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OPINION	:	No. 09-507
	:	
of	:	December 21, 2011
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THE HONORABLE MICHELE BEAL BAGNERIS, CITY PROSECUTING ATTORNEY FOR THE CITY OF PASADENA, has requested an opinion on the following question:

Is a private smokers' lounge located in or attached to a retail or wholesale tobacco shop, which serves alcoholic beverages to patrons, exempt from the requirements of Labor Code section 6404.5 to maintain a smoke-free workplace?

CONCLUSION

No, a private smokers' lounge located in or attached to a retail or wholesale tobacco shop, which serves alcoholic beverages to patrons, is not exempt from the requirements of Labor Code section 6404.5 to maintain a smoke-free workplace.

ANALYSIS

Labor Code section 6404.5¹ regulates the smoking of tobacco² in enclosed areas of the workplace. The section's broad purposes are described in subdivision (a):

The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state ... thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment ... in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.

The Legislature's intention to preempt the regulation of smoking in workplaces statewide is emphasized in subdivision (g):

The smoking prohibition set forth in this section shall constitute a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment and shall supersede and render unnecessary the local enactment or enforcement of local ordinances regulating the smoking of tobacco products in enclosed places of employment.³

¹ 1994 Stat. ch. 310 § 1 (Assembly 13). All further references to the Labor Code are by section number only.

² While section 6404.5 refers only to the smoking of tobacco products, marijuana smoking is regulated as well by virtue of other statutes. *See* Health & Saf. Code §§ 11362.785(a) (“Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment ...”); 11362.79 (“Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances: (a) In any place where smoking is prohibited by law ...”).

³ Despite section 6404.5's preemption of local regulation of workplace smoking,

Without retreating from its stated goal of eliminating smoking in 100 percent of enclosed places of employment, the Legislature carved out a few exceptions from the definition of “places of employment,” notably in circumstances where smoking presents little risk to non-smoking employees or other persons. Of particular interest here is section 6404.5(d)(4), which excludes from the definition of “workplace” any “retail or wholesale tobacco shops and private smokers’ lounges.”⁴

We are asked whether a private smokers’ lounge connected to a tobacco shop may retain its exemption from the workplace smoking prohibitions if the shop also serves alcoholic beverages to its patrons. We are informed that in some communities private smokers’ lounges serve alcoholic beverages to their customers and, further, that the California Department of Alcoholic Beverages Control, which has the exclusive power to license the manufacture, importation, and sale of alcoholic beverages in the state,⁵ has issued alcohol licenses to some of these entities. This practice has caused concern among local enforcement authorities and raised questions about how workplace no-smoking rules apply.

local authorities play a significant role in implementing and enforcing the statute. Subdivision (a) specifically authorizes local officials to regulate smoking under circumstances not covered by state law:

Notwithstanding any other provision of this section, it is the intent of the Legislature that any area not defined as a “place of employment” pursuant to subdivision (d) or in which the smoking of tobacco products is not regulated pursuant to subdivision (e) shall be subject to local regulation of smoking of tobacco products.

See also § 6404.5 at subds. (i), (j).

⁴ Other exceptions include motor truck cabs, when no non-smoking passengers are present (§ 6404.5(d)(5)); warehouse facilities larger than 100,000 square feet and housing 20 or fewer full-time employees (§ 6404.5(d)(6)); theatrical sites, if smoking is integral to the story (§ 6404.5(d)(9)); medical research or treatment sites, if smoking is integral to the research or treatment (§ 6404.5(d)(10)); private residences, except during hours of operation as licensed family day care (§ 6404.5(d)(11)); and patient smoking areas in long-term health care facilities (§ 6404.5(d)(12)). *See also City of San Jose v. Dept. of Health Services*, 66 Cal. App. 4th 35, 44 (1998).

⁵ *See* Cal. Const. art. XX, § 22(d).

When we are called upon to interpret the meaning of a statute, our primary task is to determine what the Legislature intended.⁶ In doing so, we “look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.”⁷ “If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.”⁸

As has been noted, section 6404.5(d)(4) sets out an exemption from workplace smoking restrictions for “retail or wholesale tobacco shops and private smokers’ lounges.”⁹ For purposes of the exemption, a smokers’ lounge is an “enclosed area in or attached to a retail or wholesale tobacco shop that is *dedicated to the use of tobacco products*, including, but not limited to, cigars and pipes.”¹⁰ “Dedicated” means “wholly committed to a particular course of ... action.”¹¹ Therefore an area “dedicated to the use of tobacco products” is set aside for the use of tobacco products, and for tobacco products *only*. “Where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned.”¹² Furthermore, while the statute recites that a private smokers’ lounge is an area dedicated to the use of tobacco products, “including, *but not limited to*, cigars and pipes,” the class of permitted items unquestionably remains confined to tobacco products. Despite longstanding cultural associations between tobacco and alcoholic beverages, tobacco and alcohol are two distinct products. The phrase “tobacco products” cannot reasonably be interpreted as including alcoholic beverages. “An exception to a statute is to be narrowly construed. When a statute specifies an exception, no others may be added under the guise of

⁶ *Freedom Newsps., Inc. v. Orange Co. Employees Ret. Sys.*, 6 Cal. 4th 821, 826 (1993).

⁷ *Dyna-Med, Inc. v. Fair Empl. & Housing Commn.*, 43 Cal. 3d 1379, 1386-1387 (1987).

⁸ *People v. Coronado*, 12 Cal. 4th 145, 151 (1995) (internal quotations and citations omitted).

⁹ A retail or wholesale tobacco shop is “any business establishment the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories.” § 6404.5(d)(4)(B).

¹⁰ § 6404.5(d)(4)(A) (emphasis added).

¹¹ *The American Heritage Dictionary of the English Language* (4th ed., 2000).

¹² *Shelby v. S. P. Co.*, 68 Cal. App. 2d 594, 599 (1945).

[statutory] construction.”¹³ Therefore we conclude that an area in which alcoholic beverages are served is not included in the section 6404.5(d)(4)(A) exemption from smoke-free workplace rules because it is not “dedicated to the use of tobacco products.”

In addition to a smokers’ lounge connected to a tobacco shop, however, section 6404.5(d)(4) also creates an exemption from workplace smoking restrictions for the tobacco shop itself. For purposes of the exemption, a tobacco shop is “any business establishment *the main purpose of which* is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and *smoking accessories*.”¹⁴ While this language is marginally less restrictive than the definition of a smokers’ lounge, the differences are not significant enough to produce a different conclusion.

In the first place, the expansion of the terminology to include “smoking accessories” in addition to pipes tobacco and cigars is immaterial in this context. The terms are still restricted to tobacco and tobacco-related products, and cannot reasonably be interpreted as including alcoholic beverages. And while “the main purpose” is a somewhat more elastic phrase than “dedicated to,” the difference is not enough to cause us to reach a different answer to the question we have been asked here. We recognize that a phrase as flexible as “the main purpose” could give rise to problems of application in close cases or on unusual facts, but we have no need to decide here whether it should take just a few drinks or more than fifty percent of revenues to meet the mark.¹⁵ For purposes of construing the statute, we are guided by the general rule that protective statutes, such as the statewide ban on smoking in workplaces, are to be construed broadly. “When, as in this case, a civil statute is enacted for the protection of the public, it must be ‘broadly construed in favor of that protective purpose.’”¹⁶ In addition, this conclusion avoids what would otherwise be a jarringly counterintuitive result—that is, permitting both drinking and smoking to take place in the open and public areas of a tobacco shop, while forbidding drinking to take place in the enclosed area of the tobacco shop that has been set aside for smoking purposes. Our careful review of the statute, its

¹³ *Harris v. Alcoh. Bev. Control Apps. Bd.*, 201 Cal. App. 2d 567, 571 (1962) (citations omitted).

¹⁴ § 6404.5(d)(4)(B) (emphasis added).

¹⁵ See generally 68 Ops.Cal.Atty.Gen. 263 (1985) (commercial enterprise that offers complimentary alcoholic beverages with paid services is “selling” alcoholic beverages and requires alcoholic beverage license).

¹⁶ *People ex rel. Lockyer v. R. J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 717 (2002) (quoting *People ex rel. Lungren v. Superior Ct.*, 14 Cal. 4th 294, 313 (1996)).

context, and its history convinces us that the Legislature did not intend such an anomalous result.¹⁷

Accordingly, we conclude that a private smokers' lounge located in or attached to a retail or wholesale tobacco shop, which serves alcoholic beverages to patrons, is not exempt from the requirements of Labor Code section 6404.5 to maintain a smoke-free workplace.

¹⁷ We note that a tobacco shop that serves alcohol would have nothing to gain under the smoke-free workplace rules by characterizing itself as a "bar" or "tavern." When the statute prohibiting smoking in the workplace was first enacted, bars and taverns were exempted from the definition of a place of employment. *See* § 6404.5(d)(8) (defining "bar" and "tavern"). That exemption was expressly made conditional and contingent upon the adoption of certain regulations by the state Occupational Safety and Health Standards Board or the federal Environmental Protection Agency that establish standards for the reduction of permissible exposure to environmental tobacco smoke. § 6404.5(f). These contingencies were required to occur or fail by January 1, 1998. That date passed with neither agency taking the identified regulatory action, and the exemption for bars and taverns expired. *See* § 6404.5(f)(B)(3); *see also* 82 Ops.Cal.Atty.Gen. 190, 192 (1999). Bars and taverns are now smoke-free workplaces.