



Ways & Means

Hookah Bars and
New York's
Clean Indoor Air Act

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Public Health and Tobacco Policy Center

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This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.

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What is a hookah?

A “**hookah**,” also known as a narghile or shisha, is a water pipe used to smoke tobacco, a practice begun over four centuries ago in the Middle East and Northern Africa.

Hookah tobacco, sometimes known as shisha, is very moist and usually sweetened with either molasses or fruit. Because the tobacco doesn’t remain lit independently, smoking a hookah requires a piece of lit charcoal to be placed on top of the tobacco, usually with a perforated piece of aluminum foil sandwiched between the two.¹

Hookah bars are growing in popularity throughout the U.S., particularly in cities and near college campuses.

Is hookah smoking safer than cigarette smoking?

NO. Don’t be fooled. There is a common misconception that hookah smoking is safer and less addictive than cigarette smoking. For example, some may think that the water at the bottom of the pipe “filters” the toxins out of the smoke, thereby making hookah smoking safer than cigarette smoking.² In one survey of U.S. college students, 37% of participants incorrectly believed hookah smoking to be less harmful than cigarette smoking.³

Hookah smoking is not safer than cigarette smoking. Hookah smokers inhale high levels of nicotine, carbon monoxide, tar, and other hazardous substances.⁴ The smoker also inhales charcoal combustion products.⁵ Hookahs require smokers to inhale more deeply than cigarettes, so smokers may inhale the equivalent of 100 or more cigarettes in one session with a hookah.⁶

Additionally:

- Hookah smokers are exposed to doses of nicotine sufficient to cause addiction.⁷
- A one hour hookah use session generates second-hand smoke that contains carcinogens and toxicants equal to the amount generated by 2-10 cigarette smokers.⁸
- Infectious disease can be spread if the hookah is not cleaned properly.

“Contrary to ancient lore and popular belief, the smoke that emerges from a waterpipe contains numerous toxicants known to cause lung cancer, heart disease, and other diseases.”

World Health Organization (2005)

Are hookah bars restricted by New York State’s smoke-free law?

YES. Generally, a hookah bar cannot allow the smoking of tobacco products in its establishment. The state’s Clean Indoor Air Act (CIAA) prohibits smoking in indoor public places and places of employment.⁹ Its definition of “smoking” prohibits “the burning of . . . any matter or substance that contains tobacco.” This includes burning tobacco in hookahs.

HOWEVER, Hookah bars still exist in New York, often claiming to fall under an exemption to the CIAA. Some incorrectly assert that, because there's no specific reference to "hookahs" in the legislation itself, the Clean Indoor Air Act does not apply to hookah bars.¹⁰ Some hookah bars also claim to be covered by either an exemption or a waiver.¹¹

Claimed Exemptions

Retail Tobacco Shops

CLAIM

Businesses that primarily sell tobacco products and related accessories are exempt from the CIAA's indoor smoking prohibition. The act requires retail tobacco sales to be the "primary activity" of the business to the extent that sales of other products are merely "incidental."¹²

Since hookah bars often serve food and drinks, it should not be presumed that a hookah bar falls into the category of "retail tobacco shops."

Cigar Bars

CLAIM

Businesses that generate more than ten percent of their total annual gross income from the on-site sale of tobacco products are exempt from the CIAA's indoor smoking prohibition.¹³ However, only businesses that have not changed size or location since December 31, 2002 qualify for this exemption.

Although this exemption was intended for "cigar bars," a small number of hookah bars that have been in operation since 2002 qualify for this exemption.

Hookah bars often do not qualify for any exemption to the CIAA. If these hookah bars are permitting smoking, contact local enforcement authorities.

Non-Tobacco Products

CLAIM

Some bars sell only non-tobacco shisha, which may not be covered in the CIAA's definition of "smoking."

These non-tobacco hookah bars create enforcement problems because it is difficult for officers to determine whether the products being smoked contain tobacco or not.

The Adolescent Tobacco Use and Prevention Act

New York's Adolescent Tobacco Use and Prevention Act (ATUPA) prohibits the sale of tobacco products, herbal cigarettes, shisha, rolling papers, electronic cigarettes, and smoking paraphernalia to people less than 18 years of age.¹⁴ First-time violators are fined, and those who have violated the law multiple times may lose their license to sell tobacco products.

What About Hookah Bars in New York City?

Current law

New York City's Smoke-Free Air Act prohibits tobacco smoking in many public places but creates an exemption for "tobacco bars."¹⁵ A "tobacco bar" must have generated in 2001, and must continue to generate, at least 10% of its income from on-site tobacco product sales. These tobacco bars must be registered with the city's Department of Health and Mental Hygiene and cannot change their location or size.¹⁶

New York City's laws restrict the sale of flavored non-cigarette tobacco products. New York City's Administrative Code, under its *Regulation of the Sale of Herbal Cigarettes and Flavored Tobacco Products* subchapter, permits only "tobacco bars" to sell flavored tobacco products.¹⁷ The supporting Rules and Regulations specifically define flavored tobacco-containing shisha products as a "tobacco product" that can only be sold by registered tobacco bars.¹⁸ Thus, places that sell flavored tobacco-containing shisha, like hookah bars, must be a registered tobacco bar in New York City.

Proposed law

In June 2013, an amendment to New York City's Smoke-Free Air Act was proposed by New York City Council Members Gentile, James, Palma, Koppell, and King.¹⁹

The amendment would expand the Smoke-Free Air Act to prohibit the smoking of non-tobacco products in public places – including the smoking of non-tobacco shisha products. The amendment also clarifies the definition of "smoking" by specifically including the smoking of a "water pipe" and any "similar" lighted object or device. It sets up a "non-tobacco bar" registration system to allow smoking of non-tobacco products in non-tobacco smoking or hookah? bars.

Similar laws in nearby states

New Jersey's Smoke-Free Air Act is the state's clean indoor air law. It prohibits smoking of tobacco as well as "any other matter that can be smoked."²⁰

A hookah bar owner was recently convicted of violating the law by permitting hookah smoking. A New Jersey Superior Court upheld the conviction finding that the law was not "overbroad" in its prohibition of smoking non-tobacco products. The court found that there is no fundamental right to own a hookah bar and, while a person has a right to own and conduct a business, there is no constitutionally protected right to run a business that allows smoking on the premises.²¹

How Can New York Communities Help Reduce Hookah Smoking?

Enforce the law

Report violations of the Clean Indoor Air Act or local smoke-free laws. If an exemption is claimed, work with local enforcement authorities to confirm that the hookah bar qualifies for such an exemption.

Eliminate ambiguity

Ensure that the definitions of “smoking” and “smoking materials” include hookah smoking and hookahs.

Eliminate exemptions

Amend smoke-free laws to specify that the exemption for tobacco retail stores does not apply to hookah bars, or does not apply to establishments that sell food or drink for on-site consumption.

Facilitate enforcement of the law

Eliminating ambiguity and exemptions will make tobacco control laws like the CIAA easier to enforce. If public smoking of herbal shisha is not prohibited by law, require hookah bars to keep and present upon inspection clear verification of shisha ingredients.

Citations

- ¹ WORLD HEALTH ORGANIZATION STUDY GROUP ON TOBACCO PRODUCT REGULATION (WHO), WATERPIPE TOBACCO SMOKING: HEALTH EFFECTS, RESEARCH NEEDS AND RECOMMENDED ACTIONS BY REGULATORS 2 (2005).
- ² AMERICAN LUNG ASSOCIATION, AN EMERGING DEADLY TREND: WATERPIPE TOBACCO USE (February 2007), available at http://slati.lungusa.org/reports/Trend%20Alert_Waterpipes.pdf.
- ³ Smith et. al, *Harm perception of nicotine products in college freshmen*, 9 NICOTINE TOB. RES. 977 (2007).
- ⁴ AMERICAN CANCER SOCIETY, QUESTIONS ABOUT SMOKING AND HEALTH 14 (Jan. 17, 2013), <http://www.cancer.org/acs/groups/cid/documents/webcontent/002974-pdf.pdf>.
- ⁵ WHO, supra note 1, at 2
- ⁶ *Id.* at 3.
- ⁷ *Id.*
- ⁸ Daher N et al., *Comparison of carcinogen, carbon monoxide, and ultrafine particle missions from narghile waterpipe and cigarette smoking: Sidestream smoke measurements and assessment of second-hand smoke emission factors* (2010), 44(1) ATMOS ENVIRON. 8 (2010).
- ⁹ N.Y. Pub. Health Law § 1399-n *et seq.*
- ¹⁰ Alysia Santo, *Youth Hookah Trend Catches Fire*, THE BROOKLYN INK (Oct. 14, 2010) (quoting Josephine Beckman, the district manager of Community Board 10 in Brooklyn, as saying “[C]an you ENFORCE if an establishment is selling to minors under the clean air act, and the answer turned out to be no. We can’t use what is on the books because the word hookah is missing.”).
- ¹¹ The CIAA allows for enforcement officers to grant waivers from the law’s requirements in certain circumstances. N.Y. PUB. HEALTH LAW § 1399-u (2010). The list of establishments that have been granted waivers is available here: http://www.health.state.ny.us/prevention/tobacco_control/clean_indoor_air_act/decisions.htm
- ¹² N.Y. PUB. HEALTH LAW §§ 1399-n, 1399–q (2010).
- ¹³ N.Y. PUB. HEALTH LAW § 1399-n(5) (2010).
- ¹⁴ N.Y. PUB. HEALTH LAW § 1399-aa *et seq.*
- ¹⁵ NEW YORK CITY, N.Y. CODE § 17-503(20)(b)(A) (2010).
- ¹⁶ NEW YORK CITY, N.Y. CODE § 17-502 (2010).
- ¹⁷ NEW YORK CITY, N.Y. CODE § 17-715 (2010); NEW YORK CITY, N.Y. RULES, Tit. 24, § 28-02 (2010).
- ¹⁸ NEW YORK CITY, N.Y. RULES, Tit. 24, § 28-01(p) (2010).
- ¹⁹ New York City Council Legislation Text, File #: Int. 0386a-2013 (Introduced 2013).
- ²⁰ N.J. STAT. ANN. § 26:3D-57 (2010).
- ²¹ *New Jersey v. Badr*, 2 A.3d 436 (N.J. Super. Ct. App. Div. 2010).



Providing legal expertise to support policies benefiting the public health.

The Public Health and Tobacco Policy Center is a legal research Center within the Public Health Advocacy Institute. Our shared goal is to support and enhance a commitment to public health in individuals and institutes who shape public policy through law. We are committed to research in public health law, public health policy development; to legal technical assistance; and to collaborative work at the intersection of law and public health. Our current areas of work include tobacco control and childhood obesity and chronic disease prevention. We are housed in Northeastern University School of Law.

What we do

Research & Information Services

- provide the latest news on tobacco and public health law and policy through our legal and policy reports, fact sheets, quarterly newsletters, and website

Policy Development & Technical Assistance

- respond to specific law and policy questions from the New York State Tobacco Control Program and its community coalitions and contractors, including those arising from their educational outreach to public health officials and policymakers
- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

Education & Outreach

- participate in conferences for government employees, attorneys, and advocates regarding critical initiatives and legal developments in tobacco and public health policy
- conduct smaller workshops, trainings webinars, and presentations focused on particular policy areas
- impact the development of tobacco law through *amicus curiae* ("friend of the court") briefs in important litigation

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www.tobaccopolicycenter.org

The Center's website provides information about recent tobacco news and case law, New York tobacco-related laws, and more. Current project pages include: tobacco-free outdoor areas; tobacco product taxation; smoke-free multiunit housing; and retail environment policies. The website also provides convenient access to reports, model policies, fact sheets, and newsletters released by the Center.

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The Center is funded to support the New York State Tobacco Control Program, the New York State Cancer Prevention Program and community coalitions and educators. The Center also assists local governments and other entities as part of contractor-submitted requests. If we can help with a tobacco-related legal or policy issue, please contact us.

The Center provides educational information and policy support. The Center does not represent clients or provide legal advice.



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