

NOTICES OF EXEMPT RULEMAKING

The Administrative Procedure Act requires the *Register* publication of the rules adopted by the state's agencies under an exemption from all or part of the Administrative Procedure Act. Some of these rules are exempted by A.R.S. §§ 41-1005 or 41-1057; other rules are exempted by other statutes; rules of the Corporation Commission are exempt from Attorney General review pursuant to a court decision as determined by the Corporation Commission.

NOTICE OF EXEMPT RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 2. DEPARTMENT OF HEALTH SERVICES TOBACCO TAX-FUNDED PROGRAMS

[R07-123]

PREAMBLE

1. Sections Affected

Chapter 2
Article 1
R9-2-101
R9-2-102
R9-2-103
R9-2-104
R9-2-105
R9-2-106
R9-2-107
R9-2-108
R9-2-109
R9-2-110
R9-2-111
R9-2-112

Rulemaking Action

Amend
New Article
New Section
New Section

2. The authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statutes: A.R.S. §§ 36-136(A)(7) and 36-136(F)

Implementing statute: A.R.S. § 36-601.01(G)(11)

3. The effective date of the rules:

May 1, 2007

4. A list of all previous notices appearing in the *Register* addressing the exempt rules:

Notice of Public Information: 13 A.A.R. 183, January 19, 2007

Notice of Proposed Exempt Rulemaking: 13 A.A.R. 568, February 23, 2007

5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:

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6. An explanation of the rules, including the agency's reason for initiating the rules, including the statutory citation to the exemption from regular rulemaking procedures:

a. Smoke-Free Arizona Act

On November 7, 2006, Arizona voters approved the Smoke-Free Arizona Act (Act), the initiative measure designated Proposition 201. The measure repealed former A.R.S. §§ 36-601.01 and 36-601.02, added new A.R.S. § 36-601.01, and added A.R.S. § 42-3251.02 (imposing a tax of two cents per cigarette pack).

A.R.S. § 36-601.01 generally becomes effective May 1, 2007, and establishes a statewide prohibition on tobacco smoking in public places and places of employment as defined in A.R.S. §§ 36-601.01(A)(7) and 36-601.01(A)(9). A.R.S. § 36-601.01(B) exempts most private residences from the smoking prohibition and also provides limited exemptions for certain public places and places of employment. A.R.S. § 36-601.01(G) requires the Arizona Department of Health Services (Department) to implement and enforce A.R.S. § 36-601.01 and authorizes the Department to make rules for that purpose. A.R.S. § 36-601.01(G)(10) authorizes the Department to delegate to a state agency or political subdivision any functions, powers, or duties under A.R.S. § 36-601.01.

The Department made rules at Title 9, Chapter 2, Article 1 of the *Arizona Administrative Code*. R9-2-101 provides definitions of terms used in the rules. The Department also made the rules explained in the following paragraphs.

b. Reasonable Distance

R9-2-102(A) establishes the outside smoke-free "reasonable distance," the distance included in the definition of "enclosed area" in A.R.S. § 36-601.01(A)(3). The proposed exempt rules proposed a distance of 15 feet. Of the comments on the proposed distance received by the Department, the largest number favored a distance between 20 and 30 feet. See item #11. Additionally, the first two studies listed in item #7 provide scientific support for a distance between 20 and 30 feet. Accordingly, R9-2-102(A) requires a distance "of at least 20 feet in all directions measured from each outer edge of an entrance, an open window, or a ventilation system" of a public place or non-vehicle place of employment. R9-2-102(B) requires the proprietor of a public place or non-vehicle place of employment to make sure that tobacco smoke does not drift into the reasonable distance area.

c. Individual and Proprietor Responsibilities

R9-2-103 establishes an individual's responsibility not to smoke in an area of a public place or place of employment where smoking is prohibited by A.R.S. § 36-601.01 or R9-2-102(A). An individual also must stop smoking immediately when requested to do so by a proprietor as defined in R9-2-101(22).

R9-2-104 establishes proprietor responsibilities under the Act, including R9-2-104(B) that allocates responsibilities if a building or facility contains two or more places of employment or public places with different proprietors. This allocation is based on a proprietor's control of an area. R9-2-101(8) defines "controlled" as "under the authority and responsibility of a proprietor." Consistent with A.R.S. § 36-601.01(D), R9-2-104(G) authorizes a proprietor to declare that smoking is prohibited in an entire establishment, facility, or outdoor area.

d. Signs

R9-2-104(A)(3), R9-2-104(H) and R9-2-105 implement the sign requirements in A.R.S. § 36-601.01(E), including signs in vehicles used for business purposes that are "owned and operated by the employer during working hours when the vehicle is occupied by more than one person." The definition of "places of employment" in A.R.S. § 36-601.01(A)(7) includes these vehicles. The provisions in R9-2-105 specify sign size, content, and placement.

R9-2-105(A)(2)(b) and (c) clarify that Smoke-free Arizona signs must contain the telephone number and web site address designated by the Department for making complaints. Except for the citation to A.R.S. § 36-601.01 required in R9-2-105(A)(3), R9-2-105(A)(2)(d) requires the content of Smoke-free Arizona signs at a public place or non-vehicle place of employment to be clearly legible to an individual of normal vision from a distance of five feet. R9-2-105(B) requires a sign to be posted at every entrance of a public place or non-vehicle place of employment. R9-2-105(C) requires a proprietor to post at least one vehicle sign in a vehicle that is a place of employment as described in A.R.S. § 36-601.01. Except for the citation to A.R.S. § 36-601.01 required in R9-2-105(C)(2), R9-2-105(C)(1)(c) requires a vehicle sign's content to be clearly legible to an individual of normal vision from a distance of three feet.

e. Private Residences

The Act permits smoking in a private residence "except when used as a licensed child care, adult day care, or health care facility." See A.R.S. § 36-601.01(B)(1). The Department defines "private residence" in R9-2-101(21) as "a structure, other than a health care institution, where an individual lives and sleeps." R9-2-106, the Department's rule

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on tobacco smoke at specified private residences, implements the Act's exception to the general rule that smoking is allowed in private residences.

The Department will regulate tobacco smoke at a private residence when the private residence is used as:

- A licensed health care institution, including an area of the private residence that is used as an adult day care [an adult day health care facility as defined in A.R.S. § 36-401(A)(4)] during the hours for which the area is licensed;
- A licensed child care facility or an area of the private residence that is a certified area of a child care group home; or
- A health care facility.

In Section 2, Findings and Declaration of Purpose, the Act states: “[S]econdhand smoke is particularly hazardous to elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease.” Consistent with Section 2 of the Act, an area licensed as a health care institution does not qualify for the private residence exemption. Smoking is prohibited in patient or resident rooms and residential units.

R9-2-101(16) lists the health care professionals included in the definition of “health care facility” in A.R.S. § 36-601.01(A)(4). A health care professional's office or the area where the health care professional provides services is generally exempt from licensing by the Department under A.R.S. § 36-402(A)(3). However, R9-2-106 addresses an office or area where a listed health care professional provides services because the office or area is a “health care facility” regulated under the Act. “Health care facility” includes an area that is located in or attached to a private residence and that is used by the health care professional to provide services when the health care professional is providing services to an individual. “Health care facility” does not include the private residence of an individual who receives services from the health care professional at the individual's private residence.

An area that is used by a health care professional to provide services to an individual and that is associated with a private residence but that is not located in or attached to the private residence, such as a separate building or structure on the same plot of land as the private residence, is regulated at all times as a place of employment or public place.

f. Retail Tobacco Stores

The Act allows tobacco smoking in retail stores that derive the majority of sales from tobacco products and accessories, are physically separated from smoke-free areas by solid walls or windows, and are independently ventilated from smoke-free areas. See the definition of “physically separated” in A.R.S. § 36-601.01(A)(6). R9-2-101(24), R9-2-104(E), and R9-2-107 implement the Act's limited exemption for retail tobacco stores from the smoking prohibition.

R9-2-101(24) defines “tobacco products and accessories.” R9-2-104(E) requires a proprietor of a retail tobacco store where smoking is permitted to comply with R9-2-107. Under R9-2-107(A), a proprietor may permit smoking in a retail tobacco store only if the retail store derives the majority of its sales from tobacco products and accessories, is physically separated and independently ventilated, and meets the requirements in R9-2-107.

Under R9-2-107, the proprietor of a retail store where smoking is permitted under the Act's retail tobacco store exemption must:

- Prepare an affidavit certifying that the retail tobacco store expects to derive at least 51 per cent of its gross income from the sale of tobacco products and accessories during each calendar year, if the retail tobacco store begins operating after January 1 of a calendar year; or
- Annually prepare an affidavit certifying that the retail tobacco store derived at least 51 percent of its gross income from the sale of tobacco products and accessories during the previous calendar year, if the retail tobacco store has been in operation for at least an entire calendar year.

R9-2-107(D) specifies the documents to be provided to the Department or the Department's designee by the proprietor of a retail tobacco store where smoking is permitted if the Department or the Department's designee receives a complaint under R9-2-109(A) about the retail tobacco store. See the definition of “Department's designee” in R9-2-101(10). R9-2-107(E) specifies the documents that the proprietor of a retail tobacco store where smoking is permitted must retain and make available to the Department or the Department's designee upon request.

g. Outdoor Patios

A.R.S. § 36-601.01(B)(6) authorizes tobacco smoking on outdoor patios “so long as tobacco smoke does not enter areas where smoking is prohibited through entrances, windows, ventilation systems, or other means.” R9-2-101(7), R9-2-101(8), R9-2-101(18), R9-2-101(19), R9-2-101(20), R9-2-104(F), and R9-2-108 implement the Act's limited exemption for outdoor patios from the smoking prohibition.

R9-2-101(7) defines “contiguous area” as “a place that: [i]s physically attached to a public place or non-vehicle place of employment; or [i]s separated from the public place or non-vehicle place of employment only by other places controlled by the proprietor of the public place or non-vehicle place of employment.” As explained in the discussion of individual and proprietor responsibilities, R9-2-101(8) defines “controlled.” R9-2-101(18) defines “outdoor patio” as “an area designated by a proprietor according to R9-2-108(A).” R9-2-101(19) defines “outdoor patio patron” as “an individual who is occupying an outdoor patio.” R9-2-101(20) defines “permeable” as “permitting tobacco smoke to

pass through.” R9-2-104(F) requires a proprietor of an outdoor patio where smoking is permitted to comply with R9-2-108.

R9-2-108(A) provides the criteria for designation of an area as an outdoor patio where smoking is permitted, including proximity to a place of employment or public place and control of the area by the proprietor of the place of employment or public place. R9-2-108(A)(3) specifies the physical or structural elements that qualify an area for outdoor patio designation. In response to the public comments on the proposed outdoor patio rule summarized in item #11, the Department simplified R9-2-108(A)(3), and is allowing outdoor patio designation when only one side of the area is completely open, consists of permeable material, or consists of open space and permeable material, or when one side has a low wall and is otherwise open or consists of permeable material. The low wall can be no more than three and one-half feet high or the minimum height that is more than three and one-half feet required by an applicable local ordinance or building code. R9-2-108(A) also provides for outdoor patio designation when an area has no overhead covering or has an overhead covering that consists of permeable material or a combination of open space and permeable material.

R9-2-108(B) establishes requirements for a designated smoking patio that individuals can enter from an area other than the place of employment or public place, such as a street, sidewalk, or parking lot; and that has a doorway to the place of employment or public place. The proprietor must provide information that this doorway is not an entrance and is for outdoor patio patrons and must direct individuals who are not outdoor patio patrons to an entrance. See the definition of “entrance” in R9-2-101(14), which excludes a doorway for outdoor patio patrons as well as an emergency exit.

Under R9-2-108(D), the reasonable distance required in R9-2-102(A) does not apply to a doorway for outdoor patio patrons, a window, or a ventilation system located in an area designated as an outdoor patio where smoking is permitted. However, to qualify for an exemption from the smoking prohibition and to remain violation-free, tobacco smoke from an outdoor patio must not drift into a smoke-free area. See R9-2-108(C).

In response to public comments on the proposed outdoor patio rule summarized in item #11, a proprietor may designate as an outdoor patio where smoking is permitted an area that is less than 20 feet from any entrance of a public place or non-vehicle place of employment. A proprietor who designates such an area must use a method that permits an individual to avoid breathing tobacco smoke when using the entrance and that does not permit tobacco smoke to drift into smoke-free areas.

R9-2-108(F) authorizes a proprietor to designate an outdoor patio as an area where smoking is prohibited.

The Act’s limited exemption for outdoor patios and the Department’s rules related to outdoor patios do not replace the requirements in other statutes, rules, or regulations applicable to food or beverage operations.

h. Veterans and Fraternal Clubs and Other Limited Exemptions

In A.R.S. § 36-601(B)(4), the Act exempts veterans and fraternal clubs from the smoking prohibition “when they are not open to the general public.” The Act defines “veteran[s] and fraternal clubs” by referencing the definition of “club” in A.R.S. §§ 4-101(7)(a), (7)(b), and (7)(c). Accordingly, veterans or fraternal clubs include:

- A local unit of veterans chartered by the U.S. Congress for patriotic, fraternal, or benevolent purposes, including the local unit’s auxiliary, that operates clubroom facilities in Arizona;
- A local unit of an American national fraternal organization (in active existence in at least 36 states or that has been in active continuous existence for at least 20 years) that operates clubroom facilities in Arizona; and
- A hall or building association, whose capital stock is owned by a local unit of veterans chartered by the U.S. Congress, by a local unit of an American national fraternal organization, or by the local unit’s members, that operates the local unit’s clubroom facilities.

In response to the public comments summarized in item #11 on the proposed definition of “open to the general public” or otherwise related to veterans and fraternal clubs, R9-2-101(17) defines “open to the general public” as “when the proprietor of a veterans or fraternal club permits an individual who is not a member, an employee, or a bona fide guest as defined in A.R.S. § 4-101 to be present in the veterans or fraternal club.” R9-2-104(D) provides that a proprietor of a veterans or fraternal club “shall not permit smoking in an area of the veterans or fraternal club that is open to the general public.”

In A.R.S. § 36-601.01(B), the Act also provides limited exemptions from the smoking prohibition for:

- Not more than 50 percent of the guest rooms in a hotel or motel that may be designated as smoking rooms; [Note that hotel and motel common areas, such as lobbies, restaurants, shops, and exercise rooms, are included in the definition of “public place” in A.R.S. § 36-601.01(A)(9) and must be smoke-free.]
- Religious ceremonies “practiced pursuant to the American Indian Religious Freedom Act of 1978;” and
- Stage performances or film or television productions “if the smoking is part of the performance or production.”

With regard to any area subject to a limited exemption from the Act’s smoking prohibition, R9-2-104(A)(1) and R9-2-104(A)(2) require proprietors to prohibit smoking in a smoke-free area and to make sure that tobacco smoke does not drift into a smoke-free area.

i. Complaints, Violations, and Penalties

A.R.S. § 36-601.01(G)(3) through (G)(8) authorize the Department to receive complaints alleging violations of the Act, to inspect public places or places of employment for violations of the Act, to determine that a violation of the Act has occurred, and to enforce the Act's provisions. R9-2-109 through R9-2-112 implement the Act's regulatory scheme. Consistent with A.R.S. § 36-601.01(G)(10) and in response to the public comments related to enforcement summarized in item #11, the Department's designee is included in R9-2-109 through R9-2-112 and R9-2-107, the retail tobacco store rule.

R9-2-109 addresses Smoke-free Arizona complaints, observations, notification, and inspection. R9-2-109(A) specifies the information to be included in a Smoke-free Arizona complaint. In addition to a complaint by a member of the public, R9-2-109(B) provides that an individual who observes a possible violation of A.R.S. § 36-601.01 when conducting an inspection of a health care institution, child care group home, or child care facility pursuant to A.R.S. Title 36, Chapter 4 or Chapter 7.1, or of a food establishment or other place pursuant to A.R.S. § 36-136(D) and 9 A.A.C. 8, must make a Smoke-free Arizona complaint according to R9-2-109(A). Within 15 days after receipt of a complaint, made according to R9-2-109(A), about a public place or place of employment, the Department or the Department's designee will provide notification to the proprietor about the complaint or conduct an inspection for compliance with A.R.S. § 36-601.01. If the notification process fails to resolve the complaint, the Department or the Department's designee will conduct an inspection.

R9-2-110 lists the factors the Department or the Department's designee must consider in determining whether a violation of A.R.S. § 36-601.01 has occurred. Under R9-2-111(A), after the Department or the Department's designee determines that a violation has occurred, the Department or the Department's designee determines whether to issue a notice of violation and, if a civil penalty is assessed, a notice of assessment, based on the criteria in R9-2-112. R9-2-111(A) also states the requirements for a notice of violation issued by the Department or the Department's designee. In response to the public comments on appeals summarized in item #11, R9-2-111(B)(2) provides that a person may appeal the Department's designee's determination that a violation has occurred or assessment of a penalty "[A]ccording to procedures of the Department's designee that are consistent with A.R.S. Title 41, Chapter 6, Article 10..." R9-2-112 lists the factors the Department or the Department's designee must consider in determining whether to issue a notice of violation, whether to issue a notice of assessment, or the amount of a civil penalty.

j. Exempt Rulemaking

This rulemaking also has amended the 9 A.A.C. 2 heading from "Tobacco Tax-funded Programs" to "Tobacco-related Programs."

According to A.R.S. § 36-601.01(G)(11), the Department is exempt from the rulemaking requirements of A.R.S. Title 41, Chapter 6 until May 1, 2007.

In accordance with A.R.S. § 36-601.01(G)(11), the Department posted drafts of the Notice of Proposed Exempt Rulemaking on the Office of Administrative Rules' web site on December 27, 2006, January 16, 2007, and January 27, 2007. The Department filed the Notice of Proposed Exempt Rulemaking with the Secretary of State on February 2, 2007. The Notice of Proposed Exempt Rulemaking was posted on the Office of Administrative Rules' web site and on February 23, 2007, was published in the *Arizona Administrative Register*. The Department conducted three public hearings on the proposed exempt rules: in Phoenix on March 6, 2007; in Tucson on March 7, 2007; and in Flagstaff on March 8, 2007.

7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or justification for the rules or did not rely on in its evaluation of or justification for the rules, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

The Department reviewed and relied on the following study: Repace, J.L., "Measurement of Outdoor Air Pollution from Secondhand Smoke on the UMBC Campus," 2005, available from Repace Associates, Inc., 101 Felicia Lane, Bowie, MD 20720 or <http://www.repace.com/reports.html>.

The Department reviewed and relied on the following study: Klepeis, N.E., Ott, W.R., and Switzer, P., "Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study," 2004, Technical Report, Stanford University, Department of Statistics, Sequoia Hall, Stanford, CA 94305, Contract No. 3317SC, University of California at San Francisco, Prepared for the State of California, Tobacco Control Section, Sacramento, CA, available from Dr. Neil E. Klepeis at <http://klepeis.net> and <http://exposurescience.org>.

The Department reviewed and did not rely on the following study: Repace, J.L., and Johnson, K.C., "Can Displacement Ventilation Control Secondhand ETS?", *ASHRAE IAQ Applications*, Fall 2006, available from American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE), 1791 Tullie Circle, N.E., Atlanta, GA 30329, telephone (800) 527-4723 or (404) 636-8400, fax (404) 321-5478, or http://www.cnpt.es/docu_pdf/ASHRAErepace.pdf.

The third study, which was limited to indoor air quality and to one method for controlling tobacco smoke, concluded that displacement ventilation is not a viable substitute for smoking bans. This conclusion was based on tests of the indoor air quality of contiguous smoking and non-smoking areas inside one establishment in Toronto, Canada, and

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two establishments in Mesa, Arizona. The researchers also tested the Toronto establishment after it became smoke free. The study included tests of the indoor air quality of six establishments in Ottawa, Canada, which has had an indoor smoking ban since 2001. The conclusion stated that the ventilation systems of the Mesa establishments were not properly designed, implemented, or operated.

8. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

9. The summary of the economic, small business, and consumer impact:

According to A.R.S. § 36-601.01(G)(11), the Department is exempt until May 1, 2007, from the rulemaking requirements of A.R.S. Title 41, Chapter 6, including the requirement to prepare the economic, small business, and consumer impact statement described in A.R.S. § 41-1055. The costs associated with this exempt rulemaking result from the Smoke-Free Arizona Act, Proposition 201, approved by Arizona voters on November 7, 2006. Based on the approval of Proposition 201, the Department believes that many voters decided that the benefits to the health, safety, and welfare of Arizonans from the Smoke-Free Arizona Act outweigh the costs.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

SECTION	DESCRIPTION OF CHANGES
R9-2-101	The Department: <ul style="list-style-type: none"> • Deleted the definitions of “clearly and conspicuously” and “conspicuous sign;” • Added definitions of “calendar quarter,” “contiguous area,” “controlled,” and “Department’s designee” in R9-2-101(3), (7), (8), and (10); • Substituted “drift” for “enter” in R9-2-101(11) as the term defined as “the physical movement of tobacco smoke, regardless of cause, into any area in which smoking is prohibited by A.R.S. § 36-601.01;” and • Clarified and improved the definitions of “ashtray,” “Department,” “open to the general public,” “private residence,” “reasonable distance,” “tobacco products and accessories,” and “ventilation system.”
R9-2-102	The Department: <ul style="list-style-type: none"> • Added R9-2-102 with the heading “Reasonable Distance; • Changed the distance from 15 feet to 20 feet in R9-2-102(A); • Added R9-2-102(B) to provide that: “A proprietor of a public place or non-vehicle place of employment shall not permit tobacco smoke to drift into the area where smoking is prohibited as described in subsection (A)[;]” and • Renumbered Sections after R9-2-102.
R9-2-103	The Department: <ul style="list-style-type: none"> • Added subsection (A) on an individual’s responsibility not to smoke tobacco where smoking is prohibited by A.R.S. § 36-601.01; and • Lettered as subsection (B) the provision on an individual’s responsibility to stop smoking immediately when requested to stop by a proprietor.
R9-2-104	The Department: <ul style="list-style-type: none"> • Clarified and simplified proprietor responsibilities; • Combined provisions and rearranged subsections; • Simplified R9-2-104(B) by referencing the requirements in R9-2-104(A); • Specified “tobacco smoke” in R9-2-104(A)(2); • Moved the substance of a provision related to retail tobacco stores to R9-2-107(A); • Moved the substance of a provision related to outdoor patios to R9-2-108(C); • Changed R9-2-104(D) to: “A proprietor of a veterans or fraternal club shall not permit smoking in an area of the veterans or fraternal club that is open to the general public;” • Changed R9-2-104(G) to: “A proprietor may declare that smoking is prohibited in an entire establishment, facility, or outdoor area;” and • Consistent with A.R.S. § 36-601.01(A)(7) changed “by or for a proprietor” to “by a proprietor” in R9-2-104(H).

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<p>R9-2-105</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Clarified and simplified sign requirements; • For public places and non-vehicle places of employment, made sign size and content requirements in R9-2-105(A); • Deleted from R9-2-105(A) the requirement that a sign contain the e-mail address designated by the Department for making complaints and required only the telephone number and web site address; • Provided in R9-2-105(A)(2)(d) that a sign must be clearly legible for a distance of five feet; • Provided in R9-2-105(A)(3) for a citation to A.R.S. § 36-601.01 on a sign, but did not require the citation to be legible for a distance of five feet; • For public places and non-vehicle places of employment, made sign placement requirements in R9-2-105(B); • For vehicles included in the definition of “places of employment” in A.R.S. § 36-601.01(A)(7), made the sign size, content, and placement requirements in R9-2-105(C); • Specified in R9-2-105(C)(1)(c) that the international no smoking symbol or the words “No Smoking,” the complaint telephone number, and the complaint web site address in a vehicle sign must “be clearly legible to an individual of normal vision from a distance of three feet[;]” • Provided in R9-2-105(C)(2) for a citation to A.R.S. § 36-601.01 on a sign, but did not require that the citation be legible for a distance of three feet; and • Required posting of only one vehicle sign in R9-2-105(C)(1).
<p>R9-2-106</p>	<p>The Department:</p> <ul style="list-style-type: none"> • For clarity, reversed the positions of R9-2-106(B) and R9-2-106(C). R9-2-106(B) now deals with smoking in a health care professional’s private residence. R9-2-106(C) now deals with smoking in the private residence of an individual who is receiving services from a health care professional in the individual’s private residence.
<p>R9-2-107</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Made R9-2-107(A), which contains the substance of a provision from the provider responsibilities Section as proposed: “A proprietor may permit smoking in a retail tobacco store only if the retail tobacco store meets the definition in A.R.S. § 36-601.01(A)(1) and the requirements in A.R.S. § 36-601(B)(3) and this Section[;]” • Re-lettered the retail tobacco store subsections; • Changed “retail tobacco store that allows smoking” to “retail tobacco store where smoking is permitted;” • Clarified the provisions for proprietor affidavits in R9-2-107(B) and R9-2-107(C); • Added “or the Department’s designee” in R9-2-107(D) and R9-2-107(E); • Changed three-month period to calendar quarter in R9-2-107(D); and • Simplified R9-2-107(E) and clarified the documents the proprietor of a retail tobacco store where smoking is permitted must retain and provide to the Department upon request.

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<p>R9-2-108</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Changed “outdoor patio that allows smoking” to “outdoor patio where smoking is permitted;” • Changed R9-2-108(A) to permit a proprietor to designate as an outdoor patio where smoking is permitted an area with one side that is open; consists of permeable material; consists of a combination of open space and permeable material; or consists of a combination of open space, permeable material, and a low wall; • Provided in R9-2-108(A)(3)(a)(iv) that the low wall can be a maximum height of three and one-half feet or the minimum height required by an applicable local ordinance or building code, whichever is greater; • Added R9-2-108(C) that contains the substance of a provision from the provider responsibility Section as proposed: “If a proprietor designates an area as an outdoor patio where smoking is permitted, the proprietor shall not permit smoke to drift into areas where smoking is prohibited through entrances, windows, ventilation systems, or other means[;]” • Clarified R9-2-108(D) to provide that the reasonable distance does not apply to “a doorway for outdoor patio patrons, a window, or a ventilation system located in an area designated as an outdoor patio where smoking is permitted[;]” • Added R9-2-108(E) to provide that a proprietor may permit smoking on an outdoor patio that is located less than 20 feet from any entrance of a public place or non-vehicle place of employment only if the proprietor uses a method that permits an individual to avoid breathing tobacco smoke when using the entrance and “[d]oes not permit tobacco smoke to drift into the public place or non-vehicle place of employment through entrances, open windows, ventilation systems, or other means[;]” and • Re-lettered R9-2-108(F).
<p>R9-2-109</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Deleted proposed R9-2-109 that was titled “Reason to Believe a Violation of A.R.S. § 36-601.01 Has Occurred; Inspection”; • Changed this Section’s title to “Complaint; Observation; Notification; Inspection”; • Added “or the Department’s designee” throughout; • Changed R9-2-109(B) to provide that an individual who conducted an inspection pursuant to A.R.S. Title 36, Chapter 4 or Chapter 7.1 or pursuant to A.R.S. § 36-136(D) and 9 A.A.C. 8 and who observed a possible violation of A.R.S. § 36-601.01 shall make a complaint according to R9-2-109(A); • Changed R9-2-109(C) to provide for either notification of the proprietor of a public place or place of employment about a complaint made according to R9-2-109(A) or an inspection within 15 days after receipt of the complaint; • Changed R9-2-109(D) to provide for an inspection of a public place or place of employment if the notification process does not resolve a complaint made according to R9-2-109(A).
<p>R9-2-110</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Added “or the Department’s designee” in the Section’s lead-in sentence; • Specified “tobacco smoke” in R9-2-110(5) and R9-2-110(6); and • Added “Except as provided in R9-2-108(D) and R9-2-108(E) in R9-2-110(6).
<p>R9-2-111</p>	<p>The Department:</p> <ul style="list-style-type: none"> • Changed the Section’s title to “Notice of Violation; Notice of Assessment;” • Added “or the Department’s designee” except in R9-2-111(B)(1); • Added “and based on the criteria in R9-2-112” in R9-2-111(A); • Changed “shall” to “may” in R9-2-111(A); • Added “If the Department or the Department’s designee issues a notice of violation or a notice of assessment” in R9-2-111(B); and • Added “According to procedures of the Department’s designee that are consistent with A.R.S. Title 41, Chapter 6, Article 10, if the Department’s designee made the determination or assessment[;]”

Notices of Exempt Rulemaking

R9-2-112	<p>The Department:</p> <ul style="list-style-type: none"> • Changed the Section’s title to “Criteria for Issuing a Notice of Violation or Notice of Assessment”; • Added “or the Department’s designee” in the Section’s lead-in sentence, R9-2-112(5)(a), and R9-2-112(6); and • Changed the lead-in sentence to: “In determining whether to issue a notice of violation under A.R.S. § 36-601.01(G)(5), whether to issue a notice of assessment under A.R.S. § 36-601.01(G)(6), or the amount of a civil penalty that is being assessed[.]”
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11. A summary of the comments made regarding the rules and the agency response to them:

The Department received many written comments on the Smoke-free Arizona proposed exempt rules from February 2, 2007, through the close of record at 5:00 p.m., March 8, 2007. The Department also received many oral comments at the public hearings in Phoenix on March 6, 2007; in Tucson on March 7, 2007; and in Flagstaff on March 8, 2007. Many individuals commented on more than one topic. The numbers provided represent the number of comments, rather than the number of individuals commenting.

COMMENTS	DEPARTMENT’S RESPONSES
Definitions	
<ul style="list-style-type: none"> • 9 comments wanted the Department to revise definitions, including “ashtray,” “health care professional,” “private residence,” proprietor,” “tobacco products and accessories,” and “ventilation system.” • 3 comments wanted the Department to define “window” as one that would open. • 1 comment wanted a definition of “common areas.” 	<p>Based on the comments, the Department made changes to the definitions of “ashtray,” “private residence,” “tobacco products and accessories,” and “ventilation system.” The Department did not change the definition of “health care professional” or “proprietor.” The rules do not contain a definition of “common areas” or “window.” However, the Department specified that the reasonable distance required in R9-2-102(A) applies to an open window.</p>
<ul style="list-style-type: none"> • 4 comments asked what constitutes an enclosed area, how the definition of enclosed area affects outdoor patios, and whether a parking structure is an enclosed area. 	<p>A.R.S. § 36-601.01(A)(3) provides the definition of “enclosed area.” The Department’s changes to the outdoor patio requirements in R9-2-108(A) are consistent with the statutory definition of “enclosed area.” Underground parking garages are enclosed areas. Above-ground parking garages generally are not enclosed areas.</p>
Reasonable Distance	
<ul style="list-style-type: none"> • 12 comments stated that 15 feet was too short a distance and did not state an alternative distance. • 20 comments wanted a distance less than the 15 feet in the proposed exempt rules. • 31 comments agreed with the proposed 15-foot distance. • 84 comments wanted a distance between 20 and 30 feet. • 49 comments wanted a distance of 30 to 49 feet. • 44 comments wanted a distance of 50 feet or greater. 	<p>Based on the comments received and the Department’s review of two studies of outside levels of tobacco smoke listed in item #7, the Department changed the reasonable distance from 15 feet to 20 feet. R9-2-102(A) specifies a distance within which smoking is prohibited “of at least 20 feet in all directions measured from each outer edge of an entrance, open window, or ventilation system” outside a public place or non-vehicle place of employment.</p>
<ul style="list-style-type: none"> • 14 comments wanted the Department to make changes to the definition of “reasonable distance” and where it would apply. • 19 comments wanted to be able to walk to or from a building without smelling smoke. • 1 comment wanted to know how the rules would affect employees smoking outdoors. 	<p>Further clarification of the reasonable distance specified in R9-2-102 is provided in R9-2-108. Consistent with A.R.S. § 36-601.01(B)(6), the reasonable distance does not apply to outdoor patios, as long as smoke does not drift into smoke-free areas. Subject to the requirements in R9-2-108, a proprietor may designate an area less than 20 feet from an entrance to a place of employment or public place as an outdoor patio where smoking by customers or employees is permitted as long as an individual is able to use the entrance to the building without breathing tobacco smoke and smoke does not drift into any smoke-free area.</p>

Notices of Exempt Rulemaking

<ul style="list-style-type: none"> • 8 comments stated that outside receptacles for the disposal of smoking materials should be placed farther than the reasonable distance so that smoke from the receptacles does not drift into the smoke-free area. • 1 comment expressed concern about individuals moving outside receptacles into a smoke-free area without regard to where a proprietor placed the outside receptacle. 	<p>A.R.S. § 36-601.01(E)(3) requires ashtrays to be removed from areas in which smoking is prohibited, including the area encompassing the reasonable distance from an entrance. R9-2-102(B) specifies that a proprietor “shall not permit tobacco smoke to drift into the area [the 20-foot reasonable distance] where smoking is prohibited described in [R9-2-102(A)].” Smokers are not permitted to move an outside receptacle into the smoke-free area.</p>
<ul style="list-style-type: none"> • 4 comments stated that each establishment is distinctive and that a proprietor should be allowed to decide how best to implement the rules. • 12 comments wanted the “reasonable distance” requirement to apply to outdoor patios. • 29 did not want the “reasonable distance” requirement to apply to outdoor patios. 	<p>The Department recognizes that each establishment is different; however, A.R.S. § 36-601.01 states that smoking is permitted in outdoor patios “so long as tobacco smoke does not enter areas where smoking is prohibited.” R9-2-108(E) permits the proprietor of an area located less than 20 feet from any entrance of a public place or non-vehicle place of employment to designate the area as an outdoor patio where smoking is permitted if the proprietor uses a method of assuring that an individual does not breathe tobacco smoke from the outdoor patio when using the entrance and of assuring that smoke does not drift into the public place or non-vehicle place of employment.</p>
<p>Signs</p>	<p>Based on the comments received, the Department changed the rule on signs to clarify the requirements for the size, content, and placement of signs.</p>
<ul style="list-style-type: none"> • 13 comments addressed the content of the signs required in the proposed exempt rules, stating that the signs: <ul style="list-style-type: none"> – Should be available as bilingual signs; – Should be allowed to contain either the words “No Smoking” or the no smoking symbol; – Need their size, color requirements, and contact information better specified; – Should not be allowed to be derogatory to A.R.S. § 36-601.01; – Should have only one contact method listed on the sign, not all three; – Should be allowed to contain the information that an entire establishment is non-smoking; and – Need simple, easy-to-understand language. 	<p>R9-2-105(A) provides the minimum size and information requirements for signs in public places and non-vehicle places of employment. R9-2-105(A)(2)(a) provides that a sign must contain either the international no smoking symbol or the words “No Smoking.” Under R9-2-105(A)(2), only two contact methods are required: the telephone number and the web site address designated by the Department for making complaints. The rule does not address sign color, and gives proprietors the flexibility to use signs that fit with the size, décor, clientele, and type of facility or establishment. For information about specific sign content, call the Department’s Smoke-free Arizona program at (602) 364-3122.</p>

Notices of Exempt Rulemaking

<ul style="list-style-type: none"> • 9 comments addressed the placement of signs, stating that: <ul style="list-style-type: none"> – Signs should be placed at entrances and in any non-smoking area; – Signs should be placed at the edges of smoke-free zones to delineate the reasonable distance; – Signs should be not only “visible” but conspicuous; and – Multiple signs should be required in larger vehicles or the signs should be in a conspicuous place. • 1 comment questioned sign placement and where signs need to be placed at construction sites. 	<p>R9-2-105(B) provides the sign placement requirements for public places and non-vehicle places of employment. A proprietor must place signs at every entrance, at a height and location easily seen by an individual entering the public place or non-vehicle place of employment, and so that signs are not obscured in any way. R9-2-105(C)(1)(c) provides that vehicle sign content, except for a citation to A.R.S. § 36-601.01, must be of sufficient size to be clearly legible to an individual of normal vision from a distance of three feet. Under R9-2-105(C)(3), a proprietor must firmly affix at least one sign to a vehicle door window, to the vehicle dashboard, or to another area in the vehicle that is visible to each occupant in the vehicle. Areas at a construction site that are enclosed areas meet the definition of “places of employment” in A.R.S. § 36-601.01(A)(7). In these areas, signs must be posted according to R9-2-105.</p>
<ul style="list-style-type: none"> • 3 comments addressed signs in vehicles, stating that signs on doors are unsafe and that mounting a sign on the dashboard may cause problems in some vehicles. 	<p>R9-2-105(C) provides the sign size, content, and placement requirements for vehicles included in the definition “places of employment” in A.R.S. § 36-601.01(A)(7). A proprietor must firmly affix at least one vehicle sign to a vehicle door window, the vehicle dashboard, or another area in the vehicle that is visible to each occupant in the vehicle.</p>
<ul style="list-style-type: none"> • 2 comments questioned the availability of signs. • 1 comment asked whether continued use of signs already in use in jurisdictions with smoking bans should be allowed. 	<p>The Department has available signs that meet the requirements of the rule, but does not require that a proprietor use a Department-provided sign. If a proprietor already uses signs that meet the minimum size, content, and placement requirements, the proprietor may continue to use the signs.</p>
<p>Private Residences</p>	
<ul style="list-style-type: none"> • 2 comments wanted more restriction to the exemption for private residences in A.R.S. § 36-601.01(B)(1) to include foster homes that are not licensed by the Department. • 3 comments wanted less restriction, to permit smoking for adult therapeutic group homes. • 1 comment liked the rules. 	<p>A.R.S. § 36-601.01(B)(1) provides an exemption for private residences “except when used as a licensed child care, adult day care, or health care facility.” The definition of “health care facility” in A.R.S. § 36-601.01(A)(4) includes health care institutions licensed by the Department and locations where certain health care professionals provide services. These health care professionals are listed in the definition of “health care professional” in R9-2-101. The Department cannot make the requirements in the rules more or less restrictive than the statute specifies.</p>
<p>Retail Tobacco Stores</p>	
<ul style="list-style-type: none"> • 2 comments expressed concern that smoke from a retail tobacco store would get into adjoining businesses. 	<p>The exemption for retail tobacco stores in A.R.S. § 36-601.01(B)(3) applies to retail tobacco stores “that are physically separated so that smoke does not infiltrate into areas where smoking is prohibited [under A.R.S. § 36-601.01].” A.R.S. § 36-601.01(A)(6) defines “physically separated” as “all space between a floor and ceiling which is enclosed on all sides by solid walls or windows (exclusive of door or passageway) and independently ventilated from smoke-free areas, so that air within permitted smoking areas does not drift or get vented into smoke-free areas.” Under R9-2-107(A), if a proprietor cannot prevent smoke from a retail tobacco store from infiltrating into areas where smoking is prohibited, the proprietor may not permit smoking in the retail tobacco store.</p>

Notices of Exempt Rulemaking

<ul style="list-style-type: none"> • 1 comment asked whether a bar could also be a tobacco store. • 1 comment asked whether and how a proprietor's claim that a business was a retail tobacco store would be checked. 	<p>Under R9-2-107, a business must derive at least 51 percent of its gross income from the sale of tobacco products and accessories during each calendar year to qualify for the retail tobacco store exemption in A.R.S. § 36-601.01(B)(3). Based on the comments, the Department clarified the requirements for the proprietor's affidavit in R9-2-107(B) and (C) and changed "three-month period" in R9-2-107(D)(2) to "calendar quarter." The Department or the Department's designee will do complaint-based enforcement of the retail tobacco store requirements and verify the information stated in the proprietor's affidavit.</p>
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<p>Outdoor Patios</p>	
<ul style="list-style-type: none"> • 40 comments stated that non-smokers would not be able to eat outside because outdoor patios would all be for smokers, and wanted all patios to be smoke-free or separate patios for non-smokers. • 4 comments stated that there should be smoking allowed on outdoor patios. 	<p>A.R.S. § 36-601.01 does not require that an outdoor patio be smoke-free or that a proprietor who designates a patio where smoking is permitted must establish a separate outdoor patio for non-smokers. A.R.S. § 36-601.01(D) allows a proprietor to declare an entire establishment, facility, or outdoor area a non-smoking place. R9-2-108 provides the requirements for designating an area as an outdoor patio where smoking is permitted. R9-2-108(F) states: "A proprietor may designate an outdoor patio as an area where smoking is prohibited." Additionally, R9-2-104(G): "A proprietor may declare that smoking is prohibited in an entire establishment, facility, or outdoor area."</p>
<ul style="list-style-type: none"> • 28 comments were against the physical requirements for walls and overhead coverings for outdoor patios in the proposed exempt rules or thought they needed to be clarified. • 3 were in favor of the proposed requirements; • 1 comment wanted the Department to exclude outdoor areas "not intended to be a patio." 	<p>To facilitate compliance and enforcement, the Department made the changes to R9-2-108 described in item #10. These changes include the provision in R9-2-108(A)(3)(a)(iv) that accommodates local ordinances and building codes that require a minimum height for a low patio wall that is more than three and one-half feet. A proprietor can designate an area that meets the requirements in R9-2-108 as an outdoor patio where smoking is permitted even if the area was not intended to be a patio.</p>
<ul style="list-style-type: none"> • 5 comments were in favor of the use of mechanical devices on outdoor patios to prevent smoke from drifting into smoke-free areas. • 4 comments were against the use of mechanical devices. 	<p>A.R.S. § 36-601.01 states that smoking is permitted in outdoor patios "so long as tobacco smoke does not enter areas where smoking is prohibited." R9-1-108(E) specifies that a proprietor may permit smoking in an outdoor patio located within 20 feet of the entrance to a public place or place of employment if the proprietor uses a method, including mechanical devices, that keeps smoke away from individuals in smoke-free areas.</p>
<ul style="list-style-type: none"> • 7 comments wanted an extension of time to meet the requirements in the rules for outdoor patios where smoking is permitted, with 6 stating that an extension is necessary to obtain building permits, make structural changes to the building and grounds, and install mechanical devices to keep smoke out of smoke-free areas. 	<p>A.R.S. § 36-601.01, other than A.R.S. § 36-601.01(M), becomes effective on May 1, 2007. Subsection (M) became effective on December 7, 2006. The Department cannot grant an extension of time to comply with the requirements of A.R.S. § 36-601.01.</p>

Notices of Exempt Rulemaking

Veterans and Fraternal Clubs	
<ul style="list-style-type: none"> • 110 comments stated that veterans and fraternal clubs are never “open to the general public.” • 25 documents with 106 signatures and 19 oral comments wanted the Department to distinguish between a guest and the general public. • 9 comments opposed the exemption for veterans and fraternal clubs in A.R.S. § 36-601.01(B)(4) or wanted the exemption to apply when only members are present. 	<p>A.R.S. § 36-601.01(B)(4) permits smoking in “veterans and fraternal clubs when they are not open to the general public.” Based on the comments received, the Department now defines “open to the general public” as “when the proprietor of a veterans or fraternal club permits an individual who is not a member, an employee, or a bona fide guest as defined in A.R.S. § 4-101 to be present in the veterans or fraternal club.” R9-2-104(D) states that “A proprietor of a veterans or fraternal club shall not permit smoking in an area of the veterans or fraternal club that is open to the general public.”</p>
<ul style="list-style-type: none"> • 12 comments stated that the rules would have an adverse economic impact on their clubs and their clubs’ use of bingo or other activities as fund-raisers. 	<p>A.R.S. § 36-601.01(B)(4) permits smoking in “veteran and fraternal clubs when they are not open to the general public.” Consistent with the statute, R9-2-104(D) provides that a proprietor of a veterans or fraternal club shall not permit smoking in an area of the veterans or fraternal club that is open to the general public. A proprietor may permit smoking in areas when the areas are not open to the general public.</p>
<ul style="list-style-type: none"> • 20 comments stated that their organizations come within the A.R.S. § 36-601.01(B)(4) exemption. 	<p>A.R.S. § 36-601.01(A)(8) defines “veteran and fraternal clubs” as a club that meets the definition in A.R.S. § 4-101(7)(a), (b), or (c). Only if an organization meets the statutory definition of “veteran and fraternal clubs” is it exempt from the smoking prohibition in A.R.S. § 36-601.01.</p>
Vehicles That Are Places of Employment	
<ul style="list-style-type: none"> • 20 comments stated that the rules on smoking in vehicles should be more restrictive. <ul style="list-style-type: none"> – Some comments stated that all commercial vehicles transporting individuals should be smoke-free. – Some stated that all company vehicles should be smoke-free. – Some stated that a company vehicle should be smoke-free because of residual smoke if more than one individual uses the vehicle. – One comment stated that smoking should be prohibited in rental cars. • 3 comments agreed with the rules. • 6 comments wanted the rules to be less restrictive, stating that interstate vehicles should be exempt and that smoking should be allowed if all the occupants smoke or consent to smoking. 	<p>A.R.S. § 36-601.01(A)(7) includes in the definition of “places of employment” where smoking is prohibited “vehicles owned and operated by the employer during working hours when the vehicle is occupied by more than one person.” The Department cannot make the requirements in the rules more or less restrictive than specified in A.R.S. § 36-601.01.</p>
<ul style="list-style-type: none"> • 2 comments wanted the definition of vehicle clarified. • 1 comment stated that the Department should include heavy equipment or other motorized devices in the definition of vehicle. 	<p>The Department determined that the definition of vehicle in A.R.S. § 28-101 is the correct definition to use and did not change the definition of “vehicle” in the rules. If a place of employment does not come within the broad definition of vehicle in A.R.S. § 28-101, then it is a non-vehicle place of employment.</p>
<ul style="list-style-type: none"> • 1 comment stated that removing an ashtray from a vehicle during business hours did not make sense because the ashtray would be put back after business hours and could be used as a coin holder or for other storage. 	<p>The Department deleted the provision for removing vehicle ashtrays from a proprietor’s responsibilities.</p>

Notices of Exempt Rulemaking

Enforcement	
<ul style="list-style-type: none"> 5 comments addressed the information a person making a complaint is required to provide. 	The information required from an individual making a complaint is contained in R9-2-109(A). The Department did not change the information required for a complaint.
<ul style="list-style-type: none"> 13 comments wanted clarification of how an infraction would be determined and how the rules would be enforced. 3 comments addressed the delegation of enforcement and asked how the delegation agreement would affect appeals. 	R9-2-110 contains information about how a violation is determined. The Department specifies the enforcement of the rules in R9-2-109 through R9-2-112. Based on the comments received about delegation of enforcement, the Department defined "Department's designee" in R9-2-101(10) as an "agency or political subdivision to which the Department delegates any functions, powers, or duties under A.R.S. § 36-601.01." R9-2-107 and R9-2-109 through R9-2-112 contain the term "Department's designee." R9-2-111(B)(2) provides that a person may appeal the determination that a violation has occurred or assessment of a penalty made by the Department's designee "[a]ccording to procedures of the Department's designee that are consistent with A.R.S. Title 41, Chapter 6, Article 10."
<ul style="list-style-type: none"> 1 comment asked what would happen if local laws were more restrictive. 3 comments asked whether the Department would add a rule about citing individual smokers. 	A.R.S. § 36-601.01(M) states: "This section does not prevent a political subdivision of the state from adopting ordinances or regulations that are more restrictive than this section nor does this section repeal any existing ordinance or regulation that is more restrictive than this section." A.R.S. § 36-601.01(K) states: "A person who smokes where smoking is prohibited is guilty of a petty offense with a fine of not less than fifty dollars and not more than three hundred dollars." The rules do not address more restrictive ordinances or citing individual smokers.
Miscellaneous	
<ul style="list-style-type: none"> 2 comments addressed smoking in hotels and motels: <ul style="list-style-type: none"> One comment wanted hotel and motel guest rooms where smoking is permitted to be on the top floor. One comment emphasized that hotel and motel common areas are public places that should be smoke-free. 	A.R.S. § 36-601.01(B)(2) provides an exemption for "hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that not more than fifty percent of rooms rented to guests in a hotel or motel are so designated." The rules do not address hotel and motel rooms.
<ul style="list-style-type: none"> Eight comments addressed tribal sovereignty and whether the rules will apply on tribal land. 	According to A.R.S. § 36-601.01(N), A.R.S. § 36-601.01 does not apply on Indian reservations. The Department's rules to implement A.R.S. § 36-601.01 do not apply on Indian reservations.
<ul style="list-style-type: none"> The Department received 32 general comments including comments that: <ul style="list-style-type: none"> Asked about the effective date; Wanted more or less restrictive language without specifying a topic; Asked questions about compliance, smoking cessation programs, and whether smoking around children is prohibited; Asked how ashtrays could be cleaned if they could not be taken into the establishment; and Wanted no restrictions or a total ban on smoking in the rules. 	Other than A.R.S. § 36-601.01(M), the effective date of A.R.S. § 36-601.01 is May 1, 2007. The Department provides information about compliance with A.R.S. § 36-601.01 at: http://www.smokefreearizona.org . Information about local tobacco cessation projects is available from the Arizona Smokers' Helpline at (800) 556-6222 or at http://www.ashline.org . A.R.S. § 36-601.01 generally prohibits smoking in public places and places of employment. Consistent with the A.R.S. § 36-601.01(B)(1) exemption for private residences "except when used as a licensed child care, adult day care, or health care facility[.]" R9-2-106(A) prohibits smoking in a private residence licensed or certified by the Department or in areas of a private residence licensed or certified by the Department as an adult day health care facility or other health care institution, a child care facility, or a child care group home. It is not a violation of A.R.S. § 36-601.01 if an ashtray is in an establishment only for the purpose of cleaning the ashtray. A.R.S. § 36-601.01 does not authorize a total smoking ban or no restrictions on smoking. A.R.S. § 36-601.01 provides limited exceptions where smoking is allowed.

<ul style="list-style-type: none">The Department received 70 comments not related to the rules, many of which wanted changes to provisions in A.R.S. § 36-601.01.	The Department cannot add to, subtract from, or change the statute in any way.
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12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

None

13. Incorporations by reference and their location in the rules:

None

14. Were these rules previously made as emergency rules? If so, please indicate the Register citation:

No

15. The full text of the rules follows:

TITLE 9. HEALTH SERVICES

CHAPTER 2. DEPARTMENT OF HEALTH SERVICES

~~TOBACCO TAX FUNDED PROGRAMS~~ TOBACCO-RELATED PROGRAMS

ARTICLE 1. ~~REPEALED~~ SMOKE-FREE ARIZONA

Section

R9-2-101.	Repealed <u>Definitions</u>
R9-2-102.	Repealed <u>Reasonable Distance</u>
R9-2-103.	Repealed <u>Individual Responsibilities</u>
R9-2-104.	Repealed <u>Proprietor Responsibilities</u>
R9-2-105.	Repealed <u>Sign Requirements</u>
R9-2-106.	Repealed <u>Private Residence</u>
R9-2-107.	Repealed <u>Retail Tobacco Store</u>
R9-2-108.	Repealed <u>Outdoor Patio</u>
R9-2-109.	Repealed <u>Complaint; Observation; Notification; Inspection</u>
R9-2-110.	Repealed <u>Determination of Violation</u>
R9-2-111.	Repealed <u>Notice of Violation; Notice of Assessment</u>
R9-2-112.	Repealed <u>Criteria for Issuing a Notice of Violation or Notice of Assessment</u>

ARTICLE 1. ~~REPEALED~~ SMOKE-FREE ARIZONA

R9-2-101. ~~Repealed~~ Definitions

In addition to the definitions in A.R.S. § 36-601.01(A), the following definitions apply in this Article unless otherwise specified:

1. "Adult day care" means "adult day health care facility" as defined in A.R.S. § 36-401.
2. "Ashtray" means any receptacle that is designed for disposing of the debris from smoking materials such as ash, cigarette butts or filters, or cigar stubs.
3. "Calendar quarter" means a period from:
 - a. January 1 through March 31.
 - b. April 1 through June 30.
 - c. July 1 through September 30, or
 - d. October 1 through December 31.
4. "Child care facility" has the meaning in A.R.S. § 36-881.
5. "Child care group home" has the meaning in A.R.S. § 36-897.
6. "Complaint" means a written or oral statement of a possible violation of A.R.S. § 36-601.01.
7. "Contiguous area" means a place that:
 - a. Is physically attached to a public place or non-vehicle place of employment; or
 - b. Is separated from the public place or non-vehicle place of employment only by other places controlled by the proprietor of the public place or non-vehicle place of employment.
8. "Controlled" means under the authority and responsibility of a proprietor.
9. "Department" means the Arizona Department of Health Services.
10. "Department's designee" means a state agency or political subdivision to which the Department delegates any functions, powers, or duties under A.R.S. § 36-601.01.

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11. “Drift” means the physical movement of tobacco smoke, regardless of cause, into any area where smoking is prohibited by A.R.S. § 36-601.01.
12. “Emergency exit” means a doorway in a building or facility used for egress to the outdoors only when there is an immediate threat to the health or safety of an individual.
13. “Entering” means an individual going into or leaving a building or facility.
14. “Entrance” means a doorway in a building or facility that:
 - a. Is used by an individual for ingress from the outdoors or egress to the outdoors, and
 - b. Excludes:
 - i. An emergency exit, and
 - ii. A doorway for outdoor patio patrons.
15. “Health care institution” means a building or facility regulated under A.R.S. Title 36, Chapter 4.
16. “Health care professional” means one of the following individuals regulated under A.R.S. Title 32 or A.R.S. Title 36, Chapter 6, Article 7 or Chapter 17, including:
 - a. A podiatrist;
 - b. A doctor of chiropractic or chiropractic assistant;
 - c. A dentist, dental consultant, dental hygienist, or denturist;
 - d. A doctor of medicine;
 - e. A doctor of naturopathic medicine or naturopathic medical assistant;
 - f. A registered nurse practitioner, registered nurse, practical nurse, registered or practical nurse licensed by a state other than Arizona and practicing in Arizona according to the Nurse Licensure Compact, A.R.S. § 32-1668, or nursing assistant;
 - g. A dispensing optician;
 - h. An optometrist;
 - i. A doctor of osteopathic medicine;
 - j. A pharmacist, pharmacy intern, pharmacy technician, or pharmacy technician trainee;
 - k. A physical therapist or physical therapist assistant;
 - l. A psychologist;
 - m. A veterinarian or veterinary technician;
 - n. A physician assistant;
 - o. A radiologic technologist, including a practical radiologic technologist in podiatry, unlimited practical radiologic technologist, nuclear medicine technologist, or practical technologist in bone densitometry;
 - p. A homeopathic physician or a medical assistant employed by a homeopathic physician;
 - q. A behavioral health professional, including a baccalaureate social worker, master social worker, clinical social worker, professional counselor, associate counselor, marriage and family therapist, associate marriage and family therapist, associate substance abuse counselor, independent substance abuse counselor, or substance abuse technician;
 - r. An occupational therapist or occupational therapy assistant;
 - s. A respiratory therapist or respiratory therapy technician;
 - t. An acupuncturist;
 - u. An athletic trainer;
 - v. A massage therapist;
 - w. A midwife;
 - x. A hearing aid dispenser;
 - y. An audiologist; or
 - z. A speech-language pathologist or speech-language pathology assistant.
17. “Open to the general public” means when the proprietor of a veterans or fraternal club permits an individual who is not a member, an employee, or a bona fide guest as defined in A.R.S. § 4-101 to be present in the veterans or fraternal club.
18. “Outdoor patio” means an area designated by a proprietor according to R9-2-108(A).
19. “Outdoor patio patron” means an individual who is occupying an outdoor patio.
20. “Permeable” means permitting tobacco smoke to pass through.
21. “Private residence” means a structure, other than a health care institution, where an individual lives and sleeps.
22. “Proprietor” means an owner, operator, manager or other person in control of a public place or a place of employment.
23. “Reasonable distance” means the distance that meets the requirements in R9-2-102(A).
24. “Tobacco products and accessories” means:
 - a. Smoking materials such as cigars, cigarettes, or pipe tobacco; and
 - b. Smoking-related materials such as lighters, humidors, pipes, or cigarette cases.
25. “Vehicle” means motor vehicle as defined in A.R.S. § 28-101.

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26. “Ventilation system” means the natural or mechanical means of supplying air to, or removing air from a space.

R9-2-102. ~~Repealed~~ Reasonable Distance

- A.** Except as permitted in R9-2-108(D) or R9-2-108(E), a public place or non-vehicle place of employment shall have a distance where outside smoking is prohibited of at least 20 feet in all directions measured from each outer edge of an entrance, an open window, or a ventilation system.
- B.** A proprietor of a public place or non-vehicle place of employment shall not permit tobacco smoke to drift into the area where smoking is prohibited as described in subsection (A).

R9-2-103. ~~Repealed~~ Individual Responsibilities

- A.** An individual shall not smoke tobacco in an area of a public place or place of employment where smoking is prohibited by A.R.S. § 36-601.01 or R9-2-102(A).
- B.** An individual in an area of a public place or place of employment where smoking is prohibited by A.R.S. § 36-601.01 or R9-2-102(A) shall stop smoking immediately when requested to stop smoking by the proprietor of the public place or a place of employment.

R9-2-104. ~~Repealed~~ Proprietor Responsibilities

- A.** A proprietor shall:
1. Not permit smoking in a public place, a place of employment, or within the distance required in R9-2-102(A) except according to this Article and the exceptions listed in A.R.S. § 36-601.01(B);
 2. Not permit tobacco smoke to drift into a building or facility through an entrance, a window, a ventilation system, or other means;
 3. Post signs according to A.R.S. § 36-601.01(E)(1) and R9-2-105;
 4. Remove all ashtrays from all areas where smoking is prohibited; and
 5. Communicate that smoking is prohibited in places of employment to:
 - a. All existing employees by the effective date of this Article, and
 - b. An applicant for employment at the time of the application for employment.
- B.** If a building or facility that is controlled by a proprietor contains several places of employment or public places that are controlled by other proprietors:
1. The proprietor of the entire building or facility shall comply with the requirements in subsection (A) for the area controlled by the proprietor of the entire building or facility, and
 2. The proprietor of each place of employment or public place shall comply with the requirements in subsection (A) for the area controlled by the proprietor of the place of employment or public place.
- C.** If an individual in an area controlled by a proprietor is smoking in violation of A.R.S. § 36-601.01, the proprietor shall:
1. Inform the individual that the individual is in violation of A.R.S. § 36-601.01, and
 2. Request that the individual stop smoking immediately.
- D.** A proprietor of a veterans or fraternal club shall not permit smoking in an area of the veterans or fraternal club that is open to the general public.
- E.** A proprietor of a retail tobacco store where smoking is permitted shall comply with R9-2-107.
- F.** A proprietor of an outdoor patio where smoking is permitted shall comply with R9-2-108.
- G.** A proprietor may declare that smoking is prohibited in an entire establishment, facility, or outdoor area.
- H.** In a vehicle owned and operated by a proprietor during working hours, the proprietor shall:
1. Not permit smoking in the vehicle when:
 - a. More than one individual occupies the vehicle, and
 - b. The vehicle is used for business purposes; and
 2. Post signs according to A.R.S. § 36-601.01(E)(1), A.R.S. § 36-601.01(E)(2), and R9-2-105(C).

R9-2-105. ~~Repealed~~ Sign Requirements

- A.** To meet the requirements of A.R.S. §§ 36-601.01(E)(1) and 36-601.01(E)(2), a proprietor of a public place or non-vehicle place of employment shall post signs that:
1. Are no smaller than four inches by six inches; and
 2. Contain:
 - a. The international no smoking symbol or the words “No Smoking”;
 - b. The telephone number designated by the Department for making complaints;
 - c. The web site address designated by the Department for making complaints; and
 - d. Letters, numbers, and symbols of sufficient size to be clearly legible to an individual of normal vision from a distance of five feet; and
 3. Include a citation to A.R.S. § 36-601.01.
- B.** A proprietor of a public place or non-vehicle place of employment shall post a sign that meets the requirements in subsection (A):
1. At every entrance,

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2. At a height and location easily seen by an individual entering the public place or non-vehicle place of employment, and
3. So that the sign is not obscured in any way.
- C. A proprietor of a vehicle described in A.R.S. § 36-601.01(A)(7) shall:
 1. Post at least one sign that:
 - a. Is no smaller than two inches by three inches;
 - b. Meets the requirements in subsections (A)(2)(a) through (A)(2)(c); and
 - c. Contains letters, numbers, and symbols of sufficient size to be clearly legible to an individual of normal vision from a distance of three feet;
 2. Include a citation to A.R.S. § 36-601.01 on the sign; and
 3. Firmly affix the sign to:
 - a. A vehicle door window,
 - b. The vehicle dashboard, or
 - c. Another area in the vehicle that is visible to each occupant in the vehicle.

R9-2-106. ~~Repealed Private Residence~~

- A. Smoking is prohibited in a private residence licensed or certified by the Department or in areas of a private residence licensed or certified by the Department as:
 1. An adult day care.
 2. A child care facility.
 3. A child care group home, or
 4. A health care institution other than an adult day care.
- B. Smoking is prohibited in a health care professional's private residence:
 1. In an area where the health care professional provides services to an individual, and
 2. When the health care professional is providing services to an individual.
- C. A.R.S. § 36-601.01 does not apply to the private residence of an individual who is receiving services from a health care professional in the individual's private residence.

R9-2-107. ~~Repealed Retail Tobacco Store~~

- A. A proprietor may permit smoking in a retail tobacco store only if the retail tobacco store meets the definition in A.R.S. § 36-601.01(A)(10) and the requirements in A.R.S. § 36-601.01(B)(3) and this Section.
- B. The proprietor of a retail tobacco store where smoking is permitted and that begins operating after January 1 of a calendar year shall complete, by the retail tobacco store's first day of operation, an affidavit that contains:
 1. The name of the proprietor of the retail tobacco store.
 2. The name and address of the retail tobacco store.
 3. A statement that the proprietor of the retail tobacco store has personal knowledge of the facts supporting the affidavit.
 4. A statement that the retail tobacco store expects to derive at least 51 percent of its gross income during each calendar year from the sale of tobacco products and accessories as required by A.R.S. § 36-601.01.
 5. A statement describing the documents that contain the facts supporting the statement in subsection (B)(4).
 6. The signature of the proprietor of the retail tobacco store.
 7. An Arizona notary's signature certifying that the proprietor swore to or affirmed the truthfulness of the statements in the affidavit, and
 8. The date of the Arizona notary's signature.
- C. The proprietor of a retail tobacco store where smoking is permitted and that has been in operation for at least an entire calendar year shall complete, by January 31 of each year, an affidavit that contains:
 1. The name of the proprietor of the retail tobacco store.
 2. The name and address of the retail tobacco store.
 3. A statement that the proprietor of the retail tobacco store has personal knowledge of the facts supporting the affidavit.
 4. A statement that the retail tobacco store derived at least 51 percent of its gross income during the previous calendar year from the sale of tobacco products and accessories.
 5. A statement describing the documents that contain the facts supporting the statement in subsection (C)(4).
 6. The signature of the proprietor of the retail tobacco store.
 7. An Arizona notary's signature certifying that the proprietor swore to or affirmed the truthfulness of the statements in the affidavit, and
 8. The date of the Arizona notary's signature.
- D. If the Department or the Department's designee receives a complaint under R9-2-109(A) about a retail tobacco store where smoking is permitted, the proprietor of the retail tobacco store shall provide to the Department or the Department's designee:
 1. The affidavit under subsection (B) or the most current affidavit under subsection (C), whichever is appropriate; and
 2. Documents that enable the Department or the Department's designee to determine the percent of gross income

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derived from the sale of tobacco products and accessories:

- a. For the calendar quarter immediately preceding the date of the complaint; or
- b. If the retail tobacco store was not in operation for the entire calendar quarter immediately preceding the date of the complaint, for the period beginning on the date the retail tobacco store opened and ending on the date of the complaint.

E. The proprietor of a retail tobacco store where smoking is permitted shall retain on the premises of the retail tobacco store and make available to the Department or the Department's designee upon request:

1. The affidavit under subsection (B) or the most current affidavit under subsection (C), whichever is appropriate; and
2. The documents:
 - a. Identified under subsection (B)(5) or subsection (C)(5), whichever is appropriate; and
 - b. Required under subsection (D)(2).

R9-2-108. ~~Repealed~~ Outdoor Patio

A. A proprietor may designate an area as an outdoor patio where smoking is permitted only if the area:

1. Is a contiguous area of a place of employment or public place;
2. Is controlled by the proprietor of the place of employment or public place; and
3. Has:
 - a. At least one side that consists of:
 - i. Open space;
 - ii. Permeable material;
 - iii. A combination of open space and permeable material; or
 - iv. A combination of open space, permeable material, and a non-permeable wall that is not higher than three and one-half feet or the minimum height required by an applicable local ordinance or building code, whichever is greater; or
 - b. No overhead covering or an overhead covering that consists of:
 - i. Permeable material, or
 - ii. A combination of open space and permeable material.

B. If an outdoor patio where smoking is permitted has a doorway for outdoor patio patrons and does not have a wall that prevents individuals from entering the outdoor patio, the proprietor shall:

1. Inform individuals that the doorway:
 - a. Is not an entrance, and
 - b. Is a doorway for outdoor patio patrons; and
2. Direct individuals who are not outdoor patio patrons to an entrance.

C. If a proprietor designates an area as an outdoor patio where smoking is permitted, the proprietor shall not permit tobacco smoke to drift into areas where smoking is prohibited through entrances, windows, ventilation systems, or other means.

D. The reasonable distance required in R9-2-102(A) does not apply to a doorway for outdoor patio patrons, a window, or a ventilation system located in an area designated as an outdoor patio where smoking is permitted.

E. If an outdoor patio is located less than 20 feet from any entrance of a public place or non-vehicle place of employment, a proprietor may permit smoking on the outdoor patio only if the proprietor uses a method that:

1. Permits an individual to avoid breathing tobacco smoke when using the entrance at the public place or non-vehicle place of employment, and
2. Does not permit tobacco smoke to drift into the public place or non-vehicle place of employment through entrances, open windows, ventilation systems, or other means.

F. A proprietor may designate an outdoor patio as an area where smoking is prohibited.

R9-2-109. ~~Repealed~~ Complaint; Observation; Notification; Inspection

A. When a person makes a complaint to the Department or the Department's designee under A.R.S. § 36-601.01, the complaint shall include:

1. The name and address of the public place or place of employment that is the subject of the complaint;
2. The date and approximate time of the occurrence that gave rise to the complaint;
3. A description of the occurrence that gave rise to the complaint; and
4. Any other information relevant to the occurrence that gave rise to the complaint.

B. An individual shall make a complaint according to subsection (A) if the individual:

1. Conducted an inspection pursuant to:
 - a. A.R.S. Title 36, Chapter 4 or Chapter 7.1; or
 - b. A.R.S. § 36-136(D) and 9 A.A.C. 8; and
2. During the inspection, observed a possible violation of A.R.S. § 36-601.01.

C. Within 15 days after receipt of a complaint made according to subsection (A), the Department or the Department's designee shall:

1. Notify the proprietor at the public place or place of employment about the complaint; or

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2. Conduct an inspection, for compliance with A.R.S. § 36-601.01, of the public place or place of employment.
- D.** If a complaint made according to subsection (A) is not resolved under subsection (C)(1), the Department or the Department's designee shall conduct an inspection, for compliance with A.R.S. § 36-601.01, of the public place or place of employment that is the subject of the complaint.

R9-2-110. Repealed Determination of Violation

In determining whether a violation of A.R.S. § 36-601.01 has occurred, the Department or the Department's designee shall consider the following:

1. The presence of an ashtray in an area where smoking is prohibited;
2. The lack of a sign that is required under A.R.S. § 36-601.01(E) or the presence of a sign that does not meet the requirements of R9-2-105;
3. The presence of smoking;
4. The presence of tobacco ashes, cigarette butts or filters, or cigar stubs in an area where smoking is prohibited;
5. The presence of tobacco smoke that drifts into a place of employment or public place through entrances, windows, ventilation systems, or other means; and
6. Except as provided in R9-2-108(D) and R9-2-108(E), the presence of tobacco smoke within a reasonable distance from entrances, open windows, or ventilation systems.

R9-2-111. Repealed Notice of Violation; Notice of Assessment

A. After the Department or the Department's designee determines that a violation of A.R.S. § 36-601.01 has occurred, and based on the criteria in R9-2-112, the Department or the Department's designee may send to the proprietor at the place of employment or public place a written notice of violation that includes:

1. The nature of the violation;
2. The date and time that the violation occurred;
3. The name, telephone number, and e-mail address of the Department contact person or the contact person of the Department's designee; and
4. If a civil penalty is being assessed, a notice of assessment.

B. If the Department or the Department's designee issues a notice of violation or a notice of assessment, a person to whom the notice is issued may appeal the determination that a violation has occurred or assessment of a civil penalty:

1. According to A.R.S. Title 41, Chapter 6, Article 10, if the Department made the determination or assessment; or
2. According to procedures of the Department's designee that are consistent with A.R.S. Title 41, Chapter 6, Article 10, if the Department's designee made the determination or assessment.

R9-2-112. Criteria for Issuing a Notice of Violation or Notice of Assessment

In determining whether to issue a notice of violation under A.R.S. § 36-601.01(G)(5), whether to issue a notice of assessment under A.R.S. § 36-601.01(G)(6), or the amount of a civil penalty that is being assessed, the Department or the Department's designee shall consider:

1. The seriousness of the violation;
2. Any economic benefit that results from the violation;
3. The duration of the violation;
4. The previous violations of A.R.S. § 36-601.01 at the place of employment or public place, including:
 - a. The type and severity of any previous violation,
 - b. The number of individuals affected by the previous violations,
 - c. The total number of previous violations, and
 - d. The length of time from the first violation to the current violation;
5. Any good faith efforts to comply with the requirements of A.R.S. § 36-601.01, including:
 - a. Reporting violations to the Department or the Department's designee; and
 - b. Meeting the requirements of A.R.S. § 36-601.01(I) by:
 - i. Informing an individual who is smoking that smoking is illegal, and
 - ii. Requesting that the individual immediately stop the illegal smoking; and
6. Other factors affecting the public health and safety the Department or the Department's designee deems relevant.