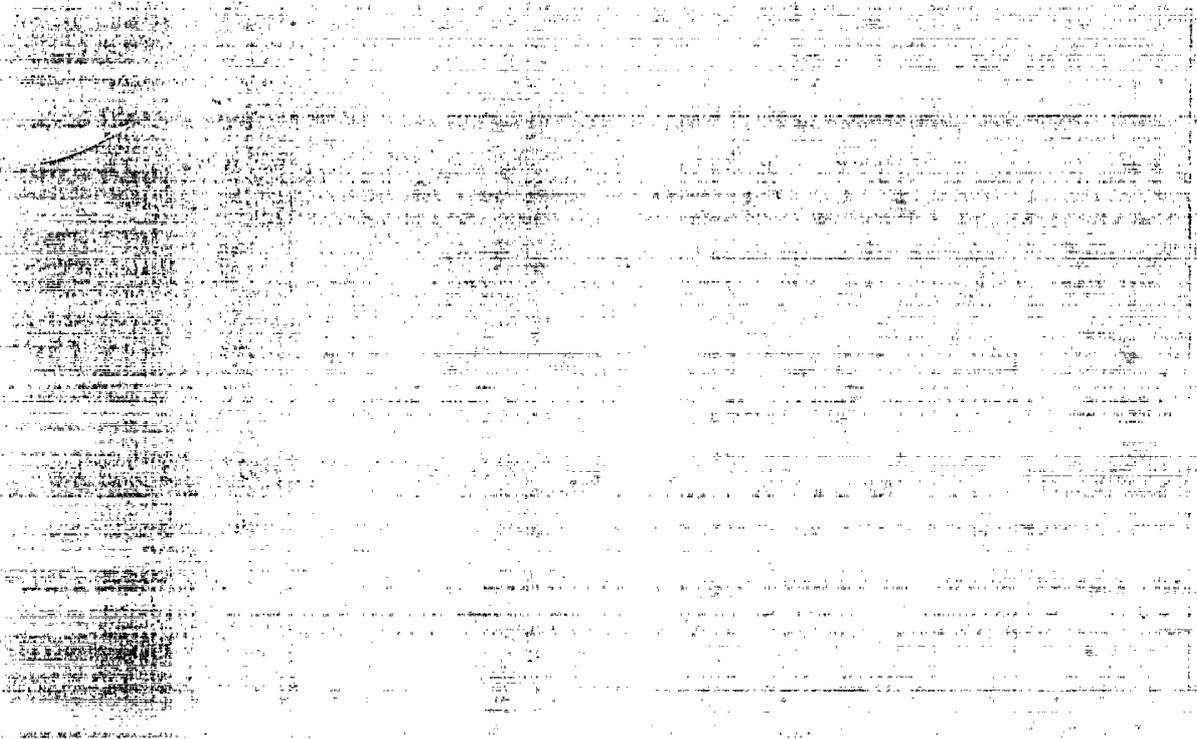


Workplace Smoking Restrictions:

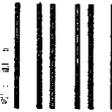


Some Considerations

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General Overview

- Among the more recent charges against smoking is the claim that exposure to other people's cigarette smoke—sometimes called public smoking—can cause disease in nonsmokers. Most public smoking restriction legislation includes a statement of purpose that speaks to protection of the public health.
- Such legislation is not justifiable on these grounds.
Efforts to make smoking socially unacceptable rely heavily on certain research reports that purport to link other people's smoke with cancer, lung problems and other diseases. Such claims have not, however, withstood scientific scrutiny.
- Concern among nonsmokers about the possible effects of breathing other people's tobacco smoke began to emerge following a 1971 speech by the then Surgeon General, Jesse Steinfeld. Calling for a ban on smoking in public places, Steinfeld said that "evidence is accumulating that the nonsmoker may have untoward effects from the pollution his smoking neighbor forces upon him."
- These words set off a chain reaction as researchers began measuring smoke and smoke components in public areas and in laboratory settings and estimating amounts to which nonsmokers may be exposed. A body of research accumulated, although the "evidence" remained so conjectural that no objective scientist could have drawn any hard conclusions about other people's smoke and disease.
- Three scientific workshops in 1983 and 1984 concluded independently that the jury is still out. And indeed, many scientists who believe smoking is harmful to smokers have publicly said there is not sufficient evidence to conclude other people's smoke is harmful to nonsmokers.
- Despite these contradictions, smoking restriction advocates are making the workplace their new target. They want to change the centuries-old arrangement whereby smokers and nonsmokers work together in harmony, settling occasional disputes individually, with common sense and courtesy.
- If the anti-smokers prevail, the precedent is set for government to be drawn into private sector matters—of lifestyle, individual rights and management policies—better handled by management, labor and employee consensus.
- It is an issue that demands impartial review and decision by corporate policy makers at all levels.

Tobacco Smoke and Air Quality

- Some researchers claim reported levels of various tobacco smoke components in the air—carbon monoxide, particulates and nicotine—are hazardous to nonsmokers' health. But just because investigators can measure such substances does not mean they have any significance to human health.
- It is important to note that all constituents of tobacco smoke are immediately *diluted* by the surrounding air. And measurements of atmospheric cigarette smoke taken *under realistic conditions* indicate that the contribution of tobacco smoke to the air we breathe is minimal.
- One widely studied component of tobacco smoke is carbon monoxide (CO). The main sources of CO in the environment are motor vehicles and industrial processes—not tobacco smoke. Indoor levels of CO are affected by the outside levels and by cooking and heating, among other factors.
- Still, other people's tobacco smoke is frequently blamed for contributing significant amounts of carbon monoxide to the environment. Studies conducted under realistic conditions, however, indicate that atmospheric CO from tobacco smoke rarely exceeds 10 parts per million (ppm) and is closer to 5 ppm in public places with normal ventilation. Both figures are well below the limit of 50 ppm recommended by the Occupational Safety and Health Administration for workers exposed over an eight-hour period.
- Use of measurements of CO to estimate atmospheric smoke levels can be questioned, then, because it is produced by many sources. But most researchers consider nicotine a more appropriate and reliable indicator, since it is produced exclusively by burning tobacco.
- Studies using nicotine as a smoke index help to confirm that the contribution of tobacco smoke to the atmosphere is minimal. Drs. William Hinds and Melvin First, researchers from the Harvard School of Public Health, found only very small amounts of nicotine in the atmosphere of crowded bars, bus and airline terminals, restaurants and student lounges.
- Based on those measurements of a substance *specific* to tobacco smoke, one scientist estimated that a nonsmoker would have to spend 100 hours straight in the smokiest bar to inhale the equivalent of a single filtertip cigarette.
- Researchers in Europe who used different methods to measure the presence of tobacco smoke in the atmosphere reported slightly higher nicotine concentrations than Hinds and First. But they, like Hinds and First, concluded from their measurements that other people's tobacco smoke does not appear a risk to healthy nonsmokers.

- The possible effect of other people's tobacco smoke on the nonsmoker has become a matter of considerable controversy. Although some reports have linked lung ailments, heart disease and even cancer with nonsmokers' exposure to tobacco smoke, these claims are based on questionable research.
- Two highly publicized 1981 studies—in Japan and Greece—are cited frequently to support a claim that cigarette smoke in the air increases the risk of lung cancer in nonsmokers. But both studies have received extensive criticism in the medical literature by a variety of experts around the world.
- In addition, findings from a later American Cancer Society study did not support the claims of the Japanese and the Greek studies. The American study found no significant increased cancer risk among nonsmokers married to smokers.
- Three recent scientific workshops on tobacco smoke in the air concluded that the scientific evidence on possible health effects is inconclusive. The first workshop, in March 1983, drew medical researchers from nine countries to the University of Geneva, examined new research data and reviewed existing studies. The Swedish researcher who organized the workshop concluded:
 - "An overall evaluation based upon available scientific data leads to the conclusion that an increased risk (in lung cancer) for nonsmokers from environmental tobacco smoke exposure has not been established."
 - Later in 1983 came a final report from a workshop by the U.S. Public Health Service—the Division of Lung Diseases in the National Heart, Lung and Blood Institute in Washington, D.C.
 - There, 21 investigators from the fields of epidemiology, statistics and adult pediatric medicine concluded: "A review of the data from the studies which have been carried out or are in progress which address the effect of passive smoking on the respiratory system suggests that the effect varies from negligible to quite small."
 - And in April 1984, a workshop, conducted in cooperation with the World Health Organization and the International Green Cross, was held in Vienna, Austria. In a joint communique following the four-day meeting, organizers Ernst Wynder of the American Health Foundation and H. Valentin of the Bavarian Academy for Occupational and Social Medicine, wrote:
 - "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."
 - The words "employers" and "workplace restrictions" can no doubt be substituted for "lawmakers" and "legislative measures" in the preceding sentence.

Smoking Restriction Laws

- Public smoking restrictions vary from local ordinances of limited scope to wide-ranging state laws encompassing all public buildings. But whatever the law or its scope, all have one thing in common: Enforcement is time-consuming and expensive and, therefore, often half-hearted at best.
- Many smoking restriction proposals place responsibility for enforcement on the owner or manager of the business. Policing the actions of employees in the private workplace can prove an administrative nightmare, leading to employee relations problems and decreased productivity.
- Separation of people who work well together is inefficient, and creates bad feelings when smoking rules are considered inequitable. Rather than contributing to greater productivity, such restrictions only mean someone must take time to referee squabbles that should be settled, person to person, with understanding and consideration.
- In a recent position paper opposing restrictive smoking proposals, the Business Council of New York, an organization representing 4,000 small and large companies, called such public smoking laws "virtually unenforceable."
- The ultimate responsibility for enforcement, of course, falls to the police and courts. Thorough and total enforcement of this type of restriction is virtually impossible because of time and manpower constraints. When a restriction is given low, or no priority, public respect for the law in general is diminished.
- If an attempt is made to enforce the measure stringently, however, it will come at great expense to the taxpaying public. And strict enforcement can only exacerbate the problems of an already overburdened court system.
- Application of such restrictive measures can disproportionately affect one segment of the populace more than others. With hard and fast enforcement of laws restricting smoking in the workplace, for example, the attorney may smoke or not in his office, but his secretary who shares space with another may not. The bank manager may not be affected by the law, but the tellers may. The editor may not be affected yet his reporters may, for lack of an enclosure occupied by only one employee.
- Were lawmakers to consider increasing taxes for individuals who work in open offices but not for those with offices of their own, such proposals quickly would be rejected as inequitable. Yet laws restricting smoking have similarly disproportionate impact.
- The Montgomery County (Md.) Council in 1982 struck a workplace restriction from a measure when told the results of a survey of county employers. No need for law, the council was told—people can deal with people.
- Common sense tells us not to raise our voices in a restaurant, busy office, or other public area. It tells us not to bathe in heavy perfume or overdo the garlic.
- Common sense tells us that cooperation and mutual understanding—respect for the preferences and sensitivities of others—are the simplest and least intrusive means by which all of us, smokers and nonsmokers alike, can get along.

Economic Issues

- 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.
- Advocates of workplace smoking restrictions fail, however, to note caveats contained in these studies. "Skeptics might argue that these numbers are as soft as the underside of a porcupine, and that may be true," admitted William Weis, a Seattle University accounting professor who has been a vocal advocate of economic reasons for banning smoking and smokers from the workplace.
- "We lack meaningful 'case-controlled' company comparisons of experience with smoking employees vs nonsmoking employees vs ex-smokers and the impact on company costs," said Marvin Kristein, an American Health Foundation economist who has in the past estimated the average smoker costs his/her employer between \$336 and \$601 per year.
- To achieve a scientific basis for such cost claims, Kristein admits, "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.
- As 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 more often found among blue-collar workers, they are more likely also to be engaged in strenuous physical activity and therefore are more likely to be exposed to more 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 for the particular state.
- Some who argue that smokers spend more leisure time on the job assume—erroneously—that nonsmokers do not spend equal time at the coffee machine or talking with co-workers.
- Interestingly, William Weis, the accounting professor who first proposed that smokers might be costing their employers money, apparently has since changed his mind. Weis now says his research into companies that have restricted smoking indicates cost is not a factor in that decision. Today, Weis says the major factor is employee morale.

Smoking, Productivity and Morale in the Workplace

- Some proponents of smoking controls in the workplace point to studies that purport to show smokers are less productive and therefore more costly to their employers than nonsmokers. But a recently completed survey of union representatives and managers in business, industry and government contradicts that claim.
- Response Analysis Corp., Princeton, N.J., interviewed almost 2,000 local union officials and first-level supervisors. First-level supervisors were interviewed—instead of senior managers—because they directly observe and evaluate employee behavior and are sensitive to factors influencing employee productivity.
- The survey found:
 - 74 percent of all supervisors believe smoking during work breaks has no significant effect on employee job performance. 17 percent feel smoking during work breaks has a positive effect on productivity; only eight percent see a negative effect.
 - Two-thirds of the survey respondents say smoking while working either has a *positive* effect or no significant effect on productivity.
 - 83 percent of all supervisors disagree with the statement: “Not hiring people simply because they smoke makes sense.”
 - 78 percent of all supervisors interviewed said a smoking ban would not enable their organization to accomplish the same work with fewer employees.
 - Of the 64 percent who said their organization had no smoking regulation, 63 percent believe a smoking ban would *worsen* morale; 26 percent said a ban would not affect morale.
 - Of the 36 percent who reported some kind of smoking regulation in their organization, fewer than three percent said the regulation was adopted because smoking interferes with job performance.
- From an economic viewpoint, firms that reject more productive smokers in favor of less productive nonsmokers will be less profitable than firms that do not discriminate in such a manner. Businesses making economic decisions affecting their employees should base those decisions on meaningful, direct data—not on estimates and unsupported propaganda.

- Although some smoking restriction advocates suggest that organizations not adopting “smoke-free environments” soon will be held liable by the courts to do so, 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. And in cases where employees have tried to use common law to impose smoking restrictions, the courts have generally sided with the employer, most recently in the 1983 decision in *Gordon v. Raven Systems & Research Inc.*
- A New Jersey Superior Court judge noted in 1983—in *Smith v. Blue Cross and Blue Shield of New Jersey*—that smokers are “after all human beings with needs and feelings like everyone else, and there simply is no warrant and no justification as a matter of civilized management of a work force to treat smokers as though they were moral lepers and to banish them to a remote isolated area of the workplace.”
- And in *Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board*—also in 1983—the court ruled an employer cannot unilaterally impose smoking restrictions when a collective bargaining agreement is in effect.
- Smoking restriction advocates cite three decisions to support their claim of a universal right to a tobacco smoke-free workplace: *Parodi v. Merit Systems Protection Board*, *Vickers v. Veterans Administration* and *Shimp v. New Jersey Bell Telephone Company*. Reliance on these cases, however, is misplaced.
- *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 thus 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. 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 against smokers in hiring raises troubling legal questions, too, if the discrimination has a disproportionate impact in terms of race or gender. 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?