

NOTICE OF PROPOSED EXPEDITED RULEMAKING
TITLE 9. HEALTH SERVICES
CHAPTER 2. DEPARTMENT OF HEALTH SERVICES
TOBACCO-RELATED PROGRAMS

PREAMBLE

- 1. Article, Part, or Section Affected (as applicable) Rulemaking Action**

R9-2-101	Amend
R9-2-107	Amend
R9-2-110	Amend

- 2. Citations to the agency’s statutory authority for the rulemaking to include the authorizing statute (general) and the implementing statute (specific):**

Authorizing Statutes: A.R.S. §§ 36-136(A)(7) and 36-136(G)
Implementing Statutes: A.R.S. § 36-601.01(G)(11)

- 3. Citations to all related notices published in the Register as specified in R1-1-409(A) that pertain to the record of the proposed expedited rulemaking:**

Notice of Docket Opening: 29 A.A.R. 1476, June 30, 2023

- 4. The agency’s contact person who can answer questions about the rulemaking:**

Name:	Jennifer Botsford, Office Chief Senior
Address:	Arizona Department of Health Services Division of Public Health Services, Public Health Preparedness, Office of Environmental Health 150 N. 18th Ave., Suite 220 Phoenix, AZ 85007-3248
Telephone:	(602) 364-3142
Fax:	(602) 364-3146
E-mail:	Jennifer.Botsford@azdhs.gov
or	
Name:	Stacie Gravito, Interim Office Chief
Address:	Arizona Department of Health Services Office of Administrative Counsel and Rules 150 N. 18th Ave., Suite 200 Phoenix, AZ 85007

Telephone: (602) 542-8819
Fax: (602) 364-1150
E-mail: Stacie.Gravito@azdhs.gov

5. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, under A.R.S. § 41-1027, to include an explanation about the rulemaking:

Arizona Revised Statutes (A.R.S.) § 36-601.01(G)(11) requires the Arizona Department of Health Services (Department) to implement and enforce A.R.S. § 36-601.01, which was enacted as part of the Smoke-Free Arizona Act and authorizes the Department to promulgate rules for that purpose. In accordance with A.R.S. § 41-1039, on May 24, 2023, the Governor's Office approved the Department's rulemaking request to amend the Smoke-Free Arizona rules to address issues identified in a five-year-review-report, which includes making the rules more clear, concise, and understandable; correct cross-references; remove redundant language; clarify language without changing the effect of the rule, specifically in regards to the type of documentation a retail tobacco store submits to the Department to show that at least 51% of the retail tobacco store's gross income sales are on tobacco products and accessories. This rulemaking is expected to benefit the general public as well as businesses that identify as retail tobacco stores. The proposed rulemaking will conform to the rulemaking format and style requirements established by the Office of the Secretary of State.

6. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

The Department did not review or rely on any study for this rulemaking.

7. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state.

Not applicable

8. The preliminary summary of the economic, small business, and consumer impact:

Under A.R.S. § 41-1055(D)(2), the Department is not required to provide an economic, small business, and consumer impact statement.

9. The agency's contact person who can answer questions about the economic, small business, and consumer impact statement:

Not applicable

10. Where, when, and how persons may provide written comment to the agency on the

proposed expedited rule under A.R.S. § 41-1027(C):

Close of record: Monday, September 18, 2023, 4:00 p.m.

A person may submit written comments on the proposed expedited rules no later than the close of record to either of the individuals listed in item 4.

11. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

The rule does not require the issuance of a regulatory permit. Therefore, a general permit is not applicable.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

Federal laws do not apply to the rule.

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:

No such analysis was submitted.

12. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

None

13. The full text of the rule follows:

TITLE 9. HEALTH SERVICES
CHAPTER 2. DEPARTMENT OF HEALTH SERVICES
TOBACCO-RELATED PROGRAMS
ARTICLE 1. SMOKE-FREE ARIZONA

Section

- R9-2-101. Definitions
- R9-2-107. Retail Tobacco Store
- R9-2-110. Determination of Violation

R9-2-101. Definitions

In addition to the definitions in A.R.S. § 36-601.01(A), the following definitions apply in this Article unless otherwise specified:

1. “Adult day care” means “adult day health care facility” as defined in A.R.S. § 36-401.
2. “Ashtray” means any receptacle that is designed for disposing of the debris from smoking materials such as ash, cigarette butts or filters, or cigar stubs.
3. “Calendar quarter” means a period from:
 - a. January 1 through March 31,
 - b. April 1 through June 30,
 - c. July 1 through September 30, or
 - d. October 1 through December 31.
4. “Child care facility” has the meaning in A.R.S. § 36-881.
5. “Child care group home” has the meaning in A.R.S. § 36-897.
6. “Complaint” means a written or oral statement of a possible violation of A.R.S. § 36-601.01.
7. “Contiguous area” means a place that:
 - a. Is physically attached to a public place or non-vehicle place of employment; or
 - b. Is separated from the public place or non-vehicle place of employment only by other places controlled by the proprietor ~~of the public place or non-vehicle place of employment.~~
8. “Controlled” means under the authority and responsibility of a proprietor.
9. “Department” means the Arizona Department of Health Services.
10. “Department’s designee” means a state agency or political subdivision to which the Department delegates any functions, powers, or duties under A.R.S. § 36-601.01.
11. “Drift” means the physical movement of tobacco smoke, regardless of cause, into any area where smoking is prohibited by A.R.S. § 36-601.01.
12. “Emergency exit” means a doorway in a building or facility used for egress to the outdoors only when there is an immediate threat to the health or safety of an individual.
13. “Entering” means an individual going into or leaving a building or facility.
14. “Entrance” means a doorway in a building or facility that:
 - a. Is used by an individual for ingress from the outdoors or egress to the outdoors, and
 - b. Excludes:
 - i. An emergency exit, and

- ii. A doorway for outdoor patio patrons.
15. “Health care institution” means a building or facility regulated under A.R.S. Title 36, Chapter 4.
16. “Health care professional” means one of the following individuals regulated under A.R.S. Title 32 or A.R.S. Title 36, Chapter 6, Article 7 or Chapter 17, including:
- a. A podiatrist;
 - b. A doctor of chiropractic or chiropractic assistant;
 - c. A dentist, dental consultant, dental hygienist, or denturist;
 - d. A doctor of medicine;
 - e. A doctor of naturopathic medicine or naturopathic medical assistant;
 - f. A registered nurse practitioner, registered nurse, practical nurse, registered or practical nurse licensed by a state other than Arizona and practicing in Arizona according to the Nurse Licensure Compact, ~~A.R.S. § 32-1668~~ A.R.S. § 32-1660, or nursing assistant;
 - g. A dispensing optician;
 - h. An optometrist;
 - i. A doctor of osteopathic medicine;
 - j. A pharmacist, pharmacy intern, pharmacy technician, or pharmacy technician trainee;
 - k. A physical therapist or physical therapist assistant;
 - l. A psychologist;
 - m. A veterinarian or veterinary technician;
 - n. A physician assistant;
 - o. A radiologic technologist, including a practical radiologic technologist in podiatry, unlimited practical radiologic technologist, nuclear medicine technologist, or practical technologist in bone densitometry;
 - p. A homeopathic physician or a medical assistant employed by a homeopathic physician;
 - q. A behavioral health professional, including a baccalaureate social worker, master social worker, clinical social worker, professional counselor, associate counselor, marriage and family therapist, associate marriage and family therapist, associate substance abuse counselor, independent substance abuse counselor, or substance abuse technician;
 - r. An occupational therapist or occupational therapy assistant;

- s. A respiratory therapist or respiratory therapy technician;
 - t. An acupuncturist;
 - u. An athletic trainer;
 - v. A massage therapist;
 - w. A midwife;
 - x. A hearing aid dispenser;
 - y. An audiologist; or
 - z. A speech-language pathologist or speech-language pathology assistant.
17. “Open to the general public” means when the proprietor of a veterans or fraternal club permits an individual who is not a member, an employee, or a bona fide guest as defined in A.R.S. § 4-101 to be present in the veterans or fraternal club.
 18. “Outdoor patio” means an area designated by a proprietor according to R9-2-108(A).
 19. “Outdoor patio patron” means an individual who is occupying an outdoor patio.
 20. “Permeable” means permitting tobacco smoke to pass through.
 21. “Private residence” means a structure, other than a health care institution, where an individual lives and sleeps.
 22. “Proprietor” means an owner, operator, manager or other person in control of a public place or a place of employment.
 23. “Reasonable distance” means the distance that meets the requirements in R9-2-102(A).
 24. “Tobacco products and accessories” means:
 - a. Smoking materials such as cigars, cigarettes, or pipe tobacco; and
 - b. Smoking-related materials such as lighters, humidors, pipes, or cigarette cases.
 25. “Vehicle” means motor vehicle as defined in A.R.S. § 28-101.
 26. “Ventilation system” means the natural or mechanical means of supplying air to, or removing air from a space.

R9-2-107. Retail Tobacco Store

- A. A proprietor may permit smoking in a retail tobacco store only if the retail tobacco store meets the definition in A.R.S. § 36-601.01(A)(10) and the requirements in A.R.S. § 36-601.01(B)(3) and this Section.
- B. The proprietor of a retail tobacco store where smoking is permitted and that begins operating after January 1 of a calendar year shall complete, by the retail tobacco store’s first day of operation, an affidavit that contains:
 1. The name of the proprietor of the retail tobacco store,
 2. The name and address of the retail tobacco store,

3. A statement that the proprietor of the retail tobacco store has personal knowledge of the facts supporting the affidavit,
 4. A statement that the retail tobacco store expects to derive at least 51 percent of its gross income during each calendar year from the sale of tobacco products and accessories as required by A.R.S. § 36-601.01,
 5. A statement describing the documents that contain the facts supporting the statement in subsection (B)(4),
 6. The signature of the proprietor of the retail tobacco store,
 7. An Arizona notary's signature certifying that the proprietor swore to or affirmed the truthfulness of the statements in the affidavit, and
 8. The date of the Arizona notary's signature.
- C.** The proprietor of a retail tobacco store where smoking is permitted and that has been in operation for at least an entire calendar year shall complete, by January 31 of each year, an affidavit that contains:
1. The name of the proprietor of the retail tobacco store;
 2. The name and address of the retail tobacco store;
 3. A statement that the proprietor of the retail tobacco store has personal knowledge of the facts supporting the affidavit;
 4. A statement that the retail tobacco store derived at least 51 percent of its gross income during the previous calendar year from the sale of tobacco products and accessories;
 5. A statement describing the documents that contain the facts supporting the statement in subsection (C)(4), supporting documentation may include sales slips, invoices, receipts, and deposit slips;
 6. The signature of the proprietor of the retail tobacco store;
 7. An Arizona notary's signature certifying that the proprietor swore to or affirmed the truthfulness of the statements in the affidavit; and
 8. The date of the Arizona notary's signature.
- D.** If the Department or the Department's designee receives a complaint under R9-2-109(A) about a retail tobacco store where smoking is permitted, the proprietor of the retail tobacco store shall provide to the Department or the Department's designee:
1. The affidavit under subsection (B) or the most current affidavit under subsection (C), whichever is appropriate; and
 2. Documents that enable the Department or the Department's designee to determine the percent of gross income derived from the sale of tobacco products and accessories:

- a. For the calendar quarter immediately preceding the date of the complaint; or
 - b. If the retail tobacco store was not in operation for the entire calendar quarter immediately preceding the date of the complaint, for the period beginning on the date the retail tobacco store opened and ending on the date of the complaint.
- E. The proprietor of a retail tobacco store where smoking is permitted shall retain on the premises of the retail tobacco store and make available to the Department or the Department's designee upon request:
1. The affidavit under subsection (B) or the most current affidavit under subsection (C), whichever is appropriate; and
 2. The documents:
 - a. Identified under subsection (B)(5) or subsection (C)(5), whichever is appropriate; and
 - b. Required under subsection (D)(2).

R9-2-110. Determination of Violation

In determining whether a violation of A.R.S. § 36-601.01 has occurred, the Department or the Department's designee shall consider the following:

1. The presence of an ashtray in an area where smoking is prohibited;
2. The lack of a sign that is required under A.R.S. § 36-601.01(E) or the presence of a sign that does not meet the requirements of R9-2-105;
3. The presence of smoking in an area where smoking is prohibited;
4. The presence of tobacco ashes, cigarette butts or filters, or cigar stubs in an area where smoking is prohibited;
5. The presence of tobacco smoke that drifts into a place of employment or public place through entrances, windows, ventilation systems, or other means; and
6. Except as provided in R9-2-108(D) and R9-2-108(E), the presence of tobacco smoke within a reasonable distance from entrances, open windows, or ventilation systems.