

## OFFICE OF THE MAYOR

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**NOTICE OF EMERGENCY RULEMAKING**

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The Mayor pursuant to the authority set forth in section 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)), section 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), hereby gives notice of his intent to adopt the following amendments, on an emergency basis, to Title 20, Chapter 21 of the District of Columbia Municipal Regulations, (DCMR). This emergency rule would regulate smoking in places of employment and public places, specify the requirements for eligibility for exemptions from the prohibition of smoking in public places and places of employment, specify notice requirements for employers, 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.).

Emergency action is necessary to protect the health of District residents from the dangers of secondhand smoke that residents may encounter as some places of employment and public places in the District transition from places where smoking is permitted to places where smoking is prohibited after January 1, 2007. Between April 4, 2006 and January 1, 2007, the smoking prohibitions set forth in Section 4916 of the Department of Health Functions Clarification Amendment Act of 2006 do not apply to a brew pub, club, nightclub, or tavern as those entities are defined in D.C. Official Code § 25-101 or the bar and bar area of a restaurant. After January 1, 2007, these entities will no longer be exempt from the requirements of the law. The law includes exemptions for tobacco bars and tobacco retail establishments. However, the administrative procedures to validate these exemptions will not be in place without emergency action. These emergency rules will ensure that no establishment suffers an economic hardship because of a lack of administrative procedures. Promulgation of the rules on an emergency basis is necessary to ensure that employers and the public are aware of the new requirements and informed in a manner that will allow them to protect their health. On December 4, 2006, the Mayor submitted proposed permanent rules for Council approval. Council's sixty day period of review will not expire until after January 1, 2007, and the Council has advised the Mayor that direct action on the rules will not take place prior to January 1, 2007. These emergency rules will bridge the gap between January 1, 2007 and the expiration of the Council's review period.

The emergency rules were adopted on December 15, 2006 and shall remain in effect for up to one hundred twenty (120) days until April 14, 2007, unless superseded by another rulemaking.

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 smoking in public places and places of employment, 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 the following places and entities as of 12:01 A.M. on January 2, 2007:
- (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 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 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 give 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 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 as follows:

**“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 the provisions of this chapter:

- (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, Department of Health (hereinafter, 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. After the Director determines that a place qualifies for an exemption via an audit of the place's financial records, the Director may 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. The Director shall have the right to perform annual audits of an exempted business's financial records. If a business fails to qualify for the exemption during any calendar year while the exemption is valid, the exemption certificate of that business shall expire immediately.

2105.3 A conditional certificate of exemption, valid for not longer than ninety (90) days may be made available to a place of employment or public place prior to an audit by the Director if that place asserts, under penalty of perjury, that it meets the revenue requirements or is engaged in an activity that qualifies it for an exemption. During the term of the conditional certificate of exemption, the Director shall audit the place's records and deliver a written decision on the status of the exemption. If an audit validates a place's exemption, that place shall be subject to the requirements of exemptions under § 2105.2. If an audit fails to validate a conditional certificate of exemption, the Director may revoke the conditional certificate of exemption, and the place shall be subject to the requirements of § 2100. If the Director fails to deliver a decision about a conditional certificate of exemption within ninety (90) days, the conditional certificate of exemption shall be extended for thirty (30) day increments until the Director makes that determination.

2105.4 The Director may make available an event-specific exemption from the requirements of the Acts for hotels, motels, and convention halls that scheduled events prior to April 4, 2006. To qualify for an event-specific exemption, a hotel, motel, or convention hall must present documentation to the Board that a contract or other agreement was entered into on or before April 4, 2006 for an event scheduled to take place after January 1, 2007. Eligible events must take place in enclosed areas that are separate from other areas accessible to the general public.

## **2106 DISTRIBUTION OF FREE CIGARETTES**

2106.1 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.

2106.2 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.

## **2107 PENALTIES AND FINES**

2107.1 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 employer or person who manages a public place 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.

- 2107.2 Hearings or adjudication of violations under this chapter shall be conducted pursuant to D.C. Official Code § 2-1801.01 *et seq.*, (2001).
- 2107.3 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.
- 2107.4 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.
- 2107.5 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 2001, as amended (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.

**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.

**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(s)** – 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.