

"This proposed rule on indoor air quality and environmental tobacco smoke is part of the most ambitious standard-setting agenda in OSHA history."
(Robert Reich, *Los Angeles Times*, March 26)

OSHA REGULATION SUMMARY:

1) Requires employers who choose not to ban smoking in the workplace to provide a separate room with ventilation to force the smoke outside, so long as employees don't have to enter the room to work.

2) Would apply to all businesses subject to OSHA regulations. No exemption for small businesses. The smoking provision would cover virtually all of the six million employers under OSHA's jurisdiction ("all indoor or enclosed workplaces"), but the broader indoor air quality provisions (covering heating, air-conditioning and ventilation systems) included in the OSHA proposal would affect only non-industrial employers--approximately 4.5 million employers.

3) Affects fewer people than the Waxman bill.

4) The ban would be enforced by OSHA inspectors visiting workplaces to investigate reported violations of *other* OSHA regulations

5) Fines will be as high as \$70,000 per violation for companies that willfully fail to comply with the ban or \$7,000 for a lesser offense

6) Applies to private-sector employers everywhere and public-sector employers in 25 states and territories (AK, AZ, CA, HI, IN, IA, KY, MD, MI, MN, NC, NV, NM, OR, Puerto Rico, SC, TN, UT, VT, VA, Virgin Islands, WA, WY, CT and NY. The regulation does not apply to public employees in any of the 32 other states or territories where OSHA does not have jurisdiction of municipal, county or state employees:

"In New Jersey, employees in the firehouse can sit around and smoke because municipal, county and state employees are not covered by us. But in New York or Connecticut, they can't." (James F. Foster, OSHA spokesman, *New York Times*, March 26)

Relevant OSHA Definitions:

Employer: a person engaged in a business affecting commerce who has employees.

Employee: an employee of an employer who is employed in a business of his employer which affects commerce.

Commerce: trade, traffic, commerce, transportation or communication among the several states, or between a state and any place outside thereof, or within the District of Columbia, or a possession of the United States or between points in the same state but through a point outside thereof. (Basically, any workplace with 15 or more employees is *assumed* to be "affecting commerce.")

Workplace: "the place where one must be in order to do his or her job" or "the

environmental area in which an employee customarily goes about his daily tasks" (case law, no statutory definition available under OSHA).

Per conversation with OSHA staffer, a private residence which has 11 or more employees is subject to programmed inspections like any other business. According to statement by Joe Dear, asst. sec. for OSHA, "It's commonly thought, apparently, that there is some restriction on OSHA's authority with respect to small employers under 10. That only applies to their scheduling for certain types of inspection. All employers are required to comply." Any employee in a private residence can complain about indoor air quality, etc. and OSHA will follow-up with a letter or a visit, depending on the severity of the situation and whether the agency's jurisdiction is pre-empted by another agency. Thus, Brennan Dawson's assessment: "your home becomes a workplace if you have employees, domestic help--a nanny or a cleaning person" is essentially accurate, but OSHA will not automatically monitor small household staffs or home businesses with a few employees unless there is a complaint.

The proposed regulation will be entered in the Federal Register shortly for comment. Labor Dept. officials claim the rules will take full effect in one year, but OSHA said that it will probably take "a couple of years" to write the final version and put it into effect (i.e. late 1995, early 1996)

The regulation would require extensive record keeping for business owners (see attached text of regulation) including keeping a list of known air contaminants, the number of employees and visitors to the worksite, a record of employee complaints that may be related to sick-building syndrome, the number of employees affected, the date of the employee complaint, any remedial action taken, and would also require employers to monitor the building's relative humidity and carbon dioxide levels, etc.

OSHA claims a smoke-free environment would create a healthier workforce, less absenteeism and save at least \$15 billion.

Of the more than 70 million Americans who work indoors, OSHA estimates that 21 million are exposed to poor indoor air and millions of others are exposed to secondhand smoke.

Opposition:

AFL-CIO: agrees with the intent of the indoor air initiative, but is concerned "that OSHA not become the nation's smoking cops, diverting OSHA's scarce resources from the many serious hazards for which it has sole regulatory responsibility," according to Peg Seminario, dir. of AFL-CIO's occupational safety and health dept.

Building Owners and Managers Assoc.: though supports a total ban, the group is worried that OSHA's proposal imposes burdensome regulations that don't get to the source of indoor-air-quality problems: "We support banning smoking in office buildings but we think it's premature and ill-advised to regulate the indoor air environment at this time," because it would place too much responsibility upon building managers to ensure that indoor air environments are in compliance, says Jim Dinegar, BOMA's v.p. of governmental affairs.

Business: OSHA estimates the cost for businesses to comply with the smoking regulation at \$1.4 billion for the first year and \$6.6 billion annually thereafter (other estimates are as high as \$8.1 billion to implement and for every year thereafter). Since it is impossible to determine just how many employers will set up a special smoking area, at a significant expense, or will decide to ban smoking altogether, estimates for implementation of the smoking provision run from \$0 to \$68 million annually.

"A boss's office couldn't be a smoking zone, unless no co-workers ever were required to go in. Corporate dining rooms would have to be smoke-free. Company cafeterias, in order to be authorized as smoking areas, would be forced to have separate venting and no cleanup service. And business travelers accustomed to lighting up in hotel lobbies would have to find another site--possibly their rooms." (*Wall Street Journal*, March 28)

Restaurants: "Restaurants or bars would have to set aside rooms with no food or drink service to accommodate smokers. Employees couldn't be asked to go in. Those businesses would be in the position of having to create a nonrevenue-producing part of their establishments." (*Wall Street Journal*, March 28)

"It's not likely we'll build literal smoking tanks without the opportunity to generate revenue." (Carl Pirell, Innovative Restaurant Concepts, *Wall Street Journal*, March 28)

"I don't see how you could stop people from smoking in bars. Everybody smokes when they drink. Even people who don't smoke, smoke when they drink." (Tammy Senior, bartender, *Newsday*, March 26)

"Smoking in bars and restaurants effectively would be banned because employees could not be compelled to work in areas where smoking is allowed." (*Chicago Sun-Times*, March 26)

"The only excuse for federal intervention is the theory of 'economic coercion'--the idea that potential workers are forced to accept the risk or remain unemployed. That principle would justify almost unlimited government intervention in the workplace." (Editorial, *Investor's Business Daily*, March 31)

"Last week, when U.S. Labor Sec. Robert B. Reich unveiled his department's proposed restrictions on workplace smoking, he touted such economic benefits as improved productivity and reduced health care costs, along with the prospect of saving lives. But so far...there is little more than anecdotal evidence that such rules actually boost productivity or directly reduce employers' health care expenses." (*Los Angeles Times*, March 31)

A PARTIAL LIST OF WORKPLACES THAT WILL BE SUBJECT TO ONE OR BOTH REGULATIONS:

<u>Worksite</u>	<u>Covered-Waxman</u>	<u>Covered-OSHA</u>
Bars	Y	Y
Restaurants	Y	Y
Casinos	Y	Y
Bowling alleys	Y	Y
Nightclubs	Y	Y
Malls	Y	Y
Bus depots/Train stations/Airports	Y	Y
Service station garages	Y	Y
Car wash	Y	Y
Retail and wholesale tobacco stores	Y	Y
Sports arenas	Y	Y
Social, Fraternal or Religious organizations	if open to public	Y
Theater--smoking would be prohibited even if in the script and integral to storyline	Y	Y
Boxing arenas	Y	Y
Billiard and bingo parlors	Y	Y
Auditoriums	Y	Y
Greenhouses	if open to public	Y
Arcades	Y	Y
Barber Shops	Y	Y

Special situations

Construction Sites: specifically mentioned as included under OSHA regulation but still subject to "enclosed" requirement--probably if partially framed in or covered with plastic that would be sufficient. It is doubtful that doors or windows would need to be in place to satisfy "enclosed" requirement. Other "outdoor worksites" not included under OSHA regulation.

Hotel/Motel rooms: would have to be separately ventilated and smoking would not be allowed while employees were present under OSHA. Waxman's bill appears not to permit smoking in rooms because it states that nonsmokers do not have to enter a designated smoking area for any purpose (therefore all cleaning personnel would have to be smokers, or smoking would be prohibited).

Kiosks/Newsstands/Sandwich stands: If considered a public facility under Waxman definition (i.e. if customers "enter" the "building"), patrons would not be allowed to smoke while picking out daily reading material, lunch, etc.

Nursing homes, rooms: see Hotel/Motel rooms, although smoking in rooms and elsewhere should arguably be permitted under Waxman's exception for "any building or portion thereof regularly used for residential purposes."

Executive washrooms: must be separately vented and cleaning crew must be smokers under Waxman. Prohibited by OSHA.

Conference rooms: If separately vented and cleaned and served by smokers. Prohibited by OSHA.

Private offices: permitted under Waxman bill but separate ventilation required (expensive--very unlikely) and nonsmoking employees, including secretary, courier, etc. would not have to enter for any reason. Prohibited under Reich, unless employees are not required to enter while smoking was going on.