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INTRODUCTION

Historically, individuals who smoked typically felt free to do so when and where they pleased. Indeed, smoking in public places, including places of work, was generally unrestricted. Today, however, the interests of smokers and nonsmokers often compete on the job. This is especially true in workplaces where employees work side-by-side for long periods of time. While some employees adamantly seek to preserve their "right" to smoke on the job, other nonsmoking employees are pushing for a "right" to a smoke-free work environment. And, while smoking disputes are still generally resolved informally by management, now legislatures, courts and unions have become embroiled in the controversy.

In this Article, the authors present an overview of workplace smoking issues by surveying relevant case law, analyzing state and local legislation, and addressing the prominent role of unions regarding smoking in the workplace. In addition, the authors offer practical suggestions to employers about how to accommodate the competing interests of both smokers and nonsmokers. In doing so,

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the authors hope to assist employers in resolving workplace smoking issues.

I. BACKGROUND

Eighty-eight percent of all employers in the United States permit smoking in the workplace.[1] Of those employers that permit smoking, approximately one-half currently have no formal smoking policy.[2] Twelve percent of major employers in the United States ban smoking on the job.[3] Of the employers that ban smoking in the workplace, many appear to do so around food preparation stations or where employees work near combustible materials. For example, gasoline refineries and chemical processing companies ban smoking almost uniformly due to the severe safety considerations attendant to those workplaces. Similarly, product contamination concerns led the Campbell Soup Company to ban smoking in the workplace beginning in approximately 1896.

Approximately one-fourth of adult Americans smoke.[4] Higher incidences of smoking have been associated with lower income groups and blacks.[5] It is therefore possible to experience great variations in the percentage of smokers and nonsmokers in any particular work force. Accordingly, employers often face competing

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1. BNA, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE, A SPECIAL REPORT 20 (2d ed. 1987) [hereinafter BNA, SPECIAL REPORT].

2. According to one survey of 1,100 employers, 63.8% have no formal smoking policy. A more recent survey of 623 employers indicated that 43% have no such policy. *See infra* note 109.

3. The vast majority of employers permit smoking somewhere on company premises. 51% percent prohibit smoking in open work areas and shared work spaces. BNA, SPECIAL REPORT, *supra* note 1, at 20.

4. According to 1987 statistics compiled by the Centers for Disease Control, 26.5% of adults in the United States smoke. *Id.* at 12.

5. PUBLIC HEALTH SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE, REPORT OF THE SURGEON GENERAL 48-55 (1985) [hereinafter SURGEON GENERAL'S REPORT].

A 1986 study conducted by the Centers for Disease Control found that black men smoked at a rate of 32.5% while white men smoked at a rate of 29.3%. The prevalence of smoking was only slightly higher among black women (25.1%) than white women (23.7%). *See Cigarette Smoking in the United States, 1986*, MORBITY AND MORTALITY WEEKLY REPORT 582 (Sept. 11, 1987) (distributed by the Massachusetts Medical Society).

A 1985 national health interview survey conducted by the National Center for Health Statistics also found greater incidences of smoking among blacks. *See* PUBLIC HEALTH SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., VITAL HEALTH STATISTICS, HEALTH PROMOTION AND DISEASE PREVENTION UNITED STATES 70 (1988).

For a collection of the results of numerous nationwide studies concerning the prevalence of smoking among blacks and whites, see Ethridge & Fox, *Toward a Civil Rights Approach to Smoking*, CURRENTS (April 1987) attachment 1 (published by the American Association for Affirmative Action).

interests of a large group of smokers or an even larger group of nonsmokers. As a result, most employers find it prudent to accommodate, if possible, the competing interests of both smoking and nonsmoking employees. This is particularly true in this era of growing labor shortages, in which employers increasingly seek to retain happy and productive employees.[6]

While the decision to permit or limit smoking in the workplace is largely left to the discretion of employers, there are legal and practical limitations to such discretion. Accordingly, companies must proceed with care after a full evaluation of the facts and pertinent law. Further, employers are warned that the law regarding workplace smoking is still evolving.

The most significant limitations to management discretion regarding smoking in the workplace include:

(1) The common law duty to accommodate both smoking and nonsmoking employees;[7]

(2) Federal regulations, state statutes or local ordinances which limit smoking in the workplace;[8]

(3) The duty to bargain collectively with unionized employees about workplace smoking policies;[9]

(4) Management's obligation to accommodate nonsmoking employees who are found to be "medically hypersensitive" to environmental tobacco smoke (ETS) and who thus may be designated as "handicapped" pursuant to federal, state or local handicap laws;[10] and

(5) The mandates of Title VII of the 1964 Civil Rights Act (Title VII) and other discrimination laws, which prohibit employer policies which have a "disparate impact" on minority and female employees.[11]

Cases involving smoking may be based on constitutional rights, handicap discrimination acts, the Occupational Safety and Health Act (OSHA), Title VII, the National Labor Relations Act (NLRA), unemployment and workers' compensation laws, and common law theories, including wrongful discharge and negligence.

Discussed below are the various legal causes of action employ-

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6. A recent survey indicates that a majority of human resource managers polled are most concerned with issues related to recruiting and retaining good employees. Nearly 60% responded that their greatest challenge is maintaining a competent and contented work force. 2 WASHINGTON LEGAL FOUNDATION, A SURVEY OF PERSONNEL POLICIES IN THE WORKPLACE (1988).

7. *See infra* notes 51-66 and accompanying text.

8. *See infra* notes 67-91 and accompanying text.

9. *See infra* notes 92-106 and accompanying text.

10. *See infra* notes 29-42 and accompanying text.

11. *See infra* notes 43-50 and accompanying text.

ees have brought on both sides of the issue.[12] In general, the courts have been quite hostile to the claims of nonsmokers seeking a legal right to a smoke-free work environment. That same conclusion also appears to be emerging in the new wave of "smokers' rights" cases. The consensus of the courts appears to be that, absent any legislative limitation on management's discretion, employers need to accommodate the competing interests of both smoking and nonsmoking employees. For example, management must accommodate "handicapped" employees who are found to be medically "hypersensitive" to environmental tobacco smoke.[13] On the other hand, unionized workers may have a right to smoke unless and until management has bargained in good faith to limit smoking in the workplace.[14] At the same time, management must comply with any state statutes or local ordinances which may address smoking in the workplace.[15]

Inevitably, employers find themselves positioned between the competing interests of smokers and nonsmokers alike. In this situation, employers are well-advised to promptly and effectively accommodate these competing interests so as to avoid disruptive battles between employees. In some situations, employers may consider voluntarily formulating a reasonable smoking policy to assist them toward this end.

II. JUDICIAL RESPONSE TO WORKPLACE SMOKING

Workplace smoking issues have been litigated in the courts in a variety of contexts. Beginning in 1976, nonsmokers filed the first of a series of "test cases" seeking the legal right to a smoke-free

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12. This Article does not address health or product liability litigation issues concerning tobacco use. For a discussion of the scientific evidence relating to environmental tobacco smoke, *see generally* NATIONAL ACADEMY OF SCIENCES, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986) [hereinafter NAS REPORT]; SURGEON GENERAL'S REPORT ON ENVIRONMENTAL TOBACCO SMOKE—THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986) [hereinafter SURGEON GENERAL'S REPORT]; 38 WORLD HEALTH ORGANIZATION, INTERNATIONAL AGENCY FOR RESEARCH ON CANCER, IARC MONOGRAPH ON THE EVALUATION OF THE CARCINOGENIC RISK OF CHEMICALS TO HUMANS: TOBACCO SMOKING 308 (1986) [hereinafter IARC MONOGRAPH]; and PROCEEDINGS OF INDOOR AND AMBIENT AIR QUALITY CONFERENCE, *Imperial College* (London, England, June 13-15, 1988) [hereinafter PROCEEDINGS].

See also Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society*?, 56 U. CIN. L. REV. 317 (1987); and Crist & Majoras, *The "New" Wave In Smoking and Health Litigation—Is Anything Really So New*?, 54 TENN. L. REV. 551 (1987).

13. *See* Parodi v. Merit Sys. Protection Bd., 702 F.2d 743, 749-51 (9th Cir. 1982); *see also infra* notes 37 & 38 and accompanying text.

14. *See infra* notes 92-106 and accompanying text.

15. *See infra* notes 67-86 and accompanying text.

work environment.[16] With a few limited exceptions, the courts have been hostile to the claims of healthy nonsmokers seeking a legal right to a smoke-free work environment. Instead, the general response of the courts has been that this is an issue best left to management discretion or the legislative process.[17]

A. Constitutional Claims

The courts have summarily rejected the notion that employees or members of the public have a constitutional right to an environment free of tobacco smoke. In the leading decision, *Gasper v. Louisiana Stadium and Exposition District*,[18] a group of nonsmokers sought to prohibit smoking during sports and other public events at the Louisiana Superdome. The plaintiffs claimed that their exposure to tobacco smoke in the Superdome infringed upon their rights guaranteed by the U.S. Constitution. Specifically, the plaintiffs in *Gasper* alleged that exposure to tobacco smoke at the Superdome infringed upon their first amendment right to receive ideas; deprived them of life, liberty and property without due process in violation of the fifth and fourteenth amendments; and breached their fundamental privacy rights guaranteed by the ninth amendment. The court rejected each of the plaintiffs' constitutional arguments, and stated that to hold that the Constitution prohibits smoking would be to create an unprecedented avenue "through which an individual could attempt to regulate the social habits of his neighbor."[19]

Likewise, in *Kensell v. Oklahoma*,[20] a public employee's constitutional challenge to workplace smoking was also rejected. In this case, the court unequivocally stated that "the United States Constitution does not empower the federal judiciary . . . to impose no-smoking rules in the plaintiff's workplace."[21] In sum, every court faced with the issue has concluded that employees have no constitutionally protected right to a smoke-free work environment.[22]

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16. *See* Shimp v. New Jersey Bell Tele., 145 N.J. Super. 516, 368 A.2d 408 (1976).

17. *See, e.g.*, Federal Employees for Nonsmokers' Rights v. United States, 446 F. Supp. 181, 185 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 926; Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 722 (E.D. La. 1976); McCarthy v. Social and Health Servs., 110 Wash. 2d 812, 826, 759 P.2d 351, 358 (1988).

18. 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

19. *Id.* at 721.

20. 716 F.2d 1350 (10th Cir. 1983).

21. *Id.* at 1351.

22. *See also* Federal Employees for Nonsmokers' Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979) (smoking in federal buildings does not violate Constitution); GASP v. Mecklenburg

Similarly, the corollary to the nonsmokers' challenge, i.e., the smoker's asserted constitutional "right" to smoke, has also been rejected. In *Rossie v. Wisconsin Department of Revenue*,[23] the state intermediate appellate court found that a Wisconsin statute prohibiting smoking in all but certain designated areas of a state-controlled building did not violate the fourteenth amendment equal protection clause.

A prohibition against off-duty smoking, a restriction thus far imposed almost uniquely upon some police, fire and other public safety officers, has also withstood constitutional challenge.[24] In *Grusendorf v. Oklahoma City*[25] the court upheld a fire department's ban on *off-duty* smoking applicable to fire fighter trainees. The *Grusendorf* court agreed with the plaintiff that the smoking ban infringed upon liberty and privacy rights, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's nonsmoking regulation infringes upon the liberty and privacy of fire fighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.[26]

Despite this finding, the court upheld the smoking ban because, under the circumstances, the city satisfied its burden of proving that the ban bore a rational relationship to the promotion of the health and safety of the fire fighters. Nevertheless, employer restrictions against off-duty behavior give rise to serious privacy

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County, 42 N.C. App. 225, 256 S.E.2d 477 (1979) (smoking in county buildings and facilities not unconstitutional).

23. 133 Wis. 2d 341, 395 N.W.2d 801 (Wis. Ct. App. 1986), *rev. denied*, 134 Wis. 2d 457, 401 N.W.2d 10 (1987).

24. Fire fighters in many states are protected by "heart and lung" statutes which create a presumption that any cardiovascular or respiratory conditions suffered are work-related. These statutes are often used to justify off-duty smoking bans. *See generally* Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy*, 62 NOTRE DAME L. REV. 940, 952-53 (1987).

Most smoking bans have been promulgated at the local level. Approximately 32 localities currently discriminate against smokers when hiring fire fighters, police officers and other public safety employees. Massachusetts is currently the only state to ban smoking by newly hired recruits.

The most stringent hiring policies call for refusal to hire smokers, require signatures of agreement not to smoke, call for possible termination upon violation, and have, in some instances, been written into collective bargaining agreements. Several localities have expressed a general preference for nonsmoking employees if a choice must be made between a smoker and a nonsmoker. At least one jurisdiction requires mandatory attendance at "health seminars," which include compulsory exercise and nonsmoking educational programs.

25. 816 F.2d 539 (10th Cir. 1987).

26. *Id.* at 541.

concerns and are likely to be challenged in the future.[27] Moreover, where the smoking restrictions apply only to part of the work force, such as new hires, they are likely to be challenged on equal protection grounds.[28] These issues have yet to be fully litigated in the courts.

B. Statutory Claims

Nonsmokers have relied upon numerous statutes attempting to limit smoking in the workplace or, alternatively, to obtain financial benefits if they believe they cannot continue working in the presence of tobacco smoke. These statutory bases include federal and state handicap laws, disability statutes and workers' compensation laws.[29]

Despite these attempts, the courts have generally refused to restrict workplace smoking. Some courts, however, have held that employees claiming severe adverse reactions to tobacco smoke are "handicapped" or "disabled" or may be able to recover workers' compensation benefits.

In *Vickers v. Veterans Administration*,[30] the court found that an employee was "handicapped" within the meaning of section 504 of the Federal Rehabilitation Act of 1973[31] when it found him to be "hypersensitive"[32] to tobacco smoke and physically una-

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27. *See* Max, *The Company Is Watching You Everywhere*, N.Y. Times, Feb. 15, 1987, § 4, at 21, col. 2; Leap, *When Can You Fire for Off-duty Conduct?*, 66 HARV. BUS. REV., 28-30, Jan.-Feb. 1988.

28. In *Grusendorf*, the court specifically questioned whether the smoking ban, which applied only to fire fighter *trainees*, could withstand an attack on equal protection grounds. The court refused, however, to consider this issue because it was not raised by the parties. 816 F.2d at 543.

29. The Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982) currently provides no remedy for nonsmokers seeking a smoke-free work environment. Tobacco smoke is not listed by OSHA as a "toxic and hazardous substance." *See* 29 C.F.R. § 1910.1000-1910.1500 (1988). Indeed, in 1987 OSHA denied a citizen petition requesting OSHA to classify tobacco smoke as a potential occupational carcinogen and develop a standard for "tobacco smoke." BNA, DAILY REPORT FOR EXECUTIVES at A-24 (Mar. 2, 1987). In addition, OSHA administrators have consistently refused to accept complaints based solely on workplace smoking and, thus, apparently do not perceive that environmental tobacco smoke constitutes a violation of an employer's statutory duty to provide a "healthful" working environment. Moreover, OSHA provides no private right of action for employees who seek to restrict workplace smoking. *See* Federal Employees for Nonsmokers Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310, *cert. denied*, 444 U.S. 926 (1979); Barrera v. E. I. du Pont de Nemours, 653 F.2d 915, 920 (5th Cir. 1981).

30. 549 F. Supp. 85 (W.D. Wash. 1982).

31. 29 U.S.C. §§ 701-796i (1982). The Rehabilitation Act imposes affirmative action and nondiscrimination obligations upon a limited group of employers: federal agencies, federal contractors, and recipients of federal assistance.

32. The *Vickers* court used the terms "hypersensitivity" and "unusually sensitive" interchangeably. *See* 549 F. Supp. at 87. In medical terms, "hypersensitivity" is defined as "a state of altered reactivity in which the body reacts with an exaggerated response to a

ble to perform his job in the presence of environmental tobacco smoke.[33] In *GASP v. Mecklenburg County*,[34] however, the court rejected similar claims, cautioning that the term "handicap" was *not* intended to include all persons who claim to suffer from a pulmonary problem, however minor, or those who are simply irritated by tobacco smoke.

In the workers' compensation context, a California court has held that a nurse who left her job because of "allergic" reactions to tobacco smoke was eligible for unemployment compensation until she could find alternative employment in a smoke-free environment.[35] A Louisiana court has denied unemployment benefits under similar circumstances because it found that the employee's preexisting allergy, which was not aggravated by her employment, did not constitute "good cause" for her resignation.[36]

In *Parodi v. Merit Systems Protection Board*,[37] a federal employee who claimed to be hypersensitive to tobacco smoke was found to be "disabled." Nevertheless, the *Parodi* court found that the employee would not be entitled to disability benefits if the employer offered her a reasonable accommodation by transfer to a comparable job in a smoke-free work area.[38]

While each case is based on its own set of facts, these cases seem to indicate that currently only those found to have the most

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foreign agent." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 635 (26th ed. 1981).

This term must not be confused with "allergy" or "allergic reaction." To date, no specific antigens have been identified in *tobacco smoke*, and when individuals claim to be "allergic" to smoke, at best, they can be said to suffer from non-specific responses to smoke exposure. *See* Lehrer, *Tobacco Smoke Sensitivity: A Result of Allergy*?, ANNALS OF ALLERGY 56, May 1986, at 1-10.

33. The *Vickers* court did not award any injunctive or monetary relief, however, because it found that (1) the employer did not discriminate against plaintiff by reason of his handicap; and (2) the employer made reasonable efforts to accommodate plaintiff. 549 F. Supp. at 87-89. For a thorough analysis of the *Vickers* decision see Comment, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employer's Who'd Rather Fight May Have to Switch*, 59 WASH. L. REV. 305, 312-22 (1984). *See also* Department of Fair Employment and Hous. v. Fresno County, FEHC Dec. No. 81-82 (C8-0009 ph) (1984) (employee allergic to tobacco smoke found to be "handicapped" under California Fair Employment and Housing Act).

34. 42 N.C. App. 225, 256 S.E.2d 477 (1979).

35. Alexander v. California Unemployment Ins. Appeals Bd., 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980). *See also* McCrocklin v. Employment Dev. Dept., 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156 (1984) (employee's "good-faith fear" that smoke-filled room was harmful to his health found "reasonable" and employee entitled to unemployment benefits).

36. Billman v. Sumrall, 464 So. 2d 382 (La. App. 1985). *But see* Lapham v. Pennsylvania Unemployment Compensation Bd. of Review, 103 Pa. Commw. 144, 519 A.2d 1101 (1987) (bronchitis sufferer entitled to collect unemployment benefits where proffered physical relocation was deemed not a "reasonable accommodation"); *McCrocklin*, 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156.

37. 690 F.2d 731 (9th Cir. 1982), *as amended*, 702 F.2d 743 (9th Cir. 1982).

38. For a thorough analysis of *Parodi*, see Comment, *supra* note 33, at 308-22.

severe reactions to tobacco smoke will be considered "handicapped" or "disabled."[39] On the other hand, an employee who is merely "irritated" or "annoyed" is not typically found to be "medically hypersensitive."[40] Private employers subject to state handicapped statutes, or federal contractors covered by section 503 of the Rehabilitation Act of 1973, may accordingly also have a duty to reasonably accommodate employees found to be hypersensitive where such an accommodation would not pose an "undue hardship" on the employer or the rest of its work force. Yet, as the court recognized in *Vickers*, "the desires of those employees who wish to smoke cannot be disregarded."[41]

An employer's offer to transfer the "handicapped" individual to a comparable position in a smoke-free work area would appear to be sufficient accommodation.[42] But when a medically hypersensitive employee is unable to continue working, he or she may be entitled to disability or workers' compensation benefits. Despite this fact, employers have great latitude to accommodate the competing interests of smoking and nonsmoking employees because the foregoing cases do *not* impose any affirmative obligation upon employers to restrict workplace smoking.

C. *Discrimination Claims*

There is also a possibility that employers' policies or practices limiting smoking in the workplace may trigger "disparate impact" discrimination claims.[43] Because a greater percentage of blacks in the United States smoke than whites, outright hiring bans or other policies which unduly restrict smoking in the workplace may disproportionately affect black employees.[44] Thus, these actions could

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39. *See, e.g.*, Vickers v. Veterans Admin., 549 F. Supp. 85, 87 (W.D. Wash. 1982).

40. *See, e.g.*, GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Gordon v. Raven Sys. & Research, 462 A.2d 10, 15 (D.C. App. 1983).

41. *Vickers*, 549 F. Supp. at 89.

42. *See Parodi*, 702 F.2d at 749-51.

43. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1982) prohibits employer policies which, while facially neutral, "operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424 (1971). In other words, Title VII prohibits otherwise neutral employment practices which disproportionately affect protected groups.

Employer smoking restrictions may also be challenged under Title VII if individuals are subjected to "disparate treatment" because of their race, sex, religion or national origin. In such cases, the plaintiffs must prove that the employer *intended* to treat them differently on account of their protected status. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *But see* Moore v. Inmont Corp., 608 F. Supp. 919 (W.D.N.C. 1985) (Title VII claim rejected where black employee discharged for violating smoking policy related to safety standards that was applied equally to all employees).

44. The results of smoking prevalence studies vary depending on the year and sample size. However, the studies uniformly report a greater incidence of smoking among blacks than whites. For example, in 1980, 47.7% of black males smoked, compared with 40.2%

be challenged under state or federal discrimination laws.[45] Once an employee shows that an employer's otherwise neutral smoking policy or practice has a statistically significant disproportionate impact on blacks, the employee has made out a prima facie case of discrimination under Title VII.[46] In order to defend, the employer must then successfully demonstrate that the policy or practice is justified by a "business necessity."[47] Some smoking restrictions, such as those prohibiting smoking near hazardous or flammable materials, may constitute a "business necessity."[48] Unless required by statute or ordinance, however, it is unlikely that courts would find that the preferences of co-employees or customers rise to the level of a business necessity.[49] Even so, the court could still find a Title VII violation if the employee proves that there are other alternatives which accomplish the same business purpose, yet have less impact on blacks.[50]

Accordingly, employers need to examine carefully current or proposed workplace smoking restrictions to ensure that they do not discriminate against protected groups. If they do, the employer must be prepared to establish that the smoking policy adopted is justified by legitimate business purposes and is the least drastic means of accomplishing the employer's goals.

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of white males. SURGEON GENERAL'S REPORT, *supra* note 5, at 49. *See also supra* note 5.

45. For a comprehensive discussion of smoking and civil rights issues, see Ethridge & Fox, *supra* note 5.

46. A prima facie case is sufficient to prove a Title VII violation, unless contradicted or overcome by other evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

47. To prove a business necessity, an employer may show that the policy or practice has a "manifest relationship" to performance of the job in question (i.e., that it is a "job-related criterion"). Alternatively, the employer may seek to prove that the policy or practice in question is necessary to the safe and efficient operation of the business. "[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).

48. *See, e.g.*, Moore v. Inmont Corp., 608 F. Supp. 919, 927 (W.D.N.C. 1985).

49. *See* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) (employer is forbidden by Title VII to refuse to hire someone on racial grounds because his customers or clientele do not like his race); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971) (Pan Am violated Title VII when it banned employment of male flight attendants despite passenger preferences for female flight attendants); Bing v. Roadway Enter., 444 F.2d 687 (5th Cir. 1971) (invalidating a motor freight company's rule that an employee who desired to transfer to another job must resign his present position and thereby forfeit accrued employment rights. Finding the rule to have an adverse impact on blacks, the court rejected the company's argument that the rule was "necessitated" by the prospect of employee unhappiness with the demise of the rule). *Accord* Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

50. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977). If an employer meets the burden of showing that its tests or selection devices are job-related, the burden then shifts to the complaining party to show that other less discriminatory selection devices would also serve the employer's legitimate interests. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

D. Common Law Claims

An employer's general common law duty to provide a reasonably safe working environment for its employees has been codified by federal and state occupational safety and health (OSHA) laws.[51] In an attempt to restrict workplace smoking, employees have filed several lawsuits claiming that such smoking violates this general common law duty. However, only one lower court decision, in New Jersey, *Shimp v. New Jersey Bell Telephone*,[52] has found an employer permitting smoking in the workplace to have violated this duty. The remainder of the courts confronted with this issue have declined to find the duty violated and have refused to restrict workplace smoking. Thus, there is currently little, if any, authority for imposing a common law obligation upon employers to restrict smoking in the workplace.

In *Shimp*, a secretary who claimed to suffer from a severe "allergic" reaction to tobacco smoke sought an injunction to prevent other employees from smoking in her work area. Plaintiff submitted medical opinions in support of her request for an injunction. The employer, on the other hand, failed to put forth any evidence to refute the plaintiff's claims. Not surprisingly, the New Jersey Superior Court found that the employer had a common law duty to provide safe working conditions. Accordingly, it directed the employer to restrict smoking to the lunchroom.[53]

A key determinant of the outcome of *Shimp* was a lack of any active defense by New Jersey Bell, which filed no answer or affidavits in opposition to the plaintiff's request for an injunction. It is quite possible that the result in *Shimp* might have been different had it not been uncontested and had New Jersey Bell, instead, presented a true "case and controversy." Significantly, an identical complaint subsequently filed by Ms. Shimp's attorney before the same judge on behalf of another New Jersey Bell employee was summarily dismissed.[54] The only difference between the two cases is that the employer elected to defend itself in the later case.

Also, seven years later in *Smith v. Blue Cross & Blue Shield*,[55]

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51. *See* 29 U.S.C. §§ 651-678 (1982) (Federal OSHA). Section 654(a) sets forth the so-called "general duty" clause, which requires that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." *See also supra* note 29.

See also CAL. LABOR CODE §§ 6300-6711 (Deering Supp. 1988) (Cal-OSHA). Section 6400 provides that "[e]very employer shall furnish employment and a place of employment which are safe and healthful for the employees therein."

52. 145 N.J. Super. 516, 368 A.2d 408 (1976).

53. *Id.* at 531, 368 A.2d at 416.

54. Mitchell v. New Jersey Bell Tel. Co., No. C-4159-76 (N.J. Super. Ct. Ch. Div.).

55. No. C-3617-81E, 16-17 (N.J. Super. Ct., Aug. 18, 1983).

the New Jersey Superior Court *rejected* and dismissed a similar claim by a nonsmoking employee who also claimed to be hypersensitive to cigarette smoke. The court held that the safety of the workplace was to be judged by reference to the "typical" employee, *not* the hypersensitive employee.[56] Moreover, the court limited the holding in *Shimp*, stating:

> Insofar as the *Shimp* case is read by some as requiring an employer to institute Draconian measures to smoking employees I think it has to be viewed somewhat skeptically and cautiously. I myself have no problem at all with the basic concept of *Shimp*, that a safe workplace is required, but I must say it seems to me that some of the prohibitions contained in the *Shimp* case are too sweeping and go well beyond what is necessary to ensure a safe working place.[57]

The court therefore concluded that the nonsmoking "supersensitive" employee had no right to a smoke-free environment.

A District of Columbia court reached the same conclusion in *Gordon v. Raven Systems & Research, Inc.*[58] In *Gordon*, the employer terminated an employee after she refused to work in an area containing some tobacco smoke. The employee subsequently filed a lawsuit contending that the employer was negligent in not providing her with a smoke-free workplace. The court dismissed the employee's claim, because the plaintiff had presented no evidence to support her allegations that tobacco smoke was harmful to employees. Significantly, too, the District of Columbia court held that the employer had no duty to conform the workplace to the particular needs or sensitivities of an individual employee.[59]

Likewise, the trial court in *Smith v. AT&T Technologies*[60] also rejected an employee's claim that the employer breached its common law duty to maintain a safe working environment. This conclusion was based on the court's finding that "the tobacco smoke in plaintiff's former work area was [not] hazardous to the health of plaintiff or the health of the other employees in that area."[61]

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56. *Id.* at 15. ("It simply is not right in terms of the way in which human beings have to relate to one another, that because someone is as sensitive as that all the rest of the world has to go through a tightly-controlled regimen of smoking discipline"). *Id.* at 13. ("[Smokers] are after all human beings with needs and feelings like everyone else, and there simply is no matter of civilized management of a work force to treat smokers as though they were moral lepers and to banish them to a remote isolated area of the workplace").

57. *Id.* at 8.

58. 462 A.2d 10 (D.C. App. 1983).

59. *Id.* at 15.

60. No. 4446121 (St. Louis Cty. Cir. Ct., Apr. 23, 1985). This case was on remand from an earlier decision, Smith v. Western Elec. Co., 643 S.W.2d 10 (Mo. App. 1982), which recognized that employers have a common law duty to provide a safe workplace.

61. *Smith*, No. 4446121, at 3 (St. Louis Cty. Cir. Ct., Apr. 23, 1985).

The court added that the employer was not required to provide a "comfortable" workplace.[62]

While there is thus far only a single ruling to support the allegation that environmental tobacco smoke causes harm to nonsmokers, employers nevertheless must be careful not to retaliate against employees who protest corporate policies permitting smoking. In *Hentzel v. Singer Co.*,[63] a California court held that an employee could state a common law retaliatory dismissal claim after being terminated for protesting hazardous working conditions. The court did so without addressing whether the alleged hazard (environmental tobacco smoke) was, in fact, hazardous.

Overall, the courts have been reluctant to find any common law basis for restricting workplace smoking in the absence of sufficient proof that environmental tobacco smoke causes significant medical harm to nonsmokers.[64] With the exception of the now dated and criticized 1976 *Shimp* decision, the courts have declined to expand an employer's common law duty to provide a safe working environment to encompass a smoke-free working environment.[65]

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62. *Id.* at 4.

63. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

64. In fact, no link has been shown between ETS and chronic adverse health effects. Both the Surgeon General and the National Academy of Sciences found that available studies preclude any firm conclusion about the relationship between exposure to ETS and cardiovascular disease and that further studies are needed to determine whether any real link exists. *See, e.g.*, SURGEON GENERAL'S REPORT, *supra* note 12, at 14; NAS REPORT, *supra* note 12, at 11. In addition, the Surgeon General's report concluded that "a previously healthy individual would not develop chronic lung disease solely on the basis of involuntary tobacco smoke exposure in adult life." SURGEON GENERAL'S REPORT, *supra* note 12, at 62. Finally, both the Surgeon General and the National Academy of Sciences reports emphasize critical limitations on their finding of a possible connection between exposure to ETS and lung cancer. Upon reviewing the same evidence considered by the NAS and the Surgeon General, the International Agency for Research on Cancer of the World Health Organization concluded, also in late 1986, that the available evidence is equally consistent with the finding of an increase in risk or an absence of risk. IARC MONOGRAPH, *supra* note 12, at 308. A number of other studies published since 1986 also contradict the limited findings of the Surgeon General and NAS reports with respect to the purported relationship between ETS and lung cancer. *See, e.g.*, PROCEEDINGS, *supra* note 12, at 242-50, 252-58.

65. In 1986, a Massachusetts court rejected a nonsmoker's claim against her employer based on breach of contract, and intentional and negligent infliction of emotional distress. Bernard v. Cameron & Colby Co., 397 Mass. 320, 491 N.E.2d 604 (1986). But, in McCarthy v. Washington, 110 Wash. 2d 812, 759 P.2d 351 (1988), the Washington Supreme Court recently held that an employee who allegedly developed lung disease as a result of exposure to tobacco smoke in the workplace was not preempted by workers' compensation laws from stating a cause of action against her former employer for negligence—a finding inconsistent with existing labor law precedents. While four justices opined in dicta that employers have a common law duty to provide a smoke-free work environment, that conclusion was specifically rejected by a majority of the court. *See id.* at 826, 759 P.2d at 358 (Brachtenbach, J., dissenting). In a statement issued by the Washington State Attorney General's office, a spokesperson for the attorney general said that the dicta of the three justices in *McCarthy* did not establish binding law on the issue of an employer's duty to provide a "reasonably safe" workplace. 26 GOVERNMENTAL EMPLOYMENT

Indeed, several courts that have addressed the issue to date have recognized the need to consider the interests of both smokers and nonsmokers.[66]

III. WORKPLACE SMOKING LEGISLATION

In addition to analyzing case law, the workplace smoking issue demands a careful review of relevant state and local legislation.[67] Thirteen states to date have enacted legislation specifically regulating smoking in private workplaces.[68] These are: (1) Connecticut;[69] (2) Florida;[70] (3) Iowa;[71] (4) Maine;[72] (5) Minnesota;[73] (6) Montana;[74] (7) Nebraska;[75] (8) New Hampshire;[76] (9) New Jersey;[77] (10) Rhode Island;[78] (11) Utah;[79] (12) Vermont;[80] and (13) Washington.[81]

These state laws vary greatly, especially in the degree to which they attempt to displace the role of the employer and its employees in resolving workplace smoking issues. However, virtually all of the state laws have the following common features:

(1) None of the state laws entirely bans smoking in the workplace;[82]

RELATIONS REPORT 1172 (Aug. 1988). A trial on the merits in *McCarthy* is scheduled for October 1989.

66. *See* Shimp v. New Jersey Bell Tel., 145 N.J. Super. 516, 531, 386 A.2d 408, 416 (1976); Gordon v. Raven Sys. & Research, 462 A.2d 10, 15 (D.C. App. 1983); *McCarthy*, 110 Wash. 2d at 821-22, 759 P.2d at 355-56.

67. There is no federal legislation regulating smoking in private workplaces. The United States government has, however, adopted smoking restrictions covering the 6,800 buildings controlled by the General Services Administration. These restrictions apply to approximately 890,000 federal employees. *See* 41 C.F.R. Part 101-20.105-3. In addition, the Federal Labor Relations Authority has recently restricted the ability of several federal agencies to change smoking policy without first negotiating with bargaining units. *Treasury Employees Union Chapter 250*, 33 FLRA No. 8, 61-74 (Before Calhoun and McKee) (Oct. 13, 1988), Nos. 0-NG-1524, 0-NG-1536 and 0-NG-1545.

68. This figure represents only those states with laws specifically aimed at private sector workplaces. It does not include the various laws regulating smoking by public sector employees in government-owned buildings or those public safety or occupational regulations pertaining to smoking.

69. CONN. GEN. STAT. ANN. § 31—40q (West 1987 & Supp. 1988).

70. FLA. STAT. ANN. § 386.202—386.209 (West 1986).

71. IOWA CODE ANN. § 98A.1—98A.6 (West Supp. 1988).

72. ME. REV. STAT. ANN. tit. 22, § 1580-A (Supp. 1988).

73. MINN. STAT. ANN. §§ 144.411—144.417 (West Supp. 1989).

74. MONT. CODE. ANN. §§ 50-40-101—50-40-109 (1987).

75. NEB. REV. STAT. §§ 71-5701—71-5713 (1986).

76. N.H. REV. STAT. ANN. §§ 155:50—155:53 (Supp. 1988).

77. N.J. STAT. ANN. ch. 184, §§ 26:3D-23—26:3D-31 (West 1987).

78. R.I. GEN. LAWS §§ 23-20.7-1—23.20.7-7 (Supp. 1988).

79. UTAH CODE ANN. §§ 76-10-101, 76-10-106, 76-10-108—76-10-110 (Supp. 1988).

80. VT. STAT. ANN., tit. 18, §§ 1421—1428 (Supp. 1988).

81. WASH. REV. CODE ANN. § 70.160.010—70.160.900 (West Supp. 1988).

82. In a recent election in Oregon, Proposition 6—which would have imposed a vir-

(2) Most state laws do not prohibit smoking in specific areas;
(3) Most provide exceptions for enclosed private offices; and
(4) Most provide for only minor penalties, such as minimal fines, for violations.

Local city, county, or other municipal ordinances may also restrict smoking in private workplaces.[83] Local ordinances are often more restrictive and specific than state statutes.[84] Local ordinances may specifically limit smoking in particular areas of the workplace. Some of these local laws, such as the San Francisco, California ordinance, also accord preferential rights to nonsmoking employees within their work area.

Workplace smoking laws can be generally categorized into three groups, according to the degree to which they intrude upon an employer's discretion. These categories are: (1) the "least intrusive" laws, (2) the "partially intrusive" laws, and (3) the "most intrusive" laws.

The least intrusive laws are relatively straightforward. They merely require the employer to establish, post and implement a written policy regarding smoking in the workplace. These laws leave the specifics to the individual employers and do not dictate the content of the policy. For example, New Hampshire's workplace smoking law merely states:

> An employer shall, within 6 months of the effective date of this subdivision, establish and implement written rules governing smoking and nonsmoking in the workplace. The rules shall be readily available for viewing by the employees and may include the designation of smoking and nonsmoking areas. Upon request, the employer shall provide a copy of the written rules to any employee.[85]

Least intrusive laws can also be found in Connecticut, Maine and Montana.

The partially intrusive laws are somewhat more specific. They typically spell out the particulars that employers must include in smoking policies, and indicate the types of efforts required of an employer to accommodate nonsmoking employees. Often they indicate a presumption that smoking should be prohibited in all areas *except* where it is specifically permitted.

Many partially intrusive laws require the employer to allocate smoking and nonsmoking areas based on the numbers of smokers

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tual ban on smoking in all public places, including places of work—was defeated by a three to two margin.

83. Hundreds of local ordinances impact smoking in the workplace. The majority of these are located in California. BNA, SPECIAL REPORT, *supra* note 1, at 66.

84. In Florida and Oklahoma, state law preempts all local smoking ordinances.

85. N.H. REV. STAT. ANN. § 155:52(I) (Supp. 1988).

and nonsmokers. In addition, some state laws require employers to place physical barriers or "buffer zones" between smoking and nonsmoking employees. States with partially intrusive laws include Florida, Minnesota, Nebraska and Utah.

The most intrusive laws impose significantly greater burdens on employers and limit management's discretion. These laws generally dictate which portions of the workplace must be designated as no-smoking areas. Also, these laws usually specify the percentage of space in employee cafeterias, lunchrooms and lounges that must be reserved for nonsmokers. In some instances, these most intrusive laws give nonsmoking employees superior rights over smokers. For example, the local ordinance in Palo Alto, California, provides that "[i]n any dispute arising under the policy, the rights of the nonsmoker shall be given precedence."[86]

A. Objections to Legislation Concerning Workplace Smoking

The primary and most obvious objection to legislative enforcement of workplace smoking is that it usurps the ability of employers to deal individually with employee concerns as they arise. Legislation does not add to management's bevy of rights; rather, such legislation takes away the considerable flexibility employers have historically enjoyed in this area. In addition, there are numerous other potential objections to legislation covering workplace smoking.

First, smoking laws, like workplace smoking policies, can be difficult to enforce. Regardless of whether this responsibility is placed on the employer or some governmental body, such as a law enforcement agency or local health department, limited resources and personnel makes rigorous enforcement of workplace smoking laws unlikely. Second, because workplace smoking is generally considered to be a *mandatory* subject of bargaining,[87] legislative restrictions may create conflicts between employers and unions. Third, restrictions imposed by smoking legislation may interfere with worker efficiency. For example, where compliance with the law requires employers to rearrange work areas or segregate smoking and nonsmoking employees, an employer's operations may be disrupted and productivity decreased.[88] Fourth, smoking

86. Palo Alto Municipal Code, ch. 9.14, effective Feb. 1, 1984.

87. *See infra* note 95.

88. According to one study, of those employers polled which have implemented smoking restrictions, seven percent responded that their policies have had a notable effect on company costs. Eight percent indicated that employee productivity increased, while three percent reported that their restrictions had a detrimental effect on employee productivity. BNA, SPECIAL REPORT, *supra* note 1, at 22-23. For an economist's view of the "social costs" of smoking, including lost production, workplace efficiency and absenteeism,

laws which give nonsmokers unlimited power to dictate the company policy for all workers are likely to be perceived as unfair by others, especially employees who smoke. For instance, a local ordinance in San Francisco allows even one employee to veto an employer's smoking policy in that employee's "office workplace."[89] These types of policies will undoubtedly create resentment among some employees and foster the perception that employers unfairly favor nonsmokers.[90] Fifth, where legislation requires employers to physically separate smokers and nonsmokers, employers may experience a loss of managerial freedom. Finally, some state or local laws regulating smoking in the workplace are likely to be challenged on constitutional or other grounds, and may thus embroil employers in resulting litigation.[91]

As a result of these problems, smoking in the workplace is often best left to the discretion of management and its employees. Excessive regulation in this area substantially undermines an employer's ability to respond flexibly to smoking-related problems, while at the same time it creates a morass of practical and legal problems. Moreover, smoking ordinances are not a panacea. They cannot take into account the peculiarities of each workplace, nor can they address the unique problems and personalities involved in any given situation. Employers must still resolve the competing interests of smoking and nonsmoking employees.

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see R. TOLLISON & R. WAGNER, SMOKING AND THE STATE ch. 3 (1988).

89. San Francisco Municipal Health Code, Smoking Pollution Control Ordinance No. 298-83 (Proposition P), effective Mar. 1, 1984.

90. Thus far, employee sentiments about smoking policies have been mixed. Overall, 42% of recent survey respondents said the smokers think their policy is "about right," while 33% indicated the rules were too restrictive; 53% of firms with policies said that nonsmokers were satisfied, while 33% said nonsmokers wanted tougher restrictions. BNA, SPECIAL REPORT, *supra* note 1, at 23.

Press accounts of employee sentiment are decidedly mixed as well. *See Do You Smoke? Drink? If So, Some Employers Say, You May as Well Stay Home*, BUSINESS FIRST-COLUMBUS, vol. 3, no. 36, § 2, at 3; *The Company Is Watching You Everywhere*, N.Y. Times, Feb. 15, 1987, § 4, at 21, col. 2, (Editorial Desk); *Some Workers Upset by Company Smoking Ban*, AP, Jan. 21, 1987; *Bans, Red Ink: Smoking: A Burning Issue*, L.A. Times, Nov. 21, 1985, § 1, at 1, col. 1, (Metro Desk); *Where There's Smoke, There's Ire: After Years on the Defensive, Smokers Fight Back*, L.A. Times, Jan. 14, 1988, § 4, at 1, col. 1.

91. The primary challenge is that smoking laws are often too vague to set definite standards of compliance for employers. Indeed, several smoking ordinances have already been struck down as unconstitutionally vague. *See, e.g.*, Florida v. Burton, No. 80-999CO-A-42 (Fla. Cir. Ct. 1981) (ordinance restricting smoking in public places unconstitutionally vague); Greater Rockford Food Servs. v. Orthoefer, No. 76-2447 (Ill. Cir. Ct. 1976) (ordinance restricting smoking in public place struck down as unduly vague and in violation of constitutional guarantee of equal protection).

IV. Labor Relations Issue

Unionized employers seeking to adopt workplace smoking policies, including policies necessitated by statute or ordinance, must consider whether such policies can be adopted unilaterally without bargaining with the union and whether the policy violates the collective bargaining agreement.[92]

The National Labor Relations Act[93] (NLRA) prohibits an employer from unilaterally changing the terms and conditions of employment without bargaining with the union representing the employees. Failure to do so constitutes an unfair labor practice under section 8(a)(5) of the NLRA.[94]

Rules governing workplace smoking have been held to be "terms and conditions of employment" and, accordingly, are subject to mandatory collective bargaining.[95] Thus, unless the collective bargaining agreement includes a broad "management rights" clause[96] permitting the employer to unilaterally establish plant rules, the employer must first bargain with the union prior to restricting smoking in the workplace.[97] This is especially true in sit-

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92. In 1986, the AFL-CIO issued a National Resolution opposing unilateral attempts by management to impose workplace smoking policies. It provides, in part:

> Unions are faced with legislation or unilaterally imposed employer policies that forbid smoking on the job and infringe on the rights of workers who smoke. Unions have a legal responsibility to represent the interests of all their members—smokers and nonsmokers. The AFL-CIO believes that issues related to smoking on the job can best be worked out voluntarily in individual workplaces between labor and management in a manner that protects the interests and rights of all workers and not by legislative mandate.

See BNA, Special Report, *supra* note 1, app. D at 2. There have also been scattered reports that rules regarding smoking in the workplace have become issues in union organizing drives.

93. 29 U.S.C. §§ 151-169 (1982).

94. 29 U.S.C. § 158(a)(5) (1982). The National Labor Relations Board has broad powers to prevent and/or remedy unfair labor practices. *See generally* 29 U.S.C. § 160 (1982).

95. *See* Chemtronics, Inc., 236 NLRB No. 21 (1978). *See also* Pennsylvania v. Pennsylvania Labor Relations Bd., 74 Pa. Commw. 1, 459 A.2d 452 (1983) ("[t]he subject of whether employees may smoke at their workplaces appears to be at the center of those subjects properly described as 'conditions of employment' "). *See also* Gallenkamp Stores v. NLRB, 402 F.2d 525 (9th Cir. 1968); S. S. Kresge v. NLRB, 416 F.2d 1225 (6th Cir. 1969); Wintergarden Citrus Prod. v. NLRB, 238 F.2d 128, 129 (5th Cir. 1956); NLRB v. Hilton Mobile Homes, 387 F.2d 7, 10-11 (8th Cir. 1967).

96. An employer may insist upon a broad "management rights" clause. *See* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). In general, such clauses give employers considerably more discretion over specific aspects of employment, which may include promotions, transfers, plant rules, etc. It is significant that the NLRB General Counsel has recently issued guidelines stating that employers must bargain with their unions before instituting any drug-testing policy. *See* NLRB Memorandum GC 87-5 (Sept. 8, 1987). The NLRB may adopt a similar position regarding smoking policies.

97. To date, no court has found a management rights clause sufficiently broad to permit the unilateral imposition of a smoking policy. In Pennsylvania v. Pennsylvania Labor Relations Bd., 74 Pa. Commw. 1, 459 A.2d 452 (1983) the court rejected an em-

uations where smoking is a recognized right or privilege of employment.

This issue was discussed in *In re Parker Pen U.S.A.*[98] In this case, the employer—who had permitted on-the-job smoking for over twenty years—unilaterally abolished employee smoking rights that were guaranteed under the collective bargaining agreement. The employer allegedly did so for health reasons after receiving the Surgeon General's 1986 report on involuntary smoking.[99] In resolving an employee grievance, the arbitrator held that "both parties have an interest in addressing the profound issue raised by the employer concerning the safety of the workplace."[100] Accordingly, the arbitrator invalidated the employer's smoking ban until any changes could be bargained over during upcoming negotiations.

Even where the employer is required to impose smoking restrictions pursuant to state statute or local ordinance, it should bargain over all discretionary aspects of the rule.[101] In practice, bargaining will be routinely required because most workplace smoking laws leave a considerable amount of discretion to employers.[102]

Even if the unilateral implementation of a smoking policy does not violate the NLRA, it may nonetheless violate the collective

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ployer's argument that it had the "inherent managerial" authority to determine unilaterally whether to permit smoking at employee work stations. In the arbitration setting: *compare* Ohio Dept. of Health, 89 Lab. Arb. (BNA) 937 (1987) (Cohen, Arb.); Morelite Equip. Co., 88 Lab. Arb (BNA) 777 (1987) (Stoltenberg, Arb.); Snap-On Tools Corp., 87 Lab. Arb. (BNA) 785 (1986) (Berman, Arb.); National Pen & Pencil Co., 87 Lab. Arb. (BNA) 1081 (1986) (Nicholas, Arb.); Litton Indus., 75 Lab. Arb. (BNA) 308 (1980) (Grabb, Arb.); and Sherwood Medical Indus., 72 Lab. Arb. (BNA) 258 (1977) (Yarowsky, Arb.) (smoking restrictions upheld) with Dental Command, Dept. of the Army, 83 Lab. Arb. (BNA) (Allen, Arb.) 529 (1984); Union Sanitary Dist., 79 Lab. Arb. (BNA) 193 (1982) (Koven, Arb.); and Schien Body & Equip. Co., 69 Lab. Arb (BNA) 930 (1977) (Roberts, Arb.) (smoking restrictions invalid).

98. 90 Lab. Arb. (BNA) 489 (1987) (Fleischli, Arb.).

99. *See* SURGEON GENERAL'S REPORT, *supra* note 12.

100. 90 Lab. Arb. at 496.

101. There are no "smoking policy" cases directly on this point. The institution of a smoking policy would constitute a "term and condition" of employment and, therefore, be a mandatory subject of bargaining. *See supra* note 95 and cases cited therein. Nevertheless, neither union nor management may require the other to agree to provisions that are unlawful or prohibited. Meat Cutters Local 421, 81 N.L.R.B. 1052 (1949); Borg-Warner v. NLRB, 356 U.S. 342 (1958). Thus, proposed or existing provisions that directly conflict with legislation automatically become illegal or unenforceable. Hughes Tool Co., 147 N.L.R.B. 1573 (1964); Savannah Printing Specialties & Paper Prod. Local 604 v. Union Camp Co., 50 F. Supp. 632 (S.D. Ga. 1972). Legislation that provides employers with discretion, however, such as that which simply requires employers to "adopt" a smoking policy, would not be affected. That is, the particular discretionary aspects of the policy would still be a mandatory subject of bargaining.

102. For example, the New Hampshire law cited at *supra* text accompanying note 85, merely directs the employer to adopt a smoking policy. *All* of the specifics are left to the discretion of each individual employer.

bargaining agreement. Arbitral decisions have consistently stated that to be valid, an employer rule must be reasonable under the circumstances and nondiscriminatory in application.[103] Arbitrators have struck down employer smoking policies that fail to meet this standard.

In *Union Sanitary District*,[104] the arbitrator found that the employer could not unilaterally prohibit employees from smoking in their offices. Specifically, the arbitrator found that the absolute prohibition was arbitrary because there was no adequate basis for the rule. Although the employer stated it wanted to protect nonsmoking employees, the evidence showed there were only two bargaining unit members in the building who smoked; for six hours a day they were not in their offices but were out in the field; and no one complained about the smoking. Moreover, the California Indoor Clean Air Act of 1976,[105] which the employer cited to justify its ban, did not require a ban on smoking. Rather, that Act contemplates a relatively flexible regulation of smoking which recognizes the rights of both smokers and nonsmokers.[106]

V. How Should Employers Respond to the Workplace Smoking Issue?

Each employer's reaction to the workplace smoking issue will, naturally, depend on the needs and circumstances of its workplace. It is important in any situation to encourage a spirit of cooperation and communication among employees and management. Indeed, a recent survey of 1,100 employers indicated that over seventy percent expect employees to address workplace smoking issues among themselves before invoking management's time and

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103. *See* United Tele. Co. of Florida, 78 Lab. Arb. (BNA) 865 (1982)(designation of no-smoking table in cafeteria upheld as reasonable in light of company and union's interests in maintaining a healthy work environment and minimizing expenses and potential liability); H-N Advertising & Display Co., 88 Lab. Arb. (BNA) 329 (1986), 88 Lab. Arb. (BNA) 1311 (1987)(rule banning smoking in area of plant where combustibles are stored was reasonable and nondiscriminatory where worker safety was primary reason for expanding rule and implementation of measures to improve safety is normally management prerogative). *See also supra* note 97.

104. 79 Lab. Arb. (BNA) 193 (1982) (Koven, Arb).

105. Cal. Health & Safety Code § 25940-25947 (Deering 1988).

106. *See also* Schien Body & Equip. Corp., 69 Lab. Arb. (BNA) 930 (1977) (Roberts, Arb.) (employer plant-wide smoking ban unreasonable because there was no proof that the rule clearly benefitted nonsmokers since work area was well ventilated, nor was there any indication that the ban directly improved workers' health). *But cf.* Ohio Dept. of Health, 89 Lab. Arb. (BNA) 937 (1987) (Cohen, Arb.) (state's modified smoking policy for health department employees found reasonably related to legitimate objectives); Morelite Equip. Co., 88 Lab. Arb. (BNA) 777 (1987) (Stoltenberg, Arb.) (smoking ban at workstations reasonable in view of fire dangers); Litton Indus., 75 Lab. Arb. (BNA) 308 (1980) (Grabb, Arb.) (rule limiting smoking to specific areas reasonable).

efforts.[107] Employers should also consider the following specific issues:

(1) Is there an open line of communication so that employees can effectively express their concerns and thereby informally resolve smoking-related disputes?

(2) Have employees complained about co-workers' smoking or tobacco smoke in the work environment?

(3) If employees have complained, how many have done so, and on what basis? Are such complaints properly attributable to employee rivalries or individual medical hypersensitivity(ies)?

(4) Is poor ventilation the cause of actual or perceived indoor air quality problems?[108]

(5) Would the imposition of smoking restrictions in the workplace decrease productivity, adversely affect employee morale, violate the provisions of a collective-bargaining agreement or give rise to discrimination claims?

(6) Could smoking disputes be resolved by management through less drastic means, such as separating smokers from nonsmokers, erecting partitions or improving the company's ventilation system?

After evaluating the work environment based on the foregoing considerations, and addressing the likely accommodation options, an employer should decide whether it is necessary to implement a formal smoking policy.[109]

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107. HUMAN RESOURCES POLICY CORP., SMOKING POLICIES IN LARGE CORPORATIONS (May 1988) [hereinafter SMOKING POLICIES]. *See also* BNA, SPECIAL REPORT, *supra* note 1, at 26 figure E (72% of surveyed employers urged employees to resolve smoking-related problems themselves).

Other employer responses to complaints of workplace smoking included: (1) attempt to get smoker to reduce smoking (22.5%); (2) do nothing (9.7%); (3) move complainer to new work area (6.3%); (4) move smoker to new work area (3.4%); (5) other measures (3.1%); and (6) order smoker to discontinue smoking (0.9%). SMOKING POLICIES, *supra*, at 12, Table 13. *See also* BNA, SPECIAL REPORT, *supra* note 1, at 26.

108. There is substantial evidence that air quality complaints are indicative of a much larger problem, i.e., inadequate ventilation. For example, a January 1987 report prepared by the National Institute for Occupational Safety and Health (NIOSH) attributed 52% of complaints connected to indoor air quality to "inadequate ventilation." Only 17% of the complaints were attributable to indoor contaminants, including tobacco smoke (which accounted for only 2%). In addition, chemicals emitted from carpeting, furniture and copying machines also contribute to indoor air contamination. BNA, SPECIAL REPORT, *supra* note 1, at 9-10. Similarly, according to a report entitled *Source Nature and Symptomology of Indoor Air Pollutants* prepared by ACVA, Atlantia, Inc., a Fairfax, Virginia company specializing in the study and assessment of indoor air pollution, environmental tobacco smoke was found to be the immediate cause of indoor air problems in only four percent of the 233 major buildings investigated between 1981 and 1987. ACVA, ATLANTIA, INC., SOURCE, NATURE AND SYMPTOMOLOGY OF INDOOR AIR POLLUTANTS 9-11 (1987).

109. A majority (63.8%) of the 1,100 corporations who responded to the SMOKING POLICIES survey had not adopted any formal smoking policy. The survey also found that the companies most likely to have smoking policies are geographically located in areas with

VI. DRAFTING A SMOKING POLICY

In jurisdictions where workplace smoking is governed by a state statute or local ordinance, employers must conform their policies and practices to the law. In some circumstances, this may require employers to adopt a formal smoking policy. In the vast majority of jurisdictions, however, employers are still free to decide whether a smoking policy is necessary or appropriate. In doing so, employers may want to evaluate whether there is a predicate for action. In this regard, they may find it useful to survey their employees to see if there is a consensus of opinion. Management may also want to consult its labor unions, if any.

Should a company decide that a formal written policy is necessary, the specifics of the policy will naturally depend upon the individual aspects of the workplace. Because of local differences, particularly in those companies with decentralized decision making, some companies have developed a smoking policy applicable to only some divisions, offices or plants. Other employers have adopted a smoking policy in response to a specific problem or where they are governed by a particular local ordinance. In addition, companies tend to vary their smoking policies depending upon the degree of specificity desired. A less specific smoking policy aimed at promoting cooperation and consideration might, for example, state:

> It is our policy to make every reasonable effort to accommodate all employees within the constraints imposed by our physical structure and financial resources. It is our firm conviction that the wishes of smokers and nonsmokers can best be resolved through cooperation, dialogue and common courtesy. Should a dispute or concern arise, management and employees should work together to seek a reasonable resolution consistent with this policy.

A nonspecific policy such as this will increase flexibility and allow management to resolve individual disputes on a case-by-case basis.

In contrast, some employers may opt for a smoking policy with a greater degree of specificity. For instance, the employer may want to designate particular smoking or nonsmoking areas or workstations. The specific locations covered may include: private offices, hallways, conference rooms, lunch rooms, restrooms and auditoriums.[110]

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workplace smoking laws. SMOKING POLICIES, *supra* note 107, at 4. More recently, a smaller BNA survey of 623 employers indicated that a minority (43%) of employers have not adopted any workplace smoking policy. BNA, SPECIAL REPORT, *supra* note 1, at 2.

110. If enforced in an arbitrary or discriminatory manner, a smoking policy may subject an employer to potential liability. Indeed, inequitable enforcement could foster employee discontent and possibly support claims premised on breach of contract or tort claims

Smoking bans, while rare, pose more serious problems.[111] This is especially true if they proscribe off-duty behavior. In addition to employee morale problems, these bans are likely to give rise to a morass of legal claims.[112] For these reasons, employers should be extremely cautious before considering a total ban on workplace smoking.

CONCLUSION

Smoking can be the subject of emotional debate in the workplace. There are few uniform answers to guide management in dealing with the issue. But, left with enough flexibility to address the concerns of all of their employees, most employers generally find that they can resolve smoking disputes by undertaking practical accommodations on a case-by-case basis.

Some specific options for resolving smoking disputes include: (1) separating smokers from nonsmokers; (2) moving nonsmokers closer to windows or fresh air ducts; and (3) improving ventilation throughout the workplace. However difficult and legally complex the smoking in the workplace issue has become, one thing is clear: Employers have an obligation to accommodate the competing interests of smoking and nonsmoking employees. It is equally clear that in an era of increasing labor shortages, employers are redoubling their efforts to select and retain skilled and experienced workers—smokers as well as nonsmokers.

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against employers or individual supervisors. *See* Carroll v. Tennessee Valley Auth., 697 F. Supp. 508 (D.D.C. 1988) (public employer not shielded from potential tort liability under "official immunity" doctrine, because supervisor who failed to enforce smoking policy acted outside course and scope of his employment). In *Carroll*, the plaintiff claimed that she had developed lung disease allegedly from exposure to environmental tobacco smoke on the job. In addition, she alleged that her supervisors took reprisals against her by giving her poor performance evaluations, assigning her demeaning work and questioning the seriousness of her health claims. On November 1, 1988, this case was settled for an undisclosed sum of money.

111. The vast majority of employers with smoking policies do not ban smoking entirely. As noted above, those which do typically do so due to product (food) contamination concerns or because flammable materials are produced or stored in the workplace. And few (five percent) give hiring preference to nonsmoking job applicants. BNA, SPECIAL REPORT, *supra* note 1, at 17, 22. One notable exception pertains to police and fire departments, which are faced with unique workers' compensation issues. *See supra* notes 24-28 and accompanying text. *See also Bans, Red Ink: Smoking: A Burning Work Issue, supra* note 90 (Pacific Northwest Bell bans smoking in all facilities; Radar Electric of Seattle will not hire smokers; Capital City Products conducts seminars to help employees quit smoking).

112. For a thorough discussion of smoking bans, see Rothstein, *supra* note 24, at 940.