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Public Health

ARTICLE 13-E
REGULATION OF SMOKING IN
CERTAIN PUBLIC AREAS

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S 1399-n. Definitions. For purposes of this article:

1. "Auditorium" means the part of a public building where an audience sits but does not include any corridors, hallways or lobbies adjacent thereto.

2. "Bar" means any indoor area open to the public devoted to the sale and service of alcoholic beverages for on-premises consumption and where the service of food is only incidental to the consumption of such beverages. Service of food shall be considered incidental if the food service generates less than forty percent of total annual gross sales. Any bar that generates forty percent or more of total annual gross sales from the sale of food for on-premises consumption shall be a food service establishment.

3. "Employer" shall mean any person, partnership, associate, corporation or nonprofit entity which employs one or more persons, including the legislative, executive and judicial branches of state government and any political subdivision of the state.

4. "Factory" means any mill or other manufacturing establishment where one or more persons are employed in manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing.

5. "Food service establishment" means any indoor area open to the public or portion thereof in which the business is the sale of food for on-premises consumption and which has an indoor seating capacity of greater than fifty persons including, but not limited to restaurants, cafeterias, coffee shops, diners, sandwich shops or short order cafes. A food service establishment shall not include the bar area of such establishment.

6. "Indoor area open to the public" means any indoor area or portion thereof generally accessible to the public.

7. "Place of employment" means any indoor area or portion thereof under the control of an employer in which employees of the employer perform services but which is not generally accessible to the public.

8. "Public building" means any building owned or operated by the state or any county, city, town, village or any other political subdivision, public improvement or special district, public authority, commission, agency or public benefit corporation; or any other separate corporate instrumentality or unit of state or local government.

9. "School grounds" means any building, structure, and surrounding outdoor grounds contained within a public or private pre-school, nursery

school, elementary or secondary school's legally defined property boundaries as registered in a county clerk's office, and any vehicles used to transport children or school personnel.

10. "Smoke-free work area" means an enclosed indoor area in a place of employment where no smoking occurs. Such area shall be clearly designated, and separate from any smoking area.

11. "Smoking" means the burning of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco.

12. "Smoking area" means an enclosed indoor area in which smoking is permitted. Such smoking area shall be clearly designated and separate from any area in which smoking is not permitted. In a place of employment, the smoking area shall be separated from a smoke-free work area by walls or some other means, equally effective in reducing the effects of smoke on the smoke-free work area, other than ventilation systems or air cleaning devices.

13. "Tobacco business" means a sole proprietorship, corporation, partnership or other enterprise in which the primary activity is the sale, manufacture or promotion of tobacco, tobacco products and accessories either at wholesale or retail, and in which the sale, manufacture or promotion of other products is merely incidental.

14. "Warehouse" means any building or structure used for the purpose of storing merchandise or commodities.

15. "Work area" means an area in a place of employment where one or more employees are routinely assigned and perform services for their employer.

16. "Zoo" means any indoor area open to the public for the purpose of viewing animals.

S 1399-o. Smoking restrictions. 1. Smoking shall not be permitted and no person shall smoke in the following indoor areas open to the public:

- (a) auditoriums;
- (b) elevators;
- (c) gymnasiums;
- (d) enclosed indoor areas open to the public containing a swimming pool;
- (e) indoor areas open to the public in food stores provided, however, that any separate or distinct portion or part of such establishment which is dedicated to the sale of food for on-premises consumption shall be governed by the provisions of subdivision five of this section;
- (f) classrooms;
- (g) public means of mass transportation, including subways, underground subway stations, and when occupied by passengers, buses, vans, taxicabs and limousines;
- (h) ticketing and boarding areas in public transportation terminals;
- (i) youth centers and facilities for detention as defined in sections five hundred twenty-seven-a and five hundred three of the executive law;
- (j) any facility that provides child care services as defined in section four hundred ten-p of the social services law, provided that such services provided in a private home are excluded from this paragraph;
- (k) child day care centers as defined in section three hundred ninety of the social services law and child day care centers licensed by the city of New York;
- (l) group homes for children as defined in section three hundred seventy-one of the social services law;
- (m) public institutions for children as defined in section three hundred seventy-one of the social services law; and
- (n) residential treatment facilities for children and youth as defined in section 1.03 of the mental hygiene law.

2. Except as provided in subdivisions three, four and five of this section, smoking shall not be permitted and no person shall smoke in any indoor area open to the public, including but not limited to any indoor area open to the public in:

- (a) all public and private colleges, universities and other education and vocational institutions;
- (b) general hospitals and residential health care facilities as defined in article twenty-eight of this chapter, and other health care facilities licensed by the state in which persons reside, provided, however, that cafeterias and lunchrooms in such facilities shall be governed by the provisions of paragraph (c) of subdivision six of this

governed by the provisions of paragraph (c) of subdivision six of this section;

(c) public buildings, provided, however, that an employee whose work area is in an indoor area open to the public shall be governed by the provisions of subdivision six of this section;

(d) theaters;

(e) museums;

(f) libraries;

(g) retail stores in which goods, wares or merchandise are offered for sale;

(h) commercial establishments used for the purpose of carrying on or exercising any trade, profession, vocation or charitable activity;

(i) indoor arenas;

(j) waiting rooms and waiting areas;

(k) banks and other financial institutions;

(l) restrooms;

(m) waiting areas in public transportation terminals; and

(n) service areas in cafeterias and businesses selling food for on-premises and off-premises consumption; and

(o) zoos.

3. The owner, operator or manager of an indoor area open to the public subject to subdivision two of this section may designate a smoking area or areas. Such smoking area shall not include any of the indoor areas open to the public set forth in subdivision one of this section.

4. (a) The owner, operator or manager of a bowling establishment may permit smoking in the concourse area, which is the area directly behind and immediately contiguous to the bowler settee area, but shall provide a nonsmoking area constituting at least twenty-five percent of the square footage of the concourse area.

(b) The organizer or sponsor of bingo shall provide a contiguous nonsmoking area sufficient to meet patron demand. If at least fifty percent of seating capacity is designated for nonsmokers, demand shall be deemed to have been met. The organizer or sponsor may not determine that no such demand exists. Notice shall be prominently posted at each entrance stating that a nonsmoking section is available.

5. The owner, operator or manager of a food service establishment:

(a) shall designate a contiguous nonsmoking area sufficient to meet customer demand and may not determine that no such demand exists. If seventy percent of a food service establishment's indoor seating capacity for dining is designated as a nonsmoking area, then customer demand will be deemed to have been met. The designation of less than seventy percent of the indoor seating capacity for dining of a food service establishment as a nonsmoking area shall not create the presumption of noncompliance with the provisions of this subdivision;

(b) shall prominently post notice at each entrance advising that a nonsmoking section is available, and each patron shall be given an opportunity to state his preference; and

(c) may designate a separate enclosed room or rooms solely for use by smokers.

6. Each employer shall adopt and implement a written smoking policy. The policy shall apply only to a place of employment as defined in subdivision six of section thirteen hundred ninety-nine-n of this article and shall require at least the following:

(a) that employers shall provide nonsmoking employees with a smoke-free work area;

(b) that employers may set aside a work area for smoking if all employees assigned to the work area agree to the designation;

(c) that employers shall provide for contiguous nonsmoking areas in employee cafeterias, lunch rooms and lounges. The contiguous nonsmoking areas in employee cafeterias and lunchrooms shall be sufficient to meet employee demand. An employer may not determine that no such demand exists. If seventy percent of the indoor seating capacity is designated as a non-smoking area, employee demand shall be deemed to have been met. The designation of less than seventy percent of the indoor seating capacity for dining of a food service establishment as a nonsmoking area shall not create the presumption of noncompliance with the provisions of this subdivision;

(d) that smoking shall be prohibited in auditoriums, gymnasiums, rest rooms, elevators, classrooms, hallways, employee medical facilities and rooms or areas which contain photocopying equipment or other office equipment used in common and in company vehicles occupied by more than

equipment used in common, and in company vehicles occupied by more than one person unless the occupants of such vehicle agree that smoking may be permitted;

(e) that smoking shall be prohibited in conference rooms and meeting rooms, unless everyone in that room agrees that smoking may be permitted;

(f) that an employer may designate a separate enclosed room or rooms not open to the public for use as a smoking area;

(g) that employers shall prominently post the smoking policy in the workplace, and supply a written copy upon request to any existing or prospective employee;

(h) an employer shall not be required to make any expenditures or structural changes to create a smoke-free work area. In the event an employer cannot, after using its best efforts, comply with an employee's request for a smoke-free work area, the employer shall designate that employee's work area as a smoke-free work area; and

(i) any provisions in a smoking policy that are more restrictive than the minimum requirements set forth in this subdivision shall, if a collective bargaining unit exists, be subject to applicable law governing collective bargaining.

7. (a) For the purposes of this article, the employer of any place of employment within the New York state senate, and the owner, operator or manager of an indoor area open to the public in that portion of a public building occupied by the New York state senate or any member or employee thereof, shall be the temporary president of the senate or any person or persons designated by the temporary president.

(b) For the purposes of this article, the employer of any place of employment within the New York state assembly, and the owner, operator, or manager of an indoor area open to the public in that portion of a public building occupied by the New York state assembly or any member or employee thereof, shall be the speaker of the assembly or any person or persons designated by the speaker.

(c) For the purposes of this article, the employer of any place of employment within the executive chamber of the state capitol, and the owner, operator, or manager of an indoor area open to the public in that portion of a public building occupied by the governor or any employee of the governor's office, shall be the governor.

(d) For the purposes of this article, the employer of any place of employment within any state agency as defined in paragraph (g) of subdivision one of section seventy-three of the public officers law, and the owner, operator, or manager of an indoor area open to the public in that portion of a public building occupied by any such agency, shall be the commissioner, director, or other chief executive officer of such agency.

(e) For the purposes of this article, the employer of any place of employment within the judiciary, and the owner, operator or manager of an indoor area open to the public in that portion of a public building occupied by the judiciary, or any employee thereof, shall be the chief administrative judge of the office of court administration, or any person or persons designated by the chief administrative judge.

(f) Notwithstanding section two of the public buildings law or any other provision of law, the commissioner of general services shall not have or exercise any supervision or control over places of employment or with respect to any indoor area open to the public in that portion of a public building, which are subject to the provisions of paragraph (a), (b), (c), (d) or (e) of this subdivision.

8. Notwithstanding the provisions of any other law, rule or regulation, tobacco use shall not be permitted and no person shall use tobacco on school grounds; provided, however, that smoking by adult faculty and staff members may be permitted in a designated smoking area during non-school hours. For purposes of this section, school hours shall include any student activity that is supervised by faculty or staff, or any officially sanctioned school event.

S 1399-p. Posting of signs. 1. "Smoking" or "No Smoking" signs, or the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a circle with a bar across it, shall be prominently posted and properly maintained where smoking is regulated by this article, by the owner, operator, manager or other person having control of such indoor area.

2. The owner, operator or manager of a hotel or motel that chooses to

develop and implement a smoking policy for rooms rented to guests shall post a notice at the reception area of the establishment as to the availability, upon request, of rooms in which no smoking is allowed.

S 1399-q. Smoking restrictions inapplicable. This article shall not apply to:

1. Private homes, private residences and private automobiles;
2. Any indoor area where private social functions are being held when seating arrangements are under the control of the sponsor of the function and not the owner, operator, manager or person in charge of such indoor area;
3. Any indoor area open to the public exclusively reserved for conventions and trade shows if the sponsor or organizer gives notice in any promotional material or advertisements that smoking will not be restricted, and prominently posts notice at the entrance to the convention or trade show advising the public that smoking will not be restricted;
4. A hotel or motel room rented to one or more guests;
5. Tobacco businesses;
6. Limousines under private hire by an individual or corporation;
7. Wholly or partially enclosed private boxes in indoor arenas; and
8. Bars.

S 1399-r. General provisions. 1. Nothing in this article shall be construed to deny the owner, operator or manager of a place covered by this article the right to designate the entire place, or any part thereof, as a nonsmoking area.

2. The provisions of this article shall apply to the legislative, executive and judicial branches of state government and any political subdivision of the state.

3. Smoking may not be permitted where prohibited by any other law, rule, or regulation of any state agency or any political subdivision of the state. Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.

S 1399-s. Violations. 1. It shall be unlawful for any person, firm, corporation or other entity that owns, manages, operates or otherwise controls the use of an indoor area open to the public in which smoking is prohibited or restricted pursuant to section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of this article. For violations of this subdivision, it shall be an affirmative defense that during the relevant time period actual control of the indoor area open to the public was not exercised by the respondent, but rather by a lessee, the sublessee or any other person. To establish an affirmative defense, the respondent shall submit an affidavit and may submit any other relevant proof indicating that the respondent did not exercise actual control of said area during the relevant time period. Such affidavit and other proof shall be mailed by certified mail to the appropriate enforcement officer within thirty days of receipt of such notice of violation.

2. It shall be unlawful for any person, firm, corporation or other entity that owns, manages or operates a food service establishment in which smoking is restricted to fail to designate areas pursuant to subdivision five of section thirteen hundred ninety-nine-o of this article, or to fail to make good faith efforts to ensure that employees responsible for seating arrangements substantially comply with the requirements of this article. In actions brought for violations of subdivision five of section thirteen hundred ninety-nine-o of this article, it shall be an affirmative defense that notice of a violation was provided to a customer.

3. It shall be unlawful for an employer whose place of employment is subject to subdivision six of section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of such subdivision. For violations of subdivision six of section thirteen hundred ninety-nine-o of this article, it shall be an affirmative defense that the employer has made good faith efforts to ensure that employees comply with the provisions of any policy adopted pursuant to subdivision six of section thirteen hundred ninety-nine-o of this article.

4. It shall be unlawful for any person to smoke in any area where smoking is prohibited or restricted under section thirteen hundred ninety-nine-o of this article.

S 1399-t. Enforcement. 1. For the purpose of this article the term "enforcement officer" shall mean the board of health of a county or part county health district established pursuant to title three of article three of this chapter, or in the absence thereof, an officer of a county designated for such purpose by resolution of the elected county legislature or board of supervisors adopted within sixty days after the effective date of this act. Any such designation shall be filed with the commissioner within thirty days after adoption. If no such designation is made, the county will be deemed to have designated the department as its enforcement officer. Any county that does not designate an enforcement officer during the time period specified above may do so at any time, thereafter, such designation will be effective thirty days after it is filed with the commissioner. The enforcement officer shall have sole jurisdiction to enforce the provisions of this article on a county-wide basis pursuant to rules and regulations promulgated by the commissioner. In a city with a population of more than one million the enforcement officer shall be the board of health of such city which shall have sole jurisdiction to enforce the provisions of this article in such city.

2. If the enforcement officer determines after a hearing that a violation of this article has occurred, a civil penalty may be imposed by the enforcement officer pursuant to section thirteen hundred ninety-nine-v of this article. When the enforcement officer is the commissioner, the hearing shall be conducted pursuant to the provisions of section twelve-a of this chapter. When the enforcement officer is a board of health or an officer designated to enforce the provisions of this article, the hearing shall be conducted pursuant to procedures set forth in the county sanitary code, or in the absence thereof, pursuant to procedures established by the elected county legislature or board of supervisors. No other penalty, fine or sanction may be imposed, provided that nothing herein shall be construed to prohibit an enforcement officer from commencing a proceeding for injunctive relief to compel compliance with this article.

3. Any person who desires to register a complaint under this article may do so with the appropriate enforcement officer.

4. The owner, manager, operator or other person having control of an indoor area open to the public, food service establishment or place of employment under this article, shall inform, or shall designate an agent who shall be responsible for informing individuals smoking in an area in which smoking is not permitted that they are in violation of this article.

5. Any person aggrieved by the decision of an enforcement officer other than the commissioner may appeal to the commissioner to review such decision within thirty days of such decision. The decision of any enforcement officer shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

6. The enforcement officer, subsequent to any appeal having been finally determined, may bring an action to recover the civil penalty provided in section thirteen hundred ninety-nine-v of this article in any court of competent jurisdiction.

7. An enforcement officer who discovers a retail dealer who or which does not display a retail dealer certificate of license or registration from the department of taxation and finance issued pursuant to section four hundred eighty-a of the tax law shall notify the commissioner of taxation and finance within thirty days of the name and address of any such establishment so that the commissioner of taxation and finance can take appropriate action.

S 1399-u. Waiver. 1. The enforcement officer may grant a waiver from the application of a specific provision of this article, provided that prior to the granting of any such waiver the applicant for a waiver shall establish that:

(a) compliance with a specific provision of this article would cause undue financial hardship; or

(b) other factors, including but not limited to the physical layout, exist which would render strict compliance unreasonable.

2. Notwithstanding subdivision one of this section, the enforcement officer shall grant a waiver from the application of subdivision six of section thirteen hundred ninety-nine-o of this article to any applicant who

section thirteen hundred ninety-nine of this article to any applicant who as the owner, operator or manager of a factory or warehouse demonstrates that the effects of smoking on employees in work areas have been reduced to a minimal degree by factors, including but not limited to, the physical layout or size of such factory or warehouse.

3. Subdivision two of this section shall not apply to work areas in separate enclosed offices, employee cafeterias, lunchrooms or lounges in a factory or warehouse.

4. Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose of this article.

S 1399-v. Penalties. The commissioner may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in subdivision one of section twelve of this chapter. Any other enforcement officer may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in paragraph f of subdivision one of section three hundred nine of this chapter.

S 1399-w. Limitation of causes of action. An employer, administrator, manager, owner or operator of any indoor area, food service establishment, or place of employment regulated by this article who complies or fails to comply with the provisions of this article shall not be subject to any legal liability or action solely as a result of such compliance or noncompliance except as provided in section thirteen hundred ninety-nine-v of this article. Nothing in any other section of this article shall be construed to create, impair, alter, limit, modify, enlarge, abrogate or restrict any theory of liability upon which any person may be held liable to any other person for exposure to smoke.

S 1399-x. Rules and regulations. The commissioner shall not promulgate any rules or regulations to effectuate the provisions of section thirteen hundred ninety-nine-n, subdivision six of section thirteen hundred ninety-nine-o or subdivision one of section thirteen hundred ninety-nine-p of this article. The commissioner shall not promulgate any rules or regulations that create, limit or enlarge any smoking restrictions.

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