



# Tobacco Shops & Smokers' Lounges

## Understanding the Exceptions to California's Smokefree Workplace Act

*This fact sheet describes how to determine when a business is in violation of the smokefree workplace law, and provides strategies for communities to address the proliferation of businesses that allow smoking.*

California's smokefree workplace law prohibits smoking in most places of employment, such as bars, restaurants, and retail establishments.<sup>1</sup> Passed in 1994 to create a uniform standard for protecting employees from secondhand smoke exposure,<sup>2</sup> the law contains several exceptions for specific types of businesses, permitting indoor smoking on some or all of their premises.

The most common types of businesses that may allow indoor smoking are tobacco shops (for example, smoke shops and tobacconists), and smokers' lounges (for example, cigar bars and hookah lounges). These businesses have become increasingly popular throughout California. They are legally permitted to allow indoor smoking because of an exception in the smokefree workplace law for "retail or wholesale tobacco shops and private smokers' lounges."<sup>3</sup>

Many communities are concerned that the proliferation of these businesses in their neighborhoods may create a number of problems. For example, drifting smoke from a tobacco shop may severely impact neighboring businesses and residences, endangering occupants' health. There is also a concern that these businesses contribute to the normalization of tobacco use among youth and young adults. Hookah smoking in particular has become extremely popular with young people, and many communities have recently seen a boom in the number of tobacco shops opening up as hookah bars.



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Businesses must meet very specific requirements to qualify for the tobacco shop/smokers' lounge exemption, and many businesses may mistakenly believe that they qualify for the exemption when they actually do not.

This fact sheet describes how to determine when a business is in violation of the smokefree workplace law, and provides strategies for communities to address the proliferation of businesses that allow smoking.

### How Does the Law Define "Tobacco Shop?"

The law defines a "retail or wholesale tobacco shop" as "any business establishment the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories."<sup>4</sup>

### How Does the Law Define "Smokers' Lounge?"

The law defines "private smokers' lounge" as "any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes."<sup>5</sup>

In understanding the distinction between tobacco shops and smokers' lounges, it's important to recognize that they overlap. A "retail or wholesale tobacco shop" may contain a smokers' lounge, but it can allow smoking in its premises regardless of whether or not it contains a smokers' lounge, so long as it exists specifically to sell tobacco products and paraphernalia. On the other hand, a "private smokers' lounge" must be inside or attached to a retail or wholesale tobacco shop, and cannot exist independently. Note also that despite the use of the word "private," a smokers' lounge may be open to the public and still qualify for the exemption, so long as it meets all the necessary criteria discussed in this fact sheet.

### Interpreting the Definitions

The smokefree workplace law requires that a tobacco shop's "main purpose" be the sale of tobacco products<sup>6</sup> and that a smokers' lounge be "dedicated to" the use of tobacco products.<sup>7</sup> If a business operates in a way that falls outside the parameters of these definitions, it is not exempt from the requirements of Labor Code section 6404.5 and may not permit smoking. Because the law does not define the key terms "main purpose" or "dedicated to," some law enforcement officials have struggled to interpret this language. In determining the scope of the exemption for tobacco shops and smokers' lounges, legal interpretations from the California Legislative Counsel, the California Attorney General, and several City Attorney's offices provide some useful guidance.

Understanding the terms "main purpose" and "dedicated to" is extremely important from an enforcement standpoint because businesses such as bars, restaurants, and clubs will sometimes claim to be tobacco stores so that they can allow smoking, but still sell or serve food, alcohol, and/or other products. According to analyses by the California Legislative Counsel and the California Attorney General, businesses that sell food or alcohol do *not* qualify for the tobacco shop exception because their "main purpose" is not to sell tobacco products.<sup>8,9</sup> In addition, such businesses cannot simply designate a room (or an attached enclosed space) as a "smokers' lounge," because smokers' lounges can only exist inside, or attached to, a bona fide retail or wholesale tobacco shop.

Furthermore, a joint analysis from the City Attorneys' offices of San Francisco, Los Angeles, and San Jose concluded that because a tobacco shop's *main purpose* is to sell tobacco products and paraphernalia, a business owner cannot simply convert a portion of their store, restaurant, or bar into a tobacco shop in order to allow smoking on the premises.<sup>10</sup> Consistent with this analysis, they note that a tobacco shop should have a separate entrance, separate enclosure, and separate business license from any bar, restaurant, or other type of retail establishment.<sup>11</sup>

## The Attorney General's Opinion on the Exemption for Retail or Wholesale Tobacco Shops and Private Smokers' Lounges

The California Attorney General, as the state's chief law enforcement officer, issues formal legal opinions on questions related to the enforcement of particular laws. Although these opinions are not legally binding like a court decision, they carry a great deal of weight with courts that are considering a legal question for the first time.<sup>12</sup> Therefore, the Attorney General's formal legal opinions serve as guidance for law enforcement on how a law should be interpreted.

In 2011, the California Attorney General issued an opinion that interpreted the definitions of "tobacco shop" and "smokers' lounge," and determined that when an establishment that is open to the public sells alcohol (and by logical extension, food or any other non-tobacco products) it is no longer exempt from the smokefree workplace law.<sup>13</sup> The Attorney General also concluded that both a tobacco shop and an attached smokers' lounge should be set aside exclusively for the sale and use of tobacco products—if they want to allow smoking inside the premises.<sup>14</sup>

The 2011 Attorney General's opinion builds upon similar analyses that have been done in the past. For example, in 2008, the Legislative Counsel of California issued an opinion concluding that smokers' lounges attached to tobacco shops are not exempt from the smokefree workplace law if they serve alcoholic beverages to patrons, noting that the terms "main purpose" and "dedicated to" indicate exclusion of other types of retail.<sup>15</sup>

## What does this mean for cigar bars?

Cigar bars, as the name suggests, are businesses that specialize in selling a variety of cigars that patrons can smoke onsite in a social environment. Oftentimes, cigar bars cater to an affluent clientele, offering expensive "premium" cigars. Many establishments also offer a wide selection of inexpensive flavored cigars which have become increasingly popular among youth.<sup>16</sup>

Communities may be concerned about cigar bars for different reasons. In some cases, the smoke from cigar bars drifts into neighboring buildings or neighboring units in the same building. This drifting smoke impacts neighbors' health, and may have a harmful economic impact on neighboring businesses. Communities may also be concerned about the increased availability of cheap, candy-flavored cigars (and so-called "little cigars," or "cigarillos") to children and teenagers.

Cigar bars qualify for the smokefree workplace law's tobacco shop/smokers' lounge exemption; however, they may only permit smoking if the criteria listed on page 6 are met. If they sell or serve food, alcohol, or other products, they may *not* permit smoking inside their establishment.

## What does this mean for hookah lounges?

A hookah lounge is an establishment where customers pay to rent a hookah that is placed at a table for communal use. A hookah is a tobacco pipe with a long, flexible tube that draws smoke through water contained in a bowl. Many hookah lounges offer patrons a menu of flavored tobacco to choose from. They also frequently offer food and beverages, even though the smokefree workplace law prohibits such businesses from serving food or beverages.

Many communities are very concerned about the recent increase in the popularity of hookah lounges among youth and young adults. Youth and young adults who may not otherwise be inclined to use tobacco may be attracted to hookah smoking because of the sweetened, flavored smell and taste of the tobacco used in hookahs.<sup>17</sup> In addition, young people may not be aware of the health consequences of hookah use, erroneously believing that it's somehow safer or less addictive than other tobacco products. This misunderstanding may account for the increase in popularity of hookah smoking and the increase in the number of hookah lounges established in recent years.<sup>18</sup>

As with cigar bars, hookah lounges may permit smoking under the tobacco shop/smokers' lounge exemption only if they meet the criteria listed on page 6.



## What Communities Can Do

There are several ways that cities or counties can address the issue of smoking in tobacco shops, cigar bars, and hookah lounges in their community.

### Enforcing Existing Law

Cities and counties are authorized to enforce the state smokefree workplace law.<sup>19</sup> If an individual witnesses a business illicitly permitting smoking – for example, allowing smoking while also serving food or beverages – they can contact their local police or public health department to lodge a complaint. The state smokefree workplace law gives authority to local law enforcement, including public health departments, to issue citations to such businesses until they comply with the law. Businesses have typically been required to pay \$100–\$300 per violation.<sup>20</sup>

After the owner of an establishment is found to have violated the smokefree workplace law on three occasions, the case can be referred to the California Division of Occupational Safety and Health (Cal/OSHA). Cal/OSHA can then conduct an inspection and issue significant fines if they find severe or repeated violations of the law.<sup>21</sup>

For example, in Shasta County, two separate bar owners who continued to allow smoking in their bars were each fined \$54,000 by Cal/OSHA for “willful and serious” violations of the California Smokefree Workplace Act.<sup>22</sup> (These were some of the largest fines that have been levied against business owners for failing to comply with the smokefree workplace law.)

### Enacting Local Smokefree Workplace Ordinances

The state smokefree workplace law explicitly gives authority to local governments to pass laws that are more restrictive than the state law.<sup>23</sup> This means that cities and counties can pass their own laws to prohibit smoking in any or all places of employment, even those that are exempted from the state smokefree workplace law, such as tobacco shops and smokers' lounges. Because local governments can prohibit smoking anywhere within their jurisdiction, local smokefree laws can be very broad, possibly without any exemptions at all.

### Enacting Local Tobacco Retailer Licensing Ordinances

Communities can also pass tobacco retailer licensing ordinances, requiring businesses to obtain a license in order to sell tobacco, and subjecting retailers to certain conditions. For example, a community can require that tobacco retailers prohibit smoking on their premises or limit access to minors. A licensing law can also be used to regulate the types of tobacco products that are sold. For example, a licensing law could require retailers to refrain from selling candy-flavored tobacco products that may be attractive to children or teenagers. This can be a direct way of limiting hookah lounges that specialize in such youth-friendly flavors, or cigar bars and other tobacco shops that sell a wide variety of flavored cigarillos or “little cigars.”

For more information on tobacco retailer licensing ordinances, and the types of conditions that can be placed on obtaining and maintaining a license, [visit our website](#).



## Other Types of Exemptions

Establishments like cigar bars and hookah lounges often try to claim that they are exempt from the smokefree workplace law in other ways, so that they might avoid having to meet the qualification criteria for the tobacco shop/smokers' lounge exemption (i.e., so they can serve food or alcohol). Two arguments in particular are frequently made by these businesses: 1) that they qualify for the smokefree workplace law's exemption for businesses with five or fewer employees; and 2) that they are not covered by the smokefree workplace law at all because they are an owner-operated business. For reasons described below, it is actually extremely difficult for businesses to qualify for these particular exemptions.

### Exemption: Businesses with Five or Fewer Employees

The "five or fewer employees" exemption contains very strict criteria.

In order for to qualify for this exemption: 1) the smoking area must not be accessible to minors; 2) all employees who enter the smoking area must consent to allow smoking in that area; 3) the air from the smoking area must be vented directly outside and not re-circulated into the rest of the building; and 4) the ventilation used in the smoking area must meet OSHA or EPA standards.

Even if the above criteria can be met, the California Attorney General's analysis of the exemption is that bars, taverns, and gaming clubs *cannot* qualify for this exemption.<sup>24</sup>

Restaurants and other food service establishments also *cannot* qualify for the "five or fewer" exemption, as they are not permitted to arbitrarily prohibit minors from their premises just so that they might qualify.<sup>25</sup>

### Owner-Operated Businesses and Volunteers

The smokefree workplace law does not have a specific exemption for "owner-operated" businesses. However, because the law itself only applies to "places of employment," establishments that have no employees are not covered by the law and are therefore not subject to its smokefree requirement.

Some business owners have tried to "transform" their employees into "co-owners" in order to circumvent the law and allow indoor smoking. In many cases, courts have found this to be a "sham" operation and have held that the smokefree workplace law did indeed apply.<sup>26</sup>

Finally, businesses sometimes claim that they're not places of employment for purposes of the smokefree workplace law because they're operated by volunteers rather than employees. However, courts have found that there actually is an employment relationship between a business owner and volunteers if the business owner has the right to direct and control the activities of the volunteers, and if the volunteers receive some sort of benefit in return for their services.<sup>27,28</sup>

For a more detailed discussion of owner-operated businesses and/or volunteer-operated establishments, see ChangeLab Solutions' Law Notes: "[How to Prohibit Smoking in Owner-Operated Businesses](#)," and "[How to Prohibit Smoking in Places Operated by Volunteers](#)," available at [www.changelabsolutions.org/tobacco-control](http://www.changelabsolutions.org/tobacco-control).

For more about the different exemptions contained in the California Smokefree Workplace Act, see "Tobacco Laws Affecting California," available at [www.changelabsolutions.org/tobacco-control](http://www.changelabsolutions.org/tobacco-control).



## Additional Resources

ChangeLab Solutions has a [Comprehensive Smokefree Places Model Ordinance](#) with provisions to address smoking in workplaces, as well as a [Tobacco Retailer Licensing Model Ordinance and Associated Plug-ins](#). ChangeLab Solutions can help cities or counties expand or customize language from these model ordinances to address problems associated with smoking lounges in their communities. To request technical assistance, please [visit our website](#).

*ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.*

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## Checklist for determining if a business qualifies for the tobacco shop or smokers' lounge exemption created by California Labor Code 6404.5(i)(d)(4)

*Consistent with the legal analyses discussed in this fact sheet, if a business does not meet all of the following criteria, it does not qualify as a "retail or wholesale tobacco shop" under the smokefree workplace law and cannot allow smoking in their establishment pursuant to that exemption:*

- The main purpose of the business is the sale of tobacco products and smoking accessories
- The business does not sell or serve other products for consumption, such as beverages or food
- The business has its own business license separate and apart from any other business
- The business has its own entrance to the premises, separate and apart from any other business
- The business has its own separate enclosure (unit, suite, etc.), separate and apart from any other business

*Consistent with the legal analyses discussed in this fact sheet, if a space does not meet all of the following criteria, it does not qualify as a "private smokers' lounge" under the smokefree workplace law and cannot allow smoking within its walls pursuant to that exemption:*

- The lounge is attached to or inside of a retail or wholesale tobacco shop that meets the the criteria listed on the left
- Other products such as food or beverages are not served for consumption in the lounge
- The lounge is used only for the consumption of tobacco products; it is not used for the consumption of other types of products such as beverages or food

<sup>1</sup> Cal. Lab. Code § 6404.5.

<sup>2</sup> Cal. Lab. Code § 6404.5(a). ("It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.")

<sup>3</sup> Cal. Lab. Code § 6404.5(i)(d)(4).

<sup>4</sup> Cal. Lab. Code § 6404.5(i)(d)(4)(B).

<sup>5</sup> Cal. Lab. Code § 6404.5(i)(d)(4)(A).

<sup>6</sup> Cal. Lab. Code § 6404.5(i)(d)(4)(B).

<sup>7</sup> Cal. Lab. Code § 6404.5(i)(d)(4)(A).

<sup>8</sup> Cal. Att'y Gen. Op. No. 09-507 (Dec. 21, 2011).

<sup>9</sup> Legis. Counsel of Cal. Op. No. 0824950, at 3 (September 15, 2008).

<sup>10</sup> Solomon, Barbara, Deputy City Attorney, San Francisco, Evan Braude, Special Assistant City Attorney, Los Angeles, Brian Doyle, Senior Assistant City Attorney, San Jose. Legal Parameters of the California Smokefree Workplace Law (Labor Code 6404.5), Section 9.4. Available at: [http://changelabsolutions.org/sites/pblpnet.org/files/Legal\\_Parameters\\_of\\_the\\_California\\_Smokefree\\_Workplace\\_Law.pdf](http://changelabsolutions.org/sites/pblpnet.org/files/Legal_Parameters_of_the_California_Smokefree_Workplace_Law.pdf)

<sup>11</sup> *Id.*

<sup>12</sup> See *Thorning v. Hollister School Dist.*, 11 Cal. App. 4th 1598, 1604 (1992); *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.*, 194 Cal. App. 3rd 243, 251 (1987)

<sup>13</sup> Cal. Att'y Gen. Op. No. 09-507 (Dec. 21, 2011).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> See Legis. Counsel of Cal. Op. No. 0824950, at 3 (September 15, 2008).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> California Department of Public Health. California Tobacco Control Program. 2011. *Hookah Tobacco is Unsafe*, 1. [www.cdph.ca.gov/programs/tobacco/Documents/Hookah%20Fact%20Sheet.pdf](http://www.cdph.ca.gov/programs/tobacco/Documents/Hookah%20Fact%20Sheet.pdf)

<sup>19</sup> Cal. Lab. Code § 6404.5(j).

<sup>20</sup> See California's Clean Air Project. *California Court Decisions on Smokefree Bars*, *supra* note vii, at Section 4.

<sup>21</sup> See California's Clean Air Project. *The Role of Cal OSHA in Enforcing Labor Code 6404.5*, *supra* note vii, at Section 7.1. ("Example of past practice: [...] Upon referral Cal-OSHA obtained an inspection warrant, conducted an inspection (including an air sample), and levied an administrative fine based on all California code violations they found. The fine amounted to \$10,000.")

<sup>22</sup> See California's Clean Air Project. *California Court Decisions on Smokefree Bars*, *supra* note vii, at Section 4.3.

<sup>23</sup> Cal. Lab. Code § 6404.5(i) (West). ("[L]ocal governments shall have the full right and authority [...] to enact and enforce new, restrictions on the smoking of tobacco products in enclosed places of employment within their jurisdictions, including a complete prohibition of smoking.")

<sup>24</sup> Cal. Att'y Gen. Op. No. 82-190 (Oct. 8, 1999).

<sup>25</sup> Cal. Att'y Gen. Op. No. 79-8 (Feb. 15, 1996).

<sup>26</sup> See *People v. The Beacon Lounge*, Lake Elsinore Municipal Court, Riverside County (June 26, 2000). A summary is available at: [www.changelabsolutions.org/sites/pblpnet.org/files/Case\\_Summaries.pdf](http://www.changelabsolutions.org/sites/pblpnet.org/files/Case_Summaries.pdf), at page 4.9.

<sup>27</sup> See Cal. Dept. of Educ., Letter to TEROC Chairperson Jennie Cook, May 18, 1998. Available at: [http://changelabsolutions.org/sites/default/files/documents/Cal\\_Dept\\_of\\_Edu\\_Letter\\_to\\_TEROC\\_Chairperson\\_Jennie\\_Cook\\_May\\_18\\_1998.pdf](http://changelabsolutions.org/sites/default/files/documents/Cal_Dept_of_Edu_Letter_to_TEROC_Chairperson_Jennie_Cook_May_18_1998.pdf)

<sup>28</sup> *Riskin v. Indus. Accident Comm'n*, 26 Cal. 2d 130, 135 (1943) (defendant's claim that plaintiff was independent contractor and not employee fails because, in part, defendant had right to issue instructions and to expect them to be followed).