

Rulemaking Hearing 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 T.C.A. § 39-17-1801 *et seq.*

Authority: T.C.A. § 39-17-1811.

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 T.C.A. § 39-17-1812, the age requirement contained in the definition of “age-restricted venue,” set forth in T.C.A. § 39-17-1802(2), 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: T.C.A. §§ 39-17-1802, 39-17-1806 and 39-17-1811.

1200-32-01-.03 Signage.

- (1) The “No Smoking” signs or the international “No Smoking” symbol required by T.C.A. § 39-17-1805 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: T.C.A. §§ 39-17-1805 and 39-17-1811.

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 T.C.A. § 39-17-1805 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: T.C.A. §§ 39-17-1803, 39-17-1805, 39-17-1806 and 39-17-1811.

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: T.C.A. §§ 39-17-1806 and 39-17-1811.

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: T.C.A. §§ 39-17-1807 and 39-17-1811.

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 hearing held in response to a 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, Tenn. Const. Art. 1 § 8 and 39-17-1811.

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, 10-7-506 and 39-17-1811.

The rulemaking hearing rules set out herein were properly filed in the Department of State on the 27th day of December, 2007, and will become effective on the 11th day of March, 2008. (FS 12-33-07; DBID 2802)

ECONOMIC IMPACT STATEMENT

The Department applied the analysis required pursuant to T.C.A. § 4-5-402 and has also concluded that as to small businesses the proposed rules substantially meet all of the objectives not already contained in the Non-Smoker Protection Act. The Department has addressed the above referenced analysis in terms of the below listed specific issues applicable to the rules under consideration:

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, and/or directly benefit from the proposed rule:
These rules affect all small businesses employing one or more employee that conduct business in enclosed public places subject to exceptions. These rules do not impose any cost on small businesses that comply with the Non-Smoker Protection Act. They merely inform the business community and general public of the enforcement process under the Non-Smoker Protection Act.
To the extent that the requirement that “employees” of age-restricted venues, and not just patrons of those establishments, be twenty-one years of age or older might result in small businesses having to replace those employees under the age of twenty-one with those who meet the legal age requirements, they may have to pay a minimally higher wage for the older employees. This is not anticipated to involve any large numbers of existing employees.
To the extent that the Act requires the posting of the No Smoking sign or symbol and provides for penalties for non-compliance the cost to small businesses related to those provisions should be minimal, if any. No Smoking signs can be purchased at minimal cost or can be obtained for free at the State-sponsored Smoke-Free Tennessee website. The Act provides that a warning letter is issued first to a non-complying business prior to the imposition of a penalty. Accordingly, small businesses that comply with the law will never have a monetary penalty imposed on them.
- (2) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record;
These rules impose no reporting, recordkeeping and other administrative costs not already imposed by the Non-Smoker Protection Act.
- (3) A statement of the probable effect on impacted small businesses and consumers;
These rules affect all small businesses and consumers only to the extent that they provide necessary information for compliance with and enforcement of the Non-Smoker Protection Act.
- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and/or objectives of the proposed rule that may exist, and to what extent, such alternative means might be less burdensome to small business;
Of the various mechanisms and processes by which enforcement could be regulated under the Non-Smoker Protection Act these rules are the simplest and least burdensome alternatives that could be imposed considering the various other cumbersome formal due process mechanisms that might be required under the applicable provisions of both the United States and Tennessee Constitutions.
- (5) A comparison of the proposed rule with any federal or state counterparts;
The rules are less cumbersome than most other state rules (which have generally just copied verbatim from the enabling legislation) that govern similar subjects. There is no federal counterpart to these rules.
- (6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.
Exemption of small business from any or all of the provisions of these rules would make enforcement of the Non-Smoker Protection Act inapplicable to such businesses and would be counter to the intent of the Act itself.