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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

FILED

10/18/2017 11:27 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Implementing changes to the definition of "enclosed area" under the Oregon Indoor Clean Air Act

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 11/30/2017 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S):

In this rulemaking, the Oregon Health Authority (Authority) is removing the language defining "enclosed area" from rule to ensure the rules are aligned with the newly revised Oregon Indoor Clean Air Act (ICAA) statute. The definition in rule will refer to the meaning given in ORS 433.835, ICAA statute. SB 235 (Oregon Laws 2017, chapter 732) was signed by the Governor in August 2017 and the definition of "enclosed area" was added to ICAA statute ORS 433.835.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

1. Oregon Revised Statutes 433.835 through 433.875 and 433.990(5)
https://www.oregonlegislature.gov/bills_laws/ors/ors433.html
2. Oregon Administrative Rules 333-015-0030 through 333-015-0085
http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_333/333_015.html
3. SB 235 (Oregon Laws 2017, chapter 732):
<https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB235>

FISCAL AND ECONOMIC IMPACT:

There will be no impact on businesses as areas that are considered non-enclosed under the current and original "enclosed area" definitions will also be considered non-enclosed under the SB 235 definition that puts "enclosed area" back into ICAA statute ORS 433.835.

The administrative rule revisions are predicted to minimally increase enforcement costs for the Oregon Health

Authority and/or local public health authorities. The ICAA is a complaint-driven law; and there may be an increase in the number of complaints filed by employees and the public. State agencies and local public health authorities may have increased costs associated with education and awareness efforts to help businesses come into compliance with the law. Staff time to investigate complaints and, if appropriate, to issue citations may also increase costs. Recordkeeping and administrative activities are also increased in conjunction with the number of complaints and enforcement actions.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) There is no additional cost of compliance impact to the Oregon Health Authority, other state agencies or units of local government. There is no estimated cost of compliance impact on the public.

(2)(a) The ICAA applies to all businesses except sole proprietorships, not open to the public and with no employees. Therefore, most of Oregon's small businesses (approximately 100,000) are subject to the rules.

(b) Minimal additional reporting, recordkeeping and other administrative activities by private businesses are projected.

(c) Some establishments may be required to change required signage or adapt expectations of staff duties to ensure compliance.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The purpose of this rulemaking is to align administrative rule with statute. Therefore, a rules advisory committee, including small businesses, was not consulted on the development of the proposed changes.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The purpose of this rulemaking is to align administrative rule with changes made to ORS 433.835 due to the passage of SB 235 during the 2017 legislative session and therefore, a Rules Advisory Committee did not need to be consulted.

RULES PROPOSED:

333-015-0030, 333-015-0064

AMEND: 333-015-0030

RULE SUMMARY: The proposed change removes the language defining "enclosed area" from rule to align with the change in statute that occurred during the 2017 legislative session with the passage of SB 235 (Oregon Laws 2017, chapter 732). The definition for "enclosed area" now refers to the meaning given in ORS 433.835, ICAA statute.

CHANGES TO RULE:

333-015-0030

Oregon Indoor Clean Air Act: Definitions ¶

For purposes of OAR chapter 333, division 15, the following definitions shall apply: ¶

- (1) "Accessibility ramp" means a ramp intended to provide access for people with disabilities to and from an entrance or exit. ¶
- (2) "Act" means the Oregon Indoor Clean Air Act as it appears in ORS 433.835 through 433.875 and 433.990(5). ¶
- (3) "Authority" means the Oregon Health Authority. ¶
- (4) "Certificate holder" means the individual or entity on record with the Oregon Health Authority as the owner of a certified cigar bar or smoke shop. ¶
- (5) "Cigar bar" means a business that: ¶
 - (a) Has on-site sales of cigars as defined in ORS 323.500; ¶
 - (b) Has a humidor on the premises; ¶
 - (c) Allows the smoking of cigars on the premises but prohibits the smoking, aerosolizing or vaporizing of other inhalants on the premises; ¶
 - (d) Has been issued and operates under a full on-premises sales license issued under ORS 471.175; ¶
 - (e) Prohibits persons under 21 years of age from entering the premises and posts notice of the prohibition; ¶
 - (f) Does not offer video lottery games as authorized under ORS 461.217; ¶
 - (g) Has a maximum seating capacity of 40 persons; ¶
 - (h) Has a ventilation system that exhausts smoke from the business, and is designed and terminated in accordance with the state building code standards for the occupancy classification in use; and ¶
 - (i) Requires all employees to read and sign a form approved and published by the Public Health Division that explains the dangers of exposure to secondhand smoke. ¶
- (6) "Cigarillos" means a smoking device wrapped in tobacco leaf, rather than paper, that contains less than three grams of tobacco and measures less than 100 mm in length. ¶
- (7) "Employer" means any entity or individual who engages an individual to perform work or services in an area where smoking is prohibited under the employers control. ¶
- (8) "Enclosed area" ~~means all space between a floor and a ceiling that is enclosed on two or more sides by permanent or temporary walls or windows, exclusive of doors, passageways or gaps. If no ceiling is present, "enclosed area" means all space that is included by three or more sides by permanent or temporary walls or windows, exclusive of doors, passageways or gaps.~~ has the meaning given that term in ORS 433.835. ¶
- (9) "Entity in charge of a public place" means any person or organization that has responsibility because of ownership, proprietorship, management, or oversight over a place that is open to the public. Entity in charge of a public place is used to refer only to a person or organization in charge that is not also an employer. ¶
- (10) "Entrance" means any point of ingress, including an accessibility ramp, to an enclosed area from a non-enclosed area. ¶
- (11) "Exit" means any point of egress, including an accessibility ramp, from an enclosed area to a non-enclosed area. ¶
- (12) "Extended period of time" means more than 365 consecutive days. ¶
- (13) "Gross revenue" means all receipts from the sale of product(s) less the amount of any rebates, refunds, or credits. ¶
- (14) "Humidor" means a storage container designed to allow controlled airflow and equipped with a device that maintains the internal humidity in the range of 68 percent to 75 percent and an internal temperature in the range of 68 degrees to 70 degrees Fahrenheit. ¶
- (15) "Inhalant" means nicotine, a cannabinoid or any other substance that: ¶
 - (a) Is in a form that allows the nicotine, cannabinoid or substance to be delivered into a persons respiratory system; ¶
 - (b) Is inhaled for the purpose of delivering the nicotine, cannabinoid or other substance into a persons respiratory system; and ¶
 - (c)(A) Is not approved by, or emitted by a device approved by, the United States Food and Drug Administration for a therapeutic purpose; or ¶
 - (B) If approved by, or emitted by a device approved by, the United States Food and Drug Administration for a

therapeutic purpose, is not marketed and sold solely for that purpose.¶

(16)(a) "Inhalant delivery system" means:¶

(A) A device that can be used to deliver nicotine or cannabinoids in the form of a vapor or aerosol to a person inhaling from the device; or¶

(B) A component of a device described in this subsection or a substance in any form sold for the purpose of being vaporized or aerosolized by a device described in this subsection, whether the component or substance is sold separately or is not sold separately.¶

(b) Inhalant delivery system does not include:¶

(A) Any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for any other therapeutic purpose, if the product is marketed and sold solely for the approved purpose; and¶

(B) Tobacco products.¶

(17) "Local Public Health Authority" or "LPHA" means the county government, unless a health district has been formed under ORS 431.414, the county has contracted with a person or agency to act as the public health authority, or the county has relinquished its authority to the state.¶

(18) "Maximum seating capacity" means the total number of seats available to patrons, including, but not limited to, bar stools, seating at cocktail tables, seats at buddy-bar tables, banquette seating, dining seating, couch space, and floor pillows intended as seating; as well as the total number of patrons a business permits inside the business at the same time.¶

(19) "Noncommercial tobacco products" means unprocessed tobacco plants or tobacco by-products used for ceremonial or spiritual purposes by American Indians.¶

(20) "Place of employment" means an enclosed area under the control of a public or private employer, including work areas, employee lounges, vehicles that are operated in the course of an employers business and that are not operated exclusively by one employee, rest rooms, conference rooms, classrooms, cafeterias, hallways, meeting rooms, elevators and stairways. Place of employment does not include a private residence unless it is used as a child care facility as defined in ORS 657A.250 or a facility providing adult day care as defined in 410.490.¶

(21) "Private residence" means a residence or part of a residence that is not operated as a place of business where clients or customers use the premises. A residence that is considered a place of employment or public place is subject to ORS 433.835 through 433.875 during its hours of operation. Only that part of a residence used as a place of business is subject to ORS 433.835 through 433.875.¶

(22) "Public Health Director" means the director of the Public Health Division of the Oregon Health Authority.¶

(23) "Public Health Division" means the Public Health Division of the Oregon Health Authority.¶

(24) "Public place" means an enclosed area open to the public.¶

(25) "Rooms designated by the owner or entity in charge of a hotel or motel as rooms in which smoking is permitted" means sleeping rooms or suites in that hotel or motel.¶

(26) "Smoking instrument" means any cigar, cigarette, pipe, or other instrument used to smoke tobacco, marijuana or any other inhalant.¶

(27) "Smoke shop" means a business that is certified with the Oregon Health Authority as a smoke shop under OAR 333-015-0068.¶

(28) "Stand-alone business" means a business that is not attached to, does not use or occupy the same space as, is not located within, and does not share a common entryway or area with another business, another place of employment, or residential property.¶

(29) "Tobacco Prevention and Education Program" means the Tobacco Prevention and Education Program in the Public Health Division of the Oregon Health Authority.¶

(30) "Wall" means any architectural partition, permanent or temporary, with a height and length greater than its thickness, used to divide or enclose an area or to support another structure. Walls include, but are not limited to, partitions constructed of plastic, mesh or other screening materials, slats, louvered blinds, fabric, or blankets, and partitions with latticing or other open frameworks.¶

(31) "10 feet" means 10 linear feet, measured in a straight line between the points in question.

Statutory/Other Authority: ORS 433.855

Statutes/Other Implemented: ORS 433.835

AMEND: 333-015-0064

RULE SUMMARY: The proposed amendment changes the reference of an enclosed area in relation to an outdoor smoking area, so that it no longer refers to the "enclosed area" definition in OAR 333-015-0030(8).

CHANGES TO RULE:

333-015-0064

Oregon Indoor Clean Air Act: Outdoor Smoking Areas ¶

(1) The owner or entity in charge of a place of business may establish an outdoor smoking, aerosolizing or vaporizing of inhalants area if that area is: ¶

(a) Not within 10 feet of entrances, exits, windows that open, ventilation intakes that serve an enclosed area of any public place or place of employment, or any portion of an accessibility ramp; ¶

(b) Not, at any time, an enclosed area; ~~as defined in OAR 333-015-0030(8); and~~ ¶

(c) In compliance with all other state, city, and county codes. ¶

(2) Nothing in these rules shall prevent an employer from increasing the amount of property where smoking, aerosolizing or vaporizing is prohibited beyond the 10-foot requirement or from designating the entire premises as smokefree.

Statutory/Other Authority: ORS 433.855

Statutes/Other Implemented: ORS 433.835 - 433.870