

# ACT NO. 7171

BILL NO. 28-0191

## TWENTY-EIGHTH LEGISLATURE OF THE VIRGIN ISLANDS

Regular Session

2010

An Act amending title 19 Virgin Islands Code, Part VI, adding chapter 53a to enact the Virgin Islands Smoke-free Act; repealing title 23 Virgin Islands Code, chapter 9, subchapter XIII; and for other purposes

---0---

**WHEREAS**, tobacco smoke contains more than 4000 chemicals substances, and 43 of those chemicals substances have been classified by the U.S. Environmental Protection Agency as Class A carcinogens for which there is no known safe level of exposure; and

**WHEREAS**, tobacco smoke is significantly more harmful in enclosed areas and also causes diseases, disabilities and death; and

**WHEREAS**, cigarettes, cigars and other forms of tobacco smoking have been proven to cause pulmonary disease and cancer; and

**WHEREAS**, smoke contamination occurs every time and in every place tobacco smoking occurs; and

**WHEREAS**, persons, especially children, are regularly injured by secondhand smoking or involuntary smoking; and

**WHEREAS**, secondhand smoking represents a significant health hazard to public health in general; and

**WHEREAS**, passive smoking or involuntary smoking contributes to smoke-related sicknesses and diseases and is the third most preventable cause of death after active smoking and alcohol consumption; and

**WHEREAS**, the 2006 U.S. Surgeon General's Report entitled, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, has concluded that:

(1) Secondhand smoke exposure causes diseases and premature death in children and adults who do not smoke;

(2) Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory symptoms and slow lung growth;

(3) Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer;

(4) There is no risk-free level of exposure to secondhand smoke;

(5) Establishing smoke-free workplaces is the only effective way to ensure that secondhand smoke exposure does not occur in the workplace, because ventilation and other air cleaning technologies cannot completely control the exposure of all persons to secondhand smoke; and

(6) Evidence from peer-reviewed studies shows that smoke-free policies and laws do not have an adverse economic impact on the hospitality industry; and

**WHEREAS**, the world's first public health treaty, the World Health Organization's Framework Convention on Tobacco Control, ratified by more than 160 nations representing more than eighty-five percent of the world's population, declares that "scientific evidence has unequivocally established that exposure to tobacco smoke causes disability, disease and death"; and

**WHEREAS**, this treaty declares it the duty of participating governments to adopt and implement effective legislative, executive, administrative or other measures to provide for the protection from exposure to tobacco smoke in indoor work and public places and other public places; and

**WHEREAS**, the official guidelines for implementation of this treaty declare that effective protection against secondhand smoke requires “the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100 percent smoke-free environment,” that the use of designated smoking rooms or enhanced ventilation is not acceptable or effective alternative, and that smoke-free laws must be universally applicable to all indoor workplaces and public places, with no exemptions for particular types of businesses or other specific settings; and

**WHEREAS**, the Legislature finds that it is in the best interest of the people of this Territory to protect the public from involuntary exposure to tobacco smoke in both indoor and outdoor areas open to the general public, public meetings, food service establishments, places of employment, schools and universities; and

**WHEREAS**, the Legislature finds that regulation of tobacco smoking is rationally related to the legislative objective of protecting the health of the public; and

**WHEREAS**, the Legislature finds and declares that the purposes of the Act are to protect the public health and welfare by prohibiting smoking in public places and places of employment, guarantee the right of citizens to breathe smoke-free air, and ensure that the need to breathe smoke-free air have priority over the desire to smoke by imposing fines and suspending permits and licenses of those who disregard or violate the provisions of the Virgin Islands Smoke-free Act; Now, Therefore,

*Be it enacted by the Legislature of the Virgin Islands:*

**SECTION 1.** Title 19 Virgin Islands Code, PART VI is amended by adding chapter 53a to read as follows:

**“Chapter 53a. Smoking ban**

**§ 1481a. Short title**

This Act may be cited as “The Virgin Islands Smoke-free Act” or “The Smoke-free Act”.

**§ 1482. Definitions**

When used in this chapter, the term

(1) “Bar” means an indoor establishment devoted to serving alcoholic beverages for on-premises consumption and where the serving of food is only incidental to the consumption of those beverages. Bar includes taverns, nightclubs, lounges or cabarets.

(2) “Business” means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes, including retail establishments where goods or services or both are sold as well as professional corporations and other entities where legal, medical, dental or other professional services are provided.

(3) “Business vehicle” means a car, bus, van or other motorized unit owned or leased by an employer for employment purposes.

(4) “Enclosed area” means all space between a floor or flooring and ceiling or any form of roofing whether or not enclosed on all sides by permanent or temporary walls or windows which extends from the floor or flooring to ceiling or any form of roofing, and any area in, and within twenty feet from any entrance, exit, window,

ventilation system or any other opening of any building, public place or place of employment.

(5) "Place of employment" means areas under the control of any employer which employees normally frequent during the course of employment, including, work areas, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, and vehicles owned by the employer provided that the vehicle is used by more than one person at the same time. The term does not include a residence, unless it is used as a childcare, adult day care, or health care facility.

(6) "Private club" means any corporation or unincorporated association, or any organization or association that either belongs to or is affiliated with a nationally recognized fraternal, veterans or other organization:

(A) formed as a not for profit social club;

(B) operated exclusively for the benefit of its members;

(C) that owns, leases or rents a building or other limited premises within the Virgin Islands in which a club has been established;

(D) to which only duly elected or approved dues-paying members and their guests while in the company of a member are admitted;

(E) of which members of the general public are denied access;

and

(F) of which no part of the net revenues earned are to benefit, directly or indirectly, any of its members or any other individual, except for the payment of bona fide expenses of the club's operations.

(7) “Proprietor” means an employer, owner, manager, operator, liquor permit holder, or other persons in charge or in control of a public place or a place of employment subject to the provisions of this section.

(8) “Public place” means any portion of any place in which the public is invited or permitted, regardless of whether that place is owned in whole or in part, rented or leased by private persons or entities, the Government of the Virgin Islands, agencies or instrumentalities of the Government of the Virgin Islands, and regardless of whether a fee is charged for admission. The term includes inner and outer portions of restaurants, bars, taverns, clubs, lounges, cabarets, casinos and all other gaming facilities; hotels, resorts, guesthouses and inns; public, private and parochial schools; universities, colleges and other educational facilities; laundromats; malls, shopping centers, retail stores and service establishments; financial institutions; waiting rooms and lobbies of offices; public libraries and restrooms; bus and taxi stops; hospitals, healthcare facilities, nursing homes, and auditoriums; galleries, museums, arenas, theaters, beaches, parks, playgrounds, ticket areas, bowling alleys; skating rinks and outdoor recreational facilities. The term does not include a private residence unless the private residence is used as a hospice, childcare, adult day care or health care facility.

(9) “Restaurant” means an establishment serving food or beverages for on-premises consumption, whether or not any portion of the establishment is enclosed or outdoors. The term includes coffee shops, cafeterias, sandwich stands, dining rooms in hotels, ice cream parlors, private and public school cafeterias, institutional eating establishments which provide food to the public, guests or employees, as well as

commercial kitchens and catering facilities. The term, "restaurant" includes bars within restaurants, and eating establishments containing or operated in association with bars.

(10) "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco and tobacco products and accessories and in which not less than ninety percent of its generated revenues are from the sale of tobacco, tobacco products and accessories, as certified by the Internal Revenue Bureau, and that is not operated as part of, or in conjunction with any business subject to the requirements of this section.

(11) "Smoking" means inhaling, exhaling, burning, carrying or possessing a lighted cigar, cigarette, pipe, or tobacco product, weed, plant or other smoking device that contains tobacco product, weed or a plant.

#### **§ 1483. Prohibition**

(a) Except as provided in section 1484, smoking is prohibited in the Virgin Islands in:

- (1) enclosed areas of public places;
- (2) enclosed areas of places of employment;
- (3) any outdoor service or waiting line and in, and within twenty feet from any point of any service or waiting line; and
- (4) and within twenty feet of all outdoor public transportation stations and platform shelters opened to the public.

#### **§ 1484. Exceptions**

(a) The prohibition in section 1483 is subject to the following exceptions:

- (1) Smoking is not prohibited in any private club as defined under section 1482, paragraph (6), if no member is under 18 years old is present while any club member is smoking, and if the club and owners, lessors, lessees, occupants or persons in

control or possession of any building or property being used by the club ensure that no smoke will infiltrate or migrate through walls, ceilings, floors, doors, windows, ventilation systems or other forms of openings into areas where smoking is prohibited under this section.

(2) Smoking is not prohibited in any public or private parking lot unless the smoking occurs within twenty feet of any entrance, exit, window, ventilation system or other openings of any public place or place of employment subject to the prohibitions of section 1483;

(3) Smoking is not prohibited on any public street or sidewalk unless the smoking occurs within twenty feet of any entrance, exit, window, ventilation system or other openings of any public place and place of employment subject to the prohibitions of section 1483;

(4) Smoking is not prohibited in any private residence unless the private residence is used as a hospice, healthcare, daycare or adult care facility;

(5) Smoking is not prohibited in any noncommercial vehicle;

(6) Smoking is not prohibited in any area not commonly open to the public of owner-operated businesses having no employee other than the owner and where the sole purpose of the establishment is for smoking indoors if persons under the age of 18 years old are denied access;

(7) Smoking is not prohibited in any retail tobacco store in which persons under the age 18 years old are denied access if the smoke from the retail tobacco store does not infiltrate or migrate into areas where smoking is prohibited under this chapter;

(8) Smoking is not prohibited twenty feet from enclosed areas, as defined under section 1482, paragraph (4), on public parks and beaches, and twenty feet from tents, stalls, booths, stands and benches on public parks and beaches;

(9) Smoking is not prohibited twenty feet from bleachers and grandstands for use by spectators at sporting and other public events; and

(10) Smoking is not prohibited as prescribed under section 1489.

**§1485. Prohibited condition of employment: smoking by employees outside the course of employment**

(a) (1) This chapter may not be construed as allowing an employer or agent of an employer to require, as a condition of employment, that an employee or prospective employee refrain from smoking or using tobacco products outside the course the employee's employment, or to otherwise discriminate against an employee with respect to compensation, terms, conditions or privileges of employment for smoking or using tobacco products outside the course of employment.

(2) This section does not apply to nonprofit employers or organizations whose primary purpose or objective is to discourage the use of tobacco products by the general public.

**§ 1486. Posting of signs**

"No smoking" signs or 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 must be clearly and conspicuously posted at every entrance of and inside every public place and place of employment where smoking is prohibited under this chapter. All signs necessary to comply with this section must also contain the following sentence: "IT IS ILLEGAL TO SMOKE IN THIS ESTABLISHMENT", and a contact number for the Department of Health to report violations.

**§ 1487. Responsibilities of proprietors**

The proprietor shall take the following measures to prevent smoking in public places or places of employment. The proprietor shall:

- (1) Post signs in accordance with section 1486;
- (2) Remove matches, cigarette lighters and ashtrays from areas where smoking is prohibited;
- (3) Request of any person observed or believed to be smoking in an area where smoking is prohibited to refrain from smoking immediately and, if that person does not refrain from smoking after being asked to do so, the proprietor shall:
  - (A) Ask the person to leave the premises or establishment;
  - (B) Discontinue services to the person; and
  - (C) If the person refuses to leave, manage the situation consistent with the exercise of lawful methods for preserving the peace or preventing the commission of an offense pursuant to 14 V.I.C., §293.

**§ 1488. Nonretaliation**

No employer may retaliate against an employee, applicant or customer for exercising any right provided by this chapter.

**§ 1489 Intent**

(a)(1) In any area or establishment where smoking is not prohibited, nothing in this chapter prohibits a proprietor of an establishment from voluntarily establishing nonsmoking portions or designating the entire establishment as smoke-free.

(2) Nothing in this chapter prohibits proprietors of places of employment from providing an outdoor smoking space for their employees; except that any employer who provides an outdoor smoking area for the employees shall ensure that the smoking area is physically separated from the enclosed workplace so as to prevent the migration of smoke into the workplace through entrances, windows, ventilation systems, or any other openings.

(3) Nothing in this chapter may be construed to require employers to provide break rooms for smokers or nonsmokers.

**§1490. RESERVED**

**§ 1491. Administration; enforcement**

(a) (1) The Commissioner of Health is the designated person and the Department of Health is designated lead department responsible for administration and enforcement of the provisions of this chapter. However, every peace officer may enforce this chapter pursuant to 5 V.I.C., §3562(1).

(2) The Commissioner of Health shall promulgate regulations necessary to carry out mandates of this chapter, including procedures for filing, investigating and resolving complaints.

(3) Any citizen who desires to file a complaint under this chapter against a proprietor may initiate the complaint with the Department of Health.

(4) The Department of Health, after receiving a written complaint signed by the complainant and citing the section and subsection of this chapter violated, shall take the following actions:

(A) Within ten business days from receipt of a complaint, the Department of Health shall provide the accused proprietor with notice of the

complaint. The notice must include, the name of the complainant, an explanation of the violation alleged, witnesses to the violation, if any, the time and place of the violation, the provisions of this chapter allegedly violated, and any additional information the Department of Health considers relevant and necessary to comply with procedural due process of law.

(B) Within ten business days after the notice of the complaint, the accused proprietor must be given an opportunity to submit a written answer to the allegations.

(C) Within the time specified the proprietor may file one or more notices with the Commissioner of defense, in which the proprietor may:

- (i) Request a hearing;
- (ii) Admit the accusation in whole or in part;
- (iii) Present new matters or explanations by way of a defense;

or

- (iv) State any legal objections to the complaint.

(D) The accused proprietor is entitled to a hearing on the merits if the proprietor files the required notice of defense within the time allowed by subparagraph (B) of this paragraph, and any such notice is deemed a specific denial of all parts of the complaint not expressly admitted. Failure to timely file the required notice of defense or to appear at the hearing constitutes an admission of all matters and facts contained in the complaint and a waiver of the proprietor's rights to a hearing, but the Commissioner, may nevertheless order a hearing. All affirmative defenses must be specifically stated, and unless objection is taken as

provided in paragraph (4), subparagraph (C), item (iv) of this section, all objections to the form of the complaint shall be deemed waived.

(E) The Commissioner shall determine the time and place of the hearing as soon as reasonably practical after receiving the proprietor's notice of defense. The Commissioner shall hand deliver or send by certified mail a notice to all parties at least 10 days before the hearing. Unless the proprietor consents, the hearing may not be held prior to the expiration time within which the proprietor is entitled to file the notice of defense.

(F) The Commissioner shall afford an opportunity for a fair hearing to the accused proprietor at the time and place specified in the notice. On the basis of the evidence produced at the hearing, the Commissioner shall make findings of fact and conclusions of law and enter such order as in the Commissioner's opinion will best further the purposes of this section.

(G) Written notice of the order must be issued to the accused proprietor and to such other persons as appeared at the hearing and made written request for notice of the order. The order may direct the proprietor to stop the violation, take corrective action, or impose a civil or administrative penalty pursuant to section 1496, subsection (a), paragraph (2), or direct all of the foregoing. The order of the Commissioner becomes final and binding on all parties unless appealed to the courts as provided in subparagraph (H) of this section within 15 days after notice has been sent to the parties.

(H) Any person adversely affected by an order of the Commissioner may obtain a judicial review by filing a written petition for review with the

Magistrate Court within 30 days after the entry of the order. The petition must state the grounds upon which review is asked and must pray that the order of the Commissioner be modified or set aside in whole or in part. A copy of the petition must be forthwith served upon the Commissioner and within 15 days the Commissioner shall certify and file in the court a transcript of the record upon which the order complained of was entered. A copy of the transcript must also be furnished at the time of the filing to the appellant.

(I) (i) Nothing within this section precludes the Attorney General or the Commissioner of Licensing and Consumer Affairs from acting through or at the request of the Commissioner of Health from maintaining an action for injunctive relief to enforce the provisions of this chapter and assess and recover penalties in a court of competent jurisdiction.

(ii) Nothing in this section is a limitation on the power of any department or agency or private entity from adopting and enforcing additional regulations, not in conflict with this chapter, imposing further conditions or restrictions on conduct in public places which might adversely affect public health or from bringing an action to prohibit and abate nuisances.

**§ 1492. RESERVED**

**§ 1493. Private action**

(a)(1) Any person may maintain an action for declaratory and equitable relief against a proprietor to restrain any violation of this chapter. On a prima facie showing of a violation of this chapter, the court shall grant preliminary equitable relief to restrain any further violation hereof. No bond is required for an action under this section.

(2) Any person may maintain an action to compel the performance of any duty imposed on the Department of Health under this chapter, or imposed on the Department of Licensing and Consumer Affairs or on any department or agency of the Government of the Virgin Islands under this chapter, but no action may be brought unless the department or agency has first failed to perform such a duty for more than thirty days following receipt of a written notice specifying the duty the complainant alleged not to have been performed.

**§ 1494. Government buildings, places of employment**

The Department of Health shall investigate complaints of violations of this chapter at government buildings or places of employment and all other noncommercial public places.

(a) The Department of Health may cite any department, agency, or instrumentality of the Government of the Virgin Islands not in compliance with this chapter. Any department, agency, or government instrumentality cited shall have 20 days from the date of citation or a reasonable time determined by the Department of Health to bring the department, agency or government instrumentality into compliance with the provisions of this chapter.

(b) Upon the petition of the Commissioner of Health, any commissioner, director or agency head who fails to bring a department, agency or government instrumentality in compliance with the provisions of this chapter within a 20-day period may be subject to unpaid suspension from office by the Governor or the respective board of directors of the agency for a period not less than 10 working days.

(c) The Attorney General shall investigate the Department of Health for compliance under this chapter, and may petition the Governor to suspend the Commissioner of Health for violations.

**§ 1495. Inspection of Places**

(a) (1) The Department of Health, Department of Licensing and Consumer Affairs or Fire Services on its own initiative, or by the request of the Commissioner of Health, shall inspect any public place or place of employment, subject to the provisions of this chapter for compliance.

(2) Inspections must be during hours of operation or at any time employees are on the job or required to be on the job. No notice is required before an inspection.

(3) Any violations of this chapter found by the Department of Licensing and Consumer Affairs or the Fire Service must be reported to the Department of Health and treated as a filed complaint under section 1491.

(b) When the Commissioner of Health upon inspection or upon receipt of a complaint under paragraph (3) of this subsection finds a violation of this chapter, the Commissioner may issue a written order directing the proprietor to discontinue the violation or to take corrective action. The order must state the reasons for the Commissioner's decision and may be subject to such terms and conditions as the Commissioner considers necessary to ensure compliance with the provisions of this chapter. The order must be served by hand delivery or certified mail upon the person being charged with the actual violation of this chapter, and is effective upon issuance; except that the order must grant the opportunity for a hearing.

#### **§ 1496. Penalties**

(a) (1) A person who smokes in an area where smoking is prohibited under section 1483 and where a no-smoking sign has been posted in conformity with this chapter commits a misdemeanor punishable by a fine in an amount not less than \$100 and not more than \$250 for each violation.

(2) A proprietor of a public place or place of employment who violates section 1486 or 1487 commits a misdemeanor punishable by a fine in an amount:

(A) not less than \$250 nor more than \$400 for the first violation;

(B) not less than \$500 nor more than \$1000 for the second violation within one year after the first violation;

(C) not less than \$2,500 nor more than \$5000 for each subsequent violation within one year after the second violation; and

(D) In addition to the fines established under this section, violations by a proprietor of any public place or place of employment may result in the suspension or revocation of any permit or license issued for the premises on which the violation occurred for violations amounting to an intentional or reckless disregard for the provisions of this chapter.

(b) Any violation resulting from an intentional or reckless disregard for the provisions of this chapter is punishable by the maximum amount of fines prescribed in subsection (a), paragraph 2, subparagraph (C).

(c) All fines collected under this chapter must be remitted to the Commissioner of Finance and covered into the Health Revolving Fund of the Virgin Islands to be used for training and education programs.

(d) All civil penalties permitted under this chapter may be assessed by the appropriate court; however, if the Commissioner promulgates regulations establishing a procedure for the administrative assessment of civil penalties, the Commissioner may proceed by means of either court assessment or by administrative procedure.

#### **§ 1497. Education**

(a) (1) The Department of Health, in conjunction with the Department of Licensing and Consumer Affairs, shall conduct seminars to educate business proprietors, employers and employees about the health and economic effects of smoking, tobacco use and exposure to secondhand smoke. Successful completion of a seminar, as demonstrated by a passing score on a test administered by the Department of Health, may be imposed as a condition of the restoration of any business license suspended or revoked for violation of this section.

(2) The Department of Licensing and Consumer Affairs shall provide all businesses applying for the issuance or renewal of a business license with literature describing the effects of smoking, tobacco use and exposure to secondhand smoke and on the requirements of The Virgin Islands Smoke-free Act.

#### **§ 1498. Severability**

The provisions of this chapter are severable. If any provision of this chapter or the application the provision is declared by a court of competent jurisdiction to be invalid or unconstitutional, the declaration does not affect the validity of the chapter as a whole or any provision of the section other than the part declared to be invalid or unconstitutional.

#### **§1499. Other applicable laws**

This chapter may not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

**SECTION 2.** Title 27, Virgin Islands Code, section 304, subsection (a) is amended by adding paragraph (8) to read as follows:

“(8) Where the licensee fails to comply with title 19 V.I.C., chapter 53a.”

**SECTION 3.** Title 33, Virgin Islands Code, chapter 111, section 3017, is amended at the end of subsection (c) by adding the following language: “All fines collected by the Department

of Health pursuant to 19 V.I.C., §1496 to be used exclusively for education programs on tobacco smoking.”

**SECTION 4.** Title 23, Virgin Islands Code, chapter 9, subchapter XIII is repealed.

**SECTION 5.** (a) Within three months after the enactment of this Act, the Commissioner of Health shall give to the general public, proprietors, and all Departments, offices, instrumentalities and agencies of the Government written notice of the requirements of this Act.

(b) Within nine months after the enactment of this Act, the Commissioner of Health shall establish a complaint form and after public hearing promulgate pursuant to 3 V.I.C., chapter 31 regulations to carry out the purpose of this Act.

**SECTION 6.** Sections 2 and 3 of this Act take effect 6 months after enactment.”

Thus passed by the Legislature of the Virgin Islands on April 15, 2010.

Witness our Hands and Seal of the Legislature of the Virgin Islands this 27

Day of April, A.D., 2010.



*Louis Patrick Hill*  
Louis Patrick Hill  
President  
*Samuel Sanes*  
Samuel Sanes  
Legislative Secretary

**Bill No. 28-0191 is hereby approved.**

**Witness my hand and the Seal of the Government of the United States Virgin Islands at Charlotte Amalie, St. Thomas, this 10th day of May, A.D., 2010.**



*John P. de Jongh, Jr.*  
John P. de Jongh, Jr.  
Governor