



Nursing Home Smoking Exemptions & Compliance with Federal Regulation

When states, counties, municipalities, or local boards of health create clean indoor air laws, they often face pressure to include exemptions for bars, restaurants, fraternal organizations, and nursing homes. While political pressure might be the reason many bars, restaurants, or fraternal organizations are exempted from smoke-free laws, nursing homes are often exempted because of the mistaken belief that such exemptions are required to comply with federal law. This fact sheet explains why it is wrong to assume that federal regulations, including the Older Americans Act,¹ require that smoke-free laws exempt nursing homes.

Q: What is the Older Americans Act?

A: The Older Americans Act (OAA), enacted in 1965, provides assistance in the development and operation of community-based services and programs for aging Americans. The Act's provisions regarding nursing homes allow nursing home residents to have choices about service providers and living arrangements.

Q: Does the Older Americans Act mention smoking or tobacco in relation to resident choice?

A: No. The only time the Act mentions smoking or tobacco is when it refers to smoking cessation services, and to the importance of individuals who fall within the Act having access to such services.² At best, resident choice requirements are similar to those established in Medicare and Medicaid regulations, which allow a nursing home resident to “[m]ake choices about aspects of his or her life in the facility that are significant to the resident.”³

Q: Do Medicare or Medicaid regulations on resident choice include smoking guidelines?

A: Although Medicare and Medicaid regulations do not specifically mention smoking in regard to resident choice, a federal guideline interpreting Medicare and Medicaid resident choice regulations includes smoking as an example of resident choice:

[I]f a facility changes its policy and prohibits smoking, it must allow current residents who smoke to continue smoking in an area that maintains

the quality of life for these residents. Weather permitting, this may be an outside area. Residents admitted after the facility changes its policy must be informed of this policy at admission.⁴

Based on the wording of this guideline, federal Medicare and Medicaid laws do not appear to require localities or states to exempt nursing home residents from smoke-free laws.

Q: Do Older Americans Act regulations that apply to state grants mention smoking?

A: No. A central function of the Older Americans Act is to provide grants to state agencies for community planning and social services for older individuals. These grants to state agencies place certain requirements on how the grant money is allocated, but the Older Americans Act regulations that apply to state grants do not mention smoking.

Q: Have any courts interpreted the effect of federal guidelines on state or local laws requiring smoke-free nursing homes?

A: Yes. The California Court of Appeals held that federal guidelines do not prevent a municipality from prohibiting smoking in nursing homes. In that case, *City of San Jose v. Department of Health Services*, the court stated:

Here, defendants have failed to point to any federal law or regulation which manifests Congress's intent to preempt the smoking field. The two Code of Federal Regulations . . . provisions relied on by defendant . . . do not in fact preempt the field. CFR section 483.10, subdivision (a)(1), merely provides in relevant part that “[t]he resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States”; and CFR section 483.10, subdivision (a)(2), merely states that “[t]he resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights.” Likewise, CFR section 483.15, subdivision (b)(3), only recognizes the right of the resident to “[m]ake choices about aspects of his or her life in the facility that are significant to the resident.”

The cited CFR provisions mention nothing about smoking. From such silence, no preemption can be inferred.

Defendants' reliance on an interpretive guideline to CFR section 483.15, subdivision (b)(3), is similarly misplaced. Although “smoking” is mentioned in the interpretive guideline, nothing in the guideline can be read to confer a right to smoke indoors in long-term health care facilities. . . .

The suggestion that, weather permitting, the smoking area may be an outside area does not compel the conclusion that if weather does not

permit, the facility must allow smoking inside. The guideline's example is just that: an example. It does not exhaust the field. The qualifying requirement of the interpretive guideline is simply to “allow current residents who smoke to continue smoking in an area that maintains the quality of life for these residents.” That area does not necessarily have to be inside the facility, weather permitting or not.⁵

In sum, Medicare and Medicaid regulations do not appear to require that smoke-free laws exempt nursing homes. Similarly, the Older Americans Act does not seem to require that nursing homes allow smoking to satisfy “resident choice” requirements. For these reasons, a state, county, municipality, or local board of health should not feel compelled to include an exemption for nursing homes in its smoke-free law.

Resources

Smoke-Free Environmental Law Project, *Smoke-Free Policies in Facilities Serving Older Persons*, available at <http://www.tcsg.org/tobacco/smokepolicies.htm>.

The information contained in this document is not intended to constitute or replace legal advice. We encourage anyone considering the implementation of any tobacco-related law or policy to seek out local legal counsel to obtain legal advice on these issues.

Last updated: Sept. 2010

¹ 42 U.S.C.A. § 3001 et seq., available at http://www.aoa.gov/aoaroot/aoa_programs/oa/oa_full.asp.

² 42 U.S.C.A. § 3012(a)(1)(28) (designating a duty of the Administration on Aging to assist states in providing “disease prevention and health promotion” services, defined to include smoking cessation).

³ 42 C.F.R. § 483.15(b)(3).

⁴ U.S. Health Care Financing Admin., State Operations Manual, as amended June 1995, rev. 274, tag F242.

⁵ *City of San Jose v. Department of Health Services*, 77 Cal. Rptr.2d 609, 615 (Cal. App. 6th Dist. 1998).