

**Department of Legislative Services**  
Maryland General Assembly  
2007 Session

## FISCAL AND POLICY NOTE

## House Bill 78

(Delegate Cardin)

Economic Matters

## **Environmental Tobacco Smoke Elimination and Waiver Act**

This bill expands the locations in which individuals are not allowed to smoke and imposes fines for smoking in nonsmoking areas. The Department of Health and Mental Hygiene (DHMH) must sell a specified number of smoking ban waivers to bars and restaurants, excluding those in counties that prohibit smoking in bars and restaurants. The bill does not preempt a county or municipal government from prohibiting smoking in bars and restaurants or from enacting and enforcing additional measures to reduce involuntary exposure to environmental tobacco smoke.

The bill takes effect June 1, 2007.

## 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 the bill are not expected to significantly affect State finances. It cannot be reliably determined at this time whether the bill would affect State sales tax revenues. Cigarette Restitution Fund (CRF) special fund revenues could increase significantly beginning in FY 2008 as annual smoking ban waivers are auctioned. No effect on CRF expenditures.

**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. It is assumed that local health department staff in counties eligible for the annual waiver auctions could conduct those auctions using

existing resources. It is also assumed that local health departments could respond to smoking ban-related complaints with existing resources.

**Small Business Effect:** Potential meaningful effect on small business restaurants and bars that derive business from customers who smoke. An estimated 2,110 establishments could bid for a smoking ban waiver during an annual auction, with 211 (10%) receiving waivers in FY 2008. Progressively fewer waivers would be awarded in future years until none may be awarded after FY 2018.

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## 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 smoking ban does not apply to private homes, residences (including residences being used as a business or 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 does not apply to an indoor area being used for 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. It also does not apply to a retail tobacconist that: derives at least 75% of its revenues, measured by average daily receipts, from the sale of noncigarette tobacco products; has a ventilation system that prevents smoke from infiltrating any nonsmoking area; and prohibits the entry of minors at all times.

The bill repeals existing State-permitted smoking areas, such as an enclosed room in a restaurant if the room does not exceed 40% of the area of the restaurant, or a combination of a bar or bar area and a separate enclosed room not exceeding 40% of the total area of the restaurant including the bar or bar area.

### *Environmental Tobacco Smoke Waivers*

DHMH, collaborating with the appropriate county government, must determine the number of environmental tobacco smoke waivers for sale in each county. The number of waivers for sale in each county may not exceed 10% of the total number of bars and restaurants in the county and must decrease over 10 years. A waiver is valid for one year

and is not transferable. A separate waiver is required for each bar or restaurant. A person may smoke in a bar or restaurant that has a current waiver.

In each fiscal year from fiscal 2008 through 2018, DHMH must conduct two waiver auctions per county. One auction must be for bars and restaurants with an occupant capacity *below* the median occupant capacity for bars and restaurants in the county. The second auction must be for bars and restaurants with an occupant capacity *above* the median occupant capacity for bars and restaurants in the county. A waiver may not be awarded after May 31, 2018.

Bar and restaurant owners must bid on a waiver for one person to smoke in the bar or restaurant. A waiver must be awarded to the highest bidder. Winning bidders must pay the amount of the highest bid multiplied by the bar's or restaurant's occupant capacity. Funds collected from waivers must be paid into the CRF.

“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.

Before implementing a waiver, a bar or restaurant owner must inform each employee of the smoking policy and obtain a written statement from the employee that the employee is either a smoker or understands the smoking policy and voluntarily assumes the risk of working in an establishment that allows smoking.

#### *Regulation and Reporting Requirements*

DHMH must adopt regulations implementing the bill and collaborate with local health departments. Annually, by May 31, DHMH must report to the General Assembly on DHMH’s enforcement efforts during the prior year, the results of the enforcement efforts, the number of waivers awarded to each county, and the waivers’ effectiveness.

The Department of Licensing, Labor, and Regulation (DLLR) must adopt regulations prohibiting smoking in indoor places of employment, except as specified under the bill. DLLR must report to the General Assembly annually, by May 31, on enforcement efforts during the prior year and the results of those efforts.

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 the 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 the bill, or has testified or is about to testify in a proceeding under the 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: • a portion of private residences that are not open to the public for business purposes; • any establishment that is not a restaurant or hotel, possesses an alcoholic beverages license, and is a bar or tavern; • a bar in a hotel or motel; • a club that has an alcoholic beverages license; • restaurants under specific conditions; • up to 40% of a hotel's or motel's sleeping rooms; • any other separate enclosed room in an establishment that holds an alcoholic beverages license; or • 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 (MOSH) 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: ● a tobacconist establishment that engages primarily in the sale of tobacco and tobacco-related accessories; ● a vehicle, when used in the course of employment and occupied by only one individual; and ● 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.

#### *Cigarette Restitution Fund*

CRF is a special, nonlapsing fund supported by revenue from a settlement with the five major tobacco companies. Under the Master Settlement Agreement (MSA) participating manufacturers agreed to compensate the states for smoking-related medical costs and conform to certain marketing restrictions. CRF funds must be used to fund: ● the Tobacco Use Prevention and Cessation Program; ● the Cancer Prevention, Education,

Screening, and Treatment Program; and • other programs that serve health-related purposes as specified in statute. For each fiscal year for which CRF appropriations are made, at least 50% of the appropriations must be for these purposes.

**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.

Researchers at the Johns Hopkins Bloomberg School of Public Health conducted two studies of secondhand smoke exposure among workers and patrons of Baltimore bars. One study, conducted January 26 and 27, 2007, showed that the average level of particulate matter pollution in the bars surveyed was at least 10 times higher than the Environmental Protection Agency's outdoor air safety levels. The second study showed that nonsmoking bar employees working in bars that allowed smoking absorbed higher levels of nicotine compared to employees working at smoke-free bars. This study was conducted in January and February, 2007.

*Smoking Bans in Maryland*

Baltimore City and five Maryland counties – Charles, Howard, Montgomery, Prince George's, and Talbot – have enacted smoking bans in bars and restaurants. The smoking ban is currently in effect in Charles, Howard (for restaurants and bars opened April 2, 2006 or later), Montgomery, Prince George's, and Talbot counties. Howard County restaurants and bars in existence on April 1, 2006, must comply with the smoking ban beginning in June 2007. Baltimore City's smoking ban takes effect January 1, 2008. **Exhibit 1** details the jurisdictional bans and the penalties for violators.

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## Exhibit 1

### Maryland Smoking Bans

**Baltimore City**

Smoking is prohibited in any enclosed area to (or in) which the public is invited (or permitted) or any enclosed area that is part of a place of employment, effective January 1, 2008. A private club, smoking bar, and retail tobacconist are exempt if certain qualifications are met. The city health commissioner may grant a waiver to the ban if a waiver applicant establishes that compliance would cause undue financial hardship or other factors exist that would render compliance unreasonable. A smoker violating the ban is subject to a \$250 civil fine for each offense. An employer or other person in charge who knowingly allows a violation of the ban is subject to a maximum \$500 civil fine for each offense. For employers, each day a violation occurs is a separate offense.

**Charles County**

Smoking in public places and eating and drinking establishments, excluding nonrestaurant bars, was prohibited beginning June 15, 2006. Also exempt from the smoking ban are retail tobacconists, clubs, 40% of hotel or motel rooms; and 40% of the premises of fraternal, religious and patriotic organizations, and fire/rescue squads. Violators are subject to a \$100 fine for the first offense, \$200 fine for the second offense, and \$300 fine for a third or subsequent offense.

**Howard County**

Smoking in restaurants and bars opened April 2, 2006 or later was prohibited beginning in August 2006, with the ban applying to bars and restaurants in existence on April 1, 2006 beginning June 2007. Exceptions to the ban are: private clubs and lodges; 25% of hotel or motel rooms; specified outdoor seating areas; theatrical productions; and retail tobacconists. Violators are subject to a \$100 fine for smokers and \$250 for businesses.

<b>Montgomery County</b>	Smoking in restaurants and bars was prohibited on October 9, 2003, excluding clubs. Violators are subject to a maximum \$50 fine for a first offense and a maximum \$75 fine for each subsequent offense. The county Department of Economic Development must establish and administer a fund for marketing assistance to county restaurants affected by the ban.
<b>Prince George's County</b>	Smoking in public eating and drinking establishments, excluding clubs, was prohibited beginning December 30, 2005. Violators can be fined \$200 for individuals and \$1,000 for businesses. 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.
<b>Talbot County</b>	In April 2004, a smoking ban in restaurants was extended to include bars and the bar area of a restaurant. Exceptions to the ban are: clubs; 40% of hotel and motel rooms; and retail tobacconists. Violators are subject to a \$100 fine for the first violation, \$200 fine for the second or subsequent violation within a 12-month period. A business with three or more violations within a 12-month period faces a suspension of its alcoholic beverage license for three days for the third offense. For the fourth and subsequent offenses, the business' license will be suspended for 10 days, plus an additional 10 consecutive days for each additional violation over four within any 12-month period.

Source: Department of Legislative Services

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#### *Existing Enforcement of Smoking Prohibitions*

The MOSH program currently enforces smoking prohibitions by notifying business owners of complaints from patrons and gaining voluntary compliance with State law. However, MOSH has authority only over employee complaints. Only employee complaints initiate full investigations.

### *District of Columbia*

Beginning January 1, 2007, smoking was banned in bars, nightclubs, taverns, and bar areas of restaurants. The mayor may grant an economic hardship waiver of the law's requirements if the waiver applicant establishes, to the mayor's satisfaction, that complying with the law's requirements caused or will cause undue financial hardship.

Establishments exempt from the smoking ban are: a retail tobacconist; a tobacco bar; an outdoor area of a restaurant, tavern, club, brew pub, or nightclub; a hotel or motel room rented to one or more guests; a medical treatment, research, or nonprofit institution where smoking is conducted for medical research or an integral part of a smoking cessation program; and theatrical productions.

The law 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 under the law is subject to a \$500 fine. Failing to post a required sign also is subject to a \$500 fine.

### *Other States*

Eleven states – California, Connecticut, Delaware, Maine, Massachusetts, Montana, New York, Rhode Island, Utah, Vermont, and Washington – have enacted comprehensive smoke-free laws, according to the Health Policy Tracking Service. Eleven other states – Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, New Jersey, North Dakota, Oklahoma, Oregon, and South Dakota – restrict smoking in most public places, exempting certain businesses, such as bars. Four states – Nevada, New Jersey, North Carolina, and Wisconsin – have enacted laws restricting smoking in facilities like video arcades, child care facilities, hospital grounds, state facilities, and college and university dormitories.

**State Fiscal Effect:** The Comptroller advises that the bill could result in the purchase of fewer cigarettes from Maryland vendors (reducing both the tobacco tax and sales tax revenues). The bill also could result in a change in purchases from Maryland businesses, which could lead to an increase or decrease in sales tax revenues.

The Comptroller advises that developing a smoking waiver auction process would quickly establish the perceived economic value to proprietors of allowing customers to smoke. Auction winners would be able to retain smoking customers and presumably gain business from smokers excluded from other establishments that lost the auction. The

auctions would allow the State to capture some, or potentially all, of the extra profits from auction winners, rather than the businesses, as the price of waivers is bid higher and higher. Auction losers would suffer whatever change in business results from a smoking prohibition.

To be eligible for a waiver under the bill, a restaurant need only be licensed as a food establishment. There is no requirement for the restaurant to have a bar associated with it or to have a separate nonsmoking area. Nevertheless, for purposes of this analysis, it is assumed that restaurants with bars attached would be more likely to participate in the waiver auctions.

Six Maryland jurisdictions that currently or soon will prohibit smoking would generally not be eligible to participate in the smoking ban waiver auctions – Baltimore City and Charles, Howard, Montgomery, Prince George’s, and Talbot counties. The Comptroller advises that, as of April 2006, there were 4,728 liquor licenses in Maryland for consumption on premises, of which 2,618 were awarded to establishments in jurisdictions that currently prohibit smoking or will soon prohibit smoking. Thus, an estimated 2,110 establishments could participate in the smoking ban waiver auction, with 211 establishments receiving a waiver in fiscal 2008. Progressively fewer waivers would be awarded in future years until none may be awarded after fiscal 2018.

Existing DHMH staff could collaborate with the county health departments in 18 jurisdictions that would hold two annual smoking ban waiver auctions. Existing local health department staff would hold the auctions and could respond to any smoking ban-related complaints.

CRF special fund revenues could potentially increase significantly from fiscal 2008 through 2018 depending on the amount of revenues collected from the smoking ban waiver auctions. In fiscal 2008, two auctions would be held in 18 counties that have not enacted smoking bans in bars and restaurants. Future year revenues would depend on how many businesses participate in the smoking ban waiver auction, the number of waivers available in a given year, and how much businesses are willing to spend to receive a one-year waiver from the State’s smoking ban. Future year revenues also would depend on whether other counties would choose to ban smoking in bars and restaurants. The bill does not specify how the additional revenue would be spent.

**Local Fiscal Effect:** 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.

Existing local health department staff in the 18 counties could hold the annual smoking ban waiver auctions. An estimated 211 waivers would be awarded to businesses in the eligible counties in fiscal 2008.

Local health departments could also respond to complaints with existing resources.

**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.

This bill takes effect seven months prior to the newly enacted ban in Baltimore City and does not allow “hardship exemptions.” Thus bars and restaurants in Baltimore City that might qualify for a hardship exemption under the city’s smoking ban would have to participate and win the waiver auction as well. Otherwise, this bill would negate the hardship exemption in the city.

Bars and restaurants in the other five Maryland jurisdictions that already prohibit smoking could participate in the smoking ban waiver auctions. Thus, an estimated 2,110 establishments could participate in the smoking ban waiver auction, with 211 establishments receiving a waiver in fiscal 2008. Progressively fewer waivers would be awarded in future years until none may be awarded after fiscal 2018. However, as the waivers apply to fiscal years (beginning July 1) and the smoking ban takes effect on June 1, any business that might qualify for a waiver would have to first comply with the smoking ban for a month.

The fiscal impact on restaurants and bars that participate in and win smoking ban waiver auctions cannot be reliably determined at this time. While these restaurants and bars would likely see an increase in business from smokers, the additional revenue earned from those patrons could be negated by how much the businesses paid for the one-year waiver.

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:

- used objective measures such as taxable sales receipts;
- compared data for several years before and after the smoke-free policies were introduced;
- controlled for changes in economic conditions; and
- 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.

Legislative Services advises that the bill's smoking ban is more stringent than current State law and bans in Charles and Talbot counties with respect to the percentage of hotel or motel rooms that may be designated as "smoking" rooms.

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## Additional Information

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** City of Annapolis; City of Bowie; Town of Elkton; City of Takoma Park; Town of Thurmont; Baltimore City; Carroll County; Harford County; Montgomery County; Prince George's County; Comptroller's Office; Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; *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*, William Evans, et al., October 2005; *Public Place Smoking*, Health Policy Tracking Service, July 10, 2006; *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; *High Exposure to Secondhand Tobacco Smoke Detected in Baltimore Bars*, Johns Hopkins Bloomberg School of Public Health, February 23, 2007; Department of Legislative Services

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