

AMENDED IN ASSEMBLY APRIL 7, 2011  
AMENDED IN ASSEMBLY MARCH 25, 2011  
AMENDED IN ASSEMBLY MARCH 8, 2011  
CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 217**

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**Introduced by Assembly Member Carter**

January 31, 2011

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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.

23 (b) No employer shall knowingly or intentionally permit, and  
24 no person shall engage in, the smoking of tobacco products in an  
25 enclosed space at a place of employment. “Enclosed space”  
26 includes lobbies, lounges, waiting areas, elevators, stairwells, and

1 restrooms that are a structural part of the building and not  
2 specifically defined in subdivision (d).

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

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

9 (A) Where smoking is prohibited throughout the building or  
10 structure, a sign stating “No smoking” shall be posted at each  
11 entrance to the building or structure.

12 (B) Where smoking is permitted in designated areas of the  
13 building or structure, a sign stating “Smoking is prohibited except  
14 in designated areas” shall be posted at each entrance to the building  
15 or structure.

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

18 For purposes of this subdivision, “reasonable steps” does not  
19 include (A) the physical ejection of a nonemployee from the place  
20 of employment or (B) any requirement for making a request to a  
21 nonemployee to refrain from smoking, under circumstances  
22 involving a risk of physical harm to the employer or any employee.

23 (d) For purposes of this section, “place of employment” does  
24 not include any of the following:

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

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

38 (3) Meeting and banquet rooms in a hotel, motel, other transient  
39 lodging establishment similar to a hotel or motel, restaurant, or  
40 public convention center, except while food or beverage functions

1 are taking place, including setup, service, and cleanup activities,  
2 or when the room is being used for exhibit purposes. At times  
3 when smoking is not permitted in a meeting or banquet room  
4 pursuant to this paragraph, the establishment may permit smoking  
5 in corridors and prefunction areas adjacent to and serving the  
6 meeting or banquet room if no employee is stationed in that  
7 corridor or area on other than a passing basis.

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

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

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

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

21 (6) Warehouse facilities. For purposes of this paragraph,  
22 "warehouse facility" means a warehouse facility with more than  
23 100,000 square feet of total floorspace, and 20 or fewer full-time  
24 employees working at the facility, but does not include any area  
25 within a facility that is utilized as office space.

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

32 (8) Bars and taverns, in which smoking is permitted by  
33 subdivision (f). For purposes of this paragraph, "bar" or "tavern"  
34 means a facility primarily devoted to the serving of alcoholic  
35 beverages for consumption by guests on the premises, in which  
36 the serving of food is incidental. "Bar or tavern" includes those  
37 facilities located within a hotel, motel, or other similar transient  
38 occupancy establishment. However, when located within a building  
39 in conjunction with another use, including a restaurant, "bar" or  
40 "tavern" includes only those areas used primarily for the sale and

1 service of alcoholic beverages. “Bar” or “tavern” does not include  
2 the dining areas of a restaurant, regardless of whether alcoholic  
3 beverages are served therein.

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

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

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

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

14 ~~(A)~~

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

16 ~~(B)~~

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

20 ~~(C)~~

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

24 (B) *This paragraph does not prohibit a long-term health care*  
25 *facility from continuing or implementing a smoke-free policy inside*  
26 *and outside the facility.*

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

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

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

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

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

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

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

12 (B) All employees who enter the smoking area consent to permit  
13 smoking. No one, as part of his or her work responsibilities, shall  
14 be required to work in an area where smoking is permitted. An  
15 employer who is determined by the division to have used coercion  
16 to obtain consent or who has required an employee to work in the  
17 smoking area shall be subject to the penalty provisions of Section  
18 6427.

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

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

31 This paragraph shall not be construed to (i) supersede or render  
32 inapplicable any condition or limitation on smoking areas made  
33 applicable to specific types of business establishments by any other  
34 paragraph of this subdivision or (ii) apply in lieu of any otherwise  
35 applicable paragraph of this subdivision that has become  
36 inoperative.

37 (e) Paragraphs (13) and (14) of subdivision (d) shall not be  
38 construed to require employers to provide reasonable  
39 accommodation to smokers, or to provide breakrooms for smokers  
40 or nonsmokers.

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

5 (A) January 1, 1998.

6 (B) The date of adoption of a regulation (i) by the Occupational  
7 Safety and Health Standards Board reducing the permissible  
8 employee exposure level to environmental tobacco smoke to a  
9 level that will prevent anything other than insignificantly harmful  
10 effects to exposed employees or (ii) by the federal Environmental  
11 Protection Agency establishing a standard for reduction of  
12 permissible exposure to environmental tobacco smoke to an  
13 exposure level that will prevent anything other than insignificantly  
14 harmful effects to exposed persons.

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

30 (3) If a regulation specified in subparagraph (B) of paragraph  
31 (1) is not adopted on or before January 1, 1998, the exemptions  
32 specified in paragraphs (7) and (8) of subdivision (d) shall become  
33 inoperative on and after January 1, 1998, until a regulation is  
34 adopted. Upon adoption of such a regulation on or after January  
35 1, 1998, smoking may thereafter be permitted in gaming clubs and  
36 in bars and taverns, subject to full compliance with, or conformity  
37 to, the standard in the regulation within two years following the  
38 date of adoption of the regulation. An employer failing to achieve  
39 compliance with, or conformity to, the regulation within this  
40 two-year period shall prohibit smoking in the gaming club, bar,

1 or tavern until compliance or conformity is achieved. If the  
2 Occupational Safety and Health Standards Board and the federal  
3 Environmental Protection Agency both adopt regulations specified  
4 in subparagraph (B) of paragraph (1) that are inconsistent, the  
5 regulations of the Occupational Safety and Health Standards Board  
6 shall be no less stringent than the regulations of the federal  
7 Environmental Protection Agency.

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

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

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

18 (g) The smoking prohibition set forth in this section shall  
19 constitute a uniform statewide standard for regulating the smoking  
20 of tobacco products in enclosed places of employment and shall  
21 supersede and render unnecessary the local enactment or  
22 enforcement of local ordinances regulating the smoking of tobacco  
23 products in enclosed places of employment. Insofar as the smoking  
24 prohibition set forth in this section is applicable to all (100-percent)  
25 places of employment within this state and, therefore, provides  
26 the maximum degree of coverage, the practical effect of this section  
27 is to eliminate the need of local governments to enact enclosed  
28 workplace smoking restrictions within their respective jurisdictions.

29 (h) Nothing in this section shall prohibit an employer from  
30 prohibiting smoking in an enclosed place of employment for any  
31 reason.

32 (i) The enactment of local regulation of smoking of tobacco  
33 products in enclosed places of employment by local governments  
34 shall be suspended only for as long as, and to the extent that, the  
35 (100-percent) smoking prohibition provided for in this section  
36 remains in effect. In the event this section is repealed or modified  
37 by subsequent legislative or judicial action so that the (100-percent)  
38 smoking prohibition is no longer applicable to all enclosed places  
39 of employment in California, local governments shall have the full  
40 right and authority to enforce previously enacted, and to enact and



1 enforce new, restrictions on the smoking of tobacco products in  
2 enclosed places of employment within their jurisdictions, including  
3 a complete prohibition of smoking. Notwithstanding any other  
4 provision of this section, any area not defined as a “place of  
5 employment” or in which smoking is not regulated pursuant to  
6 subdivision (d) or (e), shall be subject to local regulation of  
7 smoking of tobacco products.

8 (j) Any violation of the prohibition set forth in subdivision (b)  
9 is an infraction, punishable by a fine not to exceed one hundred  
10 dollars (\$100) for a first violation, two hundred dollars (\$200) for  
11 a second violation within one year, and five hundred dollars (\$500)  
12 for a third and for each subsequent violation within one year. This  
13 subdivision shall be enforced by local law enforcement agencies,  
14 including, but not limited to, local health departments, as  
15 determined by the local governing body.

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

21 (l) If any provision of this act or the application thereof to any  
22 person or circumstances is held invalid, that invalidity shall not  
23 affect other provisions or applications of the act that can be given  
24 effect without the invalid provision or application, and to this end  
25 the provisions of this act are severable.

26 SEC. 2. No reimbursement is required by this act pursuant to  
27 Section 6 of Article XIII B of the California Constitution because  
28 the only costs that may be incurred by a local agency or school  
29 district will be incurred because this act creates a new crime or  
30 infraction, eliminates a crime or infraction, or changes the penalty  
31 for a crime or infraction, within the meaning of Section 17556 of  
32 the Government Code, or changes the definition of a crime within  
33 the meaning of Section 6 of Article XIII B of the California  
34 Constitution.