

Iowa Department of Public Health Inquiry No. 2.

8/10/2008

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

Re: Imbalance of risk and additional costs that may be assessed, including staff costs and nuisance abatement.

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.

**Background:** Regarding enforcement against a person who owns, operates, manages or otherwise has a control of a place where smoking is prohibited, the rules include a reference to House File 2212, section 9, which specifies penalties. Penalties include civil fines ranging from \$100 to \$500 per day for each violation, civil penalty of \$2,000 to \$10,000 for an employer who discharges or otherwise discriminates against an employee who files a complaint under the Act, and revocation or suspension of any permit or license issued for the premises where the violation occurred.

In addition to the foregoing, section 9.(5.) of HF 2212 provides that

“Violation of this chapter constitutes a public nuisance . . .” and that “. . . the entity abating the public nuisance may take action to recover the costs of such abatement.”

Based on the penalties as stated it appears to me as a layperson that the enforcement penalties against small business owners under the Smokefree Air Act are draconian, to say the least. It is self-evident that a small business owner can put be in a position to face many thousands of dollars in cumulative fines for daily violations, up to ten thousand dollars based on an employee’s allegations concerning termination, and loss of one’s ability to earn a living due to suspension or revocation of permits or licenses. In stark contrast, persons who perpetrate the actual act of smoking in a public place that creates violations, such as a patron of a bar or restaurant, face a possible citation and modest civil penalty.

The question of comparative penalties is important to me in terms of equal protection of the laws. All Iowa business owners are not persons who smoke tobacco products, however individual persons who violate the smoking prohibitions in House File 2212 are, by necessary definition, persons who smoke. Section 9, subsection 1 of House File 2212 defines penalties for individual persons, such as a patron of a restaurant, bowling center or bar, who do not own or operate a public place and provides for application of Iowa Code (805.8C(3)”a”). Section 9, subsection a., of House File 2212 defines the civil fine as \$50, provides that a criminal penalty surcharge shall not be added, and prohibits imposition of court costs. In addition, that subsection also provides that filing fees shall not be charged. No provisions of House File 2212 or the department’s rules provide for escalating penalties against persons who smoke in public places where it is prohibited, nor is there any provision in House File 2212 or the department’s rules for recovery of costs to abate a nuisance from such persons.

Based on the above information I conclude that there is a severe imbalance of prospective penalties for business owners compared to those faced by a person who commits the infraction that allegedly gives rise

the threat to public health, smoking in public places. It seems to me that such imbalanced penalty provisions in House File 2212 and the department's imbalanced focus on business Iowa owners concerning penalties defeats the expressed purpose and intent of the legislation and related rules, "to protect the public health and health of employees." I believe that genuine and earnest enforcement measures should place at least equivalent emphasis on those who perpetrate the act that allegedly give rise to the threat to public health – smoking tobacco products in public places – as they do on business owners who may accommodate them. It is my opinion that to the extent that the imbalance emphasis for penalties in either House File 2212 or the department's enforcement rules defeat the expressed purposes of the legislation I believe the penalty imbalance is improper.

Section 153.8(6) of the rules as published by the Iowa Department of Public Health states:

“Upon receipt of a complaint, the department or its designee may contact the individual making the complaint to confirm the details of the complaint and obtain any additional information.” (Underline added.)

The above penalties are not limited to the hospitality trade. It is clear to me that the above penalties can be applied to any business in the State of Iowa where smoking on the premises may occur, such as a car dealer or book store, regardless of whether the business owner is aware that a violation is occurring or has occurred.

In my view, there is a clear and troubling imbalance of risks imposed on small business owners under the rules promulgated by the Iowa Department of Public Health. Perpetrators of the act that gives rise to the above-summarized penalties for small business owners (smoking in a public place) need not even be identified, and if they are identified they face mere civil penalty if they are cited. Nor is it required that the identity of a person filing a complaint be confirmed or that the department even contact them. Needless to say, as a practical matter under these conditions persons who smoke in public places in violation of the rules will rarely, if ever, face cumulative fines and penalties that can be plied to business owners. It is also clear to me that individual persons who smoke in public places in violation of the Smokefree Air Act would not face loss of their livelihood that small business owners may confront.

Finally, the question of comparative penalties are very important to me in terms of equal protection of the laws. Section 9, subsection 1 of House File 2212 defines

**Questions:** Since the Iowa Department of Public Health is one entity that is and will be directly involved in actions to abate the declared public nuisance of persons smoking tobacco products in public places I ask the following questions:

1. What is the public health or other basis that compels such enforcement penalties against small business owners in Iowa?
2. Why do the Iowa Department of Public Health rules adopted June 27, 2008 not require that the person committing the unlawful act of smoking in a public place be identified and cited for a complaint to will be included and considered in the cumulative record of an Iowa small business owner?
3. What is the formula that is to be applied against Iowa small business owners by the Iowa Department of Public Health in calculating the amount due for “. . . abating the public nuisance” that it “may take action to recover the costs of such abatement”?

I look forward to your response because the above imbalances of risk imposed on Iowa small business owners as described above raise in my mind serious questions concerning equal protection of the laws.

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,

Tom Coats  
Director  
Iowans for Equal Rights