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"Hardship" Exceptions to Smoking Ordinances

The states of California, Connecticut, Delaware, Florida, Maine, New York, and Utah prohibit smoking in restaurants. Literally hundreds of cities and counties have adopted similar laws. In each of these cases, restaurant owners have sought exemptions on the basis that the laws would cause them severe hardship. Public health advocates familiar with these experiences are consistent in counseling against the use of a so-called "hardship" exemption. The American Nonsmokers' Rights Foundation, American Cancer Society, American Heart Association, American Lung Association, Campaign for Tobacco Free Kids and SmokeLess States National Tobacco Policy Initiative, for example, all urge lawmakers to "avoid hardship exemptions," stating that "[h]ardship exemptions are not recommended because they weaken an ordinance and are based on the false premise that negative economic impact results from clean indoor air ordinances." "Fundamentals of Clean Indoor Air Policy," April 2002, http://www.no-smoke.org/CIA_Fundamentals.pdf.

Although lawmakers may conclude that a hardship exemption is politically necessary, the courts have not ruled that such a provision is legally required. Businesses affected by smoking prohibitions have sometimes argued that the laws had the effect of "taking" their property without reasonable compensation, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. Courts have generally rejected these arguments, and usually hold that business regulations do not "take" a business owner's property unless they deprive the owner of every possible economic use of the property, something that no smoking ordinance does.

Potential Problems With Hardship Exemptions

Hardship provisions can raise three types of problems:

- **Inequities.** The more exemptions a law allows, the more uneven the playing field it creates. For every opponent who is granted an exemption, several others -- usually

competitors -- feel aggrieved because they are denied similar exemptions. This gives rise to arguments that a law denies them the equal protection of the law, an argument that is seldom successful, but that increases the potential for litigation. And of course, each exemption weakens the law's ability to protect workers and customers from exposure to toxic smoke.

- **Delay and confusion.** Hardship provisions necessarily add a long "tail" to the implementation process, and add to uncertainty about the implementation. Businesses are allowed a period of time to determine whether they have suffered the necessary hardship. They then go through a process of applying for and documenting the hardship. They then are granted exemptions which last for a prescribed period of time. Depending on the law's provisions, they may be allowed to seek renewal or extension of their exception. All of this adds to confusion about what the law requires or doesn't require, who is affected, and what the rules are.
- **Enforceability.** Hardship exemptions are meant to apply only to those businesses that have been genuinely and seriously affected by an ordinance. In practice, this is easily abused, and it is quite difficult to distinguish between those businesses that the provision was meant to reach and others that seek to blame the ordinance for any downturn in their revenues.

If Smoking Sections Are Allowed, Is A Hardship Exemption Pointless?

In addition to the concerns addressed above, options under consideration in Moorhead include the possibility that smoking areas may be permitted to continue. If restaurant owners are allowed the option of creating separate smoking rooms for diners or bar patrons, then the rationale for a hardship exception would seem to evaporate. Presumably, the reason for allowing the continued existence of smoking areas, and the reason a business would create them, would be to retain those customers who wish to smoke while eating or drinking. If this is allowed, does any justification remain for allowing the business an exemption from the law?

Issues to Consider In Drafting A Hardship Exemption

If policymakers choose to create a hardship exemption, it is very important to draft the provision carefully, to minimize unintended problems. Here is a checklist of issues to consider:

- **Is the Exemption Consistent With The Law's Purpose?** Any exemption provision should specify clearly that exemptions will only be allowed where they are consistent with the general purpose of the law. This is very important. Exemptions should not undermine the effect of the law, and any exemptions should include conditions and restrictions to minimize the harm to health. The smoke-free law adopted by the State of New York includes this requirement. The New York law provides:

Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose of this article.

Under this approach, any exemption would be conditioned on the business implementing alternative measures to minimize the exposure of workers and customers to toxic smoke..

- ❑ **What Type of "Hardship?"** Most often, communities that have allowed an exception have measured a "hardship" by the law's impact on a business's revenues. This is very different from the "hardship" variances allowed in many other ordinances. A good example is the smoke-free ordinance in Olmsted County, Minnesota, (Rochester). There, businesses seeking a variance must apply under the county's general ordinance for variance from environmental laws. A variance is permitted only if "characteristics of an individual property" make strict compliance "difficult, unreasonably expensive, or impractical." As the county attorney has explained, this does not allow an exemption based on a loss of revenues. Instead, the only type of "hardship" recognized is one where the physical characteristics of a particular property make compliance burdensome -- for example, a situation where the floor plan or structure of a business made it impractical to remodel. In such cases, the county would fashion an alternative approach to achieve the law's purpose. This approach protects any businesses that suffer a unique burden under the law, without undermining the law's general effectiveness.
- ❑ **Actual Hardship or Predicted Hardship?** It is critical that any exemptions be allowed only on the basis of the actual experience of the business, and not on the owner's speculation or projections about the future. Every one of the hundreds of communities that have been through this process has heard from frightened or angry business owners certain a smoke-free law would have cataclysmic consequences, only to see those predictions prove wrong. Any exemptions should be based on hard evidence, not hand-wringing.
- ❑ **How Big A Drop in Revenues?** If hardship is to be determined by a business's revenues, how big a decline is enough for an exemption? Ordinances in some cities, including La Crosse, Wisconsin, and Mesa and Tucson, Arizona, have used a fifteen percent decline in revenues as a trigger for such a provision. Tempe, Arizona, had a similar fifteen percent provision until it was repealed by the voters in a ballot initiative. Is this figure too low? This is a judgment call. What seems clear is that any figure selected should be high enough to select only businesses that are truly harmed by the law, and not those whose revenues declined for other reasons. Restaurants are notoriously high-risk businesses. Revenues go up, and they go down. Many new restaurants never become profitable. Any hardship provision needs to set the bar high enough that it does not treat ordinary revenue swings as ordinance-related "hardships."
- ❑ **Documentation.** An applicant's claims about business revenues should be based on hard documentation. In Erie County, New York, this must include three years of monthly sales receipt information, as submitted to state tax officials; documentation of all beer and liquor purchases for the same period, with supporting invoices; and data on staff salaries. The

enforcing authority should retain the ability to inspect the underlying books and documentation as necessary to verify any claims made.

- ❑ **Is A Decline In Revenues Really Due to The Law?** Perhaps the "single most critical requirement" in drafting a hardship provision is to ensure that "the hardship claimed was caused by the smokefree ordinance and not attributable to poor business practices, seasonal fluctuations in retail business, or a broad downward trend in the retail sector." American Nonsmokers' Rights Foundation, *et al.*, "Fundamentals of Clean Indoor Air Policy," April 2002, http://www.no-smoke.org/CIA_Fundamentals.pdf. A restaurant's loss of revenue could be due to random fluctuations; changes in the restaurant's menu, prices or facilities; construction in the neighborhood; competition from other restaurants; a harsh winter; a general recession; or any of a hundred other factors. A timely example in Minnesota might be the proposed reduction of the legal blood alcohol concentration limit, an unrelated measure that restaurants say may hurt revenues. If this proposal becomes law during the period when a smokefree ordinance is introduced, will restaurants be granted exemptions based on revenue losses actually attributable to the new drinking law? This issue is best addressed by including a provision in any hardship exemption provision specifying that an applicant must bear the burden of proving that any revenue loss was in fact caused by the law. The law should use of an application process that collects information about other possible explanations for the decline. Sample application forms from Erie County, New York, for use in implementing the New York State law, provide a good model. In addition, the Tucson, Arizona, ordinance requires an applicant to describe all efforts he or she has made or could reasonably make to operate the business successfully without allowing smoking.
- ❑ **Are Exemptions Available Only During the Phase-in Period, or An Ongoing Basis?** If hardship exemptions are allowed at all, they should be allowed only on a one-time basis, to help the community transition toward a smoke-free norm. Applicants should be allowed a single window of no more than three to six months to apply for a waiver. To allow "rolling" applications, or to allow applications on a continuing basis, would invite administrative nightmares. It would also guarantee that the playing field would never be leveled for competing businesses, and would ensure continuing public confusion about which establishments were subject to which rules.
- ❑ **How Long Does An Exemption Last?** A hardship exemption should have a reasonable "sunset," or expiration date. Some communities use a period of one year. Experience shows that any negative impact on revenues is greatest in the first few months. This stands to reason, based on surveys indicating that many non-smokers will dine out more frequently after smoke is eliminated from restaurants: there may well be a transition period as these new customers change their habits. Allowing an exemption to continue for too long will result in anachronisms and inconsistencies. As the evidence on which the exemption was awarded -- the business's revenues during a brief window of time -- becomes increasingly distant in time, the justification for special treatment becomes more and more tenuous, and harder to justify to competing businesses who must comply.

- **Compliance Issues.** Applicants for hardship exemptions should be held to requirements that guard against abuse of the waiver process, whether for purposes of delay or as part of an attempt to avoid compliance. These provisions ensure that an exemption applicant is acting in good faith and is otherwise attempting to comply with the law. Among the specific safeguards specified in various communities are: (1) a provision that exemptions are not transferable; (2) a provision that exemptions will not be granted to businesses that violate the state clean indoor air act while applying for a local exemption; (3) a provision that failure to follow through on the application, by submitting timely filings, or otherwise, will result in denial of the application; and (4) a provision allowing the city to inspect the premises at any time.

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