businesses or tribal members unless Congress expressly allows it. There is no express congressional authorization to apply the prohibitions and requirements imposed by I-901 (or the Clean Indoor Air Act) to tribes or tribal members. Consequently, the prohibitions and requirements in I-901 do not apply to tribes, tribal businesses, or tribal members in Indian country.*
- *State law generally does apply to non-tribal members and non-tribal businesses operating or acting within Indian country unless it's clear that Congress intends to preempt such state law. There is no express congressional intention to preempt the applicability of the Clean Indoor Air Act or I-901 to non-tribal members within Indian country. Consequently, except where congressional intention to preempt is found to be implied (see discussion below), I-901 does apply to non-tribal members (both as individuals patronizing a non-tribal business and as the owners or "persons in charge" of public places or places of employment) within Indian country.*
- *If state law affects a "transaction" with a Tribe or its members, courts will conduct a "particularized inquiry" to determine whether application of the state law to the non-tribal member(s) is preempted. In conducting a "particularized inquiry," the court will explore the balance of state, tribal, and federal interests to determine whether Congress implicitly intended to preempt the application of state law to non-tribal members when engaged in such a "transaction" with a Tribe or tribal members. Application of this "particularized inquiry" balancing test is fact-specific and case-by-case, and the outcome is unpredictable. For this reason, it is difficult to say with certainty, but reasonably likely, that a court would find that I-901 does not prohibit smoking by non-tribal members when patronizing tribally-owned businesses within Indian country where smoking is permitted.*

What is a Building?

The term "building," is not defined in I-901. State agencies and local entities should consult counsel about specific fact patterns to determine whether a structure is included in the scope of I-901. A structure, enclosed by four walls and a roof, with entrance and egress through doors and windows would generally, though not exclusively, be considered a "building." I-901 specifically includes transportation facilities, ticket areas, and waiting areas within the definition of a public place.

Note that in addition to determining whether a structure is a building, and consequently a public place, it is also necessary to consider whether the structure is a place of employment.

Is a Bus Shelter a Public Place?

A "waiting area" is included within the definition of public place. This may indicate an intention to prohibit smoking in places such as bus shelters where persons must congregate in order to avail themselves of governmental services. In addition, the bus itself meets the definitions of both a public place, and a place of employment, and consequently, while at the stop, the twenty-five foot minimum distances may apply.

Is an Outdoor Sporting Arena a "Public Place"?

Because I-901 includes indoor sports arenas within the definition of "public place," but does not mention outdoor arenas, it is likely that an outdoor arena was not considered to be the type of "building" that is a public place. Note however, that an outdoor arena will often be a place of employment, subject to the restrictions of I-901.

Is a Parking Garage a Public Place?

Yes, if it is used by and open to the public (regardless of ownership or fee for admission). An open parking lot would not fall within the definition of "building" but a covered structure with limited entrances and exits is likely to be considered to be a building, regardless of whether it has full walls, half walls, or railings. In addition, a parking garage may be a place of employment even if it is not a public place.

What does "Used by and Open to the Public" Mean?

The phrase "used by and open to the public," qualifies what buildings or vehicles are "public places." In that context, the phrase should be given its usual and ordinary meaning. Most publicly owned buildings are "used by and open to the public." Those that are not (such as secure facilities) will probably be "places of employment," and thereby still subject to I-901 and the Clean Indoor Air Act. In addition, most state owned facilities are subject to Executive Order 88-06.

Privately owned buildings and vehicles are "used by and open to the public" when the public is explicitly or implicitly authorized or invited to enter or use the building or vehicle, regardless of whether a fee is charged for admission. Privately owned facilities will also often be "places of employment."

Questions Specifically Related to Places of Employment

Can an Employer Allow Smoking in the Break Room, Cafeteria, Outdoor Picnic Tables shared by all Employees, or other Common Areas?

In general, no. Although an employee might not be required to use the break room or cafeteria, I-901 expressly includes these parts of a workplace within the definition of a place of employment (where smoking is prohibited). However, an employer could choose to provide some other shelter for smoking employees as long as it met the twenty-five foot buffer area requirement and other employees are not required to pass through the area in order to leave or enter the building.

May an Employer Provide a Smoking Shelter that Complies with the Provisions of I-901?

Yes, under some conditions. Outdoor structures provided for employee smokers such as gazebos or lean-tos may not be subject to regulation provided the shelters are outside the twenty-five foot buffer. However, employees cannot be required to enter an area where smoking is occurring. The employer, owner, lessor, or state agency in control of the premises should:

- Identify the smoking area clearly with signs.
- Make sure that no employee is required to enter the outdoor smoking shelter while someone is smoking there.
- Conduct cleaning and maintenance work in the designated smoking shelter when smokers are not present.
- Meet all applicable laws such as building codes, fire codes, and land use regulations.

Must an Employer Provide a Smoking Shelter for Employees?

No, unless there is a contractual requirement that requires the employer to make provision for smokers.

Is Smoking Permitted in Personal Vehicles Parked on State Grounds?

Yes, if it is in an outdoor parking lot and the vehicle is parked twenty-five feet or more from any entrance, or exit, window that opens, or ventilation intake of an enclosed, nonsmoking area.

What is the Effect of I-901 on Existing Collective Bargaining Agreements?

Bargaining units have been notified that the state intends to implement I-901. No union has requested to bargain over the implementation of I-901.

Are Employees who Work in Public Areas such as Streets, Highways, Public Parks or the Grounds of a Building Prohibited from Smoking? Are other Persons Prohibited from Smoking in those Areas because they are Places of Employment?

The entire area of a public street or park is not "under the control of" the state or local entity generally charged with maintenance or oversight of the area in the same way that a place of employment is generally under the control of an owner or supervisor. However, in keeping with the intent of I-901, employers should take reasonable measures to ensure that employees required to perform maintenance or operational work in outdoor public areas are not exposed to second-hand smoke.

Does I-901 Prohibit Smoking in a "Private Enclosed Workplace?"

The Washington Clean Indoor Air Act has governed smoking in public places, including many workplaces, since 1985. One provision in the 1985 law allows employers to have a "private enclosed workplace" inside an office work environment. Even though this provision was not repealed by I-901, it must now be interpreted in conjunction with new requirements added by I-901.

- A "private enclosed workplace" cannot be a "public place", i.e., within that part of a building or vehicle "used by or open to the public," including the presumptive twenty-five foot buffer from doors, windows and ventilation intakes.
- A "private enclosed workplace" can not be a "place of employment," i.e., an area "which [other] employees are required to pass through during the course of employment," including, work areas, common areas, and the twenty-five foot buffer from doors, windows and ventilation intakes of enclosed nonsmoking areas.
- A "private enclosed workplace" cannot be in a place where smoking is otherwise prohibited. Prior to enactment of I-901 workplace smoking in state facilities, buildings and vehicles had already been significantly curtailed by Executive Order 88-06 and by regulations adopted by the Department of Labor and Industry restricting smoking in the office work environment. WAC 296-800-240; WAC 296-800-24005; WAC 296-800-24010. To the extent the restrictions in I-901 are greater than these regulations, the provisions of I-901 must be followed.

Is an Employer Allowed to Have a Designated "Smoking Room"?

Answer for private employers:

Yes, but only under extremely limited circumstances. For most employment settings it will not be feasible.

Under I-901, a "place of employment" is defined to include a reasonable minimum distance from places where smoking is prohibited. The law presumes that the reasonable minimum distance is twenty-five feet. If a doorway separates the designated smoking room from a hallway where smoking is prohibited, then all areas, including the designated smoking room, that are within twenty-five feet of the doorway must be smoke free. That is, the no smoking area would extend twenty-five feet into the designated smoking room. Given the size of most rooms, this requirement will prevent most employers from offering a designated smoking room.

I-901 allows owners, operators, managers, or employers to present clear and convincing evidence to the local health department that, due to the unique characteristics of the building, twenty-five feet is not needed to prevent smoke from infiltrating the non-smoking area of the facility. If the local health department agrees with the evidence presented, it has authority to decrease the size of the required reasonable minimum distance, which in turn, may increase the possibility that a designated smoking room would be feasible. Local health departments are developing criteria to use when considering such requests.

Answer for State Agencies:

Designated smoking rooms are probably not permissible in buildings that house state agencies. In addition to the requirements that apply to private employers, an indoor smoking room is generally prohibited for state agencies subject to Executive Order EO 88-06.

Is it Permissible for an Agency to Have a Policy that Allows Smoking by Employees in their Personally Assigned State Vehicles when No other Persons Are Riding with Them?

Yes. Under the circumstances described above, the state vehicle permanently assigned to an individual employee for state business would qualify as a "private enclosed workplace." However, smoking with others in the vehicle would violate both state policy and I-901. An agency may choose

to prohibit smoking in all state owned vehicles, including those that are personally assigned to employees. See Executive Order EO 88-06.

How does the Prohibition on Smoking in "any Area under the Control of a Public or Private Employer Which Employees are Required to Pass Through during the Course of Employment" apply to the Grounds of a Facility?

The place of employment provisions of I-901 are limited to areas under the control of the employer through which employees have to pass during the course of employment. The definition of "place of employment" also prohibits smoking within twenty-five feet from the entrances and exits of an enclosed area where smoking is prohibited.

The various parts of the Initiative indicate that an employer should prohibit smoking along any pathways within its grounds that employees must use to get into the building and must prohibit smoking within twenty-five feet of all entrances and exits and ventilation intakes. Thus, a place of employment includes enclosed garages and walkways that employees must pass through in order to get to their workplace. It also extends to outside areas that employees must pass through as they enter or leave a building. Depending on the configuration of the building and grounds, an employer would not necessarily be required to prohibit smoking in an open parking lot on the grounds of the facility. These restrictions would be consistent with the expressed intent of I-901—to prevent exposure to second-hand smoke.

Can the Presumption that a Twenty-five foot Perimeter Around a Building is the Least Possible Distance to Prevent Smoke Incursion be Rebutted?

The law presumes that the reasonable minimum distance from entrances, exits, windows and ventilation units is twenty-five feet. As provided in I-901, § 6, this presumption can be rebutted by owners, operators, managers, employers or others who own or control a place of employment. The applicant must provide clear and convincing evidence to the local health department that smoke infiltration will not incur and that the public health and safety will be protected by a distance of less than twenty-five feet. Local health departments are developing criteria to use when considering such requests.

Questions Specifically Related to Private Facilities

What is a Private Facility?

I-901 does not define private facility. In the context of I-901, it is best defined as a facility that is not a "public place" or a "place of employment." A private facility may occasionally be open to the public, but smoking is prohibited when the public is present. Questions about whether a particular facility is "private" or "public" are highly fact specific. Charging an entry fee to a facility probably is not the determining factor, because I-901 specifically includes places which charge admission fees within the definition of public places. A decision maker likely would look to such factors as membership criteria, the purpose of the organization, and membership fees that exceed the costs of food, drinks and entertainment.

Is a Private Facility a Place of Employment?

I-901 does not exclude private facilities from the definition of place of employment. Therefore, the drafters of I-901 may have intended private facilities which have employees to be subject to the restrictions on smoking, at least while employees are present. This would be consistent with I-901's stated intent—to protect workers from the effects of second-hand smoke.

Are an Organization's Members Considered to be Employees?

I-901 does not define "employee" and decisions about whether an individual is an employee of an organization depend on the facts and circumstances of each situation. In deciding whether an employment relationship exists, a decision maker is likely to weigh a number of factors including the relationship between the employer and the individual prior to passage of I-901, the parties' understanding of their relationship, the amount of supervision the employer exercises over the individual's performance of responsibilities, the number of hours the individual spends on the job, and the amount and nature of compensation received by the individual. A member of a private organization who works for compensation of any kind, including tips, would likely be considered an employee. However, an organization might not become an employer merely because it has elected industrial insurance coverage for volunteers or because it compensates volunteers for out-of-pocket expenses incurred in the course of performing services for the organization.

Questions Specifically Related to Private Residences

Does I-901 Restrict Smoking in Private Residences?

No, with one exception. Private residences are excluded from the definitions of public place and place of employment, unless the residence is being used to provide licensed child care, foster care, adult care, or other similar social services.

If a Private Residence is used to Provide Licensed Care to Children or Adults, are the Care Providers Prohibited from Smoking in their Own Homes?

Yes. Smoking is prohibited if the private residence is used to provide licensed child care, foster care, adult care, or another similar social service. The care providers will not be able to smoke in their own homes unless 1) the area in which they smoke is twenty-five feet from entrances, exits, and ventilation intakes leading to the part of the home that is used to provide care, or 2) the individual can convince its local health department to reduce the presumed reasonable minimum distance, to a distance less than twenty-five feet.

Do the Signage Requirements Apply to a Private Residence Used to Provide Licensed Care?

Yes, because the signage requirements apply to all entities regulated by I-901.

Is Smoking in a Private Residence Prohibited Twenty-four hours per day Even if the Residence is only used to Provide Licensed Care to Children or Adults for a Certain Number of Hours each Day?

The law prohibits smoking in a private residence if it is used to provide licensed care to children or adults. The law does not indicate whether the smoking ban applies twenty-four hours a day or whether smoking is only prohibited when the home is actually being used to provide care.

If an Individual is Receiving Care in Someone else's Private Residence would that Individual be Prohibited from Smoking in the Caregiver's Home?

Yes. If the private residence is being used to provide licensed adult care (or similar social service care), it falls within the definition of place of employment, and smoking is prohibited.

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