



Ohio Legislative Service Commission

Bill Analysis

Wendy H. Gridley

S.B. 120

128th General Assembly
(As Introduced)

Sens. Schuler, Cates, Grendell, Schaffer, Seitz

BILL SUMMARY

- Modifies the state smoking ban exemptions for family-owned businesses, outdoor patios, private clubs, cigar bars, and retail tobacco stores.

CONTENT AND OPERATION

Prohibition of smoking in public places and places of employment

Current law generally prohibits a proprietor of a public place or place of employment¹ from permitting smoking in (1) the public place or place of employment or (2) in areas directly or indirectly under the control of the proprietor that are immediately adjacent to locations of ingress or egress to the public place or place of employment (R.C. 3794.02(A), not in the bill). There are several exemptions from this general prohibition. Among the exemptions are family-owned businesses, outdoor patios, private clubs, and certain retail tobacco stores.

The bill retains the exemptions but modifies them by redefining the terms used to create the exemptions.

¹ "Public place" means an enclosed area to which the public is invited or in which the public is permitted and that is not a private residence. "Place of employment" means an enclosed area under the direct or indirect control of an employer that the employer's employees use for work or any other purpose, including, but not limited to, offices, meeting rooms, sales, production, and storage areas, restrooms, stairways, hallways, warehouses, garages, and vehicles (R.C. 3794.01(B) and (C)).

Family-owned and operated place of employment

(R.C. 3794.01(K))

Current law provides an exemption for family-owned and operated places of employment in which all employees are related to the owner, but only if the enclosed areas of the place of employment are not open to the public, are in a freestanding structure occupied solely by the place of employment, and smoke from the place of employment does not migrate into an enclosed area where smoking is prohibited.

The bill defines "family-owned and operated place of employment" as a business or corporate structure that: (1) is not publicly owned or traded, (2) has a president or chief operating officer who comes from a family having controlling interest in the structure, (3) is located in a freestanding structure or is separated from any other business by a firewall, and (4) holds a liquor permit.

Outdoor patios

(R.C. 3794.01(L))

Current law provides an exemption for an "outdoor patio," which is defined as an area that is either (1) enclosed by a roof or other overhead covering and walls or side coverings on not more than two sides or (2) has no roof or other overhead covering regardless of the number of walls or other side coverings. An outdoor patio must be physically separated from an enclosed area. If windows or doors form any part of the partition between an enclosed area and the outdoor patio, the openings must be closed to prevent the migration of smoke into the enclosed area. If windows or doors do not prevent the migration of smoke into the enclosed area, the outdoor patio is considered an extension of the enclosed area and subject to the smoking ban. (R.C. 3794.03(F).)

The bill defines "outdoor patio" as any area not enclosed with permanent walls, that does not function as a parking lot, and that is attached or immediately adjacent to the permanent structure of a building. In the case of a county community-based correctional facility or a facility licensed by the Department of Rehabilitation and Correction as a halfway house or community residential center, "outdoor patio" includes an area that (1) is immediately adjacent to the permanent structure of the facility, (2) has at least one side of the enclosure consisting of one wall of the facility, and (3) is otherwise enclosed with a fence or other material used for security purposes.

Private club

(R.C. 3794.03(G))

Under current law private clubs are exempt from the smoking ban. "Private club" is defined as a corporation or association of individuals organized in good faith for social, recreational, benevolent, charitable, fraternal, political, patriotic, or athletic purposes, which is the owner, lessor, or occupant of a permanent building or part of a permanent building operated solely for those purposes, whose membership entails the prepayment of regular dues (R.C. 4301.01(B)(13)--not in the bill) and meets the following additional requirements: (1) has no employees, (2) is organized as a not-for-profit entity, (3) allows only members of the club to be present in the building, (4) has no persons under the age of 18 in the building, (5) is located in a freestanding structure occupied solely by the club, (6) does not permit smoke from the club to migrate into an enclosed area where smoking is prohibited, and (7) if the club serves alcohol, holds a D4 valid liquor permit.²

The bill limits the additional requirements an entity must meet to be a "private club" to two--that the club: (1) is organized as a not-for-profit entity and (2) if it serves alcohol, holds a valid D4 liquor permit (see **COMMENT**).

Retail tobacco store

(R.C. 3794.01(H) and 3794.03(E))

Current law defines a retail tobacco store as a retail establishment that derives more than 80% of its gross revenue from the sale of cigars, cigarettes, pipes, or other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. It does not include a tobacco department or section of a larger commercial establishment or of any establishment with a liquor permit or any restaurant.

The bill removes the language above exempting from the definition of a retail tobacco establishment a tobacco department or section or a larger commercial establishment or of any establishment with a liquor permit or of any restaurant and replaces it with a statement that a retail tobacco store includes a cigar bar. The bill defines a cigar bar as a retail establishment that contains all of the following: (1) a walk-

² A D4 permit may be issued to a club to sell beer and any intoxicating liquor to the club's members (R.C. 4303.17).

in humidors with a minimum volume of 300 cubic feet, (2) a HEPA filtration system,³ (3) carbon filtration, (4) carbon dioxide filtration, (5) smoke eaters, and (6) ozone machines.

Current law exempts retail tobacco stores in operation before December 7, 2006 (the effective date of the provision), from the smoking ban. Current law provides that any retail tobacco store that begins operation after that date or any such existing store that relocates to another location after that date may only qualify for the exemption if it is located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited. The bill exempts all retail tobacco stores regardless of date of operation or relocation. (R.C. 3794.03(E)(1) and (2).) Cigar bars, under the bill, are not required to file the affidavit currently required of retail tobacco stores stating to the Department of Health the percentage of its gross income during the previous calendar year that was derived from the sale of cigars, cigarettes, pipes, or other smoking devices. (R.C. 3794.03(E)(2) and (3).)

COMMENT

In *Ohio Licensed Beverage Association v. Ohio Department of Health*, 2007 Ohio 7147, the Ohio Licensed Beverage Association filed a complaint against the Ohio Department of Health claiming that the Department improperly attempted to expand a limited statutory exemption to the smoking ban to create an expansive loophole for private clubs. Among other requirements, a private club is exempt from the smoking ban only if the club has no employees.

The Department adopted a rule that excluded from the definition of "employee" members of private clubs who provide services to the club. The court⁴ found that this rule impermissibly added to the scope of the exemption for private clubs and conflicted with the enabling statute, creating an exemption that did not exist.

The bill removes the requirement that to be exempt from the smoking ban a private club have no employees.

³ The bill defines HEPA as having the same meaning as in current R.C. 3742.01(I)--"the designation given to a product, device, or system that has been equipped with a high-efficiency particulate air filter, which is a filter capable of removing particles of 0.3 microns or larger from air at 99.97% or greater efficiency."

⁴ The 10th District Ohio Court of Appeals. The Ohio Supreme Court declined to hear an appeal of the 10th District Court's decision, 2008 Ohio 2595.

HISTORY

ACTION

DATE

Introduced

04-30-09

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