

## **SMOKING RESTRICTIONS IN THE WORKPLACE: THE LABOR PERSPECTIVE**

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### **ABSTRACT**

Scientific evidence linking smoking in the workplace to a variety of health problems has created a dilemma for unions in the United States. Obligated by the political necessity to represent the economic interests of their membership, American labor organizations have had to balance the rights of smokers with those of nonsmokers. Their positions have ranged from trying to avoid the issue entirely, opposing unilateral employer actions or legislative restrictions, and supporting voluntary programs that offer smoking cessation aid to workers desiring to quit. In general, unions favor collectively bargained solutions where labor and management voluntarily reach agreement on this controversial issue.

Since the medical discovery that health risks from smoking apply to smokers and nonsmokers alike, smoking in the workplace has become a troublesome and complex issue. Scores of studies have provided evidence of a link between involuntary tobacco smoke and lung cancer and heart disease. Several federal agencies, including the National Institute for Occupational Safety and Health (NIOSH), the Surgeon General, the Environmental Protection Agency (EPA), and the National Academy of Science, have come to the forefront on this issue. In 1992, the EPA ranked indoor air pollution as one of the top five environmental health risks and upgraded environmental tobacco smoke to a known human carcinogen. The Occupational Safety and Health Administration (OSHA) is currently

awaiting twenty-two regulations on indoor air quality that are in the final-rule stage, eleven with final action dates scheduled by the end of 1993 [1].

Management proponents of a smoke-free workplace contend that restrictions on smoking will save lives and money by reducing absenteeism, health insurance costs, property maintenance, and legal liability, in addition to providing a healthier work environment. Many companies have designated smoking areas for their employees; however, some firms have found the cost of this seemingly reasonable step to be prohibitive and as a consequence, have banned smoking entirely.

Blue-collar workers are more likely to be exposed to workplace agents that in combination with overall higher smoking rates, place blue-collar workers at higher risk for cancer and chronic lung disease [2, p. xi]. Moreover, blue-collar workers are at significantly higher risks for all smoking-related diseases and their smoking cessation rates are less than those of white-collar workers [2, p. xi].

Unions as well as employers must balance the rights of smokers with those of nonsmokers. Since unions have a duty to represent individual workers' rights while stressing majority rule, they must address the concerns of members who desire to see smoking prohibited in the workplace while not overlooking the interests of others who may demand the right to smoke. This article explores the approaches taken by unions in their efforts to fairly represent both constituent blocs in the issues accompanying smoking restrictions in the work environment.

### **A BALANCING ACT**

Few American unions have championed the issue of workplace smoking restrictions, other than to oppose unilateral employer actions or legislation. Many labor organizations have avoided the issue due to:

1. Concern about alienating a block of members if sides are taken on the smoking issue;
2. Fear that focusing on the hazards of smoking will undermine union attacks on traditional occupational hazards;
3. Unwillingness to dictate standards of personal behavior for members;
4. Concern that smoking restrictions will endanger the economic viability of the tobacco industry. Unions represent more than 20,000 tobacco workers [3, p. 25].

Despite these concerns, union officials tend to support restrictions in situations where the policy will satisfy both smokers and nonsmokers.

At the national union level, officials have opposed outright bans on smoking in the workplace. In early 1986, the AFL-CIO Executive Council declared its

opposition to both employer-mandated and legislative smoking restrictions, calling for smoking disputes to “be worked out voluntarily in individual workplaces between labor and management in a manner that protects the interests and rights of all workers [4, p. 33]. The only antismoking efforts endorsed by the council were voluntary programs that offer smoking cessation aid to workers who want to quit.

Unions commonly respond to employer initiatives, or attempt to reach accommodations for individual employees who claim medical difficulties due to smoke. They will usually negotiate policies that either separate smokers and nonsmokers, or provide convenient areas for smoking breaks. Sometimes the policies will be included in collective bargaining agreements, since, in general, unions view smoking restrictions as a matter for negotiations and rarely initiate workplace smoking restrictions [4, p. 33]. Many local and national union leaders have expressed reservations about taking the lead on the issue with the risk of becoming embroiled in disputes between smoking and nonsmoking members. Most believe that there are more important and less politically sensitive issues to be addressed. Nevertheless, a number of union officials have supported the adoption of workplace smoking restrictions:

In 1985, Pacific Northwest Bell, which employs about 15,000 people, some 25 percent of whom are smokers, became one of the largest public employers to ban smoking in any of its facilities. The Communication Workers of America (CWA) represented nearly two-thirds of the company’s employees. The CWA met directly with the president of the company and was involved from the onset in policy development [5].

At the state and local government level, union leaders faced with the issue have frequently worked to fashion policies that attempt to reconcile the competing demands of smokers and nonsmokers [3, p. 25]. Without exception, union officials have strongly supported smoking restrictions related to safety or product integrity.

### **COLLECTIVE BARGAINING DEVELOPMENTS**

At the bargaining table or in less formal negotiations, unions generally press for the accommodation of smokers and nonsmokers. A number of complex issues arise: Are workers going to be assisted in smoking cessation? Are there places to smoke for workers who want to smoke? Does the policy protect those who don’t want to consider quitting? Generally, national union leaders suggest that local unions address these issues as they see fit [6].

Unionized workplaces are required by sections 8(a)(5) and 8(d) of the National Labor Relations Act to bargain in good faith with unions about wages, hours,

and other terms and conditions of employment [7]. There is a consensus that if the union does not concur with the proposed policy, the employer has a duty to bargain before making a unilateral decision to initiate a smoke-free policy. The reason for this position is that a smoke-free policy could constitute a change in conditions of employment or working conditions. An employer who has bargained in good faith to impasse, can then proceed to introduce a smoke-free policy without being guilty of an unfair labor practice [8].

A union may decide not to bargain on the smoking issue. The argument has been made that protecting employees from involuntary smoke is a right and the obligation of the employer, and that the failure to provide such protection could later expose the employer to claims of negligence by non-smokers. Therefore, smoking should be eliminated just as alcohol and drugs are prohibited on the job, or safety equipment is required [8]. On health issues, once a minimum standard is established, negotiators can bargain to raise the standard but cannot lower it. In rare instances, labor contracts have included language establishing smoking breaks or smoking areas. Unless there is a relevant law restricting or prohibiting smoking, such clauses need to be renegotiated with the union as part of the implementation of a smoke-free workplace [8].

A report prepared for local negotiators by the American Federation of State, County, and Municipal Employees (AFSCME) stated that both smokers and nonsmokers have legitimate rights. The report suggested:

1. Workplace smoking regulations should be treated like any other indoor air pollution or health and safety problem—not as a moral issue or by punishing the victim;
2. The rules should not be unilaterally imposed by management, but should be a subject for contract negotiations or put on the agenda of the joint labor management committee or health and safety committee;
3. Nonsmokers must be guaranteed a safe and healthful workplace, but the rights of smokers must also be recognized. Rules may differ;
4. Inefficient ventilation systems that allow all office pollutants to build up should be upgraded to clean the air;
5. Smokers should not be discriminated against by management;
6. Smoking cessation programs should be offered for all employees who want to participate [3, p. 25].

Union officials advocated further education on the hazards of smoking and the use of voluntary smoking cessation programs. The Communication Workers of America union produced a pamphlet, *Cutting Through the Smoke Screen*, which details the many health hazards posed by smoking and

the effects on health of the combination of smoking and exposure to hazardous materials, as well as the possible health problems of nonsmokers exposed to smoke [3, p. 25].

## OPPOSITION TO MANDATORY CESSATION

Union leaders have voiced serious reservations about compelling members not to smoke, even in the face of evidence that occupational exposure combined with smoking increases the risk of serious illness. This attitude is due in part to the unions' belief that employers must first eliminate hazardous working conditions. Union officials contend that smoking still remains a decision of personal choice [3, p. 25].

Smokers may claim that smoking cessation or even nonsmoking policies are a violation of their constitutional rights, right to privacy, or constitute discrimination against a handicapped person, one who is nicotine-dependent. To date, however, the courts have not qualified smokers as handicapped under the statutory definition and the Rehabilitation Act of 1973 has never qualified drug abusers as handicapped. As with nonsmokers seeking handicapped status, courts may require smokers to demonstrate that giving up smoking at work would substantially impair a major life activity [9]. Also, smokers have encountered antismoking programs of varying degrees of strictness that have been implemented by fire departments across the country, since under certain state laws, municipalities are liable for disability pay to firefighters, and some times police officers, who have developed respiratory illnesses for any reason [10]. The following case involving forced cessation due to industrial hazards was successfully brought by employees against management:

The USG Acoustical Products Company (formerly United States Gypsum) announced that employees working in its plants must give up smoking, even at home, or lose their employment. Mineral fibers used in the production of acoustical tiles were believed to be especially hazardous to smokers. The company planned to conduct lung tests to make sure workers were complying with the ban and to fire those who had not quit smoking. This policy affected about 2,000 workers in eight states, and this was the first time a company attempted to regulate smoking off the job. Employees were given the opportunity to enroll in a company-sponsored program to help them quit smoking or could elect to enroll in a program of their own choosing at company expense [11]. Under pressure from various groups concerned about invasion of privacy and lack of respect for workers' rights, the company announced that employees who had not quit smoking would not necessarily be fired, but that each situation would be evaluated on a case-by-case basis [12].

## DISPUTES AND GRIEVANCES

Local union officials often encounter political problems that develop over smoking situations. Members' personal preferences collide, and the issues generally become part of the steward's responsibility to resolve. Potential legal liability stemming from duty-of-fair-representation lawsuits brought by either smokers or nonsmokers also lurks on the horizon. To stem this threat, local union officials attempt to accommodate the needs of the minority. In the case of a worksite where the majority of the workers are nonsmokers, it becomes incumbent on the union leadership to sit down with the smokers and find a middle ground to placate both groups [4, p. 35]. The situation is more difficult if management has acted unilaterally to restrict smoking, a policy which enrages smokers but one popular with the nonsmokers who then side with management [4, p. 36]. Many of these disputes end in arbitration or in unfair labor practice charges as demonstrated by the following cases:

### ARBITRATION

In **VME Americas, Inc. v. Auto Workers Local 70**, the union charged that 1) the total ban against smoking on *company premises* is unreasonable and invalid insofar as it includes *adjacent areas such as grounds and parking lots*. Despite the contention that efficiency would be disrupted if employees were permitted to go outside the plant and smoke, cigarettes smoke readily dissipates outside and employees smoking in their cars have no effect on health or safety of others; and 2) the employer failed to give the union opportunity to provide advice as to the content of the no-smoking rule before posting it for employees despite the contractual requirement that the employer *make reasonable rules regarding smoking* that specifies they be made *after consultation with the union*.

The mediator found the smoking ban *reasonable* as applied inside company buildings but it is *unreasonable* and in violation of Section 106 as applied to outside areas. She also ordered management to meet with the union within ten working days for consultation regarding revisions to bring the policy in conformity with the ward [13].

In **Cereal Food Processors, Inc. and American Federation of Grain Millers, Local 99**, the flour mill imposed a policy prohibiting smoking in all of its buildings without prior consideration by the safety committee. The union claimed that right to smoke in designated areas was a working condition that had become past practice and a mandatory subject of bargaining, despite the collective bargaining contract that vested company with exclusive rule-making authority. That authority included the right to change rules. The committee's (1) failure to consider the policy prior to implementation did not invalidate it due to the

committee's limited function; (2) the right to smoke was not protected by statute or by U.S. or state constitutions; and (3) company had concerns about possible explosion and fire from grain dust, effect of smoking on employees' health, and contamination of food products for human consumption. The grievance was denied [14].

In **Koch Refining Company and Oil v. Chemical and Atomic Workers International Union Local 6-662**, the mediator found that imposition of a total smoking ban throughout the oil refinery was not arbitrary or capricious, where the collective bargaining contract gives the company the right to make reasonable rules, the no-smoking rule applied to everyone on site. The rule was not implemented to change employees' offsite behavior. It was imposed in order to protect against fires and to promote a healthier workforce [15].

In **City of Hartford, Connecticut and the American Federation of State County and Municipal Employees, Council 4, Local 1716**, the City Police Department improperly banned smoking, even though the City manager had the right under the collective bargaining contract to *make reasonable changes* and the change was made to protect sensitive computer and fire suppression equipment. The contract also states that city must discuss proposed changes with the union prior to implementation, and City made no attempt to do so. Grievance sustained and parties ordered to resume bargaining on implementation of smoking policy within 30 days [16].

### NATIONAL LABOR RELATIONS BOARD

In **W-I Forest Products Company, a Limited Partnership, and Lumber and Sawmill Workers Local 2841**, the union alleged that implementation of smoking ban violated Section 8(a)(5) and (1) of the Act because it was done without consent of the union and that the smoking ban was covered by a Closure of Issues clause in a strike-settlement agreement. The administrative judge dismissed the complaint on three independent grounds:

1. that a smoking ban is not a mandatory subject of bargaining insofar as a union seeks to eliminate or restrict the ban;
2. that even assuming such a ban is a mandatory subject generally, the changes in smoking restrictions reflected did not represent a material and substantial change from existing restrictions; and
3. even if a bargaining obligation existed, the Union had waived its bargaining rights and rejected the closure of issues clause. The Board dismissed the complaint [17].

The majority of union grievances center around smokers' rights in smoke-free workplaces; however, the reverse situation where nonsmokers are the grievors is steadily increasing:

The Contra Costa County Central Labor Council favored 100% smoke-free workplaces. Injured workers and union officials (SEIU and others) cited data from a recent study that showed cancer risk among restaurant workers as twice that of other workers with a four-fold risk of lung cancer for waitresses. Several municipalities approved ordinances banning smoking in workplaces and restaurants [18].

## SMOKING AND INDUSTRIAL HAZARDS

Reducing occupational health hazards is a primary objective of labor unions. Union health and safety experts acknowledge the synergistic effect of smoking and exposure to certain industrial agents, such as asbestos, coal dust, cotton dust, radiation, and various organic chemicals:

Smoking impairs the clearance of asbestos and increases retention of fibers in epithelial airways, induces causative agents of asbestosis and asbestos-related malignancies, and damages bacteriophage DNA. The Centers for Disease Control report that lung cancer morbidity and mortality rates are significantly higher in asbestos workers who smoke [19].

Union officials are reluctant to own up to scientific evidence in the event that it would undermine efforts to win disability claims involving workers who smoke. Collective bargaining prevented implementation of a no-smoking policy in the Johns-Manville asbestos company in 1980 [20]. In that case the union successfully challenged an asbestos manufacturer's attempt to ban smoking. Some unions have taken the middle ground, stating that although scientific evidence is present, political pressures in recent Republican administrations put more stress and fault on the workers.

## THE SURGEON GENERAL'S REPORT

Union officials unanimously voiced their criticism of the 1985 Surgeon General's report on smoking in the workplace at the February 1986 AFL-CIO Executive Council Meeting [3, p. 26; 27]. The Surgeon General's statement that smoking is a greater cause of disability and death among the majority of U.S. workers than traditional workplace hazards upset the unions. The report also stated that smoking and environmental exposures engender more disease than they do separately—the synergistic effect [2].

Labor leaders saw the report as *inaccurate* and felt that it fostered a *blame the victim* mentality, which in turn undermined efforts to clean up the workplace [3, p. 26]. Union officials charged that a scientist linked to the asbestos industry was involved in the report preparation. The asbestos industry has



attempted to reduce its liability for asbestos-related illness by tying asbestos-related illnesses to smoking and placing responsibility on the smoking employees. Organized labor also had problems with the antismoking stance of Surgeon General Koop, particularly on the issues of sidestream smoke [3, p. 26].

Union officials charged that workplace smoking issues were being used by employers to derail concern about traditional workplace toxins and to reduce financial compensation for workers injured by such toxins [4, p. 34]. Unions are suspicious of efforts to restrict employee smoking, particularly since air quality and other industrial hazards are not being addressed [4, p. 34, 22].

### THE OSHA STANCE

Despite the evidence on health risks, OSHA has also been reluctant to pass a ruling on environmental tobacco smoke. OSHA had been evaluating responses from industry, unions, individuals, and other government agencies as well as public comments on both sides of the issue. The AFL-CIO and fourteen other affiliated unions submitted their own petition to OSHA to promptly issue indoor air regulations, including rulings on *sick buildings*. They requested that the agency promulgate broad indoor air quality rules for employers and building owners that would:

1. Maintain a written program with employees to assess factors such as ventilation, chemical and microbiological contamination, and environmental tobacco smoke. The program would designate an employee who is responsible for indoor air quality;
2. Develop comprehensive evaluations of poor indoor air quality and conduct periodic reassessments following complaints;
3. Provide readily accessible data on the design, maintenance, and operation of building systems, as well as material safety data sheets for substances that contribute to poor indoor air quality;
4. Furnish safe handling procedures for toxic materials used in construction, renovation, and other building operations; and
5. Provide worker training which mentions the availability of material safety data sheets [23].

In addition, OSHA should develop a general and broad building performance standard to guide maintenance, operation, and renovation of heating, ventilation, and air conditioning systems. The petitioners feel the agency should consider ventilation and other standards approved by the American Society of Heating,

Refrigeration, and Air-conditioning Engineers. Medical monitoring of employees following outbreaks of acute illness should be required in cases in which poor indoor air quality is suspect [23].

## LEGAL CONSIDERATIONS

While many employers are creating smoke-free workplaces for health and morale reasons, avoiding liability for employee injuries, including prenatal injuries [24], sustained through involuntary smoking on the job is also a major motivator for employers to establish smoke-free workplaces. Since the mid-1970s, case law related to workplace smoking has offered several avenues of relief for nonsmoking employees, including injunctions based on common law, duty to provide a safe and healthy place of employment [25, 26], unemployment compensation [27], workers' compensation [28], disability payments [29], negligence and wrongful discharge [30], and accommodation under national and state handicapped laws, such as the Rehabilitation Act of 1973 [31].

Common law, which can be invoked in every state except Louisiana, requires employers to provide reasonably safe workplaces for their employees. Employers may be enjoined from allowing smoking in the workplace [18, p. 14]. New Jersey passed a law requiring employers with over fifty employees to develop written policies designating smoking and nonsmoking areas [37]. The statute specifies that the rights of nonsmokers take precedence over the rights of smokers and allows enforcement by the Commissioner of Health [32].

Some employers circumvent the problem of smoking by hiring only nonsmokers [33]. Since smoking is not a naturally occurring characteristic and is not a right protected by the first amendment, there are no grounds for a constitutional challenge to this type of policy, as long as the policy is applied equitably [33, p. 956].

The consensus of legal opinion is that except in the case of a labor contract, which includes landscape prohibiting restrictions on smoking, the employer is free to eliminate all smoking on company premises [33, p. 960]. Public employees are subject to the wave of state and local legislation and ordinances on smoking that began with the Minnesota Clean Indoor Air Act in 1975 [34].

## LEGISLATION AND PUBLIC POLICY

There is also an accelerating trend toward legislatively mandating protection against involuntary smoking. The hesitant judicial response to restrictions on smoking in the private workplace is somewhat offset by legislation on the state and local level. Virtually every state has laws regulating smoking in public places.

Dozens of states and hundreds of municipalities have enacted restrictions on smoking in the workplace.

Deferring to collectively bargained solutions, many unions, as well as the AFL-CIO Executive Council, have opposed legislated smoking restrictions. One notable example of this is the phalanx of union opposition to the Nonsmokers Rights Act-S. 1937, first proposed in 1985 by Sen. Ted Stevens as S. 1440. A statement from the AFL-CIO's Public Employee Department reads,

we are opposed to [the bill] because it infringes on the collective bargaining process, imposing arbitrary work rules irrespective of the specific concerns of individual workers and worksites. We believe workplace smoking policies are best determined through the established process of collective bargaining on a case-by-case basis [4, p. 34].

Several union presidents sent letters to Stevens and the AFL-CIO opposing the bill.

The Occupational Safety and Health Act of 1970 imposes a general duty on the public and private employer to eliminate all foreseeable and preventable hazards that are capable of causing death or serious physical harm. However, this act appears to provide no support to individual employee plaintiffs, as the court held in *Federal Employees for Nonsmoker's Rights (FENSER) v. United States* [35].

In some instances, union positions on smoke-free policies have been influenced by the tobacco industry. Threatened by smoke-free policies and the concomitant loss of cigarette sales, the tobacco industry has mounted an aggressive campaign to dissuade unions from supporting smoke-free policies. The tobacco industry has been fairly successful in soliciting union support because 20,000 tobacco workers are represented by unions and the Tobacco Institute has been targeting the union leaders [8, p. 10].

Legislative efforts have won limited endorsements from individual unions and union leaders. In 1984, Communication Workers of America District 1, representing some 11,000 workers, dropped its objections to a New Jersey bill calling for limits on workplace smoking after provisions were made for union input on designation of smoking and nonsmoking areas [4, p. 38].

## CONCLUSIONS

The workplace smoking debate is a multifaceted public policy and public health issue. The union and management concerns and responses are as complex and as varied as the unions and firms themselves. While the petrochemical, textile, and mining industry unions have favored concerns for smokers' rights, given the

occupational hazards and blame-shifting by management, the communication and restaurant workers are in the forefront of the nonsmokers' rights issue.

In earlier days, the unions' primary focus was to negotiate increases in wages and benefits. International competition, U.S. companies relocating overseas, deindustrialization of the unionized heartland, technological developments, give-backs and quality circles have shifted the focus to include quality of life and occupational health issues. Labor initially did not seize this issue, but it was thrust on them by public interest groups, health activists, media attention, and rank-and-file concern. In occupational health issues, management often finds itself in a weak defensive posture despite the current perceived weakness of organized labor [36].

Union attitudes on the smoking issue may be slowly changing due to the growing pressure from nonsmokers for accommodation and increasing concern about the health effects of smoking. Demographics may also play a role. As new blood enters the labor movement, union attitudes on smoking are changing in an effort to gain support and membership. To this end, unions should not spend their time and efforts arguing with compelling scientific evidence, but rather spend time working toward safety and quality of life issues on the job.

Management must also realize that regardless of the legal climate, it is advisable to include all officially recognized employee organizations in formulating smoking policies. Union support or neutrality affects employee attitudes. Acceptance of the new smoke-free workplace will be enhanced by employee and union involvement.

The best method of instituting a smoke-free workplace is a totally smoke-free environment, particularly since the separation of smokers within the same airspace does not eliminate the exposure of nonsmokers to environmental tobacco smoke [8]. To institute a smoke-free policy, management must adopt a cooperative attitude toward employees. Bringing unions and/or employee task forces in to the development stage, as well as the implementation stage, has proved successful in union and nonunion workplaces.

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