

Florida Enclosed Indoor Workplace Smoking Ban Frequently Asked Questions

The following is provided to answer some common questions regarding the recently enacted amendment to Florida's enclosed indoor workplace smoking ban. While due care has been exercised to assure the accuracy of this information, the actual statute and administrative rules supersede this information.

General Information

1. What Florida law bans smoking in enclosed indoor workplaces?

The following sections of Florida law as amended by the 2003 Legislature: Chapter 386, Part II, Florida Statutes, "the Florida Clean Indoor Air Act," Chapter 561, Florida Statutes; and the following sections of Florida Administrative Code as recently adopted: 61AER03-1.

2. When did the ban on enclosed indoor workplace smoking begin?

July 1, 2003

3. Where is smoking allowed now that the ban has gone into effect?

The law provides that smoking may be allowed in the following places:

- Private residences not being used commercially for childcare, adult care, or a combination
- Retail tobacco shops
- Hotel guest rooms designated as smoking rooms
- Smoking cessation programs that have been approved by the Florida Department of Health
- Medical or scientific research
- "In-transit" airport smoking lounges under control of U.S. Customs and Border Protection
- Stand-alone bars (see below)
- Outdoor patios (see below)
- Membership association [See s. 386.203(12)(13), Florida Statutes] facilities used exclusively for non-commercial activity

4. When is a membership association exempted from the Florida Clean Indoor Air Act?

An association may be exempt if the facility is owned or leased by and used exclusively for noncommercial activities performed by members and their guests. Any services performed on the premises must be of a noncommercial nature and performed by members only whether compensated or not. The association must also have a current exemption under s. 501(c) (3,4,7,8,10,19) or s. 501 (d) of the Internal Revenue Code.

5. If a membership association holds a weekly bingo game that is open to the public and sometimes rents the facility for weddings, parties, etc., how does the smoking ban apply?

Smoking may be allowed in membership association facilities used exclusively for guests and members engaged in noncommercial activity.

6. Is smoking permitted in a convenience store?

No. Smoking is not permitted unless the establishment meets one of the statutory exclusions or exemptions.

7. When did enforcement begin, and who enforces the smoking ban?

Those in violation of the law after July 1, 2003 are subject to enforcement action, as a result of a complaint, by the Division of Hotels & Restaurants or the Division of Alcoholic Beverages & Tobacco if licensed by the Department of Business and Professional Regulation (DBPR), or the Florida Department of Health if any other indoor workplace.

8. How are complaints filed?

If the establishment is a Department of Business and Professional Regulation licensee, provide the complaint information to the department:

- On the department's web site at www.MyFloridaLicense.com
- By contacting the department's Customer Contact Center at 850.487.1395; or
- By mailing directly to the Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, FL 32399-1021.

For all other enclosed workplaces call the Florida Department of Health at 1.800.337.3742.

9. What happens if there is a complaint about smoking in my establishment?

The department will review all complaints regarding violations alleged at a licensed premises. If the complaint is substantiated, the department may take enforcement action including monetary penalties.

10. What are the penalties for violating the ban?

Penalties are established for individuals [See s. 386.208, Florida Statutes], for stand-alone bars [See s. 561.695(8), Florida Statutes] and for establishments that are not stand-alone bars [See s. 386.207(3), Florida Statutes].

The penalties for establishments which are not stand-alone bars are:

- First Violation: Civil penalty of not less than \$250 and not to exceed \$750; and
- Subsequent Violations: Civil penalty of not less than \$500 and not to exceed \$2,000.

The penalties for stand-alone bars are:

- First violation: Warning or a fine of up to \$500, or both;
- Second violation: If within 2 years of the first violation, a fine of not less than \$500 or more than \$2,000;
- Third violation: If within 2 years of the first violation, a suspension of the smoking designation not to exceed 30 days and a fine of not less than \$500 or more than \$2,000;
- Fourth and subsequent violations: 60-day suspension of smoking designation and a fine of not less than \$500 or more than \$2,000, or revocation of smoking designation.

11. What responsibility does the business have?

The proprietor or other person in charge of an enclosed indoor workplace must develop and implement a policy regarding the smoking prohibitions established in law. The policy may include, but is not limited to, procedures to be taken when the proprietor or other person in charge witnesses or is made aware of a violation of the law in the enclosed indoor workplace and must include a policy which prohibits an employee from smoking in the enclosed indoor workplace.

12. If a customer refuses to stop smoking in an enclosed indoor workplace, what should the owner or operator do?

As with any action that is unlawful, the establishment may seek assistance from local law enforcement.

Smoking in a DBPR Licensed Establishment

13. What is a stand-alone bar?

Florida Statute defines "stand-alone bar" as "any licensed premises devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace, including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. A place of business constitutes a stand-alone bar in which the service of food is merely incidental in accordance with this

subsection if the licensed premises derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.”

“Stand-alone bar” is the designation given to those licensed premises that operate a business that meets the definition of a stand-alone bar in s. 386.203(11), Florida Statutes, if the only food provided is limited to “nonperishable snack food items.”

“Stand-alone bar with food” is the designation given to those licensed premises that operate a business meeting the definition of a stand-alone bar in s. 386.203(11), Florida Statutes, in which the serving of food is merely incidental and the licensed premises derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

14. How does an establishment become a stand-alone bar?

To qualify, an establishment with an active alcoholic beverage license permitting consumption on the premises must notify the division of its intent to allow smoking and must continue to meet all requirements of a stand-alone bar (see above requirements). (Please note: merely electing to make the stand-alone bar designation does not establish qualification for the exemption.)

- This is done by filing Form DBPR ABT-6039 “Notification of Election to Permit Tobacco Smoking in the Licensed Premises” with the Division of Alcoholic Beverages & Tobacco, 1940 North Monroe Street, Tallahassee, FL 32399-1021.

15. Is there a fee to become a stand-alone bar?

There is no fee to add this designation to your alcoholic beverage license.

16. What types of licenses are not eligible to be designated as a stand-alone bar?

The following licenses are **not eligible** for a standalone bar designation:

S – Special Hotel

SH – Special Hotel in counties with population of 50,000 or less

SR – Special Restaurant issued on or after January 1, 1958

SRX – Special Restaurant

SBX – Special Bowling

SPX – Pleasure, Excursion, Sightseeing, or Charter boats

SAL – Special Airport

SCX – Special Civic Center

SCC – Special County Commission

X – Airplanes, Buses, and Steamships

IX – Railroad Cars

XL – Passenger Waiting Lounge operated by an airline

PVP – Passenger Vessels engaged in foreign commerce

11AL – American Legion Post permitted to sell to general public

11C – Social, Tennis, Racquetball, Beach, or Cabana Club

11CT – John and Mable Ringling Museum

11GC – Golf Club

11PA – Symphony, Live Performance Theatre, Performing Arts Center

11CE – Licensed vendors exempt from payment of surcharge tax

11CS – Special Club license; not transferable, consumption on premise only

12RT – Dog or Horse Track or Jai Alai Fronton

13CT – Catering

HBX – Special Horse Breeders

FEX – Special Public Fairs/Expositions

1APS, 2APS, 3PS, 3APS, 3BPS, 3CPS, and 3DPS – Package Stores

17. Can an establishment make physical changes to qualify as a stand-alone bar?

Before making changes, an operator should first rely on s. 386.203(5) and 386.203(11), Florida Statutes, and should consider consulting an attorney.

18. Can an establishment that serves food close off one half with a solid wall, making it a bar with a separate outside entrance and no food, permit smoking in that area?

No, before allowing smoking in this situation, the licensee would have to obtain a separate license for those premises.

19. What are the conditions or restrictions for a stand-alone bar to allow smoking?

To allow smoking a stand-alone bar must meet the following conditions:

- No more than 10 percent of the gross revenue of the business may be derived from the retail sale of food consumed on the licensed premises;
- All food must be paid for by a patron at a charge that reasonably approximates the retail value of the food; and
- Any food given away at no charge must be restricted to customary bar snacks only.
- A stand-alone bar must be totally or predominantly dedicated to the serving of alcoholic beverages for consumption on premises. "Predominantly" means that the revenue from the sale of alcoholic beverages for consumption on premises must exceed all other categories of gross sales listed in Florida Administrative Rule 61A 7.009.

20. What will happen to a licensee who has not made the election to permit smoking on their licensed premises and is permitting smoking?

If a complaint is received on such an establishment, the licensee can be issued a notice to comply with the requirements of the law. Failure to comply within 30 days will result in the following penalties:

- First Violation: Civil penalty of not less than \$250 and not to exceed \$750; and
- Subsequent Violations: Civil penalty of not less than \$500 and not to exceed \$2,000.

21. May free food, such as a "happy hour buffet" be offered at an establishment with a smoking designation?

Only customary bar snacks may be given away. All other food must be paid for by a patron at a charge that reasonably approximates the retail value of the food. All food paid for by patrons must be reported in the establishment's food sales.

22. May a stand-alone bar with a smoking designation engage a caterer to provide food?

A caterer may deliver food to the stand-alone bar; however, only the licensed operator may provide or serve food on the licensed premises.

23. What are bar snacks?

"Customary bar snack" means popcorn and any ready to eat food item, commercially prepared and packaged off the premises, served without addition or preparation, that is not a potentially hazardous food. The definition of potentially hazardous food, provided in subparagraph 1-201.10(B)(61), Food Code, 1999 Recommendations of the United States Public Health Service/Food and Drug Administration, incorporated herein by reference, shall apply to Chapter 61AER03-1, F.A.C.

Customary bar snacks include:

- Pre-packaged or bulk items: chips (potato, plantain, yucca, etc.), pretzels, nuts, crackers, trail mix, party mix, and pork rinds, and the like.
- Pickled items: eggs, pickles, pigs feet and sausages.

The above may be provided without charge, but may also be provided for sale.

24. What is an outdoor patio?

An outdoor patio is a place NOT predominantly or totally bounded all sides and above by physical barriers regardless of whether such barriers consist of or include, without limitation, uncovered openings, screened or otherwise partially covered openings, or open or closed windows, jalousies, doors or the like.

A place is “predominantly” bounded by physical barriers anytime BOTH of the following conditions exist:

- it is more than 50 percent covered from above by a physical barrier that excludes rain, and
- more than 50 percent of the combined surface area of its sides is covered by closed physical barriers. [See s. 386.203(5), Florida Statutes]

25. If a licensed premises, either a stand-alone bar or a food service establishment, serves food in an outside seating area, is smoking permitted there?

Yes. However, if the area is more than 50 percent covered from above by a physical barrier that excludes rain, **and** more than 50 percent of the combined surface area of its sides is covered by closed physical barriers, smoking is not permitted in the area.

26. Can I allow my customers to bring food onto my licensed premises if I have a stand-alone bar with a smoking designation?

No. All food consumed on the licensed premises must be provided by the licensed operator.

27. Can a licensee with a consumption on premises license close the kitchen at 10:00 p.m. and then permit smoking?

No. There is no hourly designation for smoking. Smoking is allowed in stand-alone bars that meet the requirements of the law as described in question 13.

28. Is there a requirement for certain signs?

Yes. For stand-alone bars with smoking designation, signs stating that smoking is permitted must be posted in a conspicuous place at each and every entrance to the establishment. It is left to the establishment’s discretion to determine the color and design of the signs to be posted.

Additionally, after the licensee notifies the Division of Alcoholic Beverages & Tobacco of the election to operate as a stand-alone bar, the licensee must post a notice of such intention in the same place the operator’s current alcoholic beverage license is posted. The notice shall affirm the operator’s intent to comply with the conditions and qualifications of a stand-alone bar imposed pursuant to Part II of Chapter 386 and the Beverage Law.

Enclosed indoor workplaces that had designated smoking areas prior to this legislation must conspicuously post a sign stating that smoking is now prohibited. This requirement applies to restaurants that were previously required to maintain a “no smoking” section. The requirement will expire on July 1, 2005.

While smoking is allowed in designated smoking guestrooms at public lodging establishments, no sign requirement is currently in the law.

For all other enclosed indoor workplaces, in order to increase public awareness, the proprietor may, at his or her discretion, post “No Smoking” signs.

29. Can an owner or their employees smoke in the kitchen area or any other area such as a break room?

No smoking is ever permitted in kitchen or food prep areas. Otherwise, unless the business is eligible for and has made the election to be designated as a stand-alone bar that permits smoking, neither the owner nor his employees may smoke in the licensed premises.

- 30. Is there a certain distance from a licensed premises that a person must be in order to smoke?**
No.

Reporting and Record Keeping Requirements for a DBPR Licensed Establishment

31. Is there a record-keeping requirement related to the smoking designation?

Stand-alone bars holding an “ss” or “ssf” designation shall maintain records to substantiate reports, affidavits and designation qualifications. Records of all purchases of food, all gross retail sales of alcohol for consumption on the licensed premises, all gross retail sales of alcohol for consumption off the licensed premises, all gross retail sales of food sold for consumption on premises, all gross retail sales of food sold for consumption off the premises, and gross revenue from all other sales shall be separately documented.

These records include, but are not limited to: purchase invoices, sales tickets, inventory records, receiving records, cash register journal tapes, on premises food sales records, computer records generated from automatic dispensing devices, and any other record documenting or evidencing sales. Records of all purchases and gross retail sales of food consumed on premises must be separately documented.

Department of Revenue Sales Tax Returns are acceptable as a record of total sales revenue. All required records must be maintained on the premises, or a designated place approved in writing by the Division of Alcoholic Beverages & Tobacco for a period of 3 years and provided within 14 days of a request by the division. The required records must be legible, clear, and in the English language.

32. What is required for stand-alone bars to keep or renew their smoking designation?

To retain its smoking designation, the establishment must continue to meet all stand-alone bar requirements and must file the following with the Division of Alcoholic Beverages & Tobacco:

- At the first renewal of the beverage license that occurs at least 12 months after the initial smoking designation, the licensee must file an affidavit verifying that food sales for the preceding 12 months did not exceed 10 percent of the gross revenue of the business.
- For each subsequent year, to continue to qualify as a stand-alone bar, the licensee must provide to the division annually, on or before the licensee’s annual renewal date, an affidavit that certifies that food sales for the preceding 12 months did not exceed 10 percent of the gross revenue of the business.
- The 10 percent food sales requirement is continual, not annual, and audits are based on any consecutive 2-month period.

Failure to file the required documents or reports will result in loss of the smoking designation and smoking will not be allowed on the premises.

33. Can I be audited if my establishment has a smoking designation?

Yes. The department shall have access and the right to examine all records and source documents used to determine compliance with this rule. Licensees must give the department the means, facilities, and opportunity to verify the accuracy of these records. The 10 percent food sales requirement is continual, not annual, and audits are based on consecutive 2-month periods.

34. How does an establishment change its stand-alone bar designation?

To change this status, the licensee must simply notify the division of its desire to cancel its designation as a stand-alone bar.

35. Who do I contact for more information?

For more information regarding enforcement for premises licensed by DBPR please contact:

The Florida Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399
Phone: 850.487.1395
Email: Call.Center@dbpr.state.fl.us
Internet: www.MyFlorida.com/dbpr

For more information regarding all other enclosed workplaces or the Florida Clean Indoor Act please call the Florida Department of Health at 1.800.337.3742.