April 21, 1993

LEGAL MEMORANDUM

A BAN ON SMOKING IN FEDERAL BUILDINGS IS NOT REQUIRED TO ADDRESS LIABILITY CONCERNS

Representative Traficant has introduced a bill (H.R. 881) to ban smoking in all federal buildings. He has suggested that such a ban is required to eliminate the liability that the federal government otherwise may have to nonsmoking employees should smoking continue to be permitted in federal buildings. In this connection, Representative Traficant has cited the recent report of the Environmental Protection Agency classifying environmental tobacco smoke ("ETS") as a Group A ("known human") carcinogen.

For the reasons discussed in this memorandum, a ban on smoking in federal buildings is not warranted by liability or other concerns. The regulations that currently govern smoking in facilities controlled by the General Services Administration reasonably accommodate nonsmoking federal employees and effectively eliminate the working conditions that gave rise in the past to claims by nonsmoking employees. H.R. 881 is unreasonable and should be rejected.

SUMMARY

- H.R. 881 goes further than necessary to accommodate nonsmoking federal employees.
- The EPA Report does not expose the federal government to new liability for allowing smoking in the workplace.
  - -- EPA's assertion that ETS can cause lung cancer is not new, and prior suggestions of harm have not produced an avalanche of claims against employers.

-- In and of itself, EPA's classification of a substance as a Group A carcinogen does not represent a determination that the substance is necessarily hazardous at levels typically encountered.

-- Studies of workplace smoking, which EPA ignored in its report, overwhelmingly fail to support claims of an increased risk of lung cancer.

-- The U.S. Occupational Safety and Health Administration should be allowed to complete its consideration of whether workplace exposure to ETS should be limited for health reasons.

- The EPA Report is not legally determinative on the question of whether ETS can cause lung cancer.

- Even after the EPA Report, individual claimants face nearly insurmountable problems of proving causation.

- Current federal smoking regulations protect against claims under the Federal Employees' Compensation Act.

- The federal government does not face potential liability under the Federal Tort Claims Act.

- The Americans with Disabilities Act and the Rehabilitation Act of 1973 do not require the federal government or other employers to ban smoking.

- Banning smoking would do little to address the risk of claims based on poor indoor air quality.

DISCUSSION

I. H.R. 881 goes further than necessary to accommodate nonsmoking federal employees.

Wholly aside from any legal considerations, the federal government should accommodate nonsmoking employees. It should not force its employees to work under conditions that may prompt complaints of physical irritation or aggravate preexisting conditions. The very few cases in which nonsmoking federal employees have been awarded compensation because of co-

worker smoking involved situations in which the federal government had failed to follow a policy of reasonable accommodation.

The era that gave rise to such cases -- an era in which nonsmoking federal employees sometimes were required to share their immediate workspace on a sustained basis with smoking employees -- is largely behind us. Under General Services Administration regulations in effect since 1987, smoking is prohibited in most general office space in GSA-controlled buildings and facilities. Smoking areas may be designated in such office space only if strict conditions are met to accommodate nonsmoking employees. 41 C.F.R § 101-20.105-3(b)(1).[1/] In addition, smoking is prohibited in auditoriums, conference rooms, libraries and elevators. Id. § 101-20.105-3(b)(2),(3),(6). Smoking also is prohibited in corridors, lobbies, restrooms and stairways unless it is "not possible to designate a sufficient number of other smoking areas." Id. § 101-20.105-3(b)(4) & (c)(2)(iv). The GSA regulations are designed to serve the goals of minimizing exposure of nonsmokers to ETS while at the same time recognizing and accommodating the

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[1/] Smoking areas may be designated in general office space only if the office space is "configured so as to limit the involuntary exposure of non-smokers to secondhand smoke to a minimum; e.g., the office space must be large enough and sufficiently ventilated to provide separate smoking and non-smoking sections which protect non-smokers against involuntary exposure to smoke." Id. § 101-20.105-3(c)(2)(iii). The regulations define "general office space" as "space occupied by personnel performing their daily work functions; this includes, but is not limited to, ADP areas, mail rooms, file rooms, duplication areas, court and jury rooms, office space, etc." Id. § 101-20.105-3(a)(3).

needs of smokers. See id. § 101-20.105(3)(a). The policy that the GSA regulations embody is one of reasonable accommodation.

H.R. 881, by contrast, rests on the premise that no accommodation is possible. The bill presupposes that even in the most minute quantities, and even under the most sporadic or intermittent conditions of exposure, ETS is dangerous to nonsmokers, so that only by banning smoking altogether can the safety of nonsmokers be ensured and liability claims against the federal government be avoided. It is this extreme notion that the recent report by EPA is cited to support. For the reasons discussed below, however, we believe that the EPA Report does not support a ban on smoking in workplaces and that a smoking ban is not required to address liability concerns.

II. The EPA Report does not expose the federal government to new liability for allowing smoking in the workplace.

A. EPA's assertion that ETS can cause lung cancer is not new, and prior suggestions of harm have not produced an avalanche of claims against employers.

The Surgeon General of the United States first suggested that ETS may be hazardous to nonsmokers more than 20 years ago, and both the Surgeon General and the National Academy of Sciences issued reports in 1986 claiming that ETS can cause lung cancer. Despite those reports (which are subject to many of the same criticisms as the EPA report), there has not been an avalanche of claims against the federal government or other employers who permit smoking.

Even Robert A. Rosner of the Smoking Policy Institute, who counsels employers on how to implement workplace smoking restrictions, has stated that he is "skeptical of claims that secondhand suits will [now] take off." Noting that "the same basic data has been out there since the 1980s," Mr. Rosner has asked, "Why * * * should the EPA report make a difference?"[2/]

To assess the true legal implications of EPA's action, it is necessary to understand what the agency's classification of ETS as a Group A carcinogen means -- and does not mean.

1. **In and of itself, EPA's classification of a substance as a Group A carcinogen does not represent a determination that the substance is necessarily hazardous at levels typically encountered.**

EPA, based on its review of studies conducted by others, has concluded that ETS is capable of causing cancer in humans -- at some levels, under some conditions. In and of itself, the classification of ETS as a Group A carcinogen does not reflect any conclusion about the potency of the substance or the extent of the hazard, if any, that may be presented in particular settings.

According to Bruce Ames, a University of California scientist who developed a key test for the carcinogenic potential of substances, practically everything we eat and drink contains carcinogens, many of them naturally occurring. As a

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2/ National Law J., March 1, 1993, p. 12.

recent front-page article in the Wall Street Journal points out, even common beach sand has been labeled as carcinogenic.[3/]

In fact, Dr. Devra Lee Davis of the National Research Council of the National Academy of Sciences recently noted that the relative risk of cancer from chlorinated water is greater than that attributed by EPA to ETS. As Dr. Davis stated last November, at the Disinfection Byproducts Technical Workshop of the Center for Environmental Dispute Resolution in Washington, D.C., in reference to the risk of cancer from chlorinated water:

> "The relative risk [for chlorinated water] is higher than the relative risk for environmental tobacco smoke. The difference is that nobody likes environmental tobacco smoke. It's kind of easy * * * for people to say, 'Oh, let's get rid of that smoke; it's really nasty and horrible,' but in fact, the relative risk we are talking about here in [a study of chlorinated water and cancer] was higher than the relative risk, for the average, for lung cancer for someone married to a smoker. Think about that."

Similarly, Dr. Morton Lippman, chairman of the Science Advisory Board committee that reviewed the EPA report, has cautioned against overinterpreting the significance of EPA's classification of ETS. When asked by a reporter about the extent of the danger posed by ETS, Dr. Lippman responded that the questioner probably had incurred a greater risk driving through Washington traffic to ask his question than he would incur in a lifetime's exposure to ETS.[4/]

[3/] "Cancer Scare: How Sand on a Beach Came to Be Defined As Human Carcinogen," Wall St. J., March 22, 1993, at A1.

[4/] Washington Times, April 19, 1991.

In this regard, it is instructive to consider other substances that EPA has classified as Group A ("known human") carcinogens:

> Benzene is emitted from any form of combustion such as barbecue grills and gas-fired stoves and heating. It also is found in many office cleaning agents and in ordinary tap water. Nickel is commonly used in kitchen utensils and tableware -- and even can be found in mother's milk. Chromium occurs naturally in the earth and is found in all tap water. Millions of pounds are released into the air from industrial processes each year. All are classified as Group A carcinogens but none is considered sufficiently hazardous to be banned in public settings.

The situation is similar in the case of substances that EPA has classified as Group B ("probable human") carcinogens:

> Benzo(a)pyrene is found in roast coffee and coffee powders, in hamburgers, in the fumes from wood fires and barbecues, and in water and practically all air. Formaldehyde is present in most wood products and can be released from office furnishings. Aflatoxins are found in most foods.

The State of California has concluded that more than 300 substances commonly found in the environment can cause cancer. But the State has not banned them on that basis.

The U.S. Occupational Safety and Health Administration (OSHA), which is responsible for regulating exposure to carcinogens in the workplace, establishes maximum permissible exposure levels based on significant risk determinations. Typically, these limitations are expressed in terms not of a ban but of a permissible exposure limit over an eight-hour working period. For example, permissible occupational exposure limits have been set for arsenic, asbestos, benzene, chromium, coke oven emissions, nickel and vinyl chloride, all of which are classified by EPA as Group A carcinogens.

2. Studies of workplace smoking, which EPA ignored in its report, overwhelmingly fail to support claims of an increased risk of lung cancer.

In classifying ETS as a Group A carcinogen, EPA considered the results of epidemiologic studies that have accumulated in the last ten years assessing reported ETS exposure in the home. Whether the conclusions drawn by EPA from those studies, or the methods it employed to reach those conclusions, are valid -- and many say they are not[5/] -- what is significant from a legal standpoint is that EPA simply ignored available studies of workplace smoking. Of the 15 such studies that have been conducted, 13 report no statistically significant increase in overall lung cancer risk.

5/ See, e.g. "Is EPA Blowing Its Own Smoke: How Much Science Is behind Tobacco Finding?", Investor's Business Daily, Jan. 28, 1993.

Both the National Academy of Sciences and Meridian Research, an independent research organization commissioned by OSHA to study the possible health effects of workplace exposure to ETS, have indicated (in 1986 and 1988 reports) that the differences in home and workplace environments make extrapolation from one to the other inappropriate. OSHA itself has emphasized that epidemiologic studies of spousal exposure in residential settings (the studies considered by EPA) are of "limited" applicability in assessing risk "under actual, prevailing occupational exposure conditions."[5/]

3. OSHA should be allowed to complete its consideration of whether workplace exposure to ETS should be limited for health reasons.

EPA has no regulatory authority over indoor air or ETS. So far as workplace smoking is concerned, regulatory authority resides with OSHA. OSHA may not regulate any substance in the workplace in the absence of data showing a significant risk of harm to human health based on actual occupational exposure conditions.

Prior to the release of EPA's report, OSHA consistently had rejected requests to ban or restrict workplace smoking. On January 14, 1993, after EPA released its report, the Secretary of Labor directed OSHA to commence a rulemaking

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5/ Brief for the Secretary of Labor, p. 13, ASH v. OSHA, No. 89-1656 (D.C. Cir. April 5, 1991).

addressing workplace exposure to ETS. Noting that EPA's review had been limited to studies of exposure to ETS in the home, the Secretary of Labor directed OSHA to determine the relevance, if any, of that evidence to workplace exposure to ETS.

The failure of the workplace studies to demonstrate an overall increased lung cancer risk from ETS exposure is a significant fact that OSHA must take into account. It would be precipitous for Congress to ban smoking in federal buildings without awaiting OSHA's expert determinations in this regard.

B. The EPA Report is not legally determinative on the question of whether ETS can cause lung cancer.

The EPA report is not legally determinative in court on the issue of whether ETS can cause lung cancer. It has no more judicial significance than the reports by the Surgeon General and the National Academy of Sciences, which also have expressed the view, based on many of the same studies reviewed by EPA, that ETS is capable of causing cancer. As noted, these reports have not produced an avalanche of claims.

Moreover, even if the EPA Report were to be considered as evidence in a court of law, it seems unlikely that the report itself would ever be treated as establishing that ETS was the cause of any individual's lung cancer. Among other things, EPA's estimated "relative risk" of lung cancer in nonsmokers exposed to ETS is so low as to invite considerable judicial skepticism with regard to such a claim.

"Relative risk" compares the incidence of a disease among a population exposed to a substance to the incidence of the disease among a population not exposed to the substance. Because of the difficulty of controlling for bias and confounding in epidemiologic studies, relative risk estimates below 2.0 (1.0 signifies no difference in risk) generally are regarded as weak and either uninterpretable or unimportant.

EPA's estimated relative risk of lung cancer in nonsmokers reportedly exposed to ETS in homes was only 1.19. Courts have been quite skeptical of efforts to attach importance to such low estimates. See, e.g., DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) (where a plaintiff relies solely on epidemiologic proof to establish that a product caused her condition, "relative risk" must exceed 2.0 if plaintiff is to avoid summary judgment).

C. Even after the EPA Report, individual claimants face nearly insurmountable problems of proving causation.

Even if EPA's report were viewed by a court as establishing that ETS can cause lung cancer in humans, that still would leave unsatisfied the other prerequisites to a successful claim. In any particular case, a nonsmoking federal employee would have to prove both that his or her lung cancer was caused by exposure to ETS (not something else) and that his or her exposure to ETS in the federal workplace (not other places) was the proximate cause of the illness. Even after the EPA Report, the plaintiff would bear the burden of proof on both points.

Many factors have been associated with lung cancer in nonsmokers. Establishing that any one of them played a causative role in any particular case would be problematic at best. That would be true for factors, such as exposure to radon and diet, for which there is a reasonably strong association with lung cancer. It would be even more true for the many reported factors, including exposure to ETS, having only a weak or highly equivocal association with lung cancer.

As noted, the claimant in such a case also would have to establish that exposure to ETS at the workplace was directly responsible for his or her condition. That burden would involve many additional problems, including overcoming the fact that the vast majority of substances in ETS are ubiquitous -- that is, exist at measurable levels in most environments (workplace and non-workplace) whether or not smoking is permitted.[1/]

D. Current federal smoking regulations provide ample protection from claims under the Federal Employees' Compensation Act.

The Federal Employees' Compensation Act ("FECA"), 5 U.S.C. 8101 et seq., provides a comprehensive remedy for federal employees who suffer work-related injury sustained in the performance of their duties. "Injury" is defined to include, in addition to injury by accident, a disease "proximately caused by the employment." 5 U.S.C. 8101(5), 8102(a). As the Employment

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1/ See generally Guerin, Jenkins & Thomkins, The Chemistry of Environmental Tobacco Smoke: Composition and Measurement (1992).

Compensation Appeals Board has stated, "[an] injury that has some connection with the employment but that does not arise out of the employment is not covered."[8/] The Appeals Board has emphasized the heavy burden on a plaintiff claiming that workplace exposure to ETS or other workplace conditions has caused disease under FECA:

> "An award may not be based on surmise, conjecture, speculation, or appellant's belief of [a] causal relationship. A person who claims benefits under the Federal Employees' Liability Act has the burden of establishing the essential elements of her claim. Appellant must establish that she sustained an injury in the performance of duty and that her disability resulted from such injury. As part of this burden, a claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing [a] causal relationship. The mere manifestation of a condition during a period of employment does not raise an inference of [a] causal relationship between the condition and the employment. Neither the fact that the condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated her condition is sufficient to establish [a] causal relationship."[9/]

[8/] In re Martinez, No. 88-937 (E.C.A.B. 1988) (emphasis added) (physician stated that none of employee's conditions was "caused exclusively" by employment-related factors including workplace exposure to ETS). A number of state courts have held that, because ETS is not an intrinsic aspect of any particular employment but is something to which people generally are exposed in myriad venues, a disease assertedly resulting from ETS exposure on the job does not "arise out of" the employment so as to make it compensable under the state workers' compensation statute. Palmer v. Del Webb's High Sierra, 838 P.2d 435, 437 (Nev. 1992); Kellogg v. Mayfield, 595 N.E.2d 465, 466 (Ohio App. 1991); ATE Fixture Fab v. Wagner, 559 So.2d 635 (Fla. App. 1990); Mack v. County of Rockland, 530 N.Y.S.2d 98, 99 (N.Y. App. 1988).

[9/] In re Welke, No. 89-866 (E.C.A.B. 1989) (emphasis added and citations omitted). This standard is expressed in regulations implementing FECA, 20 C.F.R. § 10.110 (1992) (burden of proof).

On several occasions, the Compensation Appeals Board has found that, although workplace exposure to ETS was not shown to have caused an employee's medical condition, such exposure did temporarily aggravate the condition. But these were atypical cases in which the federal government had failed to follow a policy of reasonable accommodation. The employees in these cases were found to have preexisting medical conditions that were aggravated temporarily when the employees were forced to share their immediate workspace with smoking employees in poorly ventilated offices. The employees were found to be unable to work under such conditions and were awarded compensation for the period during which these working conditions rendered them disabled.[10/]

[10/] See In re Varela, No. 89-1189 (E.C.A.B. 1989) (employee had been forced to work in a poorly ventilated room amidst heavy smoking 8½ hours a day); In re Soo, No. 89-19 (E.C.A.B. 1989) (nonsmoking employee who alleged exposure to ETS, perfume and "other chemicals" in a poorly ventilated workspace); In re Valenza, No. 88-1216 (E.C.A.B. 1988) (employee had been required to work in a "very smoky" environment and was exposed to "heavy concentrations of cigarette and cigar smoke" at work); In re Hembree, No. 82-154 (E.C.A.B. 1982) (employee who previously had occupied a nonsmoking semi-private office was reassigned to a workspace shared with smoking employees); In re Meyer, No. 80-1719 (E.C.A.B. 1980) (employee had been required to share a workspace with smoking employees). See also Carroll v. Tennessee Valley Authority, 697 F. Supp. 508 (D.D.C. 1988) (employee forced to work in small, poorly ventilated office with coworkers who smoked); In re Marshbanks, No. 87-426 (E.C.A.B. 1987) (employee was exposed daily to "dust, cigarette smoke, stress and physical strain from lifting mail sacks"); Parodi v. Merit Systems Protection Board, 702 F.2d 743, 749 (9th Cir. 1982) (employee found to be medically precluded from working in a room in which "many other" employees smoked).

The current federal smoking regulations, as discussed, now prohibit such working conditions. The regulations thus appear to provide ample protection from such claims in the future. The lesson of these cases is that the federal government avoids claims by nonsmoking employees by following the policy of reasonable accommodation that its own regulations now prescribe.

These same cases, however, also illustrate the formidable obstacles facing an employee claiming that exposure to ETS in the workplace caused lung cancer. In none of these cases, as noted, did the Compensation Appeals Board find that the employee had established that workplace exposure to ETS had caused the underlying condition. 5 U.S.C. 8101(5).[11/]

D. The federal government does not face potential liability under the Federal Tort Claims Act.

Maintaining the current federal smoking policy, which allows agency heads to accommodate both nonsmoking and smoking

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11/ In re Varela, supra note 10 (employee failed to establish that workplace exposure to ETS had caused her condition); In re Valenza, supra note 10 (employee failed to establish that his asthma was caused by workplace exposure to ETS); In re Marshbanks, supra note 10 (workplace exposure to ETS had aggravated employee's preexisting condition temporarily but condition was not caused by factors of his employment including exposure to ETS). See also In re Welke, supra note 9 (employee "has not established that her [condition] was causally related to factors in her federal employment" including exposure to ETS); In re Martinez, No. 88-937 (E.C.A.B. 1988) (employee had failed to establish that her respiratory condition and stress were caused by factors of her employment including workplace exposure to ETS); In re Spangler, No. 87-1950 (E.C.A.B. 1987) ("no medical evidence that [employee's] sensitivity [to ETS] was caused or worsened by her exposure at work").

employees, does not subject the federal government to liability under the Federal Tort Claims Act (FTCA). If the injury is one for which FECA provides coverage, the remedy provided by FECA is exclusive and the claim may not be pursued under FTCA. 5 U.S.C. § 8116(c). See Carroll v. Tennessee Valley Authority, 697 F. Supp. 508, 511 (D.D.C. 1988) (employee claiming that her lung disease was caused by exposure to ETS in the workplace was barred from asserting her claim under FTCA); Richardson v. United States, 336 F.2d 265, 266 n.1 (9th Cir. 1964) (FECA is the exclusive remedy for employee claiming injury from exposure to toxic chemicals due to employer's allegedly negligent failure to maintain a safe workplace).

Even if the FECA did not bar an employee from pursuing a claim under the FTCA, we believe that the federal government would not be subject to suit for permitting smoking in federal buildings. The FTCA bars:

> "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, * * * , or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a).

Whether viewed as involving "the execution of a * * * regulation" issued by the GSA, or as involving the exercise of discretion in the furtherance of government policy, in our view an agency head's designation of smoking areas in federal buildings pursuant to the GSA rules or like authority could not serve as a basis of liability under the FTCA. See generally United

States v. Gaubert, 111 S. Ct. 1267, 1274-75 (1991) (discussing the elements of the discretionary-function exception).

E. The Americans with Disabilities Act and the Rehabilitation Act of 1973 do not require the federal government or other employers to ban smoking.

The Americans with Disabilities Act ("ADA") prohibits employment discrimination by the Legislative Branch. See 42 U.S.C. 12112(a); 12209.[12/] The Rehabilitation Act of 1973 prohibits such discrimination by Executive Branch agencies. See 29 U.S.C. 791(b). These statutes require the federal government, in matters of employment, to make "reasonable accommodations" to known disabilities of employees unless the accommodation would impose an "undue hardship" on the employer.

In promulgating rules implementing the ADA, the Equal Employment Opportunity Commission made clear that sensitivity to environmental agents such as ETS does not automatically constitute a "disability" under the ADA. 56 Fed. Reg. 35544, 35549 (July 26, 1991) (rules for public accommodations).[13/] Moreover, even if an individual were to establish that sensitivity to ETS were a disability within the meaning of the statutory term, an

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[12/] Although it is covered by the ADA, the Legislative Branch is governed by different enforcement procedures established by Congress for its employees. 42 U.S.C. 12209; EEOC's Technical Assistance Manual, Vol. 1 (Jan. 26, 1992), reprinted in Americans with Disabilities Act Manual (BNA) 90:0504.

[13/] Cf. Byrne v. Board of Education, 979 F.2d 560, 565 (7th Cir. 1992) (plaintiff claiming respiratory disability failed to show that her sensitivity to aspergillus fumigatus, a common fungus found in many environments, rendered her disabled under the Rehabilitation Act).

official of the EEOC has emphasized that "the ADA does not require employers to have a smoke-free environment or prevent it. It does not interfere one way or the other."[14/]

Indeed, a federal court of appeals has held specifically that providing an individual with a "totally smoke-free environment" goes beyond the government's obligation to provide "reasonable accommodation" within the meaning of the Rehabilitation Act. Pletten v. Merit Systems Protection Board, Nos. 88-1467, 89-1086 (6th Cir. 1990) (unpublished disposition), cert. denied, 111 S. Ct. 768 (1991). See Vickers v. Veterans Administration, 549 F. Supp. 85 (W.D. Wash. 1982) (assigning hypersensitive nonsmoking employee to work in room without smoking employees was a "reasonable accommodation" under the Rehabilitation Act).

Assuming that an individual's hypersensitivity to ETS were to be viewed as a "disability" under the ADA or the Rehabilitation Act in a particular case, it seems likely that the provision of smoking and nonsmoking areas in federal buildings as prescribed by the current federal smoking regulations would be viewed as a "reasonable accommodation" within the meaning of those statutes.

14/ National Law J., March 1, 1993, p. 12.

F. Banning smoking would do little to address the risk of claims based on poor indoor air quality.

Tobacco smoke frequently is claimed to contribute to poor indoor air quality because it typically is the most visible component of the indoor environment. Because it is visible, tobacco smoke is the proverbial "canary in the coal mine." If employees or other building occupants are complaining about tobacco smoke, a broader problem involving inadequate ventilation may well be present. Banning smoking will not solve that problem and will not eliminate potential liability for it, especially if employees are led to believe that the employer has "solved" indoor air quality problems by banning smoking.

CONCLUSION

Legislation banning smoking in federal workplaces would be premature while OSHA is studying the matter. The federal government should accommodate its smoking employees while at the same time respecting the sensitivities of its nonsmoking employees. Reasonable accommodation is the key to avoiding claims by nonsmoking employees. H.R. 881 goes further than necessary to accommodate nonsmoking federal employees. It should be rejected.