

## Ordinance 3604

**An ordinance amending Chapter 8.37 Missoula Municipal Code entitled “Smoking in Indoor Places of Employment and Public Places” revising the title to read “Smoking in Public Places and amending Sections 8.37.010 through 8.37.140 to update regulations and address e-cigarettes, codify Health Department smoking shelter guidelines and Parks and Recreation Department rules restricting smoking in certain areas, afford private businesses the ability to restrict smoking within 25 feet of their doorways, vents and other openings and clarify enforcement procedures.**

**Be it ordained the Chapter 8.37 Sections 8:37.010 through 8.37.140 are hereby amended as follows:**

### Chapter 8.37

#### SMOKING IN PUBLIC PLACES

Sections:

- 8.37.010 Findings and Purpose.
- 8.37.020 Definitions.
- 8.37.030 Smoking Prohibited.
- 8.37.040 Exemptions to Smoking Prohibitions of MMC 8.37.030.
- 8.37.050 Smoking Shelters.
- 8.37.060 Ashtrays.
- 8.37.070 Notification and Signage.
- 8.37.080 Enforcement.
- 8.37.090 (reserved).
- 8.37.100 Nonretaliation.
- 8.37.110 Violations and Penalties.
- 8.37.120 Public Education.
- 8.37.130 Other Applicable Laws.

#### **8.37.010 Findings and Purpose.**

A. Pursuant to Article II, Section 3 of Montana’s Constitution, all persons have certain inalienable rights which include a constitutional “right to a clean and healthful environment.” And pursuant to Article IX, Section 1 of Montana’s Constitution, “the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” With respect to this right and correlating duty, it is the intent of the City Council, the Board of County Commissioners, and the City-County Health Board (Health Board) in enacting this health ordinance to prescribe requirements concerning smoking tobacco in order to provide for a clean and healthful environment and to protect the health and safety of Missoula visitors and residents from exposure to smoke in environments not under their control.

B. The Missoula City Council, the Missoula Board of County Commissioners, and the Health Board hereby find that:

1. Environmental tobacco smoke (ETS) has been categorized as a known carcinogen by the United States Environmental Protection Agency (EPA), and;

2. Numerous scientific studies have determined that environmental tobacco smoke is a major cause of indoor air pollution that contains more than 40 known human carcinogens, numerous suspected carcinogens, co-carcinogens, carbon monoxide, sulfur dioxide, nitrous oxides, EPA-listed hazardous air pollutants, cilia toxic agents, sub-micron sized particulate, and;

3. The Surgeon General of the United States has declared that smoking is the largest preventable cause of premature death and disability in the United States; breathing environmental tobacco smoke is a cause of disease, including lung cancer, in nonsmokers, and;

4. At special risk from environmental tobacco smoke are children, elderly people, individuals with cardiovascular disease and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease, and;

5. Health hazards induced by breathing secondhand smoke include lung cancer, heart disease, respiratory infection, decreased respiratory function and broncho-constriction, and;

6. The National Institute for Occupational Safety and Health has recommended that all preventable measures should be used to minimize occupational exposure to environmental tobacco smoke, and;

7. Employees working in enclosed spaces where smoking is present have little or no control over the environment to which they are exposed, yet are likely to suffer lengthy and repetitive exposure to ETS; and

8. While alternative smoking devices contain fewer toxic chemicals than the deadly mix of 7,000 chemicals in smoke from regular cigarettes, e-cigarette aerosol is not harmless. It can contain harmful and potentially harmful substances, including nicotine, heavy metals like lead, volatile organic compounds, and cancer-causing agents, and can be inhaled by bystanders.

C. In conjunction with the Montana Clean Indoor Air Act, the purpose of this ordinance is to:

1. Protect the public health and welfare by prohibiting smoking in public places and places of employment;
2. Recognize the right of nonsmokers to breathe smoke-free air, and
3. Recognize the need to breathe smoke-free air has priority over the desire to smoke.

D. This health ordinance is adopted by the City of Missoula, which operates pursuant to a city voter approved self-governing charter form of government established in accordance with the provisions of Montana state law pertaining to self-government local government. 7-4-4306 MCA allows this ordinance to also be in effect outside the city limits, but within 5 miles of the city limits when approved by the Missoula County Commissioners and the Missoula City-County Health Board.

E. This ordinance is consistent with federal and state laws, and is not preempted by any such laws.

**8.37.020 Definitions.** The definitions found in 50-40-103, MCA apply to this ordinance, in addition to the words and phrases defined as follows:

A. "Alternative smoking device" means any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person in any manner for the purpose of inhaling vapor or aerosol from the product. The term includes any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah, or under any other product name or descriptor.

B. "Employee" means any person who is employed by any employer in the consideration for direct or indirect monetary wages or profit.

C. "Employer" means any person, partnership, corporation, including a municipal corporation, or non-profit entity, who employs the services of one or more individual persons.

D. "Indoor Public Place" means an indoor place, building, or conveyance to which the public has or may be permitted to have access, or an enclosed public place as defined in 50-40-103 MCA.

E. "Managing Entity" means the person or agency that has chosen to prohibit outdoor smoking as provided in this ordinance, or the agency responsible for maintaining the public space when this ordinance directly prohibits smoking.

F. "Outside Air Intake" means an opening or inlet to the outside of the building, through which fresh air is introduced into the building or into an air conditioning system.

G. "Smoking" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form. Smoking also includes the use of an alternative smoking device which creates an aerosol or vapor, in any manner or any form.

### **8.37.30 Smoking Prohibited.**

A. A person may not smoke or allow smoking in an indoor public place, except as provided in MMC 8.37.040.

B. A person may not smoke on, in or within 25 feet of the following outdoor public places owned or managed by the City of Missoula:

1. Playgrounds;
2. Sports fields assigned to or being used by youth under the age of 18;
3. Aquatic facilities, including but not limited to spray decks, pools and spas;
4. Silver's Lagoon in McCormick Park;
5. Bancroft/34<sup>th</sup> Street Duck Ponds; and
6. Structures including picnic shelters, dugouts, band shells, shade canopies, grandstands and bleachers.

C. The owner or manager of an outdoor space may choose to prohibit smoking on all or a portion of that property. A person may not smoke in an outdoor space when the property owner or manager has declared it as a non-smoking place by posting a sign in accordance with MMC 8.37.070.

D. As provided in MMC 12.18.050, an owner, operator or manager of a sidewalk cafe may choose to prohibit smoking in the sidewalk cafe. If they choose to prohibit smoking, they must post a sign in accordance with MMC 8.37.070. If they choose not to prohibit smoking, no sign has to be posted. A person may not smoke in a sidewalk cafe when the owner, operator or manager has declared it as a non-

smoking place by posting a sign in accordance with MMC 8.37.070.

E. An owner or manager of an indoor public place may choose to prohibit smoking outdoors within 25 feet of a doorway, an outdoor air intake or other opening into that indoor public place. If they choose to prohibit outdoor smoking, they must post a sign in accordance with MMC 8.37.070. If they choose not to prohibit outdoor smoking, no sign has to be posted. A person may not smoke outdoors within 25 feet of a doorway, an outdoor air intake or other opening of that indoor public place, when the owner, operator or manager has declared it as a non-smoking place by posting a sign in accordance with MMC 8.37.070. This prohibition does not prevent a person in transit from smoking while passing through an area marked as non-smoking.

**8.37.040 Exemptions to Smoking Prohibitions of MMC 8.37.030.**

The prohibition in MMC 8.37.030(A) does not apply to the following places, whether or not the public is allowed access to those places.

A. a private residence unless it is used for any of the following purposes, in which case the prohibition in subsection (1) applies:

1. a family day-care home or group day-care home, as defined in 52-2-703, MCA and licensed pursuant to Title 52, chapter 2, part 7, MCA;
2. an adult foster care home, as defined in 50-5-101, MCA and licensed pursuant to Title 50, chapter 5, MCA; or
3. a health care facility, as defined in 50-5-101, MCA and licensed pursuant to Title 50, chapter 5, MCA;

B. a private motor vehicle;

C. school property in which smoking is allowed pursuant to the exception in 20-1-220, MCA;

D. a hotel or motel room designated as a smoking room and rented to a guest; however, not more than 35% of the rooms available to rent to guests may be designated as smoking rooms; and

E. a site that is being used in connection with the practice of cultural activities by American Indians that is in accordance with the American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a.

**8.37.050 Smoking Shelters.** A smoking shelter is allowed as long as it includes all of the following:

A. An entrance or opening that does not open directly into an indoor public place, and is not on the shared wall between the shelter and building;

B. At least one entrance to the outdoors, with a minimum opening of 3 feet by 6 feet 8 inches remains open and unobstructed during all hours of use; and

C. At least 20% of the wall area, not including the doorway, is open with unobstructed air flow to the outdoors.

**8.37.060 Ashtrays.** Ashtrays may not be located in any area where smoking is prohibited by this ordinance.

**8.37.070 Notification and Signage.**

A. The proprietor or manager of an establishment containing an indoor public place shall post a sign in a conspicuous place at all public entrances to the establishment stating, in a manner that can be easily read and understood, that smoking is prohibited within the establishment.

B. The proprietor or manager of a hotel or motel shall post a sign on the door of each room as either a smoking room or a non-smoking room. Not more than 35% of the rooms available to guests may be designated or signed as smoking rooms.

C. If the owner, operator or manager of an outdoor space chooses to prohibit smoking outdoors as allowed by 8.37.030, the managing entity must post one or more signs in conspicuous locations, stating in a manner than can be easily read and understood, that smoking is prohibited in that outdoor space.

**8.37.080 Enforcement.**

A. Enforcement of MMC 8.37.030(A), 8.37.040, 8.37.050, 8.37.060 and 8.37.070 shall be implemented primarily by the Missoula City-County Health Department and the Missoula City Attorney's office.

B. The Missoula City-County Health Department shall follow the enforcement procedures in ARM 37.113.112. When a person who owns, manages, operates or otherwise controls an area where smoking is prohibited by this ordinance fails to comply with the provisions of MMC 8.37.030(A), 8.37.040, 8.37.050, 8.37.060 and 8.37.070, the Missoula City-County Health Department shall issue a written warning for the first violation, and a written reprimand for the second violation, and any subsequent violations within three years of the first warning will be referred to the City Attorney's office for enforcement.

C. The Missoula City-County Health Department has the right to enter and inspect premises in response to complaints and observations by department staff of potential violations of MMC 8.37.030(A), 8.37.040, 8.37.050, 8.37.060, and 8.37.070.

D. The managing entity of an outdoor public place where smoking is prohibited is responsible for ensuring that smoking does not occur within that area.

**8.37.090** (reserved)

**8.37.100 Nonretaliation.** No person or employer shall discharge, refuse to hire, or in any manner retaliate or discriminate against any employee, applicant for employment, or customer because such person exercises any constitutional right to a clean and healthful environment afforded by this ordinance. Any such discrimination shall be cause for private civil action against the offending party or parties. (Ord. 3098, 1999)

**8.37.110 Violations and Penalties.**

A. Violations of this ordinance, whether the violation occurs inside the city limits or within 5 miles of the city limits, are subject to the jurisdiction of the City of Missoula Municipal Court.

B. A person who violates a provision in MMC 8.37.030(A), 8.37.040, 8.37.050, 8.37.060 or 8.37.070 shall be guilty of a misdemeanor and shall be subject to the following penalties, after receiving a warning for the first violation and a written reprimand for a second violation:

1. \$100 for a third violation, within 3 years of the first violation;
2. \$200 for a fourth violation within 3 years of the first violation; and
3. \$500 for a fifth or subsequent violation within 3 years of the first violation.

C. A person who violates MMC 8.37.030(B) shall be guilty of a misdemeanor offense punishable by a fine not exceeding one hundred dollars (\$100) for each violation.

D. Incarceration is not a penalty. Each day of violation is a separate violation. (Ord. 3098, 1999)

E. Enforcement of penalties shall not bar enforcement of this ordinance by injunction or other appropriate remedy. The Missoula City-County Health Department may petition the district court to enjoin any action in violation of MMC 8.37.030(A), 8.37.040, 8.37.050, 8.37.060 and 8.37.070.

F. Corporate entities and their agents may be held liable for conduct prohibited herein.

**8.37.120 Public Education.** The Missoula City-County Health Department shall engage in a continuing program to explain and clarify the purposes and requirements of this ordinance to citizens affected by it, and to guide owners, operators and managers in their compliance with it.

**8.37.130 Other Applicable Laws.** This ordinance shall not be interpreted or construed to allow smoking where it is otherwise restricted by other applicable laws.

Effective date: This ordinance shall be effective 30 days after adoption and passage.

Severability: If any section, subsection, sentence, clause, phrase or word of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, phrase, and words thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or words have been declared invalid or unconstitutional, and if for any reason this ordinance should be declared invalid or unconstitutional, then the remaining ordinance provisions will be in full force and effect.

First reading and preliminary adoption on the 12<sup>th</sup> day of February, 2018 by a vote of 11 ayes, Stacie M. Anderson, Julie Armstrong, Michelle Cares, John DiBari, Heather Harp, Jordan Hess, Gwen Jones, Julie Merritt, Jesse L. Ramos, Bryan von Lossberg, Heidi West; 0 nays; 0 abstentions; and 1 absent, Mirtha Becerra.

Second and final reading and adoption on the 19<sup>th</sup> day of March, 2018, by a vote of 11 ayes, Stacie M. Anderson, Julie Armstrong, Mirtha Becerra, Michelle Cares, John DiBari, Heather Harp, Jordan Hess, Gwen Jones, Julie Merritt, Jesse L. Ramos, Heidi West; 0 nays; 0 abstentions; and 1 absent, Bryan von Losberg.

ATTEST:

APPROVED:

/s/ Martha L. Rehbein

/s/ John Engen

---

Martha L. Rehbein, CMC  
City Clerk

---

John Engen  
Mayor