

Left Behind in the Smoke

How Exemptions in California's Smokefree Workplace Act Impact Health Inequities



ChangeLab Solutions
Law & policy innovation for the common good.

Contents

ACKNOWLEDGMENTS

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This guide was developed by ChangeLab Solutions with funds received from the California Department of Public Health, under contract #09-11182.

Note to readers: The percentages throughout this guide have been rounded to increase readability. For the precise percentages, please refer to the source material.

Design & illustration:

Karen Parry | Black Graphics

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Summary

These key points highlight the unjust and unfair nature of the California Smokefree Workplace Act's exemptions and the resulting health inequities.

- > Although widely perceived as a comprehensive smokefree air law, the California Smokefree Workplace Act still does not prohibit smoking in places like hotels, cabs of trucks, warehouses, private residences used for family daycare, long term health care facilities, outdoor places of employment, small businesses, and tobacco shops and private smokers' lounges.¹
- > As a result, one in seven Californians face secondhand smoke exposure at work.²
- > The industries most impacted by the exemptions in the California Smokefree Workplace Act primarily pay low wages and employ communities of color.
- > The exemptions in the law contribute to tobacco related health inequities among the working poor and communities of color.
- > These exemptions have become part of a system that makes it easier for some of California's most affected populations to start smoking, more difficult to quit smoking, and more likely to die from diseases associated with tobacco use.
- > Local governments should look for ways to close the gaps in California's Smokefree Workplace Act to minimize this source of health inequities and ensure all employees can work safely in a smokefree environment.

California Labor Code Section 6404.5: Exemptions

The law states that no employer shall permit smoking in an enclosed space at a place of employment. "Enclosed space" includes lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building. For purposes of the law, "place of employment" **DOES NOT INCLUDE** any of the following:



HOTELS, specifically:

- 65% of the **GUESTROOM** accommodations in a hotel, motel, or similar transient lodging establishment.
- Up to 25% or 50% (depending on square footage) of hotel/motel **LOBBIES**.
- **MEETING AND BANQUET ROOMS** except while food is being served.



Retail or wholesale **TOBACCO SHOPS** and **PRIVATE SMOKERS' LOUNGES**.



CABS OF TRUCKS OR TRACTORS if no nonsmoking employees are present.



WAREHOUSE FACILITIES (with more than 100,000 square feet of total floorspace, and 20 or fewer full-time employees working at the facility), but does not include any area within a facility that is utilized as office space.



THEATRICAL PRODUCTION SITES, if smoking is an integral part of the story in the theatrical production.



MEDICAL RESEARCH OR TREATMENT SITES, if smoking is integral to the research and treatment being conducted.



PRIVATE RESIDENCES, except for private residences licensed as **FAMILY DAYCARE HOMES**. People are only allowed to smoke after hours and only in the areas of the house where children are not allowed.



Patient smoking areas in **LONG TERM HEALTH CARE FACILITIES**.



BREAKROOMS designated by employers for smoking, provided that:

- Air from the smoking room is exhausted directly to the outside by an exhaust fan.
- The employer complies with any applicable state and federal ventilation standards.
- The smoking room is located in non-work areas.
- There are sufficient nonsmoking breakrooms to accommodate nonsmokers.



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:

- The smoking area is not accessible to minors.
- All employees who enter the smoking area consent to permit smoking.
- Air from the smoking area is exhausted directly to the outside by an exhaust fan.
- The employer shall comply with all applicable federal and state ventilation standards.



The law does not apply to any **WORKPLACES THAT ARE LOCATED OUTDOORS.**

Introduction

1 in 7

workers in California
continues to be needlessly
exposed to secondhand
smoke at work.²

Once a leader in protecting workers from secondhand smoke, California has fallen behind. When California passed the Smokefree Workplace Act in 1994, it led the nation by becoming the first state to amend its Labor Code to require employers to prohibit smoking in enclosed places of employment.³ However, California left gaping holes in the Labor Code by not prohibiting smoking in places like hotels, cabs of trucks, warehouses, family daycares in private residences, small businesses, long term health care facilities and outdoor places of employment.¹ These exemptions in California persist today even though 25 states and D.C.³ have since adopted comprehensive smokefree laws.* As a result, one in seven workers in California continues to be needlessly exposed to secondhand smoke at work.²

Comprehensive smokefree workplace policies[†] have the power to reduce secondhand smoke exposure, lower the number of people who smoke, and improve health outcomes.⁴ Unfortunately, the California Smokefree Workplace Act's exemptions mean people who work in professions such as maids, truck drivers, home health aides, orderlies, and childcare assistants continue to be exposed to secondhand smoke at work. The exemptions in the law and the confusion these exemptions create for enforcement agencies exacerbate tobacco related health inequities among the working poor and communities of color.⁵

These exemptions have become part of a system that makes it easier for some of California's most affected populations[†] to start smoking, more difficult to quit smoking, and more likely to die from diseases associated with tobacco use. Closing these exemptions is critical for eliminating a significant source of health inequities in California.[‡] As of January 2014, at least 57 local California jurisdictions have begun this process by strengthening their laws to ensure that 100 percent of non-hospitality workplaces are smokefree.⁶

* CDC uses the term "comprehensive smokefree laws" to refer to "state smoking restrictions for private-sector worksites, restaurants, and bars." However, to be truly comprehensive, localities may want to also think of other locations like outdoor areas, hotel guestrooms, or worksites that are located in private residences.

† We use the term "affected populations" instead of "vulnerable populations" because it is a more precise term. "Affected populations" refers specifically to those populations that have the highest health inequities because they are the most impacted (or "affected") by a specific system such as the California Smokefree Workplace Act that creates the circumstances in which they live, work, and play in.

‡ This report focuses on the impact of the exemptions where local governments have authority to close these exemptions. There may be other populations who may be exposed to secondhand smoke at work such as casino workers on tribal lands. However, these populations are not discussed because local governments do not have the authority to prohibit smoking in workplaces on tribal land.

An estimated **8%**
of secondhand smoke
exposure at work is due
to lack of or insufficient
enforcement.²

➤ Unequal Enforcement of the California Smokefree Workplace Act

In passing California's Smokefree Workplace Act the legislature intended to eliminate any confusion that can result from inconsistent enforcement of smokefree air laws.¹ Unfortunately, because the law has so many exemptions, there remains considerable confusion about enforcing smokefree workplace requirements.

Additionally, enforcement has not always been consistently applied to all worksites, including those worksites that are clearly covered by the California Smokefree Workplace Act. The California Tobacco Control Program estimates that "there is likely poor enforcement or lack of implementation of the work ban policy for about 8% of those [workers] that reported exposure to secondhand smoke."²

Unequal enforcement of the existing law means that certain groups of people are less likely to be protected from secondhand smoke exposure. Statewide polls suggest that the people most likely to be left out are from low-income and communities of color.² It is important that jurisdictions make sure that the California Smokefree Workplace Act is being enforced correctly to reduce inequities in exposure to secondhand smoke at work.

What Do We Mean by Health Inequities?

The California Health and Safety Code defines health equity, health disparities, and health inequities in the following ways:⁷

'HEALTH EQUITY' means efforts to ensure that all people have full and equal access to opportunities that enable them to lead healthy lives.⁷

'HEALTH AND MENTAL HEALTH DISPARITIES' means differences in health and mental health status among distinct segments of the population, including differences that occur by gender, age, race or ethnicity, sexual orientation, gender identity, education or income, disability or functional impairment, or geographic location, or the combination of any of these factors.⁷

'HEALTH AND MENTAL HEALTH INEQUITIES' means disparities in health or mental health, or the factors that shape health, that are *systemic* and *avoidable* and, therefore, considered *unjust* or *unfair*.⁷

Throughout this report, we use the term *health inequities* as defined by the California Health and Safety Code because it is how the state legally defines health inequities and because it is very similar to definitions used by public health organizations like the Centers for Disease Control and Prevention.⁵ More importantly, though, we use the term health inequities because it underscores the unjust and unfair nature of the exemptions in California's Smokefree Workplace Act and emphasizes that the California Labor Code shapes people's health in a systemic way that is entirely avoidable.

Tobacco's Impact on Health at Work

Almost half a million people die prematurely in the United States from tobacco related diseases every year, making tobacco use the nation's leading cause of preventable death.⁸ Tobacco use can cause disease in nearly all organ systems and is responsible for "87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of chronic obstructive pulmonary disease."⁸ It also causes a third of all cancer deaths.⁸ Tobacco smoke contains thousands of chemicals including at least 250 harmful chemicals and at least 70 known carcinogens.⁸

Because the California Smokefree Workplace Act fails to provide comprehensive workplace protections, it increases the likelihood that workers will:

Nonsmokers who are exposed to secondhand smoke at work are

20 to 30%

more likely to die from smoking related diseases.¹²

➤ Smoke

Workplace smoking bans reduce the number of people who start smoking, increase the number of people who quit smoking, and decrease the number of cigarettes consumed by people who continue to smoke.^{9,10}

➤ Suffer from secondhand smoke exposure

According to the CDC, "comprehensive smokefree policies are the most effective means to protect all workers from secondhand smoke."¹⁵ Secondhand smoke is responsible for as many as 41,300 deaths among nonsmokers each year in the United States.¹¹ The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke.¹²

In California, those who work in smokefree workplaces are substantially less likely to be exposed to secondhand smoke (11 percent versus 51 percent).¹³ Research suggests that nonsmokers who are exposed to secondhand smoke at work are 20 percent to 30 percent more likely to die from smoking related diseases.¹²

Nonsmoking people who are exposed to thirdhand smoke have significantly higher nicotine and cotinine levels than those who have not been exposed to thirdhand smoke.¹⁶

➤ Inhale, ingest, or absorb dangerous contaminants found in thirdhand smoke

When tobacco is burned, the smoke forms a residue, often called “thirdhand smoke.” This residue is absorbed by porous surfaces like carpeting, drapes, and upholstery. It also creates a sticky film on non-porous surfaces like walls, countertops, appliances and fixtures.¹⁴ Thirdhand smoke has been found to contain carcinogenic materials that accumulate over time, presenting a health hazard long after the initial smoke is gone.¹⁵ These materials are slowly re-released out of carpeting and drapes into the air where they can be inhaled or absorbed through the skin.¹⁶ Nonsmoking people who are exposed to thirdhand smoke have significantly higher nicotine and cotinine levels (which is the best available biomarker for measuring people’s exposure to tobacco)¹⁷ than those who have not been exposed to thirdhand smoke.¹⁶ Additionally, research has shown that thirdhand smoke damages human cellular DNA.¹⁸

➤ Experience the effects of adverse interactions between tobacco and other environmental toxins

Those who work in the industries that the California Smokefree Workplace Act currently does not protect from workplace exposure to secondhand and thirdhand smoke are often likely to be exposed to other non-tobacco related toxins and carcinogens at work.^{19, 20} For example, volatile organic compounds (VOCs), which cause everything from headaches to cancer, are commonly found in cleaning agents, fuel and combustion products, and air fresheners.²¹ These are items that employees are likely to encounter if they work in hotels, as a tractor or truck driver, or in warehouses. There are significant concerns that environmental contaminants interact in ways to increase people’s risks for a wide range of health conditions from inflammation of the lungs to cancer.²⁰

➤ Be hurt or even die in a fire

Nationally, smoking cause 1,900 fires each year in non-residential buildings.²² African Americans, Native Americans, and low-income populations have the highest risk for fire related injury and death.²³

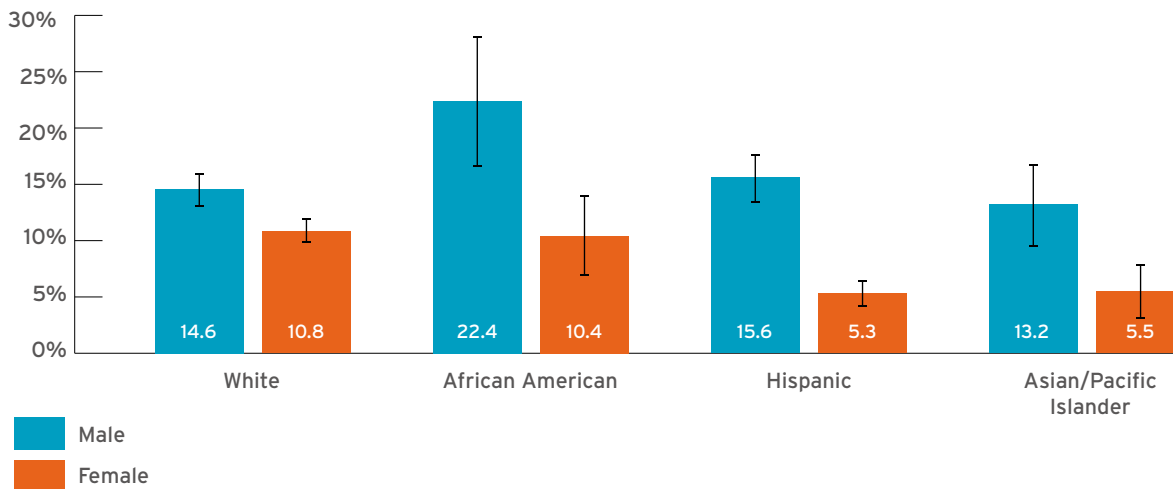
California's Smoking Related Health Inequities

The California Smokefree Workplace Act's exemptions impact health inequities by creating disparities among communities of color and low-income populations. Many of these populations are the most likely to use tobacco and are also the most likely to work in industries that are not required to be smokefree under the Smokefree Workplace Act.

➤ Smoking is highest among men, African Americans (both male and female), and Hispanic men

One in eight Californian's over the age of 18 smoke.²⁴ African American men, African American women, and Hispanic/Latino men have some of the highest smoking rates (see Table 1).^{25, 26}

TABLE 1
Smoking Prevalence by Race/Ethnicity and Gender in 2013



*Note that these are point estimates with wide confidence intervals, especially for African Americans. Compared to 2012 data, there was not a statistically significant change in the smoking prevalence.

Source: Behavioral Risk Factor Surveillance System (BRFSS) 2013. The data are weighted to the 2010 California population. Information provided by: California Department of Public Health California Tobacco Control Program

Men and Hispanics are also the most likely to be exposed to secondhand smoke at work.¹³ Between 2002 and 2005, nearly one in five Hispanic nonsmokers and one in ten African American nonsmokers reported being exposed to secondhand smoke in the last two weeks.¹³

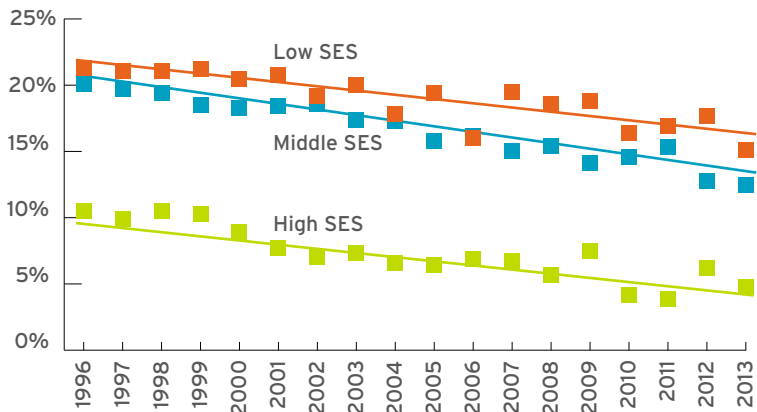
There are substantial costs associated with smoking among African American and Hispanic communities.* For example, smoking-attributable health care expenditures and lost productivity for the Californian Hispanic community was \$1.9 billion in 2010²⁷ and \$1.8 billion for the African American community in 2008.²⁸

In 2013, the average annual income in California was **\$53,030.**³⁰

➤ Smoking is highest among low-income populations

The smoking prevalence rates among low- and lower-income populations are significantly higher than smoking prevalence rates among higher income populations (see Table 2).²⁹

TABLE 2
Smoking Prevalence Among California Adults by Socioeconomic Status (SES)



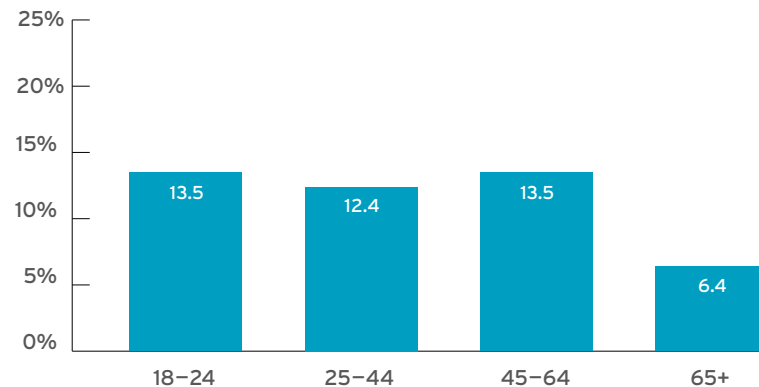
Source: Behavioral Risk Factor Surveillance System (BRFSS) 1996 and 2013, 2014. Information provided by: California Department of Public Health California Tobacco Control Program

* Many of the populations that are disproportionately affected by the California Smokefree Workplace Act's exemptions are also specifically targeted by the tobacco industry and disproportionately impacted by gaps in other tobacco related laws. The confluence of these factors heightens their risk of smoking and suffering from tobacco related diseases. For example, the tobacco industry specifically markets mentholated cigarettes to African Americans to increase their use of these products. Another is example is that neighborhoods with a high concentration of poverty often have a higher density of tobacco outlets which contributes to higher smoking rates among low-income populations. No single policy change like closing the gaps in the California Smokefree Workplace Act will eliminate health inequities; rather, a collection of strategies are needed to prevent tobacco use and exposure to secondhand smoke. A discussion of the myriad of approaches to restricting tobacco use in addition to closing gaps in the California Smokefree Workplace Act can be found on our website at: www.changelabsolutions.org/tobacco-control.

➤ Tobacco use is highest among working age adults

According to statewide surveys, working age adults are the most likely to smoke (see Table 3).³¹

TABLE 3
Smoking Prevalence by Age in 2013



Source: Behavioral Risk Factor Surveillance System (BRFSS) 2013. 2014. Data are weighted to the 2010 California Population
Information provided by: California Department of Public Health California Tobacco Control Program

Tobacco Exposure at Work & Other Affected Populations

While the focus of this report is on low-income workers and racial/ethnic minority populations, there may be many other affected populations. For example, lesbian, gay, bisexual, and transgender (LGBT) individuals may be disproportionately impacted by the California Smokefree Workplace Act. However, because government employment figures do not systematically track people's sexual orientation or transgender status by industry or profession, it is difficult to determine the extent to how these populations may be impacted.

Surveys and published research do suggest that LGBT populations have higher rates of smoking and secondhand smoke exposure.³² For instance, a recent California survey of lesbian, gay, and bisexual (LGB) populations* found that LGB populations are more than twice as likely to smoke and are more likely to report being exposed to secondhand smoke.³³

Considering the needs of other affected populations is important in health equity work, especially when addressing smoking related health inequities. For this reason, jurisdictions should consider what other specific populations may be affected within their communities to target education and enforcement activities.

* According to CTCP, "The California Adult Tobacco Survey does not collect information about individual's transgender status."

Smoking Related Health Inequities by Occupation

Comprehensive smokefree policies in the workplace are the most effective means of protecting all workers from secondhand smoke.⁵ In California, people in many professions and industries may be legally exposed to secondhand smoke at work because of definitions and exemptions in the California Smokefree Workplace Act such as the employee break room exemption, the small business exemption, and the definition of what a place of employment is.

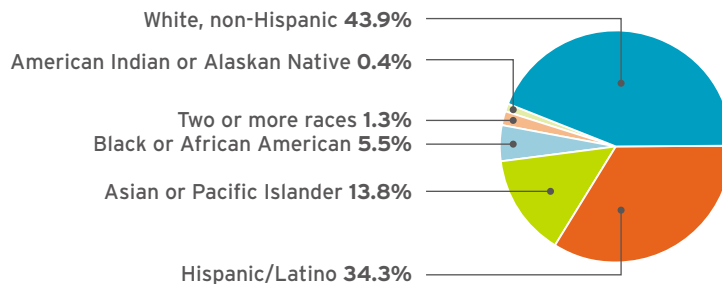
51%

of California workers who are employed in locations where smoking is not prohibited report being exposed to secondhand smoke in the last two weeks.³⁴

However, certain exemptions in the California Smokefree Workplace Act unfairly and disproportionately impact communities of color and low-income workers. This report finds that many of the industries that are exempted by the state law – such as the hotel and accommodation, trucking, warehouse, childcare, and long term health care industries – often pay low wages and employ communities of color at much higher rates than the state average. Additionally, those who work in warehouses, restaurants, bars, and vehicles are some of the most likely to report being exposed to secondhand smoke.^{2, 34}

By looking closely at the impact of some of the exemptions in the law, it becomes even more evident that this law unfairly targets the working poor and communities of color. Closing these exemptions will help reduce these health inequities.

California's Workforce



Source: U.S. Census 2010

The following sections describe each of the exemptions in the California Smokefree Workplace Act that directly impact health inequities. These sections are designed to be read both as sections within this larger report and as stand alone fact sheets that can be used when working with community members to educate people about the impact of individual exemptions in the California Smokefree Workplace Act.

Hotels



- > There are many people including maids, bellhops, desk clerks, and doormen who help to ensure that a hotel or motel visit is comfortable, safe, and clean. Unfortunately, being exposed to secondhand and thirdhand smoke is a reality for many of these individuals. The California Smokefree Workplace Act does not prohibit smoking in hotel guestrooms, lobbies, or in meeting and banquet rooms.¹

This means that under state law, people can legally smoke in over a quarter million hotel rooms in California (281,351) as well as in the lobbies and banquet rooms in each of California's 5,274 hotels.³⁵

Some communities and hotel chains have decided to implement 100 percent smokefree hotels. In 2011, about a third of California hotels with 26 or more rooms (1,575 hotels) had gone 100% smokefree.^{36, 37} However, the impact of this exemption on the California workforce remains quite large. In 2007, California hotels and motels employed 195,405 people – the majority of whom worked in hotels where smoking was not prohibited.³⁵

Who is most impacted?

Nationally, 73% of people who work in the hotel industry are people who work in cleaning, food preparation, food service, and administrative support (e.g., desk clerks) occupations.³⁸ These include:



Maids & Housekeeping

90% female³⁹
80% Hispanic/Latino³⁹
Annual Income: \$25,200³⁰



Desk Clerks

57% female³⁹
54% from communities of color³⁹
Annual Income: \$25,180³⁰



Waiters & Waitresses

65% female³⁹
55% from communities of color³⁹
Annual Income: \$22,490³⁰

How do these exemptions impact hotel workers?

Thirdhand Smoke

Even nonsmoking rooms in California hotels where smoking is allowed have up to twice the nicotine levels in the air and on the surfaces of furniture and walls.^{40, 41}

Secondhand Smoke

After only 14 hours in a hotel, a hotel guest in a nonsmoking room of a hotel where smoking is allowed has 4 to 5 times the level of cotinine (a biomarker for nicotine) in their blood compared to those guests who stay in a completely nonsmoking hotel.⁴⁰ Given that hotel employees average around 25 hours a week in hotels,⁴² their risk for elevated levels of nicotine and cotinine is substantially higher.

Fire Risk

Nearly 10% of hotel fires are started by tobacco products.⁴³



Cabs of Trucks or Tractors



> Truck drivers travel an estimated 23.9 billion miles a year.⁴⁴ They make sure that packages and goods arrive safely and on-time. They work with dock workers, mechanics, and auto detailers to load and unload shipments; plan and drive the best routes; and maintain clean, running vehicles. Unfortunately, under the California Smokefree Workplace Act, smoking is not prohibited in cabs of trucks or tractors^{45, 46} if nonsmoking employees are not present.¹ Meaning, under state law, over 125,000 truck drivers in California³⁰ may be involuntarily exposed to secondhand and thirdhand smoke.

Because truck drivers may share trucks or because truck drivers may have cleaning crews, mechanics, etc who work on their trucks, when someone smokes in the cab that smoke will linger, contaminating the air and lining the surfaces of the truck for the next person to breathe in and absorb into their bodies.

Who is most impacted?

Some of the most common positions likely to be impacted by this exemption include:



Heavy & Tractor Trailer Drivers

(such as cement truck drivers or moving van drivers)⁴⁷

Annual Income: \$42,530³⁰

How does this exemption impact truck drivers?

Secondhand & Thirdhand Smoke

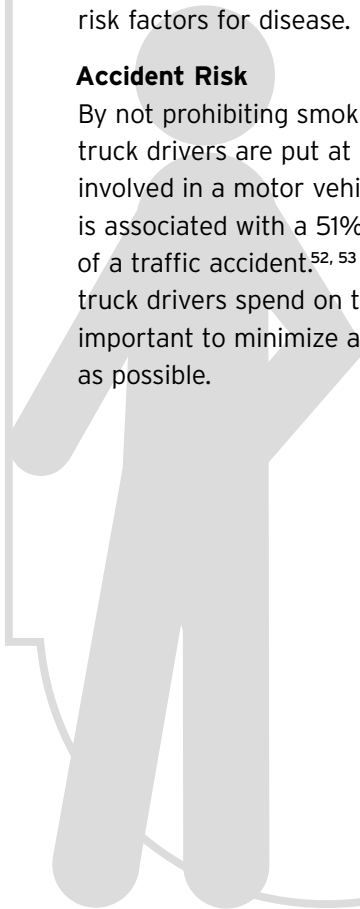
In addition to any secondhand smoke exposure from smoke that may linger when a person has left the vehicle, research has found that thirdhand smoke contaminants are highest in vehicles where smoking is not prohibited.^{41, 48} Since drivers spend on average 41.5 hours a week in their truck, truck drivers are likely exposed to high levels of tobacco contaminants in vehicles where smoking has occurred.⁴⁹

Tobacco & Diesel Exhaust Interactions

People who work in the trucking industry already have an elevated risk for lung cancer.⁵⁰ The California Air Resource Board lists diesel exhaust as a toxic air contaminant.⁵¹ Occupational studies have found that truck drivers are exposed to high levels of diesel exhaust and have an increased risk for lung cancer.⁵⁰ By not prohibiting smoking in the cabs of trucks and trailers, people who work in the trucking industry are exposed to an even greater number of risk factors for disease.

Accident Risk

By not prohibiting smoking in trucks and tractors, truck drivers are put at an increased risk of being involved in a motor vehicle accident. Smoking is associated with a 51% to 86% increased risk of a traffic accident.^{52, 53} Given how many hours truck drivers spend on the roads each week, it is important to minimize as many risks for accidents as possible.



Warehouse Facilities



> Warehouse workers such as laborers, packers, forklift operators, and dock workers help make sure that products and goods are properly packed, stored, and transported. The difficult and sometimes hazardous conditions that warehouse employees work under^{54, 55, 56} are exacerbated by the California Smokefree Workplace Act's warehouse exemption. This exemption does not prohibit smoking in warehouses with more than 100,000 square feet and fewer than twenty full-time employees.¹

There are roughly 1,735 warehouses in California that employ an estimated 70,934 Californians.⁵⁷ Many of these employees are part-time or temporary.⁵⁴ Because of this, it is entirely possible that the number of people impacted could be quite high. The California

Labor Code defines a full-time employee as someone who works 40 hours a week.⁵⁸ Meaning, a warehouse that falls within the exemption because it has more than 100,000 square feet of floor space could have hundreds of part-time employees. As long as they have fewer than 20 full-time employees, the warehouse is not required to prohibit smoking in the warehouse.

The warehouse exemption increases the likelihood that some warehouse workers are exposed to secondhand smoke in multiple locations. For example, truck and tractor drivers may be exposed to secondhand and thirdhand smoke both in the cab of their truck as well as when they arrive to load and unload items into the truck.

Who is most impacted?

Nationally, those who work in warehouses are low-income,^{59, 60} male (70%), African American (22.5%), and/or Hispanic (30%).⁶¹ In California, some of the most common positions found in warehouse are transportation and material moving occupations like those listed below.⁶² These occupations make up nearly 60% of the warehouse industry.⁶²



Laborers

(who move freight, stock, and material by hand)^{47, 63}
82% male⁶⁴
72% from communities of color⁶⁴
Annual Income: \$27,270³⁰



Industrial Truck & Tractor Operators

(such as forklift operators)⁴⁷
94.5% male⁶⁴
85.5% from communities of color⁶⁴
Annual Income: \$37,090³⁰



Packers

63% female⁶⁴
92.5% from communities of color⁶⁴
Annual Income: \$22,470³⁰

How does this exemption impact warehouse workers?

Warehouse Workers vs. Office Workers

The law expressly prohibits people from smoking in areas utilized as office space.¹ In other words, people working in office and administrative support positions are less likely to be exposed to secondhand smoke in comparison to laborers, packers, truck drivers, and other positions that work in the non-office areas of the warehouse.

Secondhand Smoke

More than 24% of warehouse employees smoke.⁶⁵ A California survey found that an estimated 17% of all nonsmokers who work in warehouses report being exposed to secondhand smoke.¹³ Since this survey did not distinguish between employees who work in warehouses that are exempt and not exempt from the California Smokefree Workplace Act, these results suggests two things. One, the number of individuals exposed to secondhand smoke in warehouses that are exempt from the California Smokefree Workplace Act is likely substantially higher.¹³ Two, enforcement in warehouses that are not exempt from the California Smokefree Workplace Act is low.^{2, 13}

Injury & Fire Risks

Smoking in warehouses also increases the risk for fire. Nationally, there are on average 1,270 fires each year in warehouses.⁶⁶ An estimated 4% of all of these fires are caused by tobacco products.⁶⁶ Fire related injuries in warehouses are a significant concern and prohibiting smoking can reduce these risks.⁶⁷

Family Daycares at Private Residences



➤ Daycare assistants who work in private residences for a daycare provider play an invaluable role in watching over young children. Yet, despite their efforts to provide safe and healthy environments for young children, they are potentially at risk for secondhand and thirdhand smoke exposure. Even though the California Smokefree Workplace Act prohibits smoking in all indoor areas of a day care center, the California Smokefree Workplace Act does not prohibit smoking in the indoor areas of private homes after daycare hours and in the areas of the

home where children are not permitted. It also does not prohibit smoking outdoors in areas like the play yard.¹

While family daycare home providers may provide care to populations other than children (e.g. senior citizens or people with disabilities), for the purposes of this analysis, the focus will be on the impact on child care providers. Additionally, it will focus on daycare assistants because they are the primary kind of employee who works in a home based daycare.

NOTE: As of January 1, 2015, smoking tobacco in a private residence that is licensed as a family day care home is prohibited in the home and in those areas of the family day care home where children are present.

Who is most impacted?

In terms of workers, the loophole hurts primarily women of color and low-income daycare workers. In 2005, it was estimated that 51.5% of licensed childcare providers in California who care for children in their homes had at least one paid assistant.⁶⁸ At the same time, there were between 16,184 and 20,735 paid assistants who worked in private residences licensed for daycare.⁶⁸



Paid Childcare Assistants

93% female⁶⁹

67.5% from communities of color⁶⁹

Annual Income: \$24,680³⁰

How does this loophole impact daycare workers?

Outdoor Secondhand Smoke

The California Smokefree Workplace Act does not prohibit smoking outside in the yard. Smoke can drift indoors through windows and doors. The levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers.^{70, 71} Smoking cigarettes near building entryways can double the level of air pollution, with maximum levels reaching the “hazardous” range on the US EPA’s Air Quality Index.⁷² To be completely free from exposure to secondhand smoke on a backyard patio, a person may have to move over 23 feet away from the source of the smoke (about the width of a two-lane road).^{71, 73}

Indoor Secondhand & Thirdhand Smoke

In addition to thirdhand smoke that may be left behind by smoke drifting from areas of the house where children are not allowed, smokers are significantly less likely to enforce smoking bans in the home if they believe thirdhand smoke is not a threat to children.⁷⁴ Research has shown that the majority of smokers are unaware of the dangers of thirdhand smoke (only 43% think thirdhand smoke threatens children’s health).⁷⁴ This raises the possibility that the smoking ban during hours of operation is not always being followed and that increased enforcement may be necessary.⁷⁵

Practice Tip:

For jurisdictions interested in addressing secondhand smoke in private residences licensed as family daycares, it is important to ensure that smoking is prohibited 24 hours a day within the residence as well as in the outdoor areas immediately surrounding the residence. It is also important that jurisdictions make sure the law is being followed by educating providers about the dangers of secondhand smoke outdoors and thirdhand smoke. By doing this, jurisdictions can protect both childcare workers and children who attend daycare in licensed private residences.

Children Being Cared for in Licensed Home Daycares

Providing 100 percent tobacco free environments for children is an integral component of safe, healthy and quality child care, especially given the wide ranging health implications for infants and children exposed to secondhand and thirdhand smoke.¹²

Even though smoking is never allowed in a daycare center at any time, smoking is not prohibited in daycares operated out of a private residence as long as smoking occurs after hours and in the parts of the home where children are not permitted. Childcare trends suggest that this private residence exemption in the California Smokefree Workplace Act impacts tobacco related health inequities because home daycares tend to be less expensive than daycare centers, making them more affordable for lower income families. Home daycares are also more likely than daycare centers to offer care before and after normal business hours, making home daycares more appealing to people who work non-traditional hours.

Nationally, daycare in private homes represents about 12 percent of childcare.¹⁶ As of April 2014, in California, there are 32,380 licensed family childcare home providers.⁷⁷ These providers care for up to 327,536 children.⁷⁷ Children, who attend daycare in private residences where smoking may occur either after-hours or in outdoor play areas, are put at risk of:

> Secondhand Smoke

By simply prohibiting smoking within indoor areas of family daycare homes, this exemption fails to protect children from secondhand smoke exposure in the backyard and from smoke that may drift indoors from the outside. As mentioned, levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers.^{70, 71}

> Thirdhand Smoke

Given that 80 percent of children receiving care in private residences are not yet in kindergarten and nearly half of them are age 2 or under,⁶⁸ these children are the most vulnerable to thirdhand smoke exposure. Children younger than age 2 are the most likely to inhale, ingest, and absorb thirdhand smoke contaminants as they crawl, put toys in their mouth, and kick up dust and other thirdhand smoke particles in the environment through their play.^{78, 79} They are the most vulnerable to thirdhand smoke because their immune and respiratory systems are not yet fully developed.

> Prolonged Exposure

Children receiving subsidized care in a private home typically spend more hours in home daycares than children who receive care from daycare centers, thus substantially raising their risk of secondhand and thirdhand smoke exposure.⁸⁰

> **Who relies on licensed childcare provided in private homes?**

Lower-Income Families

The cost of a home-based daycare for children who are not yet in school is typically between \$1,321 and \$4,636 less than the annual cost of a family daycare center,⁸¹ making it more affordable for moderate to lower-income families.

Families Who Are Required to Work Evenings, Nights, or Other Kinds of Shift Work

Licensed childcare homes are more likely to offer care in the evenings, on weekends, or overnight. Only 2 percent of daycare centers offer this kind of care versus 38 percent of providers who offer care in their homes.⁸² Those employed in office jobs are significantly less likely to require non-business hour care when compared to those who work jobs that require shift work such as hotel workers, food service workers, and security guards.⁸³ Meaning, that it is possible that this exemption disproportionately impacts children of shift work employees.

Families Receiving Subsidized Care

Subsidized childcare is critical for a large number of California families. California provides funding for childcare to 489,200 children statewide.⁸⁴ An estimated 22.5 percent of these children receive childcare in a private home licensed for daycare.⁸⁰

Families of Color

California's family daycare loophole likely disproportionately impacts Hispanic and African American children. For example, 62 percent of children who receive subsidies for childcare are Hispanic and 14 percent are African American.⁸⁰ Additionally, African Americans, Hispanics, and Asian workers are all significantly more likely to work evening and night shifts.⁸⁵ It is possible that their children are more likely to be receiving care in private residences licensed for daycare.

> **What does this all mean?**

Some of California's most vulnerable children are the most likely to receive care in private residences and spend significantly more time there. As a result, it is possible that their risk of exposure to secondhand smoke and thirdhand smoke is higher than those children from more affluent families.

Private Residences & Home Health Workers



> Many people work in private residences such as cooks, maids, baby-sitters, caretakers, home health care workers, and handymen.⁸⁶ These workers take care of people's homes as well as care for children and aging, sick, and/or disabled family members. Unfortunately, they have no legal protection from secondhand and thirdhand smoke. Even though one person's private residence may often be another

person's place of employment, the California Smokefree Workplace Act does not include private residences in its definition of a place of employment. Because data on home health care workers is the most readily available, this section focuses on the over 100,000 Californians^{87, 88} who provide healthcare services in the home.

Who is most impacted?

The exemption adversely impacts women of color and the working poor. This includes:



Home Health Aides*

81.5% female⁸⁹

74.5% from communities of color⁸⁹

Annual Income: \$22,770³⁰

How does this exemption impact home health aides?

Secondhand Smoke

A Massachusetts study found that over three quarters of companies that provide living and health care assistance in the home do not have a policy against patients smoking in front of workers. Not surprisingly, this survey found that 83% of workers report at least 1 hour of secondhand smoke exposure at work each month, and 16% report more than 11 hours a month.⁹⁰ Further, home health workers feel uncomfortable addressing this issue with both their employers and their clients. Less than a third ever raise the issue with their employer. Fewer than one in eight employees ever raise it directly with clients.⁹⁰

Injury & Fire Risks

For home health workers, exposure to tobacco use also increases their risk of fire. In addition to the general risk of fire from tobacco products in residential buildings,²² home health workers have the added danger of the interaction of tobacco products with medical equipment that is highly combustible such as portable oxygen machines.⁹¹ Nearly 73% of fires involving home medical oxygen equipment are caused by tobacco products.⁹²

Practice Tip:

One way to reduce secondhand smoke exposure among home health workers is to provide training to home health workers and their clients about the dangers of secondhand smoke. Another way is to establish voluntary smokefree agreements between clients and home health workers.⁹⁰

However, a stronger option would be to pursue a policy that would require private residences to be smokefree when all employees, like home health aides, maids, and cooks, are present. However, this policy option would not protect workers from thirdhand smoke and it would be difficult to enforce. Jurisdictions would need to explore options on how to effectively implement this kind of requirement.⁹³

* Because U.S. Census aggregates data about home health aides with nursing and psychiatric assistants, there may be some variation in the race and gender demographics of home health aides.

Long Term Health Care Facilities



> The people who work in long term health care facilities include nurses, nursing assistants, and orderlies. They take care of some of the most vulnerable populations - people with disabilities, debilitating injuries, and terminal illnesses. These medical professionals dedicate their lives to the health and safety of their patients. In doing so, they are often subject to secondhand smoke because under state law smoking is not prohibited in patient smoking areas of long term health care facilities.

The long term health care facilities include places like:

- Skilled nursing facilities⁹⁴
- Intermediate care facilities for patients with developmental disabilities⁹⁴
- Small residential living health facilities for patients who are physically disabled or have terminal illnesses⁹⁴
- Pediatric day health and respite care facilities⁹⁴

According to California Health Facilities Consumer Information System, there are 2,565 long term health care facilities.⁹⁵ These facilities include 16 pediatric day health and respite care facilities, which serve up to 264 children.⁹⁵

Who is most impacted?

Some of the most common positions likely to be impacted by this exemption include:



Psychiatric & Nursing Assistants*

81.5% female⁸⁹
74.5% from communities of color⁸⁹
Annual Incomes: \$28,730 to \$29,910^{30, 96, 97}



Orderlies

Annual Income: \$35,940^{30, 96, 97}

How does this exemption impact workers in long term health care facilities?

Secondhand Smoke

Surveys from the 1990's of nursing facility administrators found that smoking prevalence in long term health care facilities was as high as 80%.⁹⁸

Practice Tip

A complete ban of smoking in long term health care facilities may pose challenges. For example, patients who smoke who cannot walk by themselves to designated smoking areas or who are potential flight risks will require staff assistance even if smoking is prohibited indoors.

Communities interested in closing the long term health care facility exemption will want to explore implementation strategies that anticipate the kinds of challenges that long term health care providers face in providing safe and quality care for populations with high medical needs.

For example, communities may want to consider working with providers to offer cessation services, designate appropriate smoking areas, reduce access to tobacco products, and limit staff availability for transporting patients to and from designated smoking areas.⁹⁸ However, these strategies will not entirely solve the problem of employees being exposed to secondhand and thirdhand smoke at work if they are required to transport patients to designated smoking areas.

For a full list of long term health care facilities in your community eligible for this exemption, visit the California Health Facilities Consumer Information System available at <http://hfcis.cdph.ca.gov/search.aspx>.

* Because U.S. Census aggregates data about nursing and psychiatric assistants with home health aides, there may be some variation in the race and gender demographics of nursing and psychiatric assistants.

Workplaces Located Outdoors



> People who work outdoors often have high rates of work related injuries and fatalities.^{55, 99} Unfortunately, because people who work outdoors are not protected by the California Smokefree Workplace Act,¹ they are also at risk for secondhand smoke exposure.

As of January 2014, at least 42 jurisdictions have prohibited smoking in outdoor worksites and 119 have prohibited smoking in outdoor dining areas.¹⁰⁰ However, the majority of people who work outside remain unprotected from secondhand smoke.

Who is most impacted?

Many industries that involve outdoor work often rely heavily on low-income or communities of color, including:



Agriculture, Forestry, Fishing & Hunting Industry

75.5% male¹⁰¹

79% from communities of color¹⁰¹

Annual Income: \$20,550³⁰



Restaurant Industry

(waiters & waitresses)

65% female³⁹

55% from communities of color³⁹

Annual Income: \$22,490³⁰



Amusement Park industry

(outdoor attendants who make up 27% of the industry)¹⁰²

Annual Income: \$22,270³⁰



Construction Industry

(e.g., brickmasons, cement masons, laborers, painters, and roofers)

96.5%–99% Male¹⁰³

70%–81.5% from communities of color¹⁰³

Annual Income: \$42,530–\$64,230³⁰

How are outdoor workers impacted?

High Smoking Rates

Nationally, CDC finds that those who work in food services, construction, transportation, recreation, agriculture, forestry, and farming have some of the highest smoking rates.⁶⁵ Smoking prevalence ranges from 18.5% of those who work in agriculture, forestry, fishing, and hunting to as high as 30% for those who work in the mining and food service industries.⁶⁵

Secondhand Smoke

Levels of secondhand smoke exposure outdoors can reach levels attained indoors.^{70, 71} To be completely free from exposure to secondhand smoke, a person may have to move over 23 feet away from the source of the smoke.^{71, 73}

Secondhand Smoke Exposure & Smoking Rates

This gap in the law helps to support a vicious cycle where (1) workers are exposed to higher rates of secondhand smoke and (2) by seeing others smoke workers are more likely to smoke themselves.¹⁰⁴

Other Exemptions

There are other exemptions in the California Smokefree Workplace Act that likely impact health inequities in various ways. However, it is difficult to measure their impact. For example, there is no tracking system for how many companies might have break rooms where smoking is not legally prohibited. Provided below is a brief discussion of how the small business exemption, the tobacco shops and private smokers' lounges retailer exemptions, and the owner operated business loophole might impact smoking related health inequities.

Small Business Exemption

The California Smokefree Workplace Act's small business exemption allows employers with a total of five or fewer employees to permit smoking if all of the following criteria are met:

- the smoking area is not accessible to minors;
- all employees who enter the smoking area consent to permit smoking;
- air from the smoking area is exhausted directly to the outside by an exhaust fan;
- the air from the smoking area is not recirculated to other parts of the building; and
- if the employer complies with all applicable federal and state ventilation standards.

The majority of Californian businesses (56.5 percent) employ fewer than five employees. At least half a million people in California work in businesses that employ five or fewer employees.¹⁰⁵ Even though we do not know how many of these businesses allow smoking, we do know that the small business exemption is:

Exacerbating challenges around enforcement.

The small business exemption is a very difficult exemption to meet. Despite this, there is considerable confusion about which businesses are eligible for this exemption.^{106,107} As a result, some enforcement agencies are hesitant to enforce this exemption. Additionally, employees may feel uncomfortable asking their boss for a nonsmoking work environment. Not surprisingly, employees of small businesses are some of the most likely to be exposed to secondhand smoke.²

Failing to protect workers from secondhand smoke exposure.

According to the Surgeon General, there is no way to use exhaust fans or other mitigation strategies to prevent secondhand smoke from seeping into nonsmoking areas.¹²

Increasing the likelihood that small business employees will smoke.

The smaller the company is the more likely a person will smoke if they have a coworker who smokes.¹⁰⁸

Tobacco Shops and Private Smokers' Lounges Exemptions

The California Smokefree Workplace Act does not prohibit smoking in retail tobacco shops and private smokers' lounges if the retailers' main purpose is the sale of tobacco products. Tobacco shops and private smokers' lounges include places like smoke shops, tobacconists, cigar bars, and hookah lounges. This exemption impacts occupational related health inequities.

According to the U.S. Census, there are 726 tobacco shops with employees in California,⁸⁷ which excludes both mail order and online tobacco retailers.⁸⁷ These stores employ 1,628 individuals, though there are likely more individuals who may be impacted.¹⁰⁹ These exemptions contribute to inequities by:

Making enforcement more difficult.

Enforcement for this exemption is a big issue as many tobacco shops and private smokers' lounges have tried to use these exemptions in order to serve food and beverage. Opinions from Attorney General and Legislative Counsel of California have both concluded that tobacco shops and private smokers' lounges no longer qualify for these exemptions if they serve alcoholic beverages¹¹⁰ and/or food.¹¹¹ Yet despite these legal opinions,* confusion persists in the field and this deters enforcement.

Failing to protect low-income workers from secondhand smoke.

Even though some may argue that people who work in private smokers' lounges and tobacco shops know the risks they are putting themselves at by working in these kinds of establishments, there are substantial income related health inequities as a result of this exemption. For example, the average income for those working in tobacco shops is \$40,227,⁸⁷ which is well below the state average of \$53,030 per year.³⁰ Other positions in tobacco shops or private smoking lounges may even make less such as cashiers (\$23,620 per year in California) or hosts at hookah bars (\$20,570 per year in 2013 in California).³⁰

Owner Operated Businesses Without Employees

The California Smokefree Workplace Act does not apply to a business that is operated solely by the owner(s) and has no employees. This kind of business is not considered a place of employment under the law, unless any individual who is employed by someone other than the business owner, such as a delivery person or janitor, performs work at the business' location. There are roughly 2.9 million firms in California without any employees.⁸⁸ These firms do significant business generating nearly \$149 billion in gross income for their owners.⁸⁸ This loophole impacts:

Workers who are not employees that are required to enter owner operated businesses.

This loophole has had the effect of subjecting non-employee workers to secondhand smoke as part of their jobs. This likely impacts income and racial/ethnic related health inequities. For example, delivery people typically make \$35,310 per year in 2013³⁰ and are usually from racial and ethnic minority groups.¹¹²

A recent Attorney General Opinion stated that "businesses with no employees... constitute a 'place of employment' under Labor Code section 6404.5" even if work is carried out on the premise "by someone other than the business owner."¹¹³ This decision should help to clarify that owner operated businesses that permit non-employees to perform work on the premises must also maintain a smokefree workplace. However, it is possible that enforcement of this provision will be insufficient because of confusion around this loophole. Closing this loophole will further embolden enforcement agencies to take action against these kinds of firms.

Employees who are set up as "sham" co-owners by their employer.

For instance, some restaurant and bar owners have thought that if they make their waiters, waitresses, and bartenders co-owners, they can avoid the California Smokefree Workplace Act's requirements because they would no longer fit the definition of a "place of employment." However, California Courts have found these types of scenarios to be "sham" operations.¹¹⁴ These kinds of "co-owners" are not co-owners at all but instead constitute employees for the purposes of the law.^{114, 115}

This impacts health inequities. Restaurant and bar employees are typically low-income and from racial and ethnic minority groups. For example, in California waiters and waitresses are predominately female (65 percent), are from communities of color (55 percent),³⁹ and earn an average of \$22,490 per year in 2013.³⁰

Again, despite Attorney General opinions to the contrary,¹⁰⁶ there is confusion in the field that hinders enforcement. Given that there are 33,407 food services and drinking places in California without employees,⁸⁸ enforcing this law accurately is important.

* 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. Therefore, the Attorney General's formal legal opinions serve as guidance for law enforcement on how a law should be interpreted.

Conclusion

Exemptions in the state law have become part of the system of forces in California that form the basis for smoking related health inequities within the state. These exemptions unfairly impact communities of color and low-income workers. Closing these exemptions will reduce an important source of health inequities and reduce the disproportionate impact of tobacco related illnesses among some of California's most affected populations. Local communities should also make sure the California Smokefree Workplace Act is being properly enforced.

Resources

ChangeLab Solutions has the following resources available to help local communities interested in policy options for closing the gaps within the California Smokefree Workplace Act to ensure that all workers are equally protected from smoke in the workplace.

- › Model Ordinance: Comprehensive Smokefree Places
www.changelabsolutions.org/publications/comp-smokefree-places
- › Tobacco Shops & Smokers' Lounges: Understanding the Exceptions to California's Smokefree Workplace Act
www.changelabsolutions.org/publications/tobacco-shops-smokers-lounges
- › Law Notes: How to Prohibit Smoking in Owner-Operated Businesses
www.changelabsolutions.org/publications/TC-owner-operated-businesses

Additionally, the following resources may help communities interested in building momentum for comprehensive smokefree laws in workplaces.

- › California Tobacco Control Program
"Breathing Secondhand Smoke Shouldn't Be a Condition of Employment in California"
www.cdph.ca.gov/programs/tobacco/Pages/CTCPFactSheets.aspx
- › Centers for Disease Control and Prevention
"A Practitioner's Guide for Advancing Health Equity: Community Strategies for Preventing Chronic Disease"
www.cdc.gov/nccdphp/dch/pdf/HealthEquityGuide.pdf

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