
Coates' Canons Blog: Smoking: What Is A Restaurant?

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Shortly after the 2010 New Years' celebrations have died down, smoking will be prohibited in most restaurants and bars across the state. In addition, local governments will have new authority to regulate smoking in many public places. The new law can be seen here and my summary of it is in this Health Law Bulletin from May 2009.

One of the definitional issues that I have been struggling with recently relates to use of the term "restaurant." The law states that "smoking is prohibited in all enclosed areas of restaurants and bars..." (subject to limited exceptions). G.S. 130A-496(a). The term "restaurant" is defined as follows:

A food and lodging establishment that prepares and serves drink or food as regulated by the Commission pursuant to [the state public health sanitation laws in] Part 6 of Article 8 of [Chapter 130A].

This definition is unique to the smoking law – the term "restaurant" is never defined in the state public health sanitation laws. At first glance, however, the definition of the new term seems straightforward – a place is a restaurant if it prepares and serves drink or food and is subject to the public health sanitation laws. The definition of "restaurant" also captures any lodging establishment (e.g., hotel, motel) that prepares and serves drink and food.

This definition captures most of the places we think of when we hear the term "restaurant." But recent questions from public health officials and local government attorneys have inspired me to think more deeply about multi-use facilities. Consider, for example:

- A mall has a central food court with multiple restaurants.
- A bowling alley has an area where patrons can buy food and drink.
- An airport building has several kiosks and storefronts that serve food and drink.

Where is the line that separates the restaurant function of this "enclosed area" from the rest of the space?

One possible way to approach this question is to rely upon the direct connection between the sanitation laws and the new smoking law. Given that definition of "restaurant" in the smoking law cross-references the sanitation law, this seems like a logical approach. Using this analysis, the "restaurant" subject to the smoking law would likely be limited to the area regulated and inspected by public health officials. In reviewing the regulations guiding the sanitation inspection and in conferring with several public health officials working in this field, it seems that the inspections rarely go beyond the immediate area where the food and drink is prepared and served. Inspectors will visit the kitchen, dining areas, restrooms, dumpsters, etc. But because they are focused on the safety of the food and drink being prepared, they typically do not extend their inspections much further.

An alternative approach would be to consider the issue being regulated – secondhand smoke. As acknowledged by the General Assembly, secondhand smoke causes cancer (see GS 130A-491 (a)) and has the potential to migrate (see GS 130A-496(b)(2)) from one place to another. Therefore, a public health advocate might argue that, unless something is done in a multi-use facility to prevent the migration of smoke into the food service area, the entire "enclosed area" must be smoke-free.

In the absence of legislative changes or regulatory clarification, I think the first approach – that is, tying the smoking law to the areas subject to sanitation inspections – may make the most sense. In earlier versions of the smoking law, the General Assembly clearly contemplated and rejected prohibiting smoking in "public places." The scope of the bill was narrowed to restaurants, bars and lodging facilities after the bill had been heavily debated and amended in both chambers. If public health officials were to interpret the term "restaurant" broadly (as per the second approach described above), one



could argue that they were ignoring both the plain language of the statute as well as the legislature's intent to limit the scope of the legislation.

I think local health department staff members charged with enforcing this new law will be facing some difficult judgment calls about its interpretation and application in these multi-use facilities. They will need to decide where the invisible line is drawn between the restaurant and the rest of the facility. It will be interesting to see if the definition is interpreted and applied consistently across the state.

Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=h+2&submitButton=Go
- www.sog.unc.edu/pubs/electronicversions/pdfs/hlb90.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_130A/Article_8.html
- www.deh.enr.state.nc.us/ehs/images/rules/t15a-18a.26.pdf
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