

Iowa Department of Public Health Inquiry No. 4.

8/10/2008

Thomas Newton, Director
Iowa Department of Public Health
Lucas State Office Building
Des Moines, Iowa 50319-0075

Re: Restaurant and bar definitions.

Director Newton,

As you are aware, the Iowa Department of Public Health adopted and filed rules to implement the Smoke-free Air Act of 2008, House File 2212, on June 27, 2008. The current enforcement rules are unclear as to the total scope of the department's enforcement intent, are often ambiguous and apparently contradictory, and in some cases appear to extend beyond the stated legislative intent and/or proper material risk considerations. The definition of some terms adds to the lack of clarity and other problems with the rules. The absence of opportunity to make oral presentation before the department due to the emergency declaration under which the rules were adopted greatly adds to the difficulties encountered when attempting to clarify the enforcement rules.

In light of the present vagueness and ambiguity in several rule sections it is particularly troubling that, absent opportunity for oral presentation, there appears to be no rulemaking opportunity for interested persons and/or organizations that represent them to present oral, written or data submissions that the department has a recognized statutory duty to "consider fully." While meaningful and constructive dialog with the department concerning the rules would clearly be the preferred course of action, dialog requires two-way communication that the emergency declaration precludes. Notwithstanding these extreme limitations imposed on interested persons and their trade representatives by the department's emergency declaration, I will attempt to address below from my layperson's viewpoint several issues concerning definitions of restaurants and bars and outdoor areas will be subject to smoking prohibitions contained in the rules.

I also mention as preface to my comments that the lack of clarity as to the department's enforcement rules in the public eye can increase risks to burdens imposed on small business owners. The increased risks and burdens can occur because complaints concerning alleged violations of smoking in public places can be filed with the department, even though someone may be smoking in a public place or area where smoking is permitted. For example, the current enforcement scheme requires that members of the general public be aware of and sensitive to the fact that, according to section 3.2.b. of House File 2212, smoking is prohibited in outdoor seating and service area of restaurants yet no such express prohibition is found for bars in that section. As you know, the department has escalating notices and penalties in its rules for business owners, including determination of what constitutes a second or subsequent notice or violation, this lack of public knowledge due to confusion concerning the rules. It is also apparent that the department has not included in its rules a mandatory requirement to contact persons who file complaints that allege violations of the Smokefree Air Act or to confirm the particulars of a complaint. Subsequent complaints would, for example, count as to whether a business owner faced a first or second notice of prospective violation, however. Since the department's enforcement actions and related penalties are different for a first or second notice and/or violation, lack of clarity in the general public's eye can lead to unwarranted enforcement actions or penalties. I consider those circumstances to be unacceptable.

Background:

The Iowa Department of Public Health's rules and House File 2212 define "restaurant" as, "Restaurant' means eating establishments, including private and public school cafeterias, which offer food to the public, guests, or employees, including the kitchen and catering facilities in which food is prepared on the premises for serving elsewhere, and including a bar area within a restaurant."

While I understand that similar definition(s) may be found in other Iowa Code relating to restaurants, I also note that there is no distinction in the above definition concerning the percentage of revenues that prepared food constitutes. This can create an apparent conflict for enforcement of the rules.

The Iowa Department of Public Health's rules and House File 2212 define "bar" as, "Bar' means an establishment where one may purchase alcoholic beverages as defined in Iowa Code section 123.3, for consumption on premises and in which the serving of food is incidental to the consumption of those beverages."

Considering the above language, service of food incidental to the consumption of alcoholic beverages is a critical element in the definition of a bar. It is also apparent to me that the definition of incidental in terms of revenue percentage could add considerable clarity to the department's enforcement rules.

As to bars, the Iowa Department of Public Health's rules define use of the term "incidental" as, "Serving of food incidental to consumption of alcoholic beverages' means food preparation that is limited to the service of ice, prepackaged snack foods, popcorn, peanuts, and the reheating of commercially prepared foods that do not require assembly, such as frozen pizza, pre-packaged sandwiches, or other prepackaged, ready-to-serve products."

Consider the case of a bar, bowling center, or other hospitality establishment that conducts an occasional outdoor barbeque to attract customers and charges a token amount for the food served. The food items to be barbequed and the manner of preparation do not conform to the above definition of "incidental" as cited above. That bar could be unwittingly defining itself as a restaurant and opening itself to escalating penalties and costs associated with alleged violations under definitions in the Smokefree Air Act if a patron were to smoke in the outdoor area, even though smoking could be otherwise permitted. The possible violations could arise even though total income from the food items is less than 5 percent of revenues. The same enforcement circumstances could apply to a book store or other retail store that prepares and provides to customers snack trays and free coffee or tea that it prepares in an outdoor area, to attract to build a patron base. My layperson's view is that in both cases of the bar and the bookstore the prohibitions imposed by the Smokefree Air Act and the department's enforcement rules could be viewed as an unwarranted restraint of trade that prohibits otherwise lawful acts by an owner to establish and build a customer base for his or her small business.

The above definitions are different than some customary trade practices and other definitions. I understand a restaurant to be an establishment that derives 51 percent or more of its revenue from sales of food. Food service that is incidental to the serving of alcoholic beverages is understood to mean revenues from food constitute 5 percent or less of an establishment's revenues. The preceding differences are highly important when considered in light of the various smoking prohibitions under the department's enforcement rules for restaurants and bars, as well as in determining where food sales may be incidental. It is a concern to me that the department's enforcement rules not be so fixated on crafting clever "gotcha" rules concerning use of tobacco products that it loses sight of the materially important day-to-day issues that small business owners face when lawfully operating their establishments.

Questions: Based on the forgoing and my layperson's understanding I ask the following questions:

1. Does the Iowa Department of Public Health intend to impose restraint of trade prohibitions concerning how non-restaurant business owners can solicit customers and build its patron base?
2. Has the Iowa Department of Public Health rejected or does it reject the definition of a restaurant as an establishment that derives 51 percent or more of its revenues from the sale of food?
3. Has the Iowa Department of Public Health rejected or does it reject the definition of “incidental” as 5 percent or less of revenues derived from sales of foods?
4. Why has the Iowa Department of Revenue substituted the above-quoted definitions for those customarily applied by related trade groups and as found in industry classification system code definitions?

Finally, please note that this inquiry has been sent by both U.S. Mail and through the health department’s Web form. I request a response by both E-Mail and letter from the health department.

Respectfully,

Randy Stanford
Secretary/Treasurer and Director
Iowans for Equal Rights