

Developing Smokefree Implementation Regulations

Rulemaking resources for the public health community

Tobacco Control Network

Smoke-free Air Policy Implementation Teleconference Number 4

Wednesday, October 22, 2008

12:00 - 1:30pm; PT 3:00 - 4:30pm ET

Mark Pertschuk

Project Director

Developing Smokefree Implementation Regulations

A project of the

Tobacco Technical Assistance Consortium





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Welcome

Welcome to **Developing Smokefree Implementation Regulations** (DSIR). This website has background information, tools, and links to help draft and adopt effective smokefree implementation regulations. These materials were developed for state and local health departments, but are also intended for anyone working in tobacco control.

If you are already involved in tobacco control but are new to rulemaking, start with our [Introduction to Smokefree Rulemaking](#). If you are an attorney who is learning about tobacco policy, start with our [Background for Lawyers](#). [Timeline and Tools](#) places rulemaking in the context of smokefree implementation planning and the [Checklist](#) summarizes key steps in the rulemaking process. You will also find models and examples of effective [implementation language](#) covering the most common implementation issues facing health and enforcement agencies.

For help using this website, or technical assistance with smokefree rulemaking or implementation [click this link](#) to request TA or contact TTAC at (404) 712-8474 or ttac@sph.emory.edu.





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Timeline

The following is a suggested timeline for implementation planning, including developing effective rules, procedures, and forms. If you are new to implementation and rulemaking, start with our [Introduction to smokefree rulemaking](#) and [Implementation Fact Sheet](#), and keep in mind that each state has its own unique rulemaking requirements. As in the case of public education, it is best to plan as far ahead as possible for the rulemaking process.

As you begin to plan, consider what size budget will be available for implementation - there is a wide range from state to state (For implementation cost estimates, *see our [Cost Memo](#)*). While rulemaking itself is not expensive, it can require a small budget to hire an outside hearing officer or publish the notice of proposed rulemaking.

- [Three Months before the Effective Date](#)
- [One Month before the Effective Date](#)
- [Effective Date](#)
- [After the Effective Date](#)
- [One Year Anniversary](#)

A more detailed implementation timeline can be found [here](#).

Three Months Before the Effective Date *(or earlier, if possible)*

Research the rulemaking process in your state using our Checklist. [Click here](#) to request assistance with the rulemaking process, drafting and related issues.

- **Meet with legal staff.**

Contact the health department's legal staff (or the attorney general's office) to identify the state's legal requirements for rulemaking, such as where proposed rules must be published and what records must be kept. Use our [Background for lawyers](#) to educate legal staff about secondhand smoke and the history of tobacco policy.



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Rulemaking Toolkit Overview

Introduction to Smokefree Rulemaking

- ❖ Regulation and rulemaking
- ❖ Rulemaking authority
- ❖ Lessons from the field
- ❖ Case study – New Mexico

Implementation Language

- ❖ Models
- ❖ Examples

Athletic facilities, buffer zones, cigar bars, duties of proprietors, enclosed (defined), gaming facilities, health care facilities, outdoor areas, patios, place of employment, private clubs, retail tobacco stores, smoking (defined), and more to come...



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Implementation Language

Hundreds of cities, counties, and states have already implemented successful smokefree laws, and we can benefit from their experience by borrowing their legislative and regulatory language. While every state and community is unique, there are common implementation issues for which it is unnecessary to "reinvent the wheel."

The Developing Smokefree Implementation Regulations project has identified common implementation issues - for example, defining "enclosed" or the duties of proprietors - and collected **examples** of language from state and local smokefree laws that address these issues. We have also developed **model language** that draws both on these examples and other sources, such as Americans for Nonsmokers' Rights' widely-used Model Ordinance.

In the coming months, new examples and model language will be added to this section. **Help us** by submitting examples of language from your own laws or suggesting implementation issues that need to be addressed. *Contact TTAC at (404) 712-8474 or ttac@sph.emory.edu.*



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Rulemaking Toolkit, cont.

Background for Lawyers

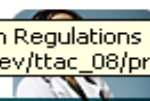
- ❖ **Health benefits**
- ❖ **Economic impact**
- ❖ **Legal Issues**

Timeline and Tools

- ❖ **Timeline**
- ❖ **Checklist [printable PDF]**
- ❖ **Templates – Notice of proposed rulemaking, press release, application and renewal forms**

Quicklinks

- ❖ **Terms**
- ❖ **Links**



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Rulemaking Authority

The first step in developing smokefree implementation regulations is determining whether or not an agency has the authority to develop such regulations. Rulemaking authority may be specific to a particular piece of legislation or general for the health department or other agency. For help making this determination, as well as identifying the relevant requirements for rulemaking in a specific state or community [request TA](#) or contact TTAC at (404) 712-8474 or ttac@sph.emory.edu.

Many state smokefree laws grant rulemaking authority in their statutory language. For example, the [New Jersey Smoke-free Air Act](#), adopted in 2006, states:

The Commissioner of Health and Senior Services, pursuant to the 'Administrative Procedure Act,' , shall adopt rules and regulations to effectuate the purposes of this act.

In other states, including New Mexico, the legislature has given the Secretary of Health the **general** authority to adopt needed regulations:

The secretary may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the department and its divisions. No rule promulgated by the director of any division in carrying out the functions and duties of the division shall be effective until approved by the secretary unless otherwise provided by statute. (Annotated Statutes of New Mexico, §9-7-6. Secretary; duties and general powers.)

A smaller number of states expressly *prohibit* the health department from adopting implementation regulations, as in the case of New York. The [New York Clean Indoor Air Act](#) states:

The commissioner shall not promulgate any rules or regulations to effectuate the provisions of [the Clean Indoor air Act]. The



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Rulemaking Authority

- ❖ **Specific authority:**

e.g., “The Secretary shall adopt rules and regulations to effectuate the purposes of this act.”

- ❖ **General authority:**

e.g., “The Secretary may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the department and its divisions.”

- ❖ **Even if a state or local agency lacks “formal” rulemaking authority, the agency usually has the authority to develop *informal policies* or procedures, including forms, implementation guidance or guidelines, and procedures for sharing data between agencies.**

- ❖ ***Local/legislative* and rulemaking authority.**

- ❖ **DSIR can help research rulemaking authority and identify the requirements for rulemaking in a specific state or community.**

Case Study: New Mexico Rulemaking

❖ **March 2007: The smokefree law passes**

- **Dee Johnson Clean Indoor Air Act eliminates smoking in workplaces, restaurants, and bars, but exempts “cigar bars” – effective June 15, 2007**

❖ **April-December, 2007: To be or not to be...a “cigar bar”**

- **By the end of the year, it was evident that a handful of ordinary bars would seek to use the exemption**

❖ **January – April, 2008: New Mexico’s rulemaking process**

- **Seeing need for greater detail and fair procedures, the Health Department begins the rulemaking process**

❖ **April – May, 2008: Public hearing and final rule**

- **March 13 – Notice of Public Hearing**
- **April 30 – Public hearing**
- **May 13 – Secretary signs final rule**
- **May 30 – Effective date, Cigar Bar Rule**



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Case Study - New Mexico

The following is a recent example of a state rulemaking process to flesh out the implementation provisions of a statewide smokefree law – in this case, the “cigar bar” exemption in New Mexico’s 2007 smokefree law. Some of the other issues that have been addressed through rulemaking include the duties of business proprietors, private club exemptions, outside seating areas, retail tobacco stores, gaming facilities, and various definitions.

Many thanks to Larry Elmore, Program Director of New Mexico’s Tobacco Use Prevention and Control Program, and Chris D. Woodward, Assistant General Counsel for the New Mexico Department of Health, for generously sharing their knowledge and expertise.

- [March 2007: The smokefree law passes](#)
- [April – December, 2007: To be or not to be... a “cigar bar”](#)
- [January – April, 2008: New Mexico’s rulemaking process](#)
- [April – May, 2008: Public hearing and final rule](#)

March 2007: The smokefree law passes

On March 12, 2007, New Mexico’s governor signed the Dee Johnson Clean Indoor Air Act, named for a respected former State First Lady who had been an outspoken champion for public health and who was largely responsible for the state capitol becoming smokefree in 2002. New Mexico’s Clean Indoor Air Act eliminated smoking in workplaces, restaurants, and bars, but exempted “cigar bars,” defined in the new law as:

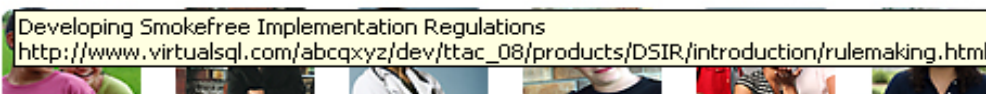
“[a bar that] is engaged in the business of selling cigars for consumption by patrons on the premises and generates ten percent or more of its total annual gross revenue or at least ten thousand dollars (\$10,000) in annual sales from the sale of cigars, not including any sales from vending machines. A cigar bar that fails to generate at least ten percent of its total annual sales from the sale of cigars in the calendar year after December 31, 2006, not including sales from vending machines, shall not be defined as a cigar bar and shall



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Rulemaking Resources

- **Peer technical assistance:** Start with the LINKS page on DSIR website. The Tobacco Control Network (TCN) can also help provide implementation technical assistance from peers and experts.
- As part of the **Developing Smokefree Implementation Regulations** project, **TTAC** provides technical assistance to state and local health departments on all aspects of smokefree regulation and rulemaking.
- The **Tobacco Control Legal Consortium** provides technical assistance on legal issues, including rulemaking, to the tobacco control field.
- **Americans for Nonsmokers' Rights** (510-841-3032, www.no-smoke.org) provides comprehensive technical assistance on smokefree policy, including implementation.



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National Resources

[Americans for Nonsmokers' Rights](#)

[Campaign for Tobacco-Free Kids](#)

Special expertise on public relations and evaluation.

[Centers for Disease Control and Prevention,](#)

Office on Smoking and Health offers an up-to-date, comprehensive toolkit for [evaluating smokefree policies](#).

[KIISS](#)

Kids Involuntarily Inhaling Secondhand Smoke provides special expertise in smokefree restaurants and bars.

[Smokefree Implementation Handbook for restaurants and bars](#)

[North American Quitline Consortium](#)

Provides an online Policy Playbook for integrating cessation into smokefree implementation.



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Over the coming months, new examples and model language will be added. Help us by submitting examples of language from your own laws or suggesting implementation issues that need to be addressed.

Thank you!

**Brleon Arthur
Marla Azzarelli
Stephen Babb
Ursula Bauer
Diane H. Beeson
Doug Blanke
Nicole Truax Chacon
Larry Elmore
Bronson Frick
Phyllis M. Gingliss
Frieda Glantz
Stan Glantz**

**Cynthia Hallett
Robin Hobart
Andrew Hyland
Ed Kazimir
Randi Lachter
Michelle Larkin
Linda Lee
Allison Leppke
Rachel Lawley
Maggie Mahoney**

**Virtual Magic
Deb Montgomery
Jennifer Poltli
Terry Reid
Ashley Ross
Robin Salsburg
Allison Sipler
Madeleine Solomon
Annie Tegen
Lou M. Valcarcel
Chris D. Woodward
Leslie Zellers**

**Mark Pertschuk
(510) 548-4053
m.pertschuk@yahoo.com**