

Department of Health

Chapter 1200-32-01
Non-Smoker Protection Act Rules

Statement of Necessity Requiring Public Necessity Rules

The Commissioner of the Tennessee Department of Health ("Commissioner") makes this statement pursuant to T.C.A.. § 4-5-209(a)(4). The Commissioner hereby promulgates the following public necessity rules required by enactment of the Non-Smoker Protection Act, 2007 Tenn. Pub. Acts ch. 410 ("Act") (June 11, 2007).

Under the Act, the Commissioner must promulgate rules to implement the Act by October 1, 2007, its effective date. 2007 Tenn. Pub. Acts ch. 410, § 5. Based upon the effective date of the Act for rulemaking purposes (June 11, 2007), the Commissioner is precluded from utilizing ordinary rulemaking procedures under Uniform Administrative Procedures Act to timely promulgate permanent rules. 2007 Tenn. Pub. Acts ch. 410, § 5. Therefore, the Commissioner may properly promulgate these rules as public necessity rules.

For purposes of promulgating these rules as rulemaking hearing rules, the earliest date upon which the notice of rulemaking could have been filed for publication in the Tennessee Administrative Register ("TAR") would have been on July 1, 2007, for publication in the July, 15, 2007, issue of the TAR. T.C.A.. § 4-5-203(a). The rulemaking hearing pursuant to that notice could not be held until 45 days from the date of publication in the TAR, or, at the earliest, on August 15, 2007. T.C.A.. § 4-5-203(b). Assuming that the Commissioner filed with the Secretary of State rulemaking hearing rules on August 15, 2007, the rules would not become effective until the expiration of 75 days from the date of filing with the Secretary of State, or, at the earliest, on November 1, 2007. T.C.A.. § 4-5-207.

For purposes of promulgating these rules as proposed rules, assuming that the Commissioner filed the rules with the Secretary of State on June 11, 2007, and assuming that no request for a rulemaking hearing is filed, the rules would not become effective until the expiration of 120 days from the date of filing with the Secretary of State, or, at the earliest, on October 9, 2007.

Further, the Act requires that, for purposes of promulgating rules, the Commissioner consult with the Department of Labor and Workforce Development, 2007 Tenn. Pub. Acts ch. 410, § 2. The Commissioner has acted as timely as possible under the circumstances, and both agencies have jointly and expeditiously developed and promulgated these rules. Under no circumstances, however, could these rules have been effective on October 1, 2007, utilizing ordinary rulemaking procedures to timely promulgate permanent rules.

For a copy of this public necessity rule contact: Robert J. Kraemer, Jr., Assistant General Counsel, Office of General Counsel, 220 Athens Way, Suite 210, Nashville, TN 37243, (615) 741-1611.

Susan R. Cooper, MSN, RN, Commissioner
Tennessee Department of Health

Public Necessity Rules
of
Tennessee Department of Health
Chapter 1200-32-01
Non-Smoker Protection Act Rules

New Rules

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1200-32-01-.01 Purpose.

- (1) The Non-Smoker Protection Act (“Act”) requires that on and after October 1, 2007, smoking be prohibited in all enclosed public places within the State of Tennessee. It is the purpose of these rules to supplement the provisions of that Act and provide the mechanisms by which the Department of Health (“Department”) shall implement the enforcement duties placed upon it by Section 1 of Chapter 410 of the Public Acts of 2007.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.02 Public Places Regulated.

- (1) The Department shall be responsible for the enforcement activities required by the Act in the following enclosed public places:
 - (a) All health care facilities licensed, permitted or certified pursuant to Tennessee Code Annotated, Title 68, Chapter 11; and
 - (b) All enclosed public places for which a license, permit or certification must be obtained from any health related board assigned to the Department’s Division of Health Related Boards pursuant to Tennessee Code Annotated, 68-1-101 before a health related profession may be practiced therein; and
 - (c) All enclosed public places for which a license, permit or certification must be obtained from the Department’s Division of Emergency Medical Services; and
 - (d) All other enclosed public places over which the Department has regulatory authority pursuant to Tennessee Code Annotated, Title 62, Title 68 or otherwise, including, but not limited, to the following:
 - 1. Restaurants
 - 2. Indoor swimming pools
 - 3. Food Service Establishments
 - 4. Hotels
 - 5. Bed and Breakfasts
 - 6. Fast Food Establishments

7. Primary Health Care Centers
8. County and District Health Departments
9. Tattoo and Body Piercing Parlors
10. Organized Camps

- (2) For enforcement purposes as to the establishments listed above that choose to be an “age-restricted venue”, and consistent with the liberal construction required pursuant to Section 3 of Chapter 410 of the Public Acts of 2007, the twenty one (21) years of age requirement contained in the definition of “age-restricted venue,” set forth in Section 1 of Chapter 410 of the Public Acts of 2007, is intended to apply also to employees of such venues.
- (3) To the extent that the Department of Labor and Workforce Development has concurrent jurisdiction over those enclosed public places identified above, all documentation of violations of the Act created or collected by that Department during its normal inspection or regulatory duties may be forwarded to the Department of Health for processing and disposition.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.03 Signage.

- (1) The “No Smoking” signs or the international “No Smoking” symbol required by Section 1 of Chapter 410 of the Public Acts of 2007 to be posted at every entrance to every public place and place of employment where smoking is prohibited shall be clearly and conspicuously placed at a height, location and in such a size as to be easily seen by a person with normal vision entering the establishment and shall not be obscured in any way.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.04 Violations.

- (1) During its routine inspections, investigations, surveys or other required regulatory activities in the enclosed public places under its jurisdiction or in response to complaints of violations of the Act occurring in any of those enclosed public places, the Department shall document and collect necessary information on any of the following listed violations of the Act:
 - (a) Any persons knowingly smoking in a place where it is prohibited; or
 - (b) Any owners, managers, operators or persons who otherwise control a public place who knowingly fail to do any of the following:
 1. Communicate the smoking prohibition to existing and prospective employees. For purposes of enforcement of this rule, the existence of a written policy, handout or statement for distribution to all employees and prospective employees or a sign posted in any area(s) necessarily frequented by all employees either or both of which communicates the smoking prohibition constitutes compliance; and/or
 2. Post no smoking sign or the universal no smoking symbol at every entrance to the public place as required by Section 1 of Chapter 410 of the Public Acts of 2007 and rule 1200-32-01-.03; and/or
 3. Either themselves or through their employees inform any person violating the Act of the appropriate provisions of the law.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.05 Complaints.

- (1) Any person wishing to file a complaint against any person or public place where smoking is prohibited for not complying with the provisions of this Act may do so in one of the following ways:
 - (a) By a telephone call to the Department; or
 - (b) By submitting a complaint via the Internet; or
 - (c) In writing to the Department.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.06 Penalties.

- (1) A person who knowingly smokes in an area where smoking is prohibited by the provisions of the Act shall be subject to a civil penalty of fifty dollars (\$50).
- (2) A person who owns, manages, operates or otherwise controls any public place where smoking is prohibited pursuant to the provisions of the Act and who knowingly fails to comply with any provision of the Act shall be subject to the following:
 - (a) For a first violation in any twelve-month period, a written warning from the Department, as appropriate;
 - (b) For a second violation in any twelve-month period, a civil penalty of one hundred dollars (\$100); and
 - (c) For a third or subsequent violation in any twelve-month period, a civil penalty of five hundred dollars (\$500).
- (3) Each day on which a knowing violation of the Act occurs shall be considered a separate and distinct violation.
- (4) The Department may, in those instances when a reported violation cannot be substantiated, issue advisory letters to the public place wherein the violation was alleged to have occurred.

Authority: 2007 Tenn. Public Acts, ch. 410.

1200-32-01-.07 Enforcement Process, Appeals and Payment of Penalties.

- (1) Upon receipt of verification of a violation of the Act the Department shall issue a written notice to the offender of the violation and the penalty applicable to the violation. The written notice may be issued by certified mail, delivery service, or personal service.
- (2) Any person receiving a notice of violation and penalty who wishes to contest the determination of the violation and/or the assessment of the penalty must, within ten (10) business days of receipt of the notice, file a written request for an appeal with the Department.

- (3) Any request for an appeal timely received by the Department shall be conducted pursuant to the provisions of the Uniform Administrative Procedures Act compiled at Tennessee Code Annotated, Title 4, Chapter 5 and the Administrative Procedures Division of the Secretary of State's rules governing contested case proceedings compiled at Chapter 1360-4-1.
 - (a) In contested cases pursuant to this rule, the Department shall have the burden of proof by a preponderance of the evidence to establish that a person violated the Act.
- (4) Civil Penalty Payments
 - (a) Any person who is assessed a civil penalty pursuant to the Act who does not timely file an appeal of that assessment must pay such civil penalty on or before the thirtieth (30th) day after receipt of the notice of violation and penalty.
 - (b) If the assessed civil penalty is timely appealed, the assessed penalty must be paid no later than thirty (30) days after the date of a final order affirming the assessed penalty.
 - (c) Payment of any civil penalty shall be made by check or money order made payable to "Treasurer, State of Tennessee" and mailed or delivered in person to the Department.

Authority: T.C.A. § 4-5-102(3), 68-1-103, 68-1-104 2007 Tenn. Public Acts, ch. 410; Tenn. Const. art. 1, § 8.

1200-32-01-.08 Copy Costs.

- (1) Information gathered under or generated pursuant to the Act or rules promulgated pursuant thereto shall, pursuant to the Public Records Act, be made available to any citizen of the State of Tennessee upon request and payment of a fee in the amount of twenty-five cents (\$0.25) per page.
- (2) Payment of fees set forth in this rule shall be by check or money order made payable to "Treasurer, State of Tennessee." Fees must be prepaid before requested information is sent. Payment of fees in cash shall not be accepted by the Department.

Authority: T.C.A. §§ 68-1-103, 10-7-503 and 10-7-506 and 2007 Tenn. Public Acts, ch. 410.

The public necessity rules set out herein were properly filed in the Department of State on the 28th day of September, 2007, and will become effective from the date of filing for a period of 165 days. These public necessity rules will remain in effect through the 11th day of March, 2008. (09-44-07; DBID 2966)