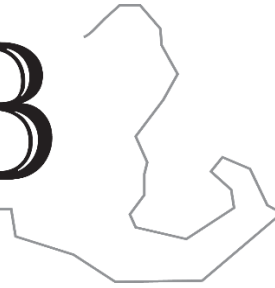


# MAHNB

Assisting Massachusetts Boards of Health through  
training, technical assistance and legal education



## Massachusetts Association of Health Boards

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### **1. Are Smoking Bars, as defined in G.L. c. 270, § 22 permitted to be open during Phase III – Step 1?**

No. State law defines a smoking bar as “an establishment that: (i) exclusively occupies an enclosed indoor space and is primarily engaged in the retail sale of tobacco products . . . for consumption by customers on the premises; (ii) derives revenue from the sale of food, alcohol or other beverages that is incidental to the sale of a tobacco products and prohibits entry to a person under 21 years of age; (iii) prohibits a food or beverage not sold directly by the establishment from being consumed on the premises; (iv) maintains a valid permit for the retail sale of a tobacco product as required to be issued by the appropriate authority in the city or town in which the establishment is located; and (v) maintains a valid permit issued by the department of revenue to operate as a smoking bar.”<sup>1</sup>

As part of Phase III – Step 1, effective August 11, 2020, restaurants were permitted to open for indoor table service.<sup>2</sup> Per the Commonwealth’s sector specific workplace safety standards, a restaurant is defined as “an establishment that provides seated food service that is prepared on-site and under a retail food permit issued by a municipal authority pursuant to 105 CMR 590.000. Potato chips, pretzels, and other similar pre-packaged, shelf-stable foods, or other food prepared off-site do not constitute food ‘prepared on-site.’”<sup>3</sup>

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<sup>1</sup> MASS. GEN. LAWS, ch. 270, § 22(a).

<sup>2</sup> See COMMONWEALTH OF MASSACHUSETTS, Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19 (updated August 10, 2020), available at <https://www.mass.gov/doc/sector-specific-workplace-safety-standards-phase-iii-step-1-for-restaurants-to-address-covid-19>.

<sup>3</sup> Id.

No activity can take place in a restaurant without following sector specific COVID-19 workplace safety standards for restaurants. The mandatory safety standards include, but are not limited to the following:

- Tables must be positioned so to maintain at least a 6-foot distance from all other tables;
- Restaurants may not seat any customers at the bar;
- All customers must be seated; eat-in service to standing customers (e.g., around bar areas) is prohibited; and
- Face coverings are required for all customers and workers at all times, except that customers may remove face coverings while seated at tables.

If a smoking bar wants to change its designation to a “restaurant,” and has the appropriate license from the Alcoholic Beverage and Control Commission (ABCC) and the appropriate local permits, then smoking cannot be permitted in the establishment because smoking is prohibited in all restaurants and bars in Massachusetts pursuant to G.L. c. 270, § 22(b). In addition, to be designated as a restaurant, food must be prepared on-site. Lastly, customers may only remove their face masks for the purposes of eating and drinking and only while seated at a table.

**2. If a smoking bar opens as a restaurant in Phase III – Step 1, does it have to maintain the requirement that 51% of its sales are from tobacco, per G.L. c. 270, § 22(h)(b)?**

No. Smoking bars operating in Phase III – Step 1 do not have to demonstrate that 51% of their business is from tobacco *because they are not operating as smoking bars but as restaurants*. G.L. c. 270, § 22(b) prohibits smoking in all enclosed workplaces, including restaurants and bars. The establishment cannot have it both ways; it either operates as a restaurant or it does not open until Phase IV. If an establishment opens as a restaurant in Phase III – Step 1 and converts back to a smoking bar in Phase IV, then pursuant to its Department of Revenue permit, 51% of its sales must be from tobacco.

**3. What are the penalties for operating in violation of COVID-19 guidance?**

Per the Governor’s COVID-19 Order No. 33, the Department of Labor Standards may issue fines of up to \$300 per violation.<sup>4</sup> In COVID-19 Order No. 46, the Governor increased the amount of fines for violating the Travel Quarantine Order and the Gathering Order, to up to \$500 per violation. COVID-19 Order No. 48 states that “[a]ll fines issued . . . and their applicable guidance shall be administered in the manner provided for the non-criminal disposition of violations of municipal by-law, ordinance, rule, or regulation pursuant to G.L. c. 40, § 21D.” The Orders affected are the following:

- Facial covering requirement (COVID-19 Order No. 31);
- Phased Reopening of Workplaces and Workplace Safety Measures (COVID-19 Order No. 33);

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<sup>4</sup> All COVID-19 Orders may be downloaded from the Commonwealth’s website (<https://www.mass.gov/info-details/covid-19-state-of-emergency>).

- Order Authorizing the Re-Opening of Phase II Enterprises (COVID-19 Order No. 37);
- Order Further Advancing the Re-Opening of Phase II Enterprises (COVID-19 Order No. 40);
- Order Authorizing the Re-Opening of Phase III Enterprises (COVID-19 Order No. 43);
- Order Instituting a Mandatory 14-day Quarantine Requirement for Travelers (COVID-19 Order No. 45) (\$500 fine); and
- Third Revised Order Regulating Gatherings Throughout the Commonwealth (COVID-19 Order No. 46) (\$500 fine).
  - It is important to note that one of the reasons the Governor reduced the number of people who can gather is because of “bars masquerading as restaurants.”<sup>5</sup>

In addition to the above fines, if an establishment is creating a public health nuisance that may endanger the health of the public, the local Board of Health has the legal authority to issue a Cease and Desist Order and fines of up to \$1,000.<sup>6</sup>

There are also fines for operating in violation of G.L. c. 270, § 22.<sup>7</sup>

*This information is provided for educational purposes only and is not to be construed as legal advice. Please see your city or town attorney for legal advice.*

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<sup>5</sup> OFFICE OF THE GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, Baker-Polito Administration Announces New Initiatives to Stop Spread of COVID-19 (August 7, 2020), available at <https://www.mass.gov/news/baker-polito-administration-announces-new-initiatives-to-stop-spread-of-covid-19>.

<sup>6</sup> A template for Cease and Desist Orders can be found at MAHB’s website (<https://www.mahb.org/wp-content/uploads/2020/08/FINAL-CD-Template-COVID-19-BOH-8.5.2020.pdf>).

<sup>7</sup> MASS. GEN. LAWS ch. 270, § 22(1).