RECOMMENDED ACTION AND JUSTIFICATION: (Policy Item: Yes ___ No x ___)

Information regarding new State Law AB 13 "Occupational Safety and Health: Tobacco Products" and how it may impact in Mariposa County; designation of County agency or agencies to assume responsibility for implementation of this State Law.

See attached memo.

BACKGROUND AND HISTORY OF BOARD ACTIONS:

The Board previously adopted Chapters 8.24 and 9.20 of County Code which prohibit smoking under certain conditions where it may pose a fire hazard and which regulates smoking in certain public areas, but is generally less stringent than the new State Law.

LIST ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:

1. There will be no local agency to provide information to businesses effected by this State Law which may pose some risk to the businesses via action by Cal-OSHA.

2. County may be in violation of this State Law having failed to designate an enforcement agency.

3. Members of the public may be exposed to environmental tobacco smoke at a level beyond the state-wide standard set by the new State Law.
MARIPOSA COUNTY BOARD OF SUPERVISORS

MINUTE ORDER

TO: DR. CHARLES MOSHER, County Health Officer
FROM: MARGIE WILLIAMS, Clerk of the Board

SUBJECT: Information Re AB 13 "Occupational Safety and Health: Tobacco Products" Resolution Number 95-5

THE BOARD OF SUPERVISORS OF MARIPOSA COUNTY, CALIFORNIA,

ADOPTED THIS Order on January 3, 1995

ACTION AND VOTE:

9:16 a.m. Dr. Charles Mosher, County Health Officer; Information Regarding New State Law AB 13 "Occupational Safety and Health: Tobacco Products" and the Impact in Mariposa County; and Designation of County Agency or Agencies to Assume Responsibility for Implementation of this State Law

BOARD ACTION: Discussion was held. Dr. Mosher advised that he felt notification costs could come from Proposition 99/Tobacco Tax revenue, and that implementation of this law would be a small burden with few complaints. Motion by Balmain, died for lack of a second, to designate the Health Department as the agency responsible for implementation of this State law, directing that employers be advised through the news media and complaints be handled pursuant to the County complaint process with any arrest(s) that may be involved to be handled by the Sheriff Department; and to respond to State legislation through California State Association of Counties (CSAC) objecting to unfunded mandates such as this and the placing of a further burden on employers. Supervisor Reilly requested that information sheets be available to those who inquire about this law. Following further discussion, Supervisor Balmain restated his previous motion and it was seconded by Supervisor Reilly, with amendment to delete direction to contact CSAC to object to unfunded mandates/Ayes: Reilly, Balmain, Stewart, Parker; Abstained: Taber.

cc: Roger Matlock, Sheriff
File
December 21, 1994

TO : Board of Supervisors

FROM : Charles B. Mosher, MD, Health Officer

SUBJECT: Implementation of State Law AB 13

Earlier this year the State Assembly passed, and the Governor signed into law, AB 13 "Occupational Safety and Health: Tobacco Products". The Phillip Morris Tobacco Company launched an attempt to block implementation of AB 13 (and local ordinances pertaining to regulation of smoking in public places) via State Proposition 188. California voters rejected Proposition 188. Therefore, AB 13 must be implemented. The statutory date of implementation is January 1, 1995.

Action sought from the Board of Supervisors in regard to AB 13 is designation of which local agency(s) shall implement and enforce AB 13 in Mariposa County.

Background information on this law is attached for your information. A very brief overview is as follows:

1. This State Law prohibits smoking of tobacco products in "an enclosed space at a place of employment"; it is designed to protect employees (rather than customers). In this regard, it is different from most laws regulating smoking.

2. The employer has the responsibility to take "reasonable steps" to prevent smoking by employees and non-employees including:
   a. Posting of signs.
   b. Requesting, when appropriate, that people refrain from smoking in the workplace.
3. The definition of "enclosed space at a place of employment" is very broadly interpreted in all the information we've seen as any place of employment with walls and a ceiling (see the California League of Cities memo, attached). There is, however, a long list of exceptions to the definition of place of employment within the law. These are listed under 6404.5(d) of the law and items C1 through C14 of the California League of Cities memo.

4. Penalties for violations are laid out in the law and are of two natures:
   a. Fines of $100, $200, and $500 sequentially, and
   b. Possible action by Cal-OSHA if there have been three violations at any place of employment within the previous year.

5. AB 13 will not automatically repeal any local ordinance which controls smoking in public places, but mandates that the more stringent requirements of either AB 13 or local ordinances will apply. With regard to Mariposa County's current ordinances governing smoking, AB 13 is almost uniformly more stringent with the following exceptions:
   a. County Chapter 8.24 prohibits smoking on other people's property where such smoking may pose a fire hazard.
   b. County Chapter 9.20 defines vehicles as an enclosed County workplace, thereby, prohibiting smoking in County vehicles but allows department heads to designate a smoking vehicle.
   c. County Chapter 9.20 prohibits smoking in child day care facilities.

Local business owners will probably need some assistance with understanding the implementation of this State Law. The County can assist them best by getting out information regarding this State Law as soon as possible, and by designating the local agency or agencies which will be responsible for implementation and enforcement of the State Law.
According to the law, (Section 6404.5(j)), AB 13 "shall be enforced by local law enforcement agencies including, but not limited to, local Health Departments, as determined by the local governing body". Agencies that have been mentioned as appropriate for designation as the enforcement agency of this law include a City Manager's Office, a Police Department, a Health Department, and/or a Department of Environmental Health or some combination of these departments.

Encl
Assembly Bill No. 13

CHAPTER 310

An act to add Section 6404.5 to the Labor Code, relating to occupational safety and health.

[Approved by Governor July 21, 1994. Filed with Secretary of State July 21, 1994.]

LEGISLATIVE COUNSEL'S DIGEST


The existing California Occupational Safety and Health Act of 1973, administered and enforced by the Division of Occupational Safety and Health within the Department of Industrial Relations, prohibits any employer from occupying or maintaining any place of employment that is not safe and healthful. It also provides, under specified circumstances, for misdemeanor penalties with respect to violations of the act, except where another penalty is specifically provided.

This bill would additionally prohibit any employer from knowingly or intentionally permitting, or any person from engaging in, the smoking of tobacco products in an enclosed space at specified places of employment. The bill would specify that, for purposes of these provisions, "place of employment" does not include certain portions of a hotel, motel, or other lodging establishments, meeting or banquet rooms subject to certain exceptions, retail or wholesale tobacco shops, private smoker's lounges, cabs of motortrucks or truck tractors as specified, bars and taverns and gaming clubs subject to certain prescribed conditions, warehouse facilities, theatrical production sites, and medical research or treatment sites, employee breakrooms under prescribed conditions, patient smoking areas in long-term health care facilities, as defined, and specified smoking areas designated by employers with fewer than 5 employees. It would also specify that, for purposes of these provisions, an employer who permits any nonemployee access to his or her place of employment on a regular basis has not acted knowingly or intentionally if he or she has taken certain reasonable steps to prevent smoking by a nonemployee.

This bill would also specify that the smoking prohibition set forth in these provisions shall constitute a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment, and shall supersede and render unnecessary specified local ordinances regulating the smoking of tobacco products in enclosed places of employment.

This bill would additionally provide that a violation of the smoking prohibition set forth in these provisions is an infraction punishable by
specified fines. It would further provide that the smoking prohibition shall be enforced by local law enforcement agencies, as specified, but would specify that the division shall not be required to respond to any complaint regarding a violation of the smoking prohibition, unless the employer has been found guilty of a 3rd violation of the smoking prohibition within the previous year. By establishing a new prohibition the provision of which is, under specified circumstances, an infraction, this bill would create a new crime and would thereby establish a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 6404.5 is added to the Labor Code, to read:

6404.5. (a) The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions. Notwithstanding any other provision of this section, it is the intent of the Legislature that any area not defined as a “place of employment” pursuant to subdivision (d) or in which the smoking of tobacco products is not regulated pursuant to subdivision (e) shall be subject to local regulation of smoking of tobacco products.

(b) No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment.

(c) For purposes of this section, an employer who permits any nonemployee access to his or her place of employment on a regular basis has not acted knowingly or intentionally if he or she has taken the following reasonable steps to prevent smoking by a nonemployee:

(1) Posted clear and prominent signs, as follows:

(A) Where smoking is prohibited throughout the building or structure, a sign stating “No smoking” shall be posted at each entrance to the building or structure.

(B) Where smoking is permitted in designated areas of the building or structure, a sign stating “Smoking is prohibited except in designated areas” shall be posted at each entrance to the building or structure.

(2) Has requested, when appropriate, that a nonemployee who is smoking refrain from smoking in the enclosed workplace.

For purposes of this subdivision, “reasonable steps” does not include (A) the physical ejection of a nonemployee from the place of employment or (B) any requirement for making a request to a nonemployee to refrain from smoking, under circumstances involving a risk of physical harm to the employer or any employee.

(d) For purposes of this section, “place of employment” does not include any of the following:

(1) Sixty-five percent of the guest room accommodations in a hotel, motel, or similar transient lodging establishment.

(2) Areas of the lobby in a hotel, motel, or other similar transient lodging establishment designated for smoking by the establishment. Such an establishment may permit smoking in a designated lobby area that does not exceed 25 percent of the total floor area of the lobby or, if the total area of the lobby is 2,000 square feet or less, that does not exceed 50 percent of the total floor area of the lobby. For purposes of this paragraph, “lobby” means the common public area of such an establishment in which registration and other similar or related transactions, or both, are conducted and in which the establishment’s guests and members of the public typically congregate.

(3) Meeting and banquet rooms in a hotel, motel, other transient lodging establishment similar to a hotel or motel, restaurant, or public convention center, except while food or beverage functions are taking place, including setup, service, and cleanup activities, or when the room is being used for exhibit purposes. At times when smoking is not permitted in such a meeting or banquet room pursuant to this paragraph, the establishment may permit smoking in corridors and prefunction areas adjacent to and serving the meeting or banquet room if no employee is stationed in that corridor or area on other than a passing basis.

(4) Retail or wholesale tobacco shops and private smokers’ lounges. For purposes of this paragraph:

(A) “Private smokers’ lounge” means any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes.

(B) “Retail or wholesale tobacco shop” means any business establishment the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and
smoking accessories.

(5) Cabs of motor trucks, as defined in Section 410 of the Vehicle Code, or truck tractors, as defined in Section 655 of the Vehicle Code, if no nonsmoking employees are present.

(6) Warehouse facilities. For purposes of this paragraph, "warehouse facility" means a warehouse facility with more than 100,000 square feet of total floor space, and 20 or fewer full-time employees working at the facility, but does not include any area within such a facility that is utilized as office space.

(7) Gaming clubs, in which smoking is permitted by subdivision (f). For purposes of this paragraph, "gaming club" means any gaming club as defined in Section 19692 of the Business and Professions Code or bingo facility as defined in Section 326.5 of the Penal Code that restricts access to minors under 18 years of age.

(8) Bars and taverns, in which smoking is permitted by subdivision (f). For purposes of this paragraph, "bar" or "tavern" means a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental. "Bar or tavern" includes those facilities located within a hotel, motel, or other similar transient occupancy establishment. However, when located within a building in conjunction with another use, including a restaurant, "bar" or "tavern" includes only those areas used primarily for the sale and service of alcoholic beverages. "Bar" or "tavern" does not include the dining areas of a restaurant, regardless of whether alcoholic beverages are served therein.

(9) Theatrical production sites, if smoking is an integral part of the story in the theatrical production.

(10) Medical research or treatment sites, if smoking is integral to the research and treatment being conducted.

(11) Private residences, except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present.

(12) Patient smoking areas in long-term health care facilities, as defined in Section 1418 of the Health and Safety Code.

(13) Breakrooms designated by employers for smoking, provided that all of the following conditions are met:

(A) Air from the smoking room shall be exhausted directly to the outside by an exhaust fan. Air from the smoking room shall not be recirculated to other parts of the building.

(B) The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency. If both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

(C) The smoking room shall be located in a nonwork area where no one, as part of his or her work responsibilities, is required to enter. For purposes of this paragraph, "work responsibilities" does not include any custodial or maintenance work carried out in the breakroom when it is unoccupied.

(D) There are sufficient nonsmoking breakrooms to accommodate nonsmokers.

(14) Employers with a total of five or fewer employees, either full-time or part-time, may permit smoking where all of the following conditions are met:

(A) The smoking area is not accessible to minors.

(B) All employees who enter the smoking area consent to permit smoking. No one, as part of his or her work responsibilities, shall be required to work in an area where smoking is permitted. An employer who is determined by the division to have used coercion to obtain consent or who has required an employee to work in the smoking area shall be subject to the penalty provisions of Section 6427.

(C) Air from the smoking area shall be exhausted directly to the outside by an exhaust fan. Air from the smoking area shall not be recirculated to other parts of the building.

(D) The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency. If both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

This paragraph shall not be construed to (i) supersede or render inapplicable any condition or limitation on smoking areas made applicable to specific types of business establishments by any other paragraph of this subdivision or (ii) apply in lieu of any otherwise applicable paragraph of this subdivision that has become inoperative.

(e) Paragraphs (13) and (14) of subdivision (d) shall not be construed to require employers to provide reasonable accommodation to smokers, or to provide breakrooms for smokers or nonsmokers.

(f) (1) Except as otherwise provided in this subdivision, smoking may be permitted in gaming clubs, as defined in paragraph (7) of subdivision (d), and in bars and taverns, as defined in paragraph (8) of subdivision (d), until the earlier of the following:

(A) January 1, 1997.

(B) The date of adoption of a regulation (i) by the Occupational Safety and Health Standards Board reducing the permissible employee exposure level to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees or (ii) by the federal Environmental.
Protection Agency establishing a standard for reduction of permissible exposure to environmental tobacco smoke to an exposure level that will prevent anything other than insignificantly harmful effects to exposed persons.

(2) If a regulation specified in subparagraph (B) of paragraph (1) is adopted on or before January 1, 1997, smoking may thereafter be permitted in gaming clubs and in bars and taverns, subject to full compliance with, or conformity to, the standard for the period of time specified in the regulation within two years following the date of adoption of the regulation. An employer failing to achieve compliance with, or conformity to, such a regulation within this two-year period shall prohibit smoking in the gaming club, bar, or tavern until compliance or conformity is achieved. If the Occupational Safety and Health Standards Board and the federal Environmental Protection Agency both adopt regulations specified in subparagraph (B) of paragraph (1) that are inconsistent, the regulations of the Occupational Safety Standards Board shall be no less stringent than the regulations of the federal Environmental Protection Agency.

(3) If a regulation specified in subparagraph (B) of paragraph (1) is not adopted on or before January 1, 1997, the exemptions specified in paragraphs (7) and (8) of subdivision (d) shall be inoperative on and after January 1, 1997, until such a regulation is adopted. Upon adoption of such a regulation on or after January 1, 1997, smoking may thereafter be permitted in gaming clubs and in bars and taverns, subject to full compliance with, or conformity to, the standard in the regulation within two years following the date of adoption of the regulation. An employer failing to achieve compliance with, or conformity to, such a regulation within this two-year period shall prohibit smoking in the gaming club, bar, or tavern until compliance or conformity is achieved. If the Occupational Safety and Health Standards Board and the federal Environmental Protection Agency both adopt regulations specified in subparagraph (B) of paragraph (1) that are inconsistent, the regulations of the Occupational Safety Standards Board shall be no less stringent than the regulations of the federal Environmental Protection Agency.

(g) The smoking prohibition set forth in this section shall constitute a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment and shall supersede and render unnecessary the local enactment or enforcement of local ordinances regulating the smoking of tobacco products in enclosed places of employment. Insofar as the smoking prohibition set forth in this section is applicable to all (100 percent) of places of employment within this state and, therefore, provides the maximum degree of coverage, the practical effect of this section is to eliminate the need of local governments to enact enclosed workplace smoking restrictions within their respective jurisdictions.

(h) Nothing in this section shall prohibit an employer from prohibiting smoking in an enclosed place of employment for any reason.

(i) The enactment of local regulation of smoking of tobacco products in enclosed places of employment by local governments shall be suspended only for as long as, and to the extent that, the (100 percent) smoking prohibition provided for in this section remains in effect. In the event this section is repealed or modified by subsequent legislative or judicial action so that the (100 percent) smoking prohibition is no longer applicable to all enclosed places of employment in California, local governments shall have the right and authority to enforce previously enacted, and to enact and enforce new, restrictions on the smoking of tobacco products in enclosed places of employment within their jurisdictions, including a complete prohibition of smoking. Notwithstanding any other provision of this section, any area not defined as a "place of employment" or in which the smoking is not regulated pursuant to subdivision (d) or (e), shall be subject to local regulation of smoking of tobacco products.

(j) Any violation of the prohibition set forth in subdivision (b) is an infraction subject to subdivision (d) of Section 17 of the Penal Code and, notwithstanding Section 19.8 of the Penal Code, is punishable by a fine not to exceed one hundred dollars ($100) for each first violation, two hundred dollars ($200) for a second violation within one year, and five hundred dollars ($500) for a third and for each subsequent violation within one year. This subdivision shall be enforced by local law enforcement agencies including, but not limited to, local health departments, as determined by the local governing body.

(k) Notwithstanding Section 6300, the division shall not be required to respond to any complaint regarding the smoking of tobacco products in an enclosed space at a place of employment, unless the employer has been found guilty pursuant to subdivision (i) or a third violation of subdivision (b) within the previous year.

(l) If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision of application, and to this end the provisions of this act are severable.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.
A GUIDE TO UNDERSTANDING AB 13 (T. FRIEDMAN)
Chapter 310, Statutes of 1994
Smoking in Enclosed Places of Employment
(Labor Code Section 6404.5)
August 1994

I. INTRODUCTION

On July 21, 1994, the Governor signed AB 13 (T. Friedman -- Chapter 310, Statutes of 1994), which generally prohibits smoking in enclosed places of employment. Unless preempted by the passage of Proposition 188 in November, AB 13 will go into effect January 1, 1995. The purpose of this Guide is to provide an explanation of the provisions of AB 13 and to answer commonly asked questions about the measure. A copy of the text of AB 13 is attached. While the League has prepared this Guide to provide a general explanation of the measure, it is not meant to be a legal interpretation of the law. Therefore, we encourage individual cities to work with their city attorneys to interpret specific sections and to evaluate how the measure may relate to their existing or new smoking ordinances.

II. OVERVIEW OF KEY PROVISIONS

In general, AB 13 prohibits smoking in all enclosed places of employment, with the exception of fourteen specified areas not included in the definition of place of employment. Enforcement of AB 13 is by local law enforcement agencies, including but not limited to local health departments, as determined by the local governing body. AB 13 supersedes existing local ordinances regarding smoking in the workplace which are weaker than the standard established in AB 13. However, existing stronger ordinances remain in effect. Also, AB 13 authorizes local governments to enact new ordinances that are stronger than the standard established in AB 13. In addition, AB 13 does not prevent cities and counties from regulating smoking and tobacco in other areas not covered by the workplace regulations, such as outdoor restaurants, stadiums, other outdoor areas, juvenile access, or tobacco vending machines.

All sections of AB 13 refer to the Labor Code.
III. SUMMARY OF KEY PROVISIONS

A. No Smoking in An Enclosed Place of Employment (Section 6404.5(b))

The heart of AB 13 is Section 6404.5(b) of the Labor Code, which reads: "No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment." According to Section 6303 of the Labor Code, "Place of employment' means any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division." (The exception referred to in the definition is generally any place regulated by Federal law.)

Basically, an "enclosed" place of employment is any place of employment with walls and a ceiling. Partitioned, individual offices within a larger office space are included, since they are within a larger building. Individual offices with doors within a larger office space are included, since they are within a larger building. Outdoor patios, outdoor stadiums, outdoor malls, parks or other non-enclosed places of employment are not covered by AB 13, since they do not have walls and a ceiling surrounding them. Therefore, AB 13 permits smoking in these areas, unless the local government decides to regulate them.

B. Local Control (Sections 6404.5(a),(g),(i))

AB 13 establishes a minimum statewide standard for smoking in enclosed places of employment. However, any area not covered by the 100 percent prohibition (i.e., an area not included in the definition of place of employment) may be regulated by the local government. This may be part of an existing ordinance, or a new ordinances. When reading AB 13, it is important to read the entire bill in order to understand how it relates to local regulatory authority.

AB 13 specifies fourteen areas that are excluded from the definition of "place of employment." The effect of this is that those excluded areas itemized in subsection (d) of the bill (and described below in Section C of the Guide) are not covered by the 100 percent smoking prohibition. Although the language of AB 13 may appear confusing, it was drafted this way to make clear that any area not defined as a place of employment is subject to regulation by local government.

The key local control (or "anti-preemption") language in AB 13 that authorizes cities and counties to enact local ordinances regarding smoking in areas left unregulated by AB 13 (i.e. indoor areas not included in the definition of "place of employment", outdoor areas, or tobacco vending machines) is found in subsection (i). It states: "Notwithstanding (emphasis added) any other provision of this section, any area not defined as a "place of
employment" or in which smoking is not regulated pursuant to subdivision (d) or (e), shall be subject to local regulation of tobacco." The use of the term "notwithstanding" signifies that in spite of any provisions elsewhere in the bill, local governments can regulate any area not defined as a place of employment. This far sweeping authority is included Section (a) of the bill, which lays out the legislative intent of AB 13.

An example of how local governments can regulate areas not included in the definition of place of employment are hotel/motel sleeping rooms. AB 13 permits smoking in sixty-five percent of sleeping rooms, because sixty-five percent are excluded from the definition of place of employment. A local government could regulate this area by providing that smoking is permitted in only fifty percent of sleeping rooms. Similarly, AB 13 permits smoking in bars until 1997, or when the EPA or Cal-OSHA develop appropriate ventilation standards and the bar complies with that standard. However, the local control provisions of AB 13 authorize the city or county to prohibit smoking completely in bars regardless of the ventilation standard, if they so desire.

Although subsection (g) of AB 13 expresses a statewide preemption in the area of worker safety, subsection (i) goes on to state that local enactment of smoking regulations in enclosed places of employment is suspended "only for as long as, and to the extent that the (100 percent) smoking regulation" included in AB 13 remains in effect. If subsequent legislation or judicial review repeals or modifies the 100 percent prohibition so that it is no longer in effect, AB 13 states that "...local governments shall have the full right and authority to enforce previously enacted, and to enact and enforce new, restrictions on smoking of tobacco products in enclosed places of employment within their jurisdictions, including a complete prohibition of smoking."

C. Exceptions to Definition of Place of Employment (Section 6404.5(d))

As mentioned previously, AB 13 includes fourteen exceptions or areas not included in the definition of place of employment. These are described generally below. Please refer to the specific language for each exception on the attached copy of AB 13. The numbers refer to paragraphs in Section 6404.5(d) (Remember, any area not included in the definition of place of employment may be regulated by local ordinances.)

1. Hotel/Motel Guest Rooms: Sixty-five percent of guest rooms in a hotel, motel or similar transient lodging establishment may be set aside for smokers. This means that at least thirty-five percent of hotel/motel sleeping rooms must be non-smoking rooms.

2. Hotel/Motel Lobbies: Smoking is permitted in a designated hotel/motel lobby area that does not exceed 25 percent of the total floor area of the lobby, or, if the total area of the lobby is 2,000 square feet or less, that does not exceed 50 percent of the total floor area of the lobby. Lobby means the common public area of a hotel/motel in which registration and other similar activities are
conducted and in which the establishment's guests and members of the public congregate.

3. **Meeting and Banquet Rooms:** Smoking is permitted in meeting and banquet rooms only during private functions in a hotel, motel or other transient lodging establishment similar to a hotel, motel, restaurant, or public convention center. However, smoking is not permitted when food or beverage functions are taking place, including setup, service and cleanup activities, or when the room is used for exhibit purposes. At a time when smoking is not permitted, the establishment may permit smoking in corridors and pre-function areas adjacent to and serving the meeting or banquet room if no employee is stationed in that corridor or area, other than on a passing basis.

Thus, if a hotel, motel, restaurant or convention center has meeting or banquet rooms, smoking is permitted except during food or beverage service, which includes setup and cleanup.

4. **Tobacco Shops/Smokers’ Lounges:** Smoking is permitted in any business whose main purpose is the sale of tobacco products and accessories. Smoking also is permitted in any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products.

5. **Truck Cabs:** Smoking is permitted in the cabs of motortrucks or truck tractors, if no nonsmoking employees are present.

6. **Warehouse Facilities:** Smoking is permitted in a warehouse facility, defined as a warehouse with more than 100,000 square feet of total floor space and 20 or fewer full-time employees working at the facility. However, smoking is not permitted in any area within such a facility that is utilized as office space.

7. **Gaming and Bingo Clubs:** Smoking is permitted in gaming clubs if the establishment complies with specified ventilation standards, described below in section 8a. A gaming club is defined according to Section 19802 of the Business and Professions Code; a bingo facility is defined according to Section 326.5 of the Penal Code that restricts access to minors under the age of 18.

8. **Bars and Taverns:** Smoking is permitted in bars and taverns if they meet the ventilation standards described below in Section 8a. For the purposes of AB 13, a bar or tavern means a facility primarily devoted to the serving of alcoholic beverages, in which the serving of food is incidental. A bar or tavern can be freestanding, but also includes those facilities located within a hotel or motel or other transient occupancy establishment. When a bar or tavern is located in conjunction with another use, such as a restaurant, the definition of bar or tavern applies only to those areas used primarily for the sale and service of alcoholic
beverages. Bar or tavern does not include the dining areas of a restaurant, regardless of whether alcohol is served in them. A bar that is part of a restaurant must comply with the ventilation criteria described below.

a. Ventilation Standards for Gaming Clubs and Bars: AB 13 permits smoking in gaming clubs (as described in 7) and bars/taverns (as described in 8), until the earlier of the following: (1) January 1, 1997; or, (2) the date of adoption of regulations by the Occupational Safety and Health Standards Board (Cal-OSHA) or the Federal EPA reducing the permissible employee exposure level to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees. If such a regulation is adopted on or before January 1, 1997, smoking is permitted in gaming clubs and bars, if they fully comply with the regulations within two years of adoption of the regulations. If the two agencies adopt inconsistent regulations, the stricter regulation prevails.

If a ventilation standard is not adopted by January 1, 1997, AB 13 prohibits smoking in gaming clubs and bars. This prohibition remains until a regulation is adopted. If a regulation is adopted after January 1, 1997, an establishment has two years in which to come into full compliance with the ventilation regulation. During that time, smoking would be permitted. If the establishment fails to come into full compliance during that two year period, then smoking would be prohibited. (It is important to remember that in spite of these provisions of AB 13, if a city wishes to prohibit smoking in gaming clubs and bars, even with a ventilation standard, it may do so.)

9. Theatrical Productions: Smoking is permitted at theatrical production sites (movie and television production sets and live theater) if smoking is an integral part of the story.

10. Medical Research/Treatment Sites: Smoking is permitted at medical research or treatment sites if smoking is integral to the research or treatment being conducted.

11. Private Residences: Smoking is permitted in private residences, except for those residences licensed as family day care homes. In those cases, smoking is prohibited during the hours when the home is used as a family day care home and in those areas where children are present.

12. Patient Smoking Areas: Smoking is permitted in patient smoking areas of long-term health care facilities, as defined in Section 1418 of the Health and Safety Code. This generally includes any licensed facility that is a skilled nursing, intermediate care, developmentally disabled or congregate care facility.
13. **Employee Breakrooms**: Smoking is permitted in employer designated smoking rooms, provided all of the following conditions are met:

a. Air from the smoking room shall be exhausted directly to the outside. Air from the smoking room shall not be recirculated to other parts of the building.

b. The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, adopted by the Occupational Safety and Health Standards Board, or the federal EPA, whichever is stronger.

c. The smoking room shall be located in a nonwork area where no one, as part of his or her job responsibilities, is required to enter. Job responsibilities do not include any custodial or maintenance work carried out when the room is unoccupied.

d. There are sufficient nonsmoking breakrooms to accommodate nonsmoking employees.

14. **Small Businesses**: AB 13 permits smoking in places of employment with five or fewer full- or part-time employees, if all of the following conditions are met:

a. The smoking area is not accessible to minors.

b. All employees consent to smoking in the area, and such consent is not coerced.

c. Air from the smoking area is exhausted directly to the outside and is not recirculated to other parts of the building.

d. The employer complies with ventilation standards described above for breakrooms (13).

The provisions of this small business exception do not supersede or make inapplicable any other conditions applicable to other establishments, such as bars or taverns.

In interpreting the small business provision, it is important to remember that for smoking to be permitted in businesses with five or fewer employees, all four conditions must be met. The two key provisions are that the smoking area is not accessible to minors and that a ventilation system that meets specified criteria must be installed. Because the Unruh Civil Rights Act prohibits arbitrary discrimination, it is impermissible for a business to deny access to minors (unless minors may not legally participate in the business activity, such as gambling or consumption of alcohol). Thus, the operative effect of this exception is very limited.

Paragraphs 13 and 14 are not to be interpreted to require employers to provide reasonable accommodations to smokers or to provide breakrooms for smokers or nonsmokers.
AB 13 also provides that regardless of whether smoking is permitted in an area based upon the exceptions outlined in C1 through 14, employers may enact more stringent restrictions or may totally prohibit smoking in their establishments.

D. **No Smoking Signs** (Section 6404.5(b)(c))

AB 13 provides that no person shall smoke in an enclosed place of employment and employers shall not knowingly or intentionally permit smoking in an enclosed place of employment. An employer who has taken reasonable steps to prevent smoking is not liable if a nonemployee enters the place of employment and smokes. These reasonable steps include posting clear and prominent signs and where appropriate, requesting that the nonemployee refrain from smoking. Where smoking is prohibited throughout a building or structure, a sign stating, "No smoking," must be posted at each entrance to the building. Where smoking is permitted in designated areas of the building or structure, a sign stating "Smoking is prohibited except in designated areas" must be posted at each entrance to the building or structure. Reasonable steps do not include physical ejection of a non-employee, or any requirement for making a request of a nonemployee to refrain from smoking which might involve risk of physical harm to the employee or employer.

E. **Enforcement** (Section 6404.5(j)(k))

Enforcement of AB 13 shall be carried out by local law enforcement agencies including, but not limited to, local health departments, as determined by the local governing body. That is, an individual city (or county) may determine which department shall enforce the provisions of AB 13 locally. They may determine the enforcement entity to be the police department, or the city manager’s department. AB 13 clearly provides that who enforces the measure locally is to be determined by the city council (or board of supervisors).

A violation of AB 13 is an infraction subject to subdivision (d) of Section 17 of the Penal Code. It is punishable by a fine not to exceed $100 for the first violation, $200 for a second violation within one year, and $500 for a third or for each subsequent violation within one year.

Under the Labor Code, the Division of Occupational Safety and Health (Cal-OSHA) is charged with enforcing worker safety violations. Subsection (k) of AB 13 provides that Cal-OSHA must respond only after an employer has violated the bill’s provisions three times. That is, after three violations, Cal-OSHA will respond to a complaint filed by an employee of the place of employment. Also, Cal-OSHA enforcement is limited to investigation of employee complaints against employers, not citizen complaints. Therefore, Cal-OSHA will not investigate a complaint from a restaurant or hotel customer. That type of investigation is subject to local enforcement.
F. Effective Date of AB 13

AB 13 goes into effect January 1, 1995, unless Proposition 188, the Phillip Morris Tobacco Company sponsored initiative is passed by the voters in November of 1994. This measure, called the "California Uniform Tobacco Control Act", would abolish all existing and prohibit any future local smoking and tobacco control ordinances and would abolish AB 13. In their place, it would enact a smoking and tobacco control standard that is weaker than the standard established by AB 13 for enclosed places of employment and that covers areas beyond enclosed places of employment, such as tobacco vending machines and sales to minors.

IV. QUESTIONS AND DISCUSSION

This section provides a discussion of some of the most frequently asked questions regarding AB 13. While we have attempted to anticipate the types of questions cities may have about AB 13, additional questions most certainly may exist. Subsequent questions should be directed to the League's Sacramento office. In addition, specific legal questions should be referred to your city attorney.

A. How does AB 13 impact restaurants? What about a bar that is part of a restaurant?

AB 13 totally prohibits smoking in restaurants. Since restaurants are not included in any of the fourteen exclusions to the definition of "place of employment", they are covered by the 100 percent smoking prohibition.

A bar that is part of a restaurant falls under the provisions described in IIIB(8) above. Smoking is permitted in a bar that is part of a restaurant until 1997 or until the ventilation standards are adopted. After that time, smoking is permitted only if the bar complies with the ventilation standard and if the serving of food is incidental. While AB 13 does not define "incidental", the intent of the measure is to consider snacks and appetizers, but not full meals, as incidental. If the ventilation standards are not adopted by Cal-OSHA or the EPA, then after 1997 smoking is not permitted in bars attached to restaurants, unless a standard is adopted later and the establishment complies with that standard within two years. Remember, smoking is prohibited in restaurants, even if they serve alcoholic beverages.

B. What about smoking on an outside patio of a restaurant?

Because AB 13 is limited to "enclosed" places of employment, it does not address or prohibit smoking on an outdoor patio of a restaurant. This is an area that is left to local
governments to regulate. If your city already has an ordinance that prohibits smoking in outdoor restaurants, or permits smoking in only part of an outdoor restaurant, that ordinance may still be enforced. Your city may also enact a new ordinance limiting smoking in outdoor restaurants.

C. How does the exception for small businesses (five or fewer employees) work? Does it mean that smoking is permitted in a one or two person real estate office, shoe repair store or law office?

Readers should carefully review the criteria listed in IIIB(14) of this Guide and the appropriate section of the bill. All of the conditions must be met for smoking to be permitted in businesses with five or fewer employees. This includes uncoerced consent of all employees and installation of the appropriate ventilation equipment. However, the key criteria is that minors cannot be denied access to the business. Currently, under existing law, the Unruh Civil Rights Act, very few business legally can deny access to minors. These would only include bars and gambling establishments, and perhaps adult book stores. It is illegal, for example, for a real estate office to ask clients to leave their children outside and not permit the children to enter the business. Therefore, the real world application of this exception is extremely limited.

D. Our city has an ordinance which only allows smoking in ten percent of hotel/motel rooms? Can it remain in effect? We are thinking of changing our ordinance to permit smoking in seventy-five percent of hotel/motel rooms? Can we do this?

In response to the first question, yes, an existing ordinance that allows smoking in only ten percent of hotel/motel rooms can remain in effect. The first item in Section IIIB of this Guide, dealing with hotel/motel sleeping rooms, allows smoking in 65 percent of hotel/motel rooms. But, since AB 13 allows cities to regulate in areas excluded from the definition of place of employment (i.e. sixty-five percent of sleeping rooms in a hotel/motel), your city can retain its ordinance that allows smoking in only ten percent of sleeping rooms. However, you cannot change your ordinance to allow smoking in seventy-five percent of sleeping rooms and prohibit smoking in twenty-five percent of sleeping rooms. This is because it would be superseded by AB 13, which permits smoking in only sixty-five percent of sleeping rooms and prohibits smoking in thirty-five percent of rooms.

E. Our existing ordinance, which is similar but not identical to AB 13, currently is enforced by the city manager's office? Can we continue to have staff in that office enforce AB 13?
Yes. AB 13 provides that enforcement shall be by "local law enforcement agencies, including, but not, limited to, local health departments, as determined by the local governing body". Therefore, your city is not limited to using police personnel to enforce AB 13. Local law enforcement personnel is viewed broadly and is further modified by the phrases, "including but not limited to, local health departments, as determined by the governing body." The bottom line is that your city can decide who it wants to enforce AB 13. Also, Cal-OSHA's enforcement role is limited to responding to employee complaints and only after an employer has received three violations.

F. We have an existing smoking ordinance. What is its status after AB 13 goes into effect? If we don't have an existing ordinance, should we enact one that mirrors AB 13?

While AB 13 states that it constitutes a uniform statewide standard and shall supersede and render unnecessary the enactment of or enforcement of local ordinances, it also clearly states that if any of the 100 percent smoking prohibition is weakened or eliminated by legal action or future legislation, "local governments shall have the full right and authority to enforce previously enacted, and to enact and enforce new, restrictions on..." smoking in enclosed places of employment. Therefore, if your city has an existing ordinance, it is superseded by AB 13 to the extent that it regulates an "enclosed place of employment", but would once again go into effect if all or part of AB 13 is changed. Therefore, your ordinance still remains on the books. If your existing ordinance regulates areas excluded from the definition of enclosed place of employment, it is enforceable as a matter of local control. If you have an existing ordinance, you will want to keep it on the books.

A city attorney who reviewed this Guide does not see any advantage to enacting a local ordinance that mirrors AB 13. However, the decision of whether to enact an ordinance identical to the provisions of AB 13 is one best left up to each individual city and should be made after legal consultation with your city attorney.

G. Should our city enact a new ordinance that is stronger than AB 13 (i.e., covers areas that are excluded from the definition of place of employment)? That is, should we enact an ordinance that completely prohibits smoking in all bars, regardless of ventilation standards, that does not allow smoking in breakrooms or prohibits smoking in entire hotel lobbies?

While AB 13 authorizes your city to regulate in areas not defined as a place of employment, such as a bar or breakroom, the decision to enact such an ordinance should be made locally.
H. Can my city regulate smoking in outdoor stadiums, outdoor restaurants and shopping malls? Can we regulate tobacco vending machines?

Absolutely. Remember, AB 13 is limited to enclosed places of employment. Outdoor stadiums, outdoor restaurants and exterior shopping malls are not "enclosed". By definition, they are outside the scope of AB 13 and thus subject to local regulation. The same is true of regulating tobacco vending machines. They are not a place of employment and thus can be regulated by cities and counties.

V. CONCLUSION

The provisions of AB 13 are relatively straightforward. We encourage individuals to read the bill's text (attached) for a more thorough understanding of its provisions. We hope we have provided useful information so that city officials may understand how to implement AB 13. In addition, we hope we have anticipated the types of questions cities have about the measure. If you have additional questions, please contact Yvonne Hunter of the League's Sacramento office at 916/444-5790, extension 242.

Please remember, this Guide is designed to provide general information and should not be viewed as a legal interpretation of AB 13. We encourage city officials to consult with their city attorney when evaluating how AB 13 relates to local conditions.

The League can assist cities wishing to consider tobacco control in areas not covered by AB 13. Some cities, for example, have ordinances covering tobacco vending machines, outdoor eating areas or other local concerns. The League has compiled a twenty-two page matrix display, which summarizes provisions of local ordinances passed between January 1, 1991 and April 1, 1994. Copies of ordinances and of the matrix are available upon request.

The League is a partner in California Smoke-Free Cities, which also includes Americans for Nonsmokers' Rights, and the partnership's sponsor, California Healthy Cities. Funding is provided by the State Department of Health Services through revenues generated by Proposition 99 and administered by the Western Consortium for Public Health.
Assignment of Enforcement Authority and Responsibility for Labor Code 6404.5

Labor Code 6404.5 (AB13) provides that local government may select the appropriate authority to enforce the provisions this State Law concerning smoking in enclosed places of business including restaurants. The City Attorney has drafted legislation for submittal to the Board of Supervisors that would appoint both the Health and Police Departments as enforcement officers. It is expected that the Health Department through BEHS will be responsible for dealing with business owners and building managers in the enforcement of the public notification and sign posting provisions of the ordinance. The Police Department will handle violations on the part of individual patrons, employees or visitors. Environmental Health Inspectors will not issue citations to restaurant patrons or employees who smoke in their presence. Inspectors will coordinate with the Police Department through their Principal Inspectors when citations of patrons, employees or visitors becomes necessary for the complete implementation of this "No Smoking" law.