

Memorandum

To: Janelle Waldock, BCBS of Minnesota, Center for Prevention
Kerri Gordon, ClearWay Minnesota
From: Susan Weisman, Public Health Law Center
Re: Analysis of H.F. No. 188/S.F. No. 168, 87th Legislative Session (2011-2012)
Date: February 10, 2011

Re: Analysis of H.F. No. 188 and S.F. No. 168 as introduced - 87th Legislative Session (2011-2012)

Thank you for this opportunity to address key policy concerns raised in conjunction with the introduction of H.F. 188 and S.F. 168, which seek to permit smoking in food and beverage establishments that serve alcoholic beverages.

Intent of H.F. 188/S.F. 168

H.F. 188 and S.F. 168 (identical language) would roll back the Freedom to Breathe Act's (FBA) prohibition against smoking in restaurants and bars by allowing smoking in a bar, tavern, and any restaurant with a walled-off bar area that is separated from the rest of the restaurant by a door that is kept closed except for entry and exit. Smoking would continue to be prohibited in the restaurant portion of an establishment.

To be exempted from the FBA prohibition against smoking, a bar, tavern or the walled-off bar area(s) of a restaurant would need to install an HVAC ventilation system that would exchange the indoor air once every two hours. A gradual phase-in of the ventilation requirement would take place over a period of five years, between June of 2012 and June of 2017, with the timing based on the percentage of an establishment's total gross sales of alcoholic beverages. The lower the percentage of an establishment's total gross sales of alcoholic beverages, the earlier the HVAC system would need to be installed (e.g., if 40% of an establishment's total gross sales are from alcoholic beverages, a HVAC system would have to be installed by June 1, 2012, whereas if over 80% of total gross sales are from alcoholic beverages, an establishment would not have to install a HVAC system until June 1, 2017).

The proposed legislation would undermine a central purpose of the FBA— to protect workers and the public from exposure to secondhand smoke. Employees and patrons of restaurants and bars that permit smoking would no longer be protected.

The proposed language is severely problematic in many respects, discussed below. First, it is helpful to understand how bars and taverns are classified for regulatory purposes under Minnesota law.

Classification of bars and taverns for regulatory purposes: Chapter 157

Neither a "bar" nor a "tavern" is specifically defined in Minnesota Statutes. Under the state's food and beverage establishment regulatory scheme, a bar or tavern fits within the definition of a "restaurant," which is a type of "food and beverage establishment." A "food and beverage establishment" is any place

that “...prepares, serves, or otherwise provides food or beverages, or both, for human consumption” (Minn. Stat. §157.15, subd. 3). A “restaurant” includes nearly all types of food and beverage establishments, whether they serve alcoholic or nonalcoholic beverages, as long as long as they operate from a location for more than 21 days a year and are not food carts or mobile food carts (Minn. Stat. §157.15, subd. 12).

All food and beverage establishments must pay license fees established under Chapter 157. All pay an annual base fee (currently \$150, Minn. Stat. § 157.16, subd. 3(b)). Additional fees apply to different types of food and beverage establishments, depending on the scope of food service and whether or not alcoholic beverages are served.

Food and beverage licenses are divided into four food service categories, any of which may be combined with alcoholic beverage service: (1) Limited food menu selection (serves largely pre-packaged food, like frozen pizza, that is heated onsite, with very little cooking equipment or capacity); (2) Small establishment (one step up from the limited food menu category, with low-level food preparation capacity – no more than deep fat fryer, a grill, two “hot holding” containers and one or more microwaves and no salad bar, generally seats 50 or fewer persons; (3) medium establishment (food service equipment would be greater than in a small establishment, and might include an oven, range, steam table, salad bar or salad preparation); and (4) large establishment (like category 3 except larger, offers a full menu selection, seats more than 175 people 5 or more days per week or serves more than 500 meals a day).

Establishments that serve alcoholic beverages pay additional fees. The amount of the fee varies depending on the type of alcoholic beverages served. Establishments that serve only wine or beer pay a lower alcoholic beverage service fee than those that offer full liquor service (Minn. Stat. §157.16, subd. 3(d) (6), (7)). The fees apply to an establishment as a whole, regardless of whether an establishment has a separate bar area or areas.

Liquor licensing provisions: Chapter 340A

H.F. 188 and S.F. 168 seek to apply the liquor licensing provisions of Chapter 340A. This chapter addresses the issuance of “on-sale” liquor licenses—licenses to sell alcoholic beverages for consumption on the premises. Chapter 340A provides that liquor licenses are to be handled by the local jurisdictions in which the establishments are located. Thus, a city issues on-sale liquor licenses to hotels, restaurants, clubs, sports facilities, certain theaters, convention centers, etc., and any other establishments that the state law allows to be licensed. It is important to understand that the proposed legislation, if enacted, would be subject to the licensing provisions of both Chapter 157 and Chapter 340A.

Policy issues related to H.F. 188 and S.F. 168

The identical language of H.F. 188 and S.F. 168 is problematic in several ways:

- (1) The proposed legislation would compromise workers’ health. As already noted, the law would undermine the FBA by failing to protect workers in food and beverage establishments from exposure to secondhand smoke. There is no legitimate scientific support for reverting to a smoking-permitted

indoor workplace environment. Rather, the uncontroverted evidence base shows that: there is no known safe level of exposure to secondhand smoke;¹ even short-term exposure is unhealthy and can trigger cardiac symptoms; and no air purification or cleansing system can rid the air of all tobacco toxins and provide a risk-free environment. What's more, an alarming 44% of workers in the hospitality industry, including those who work in the food and beverage industry, are smokers. Theirs is the highest smoking prevalence rate in the U.S. of all occupations measured—and it is more than twice as high as the prevalence rate for U.S. adults, in general. Rolling back the health protections of FBA would place food and beverage workers at great risk for health consequences caused by continuous exposure to secondhand smoke during their shifts.

Workers in establishments with a smoking room would be exposed to secondhand smoke regardless of whether they worked in the walled-off bar area of the establishment or in the adjacent area where smoking would continue to be prohibited. The smoke from inside the walled-off area would infiltrate into the non-smoking area since the door(s) between them would be opened and closed frequently for entry and exit of employees and patrons.

- (2) The proposed legislation would compromise the public's health, including the health of children, youth, women of child-bearing age and persons with chronic health conditions or diseases. Because smoke from smoking-permitted room(s) would infiltrate into non-smoking portions of an establishment, children and youth would be exposed to smoke in any establishment that does not prohibit persons under 18 from entering at any time. For children, secondhand smoke has serious and costly health implications and is a known cause of Sudden Infant Death Syndrome (SIDS), ear infections, including fluid build-up (a sign of chronic middle ear disease), more frequent and more severe asthma attacks which can endanger their lives, and upper and lower respiratory infections. Exposure to secondhand smoke is also a risk factor for new cases of asthma in children with no prior symptoms. Direct medical costs from exposure to secondhand smoke among U.S. children exceed \$700 million per year.
- (3) The proposed legislation places no limit on the number of bar areas/smoking rooms within a food and beverage establishment and no limit on the dimensions or seating capacity of a bar or bar area relative to the no-smoking area of an establishment. Some establishments (e.g., hotels or large restaurants) might choose to create multiple bar areas/smoking rooms. As long as each bar or bar area of a single establishment meets the floor to ceiling wall requirements and installs the specified HVAC system, the bill does not appear to prohibit multiple smoking rooms within a single establishment. Not only is there no limit on the number of smoking-permitted rooms, there is no limit on the physical

¹ The official guidelines for implementation of the global tobacco treaty, the Framework Convention on Tobacco Control, adopted by most nations of the world, specifically declares that there is no safe level of exposure to tobacco smoke in the Article 8 guidelines, stating, in pertinent part: "...notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence. Approaches other than 100% smoke free environments...have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke." World Health Organization, *Guidelines on Protection from Exposure to Tobacco Smoke (2007)*, available at http://www.who.int/fctc/cop/art%208%20guidelines_english.pdf .

dimensions of a room designated as a smoking-permitted bar or bar area. This is problematic because the physical dimensions of a room designated as a bar area could be much larger than the smoking-prohibited area to which it is appended, further eroding the FBA.

- (4) The proposed legislation is poorly drafted and has the appearance of having been slapped together. For example, the introductory clause has words that are out of place. The words "...bar, or tavern..." presumably should be placed after "restaurant..."

"Sections 144.414 to 144.417 do not prohibit smoking in a restaurant that serves alcoholic beverages, *bar, or tavern* if the facility meets the requirements of this subdivision..." (The misplaced text is italicized for emphasis.)

As noted earlier, the definition of "restaurant" in Chapter 157, Section 157.15, subdivision 12, includes bars, taverns, etc. The proposed statute purports to allow smoking in any restaurant that serves alcoholic beverages as long as the restaurant complies with the ventilation requirements of the statute. The bills then state that if a "restaurant" has an "attached bar," the "...restaurant... must be separated from the bar area..." How can a restaurant be separated from itself? If the appropriate agency authorities were to determine that additional definitions are necessary for regulatory purposes, this could contribute to a need for rulemaking.

The language of the bills is also flawed in that it doesn't clearly address whether smoking would be permitted in the bar area of a food and beverage establishment that has a separate or separable bar area with alcoholic beverage sales of less than 40 % of total gross sales. Under proposed subdivision 5(a) and (b), HVAC systems are required for bar areas whose total gross sales of alcoholic beverages equal or exceed 40%. Smoking is permitted in a room of a restaurant that is designated as a bar as long as the room is in compliance with wall, door and ventilation requirements, but the bills' text ignores the possibility that a restaurant may have a separate bar area that meets the room requirements but has alcoholic beverage sales that are less than 40% of total gross sales. Would smoking be permitted in that bar area or would a proprietor need to raise alcoholic beverage sales in that room to the 40% threshold before smoking could be permitted? Assuming the latter, a proprietor could easily manipulate sales outcomes by offering free food, e.g., as a happy hour enticement to patrons, to achieve a desired proportion of alcoholic beverages sales.

In addition, because the proposed legislation applies to any "restaurant" (as that term is broadly defined in Minn. Stat. 157.15, subd. 12) serving alcoholic beverages, a very large number of food and beverage establishments in the state would potentially be impacted, including establishments within bowling alleys, convention centers, sports facilities, and the like. I have requested data from the Minnesota Department of Health on the number of food and beverage establishments with any type of alcoholic beverage license for each of the four categories specified in Chapter 157 (limited food; small; medium; large) so that we can determine approximately how many food and beverage establishments could potentially be affected by the proposed law. I will share that information when we receive it (hopefully by next week).

(5) The proposed legislation would wreak havoc on the state’s regulatory structure because it does not mesh with the current regulatory scheme and would likely require rulemaking as well as the commitment of considerable implementation, enforcement and inspection resources.

- The proposed legislation does not establish a process for determining the percentage of total gross sales of alcoholic beverages that would trigger the date by which ventilation equipment must be installed. Rulemaking would likely be required to establish an equitable and timely application, review and appeal process. Decisions would need to be made, for example, about what information proprietors would need to submit, what time period would be used for the application, and which division(s) of state and/or local government would be responsible for handling this aspect of the proposed requirements.
- Because the proposed legislation contemplates staggering the installation of HVAC equipment (such that the higher percentage of alcoholic beverages sold in a restaurant, the longer an establishment could delay installation), the proposed law appears to allow smoking to occur in a number of locations for up to 5 years before ventilation would be added, entirely dependent on an establishment’s reported percentage of alcoholic beverage sales in the affected area. For example, establishments (or rooms within establishments) that demonstrate alcoholic beverage sales of 70% of total gross sales could delay implementation until June of 2015; those demonstrating that 80% of total gross sales are from alcoholic beverages could delay until June of 2016, and those reporting over 80% could delay installation until June of 2017. This staggered approach is nonsensical from an administrative and public health standpoint—by drawing out the transition process for several years, this approach would increase administrative cost burdens of affected government agencies and expose an untold number of workers and patrons to secondhand smoke in unventilated areas. This approach could also contribute to potential manipulation of sales records by proprietors (as mentioned above, by gaming the system to boost alcoholic beverage sales and reduce food sales) in order to delay their installation of HVAC equipment as long as possible. If the proposed statute recognizes a need for ventilation, arguably there should be one transition date that applies to all establishments. As written, it is likely that the smokiest environments would be the ones with the longest grace periods.
- Oversight responsibility and processes are unclear and would need to be determined for inspection and approval of the build-out of new rooms in any restaurant that elects to add a room where smoking would be permitted. Determinations would need to be made about who would be responsible for plan reviews. Administrative costs would be incurred in conjunction with the review and approval process and an appeal process would likely be required.
- Quite importantly, the HVAC equipment air exchange standard set in the proposed legislation is wholly inadequate to improve air quality by a reasonable measure in a smoking-permitted environment. According to John Olson, MDH Indoor Air Enforcement Coordinator, the proposed mandated level, to “...exchange the indoor air every two hours...” (in other words, one-half an air exchange per hour) is an extremely weak air exchange rate (almost zero). The proposed air exchange rate would not protect workers or patrons from exposure to secondhand smoke.

- Oversight of the installation and maintenance of HVAC equipment would also have to be determined. This would appear to be a thorny, complicated determination. One concern is that the food and beverage division with the Department of Health licenses only half of the state's food and beverage establishments. The others are handled through delegation agreements with local jurisdictions. This split of responsibility would complicate not only the installation process, but maintenance and enforcement processes as well. Who would be deemed responsible for review of the initial installation? Plans might need to be reviewed by one division of government (e.g., health), and inspection of installation might be evaluated by another (e.g., a building official or mechanical engineer). Would periodic inspections of the operation of the ventilation system be required? If so, who would do them and what would the costs be? Maintenance checks appear to fall through the cracks of the existing inspections infrastructure altogether. Food and beverage ventilation inspections address ventilation in the kitchen area of an establishment (e.g., venting of cooked foods); the assigned personnel do not address the mechanical systems (e.g., ventilation of an establishment, generally). Because food and beverage inspectors in the Department of Health's Environmental Health Services do not have personnel with this expertise, responsibility would default to another division of government, to be determined.
- (6) The proposed legislation would be difficult and potentially costly to enforce. A determination would need to be made within the Department of Health as to whether the existing Minnesota Clean Indoor Air Act Rules suffice for enforcement purposes or whether rulemaking might be required. Enforcement mechanisms would need to be determined. A complaint-based system might be the least costly; however, with the bill as drafted allowing a five year grace period, complaints and other enforcement-related inquiries could spread across this entire time, thereby increasing administrative expenses and likely requiring additional staff. A critical component of a well-planned, new enforcement scheme involves educating businesses and the general public about the new provisions of law. This would be particularly critical in this instance, where current public health protections would be rolled back and the existing law weakened. The FBA has been popular with the public and with food and beverage establishments. It would be reasonable to anticipate a high volume of calls and complaints extending for up to 6 years.
- (7) The proposed legislation would result in uneven playing field. Aside from the concerns discussed above, the proposed legislation would create an uneven playing field among food and beverage establishments. It is quite unlikely that most establishments would want to retreat to a smoke-filled environment anywhere within their establishments. As noted, the FBA has been well received by the public and by food and beverage establishments, in particular. Fears about loss of business subsided quickly after the passage of FBA and claims to that effect were found to be unsubstantiated in most instances. Even among those proprietors who might be drawn to the idea of reverting to smoking-permitted rooms or smoking-permitted establishments, the conversion costs would be prohibitive for many small businesses.

The above discussion highlights many, but not all, concerns raised by the proposed legislation. As others review this memorandum and ponder the proposed legislation, additional perspectives

and concerns will undoubtedly surface. Thank you again for this opportunity to comment. Please let me know if you have any immediate questions. I will continue to track the bills and will share additional perspectives as additional information becomes available.

S.R.W.

The Public Health Law Center provides information and technical assistance on issues related to tobacco and public health, but does not provide legal representation or advice. This correspondence should not be considered legal advice or a substitute for obtaining legal advice from an attorney. If you have specific legal questions, we recommend that you consult with an attorney familiar with the laws of your jurisdiction.

