

# Despite confusion, Ohio's smoking ban is in effect

On Dec. 7, 2006, Chapter 3794 of the Ohio Revised Code took effect and established a broad indoor smoking ban in Ohio. In November, voters in every county of the state adopted Issue 5 and yet, despite the recent effective date of the new smoking ban, business owners across the state are confused by rumors and reports that the law is not yet in effect.

**LEGAL  
 MATTERS**

Jack Greiner  
 AND  
 Neil Fairweather

Inconsistencies in the treatment of the smoking ban were evident in different parts of the state. Reports from the Cincinnati area indicate that in several bars, patrons continued to smoke even after the ban took effect on Dec. 7. Several days later, in Marietta, however, a smoker who refused to leave the Marietta Brewing Co. after lighting up a cigarette was arrested for misdemeanor criminal trespassing.

So what's the problem? A number of factors contribute to the confusion. First, the new law creates a gap between the effective date of the smoking ban and the deadline for the Ohio Department of Health to promulgate new regulations that will allow the enforcement of violations of the smoking ban. The ODH has until June 7 to

adopt rules to implement and enforce the smoking ban.

This means that until the new rules are in effect, businesses that violate the smoking ban are not subject to fines or other penalties and may only receive an "informational letter" from the ODH. This creates little incentive for businesses that cater to smokers, like bars and taverns, to comply with the smoking ban.

Second, on the day before the Dec. 7 effective date, the Buckeye Liquor Permit Holders Association, a trade group that represents Ohio bars and restaurants, filed a lawsuit in Hamilton County challenging the constitutionality and enforceability of the smoking ban.

Buckeye also filed a motion seeking to enjoin the enforcement of the smoking ban until the Ohio Department of Health can establish rules for the enforcement of the ban.

To dispel confusion about the effect of the new smoking ban, the director of the Ohio Department of Health, Dr. J. Nick Baird, issued a statement on Dec. 8 that read in part:

"Despite rumors and some news reports to the contrary, the Ohio

smoking ban is alive and well. The law took effect Dec. 7 and remains in effect today. Under the language of the law passed on Nov. 7, the Ohio Department of Health (ODH) is not able to levy any fines until the enforcement mechanisms are in place.

During this implementation period, ODH will follow up on all notices of potential violations with an informational letter reminding businesses of their obligations under the law. This implementation period is NOT a grace period. This implementation period will give Ohio businesses the opportunity to better understand how to comply with the smoking ban.

***What should  
 Ohio businesses  
 do until the new  
 rules take effect?***

Some 280,000 Ohio businesses, as of Dec. 7, are required to prohibit smoking, remove ashtrays and other smoking receptacles and post no-smoking signs with the number for reporting violations - (866) 559-OHIO."

The Ohio Attorney General's office has also confirmed that the smoking ban is currently in effect.

What should Ohio businesses do until the new rules take effect?

Notwithstanding the gap be-

tween the effective date of the smoking ban and the adoption of enforcement rules, businesses must begin to make the transition. The statute sets out three primary responsibilities. Businesses must: prohibit indoor smoking in public places and certain enclosed outdoor places including areas "immediately adjacent" to entrances and exits; conspicuously post no-smoking signs; and remove ashtrays and other smoking receptacles.

Failure to meet these requirements may initially only meet with an informational letter, but businesses can anticipate that eventually fines and other penalties may follow.

While certain aspects of the new law need clarification - for example, what does "immediately adjacent" mean - other aspects, such as no smoking inside, removing ashtrays and posting signs, are unambiguous. The best course of action, at this point, would be to comply with the unambiguous requirements.

Ohio businesses, along with Ohio smokers and non-smokers alike, will all wait together for the smoke to clear.

**Greiner** and Fairweather are attorneys in the Commercial Litigation and Dispute Resolution Department at Graydon Head & Ritchey LLP.