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# Occupational Hazards

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# WILL OSHA BAR THE DOOR TO WORKPLACE SMOKING?

By Gregg LaBar



Though most employers already have smoking policies, recent reports on the dangers of secondhand smoke have put enormous pressure on OSHA to snuff out workplace smoking.

**Y**ou get the impression that if OSHA officials had their way, they would rather not devote their limited resources to a controversial societal issue such as smoking. They don't have much of a choice, however, given the environment of legislation, lawsuits, and employer and employee concerns about the adverse health effects of smoking.

"Doing nothing about workplace smoking is still one of our options, but it's not a very viable one," admits Charles Adkins, OSHA's director of health standards programs. "We will have to do something, but it's certainly not going to be quick or easy."

Adkins said OSHA is considering two standards-setting approaches designed to protect nonsmokers from exposure to passive tobacco smoke at work: The agency will either develop a smoking-specific health standard, or it will try to address workplace smoking as part of a

broad-based generic rulemaking on indoor air quality (IAQ). An official announcement could come as early as this month in response to a lawsuit by Action on Smoking and Health (ASH), a Washington, D.C., antismoking group.

An OSHA spokesman said the review of options has been very careful because smoking is a highly emotional issue and because if OSHA tackles smoking on its own, presumably there will be no action on IAQ. He said the attraction of developing a smoking-only standard is that, despite all of the accompanying emotion and politics, it could still be completed faster (in three to five years) than an IAQ rule (which would take five to eight years).

At press time, it appeared the agency was leaning toward the more inclusive IAQ approach — a decision that would please labor unions and tobacco manufacturers but infuriate public health activists. Employers, at least 85 percent of whom al-

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ready have smoking policies, would appear to favor a smoking-only rulemaking.

Assuming OSHA picks the IAQ approach, our sources said the agency would still have the option to spin off a separate smoking project if the IAQ rulemaking stalls or the Congress or courts become impatient.

No matter which approach OSHA chooses, the agency probably will not propose an all-out ban on smoking unless a court or Congress mandates it. But sources pointed out, if OSHA imposes strict, costly requirements — atmospheric monitoring for contaminants or separately ventilated smoking rooms — on workplaces which allow smoking, many employers may decide to ban it anyway. About 35 percent of U.S. workplaces already have smoking bans.

### Studies Galore

"I wish it were not true," Assistant Director of NIOSH Bryan D. Hardin said, "but I am afraid OSHA needs a standard to address this. There are still too many workers exposed to this carcinogen."

Ideally, NIOSH's Hardin said, all employers and other organizations would have banned or restricted smoking years ago in response to any number of reports and studies linking active and passive smoking to adverse health effects.

In 1964, the U.S. Surgeon General issued a landmark report on smoking and health which declared that smoking causes cancer. By 1986, the Surgeon General and National Research Council had concluded that cigarette smoke inhaled by nonsmokers, so-called "secondhand smoke," is also a cause of serious disease.

In 1991, when Hardin was deputy director of NIOSH's Div. of Standards Development and Technology Transfer, the Institute issued "Environmental Tobacco Smoke in the Workplace: Lung Cancer and Other Health Effects" (Current Intelligence Bulletin 54). The report concluded that ETS is "a potential occu-

pational carcinogen" and recommended that to protect nonsmokers, "exposures be reduced to the lowest feasible concentration."

Earlier this year, a landmark EPA report, "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders," analyzed the results of 30 epidemiological studies and concluded that ETS is a known human carcinogen, responsible for approximately 3,000 lung cancer deaths annually among U.S. adult nonsmokers. Steven P. Bayard, an EPA statistician who coauthored the report, said cigarette smoke contains more than 40 known or suspected human carcinogens.

An estimated 50 million Americans are smokers. The U.S. Centers for Disease Control and Prevention estimates that smoking is responsible for 434,000 deaths per year among U.S. smokers and former smokers. Various studies have linked active and passive smoking to everything from lung cancer and heart disease to reproductive health disorders and childhood infections and respiratory problems.

"Tobacco smoke is the biggest toxin we allow in workplaces," said Jon Rudnick, M.D., corporate medical director of Pittsburgh-based Consolidated Natural Gas Co. (CNG), which prohibits smoking in its facilities. "It's hypocritical to worry about low levels of other chemicals when you still allow exposure to tobacco smoke. From a hazmat standpoint, there's every reason in the world that tobacco smoke should be regulated out of existence."

The U.S. tobacco industry, a \$44 billion market, insists that there is no proof that cigarette smoking causes disease. Industry representatives are even more critical of reports that passive smoking can cause serious adverse health effects.

"We concede that smoking has been linked statistically with a number of disease conditions, but that does not prove causation," said Christopher R.E. Coggins, principal research and devel-

opment toxicologist for R. J. Reynolds Tobacco Co., Winston-Salem, N.C. "The idea that ETS causes lung cancer is not anything like conceivable. I don't think that's a valid conclusion."

Tobacco Institute spokesman Bill Wordham told *Occupational Hazards* that even though the tobacco industry does not believe exposure to ETS is a hazard, it recommends that employers establish smoking policies to "accommodate smokers and nonsmokers." Many tobacco manufacturers have smoking policies of their own and offer guidelines to help other businesses implement policies.

### Not Waiting for OSHA

Most employers are well ahead of OSHA in addressing workplace smoking. In 1991, a study by the Society for Human Resource Management (SHRM) and the Bureau of National Affairs (BNA) reported that 85 percent of organizations surveyed had smoking policies. Virtually every one of them prohibited smoking in common areas like hallways, restrooms, and conference rooms. Another 34 percent had banned smoking altogether. The survey found that 8 percent of organizations had a stated preference for hiring nonsmokers and that 2 percent hired nonsmokers exclusively.

In an April 1993 report, *Organization Resources Counselors (ORC)*, a Washington, D.C., government relations consulting firm, said that 111 of 113 large client companies surveyed had formal smoking policies. Many of the companies allowed smoking only in designated areas. Very few reported having total bans on smoking, but approximately one-fourth indicated that they were considering policy revisions, most likely moving toward greater restrictions.

"A lot of employers have programs because they think it's the right thing to do," ORC Vice President Richard F. Boggs said. "In some companies, there will be repercussions, but most large companies

## Bad News About ETS

1964

U.S. Surgeon General issues first report on smoking and health, which concludes that cigarette smoke causes cancer.

The Surgeon General begins addressing the possible health effects of exposure to environmental tobacco smoke (ETS).

1986

Surgeon General and National Research Council report that ETS is a cause of lung cancer in nonsmokers.

1991

NIOSH concludes that ETS is "a potential occupational carcinogen" and recommends that to protect nonsmokers, "exposures be reduced to the lowest feasible concentration."

1993

EPA determines that ETS is a known human carcinogen, responsible for approximately 3,000 lung cancer deaths annually among U.S. adult nonsmokers.

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**Dr. Rudnick: "Tobacco smoke is the biggest toxin we allow in workplaces."**

seem to be handling this well."

"We'd like to see people quit smoking, but that's a behavioral issue that we can't force on them," said Rudnick of Consolidated Natural Gas, an ORC client included in the survey. "We can say that you must control your behavior to comply with the company's smoke-free policy."

Rudnick implemented CNG's smoking policy over several months, beginning by involving management, smokers, and nonsmokers in meetings and policy drafting. After the policy was announced, CNG, which has 9,000 employees, provided training to smokers and to managers and supervisors. Smokers also had access to a take-home kit designed to help them manage their urge to smoke during work hours and perhaps help them to quit altogether.

"The real key was how we approached the transition," Rudnick said. "When the policy went into effect, it was not like D-Day. Our smokers were ready. They were not outside frantically puffing away to store up their smoking — what we call 'power smoking.'"

Many other companies, while stopping short of banning smoking indoors, have substantial restrictions. At Exxon Research and Engineering Co., Florham Park, N.J., for example, smoking is allowed in individual offices, smoking sections of the cafeteria, and lobbies and hallways, but not in conference rooms or bathrooms. "Our policy recognizes the right of the nonsmoker over the right of the smoker when the two rights conflict," spokeswoman Rosary Lescohair said.

International Business Machines Corp. (IBM), Armonk, N.Y., allows individual business units and locations to

develop their own smoking policies so they can be sensitive to the concerns of smokers, nonsmokers, and customers.

"We are moving toward becoming a smoke-free company in the U.S.," said Carol Wilkinson, M.D., IBM's director of occupational health.

### Good Reasons

Employers offer many reasons for addressing workplace smoking even without an OSHA standard. Common ones include employee complaints, concerns about rising health care costs, and protection of products and equipment.

"Smoking has come up on employee opinion surveys on a regular basis," IBM's Dr. Wilkinson said. "It's hard to make nonsmokers comfortable if you allow people to smoke anywhere they want."

In some cases, employers are simply responding to the requirements of state and local laws. According to a 1992 report by the Coalition on Smoking OR Health, 41 states restrict smoking in public sector workplaces and 19 states limit smoking in private sector workplaces. In recent years, smoking has also been severely restricted on public transportation, in restaurants, and at many public events.

"It's hard to think of many public places which are not also workplaces for somebody," pointed out John Banzhaf, executive director of Action on Smoking and Health and a law professor at George Washington University.

Still, the most compelling, long-term reason for having a smoking policy is to protect against litigation, says John A. Tiffany, coowner of Tiffany-Bader Environmental Inc., a Chatham, N.J., IAQ



**Coggins: "The idea that ETS causes lung cancer is not ... conceivable."**

consulting firm. Tiffany, who chairs the American Industrial Hygiene Assn.'s Indoor Environmental Quality Committee, said the EPA study opened up "lawsuit land" for employers who fail to address workplace smoking.

Employees have been winning cases under several legal theories and doctrines, including negligence, workers' compensation, unemployment insurance, disability, and discrimination, ASH's Banzhaf reported.

In *Schiller v. Los Angeles Unified School District*, for example, a teacher showed that her chronic lung disease was triggered by cigarette smoke drifting up from a first-floor smoking area into her second-floor classroom. In another case, *Pletten v. Dept. of the Army*, an Army employee sensitive to tobacco smoke was ruled a "handicapped person" under the Federal Rehabilitation Act, and the Army was required to make a reasonable accommodation to his handicap.

In other jurisdictions, plaintiffs have not had as much success. The Nevada Supreme Court, for example, recently ruled in *Palmer v. Del Webb's High Sierra Casino* that a casino pit boss exposed to ETS for some 20 years was not entitled to workers' compensation benefits because exposure to secondhand smoke was not "uniquely incidental to the character of that business." The court said that, until state law identifies ETS-related health effects as an occupational disease, these conditions must be recognized as "products of a nonvenereal form of social disease."

In situations where the employer is a building tenant, some workers have filed common law and negligence claims against building owners. For now, defendants are prevailing in most of those cases, according to James O. Neet Jr., Martha S. Warren, and Mark W. Cowing, attorneys in the Kansas City office of Shook, Hardy & Bacon.

"Nonetheless, the problems associated with indoor air pollution... could be one of the most litigated issues of the 1990s," the three lawyers wrote in a paper presented at last year's Air & Waste Management Assn. annual meeting.

Bill Borwegen, director of health and safety for the Service Employees International Union, said he worries that some employers may think they have addressed the larger issue of indoor air quality simply by restricting smoking.

"When employers get IAQ complaints, the knee-jerk reaction is often to ban smoking," Borwegen said. "It is easier for them

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# CONGRESS CONSIDERS INDOOR AIR BILLS

**F**or the third consecutive Congress, Sen. George Mitchell (D, Maine) and Rep. Joseph Kennedy (D, Mass.) have introduced bills designed to address indoor air quality (IAQ).

Although previous versions of the Kennedy bill directed OSHA to issue IAQ regulations, both bills (The Indoor Air Quality Act, S. 656 and H.R. 1930) now focus on research.

The proposed legislation directs EPA to research health effects of contaminants and to issue health bulletins and advisories when necessary. Included in the list of contaminants under consideration are tobacco smoke and "combustion by-products," including carbon monoxide and nitrogen oxides from smoking.

EPA would be required to determine the effectiveness of existing ventilation standards, and several government agencies would manage a \$12 million state and local grant program.

The legislation, which authorizes the expenditure of \$48.5 million annually, has already passed the Senate in the last two Congresses virtually intact. Rep. Kennedy's bills, which called for OSHA regulation, never made it to the House floor

for a vote. Speculation is that the new House bill has a better chance of being passed and catching up to the Senate version.

There are also several bills before Congress targeting workplace smoking. Rep. James Traficant Jr. (D, Ohio), for example, has introduced H.R. 881, which would prohibit smoking in an estimated 7,800 facilities owned and leased by the federal government.

Sen. Frank Lautenberg (D, N.J.) and Rep. Richard J. Durbin (D, Ill.) have introduced slightly less stringent legislation which would prohibit smoking in federal facilities unless they have smoking areas equipped with separate ventilation.

A smoking ban is already in effect in some federal agencies, including the U.S. Postal Service, although others like the Labor and Health and Human Services departments continue to allow it with restrictions.

State and local governments are also taking action. According to a December 1992 report by the Coalition on Smoking OR Health, 41 states restrict smoking in public sector workplaces and 19 states limit smoking in private sector workplaces.

to blame workers who have a medical addiction than it is to address indoor air."

Borwegen noted that his department receives more complaints about IAQ than other safety and health concerns. In most cases, he said, the complainants' workplaces have already banned smoking, but the complaints persist. (Indeed, research from NIOSH and other sources has shown that less than 10 percent of indoor air complaints are related to smoking.)

## Setting the Standard

The only current reference to smoking on OSHA's books involves asbestos workers, who are not permitted to smoke in areas where they are exposed to asbestos. The employer must also warn workers of the links between smoking and asbestos exposure and lung cancer, and provide self-help smoking cessation program materials.

If OSHA should proceed with a comprehensive IAQ approach, say agency sources, the standard would probably include provisions for:

- minimum acceptable ventilation;
- training for workers who maintain ventilation and filtration systems;
- control and elimination of air contaminants and;
- mechanisms for managing employee complaints.

Presumably, cigarette smoke would be one of the contaminants covered by the standard. Therefore, allowing smoking in the workplace could trigger requirements for protecting nonsmokers. OSHA could, for example, require a higher level of air

circulation in areas where smoking is allowed or the establishment of separately ventilated smoking areas. A total ban on smoking is unlikely to be part of an IAQ standard, sources said.

Although an indoor air standard would be one of OSHA's most far-reaching rules, it probably would not cover smoking at outdoor workplaces like construction sites, sports stadiums, and amusement parks. In addition, some experts said, it might not have a dramatic impact on manufacturing facilities, which tend to have more wide-open space and air circulation than office environments.

The smoking-only approach would probably yield some of the same program elements. Sources predicted that it would take less time to complete, however, because more is known about the science and control of ETS than about indoor air quality. Compliance might be easy for employers who already have smoking control policies.

An outside chance does exist that OSHA would use the standards-setting process to try to ban smoking at work. It is unclear if OSHA could require workplaces where smoking is banned to provide smoking cessation programs and allow long phase-in periods.

"OSHA has never banned anything before," Adkins noted. "I'm not certain the OSH Act even allows us to do that. A ban might not be inappropriate. It would be a simple standard for sure. I think there are a lot of industry people who would like to see us ban smoking to take the heat off of them."

A smoking standard would probably take at least three years to develop, according to our sources. In the meantime, EPA, whose authority on this issue is limited to research and education, hopes to issue voluntary guidelines for the control of workplace smoking. The guidelines, which OSHA has helped to develop, may well be the blueprint for an OSHA standard.

"We want to see the elimination of involuntary exposure to environmental tobacco smoke," said Robert Axelrad, director of EPA's Indoor Air Div. "Bans are not the only way to make that happen. The government will decide what level of protection a nonsmoker is entitled to. We may have to let the employer decide how to achieve that goal."

## Battle Lines

Even before OSHA begins rulemaking, this issue is shaping up as a major battle between tobacco companies and public health activists, with the traditional OSHA constituencies, industry and labor, playing a lesser role.

Attorney Frank A. White, R. J. Reynolds' OSHA counsel in the Washington, D.C., law office of McDermott, Will & Emery, said, "We're going to push the IAQ approach. If OSHA decides to split out the smoking project, we will argue that there should be accommodation for smokers. There is no justification for a ban on workplace smoking."

If OSHA tries to rely on the EPA report which linked ETS and lung cancer, the tobacco industry will be ready with

a bevy of legal, statistical, and scientific reasons why the report should be disregarded. Among the reasons:

- It is based on spousal exposure to ETS, not actual concentrations in a work environment.

- The results can be easily invalidated by using other analytical methods or including two later major studies which allegedly showed no correlation between ETS exposure and lung cancer.

- Compared to EPA, OSHA is subject to a higher burden of proof and a different test for significant risk. (The Supreme Court's 1981 decision on OSHA's benzene standard defined the level of acceptable risk for workers exposed to a toxic material at one adverse outcome per 1,000 workers.)

ASH, meanwhile, will point to Section 6(b)(5) of the OSH Act to justify its position that OSHA ban smoking. According to the law, OSHA "shall set the standard, which most adequately assures, to the extent feasible, ... that no employee will suffer material impairment of health or functional capacity..."

"The lowest feasible level of tobacco smoke is zero," argues ASH Executive Director Banzhaf, who is in the midst of his fourth lawsuit against OSHA. "OSHA has never banned anything because every toxic material regulated so far has been part of the industrial process. Tobacco smoke is not essential to any workplace activity."

If need be, Banzhaf said, he will take his case for banning workplace smoking all the way to the U.S. Supreme Court.

Frank Mirer, director of health and safety for the United Auto Workers (UAW), acknowledges that workplace smoking is a tough issue for organized labor. In the 1940s, the UAW bargained for the workers' right to smoke at work and has sought to retain it ever since. At the same time, however, the union has been pushing for stricter standards on other air contaminants.

"Cigarette smoking is a public health disaster," Mirer said in May at the Emerging Issues Forum of the American Industrial Hygiene Conference and Exposition. "We ought to do everything we can to reduce the amount of cigarette smoking that goes on, but I don't think that's something for OSHA to do in a 6(b) rulemaking. Someone else should deal with the social issues."

Mirer said OSHA should focus on an IAQ rule, for which organized labor has petitioned OSHA, and on comprehen-

sive health standards for industrial-use substances like methylene chloride, chromates, and synthetic mineral fibers.

While most employers already have smoking policies, they use different approaches with varying degrees of success. Employee wellness and morale, not OSHA compliance, have usually been the focus of these programs.

"(Workplace smoking) is an issue on the rise," said Mark Stuart, associate director of risk management for the National Assn. of Manufacturers. "I admit

that we haven't spent a lot of time on this issue until now, but we will start. Indoor air and smoking will be big issues for employers." ■

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