

SUBJECT: Banning smoking in all workplaces and public places

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 6 ayes — Giddings, Darby, Bohac, Castro, Martinez, Zedler

3 absent — Elkins, Bailey, Solomons

WITNESSES: For — Mark Clanton, The American Cancer Society; Joel S. Dunnington, TMA, TAFP, Texas Pediatric Society, Texas Public Health Coalition; Melody Fraser, Smoke Free Texas Coalition; Glen Garey and John Murphy, Texas Restaurant Association; Bennie McWilliams, American Lung Association; Alan Simpson, Texas Restaurant Association, Smoke Free Texas; Jodie Smith, Texans Care for Children; Thomas E. Tenner, Jr., American Heart Association, Texas Council on Cardiovascular Disease and Stroke; Dawn Askew Bohac, and three others; (*Registered, but did not testify*: Jeffrey Brooks, TxPIRG; Marshall Kenderdine, TAFP; Casey Magnuson, Texas PTA; David Marwitz, Texas Dermatological Society; Linda Nichols, American Lung Association; Jay Propes, Texas Ophthalmological Association; Michelle Romero, Border Health Caucus; Joel Romo, American Heart Association; Denise Rose, Texas Children's Hospital; Jason Sabo, United Ways of Texas; Joe Sanchez, AARP-Texas; Bryan Sperry, Children's Hospital Association of Texas; Morgan Walthall, March of Dimes; Saul Alan Barrera)

Against — Sandra Crenshaw, Neighborhood Improvement Association; Stephen Fenoglio, State VFW posts and other organizations involved in charitable bingo; Dan Goodwin and Lynn Goodwin, Richmond Avenue Cigars, LLC; Bill Johnson, Hooz Cocktails; Thomas L. Kirkland, GTK Management, Inc.; Jacob Larkey and Kandis Larkey, SA Cigars; Kevin McCormack, Time Out Tavern; Jeff McKenney, Ft. Worth Bar and Tavern Coalition; Patricia O'Connor, The Briar Shoppe, Inc.; Albert Perkins, Clown Alley Inc.; Jake Plaia, Amusement and Music Operators of Texas; Stacey Rumbo and Tiffany Rumbo, Club Humidor; Lisa Schraub, Seguin Cigar, Inc.; Perry Tong, Pop's Safari Cigars & Fine Wine, Pop's Safari Room Bistro; Peggy Venable, Americans for Prosperity; John Wickham, Red River District Association; Clark E. Boeken, and six others; (*Registered, but did not testify*: Amanda Asher, H&W Entertainment; Mary Bedosky and Matthew R. Bedosky, Calypso Products, Inc.; Steve

Bresnen, Bingo Interest Group; Patrick Dixon, Libertarian Party of Texas; Richard Glaubinger, BR Internet; Margaret Hlavinka and Jacob Larkey, S.A. Cigar Club; Andrew Howard and Raymond Joseph, Habana House; John H. Nissen, Rascals Bar, Inc.; Kent Pennington, Elite Cigars and Accessories; Ronald Pitre, The Smoke Ring; Mark Edward Sewell, Tabak, Inc.; Tracy Spence, Town and Country Cigars of Euless; Linda Zambelli, Hooz Cocktails; Matt Biehler, and 22 others)

On — Lynn Carter, City of Austin; Phil Huang, DSHS; Charles A. LeMaistre, U.T. M.D. Anderson Cancer Center; David Lurie

DIGEST:

CSHB 9 would prohibit a person from smoking:

- in a public place or place of employment;
- within 15 feet of an entrance, operable window, or ventilation system of a public place or place of employment;
- in the seating area of an outdoor arena, stadium, or amphitheater; or
- in bleachers or grandstands for spectators at sporting or other public events.

The bill would not apply to:

- a private residence, except when used as a child-care, adult day-care, or health care facility;
- a hotel or motel room rented to a guest and designated exclusively as a smoking room;
- a private or semiprivate room in a nursing home or long-term care facility occupied exclusively by consenting smokers;
- a tobacco shop;
- a cigar bar; or
- a private club that was not established for the sole purpose of avoiding compliance with the bill and does not employ anyone, unless the club was being used for a public function.

Definitions. CSHB 9 would define “tobacco shop” to mean a business primarily devoted to the sale of tobacco products that did not hold an alcoholic beverage permit or license. “Cigar bar” would mean a business that had in excess of 25 percent of gross sales in tobacco products, held a permit to sell tobacco under the Tax Code, ch. 155, and held an alcoholic beverage permit or license issued before May 15, 2007.

The bill would define “private club” as an organization that:

- owned, leased, or occupied a building used exclusively for club purposes at all times;
- was operated solely for a recreational fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain;
- sold alcoholic beverages only incidentally to its operation;
- was managed by a board of directors or similar body chosen by the members at an annual meeting;
- had established bylaws or a constitution to govern the club’s activities; and
- was exempt from federal income taxation as a non-profit organization.

Duties regarding a public place. The bill would define “public place” as an enclosed indoor area the public is invited or permitted to enter. Examples would include a bar, restaurant, theater, bus, polling place, hospital, public restroom, hotel lobby, shopping mall, and bingo hall.

A person in control of a public place or place of employment would have specific requirements, including posting a conspicuous “NO SMOKING” sign, removing all ashtrays, and making a reasonable effort to request that any person known to be smoking in a prohibited area extinguish the tobacco product.

Declaration as non-smoking. A person in control of an establishment, facility, or outdoor area could declare that entire area as a non-smoking place. Under CSHB 9, a person could not smoke in a place that conformed to the requirements prohibiting non-smoking in public places, including the specified signs.

Enforcement. The Department of State Health Services (DSHS), or any other state agency, or a political subdivision of the state could enforce these provisions and inspect a public place. Under the bill, a person could file a complaint concerning a violation with DSHS or a political subdivision of the state.

Injunctive relief. In addition to other provided remedies, the attorney general, or a district, county, or city attorney, could bring an action for injunctive relief to enforce these requirement.

Offenses, penalties. A violation of the bill, including smoking in a prohibited place or failure by a person with authority to create an environment to prevent smoking in public or at work, would commit a misdemeanor punishable by a fine not to exceed \$100. If it was shown at trial that the defendant had a previous conviction for the same offense within one year, upon conviction the defendant would be punished by a fine of not more than \$500. If it was shown at trial that a defendant had two previous convictions that occurred within one year, upon conviction for the third offense the defendant would be punished at a fine of not more than \$1,000. Each day on which a violation occurred would be considered a separate violation.

Denial of permit to holders of alcoholic beverage permits or licenses. The comptroller would not issue a tobacco retailer's permit to the holder of certain alcoholic beverage permits or licenses — including for wine, beer, and mixed drink retailers and private clubs — unless the beverage permit or license originally was issued before May 15, 2007, if the comptroller determined that the applicant's sales of tobacco products exceeded 25 percent of the applicant's gross sales.

Public education. The Department of State Health Services could engage in a program to educate the public about these provisions.

Applicability, construction. The bill would preempt and supersede a local ordinance, rule, or regulation adopted by any political subdivision that restricted or prohibited smoking to a lesser degree and could not be construed to permit smoking where it was restricted by other law. Further, the bill would not preempt or supersede Education Code, sec. 38.006, which relates to smoking prohibitions on school property. The bill would repeal Penal Code, sec. 48.01, which penalizes smoking in certain public places.

The bill would take effect September 1, 2007.

SUPPORTERS
SAY:

CSHB 9 would protect the health of employees by eliminating smoking in all indoor public and private workplaces, including restaurants and bars. A recent statewide poll calculated that 66 percent of Texans favor a

statewide comprehensive law to eliminate smoking in all indoor workplaces and public facilities, including public buildings, offices, restaurants, and bars. CSHB 9 would ban smoking in all of those places as well as seating areas of outdoor arenas and stadiums and bleachers or grandstands at sporting or other public events.

A June 2006 report issued by the U.S. Surgeon General stated that there is no risk-free level of exposure to secondhand smoke and that the only way to protect the population from this health hazard is completely to eliminate exposure. According to the National Cancer Institute, second-hand smoke kills 53,000 non-smoking Americans each year and is the third leading cause of preventable death. CSHB 9 would offer protection to employees and the public at large from second-hand smoke. Seventeen states have enacted smoke-free laws according the American Cancer Society with 14 other states, including Texas, considering such legislation.

OPPONENTS
SAY:

Smoking bans constitute a reckless expansion of government and set a dangerous precedent. CSHB 9 would violate the rights of individuals and business property owners. Smoking tobacco is a choice made by millions of Americans, and this bill represents an assault on a legal product that has been part of Western culture for 500 years.

Small business owners, particularly restaurant and bar owners, in Texas cities that have adopted various smoking ordinances claim that their revenues have dropped as much as 30 percent due to smoking bans. This economic factor has affected not only owners but also employees, including waitresses and other restaurant and bar staff.

NOTES:

The companion bill, SB 368 by Ellis, was heard in the Senate Health and Human Services Committee on April 19.

HB 9 originally was reported from committee on April 17, and was recommitted on April 30. The original vote to report the bill was 6 ayes, 1 nay (Elkins), 2 absent.