

**CHAPTER 328J**  
**SMOKING**

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## Cross References

Hawaii health systems corporation facilities; tobacco and electronic smoking device use prohibited, see §323F-34.

Prohibition on smoking in and around public housing, see §356D-6.5.

Reduced ignition propensity cigarettes, see chapter 132C.

Smoking or use of tobacco products prohibited within state park system, see §184-4.5.

Tobacco products and electronic smoking devices; persons under twenty-one years, see §712-1258.

" **§328J-1 Definitions.** As used in this chapter, unless the context otherwise requires:

"Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises regardless of whether food is served, including but not limited to taverns, cocktail lounges, and cabarets, including outdoor areas of bars.

"Building" means any area enclosed or partially enclosed by a roof and at least three walls.

"Business" means a sole proprietorship, partnership, joint venture, corporation, or other business entity, either for-profit or not-for-profit, including retail establishments where goods or services are sold, professional corporations, and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered.

"Department" means the department of health.

"Director" means the director of health.

"Electronic smoking device" means any electronic product that can be used to aerosolize and deliver nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, hookah pipe, or hookah pen, and any cartridge or other component of the device or related product, whether or not sold separately.

"Employee" means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and a person who volunteers the person's services for a nonprofit entity.

"Employer" means a person, business, partnership, association, corporation, including the State or any of its political subdivisions, a trust, or nonprofit entity that employs the services of one or more individual persons, but shall not include the United States.

"Enclosed or partially enclosed" means closed in by a roof or overhang and at least two walls. Enclosed or partially enclosed areas include but are not limited to areas commonly

described as public lobbies, lanais, interior courtyards, patios, and covered walkways.

"Health care facility" means an office or institution, including all waiting rooms, hallways, private rooms, semiprivate rooms, and wards, which provides care or treatment of diseases, whether physical, mental, or emotional, or other medical, physiological, or psychological conditions, including but not limited to hospitals, rehabilitation hospitals or other clinics, including weight control clinics, nursing homes, homes for the aging or chronically ill, laboratories, and offices of surgeons, chiropractors, physical therapists, physicians, dentists, and all specialists within these professions.

"Multifamily dwelling" means a building containing more than two dwelling units.

"Nightclub" means an establishment in which live entertainment is provided or facilities for dancing by patrons either by live entertainment or recorded music may be provided, regardless of whether alcoholic beverages are served.

"Open to the public" means enclosed or partially enclosed areas to which the public is invited or permitted and areas within any building available for use by or accessible to the general public during the normal course of business conducted therein by either private or public entities, including but not limited to bars, educational facilities, financial institutions, health care facilities, hotel and motel lobbies, lanais, laundromats, public transportation facilities, including airport areas from curb to cabin and including all areas within and immediately in front of and adjacent to passenger terminals and pick-up areas, throughout the airport facility, and up to the passenger loading gates of all state airports, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms, but does not include a private residence unless it is used as a child care, adult day care, or health care facility.

"Place of employment" means an area under the control of a public or private employer that employees normally frequent during the course of employment, including but not limited to auditoriums, cafeterias, classrooms, clubs, common work areas, conference rooms, elevators, employee lounges, hallways, medical facilities, meeting rooms, private offices, restrooms, and stairs. A private residence is not a "place of employment" unless it is used as a child care, adult day care, or health care facility.

"Restaurant" means an eating establishment, including but not limited to coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, which gives or offers for

sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere. The term "restaurant" includes a bar area within the restaurant and outdoor areas of restaurants.

"Retail tobacco store" means a retail store used primarily for the sale of tobacco products and accessories.

"Service line" means an indoor line in which one or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money.

"Shopping mall" means an enclosed or partially enclosed public walkway or hall area that serves to connect retail or professional establishments.

"Smoke" or "smoking" means inhaling, exhaling, burning, or carrying any lighted or heated tobacco product or plant product intended for inhalation in any manner or in any form. "Smoking" includes the use of an electronic smoking device.

"Sports arena" means any sports pavilion, stadium, gymnasium, health spa, boxing arena, swimming pool, roller or ice rink, bowling alley, and any other similar place where members of the general public assemble to engage in physical exercise, participate in athletic competition, or witness sports or other events.

"Tobacco product" means any product made or derived from tobacco, that contains nicotine or other substances, and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by any other means, including, but not limited to, a cigarette, cigar, pipe tobacco, chewing tobacco, snuff, snus, or an electronic smoking device. "Tobacco product" does not include drugs, devices, or combination products approved for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act. [L 2006, c 295, pt of §2; am L 2015, c 19, §§2, 3]

" **[§328J-2] Prohibition in facilities owned by the State or the counties.** Smoking shall be prohibited in all enclosed or partially enclosed areas, including buildings and vehicles owned, leased, or operated by the State or any county. [L 2006, c 295, pt of §2]

" **[§328J-3] Prohibition in enclosed or partially enclosed places open to the public.** Smoking shall be prohibited in all enclosed or partially enclosed areas open to the public, including but not limited to the following places:

- (1) Airports and public transportation facilities and vehicles, including buses and taxicabs, under the

- authority of the State or county, and ticket, boarding, and waiting areas of public transit depots, including airports from curb to cabin and including all areas within and immediately in front of and adjacent to passenger terminals and pick-up areas, throughout the airport facility, and up to the passenger loading gates of all state airports;
- (2) Aquariums, galleries, libraries, and museums;
  - (3) Areas available to and customarily used by the general public, including but not limited to restrooms, lobbies, reception areas, hallways, and other common areas, in businesses and nonprofit entities patronized by the public, including but not limited to professional offices, banks, laundromats, hotels, and motels;
  - (4) Bars;
  - (5) Bowling alleys;
  - (6) Convention facilities;
  - (7) Educational facilities, both public and private;
  - (8) Elevators;
  - (9) Facilities primarily used for exhibiting a motion picture, stage, drama, lecture, musical recital, or other similar performance, except when part of the performance;
  - (10) Health care facilities;
  - (11) Hotel and motel lobbies, meeting rooms, and banquet facilities;
  - (12) Licensed child care and adult day care facilities;
  - (13) Lobbies, hallways, and other common areas in apartment buildings, condominiums, retirement facilities, nursing homes, multifamily dwellings, and other multiple-unit residential facilities;
  - (14) Nightclubs;
  - (15) Polling places;
  - (16) Restaurants;
  - (17) Retail stores;
  - (18) Rooms, chambers, places of meeting or public assembly under the control of an agency, board, commission, committee or council of the State or county, to the extent the place is subject to the jurisdiction of the State or county;
  - (19) Service lines; and
  - (20) Shopping malls. [L 2006, c 295, pt of §2]

" **[§328J-4] Prohibition in enclosed or partially enclosed places of employment.** Smoking shall be prohibited in all

enclosed or partially enclosed areas of places of employment. [L 2006, c 295, pt of §2]

" **[§328J-5] Prohibition in sports arenas, outdoor arenas, stadiums, and amphitheaters.** Smoking shall be prohibited in the enclosed or partially enclosed areas and in seating areas of sports arenas, outdoor arenas, stadiums, and amphitheaters. [L 2006, c 295, pt of §2]

" **[§328J-6] Presumptively reasonable distance.** Smoking is prohibited within a presumptively reasonable minimum distance of twenty feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed or partially enclosed area where smoking is prohibited. Owners, operators, managers, employers, or other persons who own or control a place open to the public or place of employment may seek to rebut the presumption that twenty feet is a reasonable distance by submitting an application to the department. The presumption will be rebutted if the applicant can show by clear and convincing evidence that, given the circumstances presented by the location of entrances, exits, windows that open, ventilation intakes, or other factors, smoke will not infiltrate into the place open to the public or place of employment. [L 2006, c 295, pt of §2]

" **§328J-7 Exceptions.** Notwithstanding any other provision of this chapter to the contrary, the following areas shall be exempt from the provisions of sections 328J-3, 328J-4, and 328J-5:

- (1) Private residences, except when used as a licensed child care, adult day care, or health care facility;
- (2) Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided that not more than twenty per cent of rooms rented to guests in a hotel or motel may be so designated. All smoking rooms on the same floor shall be contiguous and smoke from these rooms shall not infiltrate into areas where smoking is prohibited under this chapter. The status of rooms as smoking or nonsmoking may not be changed, except to add additional nonsmoking rooms;
- (3) Retail tobacco stores; provided that smoke from these places shall not infiltrate into areas where smoking is prohibited under this chapter;
- (4) Private and semiprivate rooms in nursing homes and long-term care facilities that are occupied by one or more persons, all of whom are smokers and have requested in writing to be placed in a room where

smoking is permitted; provided that smoke from these places shall not infiltrate into areas where smoking is prohibited under this chapter;

- (5) Outdoor areas of places of employment except those covered by the provisions of sections 328J-3 and 328J-5;
  - (6) All areas covered by this chapter when smoking is part of a production being filmed; and
  - (7) State correctional facilities; provided that smoking shall only be authorized for employees and volunteers of a correctional facility in an area outside the secure confines of a correctional facility restricted from access by inmates or detainees that has been designated by the warden of a correctional facility.
- [L 2006, c 295, pt of §2; am L 2009, c 99, §1]

" **[§328J-8] Declaration of establishment as nonsmoking.** (a) Notwithstanding any other provision of this chapter, an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that an entire establishment, facility, or outdoor area or any part thereof as a place where smoking is prohibited.

(b) Smoking shall be prohibited in any place in which a sign conforming to the requirements of section 328J-9 is posted.  
[L 2006, c 295, pt of §2]

" **[§328J-9] Signs.** Clearly legible signs that include the words "Smoking Prohibited by Law" with letters of not less than one inch in height or the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it, shall be clearly and conspicuously posted in and at the entrance to every place open to the public and place of employment where smoking is prohibited by this chapter by the owner, operator, manager, or other person in control of that place. [L 2006, c 295, pt of §2]

" **[§328J-10] Nonretaliation and nonwaiver of rights.** (a) No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because that employee, applicant, or customer exercises any rights afforded by this chapter or reports or attempts to prosecute a violation of this chapter.

(b) An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party. [L 2006, c 295, pt of §2]

" **[§328J-11] Compliance and administration.** (a)

Enforcement of compliance with this chapter shall be under the jurisdiction of the department.

(b) The director shall adopt rules under chapter 91 as are appropriate to carry out the purposes of this chapter and for the efficient administration thereof.

(c) Any citizen who wants to register a complaint under this chapter may initiate an enforcement action with the department as set forth by the director.

(d) An owner, manager, operator, or employee of an establishment regulated by this chapter shall inform persons violating this chapter of its provisions.

(e) Notwithstanding any other provision of this chapter, an employee or private citizen may bring legal action to enforce this chapter.

(f) Notwithstanding any other provision of this chapter, the department, other appropriate county agency, county, or any other person aggrieved by the failure of the owner, operator, manager, or other person in control of a place open to the public or a place of employment to comply with this chapter may apply for injunctive relief to enforce this chapter in any court of competent jurisdiction. [L 2006, c 295, pt of §2]

" **[§328J-12] Penalties.** (a) A person who smokes in an area where smoking is prohibited by this chapter shall be guilty of a violation and fined not more than \$50 to be deposited into the general fund. The district courts may assess costs not to exceed \$25 for issuing a penal summons upon any person who fails to appear at the place within the time specified in the citation issued to the person.

(b) Any authorized police officer, upon making an arrest, shall take the name and address of the alleged violator and shall issue the violator a summons or citation in writing.

(c) There shall be provided for use by an officer or employee of the respective government jurisdictions, duly authorized to issue a summons or citation, or any police officer, a form of summons or citation for use in citing a violator of this chapter that shall not provide for the physical arrest of the violator. The form and content of this summons or citation shall be as adopted or prescribed by the administrative judge of the district court. When a citation is issued, the original of the citation shall be given to the violator; provided that the administrative judge of the district court may prescribe that the violator be given a copy of the citation and provide for the disposition of the original and any other



copies. Every citation shall be consecutively numbered and each copy shall bear the same number as its respective original.

(d) If any person fails to comply with a penal summons given to the person, the court shall issue a warrant for the person's arrest.

(e) Any police officer or other officer or employee of the respective government jurisdictions may eject from the premises any person to whom a citation has been issued and who continues to smoke after the person has been so cited.

(f) A person who owns, manages, operates, or otherwise controls any place or facility designated by this chapter and fails to comply with this chapter shall be guilty of a violation and fined:

- (1) Not more than \$100 for a first violation;
- (2) Not more than \$200 for a second violation within one year of the date of the first violation; and
- (3) Not more than \$500 for each additional violation within one year of the date of the preceding violation.

(g) In addition to the fines established by this section, violation of this chapter by a person who owns, manages, operates, or otherwise controls any place or facility designated by this chapter may result in the suspension or revocation of any permit or license issued to the person or the place for the premises on which the violation occurred.

(h) Each day on which a violation of this chapter occurs shall be considered a separate and distinct violation. [L 2006, c 295, pt of §2]

" **[§328J-13] Public education.** The department shall engage in a public education program to explain and clarify the purposes and requirements of this chapter to the public, and to guide owners, operators, and managers in their compliance with it. The program may include but is not limited to publication of a brochure for affected businesses and individuals explaining this chapter. [L 2006, c 295, pt of §2]

" **[§328J-14] Other applicable laws.** This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws. [L 2006, c 295, pt of §2]

" **[§328J-15] County ordinances.** (a) Nothing in this chapter shall be construed to supersede or in any manner affect a county smoking ordinance; provided that the ordinance is at least as protective of the rights of nonsmokers as this chapter.

(b) Nothing in this chapter shall prohibit a county from enacting ordinances more stringent than this chapter. [L 2006, c 295, pt of §2]

" **[\$328J-16] Cigarette sales from vending machines and by lunch wagons prohibited.**

(a) The sale or distribution at no charge of cigarettes by the following methods is prohibited:

- (1) From cigarette vending machines unless the vending machine is located in a bar, cabaret, or any establishment for which the minimum age for admission is eighteen; or
- (2) From a lunch wagon engaging in any sales activity within one thousand feet of any public or private elementary or secondary school grounds.

(b) Violations of subsection (a), including placement of a cigarette vending machine in a location other than a bar, cabaret, or any establishment for which the minimum age for admission is eighteen, are subject to a fine of up to \$1,000 per day for each violation.

(c) As used in this section:

"Cigarette vending machine" means a self-service device that dispenses cigarettes, cigars, tobacco, or any other product containing tobacco.

"Lunch wagon" means a mobile vehicle designed and constructed to transport food and from which food is sold to the general public and includes but is not limited to manapua trucks.

"Sell" or "sale" means to solicit and receive an order for; to have, keep, offer, or expose for sale; to deliver for value or in any other manner than purely gratuitously; to peddle; to keep with intent to sell; or to traffic in. [L 2006, c 295, pt of §2]

" **[\$328J-17] Distribution of sample cigarette or tobacco products, cigarette or tobacco promotional materials, and coupons redeemable for cigarette or tobacco products or promotional materials.**

(a) It is unlawful for any person to distribute samples of cigarette or tobacco products, or coupons redeemable for cigarette or tobacco products, in or on any public street, sidewalk, or park, or within one thousand feet of any elementary, middle or intermediate, or high school.

(b) It is unlawful for any person to distribute cigarette or tobacco promotional materials, or coupons redeemable for cigarette or tobacco promotional materials, within one thousand feet of any elementary, middle or intermediate, or high school.

(c) This section shall not apply:

- (1) Within private commercial establishments, such as stores and restaurants, where tobacco products are sold, as long as distribution is not visible to the public from outside the establishment; or
  - (2) To commercial establishments where access to the premises by persons under eighteen years of age is prohibited by law.
- (d) Any person convicted of violating this section shall be fined not more than \$1,000.
- (e) As used in this section:  
"Distribute" means to pass out to members of the general public free of charge for the exclusive purpose of promoting a product. [L 2006, c 295, pt of §2]

" **[§328J-18] Placement of cigarettes and tobacco products.**

- (a) Except as otherwise provided under this section, a retailer may sell cigarettes, smokeless tobacco, and all other tobacco products only in a direct, face-to-face exchange between the retailer and the consumer. Examples of methods of sale that are not permitted include vending machines and self-service displays.
- (b) This section shall not apply to:
- (1) A duty-free sales enterprise selling duty-free merchandise in accordance with the provisions of title 19 United States Code section 1555(b), and any implementing regulations; and
  - (2) Retail tobacco stores, bars, or any other establishment for which the minimum age for admission is eighteen. [L 2013, c 227, §3]