

## LEGISLATIVE BILL 118

Approved by the Governor February 26, 2015

Introduced by Larson, 40; Coash, 27; Kintner, 2; Bloomfield, 17.

A BILL FOR AN ACT relating to tobacco; to amend sections 53-103.08, 53-1,120.01, 71-5716, and 71-5717, Reissue Revised Statutes of Nebraska, and sections 28-1429.03, 53-101, 53-131, and 71-5730, Revised Statutes Cumulative Supplement, 2014; to define cigar shop; to permit certain sales as prescribed; to provide for a nonrefundable application fee; to provide and change requirements for cigar shops; to state and restate intent; to preempt county resolutions and city ordinances relating to smoking in cigar shops; to exempt tobacco retail outlets and cigar shops from the Nebraska Clean Indoor Air Act; to provide requirements for tobacco retail outlets; to harmonize provisions; to provide severability; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 28-1429.03, Revised Statutes Cumulative Supplement, 2014, is amended to read:

28-1429.03 (1) Except as provided in subsection (2) of this section and section 28-1429.02, it shall be unlawful to sell or distribute cigarettes, cigars, vapor products, alternative nicotine products, or tobacco in any form whatever through a self-service display. Any person violating this section is guilty of a Class III misdemeanor. In addition, upon conviction for a second or subsequent offense within a twelve-month period, the court shall order a six-month suspension of the license issued under section 28-1421.

(2) Cigarettes, cigars, vapor products, alternative nicotine products, or tobacco in any form whatever may be sold or distributed in a self-service display that is located in a tobacco specialty store or cigar shop ~~bar~~ as defined in section 53-103.08.

Sec. 2. Section 53-101, Revised Statutes Cumulative Supplement, 2014, is amended to read:

53-101 Sections 53-101 to 53-1,122 and sections 5 and 6 of this act shall be known and may be cited as the Nebraska Liquor Control Act.

Sec. 3. Section 53-103.08, Reissue Revised Statutes of Nebraska, is amended to read:

53-103.08 Cigar shop ~~bar~~ means an establishment operated by a holder of a Class C liquor license which:

(1) Does not sell food;

(2) In addition to selling alcohol, annually receives ten percent or more of its gross revenue from the sale of cigars, ~~and other tobacco products,~~ and tobacco-related products, except from the sale of cigarettes as defined in section 69-2702. A cigar shop ~~bar~~ shall not discount alcohol if sold in combination with cigars or other tobacco products and tobacco-related products;

(3) Has a walk-in humidor on the premises; and

(4) Does not permit the smoking of cigarettes.

Sec. 4. Section 53-131, Revised Statutes Cumulative Supplement, 2014, is amended to read:

53-131 (1) Any person desiring to obtain a new license to sell alcoholic liquor at retail, a craft brewery license, or a microdistillery license shall file with the commission:

(a) An application in triplicate original upon forms prescribed by the commission ~~prescribes~~, including the information required by subsection (3) of this section for an application to operate a cigar shop ~~bar~~;

(b) The license fee if under sections 53-124 and 53-124.01 such fee is payable to the commission, which fee shall be returned to the applicant if the application is denied; and

(c) The nonrefundable application fee in the sum of four hundred dollars, except that the nonrefundable application fee for an application for a cigar shop ~~bar~~ shall be one thousand dollars.

(2) The commission shall notify the clerk of the city or village in which such license is sought or, if the license sought is not sought within a city or village, the county clerk of the county in which such license is sought, of the receipt of the application and shall include one copy of the application with the notice. No such license shall be issued or denied by the commission until the expiration of the time allowed for the receipt of a recommendation of denial or an objection requiring a hearing under subdivision (1)(a) or (b) of section 53-133. During the period of forty-five days after the date of receipt by mail or electronic delivery of such application from the commission, the local governing body of such city, village, or county may make and submit to the commission recommendations relative to the granting or refusal to grant such license to the applicant.

(3) For an application to operate a cigar shop ~~bar~~, the application shall include proof of the cigar shop's ~~bar's~~ annual gross revenue as requested by the commission and such other information as requested by the commission to establish the intent to operate as a cigar shop ~~bar~~. The commission may adopt and promulgate rules and regulations to regulate cigar shops. The rules and

regulations existing on August 1, 2014, applicable to cigar bars shall apply to cigar shops until amended or repealed by the commission bars.

(4) For renewal of a license under this section, a licensee shall file with the commission an application, the license fee as provided in subdivision (1)(b) of this section, and a renewal fee of forty-five dollars.

Sec. 5. (1) The Legislature finds that allowing smoking in cigar shops as a limited exception to the Nebraska Clean Indoor Air Act does not interfere with the original intent that the general public and employees not be unwillingly subjected to second-hand smoke. This exception poses a de minimis restriction on the public and employees given the limited number of cigar shops compared to other businesses that sell alcohol, cigars, and pipe tobacco, and any member of the public should reasonably expect that there would be second-hand smoke in a cigar shop given the nature of the business and could choose to avoid such exposure.

(2) The Legislature finds that (a) cigars and pipe tobacco have different characteristics than other forms of tobacco such as cigarettes, (b) cigars are customarily paired with various spirits such as cognac, single malt whisky, bourbon, rum, rye, port, and others, and (c) unlike cigarette smokers, cigar and pipe smokers may take an hour or longer to enjoy a cigar or pipe while cigarettes simply serve as a mechanism for delivering nicotine. Cigars paired with selected liquor creates a synergy unique to the particular pairing similar to wine paired with particular foods. Cigars are a pure, natural product wrapped in a tobacco leaf that is typically not inhaled in order to enjoy the taste of the smoke, unlike cigarettes that tend to be processed with additives and wrapped in paper and are inhaled. Cigars have a different taste and smell than cigarettes due to the fermentation process cigars go through during production. Cigars tend to cost considerably more than cigarettes, and their quality and characteristics vary depending on the type of tobacco plant, the geography and climate where the tobacco was grown, and the overall quality of the manufacturing process. Not only does the customized blending of the tobacco influence the smoking experience, so does the freshness of the cigars, which is dependent on how the cigars were stored and displayed. These variables are similar to fine wines, which can also be very expensive to purchase. It is all of these variables that warrant a customer wanting to sample the product before making such a substantial purchase.

(3) The Legislature finds that exposure to second-hand smoke is inherent in the selling and sampling of cigars and pipe tobacco and that this exposure is inextricably connected to the nature of selling this legal product, similar to other inherent hazards in other professions and employment.

(4) It is the intent of the Legislature to allow cigar and pipe smoking in cigar shops that meet specific statutory criteria not inconsistent with the fundamental nature of the business. This exception to the Nebraska Clean Indoor Air Act is narrowly tailored in accordance with the intent of the act to protect public places and places of employment.

Sec. 6. (1) The holder of a cigar shop license shall not allow a person under twenty-one years of age to smoke or purchase any product in the cigar shop.

(2) The licensee shall post a sign on all entrances to the cigar shop, on the outside of each door, in a conspicuous location slightly above or next to the door, with the following statement: SMOKING OF CIGARS AND PIPES IS ALLOWED INSIDE THIS BUSINESS. SMOKING OF CIGARETTES IS NOT ALLOWED.

(3) Beginning November 1, 2015, the licensee shall provide to the commission a copy of a waiver signed prior to employment by each employee on a form prescribed by the commission. The waiver shall expressly notify the employee that he or she will be exposed to second-hand smoke, and the employee shall acknowledge that he or she understands the risks of exposure to second-hand smoke.

Sec. 7. Section 53-1,120.01, Reissue Revised Statutes of Nebraska, is amended to read:

53-1,120.01 No county resolution or city ordinance that prohibits smoking in indoor areas shall apply to cigar shops bars.

Sec. 8. Section 71-5716, Reissue Revised Statutes of Nebraska, is amended to read:

71-5716 Sections 71-5716 to 71-5734 and section 11 of this act shall be known and may be cited as the Nebraska Clean Indoor Air Act.

Sec. 9. Section 71-5717, Reissue Revised Statutes of Nebraska, is amended to read:

71-5717 The purpose of the Nebraska Clean Indoor Air Act is to protect the public health and welfare by prohibiting smoking in public places and places of employment with limited exceptions for guestrooms and suites, research, tobacco retail outlets, and cigar shops. The limited exceptions permit smoking in public places where the public would reasonably expect to find persons smoking, including guestrooms and suites which are subject to expectations of privacy like private residences, institutions engaged in research related to smoking, and tobacco retail outlets and cigar shops which provide the public legal retail outlets to sample, use, and purchase tobacco products and products related to smoking. The act shall not be construed to prohibit or otherwise restrict smoking in outdoor areas. The act shall not be construed to permit smoking where it is prohibited or otherwise restricted by other applicable law, ordinance, or resolution. The act shall be liberally construed to further its purpose.

Sec. 10. Section 71-5730, Revised Statutes Cumulative Supplement, 2014, is amended to read:

71-5730 (1) The following indoor areas are exempt from section 71-5729:

(a 1) Guestrooms and suites that are rented to guests and that are designated as smoking rooms, except that not more than twenty percent of rooms rented to guests in an establishment may be designated as smoking rooms. All smoking rooms on the same floor shall be contiguous, and smoke from such rooms shall not infiltrate into areas where smoking is prohibited under the Nebraska Clean Indoor Air Act;

(b 2) Indoor areas used in connection with a research study on the health effects of smoking conducted in a scientific or analytical laboratory under state or federal law or at a college or university approved by the Coordinating Commission for Postsecondary Education;

(c 3) Tobacco retail outlets; and

(d 4) Cigar shops bars as defined in section 53-103.08.

(2)(a) The Legislature finds that allowing smoking in tobacco retail outlets as a limited exception to the Nebraska Clean Indoor Air Act does not interfere with the original intent that the general public and employees not be unwillingly subjected to second-hand smoke since the general public does not frequent tobacco retail outlets and should reasonably expect that there would be second-hand smoke in tobacco retail outlets and could choose to avoid such exposure. The products that tobacco retail outlets sell are legal for customers who meet the age requirement. Customers should be able to try them within the tobacco retail outlet, especially given the way that tobacco customization may occur in how tobacco is blended and cigars are produced. The Legislature finds that exposure to second-hand smoke is inherent in the selling and sampling of cigars and pipe tobacco and that this exposure is inextricably connected to the nature of selling this legal product, similar to other inherent hazards in other professions and employment.

(b) It is the intent of the Legislature to allow cigar and pipe smoking in tobacco retail outlets that meet specific statutory criteria not inconsistent with the fundamental nature of the business. This exception to the Nebraska Clean Indoor Air Act is narrowly tailored in accordance with the intent of the act to protect public places and places of employment.

(3)(a) The Legislature finds that allowing smoking in cigar shops as a limited exception to the Nebraska Clean Indoor Air Act does not interfere with the original intent that the general public and employees not be unwillingly subjected to second-hand smoke. This exception poses a de minimis restriction on the public and employees given the limited number of cigar shops compared to other businesses that sell alcohol, cigars, and pipe tobacco, and any member of the public should reasonably expect that there would be second-hand smoke in a cigar shop given the nature of the business and could choose to avoid such exposure.

(b) The Legislature finds that (i) cigars and pipe tobacco have different characteristics than other forms of tobacco such as cigarettes, (ii) cigars are customarily paired with various spirits such as cognac, single malt whisky, bourbon, rum, rye, port, and others, and (iii) unlike cigarette smokers, cigar and pipe smokers may take an hour or longer to enjoy a cigar or pipe while cigarettes simply serve as a mechanism for delivering nicotine. Cigars paired with selected liquor creates a synergy unique to the particular pairing similar to wine paired with particular foods. Cigars are a pure, natural product wrapped in a tobacco leaf that is typically not inhaled in order to enjoy the taste of the smoke, unlike cigarettes that tend to be processed with additives and wrapped in paper and are inhaled. Cigars have a different taste and smell than cigarettes due to the fermentation process cigars go through during production. Cigars tend to cost considerably more than cigarettes, and their quality and characteristics vary depending on the type of tobacco plant, the geography and climate where the tobacco was grown, and the overall quality of the manufacturing process. Not only does the customized blending of the tobacco influence the smoking experience, so does the freshness of the cigars, which is dependent on how the cigars were stored and displayed. These variables are similar to fine wines, which can also be very expensive to purchase. It is all of these variables that warrant a customer wanting to sample the product before making such a substantial purchase.

(c) The Legislature finds that exposure to second-hand smoke is inherent in the selling and sampling of cigars and pipe tobacco and that this exposure is inextricably connected to the nature of selling this legal product, similar to other inherent hazards in other professions and employment.

(d) It is the intent of the Legislature to allow cigar and pipe smoking in cigar shops that meet specific statutory criteria not inconsistent with the fundamental nature of the business. This exception to the Nebraska Clean Indoor Air Act is narrowly tailored in accordance with the intent of the act to protect public places and places of employment.

Sec. 11. (1) The owner of a tobacco retail outlet shall post a sign on all entrances to the tobacco retail outlet, on the outside of each door, in a conspicuous location slightly above or next to the door, with the following statement: SMOKING OF CIGARS AND PIPES IS ALLOWED INSIDE THIS BUSINESS. SMOKING OF CIGARETTES IS NOT ALLOWED.

(2) Beginning November 1, 2015, the owner shall provide to the Division of Public Health a copy of a waiver signed prior to employment by each employee on a form prescribed by the division. The waiver shall expressly notify the employee that he or she will be exposed to second-hand smoke, and the employee shall acknowledge that he or she understands the risks of exposure to second-hand smoke.

(3) The owner shall not allow cigarette smoking in the tobacco retail

outlet.

Sec. 12. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 13. Original sections 53-103.08, 53-1,120.01, 71-5716, and 71-5717, Reissue Revised Statutes of Nebraska, and sections 28-1429.03, 53-101, 53-131, and 71-5730, Revised Statutes Cumulative Supplement, 2014, are repealed.

Sec. 14. Since an emergency exists, this act takes effect when passed and approved according to law.