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CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 217

Introduced by Assembly Member Carter
(Coauthor: Assembly Member Ammiano)
(Coauthors: Senators Negrete McLeod and Wolk)

January 31, 2011

An act to amend Section 6404.5 of the Labor Code, relating to occupational safety and health.

LEGISLATIVE COUNSEL'S DIGEST

AB 217, as amended, Carter. Workplace smoking prohibition: long-term health care facilities.

Existing law prohibits an employer from knowingly or intentionally permitting, and a person from engaging in, the smoking of tobacco products in an enclosed space at a place of employment. Existing law provides that “place of employment” for purposes of that prohibition does not include, among other places, patient smoking areas in long-term health care facilities, as defined. Existing law provides that any violation of that prohibition is an infraction, punishable by a fine not to exceed \$100 for a first violation, \$200 for a 2nd violation within one year, and \$500 for a 3rd and for each subsequent violation within one year.

This bill would provide that a patient smoking area, as defined, is not a place of employment for purposes of the smoking prohibition described

above only if the patient smoking area is not located in a patient's room, is located outdoors in a courtyard, patio, or other outdoor space that can be monitored by facility staff, and is located in an area that reasonably prevents smoke from entering the facility or patient rooms.

By limiting the application of the exception for patient smoking areas, the bill would make some of those areas subject to the smoking prohibition, thereby creating an additional crime punishable as an infraction and imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 6404.5 of the Labor Code is amended to
2 read:
3 6404.5. (a) The Legislature finds and declares that regulation
4 of smoking in the workplace is a matter of statewide interest and
5 concern. It is the intent of the Legislature in enacting this section
6 to prohibit the smoking of tobacco products in all (100 percent of)
7 enclosed places of employment in this state, as covered by this
8 section, thereby eliminating the need of local governments to enact
9 workplace smoking restrictions within their respective jurisdictions.
10 It is further the intent of the Legislature to create a uniform
11 statewide standard to restrict and prohibit the smoking of tobacco
12 products in enclosed places of employment, as specified in this
13 section, in order to reduce employee exposure to environmental
14 tobacco smoke to a level that will prevent anything other than
15 insignificantly harmful effects to exposed employees, and also to
16 eliminate the confusion and hardship that can result from enactment
17 or enforcement of disparate local workplace smoking restrictions.
18 Notwithstanding any other provision of this section, it is the intent
19 of the Legislature that any area not defined as a "place of
20 employment" pursuant to subdivision (d) or in which the smoking
21 of tobacco products is not regulated pursuant to subdivision (e)
22 shall be subject to local regulation of smoking of tobacco products.

1 (b) No employer shall knowingly or intentionally permit, and
2 no person shall engage in, the smoking of tobacco products in an
3 enclosed space at a place of employment. "Enclosed space"
4 includes lobbies, lounges, waiting areas, elevators, stairwells, and
5 restrooms that are a structural part of the building and not
6 specifically defined in subdivision (d).

7 (c) For purposes of this section, an employer who permits any
8 nonemployee access to his or her place of employment on a regular
9 basis has not acted knowingly or intentionally in violation of this
10 section if he or she has taken the following reasonable steps to
11 prevent smoking by a nonemployee:

12 (1) Posted clear and prominent signs, as follows:

13 (A) Where smoking is prohibited throughout the building or
14 structure, a sign stating "No smoking" shall be posted at each
15 entrance to the building or structure.

16 (B) Where smoking is permitted in designated areas of the
17 building or structure, a sign stating "Smoking is prohibited except
18 in designated areas" shall be posted at each entrance to the building
19 or structure.

20 (2) Has requested, when appropriate, that a nonemployee who
21 is smoking refrain from smoking in the enclosed workplace.

22 For purposes of this subdivision, "reasonable steps" does not
23 include (A) the physical ejection of a nonemployee from the place
24 of employment or (B) any requirement for making a request to a
25 nonemployee to refrain from smoking, under circumstances
26 involving a risk of physical harm to the employer or any employee.

27 (d) For purposes of this section, "place of employment" does
28 not include any of the following:

29 (1) Sixty-five percent of the guestroom accommodations in a
30 hotel, motel, or similar transient lodging establishment.

31 (2) Areas of the lobby in a hotel, motel, or other similar transient
32 lodging establishment designated for smoking by the establishment.
33 An establishment may permit smoking in a designated lobby area
34 that does not exceed 25 percent of the total floor area of the lobby
35 or, if the total area of the lobby is 2,000 square feet or less, that
36 does not exceed 50 percent of the total floor area of the lobby. For
37 purposes of this paragraph, "lobby" means the common public
38 area of an establishment in which registration and other similar or
39 related transactions, or both, are conducted and in which the

1 establishment's guests and members of the public typically
2 congregate.

3 (3) Meeting and banquet rooms in a hotel, motel, other transient
4 lodging establishment similar to a hotel or motel, restaurant, or
5 public convention center, except while food or beverage functions
6 are taking place, including setup, service, and cleanup activities,
7 or when the room is being used for exhibit purposes. At times
8 when smoking is not permitted in a meeting or banquet room
9 pursuant to this paragraph, the establishment may permit smoking
10 in corridors and prefunction areas adjacent to and serving the
11 meeting or banquet room if no employee is stationed in that
12 corridor or area on other than a passing basis.

13 (4) Retail or wholesale tobacco shops and private smokers'
14 lounges. For purposes of this paragraph:

15 (A) "Private smokers' lounge" means any enclosed area in or
16 attached to a retail or wholesale tobacco shop that is dedicated to
17 the use of tobacco products, including, but not limited to, cigars
18 and pipes.

19 (B) "Retail or wholesale tobacco shop" means any business
20 establishment the main purpose of which is the sale of tobacco
21 products, including, but not limited to, cigars, pipe tobacco, and
22 smoking accessories.

23 (5) Cabs of motortrucks, as defined in Section 410 of the Vehicle
24 Code, or truck tractors, as defined in Section 655 of the Vehicle
25 Code, if no nonsmoking employees are present.

26 (6) Warehouse facilities. For purposes of this paragraph,
27 "warehouse facility" means a warehouse facility with more than
28 100,000 square feet of total floorspace, and 20 or fewer full-time
29 employees working at the facility, but does not include any area
30 within a facility that is utilized as office space.

31 (7) Gaming clubs, in which smoking is permitted by subdivision
32 (f). For purposes of this paragraph, "gaming club" means any
33 gaming club, as defined in Section 19802 of the Business and
34 Professions Code, or bingo facility, as defined in Section 326.5 of
35 the Penal Code, that restricts access to minors under 18 years of
36 age.

37 (8) Bars and taverns, in which smoking is permitted by
38 subdivision (f). For purposes of this paragraph, "bar" or "tavern"
39 means a facility primarily devoted to the serving of alcoholic
40 beverages for consumption by guests on the premises, in which

1 the serving of food is incidental. “Bar or tavern” includes those
2 facilities located within a hotel, motel, or other similar transient
3 occupancy establishment. However, when located within a building
4 in conjunction with another use, including a restaurant, “bar” or
5 “tavern” includes only those areas used primarily for the sale and
6 service of alcoholic beverages. “Bar” or “tavern” does not include
7 the dining areas of a restaurant, regardless of whether alcoholic
8 beverages are served therein.

9 (9) Theatrical production sites, if smoking is an integral part of
10 the story in the theatrical production.

11 (10) Medical research or treatment sites, if smoking is integral
12 to the research and treatment being conducted.

13 (11) Private residences, except for private residences licensed
14 as family day care homes, during the hours of operation as family
15 day care homes and in those areas where children are present.

16 (12) (A) Patient smoking areas in long-term health care
17 facilities, as defined in Section 1418 of the Health and Safety Code,
18 provided that all of the following conditions are met:

19 (i) The patient smoking area is not located in a patient’s room.

20 (ii) The patient smoking area is located outdoors in a courtyard,
21 patio, or other outdoor space that can be monitored by facility
22 staff.

23 (iii) The patient smoking area is located in an area that
24 reasonably prevents smoke from entering the facility or patient
25 rooms.

26 *(B) Notwithstanding subparagraph (A), a long-term health care*
27 *facility may prohibit a resident from smoking in a patient smoking*
28 *area as necessary to protect the resident from inclement weather*
29 *conditions. The Legislature finds and declares that this*
30 *subparagraph does not violate a resident’s rights under the law.*

31 ~~(B)~~
32 ~~(C) This paragraph does not prohibit~~ *allows* a long-term health
33 ~~care facility from continuing or implementing~~ *to continue or*
34 ~~implement~~ a smoke-free policy ~~inside and outside the facility.~~

35 (13) Breakrooms designated by employers for smoking, provided
36 that all of the following conditions are met:

37 (A) Air from the smoking room shall be exhausted directly to
38 the outside by an exhaust fan. Air from the smoking room shall
39 not be recirculated to other parts of the building.

(B) The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency. If both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

(C) The smoking room shall be located in a nonwork area where no one, as part of his or her work responsibilities, is required to enter. For purposes of this subparagraph, “work responsibilities” does not include any custodial or maintenance work carried out in the breakroom when it is unoccupied.

(D) There are sufficient nonsmoking breakrooms to accommodate nonsmokers.

(14) Employers with a total of five or fewer employees, either full time or part time, may permit smoking where all of the following conditions are met:

(A) The smoking area is not accessible to minors.

(B) All employees who enter the smoking area consent to permit smoking. No one, as part of his or her work responsibilities, shall be required to work in an area where smoking is permitted. An employer who is determined by the division to have used coercion to obtain consent or who has required an employee to work in the smoking area shall be subject to the penalty provisions of Section 6427.

(C) Air from the smoking area shall be exhausted directly to the outside by an exhaust fan. Air from the smoking area shall not be recirculated to other parts of the building.

(D) The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency. If both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

1 This paragraph shall not be construed to (i) supersede or render
2 inapplicable any condition or limitation on smoking areas made
3 applicable to specific types of business establishments by any other
4 paragraph of this subdivision or (ii) apply in lieu of any otherwise
5 applicable paragraph of this subdivision that has become
6 inoperative.

7 (e) Paragraphs (13) and (14) of subdivision (d) shall not be
8 construed to require employers to provide reasonable
9 accommodation to smokers, or to provide breakrooms for smokers
10 or nonsmokers.

11 (f) (1) Except as otherwise provided in this subdivision,
12 smoking may be permitted in gaming clubs, as defined in paragraph
13 (7) of subdivision (d), and in bars and taverns, as defined in
14 paragraph (8) of subdivision (d), until the earlier of the following:

15 (A) January 1, 1998.

16 (B) The date of adoption of a regulation (i) by the Occupational
17 Safety and Health Standards Board reducing the permissible
18 employee exposure level to environmental tobacco smoke to a
19 level that will prevent anything other than insignificantly harmful
20 effects to exposed employees or (ii) by the federal Environmental
21 Protection Agency establishing a standard for reduction of
22 permissible exposure to environmental tobacco smoke to an
23 exposure level that will prevent anything other than insignificantly
24 harmful effects to exposed persons.

25 (2) If a regulation specified in subparagraph (B) of paragraph
26 (1) is adopted on or before January 1, 1998, smoking may thereafter
27 be permitted in gaming clubs and in bars and taverns, subject to
28 full compliance with, or conformity to, the standard in the
29 regulation within two years following the date of adoption of the
30 regulation. An employer failing to achieve compliance with, or
31 conformity to, the regulation within this two-year period shall
32 prohibit smoking in the gaming club, bar, or tavern until
33 compliance or conformity is achieved. If the Occupational Safety
34 and Health Standards Board and the federal Environmental
35 Protection Agency both adopt regulations specified in subparagraph
36 (B) of paragraph (1) that are inconsistent, the regulations of the
37 Occupational Safety and Health Standards Board shall be no less
38 stringent than the regulations of the federal Environmental
39 Protection Agency.

1 (3) If a regulation specified in subparagraph (B) of paragraph
2 (1) is not adopted on or before January 1, 1998, the exemptions
3 specified in paragraphs (7) and (8) of subdivision (d) shall become
4 inoperative on and after January 1, 1998, until a regulation is
5 adopted. Upon adoption of such a regulation on or after January
6 1, 1998, smoking may thereafter be permitted in gaming clubs and
7 in bars and taverns, subject to full compliance with, or conformity
8 to, the standard in the regulation within two years following the
9 date of adoption of the regulation. An employer failing to achieve
10 compliance with, or conformity to, the regulation within this
11 two-year period shall prohibit smoking in the gaming club, bar,
12 or tavern until compliance or conformity is achieved. If the
13 Occupational Safety and Health Standards Board and the federal
14 Environmental Protection Agency both adopt regulations specified
15 in subparagraph (B) of paragraph (1) that are inconsistent, the
16 regulations of the Occupational Safety and Health Standards Board
17 shall be no less stringent than the regulations of the federal
18 Environmental Protection Agency.

19 (4) From January 1, 1997, to December 31, 1997, inclusive,
20 smoking may be permitted in gaming clubs, as defined in paragraph
21 (7) of subdivision (d), and in bars and taverns, as defined in
22 paragraph (8) of subdivision (d), subject to both of the following
23 conditions:

24 (A) If practicable, the gaming club or bar or tavern shall
25 establish a designated nonsmoking area.

26 (B) If feasible, no employee shall be required, in the
27 performance of ordinary work responsibilities, to enter any area
28 in which smoking is permitted.

29 (g) The smoking prohibition set forth in this section shall
30 constitute a uniform statewide standard for regulating the smoking
31 of tobacco products in enclosed places of employment and shall
32 supersede and render unnecessary the local enactment or
33 enforcement of local ordinances regulating the smoking of tobacco
34 products in enclosed places of employment. Insofar as the smoking
35 prohibition set forth in this section is applicable to all (100-percent)
36 places of employment within this state and, therefore, provides
37 the maximum degree of coverage, the practical effect of this section
38 is to eliminate the need of local governments to enact enclosed
39 workplace smoking restrictions within their respective jurisdictions.

1 (h) Nothing in this section shall prohibit an employer from
2 prohibiting smoking in an enclosed place of employment for any
3 reason.

4 (i) The enactment of local regulation of smoking of tobacco
5 products in enclosed places of employment by local governments
6 shall be suspended only for as long as, and to the extent that, the
7 (100-percent) smoking prohibition provided for in this section
8 remains in effect. In the event this section is repealed or modified
9 by subsequent legislative or judicial action so that the (100-percent)
10 smoking prohibition is no longer applicable to all enclosed places
11 of employment in California, local governments shall have the full
12 right and authority to enforce previously enacted, and to enact and
13 enforce new, restrictions on the smoking of tobacco products in
14 enclosed places of employment within their jurisdictions, including
15 a complete prohibition of smoking. Notwithstanding any other
16 provision of this section, any area not defined as a “place of
17 employment” or in which smoking is not regulated pursuant to
18 subdivision (d) or (e), shall be subject to local regulation of
19 smoking of tobacco products.

20 (j) Any violation of the prohibition set forth in subdivision (b)
21 is an infraction, punishable by a fine not to exceed one hundred
22 dollars (\$100) for a first violation, two hundred dollars (\$200) for
23 a second violation within one year, and five hundred dollars (\$500)
24 for a third and for each subsequent violation within one year. This
25 subdivision shall be enforced by local law enforcement agencies,
26 including, but not limited to, local health departments, as
27 determined by the local governing body.

28 (k) Notwithstanding Section 6309, the division shall not be
29 required to respond to any complaint regarding the smoking of
30 tobacco products in an enclosed space at a place of employment,
31 unless the employer has been found guilty pursuant to subdivision
32 (j) of a third violation of subdivision (b) within the previous year.

33 (l) If any provision of this act or the application thereof to any
34 person or circumstances is held invalid, that invalidity shall not
35 affect other provisions or applications of the act that can be given
36 effect without the invalid provision or application, and to this end
37 the provisions of this act are severable.

38 SEC. 2. No reimbursement is required by this act pursuant to
39 Section 6 of Article XIII B of the California Constitution because
40 the only costs that may be incurred by a local agency or school

1 district will be incurred because this act creates a new crime or
2 infraction, eliminates a crime or infraction, or changes the penalty
3 for a crime or infraction, within the meaning of Section 17556 of
4 the Government Code, or changes the definition of a crime within
5 the meaning of Section 6 of Article XIII B of the California
6 Constitution.

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