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Testimony of John C. Fox
 Before the Sacramento County Board of Supervisors
 September 25, 1990
 Sacramento, California

A BAN ON SMOKING AT WORK WILL NOT SERVE THE PUBLIC GOOD

Good morning. I am John C. Fox, a partner in the San Francisco based law firm of Pettit & Martin. I am a labor lawyer, formerly associated with the United States Department of Labor in Washington, D.C. I currently maintain a nationwide employment and labor law practice on behalf of large corporations as well as small emerging high technology companies. I appear here this morning at the request of The Tobacco Institute ("The Institute"), a Washington, D.C. based trade association.

The Institute opposes this Board's proposed ban on smoking in places of employment contained in proposed Chapter 6.84 of the Health and Safety Code. Rather than to become mired down in an unrevealing emotional debate whether to permit smoking at work, I present below three uncontradicted facts concerning smoking in the workplace. In so doing, I seek to separate often false perceptions from the actual realities in the workplace.

1. Uncontradicted Fact Number 1: Almost all employers in the United States permit smoking in the workplace.

Every available survey shows conclusively that almost 90% of all employers in the United States currently and historically permit smoking in the workplace. Indeed, the small number of employers (approximately 12%) which ban smoking in the workplace do so exclusively out of concern for traditional safety (fire/explosion) or products liability (food preparation) concerns.

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Accordingly, this Board's proposal is radically at odds with the current and historical exercise of employer discretion on behalf of their constituents (employees) regarding smoking in the workplace both here in Sacramento and throughout the United States.

2. Uncontradicted Fact Number 2: No Court in the United States which has reviewed the scientific and medical evidence regarding Environmental Tobacco Smoke ("ETS") in the workplace has found that it represents a threat of medical harm to healthy non-smoking employees.

Courts in the United States which have reviewed the medical and scientific evidence regarding the effects of ETS in the workplace have been uniformly hostile to healthy non-smokers seeking to ban smoking in the workplace due to ETS exposure. Judges hearing test cases in New Jersey, Washington, D.C. and Missouri, for example, have all concluded that exposure of healthy non-smokers to ETS in the workplace does not cause medical harm. Judges in these cases had at their disposal most of the same contradicted scientific studies the Environment Protection Agency ("EPA") considered in coming to its draft policy recommendation that smoking should be banned in the workplace. Moreover, "Non-smokers' Rights" cases have all but dried up in the 1980's for lack of success. Indeed, the Occupational Safety and Health Administration ("OSHA"), which has authority for safety and health matters in the workplace (unlike the EPA), has not historically and does not currently classify smoking in the workplace as a health hazard.

Accordingly, this Board lacks any scientific or legal predicate necessitating at this time the controversial action it proposes.

3. Uncontradicted Fact Number 3: The vast majority of employers and unions do not need or want legislation to address smoking in the workplace. The proposed legislation would remove effective localized decision making from employees and their managers.

It is an anomaly unique to the smoking in the workplace issue, and few other employment issues, that management and labor prefer to work together on this issue. In a rare display of solidarity, both employers and unions generally prefer not to lose discretion over this highly individualized and emotional issue to ill-fitting and uncustomized generic rules created elsewhere outside the workplace. Experience has taught that people are different and workplaces are different.

As a result, approximately half of the companies in the United States have no rigid policy on smoking in the workplace. This flexible approach permits responsive and localized management to customize practices suitable to the many and

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varied needs different employees express at different locations, in different work situations and with different ventilation environments. Given that almost one out of three employees smoke nationwide (as many as 7 out of 10 in certain industries), the issue of smoking in the workplace affects too many employees and is too complex to be dealt with in a draconian manner or in a "one size fits all" generic policy lacking localized thoughtfulness to each facility, and indeed to every employee.

Accordingly, this Board should not usurp the legitimate role unions and employers have to play to locally and flexibly regulate their work environments to ensure contented and productive employees.

Conclusion.

In conclusion, I respectfully request this Board to do three things:

1. Give careful consideration and dispositive weight to the three facts outlined above;
2. Review, and make part of today's record, the attached succinct California Western Law Review article discussing these issues in greater detail and in lay terms; and
3. Vote against the proposal to ban smoking in the workplace. It is too drastic, it is unnecessary and it is not sufficiently deferential to the rights of employers and employees to work together to accommodate diversity in their workplace.

Thank you Ladies and Gentlemen of the Board. I would be happy to answer any questions at this time of concern to the employer community.


John C. Fox

Enclosure