



STATE OF MICHIGAN  
**Department of  
Human  
Services**

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**Bureau of Children and Adult Licensing**

## Memo

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To: Adult Foster Care and Home for the  
Aged Licensing Division Staff  
Michigan Assisted Living Association  
Michigan Center for Assisted Living  
Aging Services of Michigan

Date: April 30, 2010

From: Deborah Wood, Division Director  
Adult Foster Care and Home for the Aged Licensing  
Bureau of Children and Adult Licensing

Subject: Act 188 - Smoking Ban in Public Places, Workplaces and Food Service  
Establishments Effective May 1, 2010

In response to the many inquiries received regarding the implications of the new smoking ban, the following summarizes requirements applicable to adult foster care (AFC) and home for the aged (HFA) facilities. I also encourage you to review PA 188 that I have also attached. The following are excerpts from a summary on the Michigan Legislature website:

House Bill 4377 amended the Public Health Code, generally, to prohibit smoking in public places, in places of employment, and in food service establishments. Exceptions are made, however, for cigar bars and tobacco specialty retail stores. Home offices are also exempt, but only if there are no other employees besides the residence owner or lessee.

**Under House Bill 4377:**

- o An individual is prohibited from smoking in a public place or at a meeting of a public body, and a state or local governmental agency or a person who owns, operates, or manages a public place must make a reasonable effort to prohibit individuals from smoking in a public place.
- o The definition of "public place" is expanded to include a "place of employment," and that term refers to an enclosed indoor area that contains one or more work areas for one or more persons employed by a public or private employer. (A "work area" is defined as a site within a place of employment where one or more employees perform services for an employer.) The term "a place of employment"

also does not include a residence that is also used as an office for the owner or lessee (but for no other employee), and also does not include a motor vehicle.

The bill requires that a *no smoking sign* or the *international no smoking symbol* be clearly and conspicuously posted at entrances to and within every building or other area where smoking is prohibited. Ashtrays and other smoking paraphernalia must be removed from places where smoking is prohibited. Owners, operators, managers, or others with control over a no-smoking area must inform individuals found smoking that they are in violation of state law and subject to penalties. They also must refuse service to individuals smoking in violation of the act, and ask individuals smoking to refrain, and if they refuse, ask them to leave.

**Penalties/ Enforcement.** The no-smoking provisions of Part 126 and 129 will be enforced by the Department of Community Health, and DCH has authorized local health departments to carry out the enforcement. Violations would be subject to a civil fine of up to \$100 for a first violation and up to \$500 for a second or subsequent violation.

The Bureau of Children and Adult Licensing asked the Office of Attorney General for guidance on the following questions and below are the responses provided:

**Q. Is smoking banned inside HFA's? Answer. Yes.**

On December 18, 2009 PA 188 of 2009 was signed by the Governor. This law prohibits an individual from smoking in a public place. "Smoking" ... means the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a tobacco product.<sup>1</sup> A "public place" is broadly defined in the statute to include an enclosed indoor area used by the general public and a place of employment that is (1) in an enclosed indoor area, and (2) has one or more employees. The definition of public place specifically includes a "home for the aged" within that definition.

Fundamental canons of statutory interpretation require us to give effect to the legislature's intent as expressed by the language of its statutes.<sup>2</sup> By expressly including a home for the aged within the definition of a public place the

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<sup>1</sup> "Tobacco product means a product that contains tobacco and is intended for human consumption, including, but not limited to cigarettes, noncigarette smoking tobacco, or smokeless tobacco, as those terms are defined in section 2 of the tobacco products tax act, 1993 PA 327, MCL 205.422, and cigars.

<sup>2</sup> DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2nd 300 (2000).

legislature intended that individuals be banned from smoking inside homes for the aged.

**Q. Is Smoking Banned inside AFC's?**

**Answer. Yes – when an AFC employs staff within the facility.**

As noted above a “public place” is broadly defined in the statute to include an enclosed indoor area used by the general public and a place of employment that is (1) in an enclosed indoor area, and (2) has one or more employees.

AFC's generally fall into one of three categories: an Adult Foster Care Family Home, an Adult Foster Care Small Group Home and an Adult Foster Care Large Group Home.

“Adult foster care family home” means a private residence with the approved capacity to receive 6 or fewer adults to be provided with foster care for 5 or more days a week and for 2 or more consecutive weeks. The adult foster care family home licensee shall be a member of the household, and an occupant of the residence.<sup>3</sup>

“Adult foster care small group home” means an adult foster care facility with the approved capacity to receive 12 or fewer adults to be provided with foster care.<sup>4</sup>

“Adult foster care large group home” means an adult foster care facility with the approved capacity to receive at least 13 but not more than 20 adults to be provided with foster care.<sup>5</sup>

Depending upon the needs of the residents within AFC facilities and the rules regarding staffing requirements in the AFC Licensing Act<sup>6</sup>, an AFC facility may have employees working in enclosed indoor work areas caring for the AFC residents. **If an AFC has an employee working inside the facility, individuals are banned from smoking inside.**

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<sup>3</sup> MCL 400.703(5)

<sup>4</sup> MCL 400.703(7)

<sup>5</sup> MCL 400.703(6)

<sup>6</sup> MCL 400.701 *et seq.*

### **May individuals smoke outside the AFC's?**

The next logical question is "*May individuals smoke outside the AFC facility*"? Yes, anyone may smoke outside the AFC facility. The ban against smoking applies to enclosed indoor areas where there is at least one employee. The entrances/exits must remain free from smoke but no distance requirements have been enacted.

### **How can an AFC owner or licensee comply with the "Smoking law Ban"?**

**Answer. The law requires an AFC owner or licensee take the following steps:**

- Clearly and conspicuously post "no smoking" signs or the international "no smoking" symbol at the entrances to and in every building or other area where smoking is prohibited under this act.
- Remove all ashtrays and other smoking paraphernalia from anywhere smoking is prohibited under this act.
- Inform individuals smoking in violation of this act that they are in violation of state law and subject to penalties.
- Ask an individual smoking in violation of this act to refrain from smoking and, if the individual continues to smoke in violation of this act, ask him or her to leave the public place, ...<sup>7</sup>

It is an affirmative defense to a prosecution or civil or administrative action for a violation of this section that the owner, (of an AFC) ... where smoking is prohibited under this section ... made a good faith effort to prohibit smoking... . To assert the affirmative defense under this subsection, the owner (of an AFC) ... shall file a sworn affidavit setting forth his or her efforts to prohibit smoking and

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<sup>7</sup> MCL 330.12603(2)

his or her actions of compliance ... .<sup>8</sup> A resident's discharge may be required under the AFC rules to protect the health of employees and resident's.

### **Who enforces the smoking ban?**

The Department of Community Health (Department) shall enforce this law banning individuals from smoking in public places including any AFC's that may have employees working inside the facilities.<sup>9</sup> The Department may authorize a local health department to enforce this law.<sup>10</sup>

Therefore, I am directing Adult Foster Care and Home for the Aged Licensing Division staff to provide "consultation" only to AFC and HFA facility staff by advising them of the requirements of this new law. As part of that guidance, AFC and HFA staff may handout copies of the law. However, this statute does not give this Division the authority to enforce its requirements.

Michigan's new smoking law is divided into two parts. Part 126 regulates workplaces and is implemented by the Michigan Department of Community Health (MDCH) while Part 129 regulates food service establishments and has been delegated by the State to local health departments. Other than the above guidance provided by the Office of Attorney General, questions from AFC and HFA facility staff regarding interpretation of this new law should be referred to their local health departments or the MDCH Tobacco Section. The MDCH website [www.michigan.gov/smokefreelaw](http://www.michigan.gov/smokefreelaw) includes clarification regarding these requirements, as well as other useful information, and a hotline number is also available (1-866-59-SMOKE).

However, since AFC and HFA residents will no longer be allowed to smoke inside of these facilities, licensees and administrators need to be planning how supervision will be adequately provided for those residents smoking outside to assure their protection and safety.

Licensees and administrators must also consider the new ban on smoking when assessing a resident for admission. If a licensee accepts a resident that smokes, the licensee must assure the resident is aware and is able to comply with the smoking ban that prohibits smoking inside of the facility and if allowed outside, the degree of supervision that will be needed to meet each person's needs.

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<sup>8</sup> MCL 333.12603(3)

<sup>9</sup> MCL 330.12613(1)

<sup>10</sup> MCL 330.12613(2)

Additionally, if a licensee is not able to meet the supervision needs of a resident smoking outside or if a resident refuses or is unable to comply with the smoking ban inside, this could be grounds for discharge of a resident.

Keep in mind however that a licensee does not have to permit smoking at all, many don't now. Likewise, a licensee should include in their house rules any stipulations regarding smoking.

Should an AFC or HFA licensing staff person observe chronic violation of this new law after consultation has been provided to an AFC or HFA licensee and/or administrator, he/she should discuss referral to local health authorities or MDCH with their area manager.

\* **NOTE:** AFC and HFA facilities also licensed as "food service establishments" should review the specified requirements contained in Act 188 applicable to those types of operations.