

HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 81

SMOKING IN PUBLIC PLACES

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§11-81-1 Definitions. As used in this chapter:

"Association" means the same as defined in section 514B-3, HRS;

"Director" means the director of the State department of health or the director's duly authorized agent;

"Department" means the State department of health;

"Enclosed or partially enclosed" means closed in by a roof or overhang and at least two walls.

Enclosed or partially enclosed areas include but are not limited to areas commonly described as public lobbies, lanais, interior courtyards, patios, and covered walkways and include those places open to the

public and places of employment where at least two walls and a roof or overhang close in an area even if the two walls and roof or overhang are not connected. Walls and a roof or overhang close in an area if at least two walls are within twenty feet of any seating area and there is a roof or overhang;

"Hotel room" means any premises subject to the transient accommodations tax pursuant to chapter 237D, HRS;

"Incense" means a legal aromatic substance, such as a wood or gum, that is burned to produce a pleasant odor and that does not include any tobacco or marijuana;

"Inspector" means a person authorized by the Director of Health to enforce chapter 328J, HRS;

"Limited common element" means the same as defined in section 514B-3, HRS;

"Private residence" means any dwelling unit owned by one or more individuals or public or private entities, including, but not limited to, apartments, houses, condominiums, and time share units. Private residence does not include hotel or motel rooms that are rented to guests;

"Production" means a series of activities that are directly related to the creation of visual and cinematic imagery to be delivered via film, videotape, or digital media and to be sold, distributed, or displayed as entertainment or the advertisement of products for mass public consumption, including but not limited to scripting, casting, set design and construction, transportation, videography, photography, sound recording, interactive game design, and post production;

"Retail tobacco store" means a retail store used primarily for the sale of tobacco products and accessories;

"Smoke" or "smoking" means inhaling or exhaling the fumes of tobacco or any other plant material, or burning or carrying any lighted smoking equipment for tobacco or any other plant material; provided that the

burning of incense shall be excluded from the definition of smoke or smoking under this chapter; and

"Story treatment" means a synopsis or overview that describes what a film production is about. It describes the structure of the story and includes a description of the characters and their relationship to each other. A story treatment can be as short as a single page or can be of greater length. In the case of a documentary, where there may be no script, a story treatment would describe what the content, subject, or story of the documentary will portray.

[Eff SEP 06 2010] (Auth: §328J-11) (Imp: §328J-11)

§11-81-2 Reasonable distance; interim exemption.

(a) An owner, operator, manager, employer, or other person who owns or controls a place open to the public or place of employment covered by the provisions of sections 328J-3 or 328J-4, HRS, may apply to the department for an interim exemption to the reasonable distance presumption in section 328J-6, HRS. The application shall include:

- (1) A completed application form;
- (2) A floor plan to scale (1/4" or 1/8" = 1' - 0") of the place open to the public or place of employment with all entrances, exits, windows that open and ventilation intakes clearly labeled;
- (3) A floor plan to scale (1/8" or 1/16" = 1' - 0") of the place open to the public or place of employment including all entrances, exits, windows that open, and ventilation intakes in the area within the 30 feet surrounding the area for which an interim exemption is sought. This floor plan shall identify by name all adjoining property owners, lessees, and tenants whose premises are within 30 feet of the area for which an interim exemption is sought;
- (4) An elevation plan drawn to scale (1/8" or 1/16" = 1' - 0") of the place open to the

- public or place of employment including all entrances, exits, windows that open, and ventilation intakes in the area within 30 feet of area for which an interim exemption is sought. The elevation plan shall identify by name all adjoining property owners, lessees, and tenants within 30 feet of the place open to the public or place of employment including vertically adjoining property owners, lessees, and tenants; and
- (5) Affidavits signed by each adjoining property owner, lessee, and tenant located within 30 feet of the area for which an interim exemption is sought attesting to their knowledge of and support for the interim exemption.
- (b) In reviewing an application for an interim exemption from the reasonable distance presumption of section 328J-6, HRS, the department shall:
- (1) Determine if the applicant has submitted the documents required under subsection (a). If the applicant has not submitted the required documents or if the documents are incomplete, the department shall notify the applicant of the missing or incomplete documents and shall provide the applicant ten business days to provide or complete the required documents. If the required or completed documents are not provided to the department within ten business days of the sending of the notice, the department shall automatically reject the application;
 - (2) Reject any application for an interim exemption of less than twelve feet. Any application for an interim exemption of less than twelve feet is by rule conclusively presumed to be unreasonable and shall be rejected; and
 - (3) If the application and documents are complete, review the application and the documents required under subsection (a).

(c) Within 180 days of receipt of all documents required under subsection (a), the department shall grant an interim exemption subject to the following conditions:

- (1) Sixty calendar days after the issuance of an interim exemption, the applicant shall submit new affidavits signed by each adjacent property owner, lessee, and tenant located within 30 feet of the area for which an interim exemption is sought, that there has been no infiltration of tobacco smoke into their premises. If the interim exemption holder fails to submit these affidavits within ten business days of the sixtieth day following the issuance of an interim exemption, the department shall automatically cancel the interim exemption and shall notify the holder of the cancellation;
- (2) If within sixty days following the issuance of an interim exemption, the department has received a written complaint signed by any person claiming to be an adjoining property owner, lessee, or tenant located within 30 feet of the area for which the interim exemption has been issued, the department shall investigate the complaint. If the department determines that:
 - (A) the complaint is from an owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued and
 - (B) the owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued claims that tobacco smoke from the area for which an interim exemption has been issued has infiltrated their property, the department shall automatically cancel the interim exemption and shall notify the holder of the cancellation;

- (3) At any time after issuance of an interim exemption, if a written complaint signed by a property owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued that claims that smoke is infiltrating into the property of a property owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued, the department shall investigate the complaint. If the department determines that:
- (A) the complaint is from an owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued and
 - (B) the owner, lessee, or tenant located within 30 feet of the area for which an interim exemption has been issued claims that tobacco smoke from the area for which an interim exemption has been issued has infiltrated their property, the department shall automatically cancel the interim exemption and shall notify the holder of the cancellation; and
- (4) An interim exemption shall be valid indefinitely until cancelled by the department.
- (d) The affidavits required by this section shall not be unreasonably withheld by a property owner, lessee, or tenant located within 30 feet of the area for which an interim exemption is sought or has been issued.
- (e) For purposes of this section, the "area for which an interim exemption is sought or has been issued" is the area between 12 and 20 feet in all directions of the entrance, exit, window that opens, or ventilation intake for which an interim exemption is sought or has been issued. [Eff SEP 06 2010]
(Auth: §328J-11) (Imp: §328J-6)

§11-81-3 Applicability to private residences.

(a) Private residences are exempt from the provisions of sections 328J-2, 328J-3, and 328J-4, HRS, except when used as a licensed child care, adult day care, or health care facility.

(b) A limited common element, such as a lanai that is designed to serve a single unit but is located outside the unit's boundaries, is exempt from the provisions of sections 328J-2, 328J-3, and 328J-4, HRS; provided that the bylaws or house rules of the association may restrict smoking in these areas.

[Eff **SEP 06 2010**] (Auth: §328J-11) (Imp: §§328J-1, 328J-7)

§11-81-4 Signs.

(a) Any place covered by the provisions of sections 328J-3 or 328J-4, HRS, that is accessed solely by means of a second place that is covered by the provisions of sections 328J-3 or 328J-4, HRS, is exempt from the signage requirements in section 328J-9, HRS; provided that the required signage is posted in the second place.

(b) If the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it, is used on a required sign, the symbol shall be not less than one inch in diameter and shall be clearly visible. [Eff **SEP 06 2010**] (Auth: §328J-11) (Imp: §328J-9)

§11-81-5 Enforcement action.

(a) Any person may register a complaint with the department either orally or in writing. The person shall not be required to provide personal information for the department to investigate and take action, if appropriate.

(b) Any inspector of the department upon observing a violation (including a violation by an individual or by a person who owns, manages, operates, or otherwise controls any establishment regulated by this chapter) shall document the violation and may

issue a citation or summons as provided in this chapter and in chapter 328J, HRS.

(c) Upon receiving a complaint or observing a violation, the department shall:

- (1) Send a letter to the reported violator informing the violator of the complaint or violation if the department did not issue a citation or summons to the violator; and
- (2) Forward a copy of the complaint, violation, summons, or citation to any other applicable licensing or permitting authority such as the county liquor commission when the violation is committed by a person who owns, manages, operates, or otherwise controls any place or facility designated by chapter 328J, HRS.

(d) Any person who violates any provision or requirement of this chapter or of any notice given pursuant thereto shall be subject to the penalties provided for under section 328J-12, HRS.

(e) The department, an appropriate county agency, a county, or any other person aggrieved by the failure of the owner, manager, operator, or other person in control of a place open to the public or a place of employment to comply with chapter 328J, HRS, or these rules may apply for injunctive relief to enforce chapter 328J, HRS, or these rules in any court of competent jurisdiction. [Eff SEP 06 2010]
(Auth: §328J-11) (Imp: §§327J-11, 328J-12)

§11-81-6 Permit or license suspension or revocation. (a) Consistent with any rules adopted to implement section 321-11, HRS, the director may suspend a permit or license authorized by section 321-11, HRS, after a person who owns, manages, operates, or otherwise controls any place or designated facility has been found to have violated the provisions of chapter 328J, HRS, or these rules at least three times within a two year period. This section shall apply only to permits or licenses that are issued by the director or the director's designee. Any action to

suspend or revoke a permit or license not issued by the director or the director's designee shall be brought before the agency or authority that issued the permit or license or before a court of competent jurisdiction.

(b) A permit or license suspended pursuant to this section shall be reinstated sixty days after the date of suspension. An appeal of a suspension may be allowed if--and shall be resolved--consistent with the rules adopted to implement section 321-11, HRS, that authorize the issuance of the permit or license in question.

(c) Consistent with any rules adopted to implement section 321-11, HRS, the director may revoke a permit or license authorized by section 321-11, HRS, if the permit or license has been suspended more than twice within a two-year calendar period.

(d) A person whose permit or license has been revoked may apply for a new permit or license no sooner than one year after the revocation becomes effective. An appeal of a revocation may be allowed if--and shall be resolved--consistent with the rules adopted to implement section 321-11, HRS, that authorize the issuance of the permit or license in question. [Eff SEP 06 2010] (Auth: §328J-11) (Imp: §§328J-11, 328J-12)

§11-81-7 Department inspector enforcement; other law enforcement officers. (a) The director shall appoint and commission one or more inspectors as the exigencies of the public service may require. Department inspectors shall enforce the provisions of chapter 328J, HRS, and these rules. Inspectors shall be provided with suitable badges or insignia of office by the department. Inspectors shall have the authority to serve and execute warrants, notices, citations, or summons, and to issue citations in all matters relating to enforcement of chapter 328J, HRS, or of these rules.

(b) Police officers, sheriffs, and other law enforcement officers are authorized to enforce chapter

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328J, HRS, and these rules. Nothing in subsection (a) shall be construed to prevent police officers, sheriffs, or other law enforcement officers from enforcing the provisions of chapter 328J, HRS, and of these rules. [Eff **SEP 06 2010**] (Auth: §328J-11) (Imp: §§328J-11, 328J-12)

§11-81-8 Responsibility of owner, manager, operator, or employee. (a) An owner, manager, operator, or employee of an establishment regulated by chapter 328J, HRS, shall inform persons violating chapter 328J, HRS, or this chapter, of the provisions of chapter 328J, HRS, and of this chapter.

(b) To inform a person who is violating chapter 328J, HRS, or this chapter, of the provisions of chapter 328J, HRS, and of this chapter, an owner, manager, operator, or employee of an establishment regulated by chapter 328J, HRS, shall:

- (1) have posted signs that comply with section 328J-9, HRS, and section 11-81-4;
- (2) inform the person that smoking is not permitted within the establishment and within 20 feet from entrances, exits, windows that open, and ventilation intakes that serve the establishment; and
- (3) not state or imply that smoking is at the person's own risk or is otherwise allowable within the area described in subsection 11-81-8(b)(2) above.

(c) No owner, manager, operator, or employee of an establishment regulated by chapter 328J, HRS, shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because that employee, applicant, or customer exercises any rights afforded by chapter 328J, HRS, or

this chapter or reports or attempts to prosecute a violation of chapter 328J, HRS, or this chapter. For purposes of this section, retaliation includes, but is not limited to: refusing service to a customer; requesting that employee, applicant, or customer to exit the establishment; contacting the police to eject that employee, applicant, or customer; taking the photograph of that employee, applicant, or customer without that person's prior written consent; or posting the photograph of that employee, applicant, or customer without that person's prior written consent. [Eff SEP 03 2010] (Auth: §328J-11) (Imp: §§328J-10, 328J-11, 328J-12)

§11-81-9 Hotels and cruise ships. (a) Smoking is allowed on the lanai areas of hotel guest rooms including non-smoking hotel guest rooms. Nothing in this subsection shall prevent a hotel from prohibiting smoking on lanai areas of hotel guest rooms pursuant to section 328J-8, HRS.

(b) For purposes of this chapter and chapter 328J, HRS, hotel rooms include cruise ship guest quarters while operating within the territorial waters of the State of Hawaii. [Eff SEP 06 2010] (Auth: §328J-11) (Imp: §§328J-1, 328J-7, 328J-11)

§11-81-10 Exception for retail tobacco stores. (a) All retail tobacco stores and any areas claimed to be retail tobacco stores shall be separately ventilated from areas where smoking is prohibited. No smoke from a retail tobacco store or an area claimed to be a retail tobacco store shall infiltrate into areas where smoking is prohibited.

(b) Upon request by an inspector, the person who owns, manages, operates, or otherwise controls a retail tobacco store or an area claimed to be a retail tobacco store shall provide copies of mechanical engineering plans for the retail tobacco store or area claimed to be a retail tobacco store that show the separate ventilation systems.

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(c) The failure to provide the mechanical engineering plans upon request of an inspector shall be prima facie evidence that the area claimed to be a retail tobacco store does not fall within the exception for retail tobacco stores provided in section 328J-7, HRS. The inspector may then issue a summons or citation for any violation of chapter 328J, HRS, or of this chapter that the inspector observes. [Eff SEP 06 2010] (Auth: §328J-11) (Imp: §§328-7, 328J-11)

§11-81-11 Exception for a scene within a production being filmed. (a) Smoking by talent only shall be allowed in areas where it is otherwise prohibited by chapter 328J, HRS, when smoking is part of a scene within a production being filmed; provided that the production complies with the requirements of this section. When smoking by talent only is allowed as part of a scene within a production being filmed, non-talent crew members who do not appear on camera in the scene shall not smoke in areas where smoking is otherwise prohibited by chapter 328J, HRS. Any smoking as part of a scene within a production being filmed shall be for a limited duration at any one location of not more than fourteen (14) calendar days.

(b) If the production is being filmed upon public property, the person in charge of the filming shall provide for inspection copies of the permit issued by the Hawaii Film Office, county film office, or federal film office upon request by an inspector.

(c) If the production is being filmed upon private property, the person who owns, manages, operates, or otherwise controls an area covered by chapter 328J, HRS, where smoking is to be allowed as part of a scene within a production being filmed shall provide for inspection upon request by an inspector copies of at least two of the following:

- (1) The script for the production being filmed;
- (2) The story boards for the production being filmed;

- (3) The story treatment for the production being filmed;
- (4) The anticipated distribution plan for the production being filmed;
- (5) The location agreement for the location where filming is to occur. At minimum, the location agreement shall specify the duration of the filming at that location (not to exceed fourteen (14) calendar days), the conditions of use for that location, fees (if any) to be paid for use of the location, insurance (if any) required to be maintained for use of the location, and the deposit (if any) for damages; or
- (6) Releases authorizing the use of their likenesses signed by all of the talent who appear on camera as part of the scene within a production being filmed.

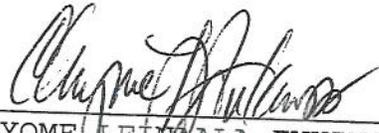
(d) The failure to provide copies of the documents required by this section upon the request of an inspector shall be prima facie evidence that the smoking claimed to be part of a scene within a production being filmed does not fall within the exception as provided in section 328J-7(6), HRS, and these rules. The inspector may then issue a summons or citation for any violation of chapter 328J, HRS, or of this chapter that the inspector observes.

[Eff **SEP 06 2010**] (Auth: §328J-11) (Imp: §§328J-7, 328J-11)

DEPARTMENT OF HEALTH

Chapter 11-81, Hawai'i Administrative Rules, on the summary page dated December 23, 2009, was adopted on March 31, 2010 following a public hearing held on August 12, 2009, after public notice was given in The Honolulu Advertiser, the Honolulu Star-Bulletin, The Maui News, the Hawaii Tribune Herald, the West Hawaii Today, and The Garden Island on July 8, 2009.

The adoption of chapter 11-81 shall take effect ten days after filing with the Office of the Lieutenant Governor.



CHIYOME LEINAALA FUKINO, M.D.
Director of Health



LINDA LINGLE
Governor
State of Hawai'i

Dated: 8/25/10

APPROVED AS TO FORM:



Deputy Attorney General

Filed