

GAPS IN CALIFORNIA'S SMOKE-FREE LAW

Hookah Lounges & Other Tobacco Retailers

Although California state labor law prohibits smoking¹ in most indoor or enclosed places of employment, including indoor areas of restaurants and bars, some establishments – most notably hookah lounges – have attempted to work around these important employee protections by asserting they are exempted under the law.

While there are limited state law exceptions, one common exception that businesses, including hookah lounges, incorrectly claim is the exception for wholesale tobacco shops and private smokers' lounges. Importantly, this exception only allows smoking in tobacco shops or lounges that are enclosed within or attached to a licensed retail or wholesale tobacco shop. Other businesses cannot allow smoking in an enclosed area under this exception. Additionally, other statutes prohibit licensed tobacco retailers from selling commercial tobacco² at the same time as they sell and








serve food and alcohol. The bottom line is that state law does permit hookah lounges, but only if they (1) are within or attached to licensed retail or wholesale tobacco shops and (2) do not also serve food or alcohol.

While this resource provides an overview of relevant California laws regarding smoke-free air and exceptions, localities can and have addressed gaps in state law by passing comprehensive indoor policies with no exceptions and also passing smoke-free outdoor area policies that often address areas like smoking on outdoor patios of restaurants.

Below are examples of several areas where smoking is and is not allowed under state law. The list is not intended to be comprehensive, but it is meant to address some of the more common questions regarding California’s smoke-free law.

State Labor Abbreviated Guide

Location	Prohibited or Permitted	Reasoning
Restaurants, indoors	 Prohibited	Smoking tobacco products (or cannabis ³) in enclosed spaces in restaurants is prohibited. All types of smoking, including the use of cigarettes, e-cigarettes, or shisha, are banned indoors at restaurants.
Restaurants, outdoors	 Permitted	State law prohibits smoking only in enclosed spaces at most places of employment, but smoking in outside spaces of a restaurant, such as on an outdoor patio, is allowed under state law. Local laws can be more restrictive.
Retail or wholesale tobacco shops	 Permitted <i>(with conditions)</i>	California labor law permits smoking in licensed retail or wholesale tobacco shops, including licensed cigar and hookah lounges, but these areas must be dedicated to using or selling tobacco products and they cannot serve food or alcohol.
Private smoker’s lounge, attached to a licensed tobacco retailer	 Permitted <i>(with conditions)</i>	California labor law permits smoking in a private smokers’ lounge <i>if</i> : <ul style="list-style-type: none"> • It is in or attached to “a retail or wholesale tobacco shop that is dedicated to the use of tobacco products,” and • It is in a separate, enclosed area, and • It does <i>not</i> serve food or alcohol.
Private smoker’s lounge, attached to a restaurant or store	 Prohibited	A restaurant or store cannot simply set aside a room that is separated by a wall or door for people to smoke in to qualify for the “smokers’ lounge” exception. This exception only applies to lounges that are attached to licensed retail or wholesale tobacco shops.

Things to Remember

Smoking is Prohibited Regardless of Who is Smoking and Who Supplied the Product

California law prohibits smoking in most enclosed spaces of places of employment. It does not matter whether it's an employee or a customer who is smoking and whether the tobacco product was brought from home or supplied by the business.

Source

Calif. Labor Code § 6404.5(c): Prohibits smoking tobacco products “at a place of employment or in an enclosed space.”

Using Hookahs, E-Devices, and Cannabis Is Smoking

California's labor laws prohibit “smoking” in most places of employment, and “smoking” *includes* using shisha, electronic smoking devices (e-cigarettes or vapes), and cannabis.

Sources

Calif. Labor Code § 6404.5(c), (l), & (m): Prohibits smoking tobacco products in places of employment.

Calif. Bus. & Prof. Code § 22950.5(c), (d): Defines “smoking” and “tobacco products.”

Calif. Health & Safety Code § 11362.3(a)(2): Clarifies that smoking cannabis or cannabis products is prohibited anywhere where smoking tobacco is prohibited.

Only Licensed Tobacco Retailers Should Be Selling Tobacco Products at Retail

A valid tobacco retailer or wholesaler license is required to sell tobacco products to consumers. Failure to have and display a tobacco license can incur fines and even criminal charges. A cigar lounge or hookah lounge can sell tobacco products *and* permit smoking, but it must have a license to sell tobacco. Businesses are prohibited from selling or providing customers with any tobacco or nicotine-based product without being licensed to do so.

Sources

Calif. Bus. & Prof. Code § 22971(k), (q), (t) and Calif. Rev. and Tax. Code § 30121(b), (c): Defines “licensee,” “retailer,” and “tobacco products.”

Calif. Bus. & Prof. Code § 22972: Requires a state license for anyone who sells tobacco products directly to the public.

Calif. Bus. & Prof. Code §§ 22980.2 and 22981: Makes it a misdemeanor to sell tobacco products without a license punishable by a fine not to exceed \$5,000, or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

Calif. Bus. & Prof. Code § 22974.5; Calif. Rev. and Tax. Code § 30474: Provides a penalty of \$500 for failure to display a tobacco retail license and states that is a misdemeanor to sell cigarettes without proper tax stamps.

Smoking Exception and the Sale of Food and Alcohol

Licensed tobacco retailers (including hookah lounges) can permit smoking, but it is a violation of state law for them to also serve food or alcohol and their customers *can't* bring their own alcohol into the tobacco retail store. Similarly, because they serve food and drinks, restaurants and bars, by definition, cannot sell tobacco products or be licensed as tobacco retailers. So, licensed tobacco retailers can have smokers' lounges, but they cannot serve food or beverages; bars and restaurants can serve food and beverages, but they cannot be licensed tobacco retailers and therefore, cannot have smokers' lounges or permit smoking.

Sources

Calif. Labor Code § 6404.5(e)(2): Makes an exception to the indoor smoking rule of tobacco retail shops and smoking lounges enclosed within tobacco retail shops provided they are "dedicated to" using tobacco or "the main purpose of" the shop is the sale of tobacco products.

Cal. Att'y Gen. Op. No.09-507 (Dec. 21, 2011): Explains that if a tobacco shop or smoking lounge within a tobacco shop serves food or alcohol, it is not "dedicated to" the use of tobacco and its "main purpose" is not the sale of tobacco, making it ineligible for the smoking exception.

Calif. Health & Safety Code § 118915: Prohibits anyone from smoking in a retail food production and marketing establishment.

Calif. Bus. & Prof. Code § 25604: Makes it a public nuisance to allow for the storing, receiving, or consumption of alcohol by the public without a liquor license.

Local Laws Can Be More Restrictive

Cities and counties can pass, and many have enacted, ordinances that are more restrictive than state law. That includes closing the gaps in the indoor smoking restrictions in state law and banning smoking in outdoor spaces. Just because the *state* permits smoking in a certain space does not mean it is legal to do so in any given city or county. Localities can close the gaps in state law for hookah lounges by adopting a comprehensive Tobacco Retailer License ordinance



prohibiting smoking in tobacco retailer locations. The Public Health Law Center's *Model Tobacco Retail License policy* includes this language.

Sources

Calif. Labor Code § 6404.5(h): Permits local governments to ban smoking in places of employment that are otherwise exempted by California state labor law.

Calif. Health & Safety Code § 118910: Permits local governments to ban smoking in places that are otherwise exempted by the Clean Indoor Air Act.

Additional Resources

Public Health Law Center, *Tracking Tobacco Laws: A California Digest* (August 2023).

California Department of Public Health, *California Clean Indoor Air Law Frequently Asked Questions (FAQ)* (September 26, 2016).

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Endnotes

- 1 This resource uses the term “smoking” to refer to smoking any tobacco or cannabis product, including using any electronic tobacco or cannabis devices. *See* Calif. Bus. & Prof. Code § 22950.5(c), (d) (defining “smoking” and “tobacco products”); *id.* § 11362.3(a)(2) (explaining that smoking cannabis or cannabis products is prohibited anywhere that smoking tobacco is).
- 2 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcmi.org>. When the word “tobacco” is used throughout this digest, a commercial context is implied and intended.
- 3 At the time of this publication, licensed cannabis retailers are prohibited from serving prepared food or beverage products. However, if signed into law, AB 374 would amend Cal. Bus. & Prof. Code Section 26200 so that local jurisdictions could permit licensed cannabis retailers to serve fresh-made food and beverage products.