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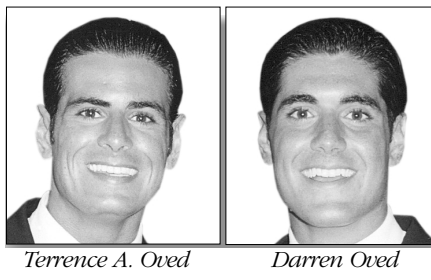
A Primer on New York's Smoke Free Air Act of 2002

On Dec. 30, the New York City Council enacted several amendments to the New York Smoke Free Air Act, which go into effect in New York City on Sunday.

The act has the intended effect of tremendously curtailing smoking in “public” places, which is very broadly defined to include any area where people, other than employees, are invited or permitted.

It prohibits smoking in all enclosed areas within public places, including public transportation facilities, public means of mass transportation (such as subway cars and all underground areas of subway stations, buses, vans, taxis, car services and limousines), public rest rooms, retail stores (with the notable exception of retail tobacco stores), restaurants (subject to the outdoor exemptions as discussed below).

Also included are business establishments such as banks, financial institutions or other offices where professional, consumer, religious or not-for-profit services are located (doctor's offices, dentist offices and counseling services offices), libraries, museums and galleries, movie theatres, and concert halls, as well as buildings used primarily for exhibitions, stage, music and dance, lecture or other such performances, auditoriums, convention halls, sports arenas and recreation areas (including all stadiums, race tracks, billiard parlors or any such other places where the public assembles to either exercise or to participate in or witness any sports or recreational activity).



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Other Restrictions

Smoking in playgrounds is also prohibited as is smoking in healthcare facilities such as hospitals, clinics, physical therapists offices and nursing homes (specially designated smoking rooms where day treatment programs are provided for patients of “residential health care facilities” are exempt from the act with the prior written approval of the fire commissioner).

Smoking is also prohibited in places of meeting or public assembly during such times as a meeting open to the public is being conducted for educational, religious, recreational or political purposes. There is an exception for meetings conducted in private residences, unless such a private residence is used during other hours to operate a child day care center or health care facility or if the residence is located in a common area of a multiple dwelling containing 10 or more homes.

Smoking is also prohibited in all schools, colleges, and universities as well as all children's institutions (such as youth centers, group homes for children, public institutions and residential treatment facilities for children), bingo halls, elevators, and indoor areas of zoos, including aquariums.

Smoking is also prohibited in membership associations (with certain exceptions), tobac-

co businesses (with certain exceptions) and bars with the exception of (i) tobacco bars; (ii) owner-operated bars; and (iii) until Jan. 2, 2006, bars with “separate smoking rooms”.

Exemptions

Smoking is specifically permitted in a “membership association” only if all of the duties with respect to the operation of the membership association (such as food preparation, food service, reception, security) are performed by members of the association who do not get paid for performing these duties.

A “membership association” is defined by the act as a not-for-profit entity created for a charitable, philanthropic, educational, political or social purpose, and registered with the Department of Health for a two-year renewable period. In determining whether an entity qualifies as a “membership association,” the Department of Health examines several factors relating to the operation, election and membership procedures of the entity.

Smoking is also permitted in “tobacco businesses” provided there is a specially designated area within such tobacco business for the purpose of testing or developing tobacco products that does not exceed two floors in the building where the tobacco business is located. A “tobacco business” is defined as a business whose primary activity is the sale of tobacco and tobacco-related accessories and in which smoking on the premises is essential to the business for tobacco testing and product development.

Smoking is also permitted in “tobacco bars,” which are defined as bars that in the calendar year ending Dec. 31, 2001, have generated 10 percent or more of their annual gross income from the on-site sale of tobacco

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products and the rental of on-site humidors and are registered with the Department of Health. These registrations are renewable after one year if in the preceding year the "tobacco bar" has continued to generate 10 percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors and has not expanded its size or changed its location from its size or location as of Dec. 31, 2001.

As noted above, smoking is also permitted in "owner operated bars" which are defined as bars in which all of the duties relating to the preparation, serving, cleaning, shelving, stocking and maintenance of all of the food and drink for such bar are performed at all times only by individuals who are "principal owners" of the bar. A "principal owner" is an individual who holds more than 25 percent of the ownership interest and is licensed by the state liquor authority for such bar. An "owner operated bar" cannot have more than three "principal owners".

Smoking Rooms

Until Jan. 2, 2006, the act also permits smoking in bars that have "separate smoking rooms," which are rooms that are completely enclosed on all sides by solid floor to ceiling walls the exclusive purpose of which is for smoking and in which no business transactions at all can take place.

The act is very specific in defining what constitutes a "separate smoking room" and the types of doors (self-closing), separate ventilation and sprinkler systems are required therein. The act further mandates that such a room not exceed the greater of 350 square feet or 25 percent of the aggregate square footage of the bar.

In addition, the "separate smoking rooms" must be clearly designated as a place where no services are offered and may not contain the sole means of ingress or egress to rest rooms or any other smoke-free area.

Employees may only enter the "separate smoking room" when there are no customers present and when there's been no smoking in the room for 15 minutes. An owner or operator in violation of the preceding prohibition regarding employees entering the separate smoking room in violation of the act can lose the right to maintain a separate smoking room in the bar.

Interestingly enough, while the Act

becomes effective on Sunday, it specifically allows entities who in good faith believe they qualify as a "membership association," "tobacco bar" or "owner operated bar" 180 days from March 30 to register as such with the Department of Health without any of the act's new prohibitions being applicable to them.

Of course, the prior prohibitions applicable to all such businesses prior to the amendments enacted by the act would still be applicable to these entities.

Outdoor Smoking

While smoking is generally prohibited in the outdoor dining areas of restaurants, an exception is provided to permit smoking in the outdoor dining areas of restaurants where the restaurant provides a continuous separated outdoor area designated for

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smoking, so long as such area is not more than 25 percent of the outdoor eating capacity of the restaurant, is at least three feet away from the outdoor area of the restaurant that is not designated for smoking and is clearly designated as a smoking area.

Smoking at Work

The act also affects smoking in the workplace by totally prohibiting any smoking in those indoor work areas to which the public does not generally have access. In addition, the act eliminates the previous "smoking room" in the office exception and makes it unlawful to smoke in any company vehicle occupied by more than one person as well as outlawing smoking in any New York City-owned vehicles.

Areas Not Effected

The act specifically permits smoking in private residences, hotel and motel rooms, private automobiles, retail tobacco stores

and enclosed rooms in bars, restaurants, convention halls and other similar places during the times that such rooms are being used exclusively for functions where the public is invited for the primary purpose of sampling tobacco products, with the prior written consent of the Department of Health and provided that such functions occur no more than five times per calendar year.

Violations and Penalties

Those caught smoking in places prohibited by the act are subject to a fine of \$100 for each violation, while the owners and operators of such places or businesses who fail to comply with the prohibitions against smoking on their premises are subject to a first time civil fine of between \$200 to \$400.

A second violation committed within 12 months of the first violation is punishable by a civil fine of between \$500 to \$1,000. A third violation committed within a 12-month period of both the first and second violations subjects the offender to a civil fine of between \$1,000 to \$2,000. The Department of Health is charged with investigating complaints of violations.

Conclusion

The act is arguably one of the strictest in the nation and significantly effects almost all industries. Many businesses in particular, such as bars, restaurants, lounges and supper clubs that are directly impacted by the act will need to reconsider and reconfigure both their business strategies and their business establishments going forward so that compliance may be achieved with minimal effect on their business and their clientele.

A thorough and detailed understanding of the act, combined with a creative approach toward its compliance, will assist such businesses in navigating their way profitably through the requirements.

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