

**Fifty-ninth Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 4, 2005**

SENATE BILL NO. 2300  
(Senators Kilzer, G. Lee)  
(Representatives Kaldor, Kingsbury)

AN ACT to create and enact a new section to chapter 23-12 and a new section to chapter 34-06 of the North Dakota Century Code, relating to smoke-free exceptions and the authority of the labor commissioner; to amend and reenact sections 23-12-09, 23-12-10, 23-12-10.2, and 23-12-11 of the North Dakota Century Code, relating to smoke-free environments; to repeal section 23-12-10.1 of the North Dakota Century Code, relating to smoking area signage; and to provide a penalty.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 23-12-09 of the North Dakota Century Code is amended and reenacted as follows:

**23-12-09. Smoking in public places ~~of public assembly and places of employment~~ - Definitions.** In sections 23-12-09 through 23-12-11, unless the context or subject matter otherwise requires:

1. ~~"Place of public assembly" means:~~
  - a. ~~Enclosed theaters; auditoriums; gymnasiums; elevators; libraries; vehicles used in public transportation; rooms in which persons are confined as a matter of health care, including the waiting room, restroom, lobby, or hallway of a hospital, nursing home, rest home, or other health care institution or facility, and waiting areas in all public transportation terminals.~~
  - b. ~~Any building or other enclosed structure owned or leased by the state, its agencies, or political subdivisions, and all public education buildings.~~
  - c. ~~Each portion of a building or enclosed structure that is not included in this subsection if it has the seating capacity for fifty or more persons and is available to the public, including restaurants, food service establishments, dining rooms, cafes, cafeterias, or other rooms used primarily for the service of food, regardless of whether the establishments serve alcoholic beverages.~~

~~The term does not include private, enclosed rooms of residence, establishments licensed primarily or exclusively to sell alcoholic beverages for consumption on the premises, including private and fraternal organizations, or areas used for the service of alcoholic beverages and which are physically separate rooms within food service establishments.~~

2. ~~"Smoke drift" means the presence of smoke from a lighted cigar, cigarette, pipe, or other smoking equipment in a place of public assembly outside a designated smoking area.~~ "Bar" means a retail alcoholic beverage establishment licensed under chapter 5-02 that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages. The term includes a bar located within a hotel, bowling center, or restaurant that is not licensed primarily or exclusively to sell alcoholic beverages if the bar is in a separately enclosed area.
2. "Business" means a sole proprietorship, partnership, association, joint venture, corporation, or other business entity, either for profit or not for profit, including retail

establishments where goods or services are sold and professional corporations and other entities where professional services are delivered.

3. "Employee" means an individual who is employed by an employer in consideration for direct or indirect monetary wages or profit, or an individual who volunteers services for an employer.
4. "Employer" means an individual, business, or the state and its agencies and political subdivisions that employs the services of one or more individuals.
5. "Enclosed area" means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows, exclusive of doorways, which extend from the floor to the ceiling.
6. "Health care facility" means any office or institution providing health care services, including a hospital; clinic; ambulatory surgery center; outpatient care facility; nursing, basic, or assisted living facility; and laboratory.
7. "Health care services" include medical, surgical, dental, vision, chiropractic, and pharmaceutical services.
8. "Place of employment" means an area under the control of a public or private employer that employees normally frequent during the course of employment, including work areas, auditoriums, classrooms, conference rooms, elevators, employee cafeterias, employee lounges, hallways, meeting rooms, private offices, restrooms, and stairs.
9. "Public place" means an enclosed area to which the public has access or in which the public is permitted, including a publicly owned building or office, and enclosed areas available to and customarily used by the general public in businesses and nonprofit entities patronized by the public, including bars; bingo facilities; child care facilities subject to licensure by the department of human services, including those operated in private homes when any child cared for under that license is present; convention facilities; educational facilities, both public and private; facilities primarily used for exhibiting a motion picture, stage, drama, lecture, musical recital, or other similar performance; financial institutions; health care facilities; hotels and motels; laundromats; any common areas in apartment buildings, condominiums, mobile home parks, retirement facilities, nursing homes, and other multiple-unit residential facilities; museums, libraries, galleries, and aquariums; polling places; professional offices; public transportation facilities, including buses and taxicabs, and ticket, boarding, and waiting areas of public transit depots; reception areas; restaurants; retail food production and marketing establishments; retail service establishments; retail stores; rooms, chambers, places of meeting or public assembly, including school buildings; service lines; shopping malls; sports arenas, including enclosed places in outdoor arenas; theaters; and waiting rooms.
10. "Publicly owned building or office" means a place owned, leased, or rented by any state or political subdivision, or by any agency supported by appropriation of, or by contracts or grants from, funds derived from the collection of taxes.
11. "Restaurant" includes every building or other structure, or any part thereof, and all buildings in connection therewith that are kept, used, maintained, advertised, or held out to the public as a place where food is served, including coffee shops, cafeterias, private and public school cafeterias, kitchens, and catering facilities in which food is prepared on the premises for serving elsewhere, and a bar area within a restaurant.
12. "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.
13. "Shopping mall" means an enclosed public walkway or hall area that serves to connect retail or professional businesses.

- 3- 14. "Smoking" means ~~carrying~~ possessing a lighted cigar, cigarette, pipe, weed, plant, or any other lighted ~~smoking equipment~~ tobacco product in any manner or in any form.
15. "Sports arena" means any facility or area, whether enclosed or outdoor, where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports or other events, including sports pavilions, stadiums, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, and bowling centers.
16. "Truckstop" means a roadside service station and restaurant that caters to truckdrivers.

**SECTION 2. AMENDMENT.** Section 23-12-10 of the North Dakota Century Code is amended and reenacted as follows:

**23-12-10. ~~Designation of smoking areas~~ Smoking restrictions - Exceptions - Retaliation - Application.** ~~Smoking is not permitted outside of designated smoking areas in places of public assembly as provided in this section. Smoking areas may be designated only by proprietors of privately owned buildings or by public officials having general supervisory responsibility for government buildings. No smoking area may be designated in a place in which smoking is prohibited by the state fire marshal. A sign must be posted in any designated smoking area which states "Designated Smoking Area" or words to that effect.~~

~~Except as otherwise provided, designated smoking areas in a place of public assembly may not occupy more than fifty percent of the total area available to the public and must be situated to minimize smoke drift. The proprietor of a food establishment with the seating capacity for fifty or more persons may temporarily, during the course of daily business, expand the designated smoking area beyond fifty percent of the total available area if the smoking area becomes fully occupied and the additional space needed for the expansion is vacant or available.~~

1. In order to protect the public health and welfare and to recognize the need for individuals to breathe smoke-free air, smoking is prohibited in all enclosed areas of:
  - a. Public places; and
  - b. Places of employment.
2. The following areas are exempt from subsection 1:
  - a. Private residences, except when operating as a child care facility subject to licensure by the department of human services and when any child cared for under that license is present in that facility.
  - b. Hotel and motel rooms, and other places of lodging, that are rented to guests and are designated as smoking rooms.
  - c. Retail tobacco stores, provided that smoke from these places does not infiltrate into areas where smoking is prohibited under this section.
  - d. Outdoor areas of places of employment, except a sports arena.
  - e. Any area that is not commonly accessible to the public and which is part of an owner-operated business having no employee other than the owner-operator.
  - f. Bars.
  - g. Any place of public access rented or leased for private functions from which the general public and children are excluded and arrangements for the function are under the control of the function sponsor.
  - h. Separately enclosed areas in truckstops which are accessible only to adults.

3. Smoking as part of a traditional American Indian spiritual or cultural ceremony is not prohibited.
4. No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or other person because that person asserts or exercises any rights afforded by this section or reports or attempts to prosecute a violation of this section.
5. This section may not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

**SECTION 3. AMENDMENT.** Section 23-12-10.2 of the North Dakota Century Code is amended and reenacted as follows:

**23-12-10.2. Complaints and enforcement - City and county ordinances and home rule charters.** ~~The state department of health is designated to receive reports or complaints from any person regarding violations of sections 23-12-09 through 23-12-11.~~

1. ~~State agencies with statutory jurisdiction over places of public assembly may a~~ state-owned building or office shall enforce sections 23-12-09 through 23-12-11 section 23-12-10. These agencies include the fire marshal department, state department of health, department of human services, legislative council, and office of management and budget. The agencies may mutually agree as to the manner in which enforcement is to be accomplished and may ~~amend their~~ adopt administrative rules to ensure compliance with ~~sections 23-12-09 through 23-12-11 section 23-12-10,~~ including referral of violations to an appropriate law enforcement agency for enforcement pursuant to section 23-12-11.

~~Authorities other than state agencies may conduct inspections and report violations to state agencies, or enforce smoking policies, rules, or ordinances more stringent than those contained in sections 23-12-09 through 23-12-11.~~

2. A city or county ordinance, a city or county home rule charter, or an ordinance adopted under a home rule charter may not provide for less stringent provisions than those provided under sections 23-12-09 through 23-12-11. Nothing in this Act shall preempt or otherwise affect any other state or local tobacco control law that provides more stringent protection from the hazards of environmental tobacco smoke. This subsection does not preclude any city or county from enacting any ordinance containing penal language when otherwise authorized to do so by law.

**SECTION 4.** A new section to chapter 23-12 of the North Dakota Century Code is created and enacted as follows:

**Exceptions - Medical necessity.**

1. Notwithstanding the provisions of any other state or local law, a patient may smoke in a hospital licensed by the state or on the grounds of a hospital licensed by the state if the patient's attending physician authorizes the activity based on medical policies adopted by the hospital organized medical staff.
2. Notwithstanding the provisions of any other state or local law, a resident of a licensed basic care facility or a licensed nursing facility may smoke in the facility or on the grounds of the facility if approved by the board of the facility.

**SECTION 5. AMENDMENT.** Section 23-12-11 of the North Dakota Century Code is amended and reenacted as follows:

**23-12-11. Penalty.** ~~Any proprietor~~

1. An individual who smokes in an area in which smoking is prohibited under section 23-12-10 is guilty of an infraction.
2. An owner or other person with general supervisory responsibility over a place of public assembly who willfully fails to comply with sections 23-12-09 through 23-12-11 is subject to a fine not to exceed one hundred dollars per violation a public place or place of employment who willfully fails to comply with section 23-12-10 is guilty of an infraction, subject to a fine not to exceed one hundred dollars for the first violation, to a fine not to exceed two hundred dollars for a second violation within one year, and a fine not to exceed five hundred dollars for each additional violation within one year of the preceding violation.

**SECTION 6.** A new section to chapter 34-06 of the North Dakota Century Code is created and enacted as follows:

**Authority of labor commissioner - Exception.** Notwithstanding section 34-06-03, the labor commissioner may not adopt rules relating to sections 23-12-09 through 23-12-11. If the labor commissioner is made aware of a possible violation of chapter 23-12, the commissioner may refer the violation to an appropriate law enforcement agency for enforcement pursuant to section 23-12-11.

**SECTION 7. REPEAL.** Section 23-12-10.1 of the North Dakota Century Code is repealed.

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President of the Senate

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Speaker of the House

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Secretary of the Senate

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Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Fifty-ninth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2300.

Senate Vote:      Yeas    33            Nays    11            Absent    3

House Vote:      Yeas    61            Nays    32            Absent    1

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Secretary of the Senate

Received by the Governor at \_\_\_\_\_ M. on \_\_\_\_\_, 2005.

Approved at \_\_\_\_\_ M. on \_\_\_\_\_, 2005.

\_\_\_\_\_  
Governor

Filed in this office this \_\_\_\_\_ day of \_\_\_\_\_, 2005,  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary of State