

Opinion No. 2013-036

July 8, 2013

The Honorable David Hillman
State Representative
403 Essex Road
Almyra, Arkansas 72003-8109

Dear Representative Hillman:

I am writing in response to your request for my opinion on the following questions:

1. Does the Arkansas Clean Indoor Air Act of 2006, derived from Acts 2006 (1st Ex. Sess.), No. 8, Sec. 1, and codified in the Arkansas Code as 20-27-1801 et seq. (“the Act”), prohibit an employee of a nursing home from smoking inside the nursing home where he or she is employed?
2. Does the Act prohibit an employee of a nursing home from smoking anywhere on the grounds of the nursing home where he or she is employed?
3. Does the Act prohibit a resident of a nursing home from smoking inside the nursing home where he or she resides?
4. Does the Act prohibit a resident of a nursing home from smoking anywhere on the grounds of the nursing home where he or she resides?

RESPONSE

As explained further below, the Act might be read as foreclosing smoking by both employees and patients of any nursing home unless the owner or operator has designated areas where smoking will be permitted. The Act at one point, however, purports to totally exclude nursing homes from its scope. The Act is thus confusing and would benefit from legislative clarification. Whichever reading is correct, the answer to each of your questions appears to be “no” inasmuch as, at the very least, the Act permits the owner or operator of a nursing home to designate general smoking areas available for employee smoking and areas for supervised patient smoking.

Question 1: Does the Arkansas Clean Indoor Air Act of 2006, derived from Acts 2006 (1st Ex. Sess.), No. 8, Sec. 1, and codified in the Arkansas Code as 20-27-1801 et seq. (“the Act”), prohibit an employee of a nursing home from smoking inside the nursing home where he or she is employed?

The Act¹ prohibits “[s]moking in all public places and enclosed areas within places of employment, including . . . [h]ealth care facilities.”² However, the highlighted term “health care facilities” is expressly defined as excluding “long-term care facilities.”³ A nursing home is consistently designated in the Arkansas Code as falling within the category of “long-term facilities.”⁴ Read in isolation, then, these provisions might be interpreted as categorically excluding nursing homes from the prohibitions of the Act.

The Act further provides, however, that nursing homes are only conditionally exempt from its restrictions:

An owner or operator of any of the following areas may exempt itself from this subchapter:

* * *

¹ A.C.A. §§ 20-27-1801 through -1809 (Supp. 2011).

² A.C.A. § 20-27-1804(b).

³ A.C.A. § 20-27-1803(6)(C)(iii).

⁴ See, e.g., A.C.A. §§ 20-10-101(10)(A) (Supp. 2010); 20-10-110(2) (Repl. 2005); 20-10-702 (Repl. 2005); 20-10-1202(5) (Repl. 2005).

(5) Areas within long-term care facilities that are designated by the long-term care facilities as a smoking area or for supervised patient smoking only[.]⁵

In attempting to reconcile these statutory provisions, I am guided by various principles of statutory construction. Legislative enactments that are alleged to be in conflict must be reconciled, read together in a harmonious manner, and each given effect, if possible.⁶ Moreover, in determining legislative intent, each section of the statute is to be read in the light of every other section, and the object and purposes of the act are to be considered.⁷ In construing an act, the reason and spirit of the act should take precedence over the letter of the act, where adherence to the letter of the act would result in an absurdity or would defeat the plain purpose of the law.⁸ A statute must be construed so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible.⁹ Finally, the decisions of administrative bodies are given substantial deference, provided that the decision is not arbitrary and does not contradict the law which it is intended to administer.¹⁰

Applying these principles, I cannot reconcile what appears to be an irresolvable conflict between, on the one hand, an apparently categorical exclusion of nursing homes from the scope of the Act and, on the other, a provision that a nursing home may elect to exempt itself from the indoor-smoking prohibitions of the Act to the extent of designating general smoking areas or areas for supervised patient smoking.¹¹ I can do no more, then, than opine that nothing in the Act precludes an

⁵ A.C.A. § 20-27-1805. This statutory provision is reproduced verbatim in the Arkansas State Board of Health Rule and Regulations Pertaining to the Arkansas Clean Indoor Act of 2006 § (V)(a)(5).

⁶ *Gritts v. State*, 315 Ark. 1, 864 S.W.2d 859 (1993); *City of Fort Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993).

⁷ *Chism v. Phelps*, 228 Ark. 936, 939, 311 S.W.2d 297 (1958); citing *Berry v. Sale*, 184 Ark. 655, 43 S.W.2d 225 (1931).

⁸ *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

⁹ *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000).

¹⁰ *See Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Allen v. Ingalls*, 182 Ark. 991, 33 S.W.2d 1099 (1930).

¹¹ With respect to the latter designation, long term care facilities will further need to tailor their regulations to the requirements of the Arkansas Office of Long Term Care Rules and Regulations for Nursing Homes §

owner or operator of a nursing home from designating a smoking area that would permit smoking by employees.

Question 2: Does the Act prohibit an employee of a nursing home from smoking anywhere on the grounds of the nursing home where he or she is employed?

As explained above, the Act either does not apply to nursing homes or it invests the owner or operator of a nursing home with discretion to designate smoking areas. In either event, given that an owner or operator may at the very least permit smoking in designated areas, the answer to your question is “no.” Among the “areas” that an “owner or operator” of property subject to the Act may “exempt” from its prohibitions are “[o]utdoor areas of places of employment.”¹² To the extent, then, that a long-term care facility is subject to the Act, this provision would invest the owner or operator with the discretion to permit its employees to smoke anywhere on the grounds.

Question 3: Does the Act prohibit a resident of a nursing home from smoking inside the nursing home where he or she resides?

In my opinion, the answer to this question is likewise “no,” although, as discussed in my response to your first question, policy on this issue is subject to the owner/operator’s discretion.

Question 4: Does the Act prohibit a resident of a nursing home from smoking anywhere on the grounds of the nursing home where he or she resides?

Again, in my opinion, the answer to this question is “no,” although, as discussed in my response to your second question, policy on this issue is subject to the owner/operator’s discretion.

426.1, which incorporates the provisions of the National Fire Code (NFPA) (1973 ed.). This edition includes NFPA No. 101, Life Safety Code (1973).NFPA 101: Life Safety Code § 19.7.4 (regulating smoking, including requirements for signage, and prohibiting smoking by residents deemed incapable of doing so). See also 42 C.F.R. § 483.70(g)(2) (requiring that long-term care facilities participating in Medicare and Medicaid be well ventilated “with nonsmoking areas identified”).

¹² A.C.A. § 20-27-1805(6). The Act’s designation of this provision as an “exemption” is problematic in that the Act’s substantive prohibitions relating to privately owned facilities apply only to “enclosed areas.” A.C.A. § 20-27-1804. With respect to such facilities, then, one might conclude that there is no proscription in the Act to which an “exemption” might apply. As noted in my text, however, I consider the inclusion of the exemption as implying what would be a proscription in the absence of the exemption.

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Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

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