



1-1-1987

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Refusing to Employ Smokers: Good Public Health or Bad Public Policy?

*Mark A. Rothstein**

| | | |
|-------|--|-----|
| I. | Introduction | 941 |
| II. | Smoking and Health | 941 |
| | A. <i>The Hazards to Smokers</i> | 941 |
| | B. <i>The Hazards to Nonsmokers</i> | 942 |
| | C. <i>The Demographics of Smoking</i> | 944 |
| | D. <i>The Costs of Smoking</i> | 945 |
| III. | Restrictions on Workplace Smoking | 946 |
| | A. <i>Legal Requirements</i> | 946 |
| | B. <i>Employer Policies</i> | 949 |
| IV. | Restrictions on Off-Work Smoking | 951 |
| | A. <i>Synergism</i> | 951 |
| | B. <i>“Heart and Lung” Statutes</i> | 952 |
| | C. <i>Effectuating Workplace Smoking Restrictions</i> | 953 |
| | D. <i>Reducing Health Insurance Costs and Improving Productivity</i> .. | 953 |
| V. | Legal Challenges to Prohibitions of Off-Work Smoking | 954 |
| | A. <i>Public Employees</i> | 954 |
| | B. <i>Private Employees</i> | 956 |
| | 1. Rehabilitation Act and State Handicap Discrimination Laws | 956 |
| | 2. Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act | 957 |
| | 3. State Constitutional Law | 958 |
| | 4. National Labor Relations Act | 958 |
| | 5. Employee Retirement Income Security Act | 959 |
| | 6. Common Law | 959 |
| VI. | Policy Issues | 960 |
| | A. <i>Economic Effects</i> | 960 |
| | B. <i>Monitoring Off-Work Behavior</i> | 961 |
| | C. <i>Lifestyle and Insurability</i> | 963 |
| VII. | Alternatives to Off-Work Smoking Prohibition | 964 |
| | A. <i>Establishing Smoking Cessation Programs</i> | 964 |
| | B. <i>Restructuring Employee Health Insurance</i> | 965 |
| | C. <i>Restrictions on Workplace Smoking</i> | 967 |
| | D. <i>Other Measures</i> | 967 |
| VIII. | Conclusion | 968 |

* Professor of Law and Director of the Health Law Institute, University of Houston. The author is indebted to the following individuals for their helpful comments on an earlier draft of this Article: Sharon Cooper, Bernic Dushman, Alan Engelberg, Tony Holtzman, Karl Kronebusch, Larry Milke, Tom Murray, and Joan Vogel. The author wishes to thank Rodney Alexander, Susan Stoner, and Teresa Valderrama for their expert research assistance.

I. Introduction

In the last five years a significant and growing number of public and private employers have adopted rules limiting cigarette and other forms of smoking by their employees. In some instances, the rules were adopted voluntarily because of concern about the health effects of smoking on both smokers and nonsmokers, increased health insurance and other costs associated with smoking; and vocal protests (and even lawsuits) by nonsmokers. In other instances, the rules were mandated by newly enacted state and local laws restricting workplace smoking.

Regardless of the impetus for restricting employee smoking, prohibitions on smoking are becoming more widespread and stringent. A relative few employers have even gone so far as to adopt rules refusing to hire smokers and forbidding current employees from smoking off work. These rules, often based on insurance and other cost containment considerations, are likely to become increasingly common. This Article examines the legal and policy implications of refusing to employ smokers. It concludes that there is little evidence that such policies further public health and, in any event, are unwarranted and subject to legal challenge. Less extreme policies can protect nonsmokers and reduce smoking rates without disrupting employment patterns and intruding into the off-work behavior of employees.

II. Smoking and Health

A. *The Hazards to Smokers*

According to the Surgeon General, cigarette smoking is "clearly the largest single preventable cause of illness and premature death in the United States."¹ It is associated with heart and blood vessel diseases; chronic bronchitis and emphysema; cancers of the lung, larynx, pharynx, lip, oral cavity, nasal sinus, kidneys, esophagus, pancreas, and bladder; and with other ailments ranging from minor respiratory infections to stomach ulcers.² Some evidence suggests that smokers also have an increased risk of dying of pneumonia and influenza.³ The estimated 314,000⁴ to 350,000⁵ premature deaths annually in the United States attributed to smoking is eight times the number of people who die each year in automobile accidents.⁶ Put another way, of a group of one hundred young cigarette smokers, it can be expected that one will be murdered, two will die in automobile accidents, and twenty-five will die from

1 U.S. DEPARTMENT OF HEALTH, EDUCATION, & WELFARE, HEALTHY PEOPLE—THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION 121 (1979).

2 COMMITTEE ON PASSIVE SMOKING, NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES & ASSESSING HEALTH EFFECTS 250, 257 (1986) [hereinafter ENVIRONMENTAL TOBACCO SMOKE].

3 STAFF MEMO OF OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SMOKING-RELATED DEATHS AND FINANCIAL COSTS 32 (1985) [hereinafter FINANCIAL COSTS].

4 STAFF PAPER OF OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PASSIVE SMOKING IN THE WORKPLACE: SELECTED ISSUES 15 (1986) [hereinafter PASSIVE SMOKING].

5 FINANCIAL COSTS, *supra* note 3, at 11.

6 Texas Heart Institute, *Cardiovascular Disease, Care and Prevention*, THI TODAY 12 (Winter 1987) [hereinafter *Cardiovascular Disease*].

smoking cigarettes.⁷ Smokers suffer ten times the risk of nonsmokers of developing lung diseases,⁸ three times the risk of developing coronary heart disease,⁹ and two times the risk of fatal coronary disease.¹⁰ Smoking is linked annually to eighty-eight percent of deaths due to chronic lung disease, thirteen percent of deaths due to cardiovascular disease, and thirty-two percent of all cancer deaths.¹¹ Smoking-related deaths resulting from these three diseases alone account for sixteen percent of all deaths in the United States annually.¹²

In addition to the general health risks to the smoker, certain sectors of the population face heightened risks. Smoking during pregnancy increases the risks of complications of pregnancy, low birth weight and retardation of fetal growth.¹³ Tobacco smoke interacts with occupational exposures to toxic substances, such as asbestos, multiplying the smoking employees' risks of developing chronic bronchitis, emphysema, diminished lung function, and bronchogenic carcinoma.¹⁴ Finally, accidental fires started by burning cigarettes take an estimated 2500 lives each year and cause substantial property damage.¹⁵

Not all smokers face identical risks. The age at which a person began smoking, the total number of years of smoking, the number of cigarettes smoked per day, the degree of inhalation, as well as genetic and other factors affect an individual smoker's risk of smoking-related disease or death.¹⁶ Although cigarette smoking has been the most carefully studied, cigar and pipe smoking, as well as tobacco chewing and snuff, present serious health risks.¹⁷ As used in this Article, virtually all of the legal and policy analyses of cigarette smoking also apply to cigar and pipe smoking.

B. *The Hazards to Nonsmokers*

A nonsmoker's exposure to tobacco smoke—also known as environmental tobacco smoke, secondary smoke, involuntary smoking, or passive smoking—is a combination of “sidestream smoke,” emitted from the burning end of the cigarette between puffs, exhaled “mainstream smoke,” and the smoke which escapes from the burning end during puff-

7 FINANCIAL COSTS, *supra* note 3, at 48, citing Doll & Peto, *The Control of Lung Cancer*, NEW SCIENTIST, Jan. 24, 1985, at 26, 30. See also Mattson, Pollack, & Cullen, *What Are the Odds that Smoking Will Kill You?*, 77 AM. J. PUB. HEALTH 425 (1987).

8 BUREAU OF NATIONAL AFFAIRS, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 5 (1986) [hereinafter WHERE THERE'S SMOKE].

9 *Cardiovascular Disease*, *supra* note 6.

10 *Id.* See also ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 262.

11 FINANCIAL COSTS, *supra* note 3, at 1-3, 43.

12 *Id.* at 43.

13 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 269; FINANCIAL COSTS, *supra* note 3, at 43.

14 Council on Scientific Affairs, American Medical Association, *A Physician's Guide to Asbestos-Related Diseases*, 252 J.A.M.A. 2593 (1984).

15 FINANCIAL COSTS, *supra* note 3, at 22.

16 PASSIVE SMOKING, *supra* note 4, at 15-16.

17 ADVISORY COMMITTEE TO THE SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF USING SMOKELESS TOBACCO (1986); Council on Scientific Affairs, American Medical Association, *Health Effects of Smokeless Tobacco*, 255 J.A.M.A. 1038 (1986).

drawing or which diffuses through the cigarette paper.¹⁸ Tobacco smoke contains between three thousand and four thousand chemicals, more than twenty of which have been shown to cause cancer or tumors.¹⁹ Undiluted sidestream smoke, the primary source of environmental tobacco smoke, contains higher concentrations of some of these toxic compounds than the mainstream smoke which the smoker inhales.²⁰ Because the smoke is diluted in the atmosphere, however, the passive smoker's actual "dose" is less than a smoker's exposure.²¹ Thus, nonsmokers' health risks per person are smaller than the risks faced by smokers. Nevertheless, the number of individuals receiving passive exposure is larger than the number of smokers; therefore, more persons may be harmed through passive smoking.²²

Many of the health effects of active smoking have been evaluated for nonsmokers exposed to environmental tobacco smoke. The most common effects associated with exposure to secondary smoke are eye, nose, and throat irritation.²³ For some persons, eye tearing can be so intense it is incapacitating.²⁴ In one study, sixty-nine percent of the non-smoking subjects suffered eye irritation and thirty-one percent reported headaches. The sensitivity increased for individuals with allergies.²⁵ Additionally, environmental tobacco smoke triggers immunological responses in some individuals, though the components of smoke eliciting these responses are unknown.²⁶

Because it is difficult to quantify exposures and to rule out other contributing factors, many studies of the health effects of secondary smoke focus on the effect of parental smoke on children.²⁷ The risks of respiratory disturbances such as wheezing and coughing are twenty to eighty percent greater for children whose parents smoke—depending upon the disturbance being assessed and the number of smokers in the household.²⁸ Children whose parents smoke are more susceptible during their first year of life to respiratory illnesses, such as bronchitis and pneumonia, with a dose-response relationship that relates more to maternal smoking than paternal smoking.²⁹ Parental smoking increases the risk of chronic ear infection and may also affect the children's rate of lung

18 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 14-15, 25; PASSIVE SMOKING, *supra* note 4, at 8-9.

19 WHERE THERE'S SMOKE, *supra* note 8, at 5.

20 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 2, 45.

21 *Id.* at 2; PASSIVE SMOKING, *supra* note 4, at 9, 16.

22 PASSIVE SMOKING, *supra* note 4, at 16.

23 *Id.* at 2, 28; ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 8, 172-77.

24 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 8.

25 WHERE THERE'S SMOKE, *supra* note 8, at 5. *See also* ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 176-77.

26 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 8.

27 *See generally* ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 10, 107, 186-87; PASSIVE SMOKING, *supra* note 4, at 30.

28 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 9, 188-89. *See also* PASSIVE SMOKING, *supra* note 4, at 23.

29 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 9, 202-03.

growth.³⁰ Finally, nonsmoking pregnant women whose husbands smoke may have low birthweight babies.³¹

Research indicates that the risk for lung cancer for nonsmoking adults may increase anywhere from 30 to 250 percent due to secondary smoke.³² Approximately twenty percent of nonsmokers' lung cancer deaths each year are attributed to others' cigarettes.³³ Studies have found that marriage to a smoker greatly increases the risk of lung cancer for the nonsmoking spouse.³⁴ Little is known, however, about secondary smoke's effects on the risk of cancers other than lung cancer.³⁵ Furthermore, environmental tobacco smoke exposure may substantially increase the risk of heart disease and can exacerbate pain in persons suffering from angina.³⁶

C. *The Demographics of Smoking*

The percentage of cigarette smokers in the United States has declined steadily since the mid-1960s when the Surgeon General first warned of health hazards associated with smoking. At that time, forty-five percent of all Americans smoked—and males outnumbered females fifty-three to thirty-four percent.³⁷ By 1985, only thirty-three percent of males and twenty-eight percent of females smoked—about thirty percent of the total population.³⁸ Despite declining percentages, an estimated fifty million Americans still smoke cigarettes.³⁹ In 1984 about six hundred billion cigarettes, or about thirty billion packs were sold.⁴⁰ Individuals who smoke today are, on the average, heavier smokers than in the 1960s,⁴¹ although about eighty-five percent of current smokers claim they would like to quit.⁴²

The patterns of cigarette consumption have also changed since the 1960s. The proportion of female smokers in their early to mid-20s actually increased in the early 1980s, and the number of female smokers is declining more slowly than the number of male smokers.⁴³ Today, more teenage girls smoke than teenage boys.⁴⁴ Men who earn more than

30 *Id.* at 9, 12, 216, 272-76.

31 *Id.* at 269-71.

32 WHERE THERE'S SMOKE, *supra* note 8, at 5 (quoting Dr. Stephen Stellman). See also ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 245; PASSIVE SMOKING, *supra* note 4, at 3, 18.

33 35 MORBIDITY & MORTALITY WEEKLY REP. 770 (1986).

34 See Humble, Samet, & Pathak, *Marriage to a Smoker and Lung Cancer Risk*, 77 AM. J. PUB. HEALTH 598 (1987).

35 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 254-55.

36 *Id.* at 260-61, 263-65; PASSIVE SMOKING, *supra* note 4, at 29; WHERE THERE'S SMOKE, *supra* note 8, at 5.

37 WHERE THERE'S SMOKE, *supra* note 8, at 8.

38 *Id.*

39 FINANCIAL COSTS, *supra* note 3, at 6.

40 *Id.*

41 ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 16, 20; PASSIVE SMOKING, *supra* note 4, at 48.

42 *Cardiovascular Disease*, *supra* note 6.

43 *Report Notes Show, Continued Decline in Percent of Smokers in U.S.*, THE NATIONS HEALTH, Jan. 1987, at 20; *Smoking Prevalence and Cessation in Selected States, 1981-1983 and 1985—The Behavioral Risk Factor Surveys*, 35 MORBIDITY & MORTALITY WEEKLY REP. 740-43 (1986).

44 *Consumer Alert*, 108 AM. HEALTH 4 (July/Aug. 1984).

twenty-five thousand dollars have a slightly lower smoking rate than men who earn less, but women in that income bracket have a higher smoking rate than women who earn less.⁴⁵ Divorced or separated persons have a very high smoking rate—approximately fifty percent.⁴⁶ The percentage of smokers is higher among blacks than among whites for both sexes.⁴⁷ Persons with a high school education smoke more often than either those with a college degree or those with less than a high school education.⁴⁸ Blue collar workers of both sexes are more prone to smoking than white collar workers: males employed as painters (55.1%), truck drivers (53.6%), unemployed (53.1%), construction laborers (53.0%), and carpenters (50.8%); and females employed as waitresses (51.1%), cashiers (44.2%), assemblers (42.1%), nurses aides (41.0%), and machine operators (41.0%) head the list of smoking rates by occupation.⁴⁹ The lowest smoking rates by occupation for males are electrical engineers (16.2%), lawyers (21.9%), secondary school teachers (24.9%), accountants (26.8%), real estate brokers (28.1%), and farmers (28.1%). For females the lowest smoking rates by occupation are elementary school teachers (19.8%), food service workers (24.6%), secondary school teachers (24.8%), bank tellers (25.4%), and registered nurses (27.2%).⁵⁰ Most Americans who smoke started the habit before they reached the age of twenty-one, with regular daily smoking generally beginning sometime between grades seven and twelve.⁵¹

D. *The Costs of Smoking*

The direct and indirect costs of smoking are tremendous. Smokers suffer more often from chronic illnesses, such as heart disease, and are more susceptible to acute conditions, such as influenza. Current and former smokers use more medical services, incur more hospitalization, and visit physicians more often than nonsmokers.⁵² The Office of Technology Assessment (OTA) estimated that for 1985, the United States health care system spent between twelve and thirty-five billion dollars to treat smoking-related diseases.⁵³ Using the OTA "middle" estimate of twenty-two billion dollars, the health care costs alone amounted to seventy-two cents per pack of cigarettes sold in the United States.⁵⁴

In addition to direct health costs, indirect costs result from smoking. Current smokers reported more lost work days and bed-disability days than nonsmokers,⁵⁵ with nineteen percent of days lost from work related

⁴⁵ *Cardiovascular Disease*, *supra* note 6; Cowell & Hirst, *Mortality Differences Between Smokers and Non-smokers*, 32 SOC'Y OF ACTUARIES TRANSACTIONS 188, 192 (1980).

⁴⁶ *The Cigarette Century*, N.Y. Times, Apr. 20, 1986, § 4 (The Week in Review), at 8, col. 3.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; *WHERE THERE'S SMOKE*, *supra* note 8.

⁵¹ *Cardiovascular Disease*, *supra* note 6.

⁵² FINANCIAL COSTS, *supra* note 3, at 19-20.

⁵³ *Id.* at 3, 55.

⁵⁴ *Id.*

⁵⁵ *Id.* at 20.

to smoking.⁵⁶ Smokers have an injury rate twice that of nonsmokers due to loss of attention, coughing, and similar distractions.⁵⁷ The estimated costs borne by businesses for the average smoker—including health insurance, fire losses, workers' compensation, absenteeism, productivity losses, and health difficulties for nonsmokers—amounted to between \$336 and \$601 per smoker in 1980,⁵⁸ and today may be as high as \$1000 per worker.⁵⁹ One study determined business costs to be as high as \$4600 per smoker annually.⁶⁰ The total "middle" estimate of the OTA for these indirect lost productivity costs was \$43 billion, or \$1.45 per pack.⁶¹ Thus, the estimated cost of health care and lost productivity combined was \$65 billion—or \$2.17 per pack of cigarettes.⁶²

III. Restrictions on Workplace Smoking

A. Legal Requirements

Prohibitions on smoking in the workplace long have been imposed where there were particular dangers of fires or explosions. Similar restrictions on smoking still are in place today. For example, section 110(g) of the Mine Safety and Health Act⁶³ provides that miners who willfully violate the Act's prohibitions on smoking or carrying smoking materials, lighters, or matches in the mines are subject to a penalty of up to \$250 for each violation. Several standards under the Occupational Safety and Health Act (OSHA) also prohibit smoking in areas where there are combustible or explosive materials or substances.⁶⁴

The most important recent development in the law of workplace smoking has been the passage of state statutes and municipal ordinances dealing with the control of smoking. Eleven states have already enacted laws regulating smoking in private employment.⁶⁵ Several other states are considering such legislation or already regulate public employee smoking. Scores of municipalities have adopted smoking ordinances.⁶⁶ Although the laws vary, most prohibit smoking in certain areas, require

56 *Id.* at 16.

57 *Consultant: More Nonsmoker Incentives are Needed*, NATIONAL UNDERWRITER, Oct. 19, 1985, at 35.

58 FINANCIAL COSTS, *supra* note 3, at 17.

59 WHERE THERE'S SMOKE, *supra* note 8, at 7.

60 *Do Puffing Employees Send Profits up in Smoke?*, 49 BUS. & SOC'Y REV. 4 (Spring 1984).

61 FINANCIAL COSTS, *supra* note 3, at 5, 55. The indirect lost productivity costs are based on lost earnings and premature mortality.

62 *Id.* at 55.

63 30 U.S.C. § 820(g) (1982). *See also* 30 C.F.R. § 77.1102 (1986).

64 29 C.F.R. §§ 1910.107(f)(7), (m)(2) and 110(h)(2) (1986). *See also* 30 C.F.R. § 77.1102 (1986).

65 ARIZ. REV. STAT. ANN. § 36-601.02 (Supp. 1986); CONN. GEN. STAT. ANN. § 31-40q (West Supp. 1986); FLA. STAT. ANN. §§ 386.201 to .209 (West 1986); ME. REV. STAT. ANN. tit. 22, § 1580-A (Supp. 1986); MINN. STAT. ANN. §§ 144.411 to .417 (West Supp. 1987); MONT. CODE ANN. §§ 50-40-101 to 201 (1985); NEB. REV. STAT. §§ 71-5701 to 5713; N.H. REV. STAT. ANN. §§ 155:50 to :55 (Supp. 1986); N.J. STAT. ANN. §§ 26:3D-23 to :3D-54 (West 1987); R.I. GEN. LAWS §§ 23-20.7-1 to .7-7 (Supp. 1986); UTAH CODE ANN. § 76-10-106 (Supp. 1986). New York's state Public Health Council promulgated no-smoking regulations in February, 1987, which have been challenged on the ground that the council exceeded its authority. *Boreali v. Axelrod*, No. 54593 (N.Y. Sup. Ct. App. Div., May 5, 1987), cited in 5 Empl. Rel. Weekly (BNA) 581 (1987). *See also* Collins, *For New York Smokers, Doomsday Looms*, N.Y. Times, April 13, 1987, at 1, col. 2.

66 Among those cities with smoking ordinances are Cincinnati, Houston, Los Angeles, Philadelphia, and San Francisco.

the posting of signs indicating whether smoking is permitted, and mandate that certain areas be set aside as nonsmoking.

There have been few challenges to these laws. In *Rossie v. State Department of Revenue*,⁶⁷ a pipe-smoking employee of the Wisconsin Department of Revenue sought to enjoin enforcement of his employer's no smoking directives adopted pursuant to the state's Clean Indoor Air Act.⁶⁸ The directives prohibited smoking in all areas of the state-owned building except the lunch room. The Wisconsin Court of Appeals refused to enjoin enforcement of the directives, specifically rejecting the equal protection and contract clause arguments of the plaintiff. The court noted that the plaintiff was not prevented from smoking in the lunchroom, at home, or in the street.⁶⁹ There was a rational basis for the statutory distinctions because the law "prohibits smoking in many public places where people must go, and does not prohibit it in many places where people need not go."⁷⁰

Besides lobbying for the passage of statutes, nonsmokers have initiated a number of lawsuits in attempting to establish their right to a smoke-free workplace. Although constitutional arguments raised by state⁷¹ and federal⁷² government employees have been rejected, a few common law actions have been successful. In *Shimp v. New Jersey Bell Telephone Co.*,⁷³ an employee who was allergic to cigarette smoke sought an injunction requiring the employer to prohibit smoking in general working areas. The court held that OSHA did not preempt the "concurrent state power to act either legislatively or judicially under the common law with regard to occupational safety."⁷⁴ The action also was not barred by the New Jersey Workmen's Compensation Act. On the merits, the court held that the plaintiff had a common law right to a safe working environment. The employer was ordered "to provide safe working conditions for plaintiff by restricting the smoking of employees to the nonwork area presently used as a lunchroom."⁷⁵

Shimp has been followed by a Missouri court,⁷⁶ but a similar action brought by federal government employees was dismissed.⁷⁷ In *Gordon v. Raven Systems & Research, Inc.*,⁷⁸ an employee with hypersensitivity to cigarette smoke was discharged when she refused to work in an area where other employees smoked. While acknowledging that an employer has a common law duty to supply a reasonably safe place to work, the court rejected the argument that this duty included protecting this particular employee of special sensitivities. *Shimp* was distinguished because the

67 395 N.W.2d 801 (Wis. Ct. App. 1986).

68 WIS. STAT. ANN. § 101.123 (West Supp. 1986).

69 395 N.W.2d at 805.

70 395 N.W.2d at 807.

71 *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983).

72 *Federal Employees for Non-smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

73 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976)

74 *Id.* at 522, 368 A.2d at 411 (footnote omitted).

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

76 *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. 1982).

77 *Federal Employees for Non-smokers' Rights*, 446 F. Supp. 181.

78 462 A.2d 10 (D.C. 1983).

plaintiff in *Shimp* presented evidence of the threat that cigarette smoking poses to all workers, not just those of special sensitivity.

In *Hentzel v. Singer Co.*,⁷⁹ the court recognized the common law torts of wrongful discharge and intentional infliction of emotional distress where an employee's discharge allegedly was in retaliation for his protesting of workplace smoking by other employees. In *Bernard v. Cameron & Colby Co.*,⁸⁰ however, the court rejected the argument that an employee had an implied contractual right to a smoke-free workplace.

An important approach under which tobacco-sensitive individuals may be able to challenge workplace smoking is to allege that the employer is violating laws prohibiting discrimination in employment on the basis of handicap. The Rehabilitation Act,⁸¹ in three relevant sections, prohibits discrimination by the federal government (section 501), federal government contractors (section 503), and recipients of federal financial assistance (section 504).⁸² In *Vickers v. Veterans Administration*,⁸³ an employee of the Veterans Administration (VA) who was "unusually sensitive to tobacco smoke" brought an action under section 504 for damages and equitable relief requiring the VA "to make reasonable accommodations to his physical handicap by providing a work environment that is free of tobacco smoke."⁸⁴ The court held that the plaintiff was "handicapped" within the meaning of the Act because his "hypersensitivity does in fact limit at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free."⁸⁵ Nevertheless, the court held that the VA was under no duty to provide an environment wholly free of tobacco smoke, and even if there were such a duty, the VA had satisfied it. Specifically, the VA had, among other things, separated smokers from nonsmokers in the office, installed two vents and an air purifier, and offered the employee an alternative job.

Besides the Rehabilitation Act, every state has a law prohibiting discrimination in employment on the basis of handicap, although three states (Alabama, Mississippi and Wyoming) have laws which only apply to public employment.⁸⁶ The state handicap laws usually provide for wider coverage and a private right of action and therefore may be more valuable than the federal law in cases of alleged handicap discrimination.

For unionized employees, collective bargaining and grievance arbitration have provided an opportunity to contest an employer's policy on smoking.⁸⁷ There have been numerous cases—some have been brought by nonsmokers claiming that workplace smoking rules were too lenient;⁸⁸

79 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

80 397 Mass. 320, 491 N.E.2d 604 (1986).

81 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985).

82 See generally L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (1984).

83 549 F. Supp. 85 (W.D. Wash. 1982).

84 *Id.* at 87.

85 *Id.*

86 See, e.g., ALA. CODE § 21-7-8 (1984); MISS. CODE ANN. § 25-9-149 (Supp. 1986); WYO. STAT. ANN. § 27-9-105 (Supp. 1986).

87 Plant smoking rules have been held to be a mandatory subject of bargaining. *Chemtronics, Inc.*, 236 N.L.R.B. 178 (1978).

88 See, e.g., *Hurley v. Miller Transporters, Inc.*, 113 L.R.R.M. (BNA) 2686 (S.D. Miss. 1981) (upholding discharge of asthmatic trucker who refused to make a run with another driver who smoked);

others have been brought by smokers claiming that the rules were too stringent.⁸⁹ The decisions have varied widely. Often, the issue is whether the employer had the authority to impose rule changes unilaterally without prior bargaining with the union.

Employer smoking policies also have been at issue in cases brought by employees to obtain government and other benefits such as unemployment insurance, workers' compensation, and disability insurance. The unemployment insurance cases usually have involved employees who quit work because of smoke in the workplace. The cases often turn on the claimant's ability to prove having a significant physical reaction to the cigarette smoke.⁹⁰ Workers' compensation cases have involved employees who became ill from exposure to workplace cigarette smoke⁹¹ as well as employees sustaining burns caused by workplace cigarettes.⁹² In a leading disability benefits case, *Parodi v. Merit Systems Protection Board*,⁹³ the Ninth Circuit held that "environmental" disability caused by cigarette smoke was grounds for disability retirement benefits for a government employee.

A final main area of smoking-related litigation has been tort actions for personal injuries. For example, in *McCarthy v. State Department of Social & Health Services*,⁹⁴ it was held that a negligence action could be brought against an employer for personal injuries arising out of exposure to tobacco smoke in the employer's office environment. According to the Washington Court of Appeals, the action was not barred by workers' compensation. Other tort actions have been brought for burn injuries⁹⁵ and even assault and battery based on cigar smoke.⁹⁶

B. Employer Policies

Historically, no-smoking policies of employers were adopted to avoid danger to products and equipment,⁹⁷ and thereafter, to appease customers. More recently, restrictions on workplace smoking have been adopted because of complaints by coworkers, health insurance costs, and

Union Sanitary Dist., 82-2 Lab. Arb. Awards (CCH) ¶ 8420 (Koven, 1982) (refusing to apply total ban on workplace smoking); Social Security Admin., 82-1 Lab. Arb. Awards (CCH) ¶ 8206 (Berkeley, 1982) (imposing ban on smoking at work stations).

89 See, e.g., *Johns-Manville Sales Corp. v. International Ass'n of Machinists, Local Lodge 1609*, 621 F.2d 756 (5th Cir. 1980) (affirming arbitrator's striking down of no-smoking rule in asbestos plant); *National Pen & Pencil Co.*, 87 Lab. Arb. (BNA) 1081 (Nicholas, 1986) (upholding ban on smoking in restrooms); *Snap-On Tools Corp.*, 87 Lab. Arb. (BNA) 785 (Berman, 1986) (upholding no-smoking rule to keep plant clean); *Dental Command*, 83 Lab. Arb. (BNA) 529 (Allen, 1984) (striking down ban on smoking in dental laboratory).

90 Compare *McCrocklin v. Employment Dev. Dep't*, 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156 (1984) and *Alexander v. California Unemployment Ins. Appeals Bd.*, 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980) (awarding benefits) with *Rotenberg v. Industrial Comm'n*, 42 Colo. App. 161, 590 P.2d 521 (1979) and *Ruckstuhl v. Pennsylvania Unemployment Compensation Bd. of Review*, 57 Pa. Commw. 302, 426 A.2d 719 (1981) (denying benefits).

91 See *Schober v. Mountain Bell Tel.*, 96 N.M. 376, 630 P.2d 1231 (1980).

92 See *Iacovelli v. New York Times Co.*, 124 A.D.2d 324, 507 N.Y.S.2d 922 (1986).

93 690 F.2d 731 (9th Cir. 1982).

94 46 Wash. App. 125, 730 P.2d 681 (1986).

95 *Iandiorio v. Kriss & Senko Enterp., Inc.*, 512 Pa. 392, 517 A.2d 530 (1986).

96 *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979).

97 *Fielding, Banning Worksite Smoking*, 76 AM. J. PUB. HEALTH 957 (1986).

legal requirements. According to a 1986 survey conducted by the American Society for Personnel Administration and the Bureau of National Affairs, fifty-nine percent of the companies surveyed either had a smoking policy or were considering adopting one.⁹⁸ The reasons are indicated in the following table.⁹⁹

Table 1. Reasons for Implementing a Smoking Policy

| <u>Reason</u> | <u>Percent</u> |
|--|----------------|
| State or local law | 28 |
| Company concerns about employee health/comfort | 22 |
| Employee complaints | 21 |
| Both law and company health concerns | 4 |
| Both law and employee complaints | 3 |
| Both employee complaints and company health concerns | 3 |
| Mandate by company owner/president | 3 |
| Other | 10 |
| No response (on this question) | 6 |

As might be expected, the actual smoking policies adopted by employers vary widely.¹⁰⁰ A majority of the policies banned smoking in hallways, meeting rooms, restrooms, and customer and visitor areas; limited smoking in cafeterias to designated areas; and permitted smoking in private offices and company vehicles.¹⁰¹

Employer policies restricting workplace smoking are likely to continue increasing.¹⁰² Even the Army¹⁰³ and the General Services Administration (GSA)¹⁰⁴ have instituted curbs on smoking. The GSA rules apply in 7500 federal buildings and to most of the nation's 2.3 million federal civilian employees. The rules grant control of smoking to local office managers, but contain, in effect, a presumption that no smoking is permitted in corridors, restrooms, lobbies, and general office space, which may be rebutted if ventilation is adequate to protect nonsmokers.¹⁰⁵ Auditoriums, class rooms, conference rooms, elevators, libraries, clinics and medical care facilities are mandatory no-smoking areas.¹⁰⁶

98 WHERE THERE'S SMOKE, *supra* note 8, at 12.

99 *Id.* at 13.

100 *See, e.g.,* Reibstein, *Forced to Consider Smoking Issue, Firms Produce Disparate Policies*, Wall St. J., Feb. 10, 1987, at 41, col. 4.

101 WHERE THERE'S SMOKE, *supra* note 8, at 16.

102 *See, e.g.,* Hutchins, *The Drive to Kick Smoking at Work*, FORTUNE, Sept. 15, 1986, at 42; Toufexis, *A Cloudy Forecast for Smokers*, TIME, Apr. 7, 1986, at 45.

103 *See Army Bans Smoking at Work and in Its Vehicles*, N.Y. Times, June 12, 1986, at B12, col. 1.

104 *See New Curbs Ordered on Smoking in Federal Offices*, N.Y. Times, Dec. 6, 1986, at A1, col. 1 (city ed.). *See also* H.R. 4488, 4546, 99th Cong., 2d Sess. (1986) (proposed legislation to restrict smoking by two million postal workers).

105 51 Fed. Reg. 44,258-59 (1986) (to be codified at 41 C.F.R. § 101-20.109-10).

106 *Id.* at 44,258.

IV. Restrictions on Off-Work Smoking

Employer policies and legal regulations prohibiting workplace smoking may help to reduce some of the costs associated with smoking on the job. In order to eliminate or reduce other smoking-related costs, such as higher absenteeism and health insurance, employers may believe it is necessary for employees to stop off-work smoking as well. In the last few years some public and private employers have begun to refuse to employ individuals who smoke off the job. Although the current number of employers with this policy appears to be small, the potential exists for a rapid growth in their number.

According to one report, about forty major employers currently hire only nonsmokers.¹⁰⁷ Other employers give a preference to nonsmokers. Many of the employers are hospitals and other health care providers, municipal police and fire departments, and insurance companies.¹⁰⁸ When one considers the primary reasons for adopting such policies, discussed below, the initial categories of employers likely to employ only nonsmokers is somewhat predictable.

A. Synergism

A number of studies have demonstrated the synergistic effect of cigarette smoking and occupational exposure to various substances. The best documented of these effects is with asbestos. Table 2 shows that smoking increased the death rate from lung cancer for both "blue collar" and asbestos workers by ten-fold. Asbestos workers had a five-fold higher death rate from lung cancer than other "blue collar" workers. Thus, smoking asbestos workers had a death rate fifty times higher than nonsmoking "blue collar" workers.¹⁰⁹

Table 2. Asbestos and Cigarette Smoking:
Death Rate from Lung Cancer

| | No Smoking | Smoking |
|---------------------------|------------|---------|
| "Blue Collar" working men | 11.3 | 122.6 |
| Asbestos workers | 58.4 | 601.6 |

In addition to the synergistic effects of smoking and asbestos, gold mine, and certain rubber industry exposures, there may be additive effects from smoking and exposures to chlorine, cotton dust, coal dust, and

¹⁰⁷ WHERE THERE'S SMOKE, *supra* note 8, at 137 (based on survey in R. CARLSON, TOWARD A SMOKEFREE WORKPLACE (2d ed.), published by Group Against Smoking Pollution, Summit, N.J.). It is not clear how many of these companies that refuse to hire smokers will discharge current employees who refuse to stop smoking.

¹⁰⁸ *Id.*

¹⁰⁹ I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-RELATED DISEASE IN THE UNITED STATES 333, 335 (1982) (report to U.S. Department of Labor). These figures are per 100,000 man years, standardized for age.

other substances.¹¹⁰ With the exception of miners (who never have been permitted to smoke on the job for safety reasons), there are few studies of workers who smoke only off work. Nevertheless, even off-work smoking is likely to produce the synergistic or additive health effects demonstrated with workplace smoking.

The foregoing suggests that industries in which employees work with substances shown to have a synergistic or additive effect with smoking may well be among the first to attempt to prohibit off-work smoking. A reduction in employee illness could mean substantial savings on workers' compensation; health, disability, and life insurance; personal injury litigation; and lost productivity. The Manville Corporation, with eight thousand employees, hires only nonsmokers.¹¹¹ In 1987 the USG Acoustical Products Company (formerly United States Gypsum), which makes glass wool and mineral wool, ordered its fifteen hundred employees to stop smoking on and off the job after recent studies showed that the risk of lung disease from glass and mineral wool exposures was increased by smoking.¹¹²

B. "Heart and Lung" Statutes

Over half the states have enacted provisions in their workers' compensation laws creating an irrebuttable presumption that any cardiovascular or respiratory impairment suffered by a firefighter is work related.¹¹³ These "heart and lung" statutes were enacted to provide a

¹¹⁰ Blackwell, French, & Stein, *Adverse Health Effects of Smoking and the Occupational Environment*, NIOSH Current Intelligence Bull. No. 31, 40 AM. INDUS. HYGIENE A.J. A38 (1979), cited in Omenn, *Predictive Identification of Hypersusceptible Individuals*, 24 J. OCCUPATIONAL MED. 369, 373 (1982).

¹¹¹ WHERE THERE'S SMOKE, *supra* note 8.

¹¹² *See Concern Warns It Will Dismiss All Who Smoke*, N.Y. Times, Jan. 21, 1987, at A16, col. 2 (city ed.); *Employees of USG Unit are Told to Stop Smoking*, Wall St. J., Jan. 21, 1987, at 5, col. 3. Cf. *Manufacturer Now Says Smoking Won't Mean Automatic Dismissal*, N.Y. Times, Jan. 29, 1987, at B7, col. 1 (city ed.).

¹¹³ Some of the laws also include police officers and other public employees. ALA. CODE §§ 11-43-144(b), (c); 36-30-20, 36-30-23 (1977 & Supp. 1986) (firefighters, police); CAL. LAB. CODE §§ 3212, 3212.2, 3212.5 (West Supp. 1987) (police, sheriff's office, district attorney's staff of inspectors or investigators, firefighters, game wardens, corrections employees, state hospital security, youth authority); CONN. GEN. STAT. ANN. §§ 5-145a, 7-433a (West 1972 & Supp. 1986) (police, firefighters, security personnel at universities, aeronautics employees, corrections officers); FLA. STAT. ANN. §§ 112.18, 185.34 (West 1982 & Supp. 1986) (firefighters, police); GA. CODE ANN. § 47-7-102 (1986) (firefighters); HAW. REV. STAT. § 88-77(b) (1985) (police, firefighters, sewer workers); ILL. REV. STAT. ch. 108½, paras. 5-154.1, 6-151.1 (West Supp. 1986) (police, firefighters); LA. REV. STAT. ANN. § 33:2581 (West Supp. 1987) (firefighters); MD. GEN. PROV. CODE ANN. art. 101, §§ 64A(a)(1) and (2) (1985) (police, firefighters); MASS. GEN. LAWS ANN. ch. 32, § 94 (West 1983 & Supp. 1986) (police, firefighters, corrections officers, crash crews at Logan Airport); MICH. COMP. LAWS ANN. § 418.405 (West 1985) (police, firefighters); MINN. STAT. ANN. § 176.011.15 (West 1987) (police, firefighters, conservation officers, department of natural resources forest officers); MO. ANN. STAT. § 87.005 (Vernon 1971) (firefighters); NEB. REV. STAT. § 18-1723 (1983) (police, firefighters); N.H. REV. STAT. ANN. § 281:2 (V-a) (1978) (firefighters); N.J. REV. STAT. ANN. § 34:15.43.2 (West Supp. 1986) (firefighters); N.Y. GEN. MUN. LAW § 207-k (McKinney 1986) (police, firefighters); N.D. CENT. CODE § 65-01-02(12)(d) (1985) (police, firefighters); OHIO REV. CODE ANN. § 742.37(c)(4) (Page Supp. 1985) (police, firefighters); OKLA. STAT. ANN. tit. 11, § 49-110 (West 1978 & Supp. 1987) (firefighters); OR. REV. STAT. § 656.802(1)(2) (1985) (firefighters); S.C. CODE ANN. § 42-11-30 (Law. Co-op. 1985) (firefighters); TENN. CODE ANN. § 7-51-201(a)(1), (b)(1) (Supp. 1986) (law enforcement officials, firefighters); TEX. CIV. STAT. ANN. § 6243e-3 (Vernon Supp. 1987) (firefighters); VT. STAT. ANN. tit. 21, § 601 (1)(c), (e) (1978) (police, firefighters); VA. CODE ANN. § 65.1-47.1 (Supp. 1986) (police, firefighters); WIS. STAT. ANN. § 891.45 (West Supp. 1986) (firefighters).

fringe benefit for incapacitated fire fighters and to eliminate the difficult problems of proving the work-relatedness of an impairment where the individual was exposed to a variety of gases, vapors, and smoke.

Benefits mandated by heart and lung presumptions can be expensive and some state and local governments blame much of the expense on cigarette smoking. Under these laws an impairment of the heart or lungs is presumed to be compensable as occupationally induced. Therefore, smoking by employees can be extremely expensive to fire departments.

For example, in March 1984, Fairfax County, Virginia adopted a rule barring any newly hired police officers, firefighters, or deputy sheriffs from smoking as long as they work for the county. Similar restrictions already were in effect in Arlington County, Virginia and the City of Alexandria, Virginia. According to a county official: "We really had to do something. We would be looking at a half a million dollars in losses by 1985 in disability pay."¹¹⁴

C. *Effectuating Workplace Smoking Restrictions*

Another reason for not employing individuals who smoke *off* the job is that it makes it easier to enforce bans on smoking *on* the job. Over 150 companies, including Boeing, Campbell Soup, and Adolph Coors, are entirely smoke free or limit smoking to certain lounges or cafeteria areas.¹¹⁵ Numerous other companies, including IBM, AT&T, and Honeywell, provide extensive smoke-free areas, including work stations.¹¹⁶ For some companies, employing only nonsmokers might be the next logical step, especially if enforcing no-smoking rules becomes difficult.

A related reason for refusing to employ smokers is the growing number of conflicts between smokers and nonsmokers.¹¹⁷ These conflicts are often resolved through time-consuming and dissension-producing internal grievance procedures. In some instances the conflict results in litigation under one or more of a variety of legal theories.¹¹⁸ If an employer is under a statutory duty to protect the rights of nonsmokers, rather than attempting to accommodate the rights of smokers and nonsmokers, the employer might simply prohibit all workplace smoking or employ only nonsmokers.

D. *Reducing Health Insurance Costs and Improving Productivity*

If there is going to be a large-scale movement to employ only nonsmokers, the main motivating factor is likely to be reducing health insurance costs. Prohibiting smoking on the job will save employers money

114 Statement of Richard A. King, Deputy County Executive for Fairfax County, Va., *quoted in* 2 Empl. Rel. Weekly (BNA) 326 (1984). Other fire departments that hire only nonsmokers include Janesville, Wis.; Manteca, Cal.; Salem, Ore.; and Wichita, Kan. WHERE THERE'S SMOKE, *supra* note 8.

115 WHERE THERE'S SMOKE, *supra* note 8, at 135-36.

116 *Id.* at 134.

117 See *id.* at 18; Bulman, *Smoking in Workplace Now a Sensitive Issue*, Houston Chronicle, Oct. 20, 1985, § 5, at 5, col. 3; Freedman, *Cigarette Smoking is Growing Hazardous to Careers in Business*, Wall St. J., Apr. 23, 1987, at 1, col. 6; Malcolm, *Mounting Drive on Smoking Stirs Tensions in the Workplace*, N.Y. Times, Feb. 20, 1987, at A1, col. 1 (city ed.); Massengill & Peterson, *Smokers vs. Nonsmokers in the Work Place: Clearing the Air*, 10 EMPLOYEE REL. L.J. 505 (1984-85).

118 See *supra* notes 71-96 and accompanying text.

on fires and fire insurance, productivity losses (due to smoking "rituals"), damaged products, workers' compensation costs, and health effects caused by passive inhalation by nonsmoking coworkers.¹¹⁹ These are only part of the costs associated with employee smoking borne by employers. According to the U.S. Chamber of Commerce, employee benefits comprise 36.6 percent of total payroll costs.¹²⁰ The largest single component (7.4 percent) is medical insurance, life insurance, and death benefits.¹²¹ According to the health insurance industry, rates for both individual and group health insurance are six to ten percent lower for nonsmokers¹²² and reductions may be as high as twenty-two percent.¹²³ According to one estimate, health care cost savings per nonsmoking employee ranged from \$75-150 annually.¹²⁴ In addition to these substantial savings, an employer with a work force of only nonsmokers would save considerable amounts on sick leave, absenteeism, turnover, and similar costs.¹²⁵ This additional savings is estimated to be \$40-80 per worker annually.¹²⁶

V. Legal Challenges to Prohibitions of Off-Work Smoking

A. *Public Employees*

As with other controversial employment practices, such as polygraphs and drug testing, the first challenges to off-work smoking bans are likely to be brought by public employees asserting a wide array of constitutional arguments. Indeed, the first such case was recently decided.

In *Grusendorf v. City of Oklahoma City*,¹²⁷ the plaintiff was hired as a firefighter trainee by the city. He was required to sign an agreement not to smoke on or off duty during the first year of employment.¹²⁸ The plaintiff had quit smoking, in order to improve his physical condition, about three months before being hired. After two months of work, during unpaid lunch time, another city employee observed the plaintiff taking three puffs of a cigarette. When the incident was reported to the fire department, the plaintiff admitted the observed conduct and was discharged.

119 See Kristein, *How Much Can Business Expect to Profit from Smoking Cessation?*, 12 PREVENTIVE MED. 358 (1983).

120 U.S. CHAMBER OF COMMERCE, 1984 EMPLOYEE BENEFITS, Table 6-2 (1985).

121 *Id.*

122 HEALTH INSURANCE ASSOCIATION OF AMERICA, SURVEY OF HEALTH PROMOTION INSURANCE UNDERWRITING PRACTICES (1986).

123 *Non-Smoking Discount Offered*, Am. Med. News, Jan. 16, 1984, at 29 (Blue Cross and Blue Shield of Minn., individual policy).

124 Kristein, *supra* note 119.

125 See generally FINANCIAL COSTS, *supra* note 3; Van Turner & Land, *Smoking and Excess Sick Leave in a Department of Health*, 28 J. OCCUPATIONAL MED. 33 (1986).

126 Kristein, *supra* note 119.

127 816 F.2d 539 (10th Cir. 1987).

128 The basis for this requirement is to maintain a healthy work force and to reduce workers' compensation costs. Telephone interview with Diane Davis Huckins, Assistant Municipal Counselor for City of Oklahoma City, Jan. 26, 1987. It is not clear why the Oklahoma City restriction applied only to the first year of employment.

The plaintiff brought an action in district court under 42 U.S.C. section 1983, seeking declaratory, injunctive, and monetary relief. He alleged that the fire department rule, among other things, violated his rights to privacy and due process under the fourteenth amendment. The district court granted the defendant's motion to dismiss and the Tenth Circuit affirmed.

According to the court, even assuming that the plaintiff had a liberty interest in smoking while off duty protected by the fourteenth amendment, the burden was on the plaintiff to prove that the ban on smoking was irrational. The court specifically held, however, that the municipal regulation was a rational means of promoting good health. Although the court questioned the rationality of applying the rule only to trainees, it noted that the plaintiff failed to raise the issue of equal protection.

Courts considering the constitutionality of off-work smoking bans will find that analogous areas of public employment law have developed some generally instructive principles. First, restrictions on the work time behavior of public employees (especially police and firefighters) are usually upheld even if there is some infringement upon the individual's freedom of expression, lifestyle, or similar interests.¹²⁹ Second, restrictions on off-work employee behavior usually will be upheld if the behavior interferes with or undermines the effectiveness of the individual or the governmental entity.¹³⁰ Third, restrictions on off-work behavior usually will not be upheld if there is an insubstantial employment-related governmental interest, especially where fundamental employee interests, such as freedom of expression, freedom of association, and the right of privacy, are implicated.¹³¹ In the context of smoking, it is not clear whether the courts will hold that economic interests (*e.g.*, insurance costs) are constitutionally adequate justifications.

A potentially important issue, only suggested by the facts in *Grusendorf*, is the possible distinction between smoking in public and smoking at home (or in other private places). A ban on smoking in public might be sustained on public health or public appearance grounds.¹³² A ban on smoking at home would seem to be more difficult to sustain—if for no other reason than the discovery of the conduct would raise substantial questions under the fourth amendment.¹³³

129 See, *e.g.*, *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding hair-length regulation for police).

130 See, *e.g.*, *Pettit v. State Bd. of Educ.*, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (upholding discharge of 48 year-old elementary school teacher who, with her husband, were members of a "swingers" club and had pleaded guilty to the misdemeanor of "outrageous public decency"); *Broderick v. Police Comm'r*, 368 Mass. 33, 330 N.E.2d 199 (1975), *cert. denied*, 423 U.S. 1048 (1976) (requiring completion of questionnaire inquiring into police officers' activities following weekend of hooliganism).

131 See, *e.g.*, *Andrews v. Drew Mun. Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed*, 425 U.S. 559 (1976) (prohibiting refusal to rehire unwed mother as school teacher); *Murray v. Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971) (unconstitutional to discharge building inspection dispatcher because he was the Grand Dragon of the Ku Klux Klan of North Carolina).

132 Cf. *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding hair-length regulation for police; challenged regulation also prohibited smoking in public).

133 The compulsory drug testing of public employees has been struck down on the basis of the fourth amendment. See, *e.g.*, *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986). *But see* *National Treasury Employees*

Civil service laws provide another possible source of protection for public employees. For example, the Civil Service Reform Act of 1978¹³⁴ prohibits discrimination on the basis of conduct unrelated to performance.¹³⁵

B. *Private Employees*

The lack of constitutionally-based arguments will require private employees challenging off-work smoking bans to make some novel arguments under various state and federal statutes and common law. Many of these same arguments also could be used by public employees.

1. Rehabilitation Act and State Handicap Discrimination Laws

As discussed previously,¹³⁶ the Rehabilitation Act has been held to apply to individuals who are sensitive to cigarette smoke. Does the Rehabilitation Act also prohibit discrimination against individuals who smoke?

Although there is no case law, a cigarette smoker could claim that he or she is addicted to cigarettes and therefore is a "handicapped individual" protected by the statute. The 1978 amendments to the Rehabilitation Act provide: "[The term handicapped individual] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drug abuse . . . would constitute a direct threat to property or the safety of others."¹³⁷ Is a cigarette smoker or addict a "drug abuser" under the 1978 amendments? There is little legislative history behind this particular provision. The amendment was sponsored by conservative members of Congress to correct a perceived flaw in the Act, whereby affirmative action plans seemingly would mandate the hiring of "active" alcoholics and drug abusers, resulting in a threat to public safety.¹³⁸ Viewed as a narrow, clarifying exception (and the proviso is written in the negative), it merely excludes *some* alcoholics and drug abusers.¹³⁹ Other alcoholics and drug abusers (those not posing a direct threat) would be covered if they met the statutory definition of "handicapped individual": "any person who (i) has a physical or mental impairment

Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987). For further discussion of the issue of detecting off-work smoking, see *infra* Part VI-B.

134 5 U.S.C. §§ 2301-2305 (1982).

135 *Id.* § 2302(b)(10).

136 See *supra* notes 81-85 and accompanying text.

137 29 U.S.C. § 706(7)(B) (1982).

138 See 124 CONG. REC. 14,507 (daily ed. May 18, 1978) (remarks of Rep. Hyde).

139 The proviso is limited to employment and is only applicable to §§ 503 and 504. This interpretation is supported by the Supreme Court's decision in *School Board v. Arline*, 107 S. Ct. 1123 (1987).

Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B).

107 S. Ct. at 1130 n.14.

which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."¹⁴⁰

This narrow reading of the 1978 amendment eliminates the need to decide whether it is possible to be an "abuser" of a legal substance. It also requires an individualized inquiry into the effect of cigarette addiction on the individual. Presumably, only those individuals whose major life activities were limited by the addiction would be covered.¹⁴¹ The argument could be made, however, that discrimination based on increased health insurance costs due to an elevated risk of future disability is, at least, "regarded as having such an impairment."¹⁴²

If a cigarette smoker were considered to be a handicapped individual, an employer might be required to provide reasonable accommodation. Conceivably, this requirement might preclude an employer from a total prohibition of workplace smoking and might mandate the creation of designated smoking areas.¹⁴³

A similar method of analysis could be used under state handicap discrimination laws. While some of these laws specifically include or exclude drug abusers, many do not, and the issue of smoking as a handicap has not been resolved in any jurisdiction.¹⁴⁴

2. Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act

Title VII of the Civil Rights Act of 1964¹⁴⁵ prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act¹⁴⁶ prohibits discrimina-

¹⁴⁰ 29 U.S.C. § 706(7)(B) (1982).

¹⁴¹ The model regulations of the Department of Justice for federal agencies enforcing § 504 provide:

(i) "Physical or mental impairment" means: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. . . .

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

²⁸ C.F.R. § 41.31(b)(1), (2) (1986). The courts, however, have rejected the "bootstrapping" argument that because "working" is a "major life activity," any condition causing a denial of work is a "physical or mental impairment" under the Act. To be an impairment, the condition must be such as to disqualify the individual from all or substantially all similar positions in a given field of endeavor. *See* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1102 (D. Hawaii 1980). *See also* de la Torres v. Bolger, 781 F.2d 1134, 1138 (5th Cir. 1986) (left-handedness not an impairment); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (muscular build not an impairment).

¹⁴² In *School Board v. Arline*, 107 S. Ct. 1123 (1987), the Supreme Court held that contagious diseases are covered handicaps, and, in so holding, rejected narrow interpretations of the Rehabilitation Act's coverage.

¹⁴³ For a further discussion, *see infra* Part VII-C.

¹⁴⁴ *See* *Lipson v. Fortunoff Fine Jewelry & Silverware, Inc.*, No. 2-E-D-84-99582 (N.Y. State Hum. Rts. Div. 1986), *cited in* WHERE THERE'S SMOKE, *supra* note 8, at 33.

¹⁴⁵ 42 U.S.C. § 2000e (1982).

¹⁴⁶ 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985), *amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-272, § 9201(b), 100 Stat. 171 (1986).

tion in employment against individuals between the ages of forty and seventy and the mandatory retirement of any employee. Because of a higher concentration of smokers in certain protected groups (*e.g.*, blacks, Hispanics, older workers),¹⁴⁷ it could be asserted that the refusal to employ smokers constitutes disparate impact discrimination.¹⁴⁸ The burden then would be on the employer to prove that its ban on smokers was compelled by business necessity.¹⁴⁹ It is questionable whether reducing health insurance costs alone would be a legally sufficient basis.¹⁵⁰

3. State Constitutional Law

Unlike the federal Constitution, certain state constitutions apply to the acts of private individuals as well as governmental actions.¹⁵¹ The right of privacy, explicitly recognized in seven states,¹⁵² including California,¹⁵³ may apply to private employment. Therefore, it could be argued that attempts by private employers to control the off-work activities of their employees violate the right of privacy protected by a state constitution. This theory has been used to challenge the drug testing of private sector employees.¹⁵⁴

4. National Labor Relations Act

As discussed previously,¹⁵⁵ in unionized workplaces employers are required by sections 8(a)(5) and 8(d) of the National Labor Relations Act to bargain in good faith with the union about wages, hours, and "other terms and conditions of employment."¹⁵⁶ An employer is not permitted to make changes in these terms unilaterally without prior bargaining.¹⁵⁷ Although workplace smoking regulations have been held to be a mandatory subject of bargaining,¹⁵⁸ there is no specific case law regarding off-work smoking. It is likely, however, to be considered within the broad ambit of "safety and health" and thus a mandatory subject of bargaining.¹⁵⁹

147 See *supra* notes 37-51 and accompanying text.

148 See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

149 See *Griggs*, 401 U.S. at 424; *Geller*, 635 F.2d at 1027; *Green v. Missouri Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975).

150 Cf. *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985) (rejecting health insurance defense in handicap discrimination case).

151 *City & County of San Francisco v. Superior Court*, 125 Cal. App. 3d 879, 882, 178 Cal. Rptr. 135, 138 (1981).

152 ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § 1; HAW. CONST. art. I, § 5; ILL. CONST. art. 1, § 6; LA. CONST. art. 1, § 5; MO. CONST. art. 1, §§ 1-4; WASH. CONST. art. 1, § 2.

153 CAL. CONST. art. 1, § 1.

154 See, *e.g.*, *Price v. Pacific Ref. Co.*, No. 292000 (Contra Costa, Cal. Super. Ct., Feb. 10, 1987), reported in 5 *Empl. Rel. Weekly* (BNA) 264 (1987).

155 See *supra* notes 77-89 and accompanying text.

156 29 U.S.C. §§ 158(a)(5), (d) (1982).

157 *NLRB v. Katz*, 369 U.S. 736 (1962).

158 *Chemtronics, Inc.*, 236 N.L.R.B. 178 (1978).

159 Physical examinations are a mandatory subject of bargaining. *LeRoy Machine Co.*, 147 N.L.R.B. 1431 (1964); *Wilburn v. Missouri, K. & T. R.R.*, 268 S.W.2d 726 (Tex. Civ. App. 1954) (*Railway Labor Act*).

5. Employee Retirement Income Security Act

For employees (but not applicants) section 510 of the Employee Retirement Income Security Act (ERISA)¹⁶⁰ may afford a remedy for discharge based on off-work smoking. Section 510 of ERISA prohibits the discharge of an employee in order to deprive the employee of benefits under an employee benefit plan.¹⁶¹ The term "benefits" includes health insurance.¹⁶² Therefore, discharge of an employee who smokes in order to save money on health insurance may violate section 510 of ERISA.¹⁶³

6. Common Law

At common law, employment contracts without a specific time period were deemed to be terminable at will. The employee could quit for any or no reason. The employer could discharge the employee for any or no reason. Although employment at will generally remains the law today, courts have begun to recognize exceptions to this rule. Consequently, an employee who is discharged because of off-work smoking might bring a tort or contract action for wrongful discharge under one or more of the following three theories. First, the employee may allege that the discharge violated a provision in an employee handbook, personnel manual, or other document providing that the employee would not be discharged without just cause.¹⁶⁴ Second, the employee may assert that the discharge violated the implied covenant of good faith and fair dealing found in every employment contract.¹⁶⁵ This argument is most likely to be successful in cases involving long-time employees. Third, the employee may claim that the discharge is a tortious violation of public policy.¹⁶⁶

An action by an individual discharged because of off-work smoking based on any of the preceding theories faces formidable hurdles. No court has been willing to extend any of the exceptions to the at will rule nearly so far. For example, in *Price v. Carmack Datsun, Inc.*,¹⁶⁷ the employer discharged an employee after he informed Carmack that he intended to file a medical claim under the company's group health insurance plan. The Supreme Court of Illinois held that discharging an employee for filing a health insurance claim does not violate public policy. Discharging an employee because of a concern about health insur-

160 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985).

161 *Id.* § 1140.

162 See *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984) (discharge of employee with multiple sclerosis violated § 510 of ERISA).

163 See generally Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024 (1987).

164 See, e.g., *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257, modified by 101 N.J. 10, 499 A.2d 515 (1985).

165 See, e.g., *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984); *Gates v. Life of Mont. Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982).

166 See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

167 109 Ill. 2d 65, 485 N.E.2d 359 (1985).

ance costs would likewise not violate public policy—at least under the reasoning used in *Price*.

VI. Policy Issues

As discussed in the preceding section, there is virtually no law on the issue of whether employers may refuse to employ individuals who smoke. This section examines the policy considerations upon which legislative and judicial decisions will be based. Policy issues are especially important to address in this area for two reasons. First, employer decisions about the employment of smokers are likely to precede legal developments. Second, employment restrictions involving applicants usually are either unregulated or unchallenged. This is because applicants often have fewer employment rights than employees and because applicants are often unaware of the reasons why they were not hired.

A. *Economic Effects*

It is important to consider the possible economic consequences of restricting the employment opportunities of smokers. Although such speculation must be undertaken with an abundance of caution, at least four effects are possible.

First, with their employment contingent upon not smoking, an unknown number of individuals will not start or will stop smoking. To the extent that individuals who would not otherwise refrain from smoking would do so,¹⁶⁸ there would be a net saving to society from the health care and other costs associated with smoking.

Second, some percentage of smokers is unable or unwilling to quit. If a large enough number of employers, or employers in certain industries or geographical areas, refused to employ smokers, then these otherwise employable individuals would become unemployable.¹⁶⁹ Consequently, there would be increased demand for transfer payments, income support, and health care.

Third, if smokers become concentrated in certain companies (those without smoking restrictions), the “smoker” companies are likely to experience a more pronounced burden of costs related to smoking. It is unclear what the characteristics of such companies would be, in terms of size, location, and industry.¹⁷⁰ One response, however, might be to terminate employer-provided health insurance.¹⁷¹ With about thirty-seven million people under age sixty-five already lacking adequate health insur-

¹⁶⁸ Obviously, there are no studies on how many of these individuals could be persuaded not to smoke by less drastic means, such as smoking cessation programs.

¹⁶⁹ The increased concentration of smokers in specific socio-economic, occupational, and ethnic groups, see *supra* notes 37-61 and accompanying text, may tend to accelerate and accentuate this effect.

¹⁷⁰ This, of course, depends on the unknown nature of those companies that would implement rules restricting employment to nonsmokers.

¹⁷¹ At this point, some smokers might quit in order to reduce their premiums on individual health insurance policies. Other individuals might become uninsured, thereby requiring the increased health care transfer payments described earlier.

ance, policies which increase the number of uninsured obviously are to be avoided.

Fourth, a disproportionately high percentage of smokers are middle-aged, male industrial workers.¹⁷² Because this group also has a growing rate of unemployment, employers might believe that there still would be an adequate supply of industrial workers even if restrictions on employing smokers were adopted. But, demographic trends indicate a labor market decline over the next ten years.¹⁷³ It is not clear that employers are going to be able to impose such restrictions in the future without increasing the wages of nonsmokers.¹⁷⁴

Economic analysis has a limited value in making policy choices regarding the wisdom of refusing to employ smokers. This point is demonstrated by the fact that smokers, by reducing their own life expectancies, actually may be helping to preserve the solvency of the Social Security system. Thus, in a perverse sense, smoking has a positive economic value because smokers are subsidizing the pensions of nonsmokers.¹⁷⁵ Obviously, no sane policy would be based on such an analysis. A detailed economic analysis also would need to consider the effects on the tobacco and cigarette industry.

B. *Monitoring Off-Work Behavior*

Employers adopting rules prohibiting their employees from off-work smoking will be tempted to implement some method of verifying compliance. At least four verification methods could be used and all of them create substantial legal and ethical problems.

First, employers could monitor the health insurance claims filed by employees to detect medical conditions, such as chronic bronchitis or emphysema, associated with cigarette smoking.¹⁷⁶ They also could review employer-maintained medical records to identify individuals who reported to their physician that they smoked.¹⁷⁷ Access to medical records by nonmedical personnel is already too widespread. A policy

172 See *WHERE THERE'S SMOKE*, *supra* note 8, at 8.

173 See Fullerton & Tschetter, *The 1995 Labor Force: A Second Look*, 106 MONTHLY LAB. REV., NOV., 1983, at 3, 5, cited in Mitchell, *The Changing World of Work*, in THE PARK CITY PAPERS—PAPERS PRESENTED AT THE LABOR LAW GROUP CONFERENCE ON LABOR AND EMPLOYMENT LAW, PARK CITY, UTAH, JUNE 29-JULY 1, 1984 (1985).

174 Arguably, this would further increase the incentives to quit smoking.

175 See *FINANCIAL COSTS*, *supra* note 3, at 62; Leigh, *Light Up and Make My Day* (letter to the editor), 257 J.A.M.A. 483 (1987).

176 Presumably, the filing of such a claim would trigger a review process that could lead to discipline or dismissal. Although § 510 of ERISA prohibits the discharge of an employee because he or she has submitted a health insurance claim, see notes 162-63 *supra* and accompanying text, it is not clear that ERISA would preclude discharge under these circumstances, especially where the employee's misrepresentation about smoking led to the initial hiring.

177 Besides the question of invasion of privacy, there are two problems with such a practice. First, the Code of Ethics of the American Occupational Medical Association (AOMA) specifically prohibits disclosure of this information:

7. Physicians should treat as confidential whatever is learned about individuals served, releasing information only when required by law or by overriding public health considerations, or to other physicians at the request of the individual according to traditional medical ethical practice; and should recognize that employers are entitled to counsel about the medical fitness of individuals in relation to work, but are not entitled to diagnosis or details of a specific nature.

leading toward further distribution of medical records should be avoided.

Second, employers could rely on reports of employees being observed smoking. Although in *Grusendorf* the observation was the result of happenstance, more elaborate systems for reporting off-work activities are not without precedent. For example, some companies have established "hotlines" to permit employees to report anonymously any drug use by coworkers.¹⁷⁸ Even if such a system were legal and effective in reducing drug abuse (or cigarette smoking), it is highly unlikely that the employee relations disruptions and other costs would justify its use.

Third, polygraphs could be used in an attempt to confirm employee statements that they did not smoke. Despite being discredited from a scientific standpoint,¹⁷⁹ polygraphs are still widely used in the retail, financial, service, and other industries.¹⁸⁰ For many employers it would be relatively easy to ask polygraph subjects whether they smoked. The intrusiveness and inaccuracy of polygraphs, however, makes their continued use lamentable and their wider use unthinkable.

Fourth, because cigarette smoking causes detectable physiological changes, urine or blood tests could be used to detect the biochemical changes in body fluids caused by smoking.¹⁸¹ Already there are reports of such testing¹⁸² and it would be easy to test for smoking when other preemployment or periodic urine or blood tests were being performed. The proliferation of drug testing in recent years, however, has raised a storm of controversy. If courts and commentators have been unwilling to accept a public safety justification for random drug urinalysis, it is hard to imagine public approval of urinalysis to detect off-work cigarette smoking, where the risks are largely personal to the smoker and the harms are not immediate.

See generally Ilka, *Necessity and Adequacy of the American Occupational Medical Association Code of Ethics*, 1 SEMINARS IN OCCUPATIONAL MED. 59 (1986). Second, employees would be encouraged to mislead their physicians (personal as well as employer-provided) about their smoking status, thereby undermining effective prevention, diagnosis, and treatment.

178 *See* Weiss, *Watch Out: Urine Trouble*, HARPER'S, June, 1986, at 56.

179 *See, e.g.*, D. LYKKEN, A TREMOR IN THE BLOOD (1981); OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING (1983).

180 D. LYKKEN, *supra* note 179, at 3. About 22 states prohibit or restrict the use of polygraphs in employment. Federal legislation, however, has yet to be enacted. *See* H.R. 1524, 99th Cong., 1st Sess. (1985).

181 Certain components of cigarette smoke and their metabolites are measurable in the blood, urine, and saliva of smokers. The most tobacco-specific substance for which commercial tests are available is cotinine, the primary metabolite of nicotine. Cotinine, which has a half-life of 20 to 30 hours, appears in elevated levels from continued exposure, and its presence correlates with changes in smoking habits and with the nicotine content in cigarettes smoked. A urinalysis for cotinine using gas chromatography costs around \$25 and appears to be the most popular technique. Other methods are thin layer chromatography and radioimmunoassay techniques. *See generally* ENVIRONMENTAL TOBACCO SMOKE, *supra* note 2, at 137-45; PASSIVE SMOKING, *supra* note 4, at 12-14; Haley & Hoffman, *Analysis for Nicotine and Cotinine to Determine Smoking Status*, 31 CLINICAL CHEM. 4 (1985); Matsukura, et al., *Effects of Environmental Tobacco Smoke on Urinary Cotinine Excretion in Nonsmokers*, 311 NEW ENG. J. MED. 828 (1984).

182 *Pre-job Urinalysis Used to Screen Out Smokers, Expert Says*, Houston Chronicle, Aug. 29, 1986, at 15, col. 1.

C. *Lifestyle and Insurability*

If companies refused to employ individuals because they smoked, it would be another step in a disturbing trend of employers attempting to regulate the off-work activities of employees. Employer inquiries into their employees' political¹⁸³ and personal¹⁸⁴ associations, sex life,¹⁸⁵ drug use,¹⁸⁶ and lifestyle, already generate extensive debate and litigation.¹⁸⁷ Both public and private employers are ill-suited for, and unwarranted in, making such inquiries. Unless an employee's off-work activity has a direct bearing on his or her ability to perform job-related tasks or significantly interferes with the business operation, then there is no justification for obtaining information about off-work activities or using that information in employment decisions.

Another unsettling trend likely to be fostered by off-work smoking restrictions is the refusal of employment based upon perceived future illness or increased health insurance costs.¹⁸⁸ New developments in genetics, epidemiology, and other disciplines will enable scientists to make long-range predictions about the probabilities of an individual's future health risks.¹⁸⁹ In some instances, employers have relied upon unproven predictive tests as a basis for employment decisions. Even if such predictions were accurate, it is difficult to justify denying employment and other opportunities based upon one's genetic makeup, family health history, diet, hobbies, or other such factors.

Although for some individuals, smoking may be deemed a controllable behavior, for other individuals it is an addiction—one that has long been tolerated by employers and subsidized by the government. Moreover, even if an employee were willing and able to stop smoking, an employer also might decide to prohibit the employment of former smokers based on morbidity and mortality rates.

183 See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (public school teachers need not disclose names of all organizations to which they belonged); *Davis v. Louisiana Computing Corp.*, 394 So. 2d 678 (La. Ct. App.), writ denied, 400 So. 2d 668 (La. 1981) (private employee unlawfully discharged after he became a candidate for public office).

184 See, e.g., *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979) (police officer need not answer questions about personal associations); *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (private employer wrongfully discharged employee because of her romantic relationship with the manager of a rival company).

185 See, e.g., *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984) (police officer need not answer questions about her sex life); *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118 (W.D. Pa. 1985) (private employer did not violate public policy by discharging employee who appeared at a convention with a woman who was not his wife).

186 See, e.g., *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067 (1st Cir. 1986) (former employee defamed by false statement that he was discharged for using cocaine); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (discharge of public employee on the basis of an unconfirmed drug test violated due process).

187 See, e.g., *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding constitutionality of hair-length and grooming regulations for police officers); *Atlantic Richfield Co. v. District of Columbia Comm'n on Human Rights*, 515 A.2d 1095 (D.C. 1986) (private employee unlawfully discharged because of her appearance).

188 A few cases decided under state handicap discrimination laws have rejected the health insurance defense. E.g., *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985). This decision is called into doubt, however, by *In re Granelle*, 118 A.D.2d 3, 504 N.Y.S.2d 92 (1986).

189 See generally M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* (1984).

VII. Alternatives to Off-Work Smoking Prohibition

If absolute bans on employing smokers raise serious legal and ethical questions, there is a definite need to explore alternatives. While it may be unrealistic and unwise to expect that societal ills will be cured at the plant gate, employers should not be expected to ignore the economic and human costs of cigarette smoking. Moreover, legislative activity at the local, state, and federal levels leaves a growing number of employers little choice but to become involved in the smoking issue.

A. *Establishing Smoking Cessation Programs*

Many employers provide employee "wellness" programs, which may include everything from healthy morning snacks and scales in the bathroom to corporate gymnasias and computerized health risk analyses.¹⁹⁰ Other programs encourage employees to lose weight, wear seat belts, avoid drugs, manage stress, eat better, and exercise.¹⁹¹ Perhaps the most important and cost-effective of these programs are smoking cessation programs.¹⁹² While each employee who smokes costs an employer at least an additional \$300-600 per year,¹⁹³ a good quality smoking cessation program may be offered at the one-time cost of only \$100 per employee.¹⁹⁴

According to the Surgeon General, on-site cigarette smoking cessation programs are more effective than either self-help or off-site programs.¹⁹⁵ Although initial success rates are about the same, on-site programs have a sixty to sixty-five percent long-term (over one-year) success rate compared to a twenty to thirty percent long-term success rate for off-site programs.¹⁹⁶ Programs are more successful when the length and frequency of sessions are increased.¹⁹⁷ Programs are less successful when they seek to address multiple problems (*e.g.*, obesity, hypertension, stress) simultaneously.¹⁹⁸ Participation and success rates are also higher in programs giving employees time off work to attend and where financial incentives and intracompany competition further encourage cessation.¹⁹⁹

190 Hirsch, *What's New in "Wellness" Programs*, N.Y. Times, Oct. 5, 1986, at C19, col. 1.

191 *Id.*

192 See Fielding, *Effectiveness of Employee Health Improvement Programs*, 24 J. OCCUPATIONAL MED. 907 (1982); Oster, Colditz, & Kelly, *The Economic Costs of Smoking and Benefits of Quitting for Individual Smokers*, 13 PREVENTIVE MED. 377 (1984); *Stop Smoking Programs Cut Costs, Improve Productivity, Experts Say*, 4 Empl. Rel. Weekly (BNA) 730 (1986).

193 See *supra* notes 52-62 and accompanying text.

194 *Workplace Smoking, Alcohol Programs Appear Cost-Effective, Report Finds*, 4 Empl. Rel. Weekly (BNA) 827 (1986). See also Altman, Flora, Fortmann, & Farquhar, *The Cost-Effectiveness of Three Smoking Cessation Programs*, 77 AM. J. PUB. HEALTH 162 (1987).

195 *Surgeon General's Report on Smoking Intervention Programs in the Workplace*, in THE HEALTH CONSEQUENCES OF SMOKING: CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE 477-510 (1985).

196 *Id.* at 483-89.

197 *Id.* at 490.

198 *Id.* at 490, 500-02.

199 *Id.* at 495-98. See generally Health and Public Policy Committee, American College of Physicians, *Methods for Stopping Cigarette Smoking*, 105 ANNALS INTERNAL MED. 281 (1986); Inverson, *Smoking Control Programs: Premises and Promise*, 1 AM. J. HEALTH PROMOTION, Winter 1987, at 16.

Although the number of employers providing smoking cessation programs continues to grow, it is still lower than might be expected, if indeed smoking costs employers money. If, however, that premise is incorrect, then the extent of these programs may be higher than expected.²⁰⁰

Table 3. Measures Taken in Past Five Years to Encourage Employees to Stop Smoking

| <u>Employer Programs</u> | <u>% of Companies</u> |
|---|-----------------------|
| Distributed quit-smoking literature | 39 |
| Sponsored in-house quit-smoking program off company time | 16 |
| Sponsored in-house quit-smoking program on company time | 15 |
| Paid for employees to attend quit-smoking programs outside work | 10 |
| Paid cash rewards to employees who quit smoking | 3 |
| Gave non-cash rewards to employees who quit smoking | 1 |
| Other | 9 |

The percentages shown in Table 3 are particularly low when it is recalled that nearly sixty percent of the companies surveyed either had or were considering a policy to regulate workplace smoking.²⁰¹ Simply banning smoking in certain areas, entirely at the workplace, or even off work as well overlooks the important and cost-effective benefits offered by smoking cessation programs.

B. *Restructuring Employee Health Insurance*

If the primary motivating factor in employer attempts to regulate off-work smoking is health insurance costs, the health insurance issue should be addressed directly. As mentioned earlier, an employee who smokes costs an employer \$75-150 annually in additional health insurance costs.²⁰² Can these additional costs be passed on to the employee? Although the issue has not yet been resolved, it is unlikely that such a policy would be in violation of ERISA or state and federal handicap discrimination laws, because neither law mandates health insurance coverage nor regulates the specifics of an employer's self-insured benefits plan.

One way to avoid the problem of discrimination in benefits is for the employer to provide a set amount of money for employee benefits and then have the employee privately purchase the health insurance and other benefits. This form of "cafeteria plan" shifts responsibility for rate variation to insurers who have long charged differing rates because of risk factors. Supporters of flexible benefits plans note that they permit

200 *WHERE THERE'S SMOKE*, *supra* note 8, at 19.

201 *See supra* note 98 and accompanying text.

202 *See supra* note 124 and accompanying text.

the coordination of health insurance coverage by working couples and that flexibility boosts morale while lowering costs.²⁰³ On the other hand, administrative difficulties, higher insurance rates relative to coverage,²⁰⁴ the difficulty of obtaining coverage for some employees,²⁰⁵ and potentially adverse tax consequences²⁰⁶ are some of the drawbacks.

Another cost-containment strategy would be for employers to put a "cap" on medical insurance claims amounts. For example, employers would pay the first \$20,000 of health insurance costs with the employee paying the difference. Employees would have to purchase additional coverage from private insurers and, if they failed to do so, the government would wind up paying a percentage of the costs for catastrophic illnesses. Of course, capping payouts would affect people with nonsmoking-related conditions as well.

A final employer strategy would be to exclude from coverage certain illnesses, which could include some of those associated with smoking, such as emphysema and chronic bronchitis. Even these illnesses may be related to other causes, however, and for conditions such as heart disease, the effects of smoking may be difficult to determine. Gaps in health coverage also mean that the costs of these illnesses would need to be assumed in the manner described above.

About sixty-five percent of individuals with health insurance are covered under employer-provided programs.²⁰⁷ Thus, any variation in traditional patterns of coverage is likely to have major ramifications. Shifting the burden of health insurance from employer to employee in the case of a smoker may be equivalent to shifting the burden onto the public, because the smoker may become uninsured. On the other hand, charging smokers higher rates may have a positive effect on public health by encouraging cessation. In any event, relegating public health policy to ad hoc and speculative determinations by employers is unlikely to be an effective public response.

Health insurance is heavily regulated at the state level. Although the states could mandate coverage for certain medical conditions or prohibit certain forms of discrimination in policies, these laws would not apply to employers that were self-insured. The Supreme Court has held that ERISA preempts state insurance laws with respect to self-insured health insurance benefits offered by employers.²⁰⁸ Consequently, self-insured

203 Herzlinger & Schwartz, *How Companies Tackle Health Care Costs: Part I*, 63 HARV. BUS. REV., July-Aug. 1985, at 68, 74-75.

204 An employer would be at a competitive disadvantage in recruiting and retaining employees if it offered a less attractive benefits package. Individual coverage and smaller group plans (as well as reduced benefits self-insurance) might provide less coverage.

205 High-risk employees, whose coverage in group plans is currently subsidized by low-risk employees, might become uninsurable.

206 See generally Comment, *Cafeteria Plans and Health Care Benefits*, 20 TULSA L.J. 634 (1984-85).

207 4 Empl. Rel. Weekly (BNA) 1297, 1298 (1986).

208 *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *Accord Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

employers currently have greater flexibility to implement cost containment strategies.²⁰⁹

C. *Restrictions on Workplace Smoking*

Some degree of restriction on workplace smoking soon will be legally mandated for most employers and for other employers smoking restrictions will be necessitated by personnel, insurance, health, and other considerations. Deciding on the appropriate level of restriction, however, may be more difficult than it appears initially. An unduly permissive policy jeopardizes the health and safety of both smokers and nonsmokers and does little to further the policy of reducing cigarette smoking. On the other hand, an overly restrictive policy (such as prohibiting all smoking on company property or during working hours) may go too far. For some employees an absolute ban on smoking at work would be tantamount to a rule refusing to employ smokers. Moreover, if cigarette smokers are deemed to be handicapped,²¹⁰ a workplace smoking ban would not constitute reasonable accommodation. Even lesser regulation, such as requiring employees to leave their work stations to smoke, may result in productivity losses.²¹¹

As with other work rules, smoking regulations should be tailored to the specific workplace and work force involved. The following factors should be considered: (1) the nature of the business; (2) the presence of occupational exposures that may have synergistic or additive health effects when combined with tobacco smoke; (3) any fire hazards, increased maintenance expenses, and productivity losses caused by smoking; (4) the degree of customer contact; (5) the intraworkplace mobility of employees; (6) the pattern of usage of common areas; (7) the adequacy of ventilation; and (8) the availability of off-site smoking locations. In general, smoking should be limited to nonwork areas to which only smokers need access.

D. *Other Measures*

A wide range of other options are being explored in an effort to create a smoke-free society. These include restricting the advertising²¹² and marketing²¹³ of cigarettes, ending subsidies to tobacco growers,²¹⁴ increasing the tax on cigarettes,²¹⁵ and increasing the number of education programs.²¹⁶ It is not clear whether any of these options would be effective or desirable and a detailed discussion of them is beyond the

209 Currently, about 40% of employees are covered under self-insured plans—mostly by larger companies. As noted earlier, however, self-insurance also has the effect of maintaining coverage under state handicap discrimination laws.

210 See *supra* notes 136-144 and accompanying text.

211 WHERE THERE'S SMOKE, *supra* note 8, at 1 (cost estimated at \$867 per year per smoker).

212 See, e.g., Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 NEW ENG. J. MED. 725 (1987); Ellwood, *Tightening the Reins on the Tobacco Industry*, HEALTH AFF., Winter, 1986, at 121.

213 Ellwood, *supra* note 212.

214 See Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POL., POL'Y & L. 277 (1980).

215 See *id.*; Harris, *Who Should Profit from Cigarettes?*, N.Y. Times, Mar. 15, 1987, at C3, col. 1.

216 See Flay, *Mass Media and Smoking Cessation: A Critical Review*, 77 AM. J. PUB. HEALTH 153 (1987).

scope of this Article. What is clear, however, is that simply addressing the workplace aspects of smoking is unlikely to resolve the broader societal issues. The problem of smoking by workers is merely a subset of the problem of smoking by people.

VIII. Conclusion

Cigarette smoking and other forms of tobacco use in the United States alone cause the deaths of about 1000 people and cost the economy about \$178 million *every day*! Given the enormity of these figures, it is tempting to use even the most drastic measures to reduce or eliminate smoking. Yet, the costs of overzealousness in regulating smoking, particularly with regard to the employment setting, may be even greater than the benefits of marginal declines in smoking rates. From a societal standpoint, the refusal to employ smokers is an unacceptable response. The employment component of a comprehensive societal smoking-elimination program must be less coercive, less intrusive, and more effective. Short-term cost savings (or cost shifting) and expediency should not be permitted to dictate public health policy on such an important matter.