

Department of Legislative Services
 Maryland General Assembly
 2007 Session

FISCAL AND POLICY NOTE
 Revised

House Bill 359
 Economic Matters

(Delegate Frush, *et al.*)

Finance

Clean Indoor Air Act of 2007

This bill expands the locations in which individuals are not allowed to smoke and imposes 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: Department of Health and Mental Hygiene (DHMH) general fund expenditures could increase by \$480,200 in FY 2008 only for grants to 18 local health departments for staff to evaluate waiver applications. 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. Civil penalties would be paid into the Cigarette Restitution Fund (CRF). It cannot be reliably determined at this time whether the bill would affect sales and tobacco tax revenues.

(in dollars)	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
SF Revenue	-	-	-	-	-
GF Expenditure	480,200	0	0	0	0
Net Effect	(\$480,200)	\$0	\$0	\$0	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Eighteen local health departments would collectively receive \$480,200 in grants from DHMH in FY 2008 only for staffing costs. 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 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. The Department of Labor, Licensing, and Regulation (DLLR) estimates that 5,000 bars and taverns would not be permitted to allow smoking under the bill unless granted a waiver.

Analysis

Bill Summary: Beginning February 1, 2008, 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 and residences, unless they are being used by a person licensed or registered to provide child or day care, and private vehicles, unless they are being used for 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 rooms 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 a retail tobacco business that is a sole proprietorship, limited liability company, corporation, partnership, or other enterprise in which the primary activity is the retail sale of tobacco products and accessories and the sale of other products is incidental. Further, the ban does not apply to any facility of a manufacturer, importer, wholesaler, or distributor of tobacco products or of any tobacco leaf dealer or processor in which the employees of those businesses work or congregate. It also does not apply to a research or educational laboratory for the purpose of conducting scientific research into the health effects of tobacco smoke.

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.

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.

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.

Smoking Ban Waivers

The health officer of a county may grant a waiver from a specific provision of the smoking ban if the applicant establishes in writing that complying with a specific provision of the waiver would cause undue financial hardship or other factors would render compliance unreasonable. The waiver must be granted within 90 days from receipt of a waiver application and the date that all conditions for the waiver application have been satisfied, as required by regulations adopted by the Secretary of Health and Mental Hygiene. Once granted, a waiver terminates January 31, 2011. A waiver may not be granted on or after January 31, 2011. The Secretary may impose conditions or restrictions on a waiver to minimize the adverse effects of the waiver on individuals exposed to secondhand smoke and ensure the waiver is consistent with the smoking ban's purposes. The Secretary must adopt regulations to implement the bill's waiver provisions.

Penalty Provisions

A person who violates a provision of the bill or a regulation adopted under the bill faces progressively stringent punishments based on the number of violations. For a first violation, a person would receive a written reprimand. A second violation is subject to a \$100 civil penalty. Each subsequent violation is subject to a civil penalty of at least \$250. Any civil penalties collected must be paid into the CRF.

A penalty may be waived by the Secretary of Health and Mental Hygiene or the Commissioner of Labor and Industry, giving consideration to factors that include the seriousness of the violation and any demonstrated good faith measures to comply with the bill's provisions.

It is an affirmative defense to a complaint brought against a person for a violation of a provision or a regulation adopted under the bill that the person or an employee of the person • posted a required no smoking sign; • removed all ashtrays and other smoking

paraphernalia from areas where smoking is prohibited; and • if the violation occurred in a bar, tavern, or restaurant, refused to seat or serve any individual smoking in a prohibited area and asked the individual to leave the establishment after an initial warning.

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.

An employee may not • make a groundless or malicious complaint to the Secretary or his designee or the Commissioner or his designee; • bring an action under the bill in bad faith; or • in bad faith, testify in an action or a proceeding that relates to the smoking ban. The Secretary or Commissioner may bring an action for injunctive relief and damages against a person who violates the above provisions.

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

The CRF is a special, nonlapsing fund supported by revenue from a settlement with the five major tobacco companies. Under the Master Settlement Agreement 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.

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.
- Montgomery County** 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.

**Prince George's
County**

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.

Talbot County

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

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: DHMH general fund expenditures could increase by \$480,168 in fiscal 2008 only which accounts for nine months of expenditures. This estimate assumes that 18 local health departments in counties that do not have a smoking ban in effect as of February 1, 2008 would each receive a \$26,676 grant from DHMH to hire an accountant to evaluate smoking ban waiver applications. The information and assumptions used in calculating the estimate are stated below:

- each county that does not have a smoking ban would receive waiver applications (18 counties);
- most waiver requests would be received and a decision regarding whether to grant the waivers would be reached during the last nine months of fiscal 2008; and
- once a business received a smoking ban waiver, that waiver would be permanent until the established January 31, 2011 waiver termination date.

Any additional requests for waivers in future years could be handled with existing resources.

This estimate assumes that the county health officers in Charles, Howard, Montgomery, Prince George's, and Talbot counties would not award smoking ban waivers because the smoking bans in those counties currently do not allow for waivers and the bill does not preempt additional measures to reduce involuntary exposure to environmental tobacco

smoke. This estimate also does not include additional funds for Baltimore City because the city's smoking ban currently allows for waivers. As a result, the Baltimore City health department is preparing to process any waiver applications it may receive regardless of this bill.

Whether the bill could result in the purchase of fewer cigarettes from Maryland vendors (reducing both 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 cannot be reliably estimated at this time. It is unknown to what extent smokers or 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. It is also unknown to what extent any smoking ban waivers granted by county health officers would impact tobacco tax and sales tax revenues.

Any civil penalties paid into the CRF are expected to be minimal.

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. Eighteen local health departments would collectively receive \$480,168 in DHMH grants (\$26,676 per local health department) to hire a temporary accountant for nine months in fiscal 2008. Any smoking ban waiver awarded would be permanent until the established January 31, 2011 waiver termination date. Existing local health department staff could evaluate any waiver applications submitted in future years. Local health departments could respond to complaints with existing resources.

Small Business Effect: 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. However, in regard to the bill's waiver provision, the bill is less stringent than the smoking bans enacted by Charles, Howard, Montgomery, Prince George's, and Talbot counties. Baltimore City's smoking ban includes a provision for granting a waiver to the ban. Under Baltimore City's ordinance, such a waiver would not terminate. However, since any waiver granted under the statewide smoking ban terminates January 31, 2011, any waiver granted to a Baltimore City establishment would terminate at that time as well.

DLLR estimates that 5,000 bars and taverns may not be permitted to allow smoking under this bill. This would depend on the number of businesses that request and are granted a waiver from the smoking ban.

The fiscal effect of the smoking ban on a business would vary depending on whether the business applied for and received a smoking ban waiver and the proximity of other similar businesses that either are required to comply with the ban or also applied for and received a waiver. For example, if a business is granted a waiver and similar neighboring businesses are not granted a waiver, revenues for businesses granted a waiver could increase significantly as it is assumed that smokers would prefer to patronize a business that would allow them to smoke. Neighboring businesses that either did not apply for a waiver or that were denied a waiver could see a significant decrease in revenues as it is assumed that smokers would instead patronize a business that allowed smoking. However, those non-smoking establishments may also see an increase in business from non-smokers. It cannot be reliably estimated at this time what the net fiscal effect on small businesses could be as a result of the smoking ban.

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.

Additional Information

Prior Introductions: A similar bill, SB 298 of 2006, was introduced in the Finance Committee, but no further action was taken. Its cross file, HB 375, received an unfavorable report by the Health and Government Operations Committee. 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 Senate Finance Committee.

Cross File: SB 91 (Senator Garagiola, *et al.*) – Finance.

Information Source(s): Baltimore City; Montgomery County; Prince George’s County; Caroline County; Calvert County; Howard 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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