



Memorandum

To: Local Health Department Designees
Smokefree Work Place Program Designees

From: Bill Robbins, Assistant Chief
Smoke-Free Workplace Program
Bureau of Regulatory Operations

Subject: Guidance Concerning House Bill 33 Changes
Smoke-Free Patios and Hearing Locations

Date: November 30, 2023

House Bill 33 Changes:

On July 4, 2023, Governor DeWine signed House Bill 33, the biennium budget bill for the State of Ohio. Contained within the budget were relevant changes that affected the Smoke-Free Workplace Program. Specifically, in Ohio Revised Code Section 3794.09(C) – Enforcement; Penalties, an appeal to a smoke-free violation has been changed to identify that the appellant would file such appeal in accordance with section 119.12 of the Revised Code.

What this means for the program and designees:

As a result of this change, and in accordance with Ohio Revised Code 119.12, the location of the hearing for Smoke-Free violations has changed from Franklin County to the county in which the violation occurred. Therefore, this appeal moves to the common pleas court in the county in which the place of business is located or the business owner resides.

Why is this important and what effect will there be:

This changes the location of appeals from one jurisdiction to multiple and as a result, could create contrary rulings and possible confusion with designees, specifically concerning outdoor patios in ORC 3794.03(F), an area in which appeals have occurred during the time the law was in effect. As a result of this change, the Department feels it necessary to clarify its interpretation of the statute and rule.

Rule Interpretation for Outdoor Patios

ORC 3794.03(F) defines an outdoor patio. *All outdoor patios shall be physically separated from an enclosed area. If windows or doors form any part of the partition between an enclosed area and the outdoor patio, the openings shall be closed to prevent the migration of smoke into the enclosed area. If windows or doors do not prevent the migration of smoke into the enclosed area, the outdoor patio shall be considered an extension of the enclosed area and subject to the prohibitions of this chapter.*

Outdoor Patios are further defined with expansion in Ohio Administrative Code 3701-52-01(N).

<https://codes.ohio.gov/ohio-administrative-code/chapter-3701-52>

The requirements for an outdoor patio have roof and overhead requirements, side coverings, air flow and enclosure requirements. In order for smoking to be permitted, the outdoor patio must be open to the air, which means that not more than 50% of the combined surface area of the patio's sides is covered by walls or side coverings.

Prior to design, or in response to an investigation onsite, it is the responsibility of the business to determine the mathematical calculation of airflow on the patio, and ODH and its designees will defer to a well-reasoned calculation by the owner. ODH and its designees retain the prerogative to develop their own calculation if the business's calculation appears unreasonable. As general guidance, ODH would agree that a fence with metal grates and significant open air provides minimal obstruction to air flow. Conversely, a densely woven curtain or similar structure allows for minimal air flow. The law only recognizes the open-air nature of the patio and does not allow for including an air filtration system into the calculation.

Compliance is determined by the open-air calculation at the time of the inspection. Therefore, a patio that is architected to have more than 50% of open air, but which has temporary obstructions (e.g., curtains, slot machines, removable plastic sheeting, etc.) may not be in compliance at the time of inspection. More specifically, a facility that uses temporary curtains to protect a patio from adverse weather may not allow smoking when the curtains are drawn, if the curtains reduce the open-air proportion to less than 50%.