

# CLEAN INDOOR AIR ACT WAIVER POLICY

(Amended effective January 1, 2005)

Pursuant to New York State Public Health Law Section 1399-t, the Oneida County Health Department is the enforcement officer for the Clean Indoor Air Act within Oneida County. Public Health Law Section 1399-u states that, as the enforcement officer, the Oneida County Health Department may grant waivers from the application of specific provisions of the Act to those establishments required to comply with the Act.

## I. Bases for Granting of Waivers

The Oneida County Health Department will grant a waiver to an applicant if that applicant can establish one of the following bases:

1. The applicant cannot comply with a specific provision of the Clean Indoor Air Act because compliance with that provision would cause the applicant *undue financial hardship*;
- OR**
2. The applicant can show that other factors exist which would *render compliance unreasonable*.

Applicants can use either one of these bases, regardless of the nature, size, or location of the applicant's establishment. The basis being used in an application must be explicitly stated and clearly proven by the applicant.

## II. Undue Financial Hardship

- (A) In general. The term "undue financial hardship" means that compliance with the Clean Indoor Air Act would cause the applicant significant financial difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
- (B) Means of showing undue financial hardship. To show undue financial hardship, the applicant must show one or more of the following:
  - (i) Exact copies of New York State sales tax statements that were submitted by the applicant to the State of New York that show at least a ten percent (10%) reduction in New York State sales tax receipts from the sale of food and beverages for a period of at least three (3) consecutive months during which the facility has operated smoke-free as compared to the combined average of such receipts during the same period of at least three (3) consecutive months in the two (2) years immediately prior to such smoke-free operation;
  - (ii) Receipts and other documentation proving that the applicant made capital expenditures prior to July 24, 2003 that were related to providing a smoke-free environment at the establishment and that the establishment is now unable to recoup the costs of such expenditures;
  - (iii) Other factors, documents, and proof that demonstrate that compliance with a specific provision of the Clean Indoor Air Act would cause undue financial hardship to the applicant. Applications using this factor to show

undue financial hardship will be judged on a case-by-case basis and may require the applicant to appear before Oneida County Health Department officials to explain such other manner of undue financial hardship.

- (C) Factors to be considered. In determining whether compliance with the Act would impose undue financial hardship on an applicant, factors to be considered include:
- (i) the nature and cost of compliance to the applicant;
  - (ii) the overall financial resources of the facility that is seeking the waiver; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such compliance upon the operation of the facility;
  - (iii) the overall financial resources of the applicant; the overall size of the business of applicant with respect to the number of its employees; the number, type, and location of its facilities; and
  - (iv) the type of operation or operations of the applicant, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility in question to the applicant.

### III. Other Factors Exist Which Would Render Compliance Unreasonable

- (A) Safety or Security Factors Exist That Would Render Compliance Unreasonable.
- (i) The applicant should demonstrate, though documentation provided as required below in subsection (ii), that compliance with the law will jeopardize the safety and/or security of facility staff, patrons, and others.
  - (ii) An application based on safety or security factors should contain the following:
    - (a) The specific provision from which the applicant seeks a waiver;
    - (b) A description of all efforts made to operate the facility safely or securely as a smoke-free environment;
    - (c) A complete description of how the specific provision from which the applicant seeks a waiver caused or contributed to, or will cause or contribute to, safety or security concerns.
- (B) Other Factors That Would Render Compliance Unreasonable.
- (i) The applicant should demonstrate, through documentation provided as required below in subsection (ii), that factors other than safety, security or undue financial hardship would render compliance with a specific provision of the CIAA unreasonable.
  - (ii) An application based on factors other than safety, security or undue financial hardship that would render compliance unreasonable should contain the following:
    - (a) The specific provision from which the applicant seeks a waiver;
    - (b) A description of all efforts made to operate the facility safely or securely as a smoke-free environment;
    - (c) A complete description of those factors that are believed to make compliance unreasonable.

IV. Conditions and Restrictions Necessary to Minimize the Adverse Effects of the Waiver

- (A) Pursuant to Public Health Law Section 1399-u(2), the Oneida County Health Department must subject every waiver granted to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose of the Clean Indoor Air Act.
- (i) To that end, each applicant must submit a plan that minimizes the effect of any waiver that is granted upon persons subject to an involuntary exposure to second hand smoke. The plan submitted by an establishment will be used to determine the conditions it must follow, if granted a waiver.
  - (ii) The ultimate decision on the conditions and restrictions to which a waiver will be subject lie with the Oneida County Health Department and will be determined on a case-by-case basis, taking into consideration the following factors:
    - (a) The size and number of rooms contained in the establishment;
    - (b) The design of the establishment, including the locations of the entrances, exits, restroom facilities, and general traffic patterns;
    - (c) The average number of customers normally in the establishment;
    - (d) The number of employees of the establishment; and
    - (e) Other factors that may be presented by the applicant, particularly unique or rare circumstances existing at a particular establishment.
  - (iii) In determining the conditions and restrictions to which a waiver will be subject, applicants should be aware of the following factors:
    - (a) Where an establishment is able to limit smoking to a physically separated room that contains less than twenty-five percent (25%) of the establishment's seating capacity and is separately ventilated, that establishment will be required to do so as a condition of its waiver;
    - (b) Establishments shall, to the extent practicable, position smoking areas away from general traffic patterns to enter the establishment and to visit the restrooms;
    - (c) The maintenance of "smoking" and "non-smoking" signs that distinctly show the separation of the "smoking" and "non-smoking" areas will be required at each establishment that is granted a waiver; and
    - (d) The Health Department will condition the issuance of a waiver on such additional reasonable restrictions that the Oneida County Health Department deems necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke.
  - (iv) Once a waiver is granted, the Oneida County Health Department reserves the right to require an applicant to changes the conditions and restrictions placed on a waiver if the Health Department determines that the original

conditions and restrictions placed on the waived facility are found to not be effective in minimizing the adverse effects of the waiver.

V. Length and Renewal of Waivers

- A. Each waiver shall be issued for a period of one (1) year, which shall begin on January 1, 2005 and end on December 31, 2005. All waivers issued during this period shall expire on December 31, 2005, regardless of the date of issuance of the waiver.
  - (i) Waivers that were issued prior to January 1, 2005 will be automatically extended to last for the one-year period starting on January 1, 2005 and ending December 31, 2005.
- B. Renewal of Waivers. At least thirty (30) days prior to the end of the initial one-year waiver period (i.e., by December 1, 2005), an applicant must, in writing, notify the Health Department of its intent to renew its waiver.
  - (i) The Health Department will evaluate each applicant's letter of intent to renew based on the following criteria:
    - (a) The establishment's basis for needing a waiver still exists (i.e., compliance with the Act would still cause undue financial hardship or other factors still exist which would render compliance unreasonable);
    - (b) The establishment has been in compliance with the Act – to the extent compliance was not waived – and the provisions of its waiver since the waiver was issued; and
    - (c) No substantial changes to the establishment's operation have been made in the year since its waiver was issued. Substantial changes include, but are not limited to the following:
      - 1. A change in the establishment's ownership;
      - 2. A change in the establishment's location;
      - 3. Remodeling or renovation of the facility; and
      - 4. A change in the nature of the establishment's business (i.e., the establishment received the waiver as a restaurant, but is now an office building).
  - (ii) If renewed, a waiver shall be in effect for the three-year period starting on January 1, 2006 and ending December 31, 2008 the date on which the previous waiver expired.
  - (iii) A waiver may be renewed for an unlimited number of three-year periods, provided the establishment continues to qualify for renewal.

VI. Procedure for Review of Initial Waiver Applications

- A. An applicant must submit a Clean Indoor Air Act Waiver Application to the Oneida County Health Department.
- B. The Oneida County Health Department will review each application to determine that it has been correctly completed and that all necessary documentation is included. If any additional documentation is needed, the applicant will be so notified, and the application will not be processed until it is complete.

- C. Once an application is complete, the Oneida County Health Department will review it and decide whether a waiver is warranted. The applicant will be informed of this decision by mail. This decision will become a final decision.
- D. An applicant may, within 15 days of receipt of the denial and in writing, request a hearing for the review of a denial of a waiver. Such a hearing must be requested within 15 days of receipt of the denial. An administrative hearing, with the Director of Health as hearing officer, will be scheduled.
- E. At an administrative hearing, both the applicant and the Health Department may attend and may present evidence and testimony. The Director of Health will make an ultimately final decision following this administrative hearing.
- F. After an appeal to the Director of Health, the applicant may take any other appellate action provided for in the Clean Indoor Air Act, or elsewhere in State or Federal law.