

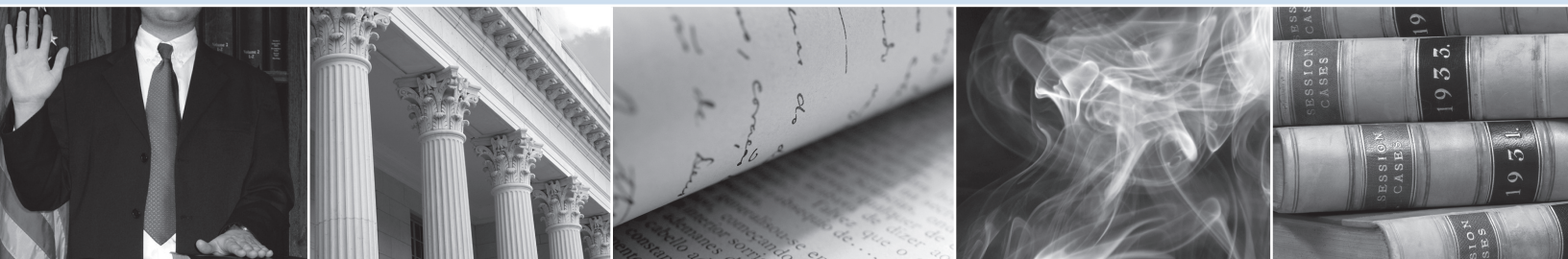
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Workplace Smoking: Options for Employees and Legal Risks for Employers

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Tobacco Control
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Workplace Smoking: Options for Employees and Legal Risks for Employers

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Introduction

Across the United States at work each day, many people are subjected to the dangerous and potentially deadly fumes of secondhand tobacco smoke. The U.S. Environmental Protection Agency has classified secondhand tobacco smoke in the most hazardous group of carcinogens,¹ and some studies have shown secondhand smoke to be even more toxic than smoke inhaled directly by smokers.² The U.S. Surgeon General has concluded that there is no safe level of exposure to secondhand smoke.³ Employees accumulate toxins in their bodies from the presence of secondhand smoke in the workplace,⁴ and nonsmokers who work in a smoking environment increase their risk of heart disease by 25 to 30 percent and their risk of lung cancer by 20 to 30 percent.⁵ Blue collar and service workers are disproportionately affected by secondhand smoke at their jobs,⁶ and employees of restaurants, bars and other hospitality businesses where smoking is allowed are especially likely to suffer the damaging effects of secondhand smoke.⁷

Advocates for clean air in the workplace have seen numerous successes over the past four decades. As of January 2008, 685 local governments and 35 states (plus the District of Columbia) have laws requiring 100 percent smokefree non-hospitality workplaces, and/or restaurants and/or bars.⁸ Moreover, at least two state occupational health and safety agencies have adopted regulations prohibiting smoking in certain enclosed places of employment.⁹

However, much of the U.S. population still is not covered by a comprehensive smokefree workplace law or regulation.¹⁰ This law synopsis explores policy options for employees to make their workplace smokefree and legal options for employees who remain exposed to secondhand smoke on the job. Section I discusses four policy approaches that an employee might pursue with coworkers and other advocates who want to turn workplaces into smokefree environments. Section II explains three types of legal actions that an employee might be able to take against his or her employer for exposure to secondhand smoke at work.

Key Points

- The U.S. Surgeon General has concluded that there is no safe level of exposure from secondhand smoke, and studies have shown that nonsmokers who work in a smoking environment increase their risk of heart disease by 25 to 30 percent and their risk of lung cancer by 20 to 30 percent.
- Despite the many successes of nonsmokers' rights advocates, much of the U.S. population is not covered by a comprehensive smokefree workplace law or regulation.
- Employees can pursue at least four policy strategies to eliminate secondhand smoke exposure in the workplace: (1) change state or local laws; (2) enact state occupational health and safety regulations; (3) change collective bargaining agreements; and (4) ask the employer to adopt a voluntary rule.
- Of these four options, changing state or local laws will have the most impact.
- If employees are exposed to secondhand smoke in the workplace, they may have viable legal claims against their employer in court.
- Employers can reduce their legal risks and help protect the health of their employees by voluntarily adopting smokefree workplace policies.

Section I – Advocating for Policy Change

Employees seeking to eliminate secondhand smoke at their jobs might want to advocate for policy change. A large body of scientific research has shown immediate improvements in indoor air quality and worker health when smokefree policies go into effect, so long as the policies are zero-tolerance.¹¹ It is important to note that the U.S. Surgeon General and the scientific community have found that the risks of secondhand smoke are not eliminated by the common practices of separating smokers from nonsmokers in the same airspace or installing ventilation systems.¹² Thus, any proposed policy change should be 100 percent smokefree.

At least four options for eliminating secondhand smoke in the workplace are available: passing state or local laws; enacting state occupational health and safety agency regulations; enforcing or changing collective bargaining agreements; and asking the employer to adopt a voluntary rule. The policy action that will have the most impact is a state or local law banning smoking in all workplaces. The other three types of policy actions are less promising.

State or Local Laws

Despite many recent successes of advocates for clean indoor air, as of March 2008, ten states lack any type of law restricting smoking in private workplaces.¹³ A host of other states have weak workplace smoking laws, many of which contain “preemption” clauses prohibiting cities and counties from passing stronger smokefree laws at the local level.¹⁴ Employees in these states can advocate for the enactment of comprehensive smokefree workplace laws at the state level. An effective statewide smokefree workplace law should expressly state that it is nonpreemptive.

Local governments, such as those at the municipal or county levels, also have the legal authority to pass smokefree workplace laws. Employees can push for local smokefree workplace ordinances so long as their state does not have

a law with a preemption clause forbidding local governments from adopting their own smoking-related laws.

Changing the law to prohibit smoking is an effective strategy for several reasons. Laws have broad and general applicability, and they can be drafted to provide for a range of government and citizen enforcement alternatives.¹⁵ Moreover, by drawing a line between socially acceptable and unacceptable behavior, laws are a strong expression of a community’s norms. Once a law is enacted, it tends to have permanence because it has survived legislative and executive consideration and because it benefits from principles of inertia. State and local smokefree workplace laws have had a proven and profound effect on smoking rates, indoor air quality, public health, and attitudes toward tobacco use.¹⁶

State Occupational Safety and Health Agency Regulations

A second policy avenue for requiring smokefree workplaces is to encourage a state occupational health and safety agency to enact smokefree workplace regulations. This approach has been less popular with advocates for clean indoor air and has had mixed results.

In the mid-1990s, state occupational safety and health agencies in Washington and Maryland implemented workplace smoking regulations.¹⁷ Washington’s regulations prohibited smoking in “office work environments,” except in specially ventilated areas.¹⁸ The regulations ultimately went into effect following an unsuccessful court challenge by cigarette manufacturers and two Washington companies.¹⁹ In



Maryland, the state regulations initially prohibited smoking in all “enclosed workplaces.”²⁰ Shortly thereafter, the Maryland Legislature reacted by enacting exceptions for bars, restaurants, and hotels.²¹ Recently, however, the Legislature reversed itself and prohibited smoking in nearly all workplaces including bars, restaurants and most rooms in hotels.²²

There are several drawbacks to a regulatory approach. First, regulations tend to have fewer enforcement options than laws. Second, regulations generally are not as well known and therefore are not as self-enforcing as laws. Third, enacting state administrative regulations requires a series of procedures, such as public comment periods and hearings, that can lead to a prolonged and protracted rulemaking process. For example, in Maryland, the regulations were proposed in 1993 and did not go into effect until late 1995 after three public hearings were held. Finally, regulations do not have the same durability as laws because—as evidenced in Maryland—a state legislature has the power to pass legislation weakening the regulations.

Collective Bargaining Agreements

A third policy avenue for unionized employees could be pressuring an employer to implement a smokefree workplace policy through a collective bargaining agreement (CBA). CBAs are an expression of the rights of workers and, thus, constitute a logical avenue for protecting the health of workers from secondhand smoke.

Technically, many CBAs allow for such a policy. The National Labor Relations Board has ruled that smoking policies are a condition of employment and must be negotiated through the collective bargaining process.²³ However, CBAs often contain a “management rights clause” stating that decisions about how the business is run rest with the employer.²⁴ Employers may unilaterally change workplace policies or practices—including smoking rules—without violating the CBA as long as those changes are within the scope of the authority reserved in the management rights clause.²⁵ Further, most CBAs contain a “health and safety clause” that requires employers to provide a healthy and safe workplace for employees.²⁶ Under a health and safety clause, employers may unilaterally institute health and safety rules without violating the CBA so long as the rules are reasonable.²⁷

However, it may be difficult to convince an employer

to use its power under a management rights or health and safety clause to implement a no-smoking policy if union leaders oppose such a policy. Because unions represent both smoking and nonsmoking employees, it is unclear whether union leaders would support smoking restrictions if employers negotiated with them regarding the terms of the rules.

Voluntary Employer Rules

A final policy option involves the adoption of smokefree workplace rules by employers. Employees can press employers to adopt smokefree workplace rules for a number of reasons. For instance, smokefree workplace rules reduce the threat of litigation and workers’ compensation costs.²⁸ Smokefree workplace policies also reduce workplace absenteeism and occupational illnesses due to the improved respiratory health of employees.²⁹

The major downside of an employer’s voluntary policy is that employers can change their minds at any time and reverse the policy. Additionally, there are no government agencies to hold employers accountable for enforcing policies that they adopt voluntarily. However, an employer may be creating a binding obligation by establishing a smokefree workplace policy and informing employees of this policy.³⁰

Section II – Possible Legal Claims

Workers who are not currently protected by state or local laws creating smokefree workplaces may have viable legal claims to make against their employers in court. For example:

- An employee could file a workers’ compensation claim against an employer for illness or injury due to exposure to secondhand smoke on the job.
- An employee could file a disability discrimination claim that an employer failed to provide a “reasonable accommodation”—in this instance, protection from exposure to secondhand smoke—if the worker has a disability that is exacerbated by exposure to secondhand smoke.
- An employee could file a claim that the employer failed to provide a safe workplace, based on a common law duty.

It is important to note that any type of litigation can be costly and time-consuming, although a lawyer may agree to represent an employee on a contingency fee basis. Often, advocates tend to focus on the passage

of clean indoor air laws, which offer a wider range of protection than litigation. Nevertheless, litigation is a powerful tool, one that is likely to be taken very seriously by an employer.

Workers' Compensation

State workers' compensation laws are designed to protect workers from injuries and illnesses that arise out of and in the course of employment. The state laws are not based on fault; an injured worker can recover benefits, including compensation for temporary or permanent loss of income and medical expenses, without proving that the employer was negligent. A state administrative agency usually oversees the workers' compensation system so that employees may recover benefits promptly. In most cases, the state workers' compensation system prevents the employee from also suing the employer in tort.³¹

Employees have succeeded in individual workers' compensation cases involving secondhand smoke-related injuries when (1) the employee suffered an asthmatic or allergic reaction as a result of exposure to secondhand smoke in the workplace; and (2) the employee demonstrated exposure to a heavy concentration of secondhand smoke for several years.³² Because the outcome of workers' compensation cases has varied widely across the states, an employee's ability to recover will depend heavily upon the state in which the employer is located.

Asthmatic or Allergic Reactions

Employees have successfully asserted workers' compensation claims where secondhand smoke caused an asthmatic or allergic reaction on the job. In one case, New York's Workers' Compensation Board awarded benefits to an employee who suffered asthma attacks at work as a result of exposure to secondhand smoke in a crowded office.³³ The Board ruled that the employee had sustained an occupational injury as a result of the repeated exposure to smoke in the office.³⁴ There were many smokers in the vicinity of the employee's work station, and she had suffered two severe asthma attacks at work that required she be taken to the emergency room.³⁵

Similarly, a New Mexico court held that an employee's allergic reaction and collapse stemming from exposure to secondhand smoke at work constituted an accidental injury.³⁶ The employee claimed that constant exposure to cigarette smoke in

the work environment triggered the allergies that, in turn, caused him to collapse.³⁷ The court upheld a workers' compensation award for the employee, stating that "the happenings may be gradual and may involve several different accidents which culminate in an accidental injury."³⁸

Prolonged Exposure to Secondhand Smoke

In some instances, plaintiffs exposed to heavy concentrations of secondhand smoke in the workplace for extensive periods of time have been able to assert workers' compensation claims.³⁹ In a New Jersey case, the plaintiff shared an office with a chain-smoking coworker for twenty-six years and contracted tonsil cancer.⁴⁰ The plaintiff's secondhand smoke exposure at work was regular and long-standing, and he attempted to avoid smoke from every other source but his coworker.⁴¹ A workers' compensation judge concluded that the plaintiff's tonsil cancer was a compensable occupational disease, and ordered the employer to pay past and future medical expenses and temporary disability benefits.⁴²

Although the New Jersey case is significant because the court recognized that secondhand smoke in the workplace can cause cancer, a review of workers' compensation cases shows that employees will be least likely to recover in cases when they suffer illnesses with longer latency periods, such as cancer or lung disease, that could have been caused by a combination of secondhand smoke exposure on the job and factors outside of the workplace.⁴³ And in some states courts have found that the workers' compensation laws do not provide coverage for injuries resulting from secondhand smoke in the workplace.⁴⁴ For example, some laws exclude diseases to which the employee might be exposed outside of the workplace, which could include illnesses caused by secondhand smoke.⁴⁵

As scientific evidence supporting the dangers of secondhand smoke exposure continues to mount, employees may be more likely to recover in workers' compensation cases as courts are faced with increasing documentation of the actual harm to workers caused directly by exposure to secondhand smoke.

State and Federal Disability Laws

If an employee is considered "disabled" under state or federal disability laws and exposure to secondhand smoke exacerbates that disability, the employer may

be required to make a “reasonable accommodation” to protect the employee from exposure to secondhand smoke.

In general, courts have held that an employee can be considered disabled under the Americans With Disabilities Act (ADA) or the federal Rehabilitation Act of 1973 (Rehab Act) if secondhand smoke substantially impairs the employee’s ability to breathe, and the impairment occurred both in and out of the workplace.⁴⁶ In determining whether an employer reasonably accommodated an employee’s secondhand smoke-related disability, employees have prevailed where the employer made little or no effort to address the employee’s request for a smokefree workplace.

“Disability” Under the ADA and the Rehab Act

Determining whether an individual’s condition qualifies as a disability is decided on a case-by-case basis.⁴⁷ In most instances, individuals bringing secondhand smoke-related lawsuits will claim that



they are disabled under the ADA and the Rehab Act because they have a “physical or mental impairment that substantially limits” a “major life activity.”⁴⁸

Employees appear to have been most successful in ADA cases when they argue that secondhand smoke both on and off the job substantially limited their ability to breathe. Courts especially take note of whether the employee ever sought medical care, left work due to the condition, or continued to participate in activities of daily living.

For example, in *Service v. Union Pacific Railroad Company*, an employee had suffered several asthma attacks requiring medical treatment while working in locomotive cabs in which coworkers had recently smoked.⁴⁹ The court rejected the employer’s assertion that the employee’s condition was temporary, noting that an employee “need not be in a constant state of distress or suffer an asthmatic attack to qualify as disabled under the ADA.”⁵⁰ The court “easily” found that genuine issues of material fact existed as to whether the employee’s asthma substantially limited his major life activity of breathing.⁵¹

However, in some cases, courts have found that employees were not able to qualify as disabled under federal disability laws. For example, in some cases, the court found that the employee’s impairment was not “substantial” if the employee’s ability to breathe was not impaired both on and *off* the job.⁵² Or, in some cases, courts have found that the employee did not qualify as substantially limited in the “major life activity” of working if the exposure to smoke impaired the employee’s ability to work only in that particular job but not in a broad class of jobs.⁵³ Each case is evaluated by the court based on the specific facts of the situation.

Also, courts must consider any factors that may mitigate the plaintiff’s impairment, such as an inhaler or other medication.⁵⁴ However, the presence of mitigating measures does not mean that an individual is not covered by the ADA or Rehab Act. An individual still may be substantially limited in a major life activity, notwithstanding the use of a mitigating measure like medicine, which may only lessen the symptoms of an impairment.⁵⁵ For example, in *Service*, the court noted that the employee could not prevent his asthma attacks by using inhalers, and even when he used medicine, his asthma could not always be controlled.⁵⁶

“Reasonable Accommodations” Under the ADA and Rehab Act

In addition to disputing whether the employee can be classified as disabled, the second major area that is litigated in secondhand smoke cases brought under the ADA and Rehab Act is whether the employer’s accommodations of the employee’s impairment were reasonable. A reasonable accommodation includes “modifications or adjustments to the work environment ... that [would] enable a qualified individual with a disability to perform the essential functions of that position.”⁵⁷ An employer need not accommodate an employee if doing so would impose an “undue hardship,”⁵⁸ which is defined as “an action requiring significant difficulty or expense.”⁵⁹

Employees with secondhand smoke-related disabilities have prevailed on the issue of reasonable accommodation where the employer made little effort to address the employee’s request for a smokefree workplace. In *Service*, the court found that although the employer barred employees from smoking in the plaintiff’s presence, it did nothing to accommodate the plaintiff’s sensitivity to residual smoke.⁶⁰ The employer claimed that providing the employee with a smokefree work environment would have constituted an undue hardship but offered no evidence of this.⁶¹ In fact, studies have shown that smokefree workplace policies and laws are inexpensive to implement and do not harm businesses that have implemented them.⁶²

In cases where the employer fails to make the reasonable accommodation requested under the ADA, a disabled employee may seek money damages, injunctive relief (a court order to prevent future harm), and attorneys’ fees, with some exceptions.⁶³

Secondhand Smoke Claims Under State Disability Rights Laws

A number of states have disability rights laws that provide broader protections than those found in the ADA and the Rehab Act. In New York, for example, state law does not require that an employee identify a major life activity substantially limited by his or her impairment in order to be categorized as “disabled.”⁶⁴ An individual may have a disability under New York law if the impairment is demonstrable by medically accepted techniques.⁶⁵ New Jersey law contains a similar provision.⁶⁶

California’s Fair Employment and Housing Act

(FEHA) also provides broader protections than those provided under federal law.⁶⁷ For example, FEHA requires an impairment that *limits* a major life activity⁶⁸ rather than the ADA and Rehab Act requirement that an impairment *substantially limit* a major life activity.⁶⁹

Sensitivity to secondhand smoke can constitute a disability under FEHA, and employers have been required to provide reasonable accommodations for employees with this disability.⁷⁰ In *County of Fresno v. Fair Employment and Housing Commission*, the employees demonstrated that because of respiratory disorders, exposure to tobacco smoke limited their ability to breathe.⁷¹ The court held that the employees were “physically handicapped within the meaning of [FEHA].”⁷² The court then held that the employer’s efforts to accommodate the employees were not reasonable.⁷³ The employer had placed smokers and nonsmokers at separate ends of the room, had asked smokers to be “considerate” of nonsmokers, and eventually moved the plaintiffs into an office adjacent to an office where employees smoked.⁷⁴ The court held that the county failed to make a reasonable accommodation because it had not provided a smokefree environment in which the employees could work.⁷⁵

Advocates should examine whether their state’s disability rights laws differ significantly from federal law, both in terms of the protections provided by the law and the types of damages available to the employer if the law is violated.

As the above cases illustrate, disability lawsuits can be an effective way for an individual who meets the legal definition of “disabled” to get relief from secondhand smoke exposure in the workplace. However, because the number of people who qualify for these federal protections is limited, disability lawsuits are not an ideal vehicle for advocates seeking workplace-smoking restrictions that protect a broad group of employees. Nonetheless, an accumulation of individual lawsuits could build a case for employers to adopt smokefree workplace policies voluntarily to avoid future liability.

Duty to Provide a Safe Workplace

In most jurisdictions, employers have a legal duty to provide employees a reasonably safe work environment.⁷⁶ This duty arises either from state law or from the “common law,” which refers to the law

derived from court decisions rather than from laws or constitutions. Several courts have examined whether the employer's common law duty to provide a safe workplace includes a duty to provide a working environment reasonably free from tobacco smoke.⁷⁷ Some courts have held that such a duty existed where plaintiff-employees complained to their employers regarding illnesses caused by workplace secondhand smoke, and the employers had the ability to remedy the situation.⁷⁸

Court decisions finding that employers breached their duty to provide a safe workplace share common elements: e.g., the employer knew that secondhand smoke was harmful to the plaintiff-employee; the employer had authority, ability, and reasonable means to control secondhand smoke; and the employer failed to take reasonable measures to control secondhand smoke.

For example, in *Shimp v Bell Telephone Co.*,⁷⁹ an employee who worked in an open area where other employees were permitted to smoke sought an injunction to require her employer to prohibit smoking in the area. The employee was severely allergic to tobacco smoke and was forced to leave work on several occasions after becoming physically ill due to secondhand smoke exposure.⁸⁰ The court took judicial notice of the extensive evidence submitted by the employee of the health hazards that secondhand smoke poses to nonsmokers as a whole.⁸¹ Relying on the employer's common law duty to provide a safe work environment, the court granted the injunction and ordered the employer to restrict the smoking of other employees to nonwork areas.⁸² The court found that the injunction would not pose a hardship for the employer because the company already had a rule barring employees from smoking around telephone equipment.⁸³

Before arguing that an employer has breached its duty to provide a reasonably safe work environment, advocates should determine whether (1) the potential plaintiff informed the employer about the detrimental effects that secondhand smoke had upon the employee's health; (2) the employer had the ability to implement reasonable restrictions on smoking in the workplace; and (3) the secondhand smoke in the employer's workplace was potentially harmful not only to the plaintiff, but to nonsmoking employees in general. Some courts have found no duty to provide a smokefree workplace where individual employees

failed to provide evidence of secondhand smoke's effects upon nonsmokers in general.⁸⁴

However, since the 1976 decision in *Shimp*, decades of additional research on the effects of exposure to secondhand smoke has convincingly demonstrated the risk such exposure has for workers. In other cases decided more recently than *Shimp*, courts have agreed that employers can breach the duty to provide a safe workplace if they fail to maintain a smokefree work environment.⁸⁵ The accumulation of evidence documenting the dangers of exposure to secondhand smoke should support plaintiffs in proving the potential harm of secondhand smoke exposure to all employees.

Advocates should note that, in most cases, the state workers' compensation system is the only remedy for obtaining individual financial awards for job-related injuries and illnesses. In these states, employees should use the workers' compensation system to recover money damages for their injuries. However, if an employee is *not* seeking money damages but instead is seeking an injunction (e.g., a court order requiring a smokefree workplace), the employee may pursue a claim based on the common law duty to provide a safe workplace.⁸⁶ Additionally, some state courts have ruled that workers' compensation laws do not provide coverage for injuries resulting from



secondhand smoke in the workplace.⁸⁷ In those states, an employee may be able to pursue a claim based on the common law duty to provide a safe workplace and seek both money damages for the employee's injury and an injunction to prevent future harm.

Section III – Conclusion

Despite many gains made by clean air advocates, much of the U.S. population is still not protected by a comprehensive smokefree workplace law or regulation. Employees can pursue at least four policy strategies to eliminate secondhand smoke in the workplace: passing state or local laws; enacting state occupational health and safety agency regulations; changing collective bargaining agreements; and adopting voluntary rules by the employer. A state or local law prohibiting smoking in all workplaces will have the broadest effect of any of these approaches. Employees who continue to be exposed to secondhand smoke at the workplace may be able to file legal claims against their employer, such as a workers' compensation claim, a disability discrimination claim, or a claim that the employer failed to provide a safe workplace. Given this legal risk, employers should voluntarily adopt smokefree workplace policies and support state or local legislation requiring smokefree workplaces. Such policies not only help fulfill an employer's legal obligation to provide a safe workplace, they also reduce the employer's legal risk and help protect employees from harm.

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- 21 Md. CODE ANN., LAB. & EMPL. § 2-106 (West 2005).
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- 24 See Glorian Sorensen et al., *Labor Positions on Worksite Tobacco Control Policies: A Review of Arbitration Cases*, 18 J. PUB. HEALTH POL'Y 433, 443 (1997).
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- 35 *Id.* at 982.
- 36 *Schober v. Mountain Bell Telephone*, 600 P.2d 283, 284 (N.M. 1978).
- 37 *Id.*
- 38 *Id.*
- 39 *Husband Wins Claim in Secondhand Smoke Death*, N.Y. TIMES, Dec. 17, 1995, at A28.
- 40 *Magaw v. Board of Educ.*, 731 A.2d 1196, 1199 (N.J. Super. Ct. App. Div. 1999).
- 41 *Id.*
- 42 *Id.* at 1201-05.
- 43 See, e.g., *ATE Fixture Fab v. Wagner*, 559 So. 2d 635 (Fla. Dist. Ct. App. 1990); *Palmer v. Del Webb's High Sierra*, 838 P.2d 435 (Nev. 1992); *Kellogg v. Mayfield*, 595 N.E.2d 465 (Ohio Ct. App. 1991); *Appellant v. Respondent*, No. 93744 (Tex. Workers' Comp. Comm'n Oct. 1, 1993); Fox, *supra* note 32; Melissa A. Vallone, *Employer Liability for Workplace Environmental Tobacco Smoke: Get out of the Fog*, 30 VAL. U. L. REV. 811, 849-850 (1996).
- 44 *Mack v. Rockland County*, 71 N.Y.2d 1008, 1009 (N.Y.1988).
- 45 See, e.g., *Palmer v. Del Webb's High Sierra*, 838 P.2d 435, 435 (Nev. 1992).
- 46 *Bond v. Sheahan*, 152 F. Supp. 2d 1055, 1064-65 (E.D. Ill. 2001); *Service v. Union Pacific R.R. Co.*, 153 F. Supp. 2d 1187, 1191-92 (E.D. Cal. 2001); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 207 (E.D.N.Y. 1997).
- 47 *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); 29 C.F.R. § 1630.2(j) (2000).
- 48 42 U.S.C. § 12102(2) (2006).
- 49 153 F. Supp. 2d 1187, 1189-90 (E.D. Cal. 2001).
- 50 *Id.* at 1192.
- 51 *Id.*
- 52 See, e.g., *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) ("there is not enough evidence of off-the-job breathing problems to find a substantial limitation of that life activity"); *Chan v. Sprint Corp.*, 351 F. Supp. 2d 1197, 1204-06 (Kan. 2005) (employee continues to participate in numerous activities of daily living including taking care of herself, shopping at stores where smokers are not prevalent, cooking, eating, traveling (although she limits her travel), and attending professional soccer games, although she monitors when she arrives and leaves); *Keck v. New York State Office of Alcoholism & Substance Abuse Servs.*, 10 F. Supp. 2d 194, 199 (N.D.N.Y. 1998) (employee did not allege specific instances of difficulty breathing outside of work, and she exercised regularly) .
- 53 *Muller*, 187 F.3d at 312; *Gupton v. Commonwealth of Virginia*, 14 F.3d 203, 205 (4th Cir. 1994); *Keck*, 10 F. Supp. 2d at 199.
- 54 *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999).
- 55 *Id.* at 487-88.
- 56 *Service v. Union Pacific R.R. Co.*, 153 F. Supp. 2d 1187, 1191-92 (E.D. Cal. 2001).
- 57 29 C.F.R. § 1630.2(o)(ii) (2000).
- 58 42 U.S.C. § 12112(b)(5)(A) (2000).
- 59 42 U.S.C. § 12111(10)(A) (2000).
- 60 *Service*, 153 F. Supp. 2d at 1193.
- 61 *Id.*
- 62 See, e.g., Benjamin C. Alamar & Stanton A. Glantz, *Smoke-Free Ordinances Increase Restaurant Profit and Values*, 22 CONTEMP. ECON. POL'Y 520, 525 (2004); Stanton A. Glantz, *Smoke-Free Restaurant Ordinances Do Not Affect Restaurant Business*, 5 J. PUBLIC HEALTH MGMT. PRAC. vi (1999); Michelle M. Scollo et al., *Review of the Quality of Studies on the Economic Effects of Smoke-Free Policies on the Hospitality Industry*, 12 TOBACCO CONTROL 13, 14 (2003).

- 63 Mary L. Topliff, *Remedies Available Under Americans with Disabilities Act* (42 U.S.C.A. §§ 12101 et seq.), 136 A.L.R. FED. 63 (1997).
- 64 “The term ‘disability’ means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. . . .” N.Y. EXEC. LAW § 292(21) (2005).
- 65 *Id.*
- 66 N.J. STAT. ANN. § 10:5-5 (West 2007).
- 67 CAL. GOV’T CODE § 12926.1 (West 2007).
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- 70 County of Fresno v. Fair Employment & Housing Comm’n, 226 Cal. App. 3d 1541, 1548-50 (1991).
- 71 *Id.* at 1549.
- 72 *Id.* at 1550.
- 73 *Id.* at 1555-56.
- 74 *Id.* at 1550-51, 1555.
- 75 *Id.* at 1556.
- 76 RESTATEMENT (SECOND) OF AGENCY § 492 (1958).
- 77 See Thomas G. Fischer, *Employer’s Liability to Employee for Failure to Provide Work Environment Free from Tobacco Smoke*, 63 A.L.R. 4th 1021 (2003).
- 78 See Melissa A. Vallone, *Employer Liability for Workplace Environmental Tobacco Smoke: Get out of the Fog*, 30 VAL. U. L. REV. 811, 849-850 (1996).
- 79 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).
- 80 *Id.* at 410.
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- 84 Gordon v. Raven Systems & Research, Inc., 462 A.2d 10, 15 (D.C. 1983).
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- 86 See Shimp, 368 A.2d at 413; Mark A. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW § 483 (4th ed. 1998).
- 87 McCarthy, 759 P.2d 351.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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