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SMOKING IN THE WORKPLACE: WHO HAS WHAT RIGHTS?

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I. INTRODUCTION

There has been popular discussion in the workplace recently about the "rights" of nonsmokers to a "smoke-free" working environment and the "rights" of smokers to smoke.[1] This is true even though state and federal courts have been quite hostile to the claims of nonsmokers and recently smokers alike, seeking legal rights for their respective positions.[2] A decade of litigation in this area has now made it clear that the courts are reluctant to accord legal rights to either side, except in certain narrow circumstances.[3]

It is increasingly clear that resolution of the workplace smoking issue has now moved beyond the judicial branch of govern-

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1. Approximately eighty-eight percent (88%) of all employers in the United States permit smoking in the workplace. Only approximately twelve percent (12%) of the employers in the United States ban smoking on the job. BNA, *Where There's Smoke: Problems and Policies Concerning Smoking in the Workplace*, A Special Report, Table 2 at page 20 (2d ed. 1987) [hereinafter BNA, Special Report]. Moreover, approximately one-half of all employers have written policies addressing smoking in the workplace. *Id.* at 18.

2. Part of the hesitancy of the courts to embrace smoking in the workplace issues may flow from the large numbers of potentially active litigants. According to the most recent (1987) government statistics compiled by the Centers for Disease Control, over one-fourth (26.5%) of adult Americans smoke. BNA, Special Report, at 12.

3. This Article does not address the 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).

ment.[4] Despairing of winning legal rights in the courts, anti-smoking advocates have moved the smoking issue into the second branch of government—the legislature. While there are currently thirteen (13) state statutes and approximately five hundred local ordinances that address smoking in the workplace, the vast majority of smoking legislation routinely fails to be enacted.

There is also recent evidence that the workplace smoking controversy is now leaving the legislative arena and heading to the third branch of government—the executive.[5] Whatever the eventual fate of the issue there, it is now clear that neither judicial action, legislative enactment, or executive branch intervention will effectively resolve the competing interests of nonsmokers and smokers in the workplace.

Rather, most employers have learned from experience that the workplace smoking issue requires nonsmoking and smoking employees, unions, ventilation experts, and management all to come together to resolve the complex interweave of perceived "rights," tolerance, accommodation, and technical/mechanical indoor air quality issues. The most effective resolutions appear to be those based on interdisciplinary considerations from the legal, human resources, and mechanical engineering departments of corporate employers. It is too simplistic in the late 1980's for companies to either ignore the issue entirely, rely on a generic corporate policy, or legislation created externally to the workplace to resolve this complex competition of social habits and preferences.

This Article will examine the legal issues that surround the workplace smoking controversy and will discuss the "rights" of smokers and nonsmokers. This Article also reviews legislation aimed at protecting the interests of smokers and nonsmokers in connection with their employment. Finally, the Article discusses practical resolutions which employers may find useful when addressing workplace smoking issues.

Generally speaking, the case law reveals that workplace smoking controversy has not accorded legal "rights" to either smokers or nonsmokers, except in very limited circumstances. Although

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4. Indeed, less than a handful of lawsuits concerning workplace smoking have been filed in the last several years.

5. For example, after twelve successive years of rejection of public smoking legislation in New York State, in 1987, Governor Cuomo directed the New York Public Health Council to issue public smoking regulations. New York's highest court subsequently struck down these regulations as violative of state law. Boreali, v. Axelrod, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987).

more significant developments have occurred on the legislative front, few "rights" have been conferred to employees—smoking or nonsmoking—by recently enacted laws. In addition, only a small number of administrative regulations in this area have surfaced. As with their legislative counterparts, it is unlikely that administrative regulations can effectively address smoking issues across-the-board in private workplaces.

Companies in the United States have managed the smoking issue by undertaking to accommodate in a fair and reasonable manner the competing interests of nonsmokers and smokers alike. In doing so, the American corporate community has staved off, for the most part, the need for judicial, legislative, or executive intervention in the workplace smoking issue.

II. Most Employees Have No Judicially Protected "Rights" Regarding Workplace Smoking

Both nonsmoking and smoking employees have found that the courts are generally unwilling to intervene in the workplace smoking controversy. Indeed, the courts have been quite hostile to the claims of nonsmokers seeking a legal "right" to a smoke-free work environment. That same conclusion is also emerging in the recent 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.

Beginning in 1976, nonsmokers filed the first of a series of "test cases" seeking the legal right to a smoke-free work environment.[6] 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.[7]

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6. *See* Shimp v. New Jersey Bell Telephone, 368 A.2d 408 (N.J. Super. Ct. 1976).

7. *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.), *cert. denied*, 444 U.S. 926 (1979); Gaspar v. Louisiana Stadium & Exposition District, 418 F. Supp. 716, 722 (E.D. La. 1976); McCarthy v. Social and Health Services, 110 Wash. 2d 812, 826, 759 P.2d 351 (1988).

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.[8] In the leading decision, *Gasper v. Louisiana Stadium and Exposition District*,[9] 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 their constitutional rights guaranteed by the U.S. Constitution.[10] 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.[11] 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."[12]

Likewise in *Kensell v. State of Oklahoma*,[13] a public employee's constitutional challenge to workplace smoking was also rejected. In this case, the employee claimed that his employer, the State of Oklahoma, violated his rights guaranteed by the first, fifth, ninth and fourteenth amendments.[14] Namely, the employee alleged that by allowing smoking in the workplace, the state interfered with his "right to think" and committed assault against his person.[15] The court rejected both of these arguments and unequivocally held that "the United States Constitution does not empower the federal judiciary . . . to impose no-smoking rules in the plain-

8. Of course, the United States Constitution generally limits only public employers' action (state and federal) and, for the most part, does not limit action by private employers. *See* Rotunda, Nowak & Nelson, *Treatise on Constitutional Law: Substance and Procedure*, § 16.1, (1986).

9. 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

10. *Id.* at 717.

11. *Id.*

12. *Id.* at 721.

13. 716 F.2d 1350 (10th Cir. 1983).

14. *Id.*

15. *Id.* at 1351.

tiff's workplace."[16] In sum, every reported decision addressing the issue has concluded that employees have no constitutionally protected right to a smoke-free work environment.[17]

Similarly, the corollary to the nonsmokers' challenge, in other words, the smoker's asserted constitutional "right" to smoke, has also been rejected. In *Rossie v. State of Wisconsin Department of Revenue*,[18] the state intermediate appellate court upheld a Wisconsin statute prohibiting smoking in all but certain designated areas of a state-controlled building.[19] Rossie, an eighteen-year employee and pipe smoker, challenged the statute, claiming that he could not lawfully be disciplined for smoking at work.[20] He alleged that the law violated his and his fellow smokers' constitutional right to equal protection of the laws.[21] The court rejected this argument on the ground that the state had a "reasonable basis" for prohibiting smoking in certain designated areas and thus, it did not violate the fourteenth amendment equal protection clause.[22]

A prohibition against off-duty smoking, a restriction thus far imposed almost uniquely upon police, fire, and other public safety officers, has also withstood limited constitutional challenge.[23] In

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16. *Id.*

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

18. 133 Wis. 2d 341, 395 N.W.2d 801 (Wis. Ct. App. 1986), *cert. denied*, 401 N.W.2d 10 (Wis. 1987).

19. *Id.*

20. *Id.* at ____, 395 N.W.2d at 804.

21. *Id.*

22. *Id.* at ____, 395 N.W.2d at 807.

23. 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, 952-953 (1987).

Most smoking bans have been promulgated at the local level. Approximately thirty-two 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. However, unions have vowed to challenge this legislation as unconstitutional. *See Police Union Plans Challenge of Smoking Ban*, Boston Globe October 7, 1988 Metro section, at 33.

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.

Grusendorf v. Oklahoma City,[24] the court upheld a fire department's ban on off-duty smoking applicable to fire fighter trainees. The *Grusendorf* Court found that the smoking ban infringed upon constitutionally protected liberty and privacy rights:

> 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 workplace 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.[25]

Despite this finding, the *Grusendorf* 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.[26]

Despite the outcome of *Grusendorf*, employer restrictions against off-duty behavior give rise to serious privacy concerns and are likely to be challenged in the future.[27] Moreover, where the smoking restrictions apply to only part of the work force, such as new hires, they are likely to be challenged on equal protection grounds. Indeed, any smoking restriction that applies to only *some* members of a work force would appear irrational on its face. 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 stated:

> The one peculiar aspect of the nonsmoking regulation that does not appear entirely rational is that it is limited in its application to first year fire fighter trainees only. The rest of the fire fighters, for whom good health and physical conditioning are no doubt also important, are apparently free, as far as the Oklahoma City Fire Department is concerned, to smoke all the cigarettes they

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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.

24. 816 F.2d 539 (10th Cir. 1987).

25. *Id.* at 541.

26. *Id.* at 544.

27. *See The Company Is Watching You Everywhere*, The New York Times, February 15, 1987, section 4, p. 21; *When Can You Fire for Off-duty Conduct?* Harvard Business Review, January-February 1988.

desire.[28]

The court refused, however, to consider this issue since it was not raised by the parties.

B. *Statutory Claims*

Employees have relied upon numerous statutes in their attempts to limit smoking in the workplace or alternatively, to obtain financial benefits. These statutory bases include federal and state handicap laws, disability statutes, and workers' compensation laws.[29] On the other hand, union employees covered by a collective bargaining agreement have successfully relied upon federal labor laws to protect their "right" to smoke. In addition, minority employees may, under some circumstances, allege that smoking restrictions unfairly affect them in violation of state or federal discrimination laws. These various statutory claims are discussed below.

1. *Handicap, Workers' Compensation and Disability Claims*

Courts have generally refused to restrict workplace smoking, regardless of the legal theory invoked by a employee. Some courts, however, have found that certain 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

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28. 816 F.2d at 543.

29. The Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651, et seq., 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, et seq. 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." Bureau of National Affairs, Daily Report for Executives, March 2, 1987, p. A-24, DER No. 39. In addition, OSHA administrators have consistently refused to accept complaints based solely on work place 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 work place 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).

of the Federal Rehabilitation Act of 1973[31] when it found him to be "hypersensitive"[32] to tobacco smoke and physically unable to perform his job in the presence of environmental tobacco smoke.[33] In *GASP v. Mecklenburg County*,[34] however, the North Carolina Court of Appeals rejected similar claims, cautioning that the term "handicap" was *not* intended to include all persons who claim to suffer a pulmonary problem, however minor, or those who experience discomfort in the presence of tobacco smoke.[35]

In the workers' compensation context, a California court has held that a nurse who left her job because of claimed "allergic" reactions to tobacco smoke was eligible for unemployment compensation until she could find alternative employment in a smoke-free environment.[36] A Louisiana court has denied unemployment benefits under similar circumstances because it found that the em-

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31. 29 U.S.C. § 701 (1978), et seq. The Rehabilitation Act generally imposes nondiscrimination obligations (and in some cases affirmative action requirements) upon a limited group of employers: i.e., federal agencies, federal contractors, and recipients of federal assistance.

32. The *Vickers* Court used the terms "hypersensitivity" and "unusually sensitive" interchangeably. *Vickers*, 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 foreign agent." Dorland's Illustrated Medical Dictionary p. 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, et al., *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: First, the employer did not discriminate against plaintiff by reason of his handicap; and second, the employer made reasonable efforts to accommodate plaintiff. 549 F. Supp. at 87-89. For a thorough analysis of the *Vickers* decision, *see 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 (1984). *See also* Department of Fair Employment and Housing v. Fresno County, FEHC Dec. No. 81-82 (C8-0009 ph) (1984) (employee "extraordinarily sensitive" 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. *Id.* at 227, 256 S.E.2d at 479. (emphasis added)

36. Alexander v. California Unemployment Insurance Appeals Board, 104 Cal. App.3d 97, 163 Cal. Rptr. 411 (1980). *See also* McCrocklin v. Employment Development Department, 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).

ployee's preexisting allergy, which was not aggravated by her employment, did not constitute "good cause" for her resignation.[37]

In *Parodi v. Merit Systems Protection Board*,[38] a federal employee who claimed to be hypersensitive to tobacco smoke was found to be "disabled."[39] 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.[40]

While each case is based on its own set of facts, these cases seem to indicate that currently only those found by the courts to have the most severe reactions to tobacco smoke will be considered "handicapped" or "disabled."[41] On the other hand, an employee who is merely "annoyed" is not typically found by the courts to be "medically hypersensitive."[42] 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."[43]

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.[44] However, if an employee is found by the court to be medically hypersensitive and unable to continue working, he or she may be permitted to collect 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

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37. Billman v. Sumrall, 464 So.2d 382 (La.App. 1985). *But see* Lapham v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review, 103 Pa. Cmmw. 144, 519 A.2d 1101 (1987) (bronchitis sufferer entitled to collect unemployment benefits where proffered physical relocation was deemed not a "reasonable accommodation"); *McCrocklin*, *supra* note 36.

38. 690 F.2d 731 (9th Cir. 1982), as amended, 702 F.2d 743 (9th Cir. 1983).

39. *Id.* at 751.

40. For a thorough analysis of *Parodi*, *see 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 (1984).

41. *See, e.g., Vickers*, *supra* 549 F. Supp. at 87.

42. *See, e.g., GASP*, *supra* 256 S.E.2d at 479; *Gordon*, *supra* 462 A.2d at 15.

43. 549 F. Supp. at 89.

44. *See Parodi*, *supra* 702 F.2d at 749-751.

any obligation upon an employer to restrict workplace smoking.

2. Labor Relations Claims

Unionized employees may have a "right" to smoke on the job protected by a collective bargaining agreement.[45]

The National Labor Relations Act (NLRA)[46] 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.[47]

Rules governing workplace smoking have been held to be "terms and conditions of employment" and accordingly, are subject to mandatory collective bargaining.[48] Thus, unless the collective bargaining agreement includes a broad "management rights" clause[49] permitting the employer unilaterally to establish plant

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45. In 1986, the AFL-CIO issued a National Resolution opposing unilateral attempts by management (and legislative mandates) to impose workplace smoking restrictions. 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, Appendix D. There have also been scattered reports that rules regarding smoking in the workplace have become issues in union organizing drives.

46. 29 U.S.C. § 151-169 (1982).

47. 29 U.S.C. § 158(a)(5). The National Labor Relations Board has broad powers to prevent and/or remedy unfair labor practices. *See generally* 29 U.S.C. § 160.

48. *See* Chemtronics, Inc., 236 NLRB No. 21 (1978). *See also* Commonwealth of Pa. v. Pennsylvania Labor Relations Bd., Pa. Commw. 1, 459 A.2d 452 (Pa. Commw. Ct. 1983) ("[t]he subject of whether employees may smoke at their work places 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 Products v. NLRB, 238 F.2d 128, 129 (5th Cir. 1956); NLRB v. Hilton Mobile Homes, 387 F.2d 7, 10-11 (8th Cir. 1967).

49. An employer may insist upon a broad "management rights" clause. *See* NLRB v. American National Insurance 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 signifi-

rules, the employer must first bargain with the union prior to restricting smoking in the workplace.[50] This is especially true in situations where smoking is a recognized right or privilege of employment.

This issue was discussed in *Re Parker Pen U.S.A.*[51] In this case, an employer, who had permitted on-the-job smoking for over twenty years, unilaterally abolished employee smoking rights which were guaranteed under the collective bargaining agreement.[52] The employer allegedly did so for health reasons after receiving the Surgeon General's 1986 report on involuntary smoking.[53] 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 work place."[54] Accordingly, the arbitrator invalidated the employer's smoking ban until any changes could be bargained over during upcoming negotiations.[55]

Even where the employer is required to impose smoking restrictions pursuant to state statute or local ordinance, presumably he must bargain over all discretionary aspects of the rule or else be

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cant 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 General Counsel's reasoning is so broad, it is not clear why "mandatory" bargaining would not also be required of every other recognized term and condition of employment, including smoking in the workplace.

50. To date, no court has found a management rights clause sufficiently broad to permit the unilateral imposition of a smoking policy. In Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 74 Pa. Commw. 1, 459 A.2d 452 (1983) the court rejected, for example, an employer's argument that it had the "inherent managerial" policy to unilaterally determine whether to permit smoking at employee work stations. In the arbitration setting, compare Ohio Dept. of Health 89 Lab.Arb. 937 (1987) (Cohen, Arb.); Morelite Equipment Co. 88 Lab.Arb 777 (1987) (Stoltenberg, Arb.); Snap-On Tools Corp. 87 Lab.Arb. 785 (1986) (Berman, Arb.); National Pen & Pencil Co. 87 Lab.Arb. 1081 (1986) (Nicholas, Arb.); Litton Industries 75 Lab.Arb. 308 (1980) (Grabb, Arb.); Sherwood Medical Industries 72 Lab.Arb. 258 (1977) (Yarowsky, Arb.) (smoking restrictions upheld) with Dental Command, Dept. of the Army 83 Lab.Arb. 529 (1984) (Allen, Arb.); Union Sanitary District 79 Lab.Arb. 193 (1982) (Koven, Arb.); Schien Body & Equipment Co., Inc. 69 Lab.Arb 930 (1977) (Roberts, Arb.) (smoking restrictions invalid).

51. 90 Lab.Arb. 489 (1987) (Fleischli, Arb.).

52. *Id.* at 489-490.

53. *See supra* note 3.

54. 90 Lab.Arb. at 496.

55. *Id.*

found guilty of an unfair labor practice.[56] In practice, bargaining will be routinely required because most workplace smoking laws leave a considerable amount of discretion to employers.[57]

Even if the unilateral implementation of a smoking policy does not violate the NLRA, it may nonetheless violate the collective bargaining agreement. Arbitral decisions have consistently stated that to be valid, an employer rule must be reasonable under the circumstances and nondiscriminatory in application.[58] Arbitrators have struck down employer smoking policies that fail to meet this standard.

In *Union Sanitary District*,[59] the arbitrator found that the employer could not unilaterally prohibit employees from smoking in their offices.[60] Specifically, the arbitrator found that the absolute prohibition was arbitrary because there was no adequate basis for the rule.[61] 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

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56. There are no "smoking policy" cases directly addressing this point. However, the institution of a smoking policy would constitute a "term and condition" of employment and, therefore, a mandatory subject of bargaining. *See supra* note 41, and accompanying text. Nevertheless, neither union nor management may require the other to agree to provisions which are unlawful or prohibited. Meat Cutters Local 421, 81 NLRB 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 NLRB 1573 (1964); Savannah Printing Specialties & Paper Products 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.

57. For example, the New Hampshire law cited at *infra* note 111 merely directs the employer to adopt a smoking policy. *All* of the specifics are left to the discretion of each individual employer.

58. *See* United Telephone Co. of Florida, 78 Lab.Arb. (BNA) 865 (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, 88 Lab.Arb. (BNA) 1311 (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 131 and accompanying text.

59. 79 Lab.Arb. (BNA) 193 (1982) (Koven, Arb.).

60. *Id.* at 196.

61. *Id.* at 195.

a day they were not in their offices but were out in the field; and no one complained about the smoking.[62] Moreover, the California Indoor Clean Air Act,[63] which the employer cited to justify its ban, did not require a ban on smoking.[64] Rather, that Act contemplates a relatively flexible regulation of smoking which recognizes the "rights" of both smokers and nonsmokers.[65]

3. *Discrimination Claims*

There is also a possibility that employers' policies or practices limiting smoking in the workplace may trigger "disparate impact" discrimination claims.[66] 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.[67] Thus, employer smoking

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62. *Id.* at 194.

63. Cal. Health & Safety Code §§ 25940, 25947 (West 1984).

64. *Id.* at 196.

65. *See also* Schien Body & Equip. Corp. 69 Lab.Arb. (BNA) 930 (1977) (Roberts, Arb.) (employer plant-wide smoking ban unreasonable since 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 Equipment Co. 88 Lab.Arb. (BNA) 777 (1987) (Stoltenberg, Arb.) (smoking ban at workstations reasonable in view of fire dangers); Litton Industries 75 Lab.Arb. (BNA) 308 (1980) (Grabb, Arb.) (rule limiting smoking to specific areas reasonable).

66. The Civil Rights Act of 1964, 42 U.S.C. § 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 applied equally to all employees).

67. 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. For example, in 1980, 47.7% of black males smoked, compared with 40.2% of white males. *See* Report of the Surgeon General, *The Health Consequences of Smoking/Cancer and Chronic Lung Disease in the Workplace*, at 49 (1985).

policies disproportionately affecting blacks might be challenged under state or federal discrimination laws.[68] 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 unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[69] In order to defend, the employer must then successfully demonstrate that the policy or practice is justified by a "business necessity."[70] Some smoking restrictions, such as those prohibiting smoking near hazardous or flammable materials, may constitute a "business necessity." 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 business necessity.[71] Even so, the court could still find a Title VII vio-

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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*, vol. 36, no. 35 (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 incidence of smoking among blacks. *See Vital Health Statistics, Health Promotion and Disease Prevention United States, 1985*, published by the U.S. Department of Health and Human Services, DHHS Publication No. (PHS) 88-1591 (February 1988) at 70.

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

68. For a comprehensive discussion of smoking and civil rights issues, *see* Ethridge and Fox, "Toward a Civil Rights Approach to Smoking," *Currents* (1987), published by the American Association for Affirmative Action.

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

70. To prove a business necessity, an employer may show that the challenged 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).

71. *See* Rucker v. Higher Educational Aids Board, 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 American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 940

lation if the employee proves that there are other alternatives which accomplish the same business purpose, yet have less impact on blacks.[72]

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.

C. *Common Law Claims*

Employees have filed several lawsuits claiming that workplace smoking violates an employer's general common law duty to provide a reasonably safe working environment for its employees.[73] However, only one lower court decision in New Jersey, *Shimp v. New Jersey Bell Telephone*[74] has found an employer permitting smoking in the workplace to have violated this duty.

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.[75] Plaintiff submitted medical opinions in support of her request for an injunction.[76]

(1971) (Pan Am violated Title VII when it banned employment of male flight attendants despite passenger preferences for female flight attendants); Bing v. Roadway Enterprises, Inc., 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, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

72. *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).

73. This duty has been codified by federal and state occupational safety and health (OSHA) laws. *See* 29 U.S.C. §§ 651-678 (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 40.

74. 368 A.2d 408 (N.J. Super. Ct. 1976).

75. *Id.* at 409.

76. *Id.* at 410-15.

The employer, on the other hand, failed to put forth any evidence to refute the plaintiff's claims.[77] 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.[78]

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 plaintiff's request for an injunction.[79] It is quite possible that the result in *Shimp* might have been different had it been contested and had New Jersey Bell, instead, aggressively defended itself. 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.[80] The only difference between the two cases is that the employer elected to defend itself in the later case.

Seven years later in *Smith v. Blue Cross & Blue Shield*,[81] the New Jersey Superior Court rejected and dismissed a similar claim by a nonsmoking employee who also claimed to be hypersensitive to environmental tobacco smoke.[82] The *Smith* Court held that the safety of the workplace was to be judged by reference to the "typical" employee, *not* the "supersensitive" employee.[83] 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

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77. *Id.*

78. *Id.* at 416.

79. *Id.*

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

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

82. *Id.*

83. *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 warrant and no justification as a 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 . . .").

> sweeping and go well beyond what is necessary to ensure a safe working place.[84]

The Smith Court therefore concluded that the nonsmoking "supersensitive" employee had no right to a smoke-free environment.[85]

A District of Columbia court reached the same conclusion in *Gordon v. Raven Systems & Research, Inc.*[86] In *Gordon*, an employer terminated an employee after she refused to work in an area containing some tobacco smoke.[87] The employee subsequently filed a lawsuit contending that the employer was negligent in not providing her with a smoke-free workplace.[88] The *Gordon* Court dismissed the employee's claim because the plaintiff had presented no evidence to support her allegations that tobacco smoke was harmful to employees.[89] Significantly, the court in *Gordon* held that the employer had no duty to conform the workplace to the particular needs or sensitivities of an individual employee.[90]

Likewise, the trial court in *Smith v. AT&T Technologies, Inc.*[91] also rejected an employee's claim that the employer breached its common law duty to maintain a safe working environment. [92] 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."[93] The court added that the employer was not required to provide a "comfortable" workplace.[94]

While there is thus far only a single court decision which might support the allegation that employers have a common law duty to restrict environmental tobacco smoke in the workplace, employers must nevertheless be careful not to retaliate against employees who protest corporate policies permitting smoking. In

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84. *Id.* at 8.
85. *Id.* at 16-17.
86. 462 A.2d 10 (D.C. 1983).
87. *Id.* at 11.
88. *Id.*
89. *Id.* at 14.
90. *Id.* at 15.
91. No. 4446121 (St. Louis Cty. Cir. Ct. April 23, 1985). This case was on remand from an earlier decision, Smith v. Western Electric Company, 643 S.W.2d 10 (Mo. App. 1982), which recognized that employers have a common law duty to provide a safe workplace.
92. *Id.* at 3.
93. *Id.*
94. *Id.* at 4.

Hentzel v. Singer Co.,[95] a California court held that an employee could state a common law retaliatory dismissal claim after being terminated for protesting existing working conditions.[96] The court did so without addressing whether the environmental tobacco smoke was, in fact, hazardous.[97]

Overall, 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.[98] With the exception of the now dated and criticized 1976 *Shimp* decision,[99] 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.[100]

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95. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

96. *Id.* at 300, 188 Cal. Rptr. at 165.

97. With the recent enactment of Proposition 65, California employers may now have to provide warnings in areas where employees or visitors may be exposed to environmental tobacco smoke. *See* Cal. Health & Safety Code § 25249.6 (West 1986).

98. In fact, no causal link has been scientifically established between ETS and chronic adverse health effects. Both the Surgeon General and the National Academy of Sciences reported 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 3, at 14; *NAS Report, supra* note 3, 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 3, at 62. Finally, both the Surgeon General and the National Academy of Sciences reports emphasize critical limitations on their claim 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 3, at 308. A number of other studies published since 1986 also contradict conclusions of the Surgeon General and NAS reports with respect to the purported relationship between ETS and lung cancer. *See, e.g., Proceedings, supra* note 3, at 242-50, 252-58.

99. 368 A.2d 408 (N.J. Super. Ct. 1976).

100. 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 and Colby Co. Inc., 397 Mass. 320, 419 N.E.2d 604 (1986). But, in McCarthy v. State of 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

Indeed, several courts which have addressed the issue to date have recognized the need to consider the interests of both smokers and nonsmokers.[101]

In sum, nonsmoking employees have not generally been accorded any legal "right" to a smokefree work environment by the courts. The only limited exception applies to alleged hypersensitive employees who may be perceived as "handicapped." Nor have courts accorded smokers a legal "right" to smoke. With the exception of employees covered by a collective bargaining agreement, smokers as well as nonsmokers, are unlikely to convince the courts to intervene in this area.

III. MOST EMPLOYEES HAVE NO LEGISLATIVE "RIGHTS" REGARDING WORKPLACE SMOKING

The issue of employee "rights" vis-a-vis smoking in the work place demands a review of relevant state and local legislation.[102] Approximately thirteen states to date have enacted legislation specifically regulating smoking in private work places.[103] These are: (1)

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stating a cause of action against her former employer for negligence. 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 Relations Report,, 1172 (Aug. 1988). While three 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. *Id.* at 826. A trial on the merits in *McCarthy* is scheduled for October 1989.

101. *See Shimp*, 368 A.2d, at 416; *Gordon*, 462 A.2d at 14; *McCarthy*, 110 Wash. 2d, at 821-822.

102. There is no federal legislation regulating smoking in private work places. However, the United States Government has 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. *See also* "Federal Smoking Curb Stirs Groans and Cheers," New York Times, February 7, 1987, sec. 1, at 30, col. 1.

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, et al., 33 FLRA No.8, pp. 61-74 (Before Calhoun and McKee) (October 13, 1988), Nos. 0-NG-1524, 0-NG-1536 and O-NG-1545.

103. 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.

Connecticut;[104] (2) Florida;[105] (3) Iowa;[106] (4) Maine;[107] (5) Minnesota;[108] (6) Montana;[109] (7) Nebraska;[110] (8) New Hampshire;[111] (9) New Jersey;[112] (10) Rhode Island;[113] (11) Utah;[114] (12) Vermont;[115] and (13) Washington.[116]

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;[117] (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.[118] Local ordinances are often more restrictive and specific than state statutes.[119] Local ordinances may specifically limit smoking in particular areas of the workplace. Some of these local laws, such as the San Francisco ordinance, also accord preferential treatment to nonsmoking employees within their work area. Overall, limited "rights" concerning

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104. CONN. GEN. STAT. ANN., §§ 31-40q, (West 1986) (effective April 1, 1988).

105. FLA. STAT. ANN., §§ 386.201-.208 (West 1986) (effective October 1, 1985).

106. IOWA CODE ANN., §§ 98A.1-6, (West, 1988) (effective July 1, 1987).

107. ME. REV. STAT. ANN., tit. 22, § 1580-A, (West Supp., 1988) (effective January 1, 1986).

108. MINN. STAT. ANN., §§ 144.411-.417, (West, 1989) (effective April 2, 1976).

109. MONT. CODE ANN., §§ 50-40-101 - 109, (1979).

110. NEB. REV. STAT., §§ 71-5701 - 5713, (1981).

111. N.H. REV. STAT. ANN., §§ 115:50 - :53 (Supp. 1988) (effective January 1, 1987).

112. N.J. STAT. ANN., §§ 26:3D-23 - 31, (West, 1987) (effective March 1, 1986).

113. R.I. GEN. LAWS, tit. 23, §§ 23-20.7-1 - 7, (Supp. 1988) (effective June 27, 1986).

114. UTAH CODE ANN. 1953 §§ 76-10-101, 76-10-106, 76-10-108 - 110, (1978) (effective April 27, 1986).

115. VT. STAT. ANN., tit. 18, §§ 1421 - 1428, (Supp. 1988) (effective July 1, 1988).

116. WASH. REV. CODE ANN., tit. 70, §§ 94.010-.910 (West, 1975) (effective May 10, 1985).

117. In a recent election in Oregon, Proposition 6, which would have imposed a virtual ban on smoking in all public places, including places of work, was defeated by a 3 to 2 margin.

118. Hundreds of local ordinances impact smoking in the workplace. The majority of these are located in California. *BNA, Special, Report*, at 66.

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

work place smoking have been accorded to employees only in certain states and localities.

In contrast to legislation aimed at restricting workplace smoking, smokers in several states may soon be protected by legislation aimed at preserving their "right" to smoke on the job. For example, the Virginia Senate recently passed a measure which provides that "[a] private employer shall have sole authority for designating smoking and nonsmoking areas within the private workplace unless the designation of such places is the subject of a written agreement between the employer and employees."[120] A companion measure would bar most government employers from requiring that employees be nonsmokers as a condition of employment.[121]

While a similar bill prohibiting employment discrimination against smokers was recently defeated in Maryland,[122] other "smokers' rights" bills have been introduced in Arkansas, Delaware, Illinois, and Missouri.[123] These proposed laws all seek to protect the employment "rights" of smokers. For example, the Missouri bill would make it unlawful for an employer "[t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because the individual is a smoker or a nonsmoker . . . ."[124] Interestingly, a bill has also been introduced in the Oregon Legislature which, if passed, would prohibit employers from testing employees or prospective employees to determine whether they smoke.[125] As the foregoing illustrates, this recent surge of activity apparently evidences a legislative trend towards protecting the "rights" of smokers and their employment.

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120. Virginia Senate Bill No. 601, offered January 20, 1989. *See also "Senate Approves Deadline For Antismoking Legislation,"* The Washington Post (February 3, 1989) sec. C, at 8, col. 1.

121. Virginia Senate Bill No. 607, offered January 20, 1989. *See also "Senate Approves Deadline for Antismoking Legislation," supra* note 120.

122. Maryland S. Res. 729 (1989).

123. Arkansas: H.R. Res. 1901 (1989);
Delaware: S. Res. 95 and 67 (1989);
Illinois: H.R. Res. 0378 (1989); and
Missouri: S. Res. 440 (1989).

124. *See* H.R. Res. 440(c).

125. *See* H.R. Res. 2487 (1989).

IV. MOST EMPLOYEES HAVE NO OTHER LEGAL "RIGHTS" REGARDING WORKPLACE SMOKING

Frustrated by this relatively insignificant success in the judicial and legislative areas, some nonsmoking employees have recently turned to the executive branch of government in an effort to restrict workplace smoking. For example, in 1987, after twelve years of legislative inaction, Governor Cuomo of New York promulgated state-wide restrictions on work place smoking. The New York Court of Appeals subsequently struck down the restrictions as an unconstitutional usurpation of legislative power.[126]

Aside from New York, most executive-type restrictions have thus far been imposed on public sector employees working in state or local office buildings. For instance, the governors of California, Kansas, Maryland, Pennsylvania, and Washington have enacted executive orders which restrict smoking to some extent within areas occupied by state agencies, departments, or other facilities.[127] In addition, several mayors have imposed smoking limitations in city facilities.[128] As with legislation, the various executive restrictions on workplace smoking differ substantially. None of the executive restrictions bans smoking entirely, while some expressly seek to respect the interests of smokers.[129]

While similar executive-inspired restrictions on workplace smoking may be imposed in the future, it is unlikely that they can effectively displace the employers' important role in resolving smoking issues. As with legislation, across-the-board executive pronouncements cannot address the unique characteristics and needs of each workplace.

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126. Boreali v. Axelrod, 523 N.Y.2d 464, 71 N.Y.2d 1, 517 N.E.2d 1350 (Ct. App 1987). *See also "Again New York Tries to Quit Smoking,"* The New York Times (December 27, 1987) sec. E, at 6, col. 1.

127. California: Executive Order No. D-62-87, issued March 2, 1987 by Governor Deukmejian; Kansas: Executive Order No. 87-99, issued July 1, 1987 by Governor Hayden; Maryland: Executive Order No. 01.01.1987.13, issued May 6, 1987 by Governor Schaefer; Pennsylvania: Management Directive No. 205.19, issued February 17, 1989 by Governor Casey; Washington: Executive Order No. EO-88-06, issued August 29, 1988 by Governor Gardner.

128. Current or former mayors of Denver Colorado; Albany, New York, and New York, New York have each issued directives concerning workplace smoking.

129. *See* Maryland Executive Order No. 01.01.1987.13, § 1; Pennsylvania Management Directive No. 205.19, § 4.

V. HOW SHOULD EMPLOYERS RESPOND TO THE WORKPLACE SMOKING ISSUE?

Naturally, each employer's reaction to the workplace smoking issue will vary depending on the needs and circumstances of its work place. 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 first address smoking in the work place issues among themselves before invoking management's time and efforts.[130] 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 sensitivities?
4. Is poor ventilation the cause of actual or perceived indoor air quality problems?
5. Would the imposition of smoking restrictions in the work place 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?[131]

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130. The survey, entitled *Smoking Policies in Large Corporations* (hereinafter "*Smoking Policies*") and completed in May of 1985, was conducted by the Human Resources Policy Corporation in Los Angeles, California. *See also BNA, Special Report* at 26 (seventy-two percent of surveyed employers urged employees to resolve smoking-related problems themselves).

Other employer responses to complaints of work place smoking included: (1) attempt to get smoker to reduce smoking (22.5 percent); (2) do nothing (9.7 percent); (3) move complainer to new work area (6.3 percent); (4) move smoker to new work area (3.4 percent); (5) other measures (3.1 percent); and (6) order smoker to discontinue smoking (0.9 percent). *Smoking Policies*, Table 13, at 12. *See also BNA, Special Report* at 26.

131. There is substantial evidence that suggests 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

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.[132]

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 with the law. In some circumstances, this may require employers to adopt a formal smoking policy. However, in the vast majority of jurisdictions, 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, to avoid possible unfair labor practices.

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 addi-

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and Health (NIOSH) attributed fifty-two percent of complaints connected to indoor air quality to "inadequate ventilation." Only seventeen percent of the complaints were attributable to indoor contaminants, including tobacco smoke (which accounted for only two percent). In addition, chemicals emitted from carpeting, furniture, and copying machines also contribute to indoor air contamination. *BNA, Special Report* at 9-10. Similarly, according to a report entitled "*Source Nature and Symptomology of Indoor Air Pollutants*" prepared by ACVA, Atlanta, Inc., a Fairfax, Virginia company specializing in the study and assessment of indoor air pollution [hereinafter *ACVA Study*], environmental tobacco smoke was associated with indoor air problems in only four percent of the 233 major buildings investigated between 1981 and 1987. *ACVA Study* at 9-11.

132. A majority (63.8 percent) of the 1,100 corporations who responded to the *Smoking Policies* survey had not adopted any formal smoking policy. The survey also revealed that the companies most likely to have smoking policies are geographically located in areas with workplace smoking laws. *Smoking Policies*, at 4. More recently, a smaller BNA survey of 623 employers indicates that a minority (forty-six percent) of employers have not adopted any workplace smoking policy. *BNA, Special Report* at 2.

tion, 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 that:

> 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.[133]

A non-specific 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. However, such policies, as with any personnel policy, place the employer in an enforcement role, protecting the sanctity of and enforcing its rules.[134]

Smoking bans, while rare, pose more serious problems.[135] This

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133. Smoking policy drafted by the Author.

134. 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 against employers or individual supervisors. *See* Carroll v. Tennessee Valley Authority, 697 F. Supp. 508 (D.D.C. 1988) (public employer not shielded from potential tort liability under "official immunity" doctrine, since 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. *Id.* at 509. 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. *Id.* On November 1, 1988, this case was settled for an undisclosed sum of money.

135. The vast majority of employers with smoking policies do not ban smoking entirely. As noted above, those which do typically do so due to prevent (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*, at 17, 22. One notable exception pertains to police and fire departments, which are faced with unique workers' compensation

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.[136] For these reasons, employers should be extremely cautious before considering a total ban on workplace smoking.

VII. CONCLUSION

Smoking can be the subject of emotional debate in the workplace. Neither the judicial, legislative, nor the executive branch of government is appropriate for resolving the competing interests of smokers and nonsmokers. Instead, 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: First, separating smokers from nonsmokers; second, moving nonsmokers closer to windows or fresh air ducts; and third, 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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issues. *See supra* notes 29-34 and accompanying text. *See also* "Bans, Red Ink: Smoking: A Burning Work Issue," *supra* (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).

136. For a thorough discussion of smoking bans, *see Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987).