

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

Senate Bill 298
Finance

(Senator Ruben, *et al.*)

Clean Indoor Air Act of 2006

This bill expands the locations in which individuals are not allowed to smoke and increases the fines for smoking in nonsmoking areas. The bill does not preempt a county or municipal government from enacting and enforcing additional measures to reduce involuntary exposure to environmental tobacco smoke.

Fiscal Summary

State Effect: Since smoking is already prohibited in many areas and enforcement is already required, enforcement of the bill's provisions could be handled within existing resources. The civil penalty provisions of this bill are not expected to significantly affect State finances. It cannot be reliably determined at this time whether this bill would affect State sales tax revenues.

Local Effect: Since smoking is already prohibited in many areas and enforcement is already required, enforcement of the bill's provisions could be handled within existing resources. It cannot be reliably determined at this time whether the bill would affect admissions and amusement tax revenues.

Small Business Effect: Potential meaningful effect on small business restaurants and bars that derive business from smoking bar customers. The Department of Labor, Licensing, and Regulation (DLLR) estimates that 5,000 bars and taverns would not be permitted to allow smoking under this bill.

Analysis

Bill Summary: Individuals may not smoke in an indoor area open to the public; an indoor place where public meetings are held; a government-owned or operated means of mass transportation including buses, vans, trains, taxicabs, and limousines; or an indoor place of employment.

The nonsmoking ban does not apply to private homes, residences (including residences being used as a business or a place of employment), and automobiles unless they are being used for child or day care, the public transportation of children, or as part of health care or day care transportation. The ban does not apply to a hotel or motel room rented to one or more guests as long as the total percentage of hotel or motel rooms being used as a smoking room does not exceed 25%. It also does not apply to an indoor area being used for the purpose of a theatrical performance, a musical concert, or the production of a film if environmental tobacco smoke is a part of the performance, concert, or film.

Smoking-permitted signs must be prominently posted and properly maintained where smoking is allowed. The signs must be posted and maintained by the owner, operator, manager, or other person having control over the area.

The Department of Health and Mental Hygiene (DHMH) must adopt regulations prohibiting smoking in indoor areas open to the public. DLLR must adopt regulations prohibiting smoking in indoor places of employment not normally open to the general public. DHMH and DLLR must report to the General Assembly each year by September 30 on their enforcement efforts and the results of those efforts to eliminate tobacco smoke in indoor areas in the prior year.

In addition, the bill allows the County Commissioners of Frederick County to continue to regulate the smoking of tobacco products in public buildings owned, controlled, or financed by the State through the adoption of regulations or enactment of laws as long as those regulations and laws are at least as stringent as the bill's provisions. The bill allows the County Commissioners of Washington County to continue to enact ordinances regulating smoking in county offices and county office buildings as long as those ordinances are at least as stringent as the bill's provisions.

Penalty Provisions

The penalty for a person or employer who violates any provision of this bill or the regulations adopted by DHMH is \$100 for the first violation and at least \$250 for each subsequent violation.

An employer who discharges or discriminates against an employee because that person has made a complaint, given information to DHMH or DLLR, has brought action or is about to bring action under this bill, or has testified or is about to testify in a proceeding under this bill is subject to a civil penalty of at least \$2,000 but not more than \$10,000 for each violation.

Current Law: Statute allows the general public to smoke tobacco products in: (1) a portion of private residences that are not open to the public for business purposes; (2) any establishment that is not a restaurant or hotel, possesses an alcoholic beverages license, and is a bar or tavern; (3) a bar in a hotel or motel; (4) a club that has an alcoholic beverages license; (5) restaurants under specific conditions; (6) up to 40% of a hotel's or motel's sleeping rooms; (7) any other separate enclosed room in an establishment that holds an alcoholic beverages license; or (8) up to 40% of the premises of a fraternal, religious, patriotic, or charitable organization, corporation, fire company, or rescue squad subject to the authority of the Secretary of Health and Mental Hygiene during a public event.

Statute prohibits smoking in the public areas of retail stores. A retail store supervisor who does not post and conspicuously place signs that indicate smoking is not permitted in the public area of a retail store is subject to a civil fine of up to \$25. Statute also prohibits smoking in hospitals. In addition, a director of a nursing home, health clinic, or physician's office must make and carry out a plan that adequately protects the health of nonsmoking patients by regulating the smoking of tobacco products on the premises.

Counties or municipal corporations of the State, except for Charles and St. Mary's counties, may enact ordinances, resolutions, laws, or rules that are more stringent than State statute.

Regulations Related to Smoking in the Workplace

The Maryland Occupational Safety and Health program allows for an employer to permit smoking in an enclosed workplace – which includes a restaurant, bar, and tavern – under the following conditions established in regulation. The designated smoking area:

- must have solid walls and ceiling and a closeable door, walls tightly joining the floor and ceiling, openings to adjacent enclosed workplaces limited to make-up air inlets, and a ventilation system that exhausts directly to the outdoors without recirculation to nonsmoking areas;
- may not be in a location where an employee, other than a custodial or maintenance employee, is required to work; and

- must be under negative pressure sufficient to prevent smoke migration to enclosed workplaces.

However, cleaning and maintenance work in a designated smoking area must be conducted while no one is smoking in the area. The employer must periodically, but at least quarterly, inspect the ventilation of the smoking area to ensure that appropriate negative pressure is being maintained.

Other enclosed workplaces this regulation applies to include an indoor work area; a vehicle when an employee is in the course of employment and it is occupied by more than one employee; an employee lounge or restroom; a conference and meeting room; a cafeteria operated by the employer for use by its employees; a hallway; a sleeping room in a hotel or motel; and an assembly, conference, convention, or meeting establishment or enclosed portion of the establishment.

This regulation does not apply to: (1) a tobacconist establishment that engages primarily in the sale of tobacco and tobacco-related accessories; (2) a vehicle, when used in the course of employment and occupied by only one individual; and (3) smoking that is necessary to conduct scientific research into the health effects of tobacco smoke conducted at an analytical or educational laboratory.

Except as provided above, an employer must ensure there is no smoking in an enclosed workplace and post at each entrance to a place of employment having an enclosed workplace a sign stating that smoking is not permitted.

Background:

Secondhand Smoking Health Effects

According to the Centers for Disease Control and Prevention (CDC), secondhand smoke has been shown to cause cancer in people. Secondhand smoke is a mixture of more than 4,000 chemicals, 42 of which are carcinogens. People who are exposed to secondhand smoke were found to have cotinine, which is created when the body processes nicotine, in their blood, saliva, and urine.

CDC also reports that, each year, about 3,000 nonsmoking adults (people who never smoked and people who used to smoke) in the U.S. die of lung cancer as a result of exposure to secondhand smoke. Secondhand smoke also is responsible for about 35,000 deaths from coronary heart disease in adult nonsmokers each year.

Existing Smoking Bans in Maryland Counties

Prince George's County's smoking ban in any eating and drinking establishment open to the public took effect December 30, 2005. Clubs and private clubs are exempt from the ban. The owner or person in control of the establishment must refuse to seat or serve any person who smokes where smoking is prohibited and must ask the person to leave if he/she continues smoking after an initial warning.

Anyone found guilty of refusing to comply with a request to stop smoking is guilty of a misdemeanor and subject to a maximum \$200 fine. The owner or person in charge of the establishment found guilty of violating the smoking ban is guilty of a misdemeanor and subject to a maximum \$1,000 fine. Failure to post required no smoking signs is punishable by a maximum \$200 fine.

The county auditor must undertake an economic evaluation of the smoking ban's impact on eating and drinking establishments and report its findings within 18 months of the ban's effective date.

On January 12, 2006, the Howard County Executive vetoed a county council bill that would have prohibited new restaurants and bars from establishing a separately ventilated area for smokers. The bill would have allowed establishments in existence during January 2006 with separate smoking areas to continue to allow smoking until April 1, 2010, when the ban would have applied to those establishments as well.

On October 9, 2003, a Montgomery County Council law banning smoking in restaurants and bars took effect. The ban does not include a bar and dining area of an eating and drinking establishment that is a club as defined in the State alcoholic beverages law, has an alcoholic beverages license issued to private clubs under the State alcoholic beverages law, and allows the drinking of alcoholic beverages. The law requires the county Department of Economic Development to establish and administer a fund for marketing assistance to county restaurants affected by the ban.

A 1999 Montgomery County health regulation prohibiting smoking in eating and drinking establishments other than private clubs was declared invalid by the Circuit Court for Montgomery County. The Court of Appeals of Maryland found the regulation invalid on May 2, 2003.

The county ban does not apply to the 22 municipalities within its limits. However, the county identified 12 municipalities that previously adopted the county's smoking law affecting eating and drinking establishments. Montgomery County expects that these municipalities are likely to adopt the more stringent requirements.

A City of Rockville ordinance that bans smoking in eating and drinking establishments was adopted December 8, 2003, and took effect February 1, 2004.

A Talbot County Council ordinance extending its smoking prohibition became effective in April 2004. Prior to the ordinance, smoking was banned in restaurants. Bars and the bar area, not exceeding 40% of the total area of a restaurant, were exempt from the ban. Under the ordinance, bar areas are no longer exempt from the smoking ban. However, the bar and dining area of a club that has a Class G alcoholic beverages license is exempt from the smoking ban.

Other State Smoking Bans

As of January 2006, 11 states – California, Connecticut, Delaware, Maine, Massachusetts, Montana, New Jersey, New York, Rhode Island, Washington, and Vermont – have adopted comprehensive smoking bans. Eight other states – Florida, Georgia, Idaho, North Dakota, Oklahoma, Oregon, South Dakota, and Utah – have restricted smoking in most public places with exemptions for certain businesses, such as bars.

The Delaware Clean Indoor Air Act prohibiting smoking in any enclosed area to which the general public is invited was signed into law on May 31, 2002. A Delaware bill introduced in 2003 amending the Clean Air Act by allowing smoking in taverns, taprooms, horse racetracks, video lottery machine facilities, and nonprofit bingo and charitable gambling facilities was defeated.

New York State enacted a law in 2003 prohibiting smoking in almost all indoor workplaces, extending the ban to outdoor seating areas for bars where food service is incidental to consuming alcohol. Cigar bars are exempted from the ban, as are enclosed rooms in bars, restaurants, and convention centers used to promote or sample tobacco products. However, the New York Department of Health will allow government officials to waive the ban for restaurant and bar owners that lost business due to the ban.

Connecticut enacted a law in 2003 that bans smoking in restaurants, cafes, taverns, and other locations. Maine enacted a law in 2003 prohibiting smoking in pool halls, taverns, and lounges. In 2002, Florida voters approved a constitutional amendment to the Clean Indoor Air Act that bans smoking in most indoor areas, including restaurants.

District of Columbia

A bill banning smoking in most indoor workplaces and restaurant dining rooms that would, after January 1, 2007, also extend to bars, nightclubs, taverns, and bar areas of restaurants was enacted January 30, 2006. The enacted bill moved to the U.S. Congress, which has 30 legislative days to review the bill. If the U.S. Congress does not take any action, the enacted bill will take effect. The bill also requires no smoking signs to be posted in affected establishments. The Mayor may grant an economic hardship waiver of the bill's requirements if the waiver applicant establishes, to the Mayor's satisfaction, that complying with the bill's requirements has caused or will cause undue financial hardship.

The bill would exempt (1) a retail store used primarily to sell tobacco products and accessories; (2) a tobacco bar; (3) an outdoor area of a restaurant, tavern, club, brew pub, or nightclub; (4) a hotel or motel room rented to one or more guests; (5) a medical treatment, research, or nonprofit institution where smoking is conducted for medical research or an integral part of a smoking cessation program; and (6) theatrical productions.

The bill also establishes the following penalties. Smoking in a prohibited area is subject to a fine of at least \$100 but not more than \$1,000 for the first offense. Subsequent offenses of smoking in a prohibited area are subject to a fine of at least \$200 but not more than \$1,000. Obscuring, removing, defacing, mutilating, or destroying any sign posted according to the bill's requirements is subject to a \$500 fine. Failing to post a required sign also is subject to a \$500 fine.

State Fiscal Effect: The Comptroller advises that it is possible that the bill could result in the purchase of fewer cigarettes from Maryland vendors (reducing both the tobacco tax and sales tax revenues) or result in a change in purchases from Maryland businesses, which could lead to an increase or decrease in State sales tax revenues. However, the Comptroller could not predict how much State sales tax revenues could increase or decrease because it is unknown to what extent smokers and nonsmokers would increase or decrease their patronage of bars and restaurants as a result of this bill and to what extent the amount of money those patrons would spend at those establishments would increase or decrease.

Local Fiscal Effect: The Comptroller also advises that the bill could have an impact on receipts from the State admissions and amusement tax, which the Comptroller administers on behalf of local governments, if the bill affects attendance at certain events – either positively or negatively.

Small Business Effect: Revenues for small business bars and restaurants, especially for those within close proximity to the Pennsylvania, Virginia, and West Virginia borders, could see a reduction in revenues from smoking customers as they go to restaurants or bars that do not ban smoking, stay home, or reduce the hours they spend in Maryland bars and restaurants. Assuming the District of Columbia's smoking ban takes effect, the Department of Legislative Services assumes that small business bars and restaurants within close proximity of the District of Columbia will not see any greater reduction in revenues than those in other areas of the State, with the above-mentioned exceptions.

DLLR estimates that 5,000 bars and taverns would not be permitted to allow smoking under this bill.

There are conflicting reports regarding what fiscal impact smoking bans have on bars and restaurants.

A 2005 study funded by the Maryland State Medical Society and the Smoke Free Maryland Coalition concluded that the Montgomery County smoking ban in restaurants had no impact on restaurant tax revenues. The researchers compared sales tax revenues from November 2001 through July 2005 in Montgomery County to Baltimore City, Baltimore County, Frederick County, Howard County, Prince George's County, and Fairfax County, Virginia. The study also showed that the smoking ban did not have an impact on employment in all restaurants when compared to the other above-listed jurisdictions.

A 2005 Restaurant Association of Maryland study of State sales tax data shows sales of Talbot County restaurants and bars with liquor licenses from May through December of 2004 fell by 11% (\$2.9 million) compared to the same period the prior year. The number of restaurants and bars with liquor licenses in the county fell from 39 establishments in November 2003 to 29 at the end of December 2004.

Sales at Montgomery County restaurants and bars with liquor licenses from April through December 2004 increased by \$110,480 compared to the same period in 2003, according to the study. The report claims that the total number of county restaurants and bars with liquor licenses fell from 526 establishments in March 2003 to 402 at the end of December 2004.

Additionally, the study reported that data from the Montgomery County Department of Liquor Control show the number of beer keg sales declined by 2,366 from April through December 2004, compared to same period the prior year. According to the association, keg sales are the best indicator of lost alcohol sales at establishments that have a bar at which customers can smoke.

A 2005 study by the Harvard School of Public Health found that patronage at restaurants and bars visited by researchers was slightly higher after Massachusetts Smoke-Free Workplace Law took effect, although the increase was not statistically significant. The study also found no statistically significant changes in inflation-adjusted sales tax collections and alcoholic beverage excise tax collections. There also was not a statistically significant change in the number of workers employed in food services and drinking places. The study's authors cautioned that the study did not account for economic differences between towns and cities with various levels of local regulations prior to the state law. The researchers also found a 93% reduction in levels of respirable suspended particles less than 2.5 microns in diameter after the law went into effect.

Data from the New York City Department of Finance from April 1, 2003 through January 31, 2004, show that bar and restaurant business tax receipts were up 8.7% from the same period in 2002 to 2003.

A December 2003 evaluation of multiple smoking studies attempting to predict or assess the economic impact of smoke-free policies in the hospitality industry, many of them focusing on areas of the United States, shows no net negative impact on restaurants and bars. These studies: (1) used objective measures such as taxable sales receipts; (2) compared data for several years before and after the smoke-free policies were introduced; (3) controlled for changes in economic conditions; and (4) used statistical tests, where appropriate, to control for data trends and fluctuations.

While the studies generally showed no net impact on the hospitality industry as a whole, they did acknowledge there were winners and losers from smoking bans. Some establishments saw increased business, while others lost customers.

Additional Information

Prior Introductions: A similar bill, HB 428 of 2005, received an unfavorable report by the Health and Government Operations Committee. Its cross file, SB 332, received an unfavorable report by the Finance Committee. Similar bills, SB 140 and its cross file HB 260, were introduced in the 2004 session. SB 140 received an unfavorable report from the Finance Committee. HB 260 had a hearing in the Health and Government Operations Committee, but no further action was taken. A similar bill, HB 771, introduced in the 2003 session had a hearing in the Health and Government Operations Committee, but no further action was taken. Its cross file, SB 261, received an unfavorable report from the Finance Committee.

Cross File: HB 375 (Delegate Frush, *et al.*) – Health and Government Operations.

Information Source(s): Somerset County; Washington County; Montgomery County; Prince George’s County; Comptroller’s Office; Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; Frederick County; *Restaurant Association of Metropolitan Washington, et al. v. District of Columbia Board of Elections and Ethics, et al.*, District of Columbia Superior Court, May 21, 2004; *Secondhand Smoke and Family Health*, Centers for Disease Control and Prevention; *The Impact of the Montgomery County Smoke Free Ordinance on Restaurant Sales and Employment, Public Health Snapshot*, NetScan’s Health Policy Tracking Service, January 30, 2005; *Evaluation of the Massachusetts Smoke-free Workplace Law: A Preliminary Report*, Harvard School of Public Health, Tobacco Research Program, April 4, 2005; *The State of Smoke-Free New York City: A One-Year Review*, New York City Department of Finance, Department of Health and Mental Hygiene, Department of Small Business Services, and Economic Development Corporation, March 2004; *Summary of Studies Assessing the Economic Impact of Smoke – Free Policies in the Hospitality Industry*, VicHealth Centre for Tobacco Control, Melbourne, Australia, December 2003; *Williams Lets City Smoking Ban Move On to Congress for Review*, Washington Post, January 31, 2006; Howard County; “Prince George’s Joins Ranks of Smoke-Free; Measure Will Affect Restaurants, Bars,” *Washington Post*, November 9, 2005; “For Smokers, the New Ban on Puffing is a Real Drag; Reaction Mixed After First Month of Law,” *Washington Post*, January 26, 2006; Department of Legislative Services

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