Smoking in the Workplace:

Some Considerations

As Americans, we always have taken pride in our freedom to practice our individual customs, to exercise our rights and to enjoy our preferences. Current efforts to restrict smoking in the workplace, by inviting government control and regulation of personal behavior, represent a threat to those principles.

Smokers and nonsmokers have lived and worked together in harmony for generations. Occasional disputes about when and where to light up have been settled individually, with common sense and courtesy. Today, there are some who want to substitute laws and fines.

Some smoking restriction advocates argue that cigarette smoke presents a health hazard to nonsmokers; others claim smokers are more costly to their employers than nonsmokers.

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Health Hazard Not Proven

Three scientific workshops in 1983 and 1984 independently concluded that environmental tobacco smoke (ETS) has not been shown to have any adverse health effects.

The first workshop, which drew medical researchers from nine countries to the University of Geneva in March 1983, concluded: "An overall evaluation based upon available scientific data leads to the conclusion that an increased risk [in lung cancer] for non-smokers from ETS [environmental

tobacco smoke] exposure has not been established."

Another, convened by the National Institutes of Health, U.S. Department of Health and Human Services, determined that the possible effect of ETS on the respiratory system "varies from negligible to quite small."

And in April 1984, Ernst Wynder of the American Health Foundation and H. Valentin of the Bavarian Academy for Occupational and Social Medicine, organized a workshop in cooperation with the World Health Organization and the International Green Cross. That workshop, in Vienna, Austria, concluded:

"Should lawmakers wish to take legislative measures with regard to passive smoking, they will, for the present, not be able to base their efforts on a demonstrated health hazard from passive smoking."

Finally, a February 1985 *Consumer Reports* article reviewed nonsmoker concerns about ETS, concluding that "the evidence of risk from passive exposure is sparse and often conflicting." The article adds, "the presumed health consequences of 'passive smoke' rest on very few undisputed facts."

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Costs to Employers?

Many proponents of smoking controls in the workplace cite studies that claim to show smokers are absent more frequently and incur higher insurance costs than nonsmokers.

But according to Marvin Kristein, an American Health Foundation economist who promotes economic arguments for workplace smoking restrictions, "we lack meaningful 'case-controlled' company comparisons of experience with smoking employees vs. nonsmoking employees vs. ex-smokers and the impact on company cost." To achieve a scientific basis for such cost claims, Kristein says, "would require studies and data we do not now—and most likely will never—possess."

Smoking restriction advocates who argue that smokers are absent from work more often than nonsmokers rely on a statistical correlation that is weak at best. "One may argue that higher rates of absenteeism and smoking both relate to and reflect other factors," Kristein has written. In fact, numerous factors are associated with absenteeism, including age, sex, family responsibilities, job satisfaction and commuting time.

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With regard to the assertion that smokers incur higher medical costs, UCLA economist Lewis Solmon has written that such claims are based on studies alleging smokers have a higher accident rate than nonsmokers.

But, Solmon notes, since smokers are found more often among blue-collar workers, they are more likely to be engaged in strenuous physical activity and therefore are more likely to be exposed to physical harm through accidents. For example, premium rates for workers' compensation are determined not by employee smoking habits, but by occupational category, carrier experience with the business and the statutory level for workers' compensation in the particular state.

A recent survey contradicts the claim that smokers are less productive than nonsmokers

Morale? Productivity?

Another factor cited by some smoking restriction proponents is employee morale. But a recently completed survey by Response Analysis Corporation of Princeton, N.J., contradicts that claim.

The Response Analysis survey of some 2,000 union representatives and managers in business, industry and government focused on first level supervisors, such as foremen and administrative assistants. They are the ones who are particularly sensitive to factors

influencing employee productivity. The survey found:

- Two-thirds of the survey respondents said employee smoking either has a positive effect or no effect on productivity.
- Seventy-eight percent said a smoking ban would not enable their organization to accomplish the same work with fewer employees.
- Only three percent of respondents agreed that "not hiring people simply because they smoke makes sense."
- Of the respondents who said their organizations restrict smoking, less than 3 percent said they did so because smoking interferes with job performance.

Another study, released in 1984 by University of Minnesota researchers, reported similar results, finding that people who smoke tended to be *more productive* than those who do not.

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No Legal 'Right'

Although some smoking restriction advocates suggest that organizations soon may be held liable by the courts for failing to adopt policies restricting workplace smoking, relevant case law provides virtually no support for the efforts of these individuals to impose their views on employers

and fellow workers. The courts have uniformly rejected arguments that a tobacco smoke-free environment is guaranteed by provisions of the U.S. Constitution.

Most recently, in *Paul Smith u AT&T Technologies Inc.*, a St. Louis County (Mo.) Circuit Court judge ruled in April 1985 that AT&T's refusal to ban smoking in certain work areas and to separate smokers from nonsmokers in others did not breach its duty "to exercise reasonable care to provide a reasonably safe work area."

The courts have uniformly rejected arguments that a smoke-free environment is a Constitutional guarantee

In Washington, D.C., in 1983, Judge William Pryor ruled that "Common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual employee."

The Tenth U.S. Circuit Court of Appeals in Denver dismissed a lawsuit brought by an Oklahoma Department of Human Services employee who claimed the State of Oklahoma had violated his constitutional rights by not prohibiting smoking in his office. The court rejected his plea, saying he had failed to prove he was deprived of a federal right by the lack of a no-smoking area.

Smoking restriction advocates cite three decisions to support their claim of a universal right to a tobacco smoke-free workplace: *Parodi u Merit Systems Protection Board, Vickers u Veterans Administration* and *Shimp u New*

Jersey Bell Telephone Company.

Parodi and *Vickers* involved claims by federal employees that their alleged hypersensitivity to tobacco smoke made them "disabled" or "handicapped" within the meaning of statutes applicable only to the federal government as an employer or to groups seeking federal aid. These cases have no relevance to the question of whether private employers have an obligation to provide a tobacco smoke-free environment.

The 1976 *Shimp* case, then, is the only one that has actually prohibited smoking in the workplace based on the theory that general common law can be used to compel smoking restrictions. A key determinant in *Shimp*, however, was the lack of any active defense by New Jersey Bell, which filed no answer to the complaint and submitted no affidavit in opposition to Shimp's request for a court order.

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That the case has little precedential value is suggested by the court's dismissal of an identical complaint subsequently filed by Shimp's attorney before the same judge on behalf of another New Jersey Bell employee. In the second case, New Jersey Bell elected to defend itself.

Discrimination in hiring raises troubling legal questions, too, if the discrimination has a disproportionate impact in terms of race or gender.

Courts also have held that, for employees working under collective bargaining contracts, smoking may be a condition of employment. As such, the court ruled in *Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board*, an employer cannot impose smoking restrictions unilaterally when a collective bargaining agreement is in effect.

But legal questions aside, who would want to discriminate against smokers if the primary motive in hiring is to employ the best individual for the job?

Decisions involving smoking in the workplace are more appropriately committed to the good sense and common courtesy of smoking and nonsmoking employees. The question of when and how workers may smoke in the office is best settled by employer and employee consensus rather than by city council or state legislature.

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For more information
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issues write:

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