



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Health

Rule Contact Name and Contact Information:

Selina Jackson 614-420-5505

Regulation/Package Title (a general description of the rules' substantive content):

Smoke Free Workplace

Rule Number(s): 3701-52-01 to 3701-52-10

Date of Submission for CSI Review: June 29, 2022

Public Comment Period End Date: \_\_\_\_\_

Rule Type/Number of Rules:

New/ 6 rules

No Change/      rules (FYR?     )

Amended/ 4 rules (FYR?     )

Rescinded/ 5 rules (FYR?     )

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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### **Reason for Submission**

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

**Which adverse impact(s) to businesses has the agency determined the rule(s) create?**

**The rule(s):**

- a. ☒ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**
- d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

### **Regulatory Intent**

2. **Please briefly describe the draft regulation in plain language.**

The rules set forth in Chapter 3701-52 of the Ohio Administrative Code (“OAC”) establish the rules pertaining to the prohibition against smoking in all public places of employment. The rules define the law and enforcement options by outlining the responsibilities of the Ohio Department of Health, proprietors, and individuals. Furthermore, the rules clarify the posting requirements for signs, outline due process for proprietors and individuals and state fines and penalties for violations.

**Revisions have been made to the following rules:**

**3701-52-01:** The rule sets forth the definitions for terms use throughout the Chapter. These definitions include, but are not limited to, “ashtray”, “enclosed area”, and “smoking.” The rule has been revised to add definitions for “electronic smoking device”, “retail vapor store”, “tobacco product”, and “vapor product.”

**3701-52-02:** The rule sets forth the responsibilities of proprietors of establishments regulated by this Chapter. These responsibilities include, but are not limited to, not permitting smoking in nonsmoking areas, taking reasonable actions to prevent smoking in nonsmoking areas, and to prevent smoke from smoking permitted areas from entering nonsmoking areas, removing ashtrays

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from nonsmoking areas, and the posting of “No Smoking” signs in nonsmoking areas. The rule has been revised to make grammatical changes to improve clarity and incorporate information specific to outdoor patios that had been included in rule 3701-52-01 as a definition.

**3701-52-03:** The rule sets forth the responsibilities of individuals in relation to the nonsmoking areas. Individuals may not refuse to stop smoking when in nonsmoking areas when asked to do so by a proprietor or any employee of the establishment. Individuals are prohibited from retaliating against any individual for exercising their rights regarding nonsmoking areas. Revisions have been made to clarify the business employees with the authority to tell customers not to smoke.

**3701-52-04:** The rule sets forth the areas where smoking is not regulated. These areas include private residences where individuals are employed on an intermittent basis, a family-owned business where contractors and third parties not under the direction or control of the family-owned business are only intermittently employed, and a private residence that is certified by the state or local government to provide overnight accommodations and personal care services to unrelated individuals. Formatting changes have been made to the rule to improve clarity and flow of the language, correct a citation, and to remove unnecessary language.

**Rescinded rule:**

**3701-52-05:** The rule sets forth the exemption requirements for retail tobacco stores. The rule is being rescinded and replaced with a new rule due to LSC rule drafting requirements.

**3701-52-06:** The rule sets forth the requirements pertaining to the posting of signs and the designation as a nonsmoking area. The rule is being rescinded and moved to new rule 3701-52-07 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements.

**3701-52-07:** The rule sets forth the authority of the Director of Health to designate health districts or an agency or instrumentality of the state, county, or municipal or township authority to conduct investigations of reported violations. The rule is being rescinded and moved to new rule 3701-52-08 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements.

**3701-52-08:** The rule sets forth the requirements pertaining to the reporting of violations, investigation of reported violations, findings of violations, and appeals. The rule is being rescinded and moved to new rule 3701-52-09 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements.

**3701-52-09:** The rule sets forth the fine structure for violations. The rule is being rescinded and moved to new rule 3701-52-10 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements.

**New rule:**

**3701-52-05:** The rule sets forth the exemption requirements for retail tobacco stores. Retail tobacco stores may request an exemption if they meet specified criteria, including submitting an affidavit stating the percentage of gross income from cigars, cigarettes, smoking devices, and accessories.

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Stores must also provide any additional information the director requires to determine whether an exemption is applicable. Retail tobacco stores established after December 7, 2006, must be in freestanding structure occupied solely by the retail tobacco store and ensure that smoke from the structure does not migrate to other structures and nonsmoking areas. The rule has been revised to remove the appendices. All forms will now be available on the Smoke-Free Workplace website.

**3701-52-06:** This new rule sets forth the exemption requirements for retail vapor stores. Retail vapor stores may request an exemption if they meet specified criteria, including submitting an affidavit stating the percentage of gross income from sales of vapor smoking devices, oils, and accessories. Stores must also provide any additional information the director requires to determine whether an exemption is applicable.

**3701-52-07:** This new rule is created due to the movement of rule 3701-52-06 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements. The rule sets forth the requirements pertaining to the posting of signs and the designation as a nonsmoking area. No smoking signs consisting of the words “No Smoking” or the international no smoking symbol and the ODH 1-866-559-OHIO (6446) number for reporting violations must be posted in all public places and places of employment where smoking is prohibited. Signs must be posted at all pedestrian points of transition from smoking to nonsmoking areas. Owners, managers, operators, or other persons in charge of specified facilities or establishments may voluntarily declare areas that do not otherwise qualify as a public place or place of employment as nonsmoking by placing signs prohibiting smoking as detailed previously.

**3701-52-08:** This new rule is created due to the movement of rule 3701-52-07 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements. The rule sets forth the authority of the Director of Health to designate health districts or an agency or instrumentality of the state, county, or municipal or township authority to conduct investigations of reported violations. Upon the director’s approval, these designated entities may enter into agreements with a third party to perform specified duties for a negotiated rate. Penalties assessed and invoiced by ODH must be deposited the smoke free indoor air fund within thirty days of collection and within forty-five days of the close of each quarter, and ninety per cent of any penalties received ODH in that quarter must be paid to the designee who brought the enforcement

**3701-52-09:** This new rule is created due to the movement of rule 3701-52-08 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements. The rule sets forth the requirements pertaining to the reporting of violations, investigation of reported violations, findings of violations, and appeals. Violations can be reported by mail, phone, or email to the ODH Smoke-Free Workplace Program and should include information necessary to determine when and where a violation occurred. The department must provide a proprietor with a written notice of a complaint, a copy of the complaint, and the opportunity to respond within 30 days. Investigations may be conducted by the department or a designee (e.g., county, local, health district). Proprietors may request a review of a finding and may appeal a final decision issued by the department. The revisions incorporate online reporting options and remove language that is no longer applicable.

**3701-52-10:** This new rule is created due to the movement of rule 3701-52-09 as part of the reorganization of the Chapter due to the integration of the new statutorily required retail vapor store requirements. The rule sets forth the fine structure for violations. The first violation or the first one

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in over two years receives a warning. As violations increase fine levels step up. Fines range from \$100 for an individual or business to \$2,500 for a fourth or subsequent fine by a business. All fines can be doubled if they are deemed to be intentional. The original rule language has been revised to incorporate retail vapor store language.

- 3. Please list the Ohio statute(s) that authorize the agency, board, or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

Ohio Revised Code (ORC) section 3794.07

- 4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

There are no federal requirements mandating this rule.

- 5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable to this rule.

- 6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

As required by Revised Code Section 3794, OAC Chapter 3701-52 rules provide the necessary framework for the Smoke-Free Workplace program to ensure the citizens of Ohio are protected from the harmful effects of secondhand smoke in public places and places of employment.

- 7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Successful outcomes for the rules are measured through the investigation of complaints, the imposition of fines, and the collection of fines. There is no routine inspection associated with the Smoke-Free Workplace rules; as such, the success of the enforcement-based program may be determined by the number of complaints received, which has steadily decreased in the years since the implementing of the state law and associated rules and smoke free environments have become the standard across the state and the nation. Additional considerations are the number of repeat violations by proprietors and individuals and the number of cases requiring collection by the Ohio Attorney General's office.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

No

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## **Development of the Regulation**

### **9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

Ohio Attorney General's Office  
Ohio State Highway Patrol  
Ohio Department of Commerce, Division of Liquor Control  
Ohio Casino Control Commission  
Jack Casino's – Calfee, Halter & Griswold LLP  
Scioto Downs  
Miami County Public Health  
Ohio Council of Retail Merchants  
Ohio Licensed Beverage Association – Shumaker Advisors  
Ohio Hotel and Lodging Association  
Warren County Health District  
Cuyahoga County Board of Health  
Dayton & Montgomery County Public Health

### **10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

Input was received in support of the new requirements and draft language.

### **11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

Not applicable to this rule.

### **12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

Alternative regulations to this specific rule were not considered. ODH is required by ORC section 3794.07 and 3794.09 to administer the smoke free workplace enforcement program. The program structure is based upon complaint driven enforcement investigations and penalties/fines. Alternative regulations are not available to these requirements.

### **13. Did the Agency specifically consider a performance-based regulation? Please explain.**

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Standard performance-based regulations are not appropriate for these requirements. The enforcement nature of the program includes investigations and enforcement actions which may be considered performance based in that they determine the individual or provider compliance with existing regulations. Successful outcomes could be measured in the reduction of complaints repeat offenders, and in necessary penalties.

**14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The agency conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place pertaining to these specific requirements.

**15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

The authorizing statutes and rules apply to public places, places of employment, or the areas directly or indirectly under the control of the proprietor or in an establishment, facility, or outdoor area declared non-smoking. Proprietors are required to post signage and individuals are required to comply with no smoking regulations. Complaints may be made by both proprietors and individuals, and it is the responsibility of the program to determine the validity of a complaint, investigate, and to impose a penalty/fine for confirmed violations. Consistency and predictability within the ODH program are ensured through the application of standard operating procedures, investigation standards, and internal reviews.

**Adverse Impact to Business**

**16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community; and**

Proprietors and individuals in public places and places of employment.

**b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**

- Fines and Penalties for failure to comply with the rule requirements.
- Time for compliance to read rules, prepare and submit exemption affidavits, and hang signs.
- Costs associated with purchase or creation of signs.

**c. Quantify the expected adverse impact from the regulation.**

Fines and Penalties: Proprietors and individuals may be subject to the following for violating the smoke free requirements:

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- (1) First violation - warning letter
- (2) Second violation - \$100
- (3) Third violation - \$500
- (4) Fourth violation - \$1000
- (5) Fifth or subsequent violation - \$2500

Time for compliance:

- 15 minutes to read the rules
- 30 minutes to complete and submit an affidavit for exemption
- Ten minutes to hang signs

Cost of signs is dependent upon the proprietor's preference for the size and materials.

**17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

ODH is required by Revised Code Section 3794. to administer a smoke-free workplace program and to impose fines/penalties for violations of the state law and rules. The fines set forth in this rule provide a scale of increasing fines for repeat violations that is within the statutorily established range of \$100 to \$2500 but may be doubled up to \$5000 if violations are deemed to be intentional.

**Regulatory Flexibility**

**18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

The rule allows for the reduction or waiver of fines based on defined criteria including, but not limited to, whether the proprietor made a good faith effort to prevent the violation from occurring, including efforts to comply with other applicable laws and rules such as division (A) (18) of section [3721.13](#) of the Revised Code or whether a proprietor or individual has shown good cause to support decreasing or waiving the fine.

**19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

ODH's Regulatory Ombudsman has set forth a policy for ODH to follow regarding the waiver of fines and penalties for paperwork violations and first-time offenders. ODH implements this policy as part of its business process. Information regarding this policy can be found online at:

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<https://odh.ohio.gov/wps/portal/gov/odh/about-us/offices-bureaus-and-departments/ogc/Statement-on-Paperwork-Violations/>

**20. What resources are available to assist small businesses with compliance of the regulation?**

The requirements set forth in Chapter 3701-52 of the Ohio Administrative Code are applicable to all public places and places of employment that are not expressly exempted by statute.

<http://www.odh.ohio.gov/smokefree/sflaw/sflaw1.aspx>

Program staff routinely responds to inquiries and aids and guidance to proprietors and individuals