

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

October 4, 2021
10:00 a.m. Central Time
Nebraska State Office Building – Lower Level A
301 Centennial Mall South, Lincoln, Nebraska
Phone call information: 888-820-1398; Participant code: 3213662#

The purpose of this hearing is to receive comments on proposed changes to Title 178, Chapter 7 of the Nebraska Administrative Code (NAC) – *Clean Indoor Air*. The proposed changes update the regulations' scope; update definitions; outline the requirements for public places and public meetings; set the requirements for smoking cessation programs; set the requirements for child care programs; establish applicant, application, temporary waiver, and grievance process; remove duplicate statutory language from the regulations; update formatting; and restructure the regulatory chapter.

Authority for these regulations is found in Neb. Rev. Stat. § 81-3117(7).

In order to encourage participation in this public hearing, a phone conference line will be set up for any member of the public to call in and provide oral comments. Interested persons may provide verbal comments by participating via phone conference line by calling 888-820-1398; Participant code: 3213662#.

Interested persons may attend the hearing and provide verbal or written comments, or mail, fax or email written comments, no later than the day of the hearing to: DHHS Legal Services, PO Box 95026, Lincoln, NE 68509-5026, (402) 742-2382 or dhhs.regulations@nebraska.gov, respectively.

A copy of the proposed changes is available online at <http://www.sos.ne.gov>, or by contacting DHHS at the mailing address or email above, or by phone at (402) 471-8417. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, 1201 N Street, Suite 120, Lincoln, NE 68508, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8417. Individuals who are deaf or hard of hearing may call DHHS at (402) 471-9570 (voice and TDD) or the Nebraska Relay System at 711 or (800) 833-7352 TDD at least 2 weeks prior to the hearing.



TO: Executive Board
Room 2108 State Capitol
Legislative Council

FROM: Marge Respeliers, Paralegal I
Legal Services
Department of Health and Human Services (DHHS)

DATE: August 26, 2021

RE: Notice of Rulemaking under Neb. Rev. Stat. § 84-907.06

The Department of Health and Human Services (DHHS) will be holding a public hearing on amending the following regulations:

TITLE: 178 Environmental Health
CHAPTER: 7 Clean Indoor Air

These regulations are scheduled for public hearing on October 4, 2021.

The purpose of this hearing is to receive comments on proposed changes to Title 178, Chapter 7 of the Nebraska Administrative Code (NAC) – *Clean Indoor Air*. The proposed changes update the regulations' scope; update definitions; outline the requirements for public places and public meetings; set the requirements for smoking cessation programs; set the requirements for child care programs; establish applicant, application, temporary waiver, and grievance process; remove duplicate statutory language from the regulations; update formatting; and restructure the regulatory chapter.

The following items are enclosed for your referral to the chair of the relevant standing committee of the Legislature:

1. A copy of the notice of public hearing;
2. A copy of the proposed regulations;
3. A copy of the Policy Pre-Review Checklist; and
4. The estimated fiscal impact of this rulemaking action on state agencies, political subdivisions or persons being regulated.

FISCAL IMPACT STATEMENT

Agency: Department of Health and Human Services	
Title: 178	Prepared by: Doug Gillespie
Chapter: 7	Date prepared: 7/30/2021
Subject: Clean Indoor Air	Telephone: 471-0548

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)
Increased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Increased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Indeterminable	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)

Provide an Estimated Cost & Description of Impact:

State Agency: N/A

Political Subdivision: N/A

Regulated Public: N/A

If indeterminable, explain why:

- N/A

~~EFFECTIVE DATE~~ ~~NEBRASKA DEPARTMENT OF~~
~~APRIL 18, 2009~~ ~~HEALTH AND HUMAN SERVICES~~ ~~178 NAC 7~~
~~OPERATIONAL JUNE 1, 2009~~

DRAFT NEBRASKA DEPARTMENT OF
07-13-2021 HEALTH AND HUMAN SERVICES 178 NAC 7

TITLE 178 ENVIRONMENTAL HEALTH

CHAPTER 7 CLEAN INDOOR AIR

~~7-001. SCOPE AND AUTHORITY. 7-001.01~~ These regulations implement Nebraska Revised Statute (Neb. Rev. Stat.) §71-1911 and are authorized by the Nebraska Clean Indoor Air Act (CIAA), Neb. Rev. Stat. §§71-5716 to 71-5734, and by Neb. Rev. Stat. §71-1911. ~~These regulations are operative June 1, 2009.~~

~~7-001.02~~ ~~The purpose of the Nebraska Clean Indoor Air Act is to protect the public health and welfare by prohibiting smoking in public places and places of employment. The Act shall not be construed to prohibit or otherwise restrict smoking in outdoor areas. The Act shall not be construed to permit smoking where it is prohibited or otherwise restricted by other applicable law, ordinance, or resolution. The Act shall be liberally construed to further its purpose.~~

~~7-002. DEFINITIONS. Definition set in the Nebraska Clean Indoor Air Act and the following apply to this chapter.~~

~~Act means the Nebraska Clean Indoor Air Act, Neb. Rev. Stat. §§71-5716 to 71-5734.~~

~~Ceiling means the top or overhead portion of a room or building. For the purposes of these regulations, it can be of any shape, height, or material; and can be full or partial.~~

~~002.01 CHILD CARE PROGRAM. Child care program~~ A child care program has the meaning found in Neb. Rev. Stat. §71-1910 means any facility providing child care and which is required to be licensed under Neb. Rev. Stat. §71-1911.

~~002.02 CHILD CARE PROVIDER. Child Care Provider~~ A child care provider is means a person who is licensed to operate a child care program under Neb. Rev. Stat. §71-1911.

~~002.03 COMPLETE APPLICATION. An application provided by the Department which contains all of the requested information, with attestation to its truth and completeness, signatures of the applicant(s), submitted with all required documentation.~~

~~Department means the Nebraska Department of Health and Human Services.~~

~~Employed means hired, contracted, subcontracted, or otherwise engaged to furnish goods or services.~~

~~Employee means a person who is employed by an employer in consideration for direct or indirect monetary wages, profit, or other remuneration.~~

~~Employer means a person, nonprofit entity, sole proprietorship, partnership, joint venture, corporation, limited partnership, limited liability company, cooperative, firm, trust, association, organization, or other business entity, including retail establishments where goods or services are sold, who or which employs one or more employees.~~

~~Entrance means the opening of a building used for entry or exit.~~

~~Floor means the lower horizontal surface of a room, and/or the surface people walk on. For the purposes of these regulations, it can be of any shape, substance, or material.~~

~~Guestroom or suite means a sleeping room and directly associated private areas, such as a bathroom, a living room, and a kitchen area, if any, rented to the public for their exclusive transient occupancy, including, but not limited to, a guestroom or suite in a hotel, motel, inn, lodge, or other such establishment.~~

~~Indoor area means an area enclosed by a floor, a ceiling, and walls on all sides that are continuous and solid except for closeable entry and exit doors and windows and in which less than 20% of the total wall area is permanently open to the outdoors. For walls in excess of eight feet in height, only the first eight feet shall be used in determining such percentage.~~

~~Person shall include bodies politic and corporate, societies, communities, the public generally, individuals, partnerships, limited liability companies, joint stock companies, and associations.~~

~~Place of employment means an indoor area under the control of a proprietor that an employee accesses as part of his/her employment without regard to whether the employee is present or work is occurring at any given time. The indoor area includes, but is not limited to, any work area, employee break room, restroom, conference room, meeting room, classroom, employee cafeteria, and hallway. A private residence is a place of employment when such residence is being used as a licensed child care program and one or more children who are not occupants of such residence are present.~~

~~Proprietor means any employer, owner, operator, supervisor, manager, or other person who controls, governs, or directs the activities in a place of employment or public place.~~

~~Public place means an indoor area to which the public is invited or in which the public is permitted, whether or not the public is always invited or permitted. A private residence is not a public place.~~

~~Smoke or smoking means the lighting of any cigarette, cigar, pipe, or other smoking material or the possession of any lighted cigarette, cigar, pipe, or other smoking material, regardless of its composition.~~

002.04 SMOKING CESSATION PROGRAM. Smoking Cessation Program A means a program designed to help people stop smoking tobacco products is a smoking cessation program.

~~Tobacco retail outlet means a store that sells only tobacco and products directly related to tobacco. Products directly related to tobacco do not include alcohol, coffee, soft drinks, candy, groceries, or gasoline.~~

002.05 WALL. Wall means Aa vertical partition with a height and length greater than its thickness; used to divide, define, or enclose an area is a wall. For the purposes of these regulations, it can be of any shape or material which impedes airflow.

7-003. PUBLIC PLACES AND PUBLIC MEETINGS. The following apply to persons providing public places and public meetings.

003.01 MEASUREMENT. For purposes of determining compliance with the statutes and this chapter, areas will be assessed according to the requirements of § 71-5730 and by measurements of the wall area to determine whether less than 20% is permanently open to the outdoors as follows:

- (A) The first eight feet of height and the entire length of each wall are measured to obtain total wall square footage. If a proprietor chooses to install security devices, such as bars, fencing, and wood slats, they must be permanent fixtures. Any security devices located within permanently open areas must be included in total wall measurements; and
- (B) A calculation of 20% of total wall square footage to obtain total open area square footage is done to determine whether less than 20% of permanently open space is present.

~~7-003.01 General Prohibition: Smoking is prohibited in all public places and indoor places of employment. The definition of an indoor area can be found in 178 NAC 7-002. For purposes of determining compliance with these regulations, the Department will assess these areas according to the following requirements:~~

- ~~1. The presence of a floor, a ceiling, and walls on all sides. Definitions of floor, ceiling and wall may be found in 178 NAC 7-002.
 - ~~a. Walls may contain closeable entry/exit doors and windows.~~
 - ~~b. Entry/exit doors allowing access between an indoor public place and an outdoor smoking area must not remain open while smoking is occurring.~~~~
- ~~2. Measurements of the wall area to determine that less than 20% is permanently open to the outdoors.
 - ~~a. The first eight feet of height and the entire length of each wall are measured to obtain total wall square footage.~~
 - ~~b. Calculate 20% of total wall square footage to obtain total open area square footage.~~
 - ~~c. If a proprietor chooses to install security devices, such as bars, fencing, and wood slats, they must be permanent fixtures. Any~~~~

~~security devices located within permanently open areas must be included in total wall measurements.~~

~~003.02 RESPONSIBILITIES OF PROPRIETOR OR OTHER PERSON IN CHARGE OF A PUBLIC PLACE. To ensure compliance, a proprietor must take measures as required by Neb. Rev. Stat. §71-5731.~~

~~7-003.02 Responsibilities of Proprietor or Other Person in Charge of a Public Place: Compliance with the provisions of 178 NAC 7 is the responsibility of the proprietor of a public place or place of employment where smoking is prohibited. To ensure compliance, a proprietor must take measures, which may include:~~

- ~~1. Posting appropriate signs that include the international symbol for no smoking on entrance doors to inform the public that smoking is not allowed, and;~~
- ~~2. Removing any smoking paraphernalia designated for on-site use, such as ashtrays.~~

~~7-003.03 Exemptions: Some indoor public places and indoor places of employment are exempt from 178 NAC 7-003.01. The following indoor areas are exempt:~~

~~7-003.03A Guestrooms and Suites: Guestrooms and suites that are rented to guests and are designated as smoking rooms.~~

- ~~1. No more than 20% of rooms rented to guests in an establishment may be designated as smoking rooms;~~
- ~~2. All smoking rooms on the same floor must be contiguous; and~~
- ~~3. Smoke from smoking rooms must not infiltrate into areas where smoking is prohibited under the Act.~~

~~7-003.03B Indoor areas used in connection with a research study on the health effects of smoking conducted in a scientific or analytical laboratory under state or federal law or at a college or university approved by the Coordinating Commission for Postsecondary Education; and~~

~~7-003.03C Tobacco retail outlets as defined in 178 NAC 7-002.~~

~~7-004 FINDING VIOLATIONS; INJUNCTIONS~~

~~7-004.01 Finding Violations: Any person may report possible violations of the Nebraska Clean Indoor Air Act to the Department or a local public health department as defined in Neb. Rev. Stat. §71-1626. Such departments may conduct inspections of public places or places of employment where smoking is prohibited in response to reports of potential violations.~~

~~7-004.02 Retaliation: No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because~~

~~such employee, applicant, or customer reports or attempts to report a violation of the Act.~~

~~7-004.03 Injunctions: The Department or a local public health department as defined in Neb. Rev. Stat. §71-1626 may institute an action in any court with jurisdiction to enjoin a violation of the Act.~~

~~7-0054. SMOKING CESSATION PROGRAMS: To qualify, a smoking cessation program a program must:~~

- ~~(A) Consist of a minimum of three contacts between participant and a qualified counselor, equaling two hours of counseling time;~~
- ~~(B) Be able to track the progress of participants to determine required counseling time is met; and~~
- ~~(C) Issue a certificate of completion to participants.~~

~~A person found guilty of smoking in a place of employment or a public place in violation of the Act is guilty of a Class V misdemeanor for the first offense and a Class IV misdemeanor for the second and any subsequent offenses. A person charged with such offense may voluntarily participate, at his/her own expense, in a smoking cessation program approved by the Department of Health and Human Services, and such charge will be dismissed upon successful completion of the program.~~

~~7-005004.01 APPROVAL. To have a program be approved by the Department, as a smoking cessation program, the program facilitator must, at a minimum: submit a complete application to the Department and a copy of the certificate issued to participants upon completion.~~

- ~~1. Consist of three contacts between participant and counselor, equaling two hours of counseling time;~~
- ~~2. Be able to track the progress of participants to determine required counseling time is met; and~~
- ~~3. Issue a certificate of completion to participants.~~

~~7-005.01A To have a smoking cessation program approved by the Department, the program facilitator must submit a written application to the Department on a form provided by the Department or construct an application that must contain the following information:~~

- ~~1. The name and address of the organization providing the smoking cessation program;~~
- ~~2. The professional experience of the individual responsible for the direct delivery of cessation counseling;~~
- ~~3. The name and phone number of the facilitator of, or primary contact for, the smoking cessation program;~~
- ~~4. A copy of the certificate issued to participants upon completion, and~~
- ~~5. A statement detailing the length of the program in hours and the cost to participants.~~

~~6. The written application must be sent to:~~

~~Clean Indoor Air Act Program Manager~~

~~Nebraska Department of Health and Human Services
Division of Public Health
301 Centennial Mall South
Lincoln NE 68509~~

~~7-005.02 The Department will maintain a list of smoking cessation programs that have met the requirements of 178 NAC 7-005.01.~~

~~7-0065. CHILD CARE PROGRAMS. Child care programs that are not located in the residence of the child care provider must be located in a smoke free environment and meet the requirements of this chapter. A child care provider who operates a child care program in his or her residence must inform parents, guardian(s), or other individuals responsible of all enrolled children if any household member, including the provider, smokes in the home. This information must be provided to parents, guardian(s), or other individuals responsible before accepting a child into care.~~

~~7-006.01 Child care programs that are not located in the residence of the child care provider must be smoke free environments. The prohibition of smoking applies:~~

- ~~1. To all persons including employees, parents, guests, contractors and others;~~
- ~~2. At all times, 24 hours per day, seven days per week, regardless of the hours of operation; and~~
- ~~3. In all indoor areas of the child care program whether or not children use the area.~~

~~7-006.02 The following requirements apply to child care programs that are located in the residence of the child care provider:~~

- ~~1. Smoking must be prohibited in all areas of the home during the hours when the residence is being used as a licensed child care program and one or more children who are not occupants of the residence are present.~~
- ~~2. The child care provider must inform parents, guardian(s), or other individuals responsible of all enrolled children if any household member, including the provider, smokes in the home. This information must be provided to parents, guardian(s), or other individuals responsible before accepting a child into care.~~

~~7-0076. WAIVER OF THE LAW. Provisions of the law may be waived under § 71-5732 (3) and this chapter.~~

006.01 APPLICANT. An applicant for a waiver must demonstrate good cause for a waiver and demonstrate that the waiver will not significantly affect the health and safety of the public and employees.

006.02 APPLICATION. To apply for a waiver of provisions of the Act, or these regulations, the proprietor or other person in charge must submit a complete application to the Department.

006.03 WAIVERS ARE TEMPORARY. At the time of the waiver's expiration, if an applicant desires a continued waiver, the applicant must reapply for another waiver to ensure the continued protection of the public, including employees', health and safety.

006.04 GRIEVANCES. Any person aggrieved by the Department's decision regarding a waiver may make a written request for a hearing pursuant to 184 Nebraska Administrative Code 1.

~~7-007.01 The Department of Health and Human Services may waive provisions of the Nebraska Clean Indoor Air Act upon good cause shown and shall provide for appropriate protection of the public, including employees', health and safety in the granting of these waivers.~~

- ~~1. An applicant for a waiver must demonstrate good cause for a waiver and demonstrate that the waiver will not significantly affect the health and safety of the public and/or employees.~~
- ~~2. To apply for a waiver of provisions of the Act, or these regulations, the proprietor or other person in charge must submit a written application to the Department on a form provided by the Department or construct an application that must contain the following information:
 - ~~a. Name and address of public place or place of employment.~~
 - ~~b. Type of public place or place of employment.~~
 - ~~c. Name and telephone number of proprietor or person in charge.~~
 - ~~d. Name and telephone number of person making the application, if other than the proprietor or person in charge.~~
 - ~~e. Description of how the public, including employees', health and safety would be protected under the waiver.~~
 - ~~f. Description of which provisions are to be waived and the time period for which the waiver is in effect.~~~~

- ~~3. The written application for a waiver must be sent to:~~

~~Clean Indoor Air Act Program Manager
Nebraska Department of Health and Human Services
Division of Public Health
301 Centennial Mall South
Lincoln NE 68509~~

~~7-007.02 In order to grant a waiver, the Department will determine that the health and safety of the public and/or employees would be protected under a waiver as if there were compliance with the Act.~~

~~7-007.03 Any waivers granted by the Department will be consistent with the intent of the statute and these regulations.~~

~~7-007.04 Any waivers granted by the Department will be temporary, with the length of the waiver to be determined by the Department. At the time of the waiver's expiration, if an applicant desires a continued exemption, the applicant must reapply for another waiver to ensure the continued protection of the public, including employees', health and safety.~~

~~7-007.05 Any person aggrieved by the Department's decision regarding a waiver may seek administrative review as provided by the Administrative Procedure Act.~~