

Legislative Analysis



NO SMOKING IN PUBLIC PLACES, WORKPLACES, AND FOOD SERVICE ESTABLISHMENTS

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4377 as enrolled

Public Act 188 of 2009

Sponsor: Rep. Lee Gonzales

House Committee: Regulatory Reform

Senate Committee: Government Operations and Reform (Discharged)

Complete to 2-2-10

A REVISED SUMMARY OF HOUSE BILL 4377 AS ENROLLED

House Bill 4377 amended the Public Health Code, generally, to prohibit smoking in public places, in places of employment, and in food service establishments (such as restaurants, cafeterias, food courts in shopping malls, and bars).

Exceptions are made, however, for cigar bars and tobacco specialty retail stores, and for gambling areas of casinos, if those places are in existence on the effective date of the smoking ban (May 1, 2010). Home offices are also exempt, but only if there are no other employees besides the residence owner or lessee. [The smoking regulations are understood not to apply to casinos operated under the Indian Gaming Regulatory Act, and the term "casino" as used in the new act does not apply to them.]

The bill amends Part 126 (*Smoking in Public Places*) and Part 129 (*Food Service Establishments*) of the Public Health Code. (Part 126 is found at MCL 333.12601. Part 129 is found at MCL 333.12901.) The heading for Section 129 is retitled *Smoke-Free Food Service Establishments*.

The new act takes effect May 1, 2010.

Under House Bill 4377:

- An individual is prohibited from smoking in a public place or at a meeting of a public body, and a state or local governmental agency or a person who owns, operates, or manages a public place must make a reasonable effort to prohibit individuals from smoking in a public place. (Section 12603, which contains this provision, is given the name *The Dr. Ron Davis Law*.)
- The definition of "public place" is expanded to include a "place of employment," and that term refers to an enclosed indoor area that contains one or more work areas for one or more persons employed by a public or private employer. (A "work area" is defined as a site within a place of employment where one or more employees perform services for an employer.) The term "a place of employment" does not include food service establishments. Food service establishments are covered under separate provisions. The term "a place of employment" also does

not include a residence that is also used as an office for the owner or lessee (but for no other employee), and also does not include a motor vehicle.

- An individual is prohibited from smoking in a food service establishment, and the person who owns, operates, manages, or is in control of a food service establishment must make a reasonable effort to prohibit individuals from smoking. It would be an affirmative defense to a prosecution or a civil or administrative action for a violation that the establishment made a good faith effort to prohibit smoking. The defense must be asserted through the filing of an affidavit setting forth those efforts. (A food court in a shopping mall is included as a food service establishment.)
- Similarly, owners, operator, managers, or persons in control of hotels, motels, or other lodging facilities must comply with the no-smoking law, and they can use the same affirmative defense.
- A number of sections of current law that provide exceptions to the prohibition on smoking in public places, or that provide for designated smoking areas, are repealed or deleted by the bill.

Obligations of Public Places, Food Service Establishments, and Casinos. The bill requires that a *no smoking sign* or the *international no smoking symbol* be clearly and conspicuously posted at entrances to and within every building or other area where smoking is prohibited. Ashtrays and other smoking paraphernalia must be removed from places where smoking is prohibited. Owners, operators, managers, or others with control over a no-smoking area must inform individuals found smoking that they are in violation of state law and subject to penalties. They also must refuse service to individuals smoking in violation of the act, and ask individuals smoking to refrain, and if they refuse, ask them to leave.

Prohibition on Retaliatory or Adverse Personnel Action. Employers and food service establishments are prohibited from taking retaliatory or adverse personnel action against an employee or applicant for employment on the basis of the individual's exercise of (or attempt to exercise) rights under Part 126 (Smoking in Public Places) or 129 (Smoke-Free Food Service Establishments) of the Public Health Code.

Cigar Bar/Tobacco Specialty Retail Store Exceptions. Cigar bars and tobacco specialty retail stores *that exist on the effective day of the new act* (May 1, 2010) and meet certain criteria and follow certain procedures are exempt from no-smoking requirements and can allow smoking on their premises. These establishments must file affidavits with DCH to claim an exemption.

To qualify, a **cigar bar** must generate during the 30 days immediately preceding the effective date of the new act at least 10 percent of its total gross annual income from the on-site sale of cigars and the rental of on-site humidors. The 10 percent requirement must be met each subsequent calendar year. A cigar bar needs to have on its premises an on-site humidor and can only allow the smoking of cigars that retail for over \$1 per cigar. (A "cigar bar" is defined as an establishment or area within an establishment that is open

to the public and is designated for the smoking of cigars, purchased on the premises or elsewhere.)

For a **tobacco specialty retail store** the total annual gross income requirement is set at 75 percent or higher from the on-site sale of tobacco products and smoking paraphernalia. (A "tobacco specialty retail store" is an establishment in which the primary purpose is the retail sale of tobacco products and smoking paraphernalia, and in which the sale of other products is incidental. The definition does not include a tobacco department or section of a larger commercial establishment or any establishment with any type of liquor, food, or restaurant license.)

Both kinds of establishments are required to file affidavits with the Department of Community Health certifying they meet the act's requirements. The initial affidavit for is to be filed within 30 days after the bill's effective date, with subsequent affidavits to be filed on January 31 of each year. The affidavit has to attest that the percentage of sales threshold was met, that the establishment is physically separated from any areas of the same or adjacent establishments where smoking is prohibited and where smoke does not infiltrate into non-smoking areas, and that entry is prohibited to anyone under 18 years of age. DCH could request additional information. "Physically separated" means an area enclosed on all sides by any combination of solid walls, windows, or doors that extended from the floor to the ceiling.

Cigar bars and tobacco specialty retail stores that do not meet the act's requirements are not exempt from the smoking prohibition and must prohibit smoking on their premises. However, if the only requirement not met is the filing of the affidavit, the establishment retains its exemption for a 21-day grace period, but then loses its exemption until the required affidavit is filed.

False Statement on Affidavit. A person who makes a false statement in an affidavit would be guilty of perjury under Section 423 of the Michigan Penal Code.

Casino Exemption. A casino *in existence when the act takes effect* can allow smoking in the gaming area of the casino. A casino not in existence on that date could not allow smoking. A food service establishment in a casino could not allow smoking; however, any part of the gaming area where patrons can take food and beverages for immediate consumption is not considered a food service establishment. (The term "casino" does not apply to a casino operated under the Indian Gaming Regulatory Act.)

Penalties/ Enforcement. The no-smoking provisions of Part 126 and 129 would be enforced by the Department of Community Health, and DCH could authorize local health departments to carry out the enforcement. Violations would be subject to a civil fine of up to \$100 for a first violation and up to \$500 for a second or subsequent violation (These are the penalties under current law). A person making a false statement on an affidavit would be guilty of perjury. The health code also allows individuals and entities alleging violations to bring civil actions for appropriate injunctive relief.

Also, as now, violations of no-smoking provisions could result in an order to cease food service operations.

No Promulgated Rules. The Department of Community Health could not promulgate rules to implement or administer the provisions of the new act prohibiting smoking.

Repealed/Deleted Provisions. The bill would repeal or delete the following provisions of current law:

- Currently, in Section 12601, the term "public place" does not include a private, enclosed room or office occupied exclusively by a smoker, even if the room or enclosed office may be visited by a nonsmoker. This exception is struck from the act.
- Section 12603 currently prohibits smoking in public places or at meetings of public bodies, but also says it does not apply to (1) rooms, halls, and buildings used for private functions if the seating arrangements are under the control of the sponsor of the function and not under the control of state or local government or the owner or operator of the facility; (2) food service establishments or licensed premises; or (3) private educational facilities after regularly scheduled school hours. The bill deletes the references to exceptions.
- Section 12604a prohibits smoking in the common or treatment area of a private practice office of a professional licensed under the Public Health Code and in health facilities. There are exceptions for cases where a prohibition would be detrimental to a patient's treatment, in which case the patient could smoke in a separate room from nonsmoking patients. Also in health facilities where smoking is allowed, smoking can be in certain designated areas only. This section is repealed.
- Section 12605 allows for, and regulates, the designation of smoking areas by state and local governments and owners or operators of public places (except where prohibited by law). This section is repealed.
- Section 12607 requires the posting of signs stating smoking is prohibited except in designated smoking areas; the arrangement of seating to provide a smoke-free area; and the separation of smokers and non-smokers. The section is repealed. The requirement that signs be posting prohibiting smoking is moved to Section 12603, but without any reference to designated smoking areas or the separation of smokers and non-smokers.
- Section 12615 says that Part 126 is in addition to, and does not supersede the requirements for a policy regulating the smoking of tobacco on the premises of a nursing home set forth in section 21733, or the requirements for a food service establishment set forth in section 12905. This section is repealed.
- Section 12617 contains the effective date of the original smoking legislation (January 1, 1987). It is repealed.
- Section 21333 addresses smoking policies at homes for the aged, describing where smoking is permitted. It is repealed.

- Section 21733 addresses smoking policies in nursing homes, describing where smoking is permitted. This section is repealed.
- Section 6127 of the Food Law of 2000 is also repealed; that section deals with where smoking is permitted in food establishments.

FISCAL IMPACT:

House Bill 4377 is likely to cause tobacco tax revenue to decline, but will also bring about short-term and long-term savings in medical costs. It is known that certain medical conditions and illnesses are directly attributable to smoking and to exposure to secondhand smoke. House Bill 4377 will reduce direct and secondhand exposure, having an impact on personal health and related medical costs. Studies also indicate that under comprehensive smoke-free workplace policy, over time, consumption of cigarettes and the rate of smoking by the population will decline by 5-20%, which will reduce tobacco tax revenue.

A significant percentage of Michigan's population is currently protected from cigarette smoke at worksites under local and private clean indoor air policies, which may moderate the impact of the bill on tobacco consumption and health care savings when compared to the results of research and studies.

Expenditures

The fiscal impact of HB 4377 for state and local governments will include short- and long-term health care savings for employees and Medicaid participants. Medical cost savings will come from non-smokers and smokers due to reduced exposure to secondhand smoke, from smokers who have reduced their cigarette consumption, and from smokers who quit smoking. For Fiscal Year 2007-08, Medicaid expenditures were \$9.50 billion, and an estimated 16% or \$1.5 billion of costs were for smoking-related illness. Using FY 2007-08 expenditures, every 1% of savings in smoking-attributable Medicaid costs would be approximately \$15.1 million, of which \$6.4 million is the state share (using federal/state share rates for that fiscal year).

The bill retains current statutory language for state and local health department enforcement and for civil fines; however, the pool of potential violators is expanded, so that additional revenue from fines is possible, and increased enforcement burden is possible. In Michigan, local health departments carry out most of the enforcement, and have the power to increase inspection fees to cover the actual cost of providing services if necessary. Fines are revenue to the enforcement entity.

There may be additional costs for the state or for any local governments that do not already meet the bill's requirement to post "No Smoking" signage on its premises.

Revenues

The fiscal impact on state revenue would primarily occur through the tobacco tax and the Lottery. Since the mid 1970s, cigarette consumption has trended downward. In general, the state's cigarette tax revenue declines 2.0% or approximately \$20 million per year (each 1% decline translates into a \$10 million revenue reduction on a full year basis). To the extent cigarette consumption declines due to the smoking ban, as described in the bill,

cigarette tax revenue would also decline. Cigarette tax revenue is earmarked as follows: 41.6% to the School Aid Fund (SAF), 31.9% to the Medicaid Trust Fund (MTF), 19.8% to the General Fund/General Purpose (GF/GP), 3.8% to the Healthy Michigan Fund, 2.4% to the Health and Safety Fund, and 0.6% to Wayne County for indigent health care.

This bill would reduce tobacco tax revenue by an estimated \$15.0 million in FY 2008-09 and by \$33.0 million in FY 2009-10.

The FY 2009-10 estimated total state revenue reduction would be allocated as follows: a decline of \$13.7 million for the SAF, \$10.5 million for the MTF, \$6.5 million for the GF/GP, \$1.2 million for the Healthy Michigan Fund, \$0.8 million for the Health and Safety Fund, and \$0.2 million for Wayne County.

Legislative Analyst: Chris Couch
Fiscal Analyst: Susan Frey
Rebecca Ross

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.