



Why Gov. Murphy's Smoking Ban Lift on AC Casinos Went up in Smoke

Last week was a roller coaster ride for the seaside resort's gambling halls.

By Suzette Parmley | September 07, 2020



New Jersey Gov. Phil Murphy – Photo by Carmen Natale/ALM

The head fake on Atlantic City casinos allowing smoking again was a potential major headache for Gov. Phil Murphy and his administration—and the reason some top employment and labor attorneys said he didn't have much choice but to pull back on lifting the smoking ban.

Last week was a roller coaster ride for the seaside resort's gambling halls.

On Aug. 31 Murphy issued a new executive order proclaiming the state's ban on indoor dining was being lifted for the second time on Sept. 4, allowing restaurants to seat up to 25 percent capacity, as well as allowing beverage service to return on the casino floors and patrons to smoke inside the casinos.

The state's gyms and movie theaters also were gearing to reopen on Sept 4.

But lifting the casino smoking ban caused such a political stink that it was quickly extinguished.

At his thrice weekly coronavirus briefing in Trenton on Friday, Murphy reversed on lifting the ban before the start of the busy, three-day Labor Day weekend. "We are taking Administrative Action to prohibit smoking at casinos," Murphy said tersely. "It's too risky." Next topic.

Matthew Collins, co-chair of the labor and employment practice at Brach Eichler in Roseland, said the move by Murphy was "more a safety and health issue than concern over a backlash from other workplaces."

"The reinstatement of drinks and food made sense, but allowing smoking was taking it further than medical experts would say is safe," said Collins.

Leading small business advisor Scott Piekarsky, a partner at Phillips Nizer in Hackensack, said the governor also risked looking hypocritical.

"Allowing smoking indoors at casinos would have been legally inconsistent and beyond embarrassing to the governor," Piekarsky said on Friday. "In Executive Order 157 on June 26, 2020, he declared how indoor dining and entertainment and recreation with groups congregating is a higher risk than indoor retail. He then flip flopped his decision on June 29 in Executive Order 158 and kept restaurants closed.

"By allowing indoor casino smoking, you have people congregating indoors without masks potentially spewing out virus when blowing smoke, talking and coughing," added Piekarsky. "We know smokers cough. Legally, his decision would have contravened the rationale of his prior order and as a matter of common sense it would have been a knucklehead decision to quote our fearless leader."

Lifting the casino smoking ban also received heavy backlash from a Senate Republican and the Senate Democrat who chairs the Committee on Health, Human Services, and Senior Citizens.

The New Jersey Smoke-Free Air Act was passed overwhelmingly by the Legislature, and former Gov, Richard Codey signed the legislation on Jan. 15, 2006, effective April 15, 2006. The act says, "The Legislature finds and declares that ... tobacco smoke constitutes a substantial health hazard to the nonsmoking majority ... and it is clearly in the public interest to prohibit smoking in all enclosed indoor places of public access and workplaces."

Among the only specified exceptions under the law where smoking may, but need not, be permitted, are the gaming areas of a casino containing at least 150 standalone slot machines, or 10 table games, or some combination thereof approved by the New Jersey Casino Control Commission; and an area within a casino simulcasting facility with a simulcast counter and dedicated seating for at least 50 simulcast patrons or at least 10 table games

"I don't think it's necessarily about other workplaces [getting upset]," Collins said. "Basically, smoking's been banned in pretty much every other workplace in the state since 2006 but the casinos were exempted out.

"A lot of businesses are already concerned about potential litigation arising from opening up - whether it's workers getting infected or whether workers infecting patrons, so I believe it was more the pressure of exposing workers and visitors [to the coronavirus] at the casinos that probably resulted in (the governor's) change of opinion," added Collins. "You can usually eat or drink and avoid spraying someone's face, but when you're smoking you're blowing out somewhere and putting particles into the air."

According to Department of Health Commissioner Judith Persichilli, who appears alongside Murphy at every coronavirus briefing, as of last Friday, the state had 193,432 positive cases of COVID-19 and 14,195 deaths.

Last week Sen. Declan O'Scanlon, R-Monmouth, called reinstating smoking in the casinos "ludicrous" on the part of Murphy.

"We are in the middle of a pandemic where we are trying to do everything in our power for people not to forcibly exhale without a mask around others," O'Scanlon said. "But that is exactly what smoking is! Even Pennsylvania, one of the few states that still allow smoking in a casino, has temporarily banned it due to face-

covering regulations.”

Sen. Joseph Vitale, D-Middlesex, Chairman of the Senate Health Committee, described Murphy’s contemplation of lifting the casino smoking ban “baffling.”

“The science and facts are clear, COVID-19 overwhelmingly spreads when we breathe,” Vitale said. “Second hand smoke and vapor from electronic cigarettes are enough, but there is absolutely no reason to believe smoking would not also spread the coronavirus because there is simply no way to smoke and wear a face covering.”

On Friday, both senators applauded Murphy’s turn-about on the issue.

“Smoking encourages the spread of the coronavirus,” O’Scanlon said. “It [the governor’s position] was ridiculous. ...We won this one.”

Added Vitale: “This was the right thing to do and safest decision for New Jerseyans.”

But it was yet another blow to the state’s struggling casino industry. Gambling revenues are estimated to be at least 30 percent down from the same period a year ago, according to the New Jersey Division of Gaming.

AC’s casinos were closed Memorial Day due to the pandemic. Some reopened in time for the traditionally busy Fourth of July weekend at 25 percent capacity but indoor dining, drinking and smoking were banned.

Some said Murphy’s Executive Order on Aug. 31 had given them a glimmer of hope that they would be able to make up some lost ground over this Labor Day weekend – one of the busiest for the Shore.

Statistically, those who track the industry say a lot gamblers also happen to smoke—which is why casino owners have invested millions of dollars in air filtration systems for their venues.

On Friday, some owners sounded resigned to the reality that smoking was still banned.

“No comment on the topic,” said Joe Lupo, property president of the Hard Rock Hotel & Casino in Atlantic City. “And yes, we began indoor dining at 25% today and the ability to serve drinks on the casino floor to those seated at a game.”

Brian Brennan, spokesman for the city’s top grossing Borgata Hotel & Casino, said this: “We will continue to follow the governor’s guidance and regulations as they pertain to Borgata.”

Late Friday, just before 10 p.m., Murphy and State Police Superintendent Colonel Pat Callahan issued a press release announcing Administrative Order 2020-19, which prohibits smoking in the indoor areas of any casino or casino simulcasting facility that are open to the public.

“We have looked closely at the science and agree with the experts who have concluded that allowing smoking indoors at our casinos is too big of a risk to take,” the governor said in a statement. “This action ensures we minimize the risk.”

The order took effect on Saturday at 6:00 a.m.