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Nevada voters approved a ballot measure expanding public smoking restrictions to nearly all indoor places of employment, with notable exceptions. Affected employers must implement these restrictions and make required postings by December 8, 2006.

Effects in the Workplace of the Expansion of Nevada's Smoking Restrictions

By Patrick H. Hicks and Matthew G. Laflin

Introduction

On November 7, 2006, the voters of Nevada continued the nationwide trend toward the establishment of nonsmoking environments in virtually all indoor public places, businesses and workplaces, in approving by a margin of 54 percent to 46 percent a ballot initiative entitled the "Nevada Clean Indoor Act" ("the Act"). This broad expansion of previously existing statutory smoking restrictions, listed on the ballot as Question 5, amends Nevada Revised Statutes Chapter 202.

Pursuant to the terms of the Act, the new smoking restrictions will take full effect 10 days from Nevada's canvass of votes, or on December 8, 2006. Consequently, employers have a very short period in which to examine their current policies and determine what steps need to be taken, if any, for compliance with the new restrictions and requirements set forth by the Act. To assist with this process, we provide the following summary.

Restrictions On Smoking In Indoor Places Of Employment

While the Act sets forth particular examples of indoor public places in which smoking in any form is prohibited, the Act's provisions are more notable for the few exceptions that are carved out for indoor places in which smoking remains allowed within Nevada. Chapter 202 previously restricted smoking in only a handful of public places, such as childcare and medical facilities. However, after the passage of the Act, smoking is prohibited in *all indoor* places of employment, with the exception of the following:

1. Areas within casinos where loitering by minors is already prohibited by state law;
2. "Stand-alone" bars, taverns and saloons;
3. Strip clubs or brothels;
4. Retail tobacco stores; and
5. Private residences, including those which serve as an office workplace, except if used as a childcare, adult day care, or health care facility.

The Act also specifically prohibits smoking in any form within school buildings and on any portion of school property, including outdoors.

Unless a place of employment qualifies for one of these limited exceptions, smoking is prohibited in all indoor spaces. As specifically set forth in the Act, this includes a ban on smoking in all indoor "work areas, restrooms, hallways, employee lounges, cafeterias, conference and meeting rooms, lobbies and reception areas." Thus, the ban appears to prohibit employers from having any type of break room where smoking is permitted.

The Act does not prohibit smoking in any *outdoor* place, thereby maintaining employers' rights to create outdoor smoking areas for employees and customers.

Required Postings And Removal Of Smoking Paraphernalia

Although many Nevada employers already restrict smoking within their facilities, even these employers are affected by the new restrictions. The Act requires the conspicuous

posting of “No Smoking” signs or signs that contain the international “No Smoking” symbol at each entrance of every public place and place of employment in Nevada where smoking is prohibited. In addition, the Act requires removal of all smoking paraphernalia, including ashtrays, from each public place and place of employment where smoking is prohibited.

Exceptions Where Smoking Is Still Allowed

As set forth above, the Act allows smoking within certain indoor public places, businesses and workplaces. The common thread among these exceptions is the restriction of minors from the premises.

Gaming Areas of Casinos

The first exception allows smoking in areas in casinos in which persons under 21 may not “loiter, or be permitted to loiter, in or about any room or premises wherein any licensed game, race book, sports pool or pari-mutuel wagering is operated or conducted.” NRS 463.350(b). The revised statute also defines casino as “an entity that contains a building or large room devoted to gambling games or wagering on a variety of events. A casino must possess a non-restricted gaming license as described in NRS 463.0177 and typically uses the word ‘casino’ as part of its proper name.”

Based on this first exception, it appears that under the revised statute, smoking is allowed in any area of a casino in which minors are not allowed to be present because licensed gaming is being conducted, including but not limited to the casino floor and bars immediately adjacent to the casino floor where gaming takes place. However, in areas that are adjacent to the casino floor in which Nevada law places no restriction on the presence of minors, smoking is now prohibited.

“Stand-Alone” Bars, Taverns and Saloons

The second exception applies to “stand-alone bars, taverns or saloons.” The Act sets forth a fairly convoluted definition for this term. However, in essence, the term means an establishment wherein:

1. the primary purpose for operation is the sale and consumption of alcoholic beverages, and any food service is

“incidental,” or limited to the sale of prepackaged items that do not entail statutory food licensing requirements;

2. smoke from the facility cannot “infiltrate” into areas where smoking is prohibited; and
3. the facility is:
 - a. housed within a physically independent building that does not share a common entryway or indoor area with a public place where smoking is prohibited, or
 - b. a completely enclosed area within a larger structure, enclosed on all sides by solid walls, windows or doors extending from floor to ceiling, with all doors and windows remaining shut at all times not in use.

Even under this exception, smoking of any kind is prohibited in all parts of any establishment that serves food prepared in a kitchen, even if the establishment primarily functions as a bar, tavern or saloon. Furthermore, smoking of any kind is prohibited in any bar, tavern or saloon that is located within, but not completely enclosed from, a larger public facility or place of employment.

Strip Clubs, Brothels and Retail Tobacco Stores

While none of these terms are defined within the Act or within any other part of the Nevada Revised Statutes, they are presumptively encompassed by their plain meaning. Therefore, smoking is allowed in any part of these types of businesses.

Offices Located Within Private Residences

The final exception allows smoking in offices that employers operate out of private residences, with the exception of offices in childcare, adult day care and health care facilities.

Unfortunately, the Act is less than clear in several respects. Many employers are struggling with issues such as: whether a particular establishment falls under the exception for stand-alone bars, taverns and saloons; whether nightclubs are subject to the smoking ban; and the effect of the ban upon hotel and motel rooms, to name a few.

Retaliation Prohibited

In addition to its restrictions on most indoor public places, the Act also prohibits persons and employers from retaliating against employees, applicants or customers for their exercise of rights afforded by the Act or any attempt to prosecute a violation of the Act. Although the Act does not specify the remedy for violating this anti-retaliation provision, it would not be surprising for an individual alleging he or she was terminated in retaliation for seeking to enforce the Act to bring a claim for wrongful termination in violation of public policy, which might allow for the recovery of tort damages.

Enforcement

The Act sets forth that restrictions on smoking in indoor public places, businesses and workplaces are to be enforced by “health authorities, police officers of cities and towns, sheriffs and their deputies” pursuant to the already existent enforcement mechanism for restrictions on public smoking, NRS 202.2492 and NRS 202.24925. Pursuant to those statutes, persons in violation of public smoking prohibitions are guilty of a misdemeanor and are liable for a civil penalty of \$100 for “each violation.”

Recommendations

The Act’s revision to Nevada Revised Statutes Chapter 202 greatly expands the scope of public smoking restrictions in Nevada to prohibit smoking of any kind within Nevada’s public places, businesses and workplaces, with a small handful of exceptions. The scope of these exceptions will likely need to be resolved by new regulations or interpretation by the courts. Until that happens, employers who believe that they are exempted from the Act will need to proceed with caution and carefully consider their policies regarding smoking by employees and customers.

All employers should take the following steps to ensure compliance with the Act:

1. Determine if your facility is covered by one of the exemptions contained within the Act. If the workplace is not exempted by the Act, maintain or implement a policy that prohibits smoking of any kind within all areas of your facility and

announce this policy to your employees. Remind your employees that smoking by customers is also prohibited.

2. If your workplace is not exempted by the Act, ensure that “No Smoking” signs are placed at all entrances to your facility. Remove all smoking paraphernalia, including ashtrays, from all indoor areas, including break areas.
3. Review your compliance decisions and policies with your labor counsel, particularly if you believe that your facility is covered by one of the exemptions contained within the Act.

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