

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health pursuant to the authority set forth in § 6(c) of the District of Columbia Smoking Restriction Act of 1979, effective September 28, 1979 (D.C. Law 3-22; D.C. Official Code, § 7-1705(c) (2001)), § 4921 of the Department of Health Functions Clarification Act of 2001, effective October 3, 2001 (D.C. Law 14-28; D.C. Official Code § 7-747(2006 Supp.)), and Mayor's Order 2007-63, dated March 8, 2007, hereby gives notice of the adoption of the following amendments, on an emergency basis, to Title 20, Chapter 21 of the District of Columbia Municipal Regulations, (DCMR). The Director also gives notice of his intent to take final rulemaking action to adopt the amendments in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

These Emergency Rules were adopted on April 10, 2007, become effective on April 17, 2007, and shall expire on August 8, 2007. These Emergency Rules shall supersede the existing emergency rules which were adopted on March 22, 2007, became effective on April 5, 2007, and would expire on July 20, 2007, unless superseded as shown by the Notice of Proposed and Emergency Rulemaking published on April 6, 2007 at 54 DCR 3084. Additionally, the Director's notice of intent to take final rulemaking action supersedes the proposed permanent rulemaking published on April 6, 2007. These emergency and proposed rules differ from the emergency and proposed rules published on April 6, 2007, by adding rules for obtaining an economic hardship waiver and making further clarifications and corrections. The emergency and proposed rules will prevent a gap in regulation and enforcement that would otherwise result from a lack of comprehensive rules to implement a smoking ban with limited exemptions. The specific differences between this rulemaking and the rulemaking published on April 6, 2007 are the: (1) substitution of the word "review" for the word "audit" in subsection 2105.5; (2) switch from "all" criteria to "one or more" criteria in subsection 2106.1(d); (3) substitution of "place of employment" and "public space" for "tobacco bar" and "retail store" in subsection 2106.7; and (4) inclusion of a definition of the term "review" in subsection 2199.

The proposed amendments would regulate smoking in places of employment and public places, specify the requirements for eligibility for exemptions or waivers from the prohibition of smoking in public places and places of employment, and harmonize existing smoking rules with the requirements for signage under the Department of Health Functions Clarification Amendment Act of 2006, effective April 4, 2006 (D.C. Law 16-90; D.C. Official Code § 7-741 *et seq.* (2006 Supp.)).

Pursuant to § 4921 of the Department of Health Functions Clarification Act of 2001, the proposed rules are being transmitted to the Council of the District of Columbia, and the proposed rules will not become effective until the expiration of the sixty (60) day period of Council review or upon approval by Council resolution, whichever occurs first, and

publication of a notice of final rulemaking in the *D.C. Register*. Publication of a Notice of Final Rulemaking before the expiration of the emergency rule shall supersede the emergency rule.

Title 20 DCMR (Environment) (February 1997) is amended to read as follows:

2100 PURPOSE AND GENERAL PROVISIONS

- 2100.1 The purpose of this chapter is to regulate tobacco sales and smoking, as required by the District of Columbia Smoking Restriction Act of 1979, as amended, and the Department of Health Functions Clarification Act of 2001, as amended, (the "Acts").
- 2100.2 This chapter shall apply to all public places and places of employment and, as of 12:01 A.M. on January 2, 2007, the following:
- (a) A brew pub;
 - (b) A club;
 - (c) A nightclub;
 - (d) A tavern; and
 - (e) The bar and bar area of a restaurant.

2101 PLACE OF EMPLOYMENT AND PUBLIC PLACE SMOKING POLICY

- 2101.1 Each place of employment and public place shall adopt a smoking policy that is consistent with the requirements of the Acts and this chapter.
- 2101.2 An employer shall notify each employee, both orally and in writing, of the smoking policy for the place of employment.
- 2101.3 The employer's smoking policy shall apply to each person in the workplace, including a visitor.
- 2101.4 An employer shall post the written smoking policy in the place of employment in the same place as the Worker's Compensation notice or any similar employee notice.
- 2101.5 An employer shall prohibit smoking in the enclosed area of a place of employment, except as provided in § 2105.

- 2101.6 An employer may permit smoking in an outdoor area under his or her control, subject to the terms and conditions of any lease or contract between the owner and the tenant.
- 2101.7 When an employer of an establishment that is a restaurant, tavern, club, brew pub, or nightclub permits smoking in an outdoor area, the employer shall ensure that no area designated for smoking encompasses an area where smoking is prohibited.

2101.8 **Repealed.**

2102 VENTILATION OF SMOKING AREA IN THE WORKPLACE

- 2102.1 For the purpose of applying the Acts to designated smoking areas permitted because the employer is exempt under D.C. Official Code § 7-743 or has obtained an economic hardship waiver under D.C. Official Code § 7-745, all buildings constructed before August 3, 1991, shall be deemed to be in compliance with the ventilation requirements of the District of Columbia Construction Codes, unless the building has undergone a renovation since August 3, 1991, that required a building permit.

2103 POSTING OF SIGNS IN PLACES OF EMPLOYMENT AND PUBLIC PLACES

- 2103.1 The requirements of this section shall supplement the requirements for the posting of warning signs pursuant to DCMR Title 12D, Fire Prevention Code Supplement, and the BOCA National Fire Prevention Code.
- 2103.2 When smoking is prohibited in a building by the building owner, the owner or the owner's agent shall conspicuously post signs that include the internationally recognized symbol for no smoking and read as follows:



“NO SMOKING UNDER PENALTY OF LAW. MAXIMUM FINE ONE THOUSAND DOLLARS (\$1,000).”

- 2103.3 When posting signs pursuant to §2103.2, the building owner, or the owner's agent, shall conspicuously post signs at the entrance of the building, inside each elevator, and inside the building in sufficient number to give notice to the public of the law.
- 2103.4 If a building owner does not prohibit smoking and a tenant of the building owner permits smoking because it is exempt under D.C. Official Code § 7-743 or has obtained an economic hardship waiver under D.C. Official Code § 7-745, the owner or the owner's agent shall conspicuously post

signs that include the internationally recognized smoking symbol and read as follows:



“NO SMOKING EXCEPT IN SMOKING AREAS. MAXIMUM FINE ONE THOUSAND DOLLARS (\$1,000)”.

2103.5 When posting a sign pursuant to §2103.4 the building owner, or the owner’s agent, shall conspicuously post signs at the entrance to the building, inside each elevator, and inside the building in sufficient number to notice to the public of the law.

2103.6 An employer shall conspicuously post one of the following signs in a place of employment:

- (a) If the employer is not exempt under D.C. Official Code § 7-743 or has not obtained an economic hardship waiver under D.C. Official Code § 7-745, the employer shall conspicuously post signs that include the internationally recognized no-smoking symbol and read as follows:



“NO SMOKING UNDER PENALTY OF LAW. MAXIMUM FINE ONE THOUSAND DOLLARS (\$1,000).”; or

- (b) If the employer is exempt under D.C. Official Code § 7-743 or has obtained an economic hardship waiver under D.C. Official Code § 7-745, the employer shall conspicuously post signs that include the internationally recognized smoking symbol and read as follows:



“NO SMOKING EXCEPT IN SMOKING AREAS. MAXIMUM FINE ONE THOUSAND DOLLARS (\$1,000).”.

2103.7 The internationally recognized smoking and no-smoking symbols required for each of the signs described in this section shall be in a typeface that is at least as large as the largest lettering on the sign.

2103.8 The employer shall post the signs required by §2103.6 in the following places that are open to or used by employees or the public:

- (a) At an entrance to the place of employment; and

- (b) On the interior of any non-smoking area so that they are visible to employees and the public.

2103.9 If the employer is exempt under D.C. Official Code § 7-743 or has obtained an economic hardship waiver under D.C. Official Code § 7-745, the employer shall conspicuously post in a designated smoking area a sign that states, in letters not less than three-quarters of an inch (3/4 in.) in height, the following:

“SMOKING IN ACCORDANCE WITH EMPLOYER’S SMOKING POLICY ONLY, SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY CAUSE FETAL INJURY, PREMATURE BIRTH, AND LOW BIRTH WEIGHT IN PREGNANT WOMEN. MAXIMUM FINE ONE THOUSAND DOLLARS (\$1,000).”

2104 PLACES LICENSED TO SELL TOBACCO PRODUCTS

2104.1 It shall be unlawful for any person to sell, give, or furnish any tobacco products to any person younger than eighteen (18) years of age.

2104.2 Any person who sells any cigarette or other tobacco product who has reasonable cause to believe that a person who attempts to purchase the product is under twenty-five (25) years of age shall require that the purchaser present identification that indicates his or her age.

2104.3 The owner, manager, or other person in charge of any business licensed to sell cigarettes or any tobacco product under D.C. Official Code §47-2404 (2001), shall conspicuously post signs that state, in letters not less than three-quarters of an inch (3/4 in.) in height, the following:

“NO PERSONS UNDER EIGHTEEN (18) YEARS OF AGE SHALL PURCHASE ANY CIGARETTE OR OTHER TOBACCO PRODUCT. THE UNITED STATES SURGEON GENERAL HAS ISSUED A WARNING THAT SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY. MAXIMUM CRIMINAL FINE ONE THOUSAND DOLLARS (\$1,000) AND NINETY (90) DAYS IN JAIL.”

2104.4 The owner, manager, or person in charge shall post the sign required by §2104.3 at the entrance to the business and on the interior of the business near all points of purchase.

2105 EXEMPTIONS

- 2105.1 The following places shall be exempt from § 2101.5:
- (a) A retail store that has as its primary source of revenue the sale of tobacco products and smoking accessories, provided that:
 - (1) No more than twenty-five percent (25%) of the revenue the store generates is from non-tobacco products; and
 - (2) The store does not share space with any other establishment;
 - (b) A tobacco bar;
 - (c) An outdoor area of the following:
 - (1) A restaurant;
 - (2) A tavern;
 - (3) A club;
 - (4) A brew pub; or
 - (5) A nightclub;
 - (d) A hotel room or motel room rented to one or more guests;
 - (e) A medical treatment, research, or nonprofit institution where the activity of smoking is conducted for the purpose of medical research or is an integral part of a smoking cessation program; and
 - (f) Upon the stage of a theatrical performance, provided that smoking is part of the theatrical production.
- 2105.2 A place shall not be exempt under § 2505.1(a), (b), or (e) until it establishes, to the satisfaction of the Director, that it satisfies the revenue requirements to qualify for the exemption or is engaged in an activity that qualifies the place for an exemption. Revenue claimed for this exemption shall be exclusive and distinct and not bundled with some other service, such as a membership fee, or an entry fee, or a non-tobacco product, such as a food item or an alcoholic drink.
- 2105.3 A place first applying for an exemption under § 2105.2 may receive a conditional certificate of exemption, valid for not longer than ninety (90) days, while its application is pending. To qualify for a conditional certificate of exemption the applicant shall:

- (a) Submit a statement that asserts, under penalty of perjury, that it satisfies the revenue requirements or is engaged in an activity that qualifies it for an exemption; and
- (b) Promptly supply documentation to support its application and respond to requests for additional information during the period of the conditional certificate.

2105.4 The Director shall deny an application for exemption if the applicant fails to comply with the requirements of § 2105.3. After reviewing the applicant's documentation in support of an application for exemption, the Director shall make a determination, in writing, whether the applicant qualifies for an exemption. If the Director fails to make a determination within ninety (90) days and the applicant has complied with requests for information, the Director shall extend the validity of the conditional certificate for additional thirty (30)-day increments until the Director makes a final determination.

2105.5 If the Director determines that a place qualifies for an exemption after a review of the place's financial records, the Director shall issue a certificate of exemption to that place. The certificate issued under this subsection shall be valid for not longer than three (3) years and shall not be transferable to another location or another owner.

2105.6 The Director may perform an annual audit of the financial records of a place that holds a certificate of exemption. If, after an audit, the Director determines that a place does not satisfy the requirements for an exemption, the Director shall revoke the certificate of exemption. The Director may revoke the certificate of exemption if the tobacco bar or retail store fails to provide documentation to show that it continues to satisfy the revenue requirements for the exemption.

2106 ECONOMIC HARDSHIP WAIVER.

2106.1 The Director may, after May 1, 2007, grant a place of employment or a public place an economic hardship waiver from the requirements of this chapter provided that:

- (a) The place of employment or public place was in existence on or before January 1, 2007;
- (b) The place of employment or public place has not been found liable for two (2) or more notices of violation for violations of the Acts or this chapter during the previous one (1) year;

- (c) The place of employment or public place demonstrates undue financial hardship by one of the following:
- (1) By showing a reduction in sales tax for food and beverages of fifteen percent (15%) or more for three (3) consecutive months after January 1, 2007, as compared to the same three (3) month period during the previous two (2) years before January 1, 2007;
 - (2) If the place of employment or public place has not operated for a period of two (2) years before January 1, 2007, by showing a reduction in sales tax for food and beverages of fifteen percent (15%) or more for a period of three (3) consecutive months during which the place of employment or public place has operated smoke-free, as compared to the three (3) month period immediately preceding January 1, 2007; and
- (d) The place of employment or public place demonstrates one or more of the following:
- (1) Sales revenues that fail to reach reasonably expected or anticipated levels for three (3) consecutive months after January 1, 2007 as compared to the same three (3) month period during the previous two (2) years before January 1, 2007;
 - (2) Significantly reduced staffing levels for three (3) consecutive months after January 1, 2007, as compared to the same three (3) month period during the previous two (2) years before January 1, 2007;
 - (3) Significantly reduced food and materials purchases for three (3) consecutive months after January 1, 2007, as compared to the same three (3) month period during the previous two (2) years before January 1, 2007; or
 - (4) Significantly reduced alcohol sales for three (3) consecutive months after January 1, 2007, as compared to the same three (3) month period during the previous two (2) years before January 1, 2007.

2106.2

To receive an economic hardship waiver a place of employment or a public place shall submit an economic hardship waiver application to the Director. In not more than ten (10) business days the Director shall return

an incomplete application and inform the applicant of the information necessary to complete the application.

2106.3 The Director shall make a final determination regarding the application, in writing, not later than sixty (60) days after receiving an application. The decision shall state the reasons for granting or denying the application.

2106.4 An application for an economic hardship waiver shall include the following information:

- (a) The specific provision from which a place of employment or public place is seeking a waiver;
- (b) A description of the efforts the place of employment or public place has made to operate profitably while smoke-free;
- (c) Exact copies of District sales tax statements for each three (3) month period used to demonstrate a reduction in sales tax receipts;
- (d) Evidence that demonstrates that the place of employment or public place incurred a reduction in revenue because of eliminating smoking instead of other factors including evidence that the place of employment or public place:
 - (1) Operated during the same number of hours;
 - (2) Was open the same number of days;
 - (3) Was open on the same high business days;
 - (4) Sold food and beverages from a menu similar in selection and cost;
 - (5) Maintained the same management and staffing strategy;
 - (6) Did not fail to respond to new competitors who entered the market; and
 - (7) Maintained a similar or enhanced marketing strategy; and
- (e) A description of the actions the place of employment or public place plans to take to minimize the effects of smoking on non-smoking patrons or visitors as a result of a waiver.

2106.5 If the Director grants a waiver under this section the Director shall require that the area where smoking is permitted shall not exceed twenty-five

percent (25%) of the total area if the place of employment or public place is a restaurant. The Director may require additional conditions or restrictions that may be necessary to minimize the adverse effects of smoking consistent with the general purpose of D.C. Official Code § 7-741 *et seq.* including the following:

- (a) Prohibiting smoking near restrooms or commonly used pathways and entrances;
- (b) Requiring physical barriers or ventilation systems, or both, between smoking and non-smoking areas;
- (c) Requiring additional or differently sized signs to designate smoking and non-smoking areas; and
- (d) Taking additional measures to minimize employee exposure to secondhand smoke.

2106.6 The Director may grant a waiver for a period not to exceed three (3) years. The waiver shall be:

- (a) For a specific location and not transferable;
- (b) For a specific applicant and not transferable to a new owner; and
- (c) Nonrenewable.

2106.7 Each place of employment and public space **that** holds an economic hardship waiver shall provide to the Director every twelve (12) months from the date of the waiver documentation that it continues to satisfy the minimum revenue requirements to maintain the waiver. The Director may revoke the waiver if the place or employment or public space fails to provide documentation to show that it continues to satisfy the revenue requirements for the waiver.

Comment [PLH1]: Using "place and employment or public space" as that phrase is used as describing who can apply for economic hardship waiver.

2106.8 The Director shall conduct periodic inspections to ensure that the holder of a waiver complies with the requirements of this section or any conditions or restrictions contained in the waiver.

2106.9 The Director may suspend or revoke a waiver upon finding that the holder of a waiver has violated a condition or restriction or has failed to comply with the requirements of this chapter or the Acts that have not been waived.

2106.10 The Director may also grant an event-specific waiver based on economic hardship to a hotel, motel, or convention hall for an event that was

scheduled before April 4, 2006. To qualify for an event-specific waiver a hotel, motel, or convention hall shall provide proof to the Director that it entered into a contract or other binding agreement on or before April 4, 2006, for an event scheduled to take place after January 1, 2007. An event shall not be eligible for an event-specific waiver unless it takes place in enclosed area that is separate from other areas accessible to the general public. The Director shall require additional conditions or restrictions that may be necessary to minimize the adverse effects of smoking.

2107 DISTRIBUTION OF FREE CIGARETTES

2107.1 No person, agent, or employee of any person shall, in the course of doing business, distribute any free cigarettes or other tobacco products to any person on any public street, public sidewalk, public park, playground, in a public building, other public property, or private property open to the public.

2107.2 A person may distribute free cigarettes or other tobacco products only under the following circumstances:

- (a) At a tobacco store to persons eighteen (18) years of age or older,
- (b) At a convention to persons eighteen (18) years of age or older, or
- (c) At a conference catering to persons eighteen (18) years of age or older.

2108 PENALTIES AND FINES

2108.1 Any person who fails to comply with any of the applicable provisions of this chapter shall, upon conviction, be punished as follows:

- (a) Any person smoking in a posted "NO SMOKING" area, disfiguring or removing a "NO SMOKING" sign, or failing to post warning signs as set forth in this Chapter shall, upon conviction, be punishable by a fine of not less than one hundred dollars (\$100) nor more than one thousand (\$1,000) for a first offense; and not less than two hundred dollars (\$200) nor a more than one thousand dollars (\$1,000) for each subsequent offense;
- (b) Each person found covering, removing, disfiguring, or otherwise destroying any sign posted under the provisions of this Chapter shall, upon conviction, be fined five hundred dollars (\$500).
- (c) Each person who fails to post or maintain "No Smoking" signs as required by this chapter shall be punished by a fine not to exceed

five hundred dollars (\$500). Each day that the violation continues shall constitute a separate offense and the penalties provided in this paragraph shall be applicable to each offense.

- (d) Each person who fails to warn a smoker observed to be smoking in violation of the Acts and as required by this chapter, shall be punished by a fine not to exceed five hundred dollars (\$500). Each day that the violation continues shall constitute a separate offense and the penalties provided in this paragraph shall be applicable to each offense.

- 2108.2 Hearings or adjudication of violations under this chapter shall be conducted pursuant to D.C. Official Code § 2-1801.01 *et seq.*, (2001).
- 2108.3 Pursuant to D.C. Official Code § 22-1320(c), any person licensed to sell tobacco products who violates § 2104.1 or 2104.2 of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars (\$500) or less than one hundred dollars (\$100), or imprisoned not more than thirty (30) days, or both, for the first offense.
- 2108.4 Pursuant to D.C. Official Code § 22-1320(c), any person who commits a subsequent violation of §2104.1 or 2104.2 shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one thousand dollars (\$1,000) or less than five hundred dollars (\$500), or imprisoned not more than ninety (90) days, or both.
- 2108.5 Pursuant to D.C. Official Code § 7-1731(b), any person who violates §2107.1 of this chapter shall, upon conviction, be fined not less than two hundred fifty dollars (\$250) for each violation.

2199 DEFINITIONS

Acts – D.C. Law 3-22, the District of Columbia Smoking Restriction Act of 1979 (D.C. Official Code § 7-1701 *et seq.*) and D.C. Law 16-90, the Department of Health Functions Clarification Amendment Act of 2006 (D.C. Official Code § 7-741 *et seq.*).

Bar area of a restaurant—the area immediately adjacent to the bar in a restaurant where there are no dining tables or that is primarily the area where persons of legal drinking age consume alcoholic beverages purchased at the bar.

Director—the Director of the Department of Health.

Employee—the license holder, person in charge, person having supervisory or management duties, person on the payroll, volunteer, or

person performing work under contractual agreement at a place of employment.

Enclosed area – the space between a floor and ceiling that is enclosed on all sides by solid walls, windows, or doors, exclusive of doorways, that extend from the floor to the ceiling, regardless of whether windows or doors are open.

Existing building—a building that was built, under construction, or had a building permit issued on or before August 3, 1991.

Place of employment—an enclosed area under the control of a public or private employer that employees normally frequent during the course of employment, including work areas, employee lounges, restrooms, conference rooms, classrooms, employee cafeterias, hallways, and vehicles owned by a private employer, if the vehicle is used by more than one person. This term does not apply to a private residence unless it is used as a child development center, adult day care facility, or health care facility.

Public place—an enclosed area to which the public is invited or in which the public is permitted, including banks, educational facilities, health care facilities, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, nightclubs, retail service establishments, retail stores, shopping malls, sports arenas, taverns, theaters, and waiting rooms. This term does not apply to a private residence unless it is used as a child development center, adult day care facility, or health care facility.

Review—a critical evaluation, examination or study on a retrospective basis that may or may not include a formal examination of accounting records with applicable audit standards.

Smoking—the act of burning a cigar, cigarette, pipe, or any other matter or substance that contains tobacco.

Tobacco bar—a restaurant, tavern, brew pub, club, or nightclub that generates ten percent (10%) or more of its total annual revenue from the on-site sale of tobacco products, excluding sales from vending machines or the rental of on-site humidors.

Tobacco product – any product made from or containing any percentage of the dried processed leaves of the plant genus *nicotiana* or any byproduct thereof used primarily for the purpose of smoking.

Persons desiring to comment on these proposed rules should submit comments in writing to the Department of Health, Office of the General Counsel, 825 North Capitol Street, N.E., 4th Floor, Washington, D.C. 20002, no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Copies of these proposed rules and related information may be obtained between 9:00 A.M. and 5:30 P.M. at the address stated above.