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[***ARTICLE: "GET OFF YOUR BUTTS": THE EMPLOYER'S RIGHT TO REGULATE EMPLOYEE SMOKING***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-VYF0-00CW-10BW-00000-00&context=)

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**Text**

**[\*905]** INTRODUCTION

Smokers in the workplace are the modern day lepers. [[1]](#footnote-1)1 In order to ***smoke***, many are exiled into cramped smokers' lounges or pushed outside into the cold by employer policies requiring a ***smoke***-free workplace. [[2]](#footnote-2)2 For others who ***smoke***, the situation is even more grim because some employers simply refuse to hire smokers. [[3]](#footnote-3)3 Smokers complain that this treatment is an unfair infringement upon their ***rights*** and some smokers have even formed groups to lobby for protection of their ***right*** to ***smoke***. [[4]](#footnote-4)4

However, smokers are not the only people who are fired up over the **[\*906]** issue of ***smoking*** in the workplace. Increasingly, nonsmokers are complaining of having to endure tobacco ***smoke*** while at work. [[5]](#footnote-5)5 Their enthusiasm for a "***smoke***-free" [[6]](#footnote-6)6 workplace has been heightened by recent medical reports which identify Environmental Tobacco ***Smoke*** (ETS) [[7]](#footnote-7)7 as a harmful, **[\*907]** and perhaps even deadly, substance. [[8]](#footnote-8)8

Indeed, if scientists are correct, ETS kills more than 50,000 nonsmokers each year. [[9]](#footnote-9)9 To put this statistic into perspective, one might recall that only about 58,000 Americans died in combat during the entire Vietnam War. [[10]](#footnote-10)10 Smokers are killing almost that many nonsmoking Americans every year. [[11]](#footnote-11)11 The situation has become so extreme that, by some accounts, smokers and nonsmokers are at war. [[12]](#footnote-12)12 While the description of these two groups as warring enemies may seem extreme, there is no denying that a certain animosity does exist between them. [[13]](#footnote-13)13

About one in every four American adults still ***smokes***. [[14]](#footnote-14)14 And since Americans spend so much time at work, it is not surprising that the **[\*908]** workplace has become a major battle ground for disputes about ***smoking***. [[15]](#footnote-15)15 Many nonsmoking workers now insist that their ***right*** to avoid the harmful effects of ETS trumps the ***smoking*** workers' ***right*** to light up while at work. [[16]](#footnote-16)16 As might be expected, the one most often caught in the middle of this fray is the employer. [[17]](#footnote-17)17 Thus, most employers today have no choice but to confront the issue of ***smoking*** in the workplace. [[18]](#footnote-18)18

This Article attempts to briefly canvas the array of legal issues that confront employers in regard to ***smoking*** in the workplace. To the extent possible, this Article does not take sides in the debate between smokers and nonsmokers. Rather, it attempts to adopt the view of the employer and analyze the issues from the standpoint of the employer who is seeking to run a profitable business. [[19]](#footnote-19)19

Part I begins this Article by examining the impact ***smoking*** in the workplace can have on the employer. Having established the various effects ***employee*** ***smoking*** can have on the employer, Part II turns to the remedies **[\*909]** available to an employer and the means by which an employer may ***regulate*** ***smoking***. Next, Part III explores the justifications for allowing an employer to ***regulate*** ***smoking***. The focus of the Article shifts briefly in Part IV from the employer to the ***smoking*** ***employees*** and their ***rights***, concluding that smokers have power -- but few legal ***rights*** in the workplace. Finally, Part V concludes the Article by providing employers with some practical considerations concerning implementation of a ***smoking*** policy.

I. IMPACT OF ***SMOKING*** ON THE EMPLOYER

A. Higher Costs and Lower Productivity

Higher costs and lower productivity are two of the problems that can plague employers as a result of ***employee*** ***smoking***. [[20]](#footnote-20)20 These problems are the primary reasons many employers are eager to curtail ***employee*** ***smoking***. In addition, these problems lend strong support to the notion that employers have a ***right*** to implement ***smoking*** controls in order to protect the best interest of their businesses. [[21]](#footnote-21)21

The costs that workplace ***smoking*** can entail are numerous. [[22]](#footnote-22)22 Higher maintenance costs [[23]](#footnote-23)23 and insurance [[24]](#footnote-24)24 are among the most frequently discussed. [[25]](#footnote-25)25 The risk of fire also dramatically increases when ***smoking*** is allowed in the workplace. [[26]](#footnote-26)26 Furthermore, ***smoking*** can damage computers **[\*910]** and other business machinery. [[27]](#footnote-27)27

***Smoking*** can lead to lower productivity in the workplace in a variety of ways. It takes time away from work for ***employees*** to locate and ***smoke*** tobacco products. [[28]](#footnote-28)28 Also, workplace ***smoking*** can lead to increased illness and sick days for smokers and passive inhalers which reduces their productivity and efficiency. In addition, ***smoking*** can cause skilled workers to die prematurely. [[29]](#footnote-29)29

Commentators have estimated that the annual cost of lost productivity and health care associated with tobacco ***smoking*** exceeds $ 27 billion and may be as high as $ 61 billion. [[30]](#footnote-30)30 One expert suggests that a typical company saves about $ 5,000 per year for every nonsmoking ***employee*** hired in place of a smoker. [[31]](#footnote-31)31 Others suggest that ***employees*** who ***smoke*** cost private employers $ 135 billion a year. [[32]](#footnote-32)32

**[\*911]** B. Increased Illness and Death of ***Employees***

Medical evidence has been accumulating to support the theory that ETS can harm nonsmokers. [[33]](#footnote-33)33 The days are gone when ETS could be dismissed by employers as a mere annoyance. [[34]](#footnote-34)34 Consequently, the possibility of nonsmoker claims of illness or death caused by exposure to ETS is another problem employers must face. [[35]](#footnote-35)35 ***Employees*** exposed to ETS register complaints which include acute physical reactions such as burning, itching, and tearing eyes, sore throat and hoarseness, persistent cough, blocked sinuses, headaches, and nasal irritation. [[36]](#footnote-36)36 Allergic reactions have also been reported including the usual acute reactions, triggered by even less exposure, as well as dizziness, nausea, blackouts, memory loss, difficulty in concentration, cold sweats, aches and pains, skin eruptions, and even vomiting. [[37]](#footnote-37)37

**[\*912]** The greatest threat of liability to employers will likely come from the recent discovery that ETS may be killing thousands of nonsmoking Americans each year. As early as 1971, the Surgeon General reported that "passive ***smoking***" caused lung cancer in dogs. [[38]](#footnote-38)38 In the 1975 Surgeon General's Report, The Health Consequences of ***Smoking***, an entire chapter was dedicated to the effects of "involuntary ***smoking***." [[39]](#footnote-39)39 However, the report concluded that for the vast majority of nonsmokers ETS caused only eye and throat irritation. [[40]](#footnote-40)40 Nothing in the report indicated that ETS could cause lung cancer or heart disease in otherwise healthy nonsmokers. [[41]](#footnote-41)41

However, like a smoldering cigarette, the medical studies refused to die out, and in 1986 the Surgeon General issued a comprehensive report on the health consequences of ETS. [[42]](#footnote-42)42 This report unequivocally concluded that "[i]nvoluntary ***smoking*** can cause lung cancer in nonsmokers." [[43]](#footnote-43)43 The 1986 report dramatically changed the emphasis in the ***smoking*** debate. Smokers could no longer claim that ***smoking*** was simply a lifestyle choice for which they alone took the risk. [[44]](#footnote-44)44 The feeling that smokers should no longer be permitted to expose nonsmokers to ETS intensified. [[45]](#footnote-45)45

**[\*913]** The first estimates of annual deaths caused by ETS were relatively small. Studies estimated that ETS killed 3,000 Americans per year. [[46]](#footnote-46)46 Smokers said that this was "de minimis." [[47]](#footnote-47)47 Then came the pioneering work of Stanton Glantz and William Parmley. In a 1991 article, Glantz and Parmley analyzed the existing epidemiological studies of the relationship between exposure to ETS and risk of premature death. [[48]](#footnote-48)48 They concluded that in addition to the estimated 3,700 annual nonsmoker, lung cancer deaths caused by ETS, another 37,000 nonsmokers died each year as a result of ETS-related heart disease. [[49]](#footnote-49)49 Moreover, they concluded that another 12,000 nonsmokers died each year as a result of other cancers caused by ETS. [[50]](#footnote-50)50 Thus, according to Glantz and Parmley, the total annual nonsmoker deaths caused by ETS was an amazing 53,000. [[51]](#footnote-51)51 This made "involuntary ***smoking***" the third most common cause of preventable death in the United States, following only voluntary ***smoking*** and alcohol use. [[52]](#footnote-52)52 Indeed, their study implied that on average, every group of 1,000 smokers was responsible for the death of one nonsmoker per year. [[53]](#footnote-53)53

The studies Glantz and Parmley used to link ETS with lung cancer and heart disease were based on the complex science of epidemiology. [[54]](#footnote-54)54 Epidemiological studies typically examine the relationship between incidence of a disease in a given population and the population's exposure to the **[\*914]** suspected disease-causing agent. [[55]](#footnote-55)55 Thus, to establish that ETS kills otherwise healthy nonsmokers, the epidemiological studies used by Glantz and Parmley relied on mathematical and statistical correlation. [[56]](#footnote-56)56 Smokers have been quick to point out that epidemiology cannot "prove" that ETS causes lung cancer and heart disease in nonsmokers, [[57]](#footnote-57)57 especially when statistics can be manipulated to yield any desired result. [[58]](#footnote-58)58

However, the link between ETS and lung cancer has now received confirmation that is dead certain. In a series of autopsies, researchers have observed the actual effects of ETS on nonsmokers. [[59]](#footnote-59)59 Nonsmokers who had lived with smokers had higher frequencies of abnormal and pre-cancerous lesions than did nonsmokers who lived with other nonsmokers. [[60]](#footnote-60)60 This study confirmed not only the epidemiological research, but also the common-sense notion that human lungs operate better when not filled with tobacco ***smoke*** and its constituent materials. Thus, while the tobacco industry may still be in denial -- as it was for many years after the link between active ***smoking*** and lung cancer was reported -- researchers and **[\*915]** most others have come to believe that ETS is dangerous and can kill otherwise healthy nonsmokers. [[61]](#footnote-61)61

Perhaps the final nail in the coffin for ETS was a 1992 Environmental Protection Agency (EPA) Report which concluded that ETS kills about 3,000 Americans each year by way of lung cancer. [[62]](#footnote-62)62 The findings in the EPA Report make it difficult for smokers and tobacco companies to successfully argue that ETS is "a fairly trivial issue." [[63]](#footnote-63)63

The science debate over whether ETS kills nonsmokers is certainly interesting enough to hold the interest of epidemiologists and oncologists. However, it is of vital importance to a thriving tobacco industry that defends ***smoking*** as an "adult choice." [[64]](#footnote-64)64 After all, if ETS can kill nonsmokers, it would appear that nonsmokers should also have a "choice" where ***smoking*** is concerned. [[65]](#footnote-65)65

However, the science debate is of little consequence to employers. The reality for employers is that many nonsmokers feel that they are unfairly subjected to health hazards when forced to inhale the ***smoke*** of others. [[66]](#footnote-66)66 It is this perception of ETS and its related health risks, not the scientific **[\*916]** reality, that makes employer liability to nonsmokers a serious issue. [[67]](#footnote-67)67

C. Legal Liability

The discovery that ETS injures and may even kill otherwise healthy nonsmokers has prompted nonsmokers to explore numerous methods of avoiding forced exposure to ETS. Not surprisingly, nonsmokers have pushed for legislative action to curtail exposure to ETS. However, the legislative process is slow, and the wealth of the tobacco companies and the amount of taxes collected from cigarette sales are great. These realities have often prevented nonsmokers from accomplishing their objectives through legislative action. [[68]](#footnote-68)68 Accordingly, nonsmokers are frequently turning to the courts and using creative legal theories in order to protect themselves from ETS. [[69]](#footnote-69)69

To analyze the newly asserted legal ***rights*** of nonsmokers, it is useful to first identify the source of these ***rights***. There is no established constitutional ***right*** to breathe ***smoke***-free air, nor is there a constitutional ***right*** to ***smoke***. [[70]](#footnote-70)70 Thus, employers face little threat of a successful constitutional **[\*917]** claim from nonsmokers. However, employers would be mistaken to discount the viability of other claims nonsmokers may assert. Statutes and the common law afford several potential remedies for ***employees*** exposed to ETS.

1. Duty to Provide a Safe Workplace

Under the common law and many state statutes, employers are obligated to provide a reasonably safe work environment for their ***employees***. [[71]](#footnote-71)71 Several courts have held that an employer may breach the duty to provide a safe workplace by permitting ***smoking*** in the workplace. [[72]](#footnote-72)72 The first case to do so was Shimp v. New Jersey Bell Telephone Co. [[73]](#footnote-73)73 Shimp was decided in 1976, ten years before the Surgeon General's Report on involuntary ***smoking*** established ETS as a cause of death among nonsmokers. [[74]](#footnote-74)74 Although scientific evidence of the deadly impact of ETS was still in the developmental stage, the court held that a ***smoke***-filled room breached the ***employer's*** common-law duty to the ***employee*** to provide a safe workplace. [[75]](#footnote-75)75

The plaintiff in Shimp alleged that exposure to ETS resulted in severe symptoms including headaches, nasal irritation, eye irritation leading to corneal abrasions, throat irritation, and vomiting. [[76]](#footnote-76)76 In granting an injunction restricting ***smoking*** in the plaintiff's work area, the court took judicial notice of "the toxic nature of cigarette ***smoke***." [[77]](#footnote-77)77 Significantly, the court **[\*918]** emphasized that there was simply no need for the employer to allow ***smoking*** on the premises because tobacco ***smoke*** was not a necessary by-product of office work. [[78]](#footnote-78)78

The court in Shimp granted the plaintiff's request for an injunction, but the court did not enjoin all ***smoking*** on the premises. [[79]](#footnote-79)79 Instead, the court restricted ***smoking*** to a few isolated areas, noting without much analysis that "the ***rights*** and interests of ***smoking*** and nonsmoking ***employees*** alike must be considered." [[80]](#footnote-80)80 Curiously, the court did not identify the source of the ***smoking*** ***employees***' ***rights***. Assuming the court believed its own statement that ETS is toxic and can harm nonsmoking ***employees***, there seems to be no readily apparent reason why a ***smoking*** ***employee*** would have a ***right*** to engage in conduct that could directly harm another ***employee***. [[81]](#footnote-81)81

A more recent and perhaps even more important decision than Shimp is McCarthy v. Department of Social & Health Services. [[82]](#footnote-82)82 McCarthy reiterated Shimp's holding that an ***employer's*** duty to provide a safe workplace may include the duty to "provide a work environment reasonably free of tobacco ***smoke*** pollution." [[83]](#footnote-83)83 Ironically, the plaintiff in McCarthy was an ***employee*** of the State of Washington's Department of Social and Health Services. [[84]](#footnote-84)84 She allegedly developed lung disease and was forced to terminate her employment as a result of ETS in the workplace. [[85]](#footnote-85)85 The court in McCarthy extended earlier court decisions by allowing Ms. McCarthy to seek monetary damages for her injuries and loss of employment. [[86]](#footnote-86)86

**[\*919]** The court's opinion in McCarthy contains three important points for employers to consider. First, McCarthy held that the employer breaches the duty to provide a safe workplace only if the employer is aware of the dangers of ETS. [[87]](#footnote-87)87 At first glance, this rule would seem to insulate some employers from liability. However, because information about the harms of ETS is rapidly accumulating, it is becoming increasingly difficult for employers to claim ignorance. Moreover, under the McCarthy standard, a disgruntled ***employee*** could actually impose a duty on the employer by affirmatively complaining about the harmful effects of ETS and providing the employer with the medical information to support the complaint. [[88]](#footnote-88)88

Second, McCarthy held that the ***employer's*** duty to provide a safe workplace is measured by the typical ***employee*** rather than the hypersensitive ***employee***. [[89]](#footnote-89)89 Thus, the employer does not need to take extraordinary steps to protect only the extremely sensitive ***employee***. [[90]](#footnote-90)90 The plaintiff in Shimp, who claimed extreme sensitivity to ETS, may have lost under the standard articulated in McCarthy. [[91]](#footnote-91)91 However, the danger associated with ETS no longer appears limited to the hypersensitive, and thus this aspect of the McCarthy decision may not be that meaningful. [[92]](#footnote-92)92 Finally, in assessing **[\*920]** the harms of ETS, the court in McCarthy expressly considered the legislative intent of the Washington Clean Indoor Air Act. [[93]](#footnote-93)93 The state legislature had already recognized the harms nonsmokers face as a result of ETS. [[94]](#footnote-94)94 If other courts follow McCarthy's lead, ***employees*** in states with statutes acknowledging the harmful effects of ETS may find it relatively easy to establish the harmful effects of ETS. [[95]](#footnote-95)95 Indeed, courts may be bound to legislative pronouncements that ETS is harmful to nonsmokers. [[96]](#footnote-96)96

2. Intentional Torts

Nonsmokers may use a variety of intentional tort theories to recover from employers. Among the most likely are battery and assault [[97]](#footnote-97)97 and intentional infliction of emotional distress. A claim for battery arises from an unauthorized touching which is harmful or offensive. [[98]](#footnote-98)98 Commentators have suggested that ***smoking*** frequently amounts to a battery because particulate matter in tobacco ***smoke*** contacts nonsmokers. [[99]](#footnote-99)99 The action for so-called "smoker battery" [[100]](#footnote-100)100 analogizes ***smoking*** to any other physical conduct. Like the bullet of an assassin or the broken bottle of a barroom brawler, ***smoke*** is the mechanism that contacts and harms the nonsmoker. In essence, the nonsmoker who sues says "you may have every ***right*** to ***smoke***, but that ***right*** ends where my nose begins." [[101]](#footnote-101)101

**[\*921]** Intentional tort claims such as battery are frequently accompanied by a claim for punitive damages. [[102]](#footnote-102)102 The potential for punitive damages obviously makes cases more attractive for contingency plaintiffs' lawyers. [[103]](#footnote-103)103 In addition, punitive damage claims are typically not covered by insurance, [[104]](#footnote-104)104 and thus a defendant facing a viable punitive damage claim has an additional incentive to pay the plaintiff and settle the case.

A claim for battery (or other intentional tort) can help a plaintiff remove the case from the exclusive workers' compensation schemes that exist in many states. Workers' compensation laws typically do not require a showing of fault on the part of the employer but they provide for limited monetary awards. [[105]](#footnote-105)105 However, most workers' compensation laws exclude intentionally caused injuries. Thus, an ***employee*** may be able to "take the lid ***off***" their potential award by claiming battery. [[106]](#footnote-106)106

An action for battery is typically viable when unauthorized contact is either offensive or harmful. [[107]](#footnote-107)107 Because acute injuries such as eye irritation, breathing difficulty, and headaches which nonsmokers typically suffer as a result of ETS exposure, are "harms," [[108]](#footnote-108)108 the plaintiff in a battery **[\*922]** action does not necessarily need to establish that ETS causes lung cancer or heart disease. Indeed, mere offensive contact could serve as the basis for a battery action. [[109]](#footnote-109)109

Two basic theories exist to refute the notion that nonsmokers can sue smokers for battery. Neither should provide much comfort for employers. The first theory is that ETS is only a minor annoyance that nonsmokers must endure. This theory was espoused in the often-criticized case of McCracken v. Sloan. [[110]](#footnote-110)110 McCracken involved two meetings between a postal ***employee*** and his employer, the postmaster. Both meetings took place in the postmaster's office. [[111]](#footnote-111)111 At each meeting the postmaster ***smoked*** a cigar despite the ***employee***'s protest. [[112]](#footnote-112)112 The postal ***employee*** sued for assault and battery. [[113]](#footnote-113)113

After addressing evidentiary and pleading problems, the McCracken court turned to a discussion of the basic issue of whether routine ***smoking*** could amount to a tort. [[114]](#footnote-114)114 The McCracken court (a court in the heart of tobacco country) faced this issue almost a decade before the Surgeon General stated that ETS could kill nonsmokers. The court decided that forced inhalation of tobacco ***smoke*** was not actionable. Instead, like a friendly tap on the shoulder to attract one's attention, exposure to ETS was the type of touching that "must be endured in a crowded world." [[115]](#footnote-115)115

Few would expect McCracken to be decided the same way today. Put simply, no studies exist blaming shoulder tapping for 50,000 annual deaths. Therefore, cautious employers will not rely on McCracken for protection against claims of nonsmokers. [[116]](#footnote-116)116

**[\*923]** The second theory that is used to refute nonsmokers' battery claims is that ETS is just one of many "environmental" harms. [[117]](#footnote-117)117 This approach neatly shifts the focus from the smoker's conduct to the broader issue of air quality. ETS becomes grouped among pollutants such as radon gas, asbestos, smog, and aerosol sprays. When ETS is lumped together with other pollutants in this way, nonsmokers become only one of many groups demanding clean air. [[118]](#footnote-118)118

To some extent, supporters of the tobacco industry have successfully used this environmental thesis to paint nonsmokers who assert their ***rights*** as part of a lunatic fringe. [[119]](#footnote-119)119 Some courts have accepted the view that tobacco ***smoke*** is merely an environmental problem. By viewing tobacco ***smoke*** as such, courts can shift the task of adjudicating disputes between **[\*924]** smokers and nonsmokers to legislative bodies. This approach was utilized in Gordon v. Raven Systems & Research, Inc. [[120]](#footnote-120)120 In Gordon, the court described the lawsuit, which alleged that the employer who had allowed ***smoking*** had failed to provide a safe workplace, as an ill-suited effort to "solve the problems of the environment." [[121]](#footnote-121)121

However, the environmental view of tobacco disputes tends to ignore a basic reality of ***smoking***-related conflict. ***Smoking*** disputes are disputes between people. A person who contracts lung cancer after being forced to endure a coworker's tobacco ***smoke*** over a period of years is upset with the particular smoker and those who permitted the smoker's conduct -- not with the indoor air quality.

When people are forced to share space there are only two possible results. Either everybody is exposed to ETS or nobody is exposed to ETS. The central question raised by the smoker battery claim is whose ***rights*** will prevail. This question presents a classic legal dispute that will likely pose a liability threat to employers that allow ***smoking***. [[122]](#footnote-122)122

Another intentional tort theory available to nonsmokers injured by ETS is intentional infliction of emotional distress. To establish intentional infliction of emotional distress, a nonsmoker must prove "extreme and outrageous conduct" that causes "severe emotional distress." [[123]](#footnote-123)123 Despite the recent trend toward nonsmoking, it is still doubtful that subjecting others to ETS constitutes extreme and outrageous conduct. [[124]](#footnote-124)124 America's long **[\*925]** history of tobacco use and the continuing popularity of ***smoking*** make successful emotional distress claims unlikely.

However, a defendant's knowledge of a plaintiff's special susceptibility to emotional distress is relevant to the determination of whether conduct is extreme and outrageous. [[125]](#footnote-125)125 If an employer repeatedly ***smokes*** or permits ***smoking*** near a nonsmoker who has complained about ETS, a court could find extreme and outrageous conduct. Thus, as is often the case with workplace ***smoking***, the ***employer's*** greatest risk of liability is after an ***employee*** has complained about ETS.

3. Wrongful Discharge

Recent times have seen an explosion of wrongful termination suits. [[126]](#footnote-126)126 ***Employees*** have claimed wrongful discharge based on race, ethnicity, gender, sexual orientation, religion, age, and disability. The suits are costly to defend, [[127]](#footnote-127)127 can harm company morale, and can result in massive jury awards capable of putting companies out of business. [[128]](#footnote-128)128 The employer who permits ***smoking*** in the workplace may unwittingly invite wrongful discharge litigation. The wrongful discharge claim that is likely to result from workplace ***smoking*** is the so-called "termination in violation of public policy." [[129]](#footnote-129)129

**[\*926]** Until fairly recently, American employers were free to terminate the employment relationship for any reason. [[130]](#footnote-130)130 However, in recent years most states have by statute or judicial decisions created exceptions to the rule of absolute employer discretion. [[131]](#footnote-131)131 For an employer concerned about liability related to workplace ***smoking***, the most important exception that has been created is the public policy exception. In simple terms, the public policy exception means that an ***employee*** cannot be terminated for a reason that would undermine an important societal objective. [[132]](#footnote-132)132

Most if not all states view the maintenance of safe workplaces as an important public policy goal. [[133]](#footnote-133)133 The plaintiff in Hentzel v. Singer Co. [[134]](#footnote-134)134 used this public policy objective as the basis for his claim of wrongful discharge. [[135]](#footnote-135)135 In Hentzel, the plaintiff was a patent attorney who was fired after he complained about health hazards created by the presence of ETS in the workplace and sought to obtain a "reasonably ***smoke***-free environment." [[136]](#footnote-136)136

The court in Hentzel held that the plaintiff's allegation that he was terminated for complaining about a potential health hazard in the workplace stated a claim for wrongful discharge in violation of public policy. [[137]](#footnote-137)137 The court reasoned that promotion of workplace safety required protection for those workers who bring conditions reasonably perceived as hazardous to the attention of their employers. [[138]](#footnote-138)138 The court held that if Hentzel could prove his allegations, he might be entitled to collect punitive damages as well from his former employer. [[139]](#footnote-139)139 The court felt that a punitive damage award would serve to protect the important public interest in maintaining **[\*927]** workplace safety. [[140]](#footnote-140)140

Significantly, the court in Hentzel stated that it was irrelevant whether the employer actually responded to the ***employee***'s complaint and provided a ***smoke***-free workplace for the particular ***employee***. [[141]](#footnote-141)141 The court believed that the question was limited to whether termination of the particular ***employee*** would undermine an important public policy. [[142]](#footnote-142)142 Thus, under the rationale of Hentzel, if an ***employee*** complains about ETS and is later terminated, the ***employee*** may be able to state a cause of action against the former employer even though the employer acknowledged the complaint and placed the ***employee*** in a ***smoke***-free environment. To win, the ***employee*** need only show that the discharge was a result of the complaint about ETS.

When viewed from the standpoint of an ***employee***, Hentzel means that an ***employee*** can buy termination insurance for the one-time low price of complaining about ETS-related health hazards. If the complaining ***employee*** is later terminated, it is the ***employee***'s word against the ***employer's*** word as to whether the discharge was for a lawful reason or was unlawfully related to the complaint about ETS. If the jury believes the ***employee***, the ***employer's*** liability may be significant. [[143]](#footnote-143)143

4. Other Remedies

In addition to the tort claims set forth in the previous sections, nonsmoking ***employees*** may be able to recover disability or workers' compensation benefits to compensate for their ETS-related injuries. It is even possible that nonsmoking ***employees*** might seek protection from ETS under antidiscrimination laws.

To successfully claim workers' compensation, injured ***employees*** need only show that they sustained injuries arising out of their employment. [[144]](#footnote-144)144 ***Employees*** do not have to show that their employers were at fault. [[145]](#footnote-145)145 Thus, it is not surprising that many nonsmokers who have sustained injury as a result of ETS on the job have successfully pursued workers' compensation claims. [[146]](#footnote-146)146 As more nonsmokers realize that their injuries are a result **[\*928]** of ETS, the number of workers' compensation claims for ETS-related injuries will likely increase. Employer insurance premiums are often based on claims experience and can be expected to rise as ETS-related claims become more common. [[147]](#footnote-147)147

Some nonsmokers have also successfully collected unemployment benefits after having to quit their jobs in order to avoid the risks and discomforts caused by ETS. [[148]](#footnote-148)148 Others have successfully claimed that exposure to ETS at work has resulted in compensable disabilities. [[149]](#footnote-149)149

Nonsmokers have also sought the protection of laws that prohibit employment discrimination against disabled persons. [[150]](#footnote-150)150 ***Employees*** who are especially sensitive to ETS have argued that their condition renders them handicapped, thereby requiring the employer to take steps to accommodate their special needs. County of Fresno v. Fair Employment & Housing **[\*929]** Commission [[151]](#footnote-151)151 offers an excellent example of the difficult issues and tremendous expense that may confront an employer who has an ***employee*** who is especially sensitive to ETS.

The court in County of Fresno held that two nonsmoking ***employees*** were "physically handicapped" under a state statute. [[152]](#footnote-152)152 The court reasoned that sensitivity to ETS which interfered with the ***employees***' respiratory functions was a "handicap" under a state law requiring reasonable accommodations for handicapped ***employees***. [[153]](#footnote-153)153 The ***employer's*** argument that sensitivity to ETS was a mere "environmental limitation" was quickly rejected. [[154]](#footnote-154)154 The court stated that while for some persons ETS may merely be discomforting, for those who face severe difficulty in breathing when exposed to ETS it is obviously more than an environmental limitation. [[155]](#footnote-155)155

Perhaps the most ominous aspect of the County of Fresno decision for employers is the ruling that the employer failed to reasonably accommodate the ETS-sensitive ***employees***. [[156]](#footnote-156)156 In response to the ***employees***' complaints, the employer took the following steps to reduce ETS exposure:

1. Desktop air filters were used by smokers;

2. Windows were kept open;

3. The desks of the ETS-sensitive ***employees*** were moved away from smokers' desks;

4. Smokers did not ***smoke*** in the immediate presence of the ETS-sensitive ***employees***;

5. ***Employees*** stopped walking in open areas with burning cigarettes;

6. The ETS-sensitive ***employees*** were moved to an enclosed office;

7. The door to the ETS-sensitive ***employees***' office was ventilated;

8. Alternative employment in a ***smoke***-free facility was offered to the ETS- sensitive ***employees***; and

9. An air filtration machine was mounted in the ceiling. [[157]](#footnote-157)157

Despite the lengthy list of efforts taken to reduce ETS, the employer was unsuccessful in establishing "reasonable accommodation." [[158]](#footnote-158)158 The evidence showed that segregation of the workplace into ***smoking*** and nonsmoking areas was useless. [[159]](#footnote-159)159 The court also found that ETS filled the entire workspace, [[160]](#footnote-160)160 and filtration devices were ineffectual. [[161]](#footnote-161)161 In addition, **[\*930]** the enclosed office where the ETS-sensitive ***employees*** were assigned was ventilated by the same system as the ***smoking*** area. [[162]](#footnote-162)162 Thus, the presence of ETS could not be significantly minimized despite the ***employer's*** efforts.

Employers that are required to provide special accommodations for sensitive nonsmokers may incur substantial expenses to provide appropriate accommodations. As County of Fresno demonstrates, even expensive and comprehensive efforts to reduce exposure to ETS may be insufficient to prevent liability on the part of the employer.

II. RESTRICTING ***EMPLOYEE*** ***SMOKING*** -- HOW FAR CAN AN EMPLOYER GO?

In an effort to protect themselves from the reduction in profits and increase in exposure to liability that can accompany ***employee*** ***smoking***, employers may want to take some remedial measures to insure that the effects of ***smoking*** on their business are minimal. The range of possibilities is not unlimited. The options include segregation, workplace ***smoking*** bans, hiring restrictions, and forbidding all ***smoking***, including ***smoking*** done at home or elsewhere while ***off***-duty. This Part explores the efficacy and legality of each of these approaches to the problem of workplace ***smoking***.

A. Segregation

In the context of workplace ***smoking***, segregation means the physical separation of smokers and nonsmokers. Like segregation based on gender or race, segregation based on ***smoking*** divides people. It creates the "us versus them" mentality that fuels conflict. [[163]](#footnote-163)163 Because it can lead to conflict, simple segregation of nonsmokers and smokers seems to have more costs than it does benefits.

Although segregation is now frequently touted as a compromise, especially by tobacco interests, it is a compromise that leaves few people **[\*931]** happy. ETS is essentially a gaseous substance (technically, an aerosol) which tends to fill available space. [[164]](#footnote-164)164 Thus, in virtually any shared environment, tobacco ***smoke*** will migrate and have an impact upon nonsmokers. [[165]](#footnote-165)165 The Surgeon General has noted that "simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco ***smoke***." [[166]](#footnote-166)166

Smokers may feel that their space is adequate and initially be satisfied with workplace segregation. [[167]](#footnote-167)167 However, the more the separation favors nonsmokers, the more likely it is that even smokers will view segregation as an unfair and unworkable solution to the problem of ETS. [[168]](#footnote-168)168 As a result, segregation will almost inevitably lead to conflict and threaten workplace morale.

Even assuming that segregation enables the majority of ***smoking*** and nonsmoking ***employees*** to peacefully co-exist, it still leaves the employer with several potential problems. Most obviously, the health and safety risks remain. [[169]](#footnote-169)169 Moreover, in most workplaces, segregation will not prevent ETS from contacting nonsmokers. [[170]](#footnote-170)170 Thus, nonsmokers will still be able to pursue their claims for injuries, and the ***employer's*** potential liability exposure will remain. In addition, a policy of simple segregation will not **[\*932]** prevent an ***employee*** from complaining about ETS, which as discussed previously, could make the ***employee*** termination proof. [[171]](#footnote-171)171

However, simple segregation may help protect an employer from claims of handicap discrimination. As discussed previously, federal and state laws exist which arguably prevent an employer from discriminating against nonsmokers who are extremely sensitive to ETS. By providing separate ***smoking*** areas, an employer can reduce the chance of being held to have violated such a discrimination law. [[172]](#footnote-172)172

A policy of segregating smokers and nonsmokers is certainly better than no ***smoking*** policy at all. However, because segregation can lead to conflict and declining morale and does little to reduce an ***employer's*** ***smoking***-related costs and exposure to liability, many employers will want to explore more aggressive approaches to the problems associated with ***smoking*** in the workplace.

B. Banning ***Smoking*** in the Workplace

Employers may want to consider the more effective alternative of simply banning all ***smoking*** in the workplace. A workplace ban will keep nonsmoking ***employees*** happy, and if accepted by ***smoking*** ***employees***, will effectively eliminate the conflict between smokers and nonsmokers. A complete ban on ***smoking*** in the workplace greatly reduces the ***employer's*** exposure to nonsmokers' injury claims. In addition, a complete ban reduces maintenance costs and fire hazards that result from workplace ***smoking***. [[173]](#footnote-173)173 However, restricting ***smoking*** in the workplace can have negative side effects as well. ***Employees*** who ***smoke*** may be less productive because they will need to leave the workplace frequently in order to ***smoke***. Moreover, because the ban on ***smoking*** in the workplace does not prevent ***smoking*** outside of work, health risks, such as premature death of skilled workers and higher absenteeism [[174]](#footnote-174)174 will remain.

C. Prohibiting All ***Employee*** ***Smoking***

Another alternative available to employers is to go beyond a mere workplace ***smoking*** ban and to prohibit all ***smoking*** by ***employees***, including ***smoking*** at home or elsewhere while ***off***-duty. The additional advantages to the employer are fairly obvious. Health risks and related insurance costs **[\*933]** associated with primary ***smoking*** would be reduced. A healthier workforce would mean less absenteeism and greater productivity. In addition, the life span of experienced ***employees*** would likely be extended. [[175]](#footnote-175)175

The primary argument against such an extensive ban on ***employee*** ***smoking*** is that it is excessively intrusive. By extending beyond the work premises into the homes of ***employees***, such a ban arguably invades the privacy of ***employees***. [[176]](#footnote-176)176 Conceivably, such aggressive measures could result in litigation by disgruntled ***employees*** who ***smoke***. [[177]](#footnote-177)177 ***Employee*** morale could decline, and skilled ***employees*** who ***smoke*** may be likely to seek alternative employment. In addition, such a ban could be costly and difficult to enforce.

D. Hiring Only Nonsmokers

Hiring only nonsmokers has its obvious advantages for employers. The generally healthier workforce will reduce costs associated with health insurance and absenteeism. In addition, the experienced workforce will likely live longer. Most importantly, by hiring only nonsmokers, an employer eliminates the divisive issue of ***smoking*** from the workplace altogether. Presumably, such a move would help facilitate workforce morale.

There are, however, two potential problems awaiting employers who choose to hire only nonsmokers. First, smokers who are denied employment could assert discrimination lawsuits. [[178]](#footnote-178)178 Second, the occasional "star" ***employee*** who is wedded to ***smoking*** may have to be passed over.

These four types of employer ***smoking*** controls -- segregation, workplace bans, ***off***-premises bans, and hiring only nonsmokers -- offer employers some flexibility in addressing the workplace ***smoking*** problem. By selecting carefully from this menu of controls, employers should be able to tailor a solution to accommodate their specific needs.

However, smokers may challenge an ***employer's*** imposition of ***smoking*** **[\*934]** controls. The next Part examines the likely ***employee*** challenges in more detail and evaluates the arguments in support of an ***employer's*** ***right*** to assert each of these controls. A legal framework is offered that should help employers assess, in light of their own unique circumstances, the best and most cost-effective course of action.

III. IN SUPPORT OF EMPLOYER ***SMOKING*** CONTROLS

Employers generally have a ***right*** to establish hiring and employment policies that will best serve the particular needs of their businesses. [[179]](#footnote-179)179 Nevertheless, employers who implement a ***smoking*** policy may face legal challenges from smokers. [[180]](#footnote-180)180 In addition, some employers' risk of a legal challenge to their ***smoking*** policy may be greater due to the nature of their business. For example, employers whose ***employees*** are unionized may have certain duties imposed upon them by virtue of collective bargaining agreements, [[181]](#footnote-181)181 and public employers may be susceptible to federal and state constitutional claims. [[182]](#footnote-182)182

This Part briefly reviews the various bases upon which employers who restrict ***employee*** ***smoking*** can justify and defend their actions. Four basic justifications for restricting ***employee*** ***smoking*** are discussed in turn. These four justifications are: (1) protection of the health and safety of people and property, (2) reduction of liability to nonsmokers injured by ETS, (3) reduction of costs associated with ***smoking***, and (4) regulation of ***employee*** grooming and appearance.

**[\*935]** A. Safety

Protection of nonsmoking ***employees*** is probably the best argument employers have to support workplace ***smoking*** restrictions. Employers generally have not only the ***right***, but the duty, to take reasonable steps to protect the safety of their ***employees***. [[183]](#footnote-183)183 The notion that ETS can cause lung cancer and heart disease in otherwise healthy nonsmokers is quickly becoming the consensus among health professionals. [[184]](#footnote-184)184 Even if it has not been proven that ETS can cause lung cancer and heart disease in nonsmokers, nonsmokers can persuasively argue that doubts about the dangers of ETS should be resolved in favor of protecting their health. [[185]](#footnote-185)185 After all, many millions of people died from ***smoking***-related cancer during the years it took the scientific community to prove that ***smoking*** could cause cancer. [[186]](#footnote-186)186

In addition to the deadly, long-term health risks imposed by exposure to ETS, many nonsmokers report that they suffer immediate negative physical reactions to ETS such as eye irritation, [[187]](#footnote-187)187 nasal irritation, and headaches. [[188]](#footnote-188)188 These symptoms can impede worker safety, reduce worker accuracy and efficiency, [[189]](#footnote-189)189 and increase absenteeism. [[190]](#footnote-190)190

Obviously, the safety of nonsmoking ***employees*** provides a powerful **[\*936]** justification for workplace ***smoking*** bans. [[191]](#footnote-191)191 Because ETS fills the air when smokers and nonsmokers share space, protection of nonsmoking ***employees*** will almost always justify a complete workplace ban. [[192]](#footnote-192)192

The threat of fire is yet another risk which attaches to ***smoking***. An employer undoubtedly has the ***right*** to protect its ***employees*** and property from fire risks. For some employers, the chemicals used or stored in the workplace or other physical conditions of the workplace can add to the danger of ***smoking***-related fires. [[193]](#footnote-193)193 Because the risk of fire will vary depending upon the particular employment facility in question, fire safety may provide an especially compelling reason for some employers to restrict or ban workplace ***smoking***. [[194]](#footnote-194)194

Of course, employers could also argue that they are restricting ***smoking*** in order to protect the health of their ***employees*** who ***smoke***. While the idea that the employer has a strong interest in preserving the good health of skilled, experienced, and productive workers may have some merit, this rationale for ***smoking*** restrictions is not particularly compelling. In this country, adults are held responsible for their own health, and most are well aware that ***smoking*** can cause disease. [[195]](#footnote-195)195 Moreover, smokers raise the **[\*937]** "slippery slope" [[196]](#footnote-196)196 argument against such paternalistic employer action. What next, smokers ask, a ban on alcohol? Butter? Bungee Jumping? How about mandatory jogging, yoga, or weight lifting? [[197]](#footnote-197)197 Smokers rightfully point out that a line must be drawn somewhere.

B. Liability Exposure

Lawsuits are already too common and too costly. [[198]](#footnote-198)198 Therefore, employers may want to establish workplace rules that will serve the prophylactic purpose of preventing lawsuits. [[199]](#footnote-199)199 Employers who allow ***employees*** to ***smoke*** in the workplace face a wide array of potential lawsuits. [[200]](#footnote-200)200 By restricting workplace ***smoking***, employers dramatically reduce the risk of lawsuits being brought by ***employees***, or in some cases, customers or clients who believe they have been injured by ETS. [[201]](#footnote-201)201

**[\*938]** Of course, not all employers face the same risks of liability. For example, an office with only one or two smokers out of many ***employees*** may have a low risk of liability to nonsmoking ***employees*** based on exposure to ETS. Other employers may face greater risks. Generally, as the number of smokers in a workplace increases, the risk of lawsuits by nonsmokers also increases.

Certain businesses, such as restaurants, may face particularly significant risks of liability to nonsmoking ***employees***. For example, studies have shown that waiters are twice as likely to die of lung cancer as persons employed in other occupations. [[202]](#footnote-202)202 Researchers blame the high lung cancer rate on exposure to ETS produced by restaurant customers. [[203]](#footnote-203)203 To make matters worse, many restaurant owners have been very active in arguing that their ability to make a profit depends on their customers' freedom to ***smoke***. [[204]](#footnote-204)204 It takes little imagination to envision the lawyer for a waiter who has contracted cancer arguing in hushed tones to the jury that the restaurant owner traded the health of ***employees*** for profits and can only be taught respect for human life if the jury imposes a substantial punitive damages award.

C. Costs

Many employers believe that a workplace which is filled with ETS generates less profit because it is dirtier, less healthy, less safe, and less productive than a ***smoke***-free workplace. [[205]](#footnote-205)205 By establishing a ***smoking*** policy, employers may be able to reduce insurance and maintenance costs, minimize absenteeism, and increase productivity. From the standpoint of the employer, this may be the best reason of all to restrict ***employee*** ***smoking***.

In addition, for employers who produce foodstuffs or other products **[\*939]** requiring some degree of purity, a ***smoking*** policy could protect the wholesomeness of their products and thus their ultimate profits on these products. [[206]](#footnote-206)206 Also, because expensive computers and electronic equipment can be damaged by the particulates contained in ETS, [[207]](#footnote-207)207 employers may wish to protect their investments and reduce repair costs by restricting ***smoking***. Protecting expensive machinery has been upheld by arbitrators as a valid reason for implementing ***smoking*** restrictions. [[208]](#footnote-208)208

D. Grooming

One aspect of ***smoking*** that has been largely ignored in legal commentaries is its effect on personal hygiene and appearance. Unfortunately, tobacco ***smoke*** stinks, and the stench lingers long after the source of the odor is extinguished. [[209]](#footnote-209)209

Among the constituents of tobacco ***smoke*** are ammonia and pyridine which, even in small amounts, produce distinctly unpleasant odors. The foul smell from tobacco ***smoke*** can remain in the hair and clothing of the smoker and nearby nonsmokers for a long time after the cigarette has been extinguished. [[210]](#footnote-210)210 In addition, the human body and tobacco ***smoke*** have opposite electrical potentials; and therefore, the human body actually attracts tobacco ***smoke***. The tars in the tobacco ***smoke*** then hold it to the skin and clothing. [[211]](#footnote-211)211

Smokers become accustomed to the smell of tobacco ***smoke***, and they are unlikely to be aware of the residual odor after ***smoking***. However, most nonsmokers are probably aware of the unpleasant odor that frequently emanates from smokers. [[212]](#footnote-212)212 While the bad odor emitted from the persons of smokers has not yet been named, it may be conveniently referred to as "thirdhand ***smoke***" or "tertiary ***smoke***." [[213]](#footnote-213)213

**[\*940]** In addition to their unpleasant smell, smokers face other hygiene and appearance problems as a result of their habit. Most noticeably, hands and fingers become tobacco stained, teeth become yellowed, and facial wrinkling is increased. [[214]](#footnote-214)214

Numerous cases have established that employers have a ***right*** to establish rules that promote the good grooming and appearance of their ***employees***. [[215]](#footnote-215)215 An interesting case involving the issue of ***employee*** grooming is Willingham v. Macon Telegraph Publishing Co. [[216]](#footnote-216)216 In Willingham, the employer refused to hire a male job seeker solely because his hair was too long. [[217]](#footnote-217)217 The plaintiff charged sex discrimination, pointing out that if he had been a woman the length of his hair would have been acceptable to the employer. [[218]](#footnote-218)218 The court rejected the claim, noting that the job seeker could simply ***get*** a haircut. [[219]](#footnote-219)219 More importantly, the court stated that the employer had a valid business reason for the hair length requirement. [[220]](#footnote-220)220 The employer was trying to please customers by ensuring that those ***employees*** who came into contact with the public were "neatly dressed and groomed." [[221]](#footnote-221)221

**[\*941]** The rationale of Willingham, and similar cases [[222]](#footnote-222)222 support the notion that employers can establish grooming standards for ***employees*** to ensure that they present a professional, positive image to the public. Such a rule appears to have significant implications for an employer who wants to restrict ***employee*** ***smoking***. An ***employee*** who is ***smoking*** while on duty arguably presents a negative image. But even more importantly, a basic rule of good grooming requires ***employees*** to have an unoffensive body odor. An ***employee*** who ***smokes*** -- even ***off*** the job or on the way to work -- is likely to smell badly and present an unfavorable image of the ***employer's*** business. [[223]](#footnote-223)223 Thus, the ***employer's*** ***right*** to require good grooming and appearance could justify a complete ban of ***employee*** ***smoking***. [[224]](#footnote-224)224

Another leading case on the ***employer's*** ***right*** to establish grooming and appearance policies is Fagan v. National Cash Register Co. [[225]](#footnote-225)225 In Fagan, a men's hair length restriction was upheld against a sex discrimination claim. [[226]](#footnote-226)226 In ruling in favor of the ***employer's*** ***right*** to restrict hair length, even though the restriction only applied to male ***employees***, the court quoted **[\*942]** extensively from the affidavit filed in the lower court by the ***employee***'s manager. [[227]](#footnote-227)227 The affidavit sought to explain the hair length regulation by noting, "We must do everything we can to create a favorable impression on our customers and prospects. We simply cannot afford to have our ***employees*** do otherwise by their personal appearance." [[228]](#footnote-228)228 From there, the court took judicial notice of the fact that "good grooming standards are not at all uncommon in the business world." [[229]](#footnote-229)229

By relying on the well-established ***right*** to set good grooming standards, an employer may be able to justify imposition of a complete ***employee*** ***smoking*** ban. As in Fagan, an employer whose ***employees*** contact the public could argue that it simply cannot afford to lose sales because an ***employee*** makes a sales call while reeking of tobacco ***smoke***. [[230]](#footnote-230)230 While the argument that ***smoking*** bans are justified as an aspect of ***employee*** grooming has apparently not yet been tested, it is especially important because it potentially justifies banning ***smoking*** even ***off*** the work premises. ***Employee*** grooming could also be used to justify the actions of employers who refuse to hire people who ***smoke***.

IV. SMOKERS' ***RIGHTS***

Smokers' ***rights*** are dying ***off*** even faster than smokers. Despite financial backing by the tobacco companies, actions by those who have asserted smokers' ***rights*** have largely failed. Many arguments have been advanced in support of the unfettered ***right*** to ***smoke*** tobacco. But so far, no coherent theory of smokers' ***rights*** has been developed. This Part analyzes some of the basic claims smokers have asserted in support of their ***right*** to ***smoke***.

A. The Genesis of Smokers' ***Rights***

Smokers' ***rights***, to the extent they exist, are grounded in history and economic concerns -- not the law. [[231]](#footnote-231)231 Before Columbus set sail in 1492, **[\*943]** only Native Americans ***smoked*** tobacco. [[232]](#footnote-232)232 However, it took only a short time for the habit to become popular throughout Europe. [[233]](#footnote-233)233 American colonists in Virginia quickly established an economy aimed largely at accommodating the new European demand for tobacco. [[234]](#footnote-234)234

From the 1600s until today, the popularity of tobacco ***smoking*** has had its highs and lows. Prior to the Surgeon General's 1964 pronouncement that ***smoking*** causes cancer, [[235]](#footnote-235)235 the most significant antitobacco movement occurred in the late 1800s and early 1900s. The movement was a response to a sharp increase in the use of tobacco that followed the implementation of high-speed cigarette-making machines. [[236]](#footnote-236)236 In 1898, the Tennessee Supreme Court stated that cigarettes were not a "legitimate" article of commerce because tobacco is "wholly noxious and deleterious to health." [[237]](#footnote-237)237 By the early 1900s, fourteen states had passed laws that prohibited ***smoking***. [[238]](#footnote-238)238

But the antismoking sentiment was ephemeral. [[239]](#footnote-239)239 After World War I, national advertising helped to increase the popularity of cigarettes. [[240]](#footnote-240)240 Cigarette ***smoking*** reached its zenith in the years following World War II. [[241]](#footnote-241)241 Incredibly, by 1955, 62% of American men between the ages of **[\*944]** twenty-five and forty-four ***smoked***. [[242]](#footnote-242)242 By 1966, 42% of adult Americans regularly ***smoked*** tobacco. [[243]](#footnote-243)243 Thus, it is not altogether surprising that smokers stopped asking permission to ***smoke*** and started ***smoking*** whenever and wherever they wanted. [[244]](#footnote-244)244 It is precisely this custom, developed at a time when the health hazards of ***smoking*** were relatively unknown, that has served as the basis for the argument that smokers have a ***right*** to ***smoke*** in public. [[245]](#footnote-245)245

The second basic impetus behind the ***right*** to ***smoke*** is money. Tobacco companies are tremendously wealthy. [[246]](#footnote-246)246 Americans spend about $ 30 billion on tobacco products each year. [[247]](#footnote-247)247 In addition, a mere handful of companies control the market, ensuring high profit margins. [[248]](#footnote-248)248 The recent antismoking trend in the United States has urged tobacco companies into profitable foreign markets. [[249]](#footnote-249)249 Tobacco companies have used their profits to diversify. [[250]](#footnote-250)250 Thus, despite the recent widespread knowledge of the **[\*945]** health risks associated with tobacco usage, tobacco company profits have continued to rise. [[251]](#footnote-251)251 As a result, tobacco farming and manufacturing have provided jobs for more than one million people. Tobacco is said to account for about 1% of the United States' gross national product. [[252]](#footnote-252)252

In a variety of ways, the tobacco industry has used its large profits to campaign for protection of smokers' ***rights***. [[253]](#footnote-253)253 First, the tobacco industry has frequently opposed antismoking legislation by arguing that a reduction in the use of tobacco products would be a bitter pill for the economy to swallow. [[254]](#footnote-254)254 This argument has been successful, especially in recessionary times and in those states where tobacco is a major crop. [[255]](#footnote-255)255 Money also enables tobacco companies to influence the politicians who make the laws. [[256]](#footnote-256)256 According to one tobacco lobbyist, the industry's record in Congress is flawless. [[257]](#footnote-257)257 Tobacco companies use their money to promulgate large amounts of advertising that is designed to make ***smoking*** appear respectable and to encourage people to start ***smoking***. [[258]](#footnote-258)258 Finally, tobacco **[\*946]** companies have asserted overwhelming defenses against all lawsuits seeking to establish liability for their dangerous product. [[259]](#footnote-259)259 So far, the industry has never paid a penny to an injured plaintiff or a surviving family. [[260]](#footnote-260)260 By avoiding liability, tobacco companies keep cigarette prices affordable for millions of Americans who might otherwise be inclined to quit ***smoking***. [[261]](#footnote-261)261

The nation's long history of tobacco use and the great wealth generated by tobacco sales have been used to benefit smokers and to protect them from antismoking sentiment. However, today's nonsmokers are becoming less tolerant. Health risks of ETS are too well documented to be ignored. Consequently, the ***right*** to ***smoke*** is being challenged more frequently and smokers are being asked more and more to refrain from ***smoking***. Many smokers perceive this as a loss of the ***rights*** they formerly held. From the nonsmoker's vantage point, however, this loss of smokers' ***rights*** could be seen as progress.

B. Constitutional ***Rights***

The United States Constitution does not guarantee the ***right*** to ***smoke***. [[262]](#footnote-262)262 Some have argued that tobacco ***smoking*** should receive constitutional protection since it implicates the ***right*** of privacy. [[263]](#footnote-263)263 While the ***right*** to make certain decisions such as those relating to marriage and family have been determined to be fundamental and have received increased privacy protection, tobacco ***smoking*** has not been recognized as a fundamental ***right***. [[264]](#footnote-264)264

**[\*947]** Government has the power to ***regulate*** the health and safety of its citizens. [[265]](#footnote-265)265 That the government could completely ban tobacco, as it does with other harmful substances and drugs, is beyond serious question. [[266]](#footnote-266)266 Indeed, the conclusion that tobacco ***smoking*** is a constitutionally protected ***right*** would almost inevitably lead to the conclusion that a person has a ***right*** to take any drug or narcotic.

Few legal decisions address claims of a constitutionally protected ***right*** to ***smoke***. In the employment context, the leading case is Grusendorf v. City of Oklahoma City. [[267]](#footnote-267)267 In Grusendorf, a firefighter trainee was fired for taking "approximately three puffs" of a cigarette at lunchtime. [[268]](#footnote-268)268 Mr. Grusendorf sued, arguing that the termination for ***smoking*** violated his constitutional ***right*** to liberty and privacy. [[269]](#footnote-269)269 The court upheld Grusendorf's termination. [[270]](#footnote-270)270

The Grusendorf court noted that the fire department's ***smoking*** policy for trainees was invasive because it prevented Grusendorf from ***smoking*** even at home. [[271]](#footnote-271)271 However, the court concluded that the fire department had a legitimate interest in promoting the health of its firefighters, and therefore the nonsmoking rule was rational. [[272]](#footnote-272)272

While Grusendorf is an important case for employers to consider, its applicability is limited. First, Grusendorf involved a complete ***smoking*** ban. [[273]](#footnote-273)273 ***Employees*** subject to the rule were not allowed to ***smoke*** anywhere, not even in their own homes. [[274]](#footnote-274)274 Moreover, Grusendorf involved **[\*948]** a public employer. [[275]](#footnote-275)275 As a public ***employee***, Grusendorf was able to claim that the government as his employer could not stop him from ***smoking*** because he was protected by the Constitution of the United States. [[276]](#footnote-276)276

The court in Rossie v. Wisconsin Department of Revenue [[277]](#footnote-277)277 also considered the constitutionality of an ***employer's*** ***smoking*** restrictions. In Rossie, a pipe-***smoking*** ***employee*** sued for judicial declaration that a law that prohibited ***smoking*** in specified areas, but allowed ***smoking*** in other areas and in certain classes of businesses, was an unconstitutional violation of a smoker's ***right*** to equal protection. [[278]](#footnote-278)278 The court rejected Mr. Rossie's reasoning. [[279]](#footnote-279)279 The court pointed out that although the law prohibited ***smoking*** in some areas, but allowed it in other areas, the law did not violate equal protection. [[280]](#footnote-280)280 Indeed, the court noted that the law was designed to prohibit ***smoking*** in precisely those areas that nonsmokers would have difficulty avoiding. [[281]](#footnote-281)281

Together, Grusendorf and Rossie show that even a public employer is not constitutionally prohibited from implementing ***smoking*** restrictions. However, the Constitution is not the only basis upon which smokers may assert a ***right*** to ***smoke***.

C. Discrimination

In an effort to challenge workplace ***smoking*** restrictions, some have even suggested that ***smoking*** restrictions have a discriminatory effect on blacks, [[282]](#footnote-282)282 and thus constitute unlawful discrimination. [[283]](#footnote-283)283 The argument **[\*949]** is fairly simple. Because blacks as a group have a slightly higher rate of ***smoking*** than whites as a group, workplace ***smoking*** restrictions unlawfully discriminate against blacks. [[284]](#footnote-284)284

The argument that employer ***smoking*** restrictions are really just pretexts for racial discrimination falls flat upon closer scrutiny. First, the connection between ***smoking*** and race is, at best, extremely tenuous. While tobacco companies have begun to target blacks with advertising designed to encourage ***smoking*** among blacks, [[285]](#footnote-285)285 there is nothing about one's race that causes one to ***smoke***. In fact, the percentage of black smokers has fluctuated dramatically over time. [[286]](#footnote-286)286 Moreover, it is likely that as the black community turns more attention toward the harm inflicted by tobacco products, the rate of ***smoking*** among blacks will also decline. [[287]](#footnote-287)287

Second, the statistics do not support the contention that antismoking policies are intended to harm blacks. Blacks are slightly more likely to ***smoke*** than are whites. [[288]](#footnote-288)288 But overall, American smokers are far more likely to be white than black. Thus, it is extremely unlikely that any court would view an antismoking rule as disproportionately impacting blacks. The United States Supreme Court's decision in New York City Transit Authority v. Beazer [[289]](#footnote-289)289 establishes the difficulty a smoker would have in asserting a racial discrimination claim based on ***smoking*** restrictions. In Beazer, an ***employer's*** refusal to hire persons from a methadone program for recovering heroine addicts was challenged as racially discriminatory under the Equal Protection Clause of the Constitution [[290]](#footnote-290)290 and Title VII of the **[\*950]** Civil ***Rights*** Act. [[291]](#footnote-291)291 The Court acknowledged that 63% of persons in public methadone programs were black or Hispanic. [[292]](#footnote-292)292 Nevertheless, the Court refused to find a violation of either Title VII or the Constitution. [[293]](#footnote-293)293 Even though more than half of all persons disqualified were minorities, the Court found the statistical showing "weak." [[294]](#footnote-294)294

Because blacks currently are only slightly more likely to ***smoke*** than are whites, and because blacks are far less than half of all smokers, the link between blacks and ***smoking*** is substantially less certain than the weak minority-methadone link that the Supreme Court rejected in Beazer. As a result, it is very unlikely that employer policies which prohibit ***smoking*** will be found to unlawfully discriminate against minorities. [[295]](#footnote-295)295

D. Handicap and Disability -- Addiction to Tobacco

Nonsmokers have had modest success arguing that sensitivity to tobacco ***smoke*** can amount to a handicap that warrants protection under federal law. [[296]](#footnote-296)296 Therefore, it is not altogether unlikely that smokers will also advance this same argument, only in reverse based on their addiction to ***smoking***.

Two basic federal laws protect the employment ***rights*** of disabled workers. These laws call on employers to take reasonable steps to accommodate the disabled persons, to the extent that such steps are consistent with job function and business needs.

The first law protecting disabled persons' employment ***rights*** is the Rehabilitation Act of 1973. [[297]](#footnote-297)297 The Rehabilitation Act precludes discrimination based on a person's handicap in federal jobs and programs receiving federal funding. [[298]](#footnote-298)298 The second law is the Americans with Disabilities Act of 1990 (ADA). [[299]](#footnote-299)299 The ADA's reach is far broader than that of the Rehabilitation Act. The ADA applies to all employers with twenty-five or more ***employees***. [[300]](#footnote-300)300 Like the Rehabilitation Act, the ADA precludes **[\*951]** discrimination based on an ***employee***'s disability, and requires employers to make reasonable accommodations for otherwise qualified candidates and ***employees***. [[301]](#footnote-301)301

While the general perception is that protection against disability discrimination will benefit nonsmokers who are harmed by exposure to ETS, [[302]](#footnote-302)302 the possibility that a smoker may claim a benefit under the Rehabilitation Act or the ADA has also been noted. [[303]](#footnote-303)303 Smokers will probably not be so bold as to argue that the Rehabilitation Act and ADA permit them to ***smoke*** at work. [[304]](#footnote-304)304 However, smokers are likely to argue that their addiction to tobacco renders them handicapped or disabled and thereby prevents an employer from firing or not hiring them simply because they ***smoke*** away from work.

To claim protection under the Rehabilitation Act or the ADA, smokers must establish a "handicap" or "disability." [[305]](#footnote-305)305 These terms are similarly defined in both the Rehabilitation Act and the ADA. [[306]](#footnote-306)306 The ***employee*** claiming a protected disability or handicap must establish a condition that substantially limits a major life activity. [[307]](#footnote-307)307

The argument for protection of the smoker's ***rights*** is that the smoker is physically impaired as a result of an addiction. [[308]](#footnote-308)308 This argument has several apparent flaws. First, the tobacco industry itself disputes the claim that tobacco products are addictive. [[309]](#footnote-309)309 Second, while ***smoking*** can easily be described as addictive, the number of Americans who have quit ***smoking*** is staggering -- 34 million as of 1984. [[310]](#footnote-310)310 Thus, it seems that many people who want to quit have successfully done so. [[311]](#footnote-311)311

The third flaw, and perhaps the most significant, is the basic distinction **[\*952]** between ***smoking*** and other forms of drug usage. The key distinction is the intake process. Unlike pills, alcohol, or even heroine, tobacco is taken into the body via ***smoking***. The ***smoking*** process results in production of ETS. Thus, the process insures that persons near the smoker will also be affected. The process also creates fire risks. The process causes a bad odor, and the process increases maintenance costs. Commentators who have suggested that smokers are protected under the Rehabilitation Act and ADA by virtue of their addiction have not considered the question of whether smokers are addicted to the act of ***smoking*** or to the nicotine. [[312]](#footnote-312)312 The current popularity of the nicotine skin patch (a ***smoking*** substitute of sorts) shows that the addiction may be to nicotine and not to the act of ***smoking***. [[313]](#footnote-313)313

Of course, few people would complain if smokers simply took in nicotine by skin patches or by swallowing tablets. Similarly, employers' reasons for restricting ***employee*** ***smoking*** have nothing to do with nicotine. It is ***smoking*** and its byproduct -- not the nicotine addiction -- that makes tobacco use unpopular with nonsmokers and employers.

Moreover, even if ***smoking*** is viewed as a protected addiction, an employer can still justify the refusal to hire smokers based on business necessities. [[314]](#footnote-314)314 The ***employer's*** business needs obviously include cost controls, ***employee*** health and safety, and ***employee*** appearance and grooming. All of these business needs are adversely impacted by ***employee*** ***smoking***.

V. IMPLEMENTING A ***SMOKING*** POLICY: SOME FACTORS TO CONSIDER

While general observations about ***smoking*** policies are worthwhile, each employer has a unique set of needs and circumstances that will effect implementation of a ***smoking*** policy. The first step for an employer in crafting an effective ***smoking*** policy is to identify the objectives the policy will facilitate. A typical ***employer's*** objectives might include some or all of the following:

1. Reduce absenteeism;

2. Protect health of all workers including smokers;

3. Reduce health care costs;

4. Improve image and appearance of ***employees***;

5. Increase worker productivity;

6. Reduce likelihood of lawsuits by injured nonsmokers;

7. Reduce conflict between ***smoking*** and nonsmoking ***employees***;

**[\*953]** 8. Reduce risk of fire;

9. Reduce maintenance costs;

10. Protect purity of products such as foodstuffs;

11. Protect expensive equipment;

12. Eliminate odors in the workplace; and

13. Make the workplace more attractive to customers.

Items one through five can be best achieved by complete restrictions on ***smoking***, including restrictions on ***employee*** ***smoking*** away from work. Items six through thirteen can be achieved simply by restricting ***smoking*** in the workplace.

Before implementing any policy, the employer should take steps to determine the particular objectives of the policy. The policy can then be tailored to meet the objectives. For example, an employer who wants to eliminate the possibility of lawsuits by nonsmoking ***employees*** and protect its sensitive computer equipment from ***smoke*** damage may need only to restrict the location of workplace ***smoking*** or prohibit workplace ***smoking***. The employer will not need to establish a policy of terminating or refusing to hire smokers. On the other hand, an employer who wants to reduce absenteeism and ensure that ***employees*** are presentable to the public, may need to consider a policy that precludes the hiring of smokers or that restricts all ***smoking***. [[315]](#footnote-315)315

Generally, employers should use the least restrictive measures available that will accomplish their goals. Should a disgruntled ***smoking*** ***employee*** challenge the policy, the employer whose policy is only as restrictive as is needed to achieve the ***employer's*** goals will be in the best position to have the policy upheld as reasonable. The employer that chooses to go further with the policy than is needed could be faced with a legal challenge by a smoker who appears to be the victim of a dictatorial and overreaching policy. The best policies will be written, factually substantiated, and clearly explained. An oral ***smoking*** policy is an invitation to disaster. In any dispute concerning the policy (or the lack of a policy) the ***employer's*** actions will be judged on the basis of conflicting testimony about the oral ***smoking*** policy. A written policy is cheap insurance against such a swearing contest.

Moreover, the written policy provides the employer with an opportunity to persuasively put forth the case for the ***smoking*** policy. It will be a focal point of any subsequent dispute concerning ***smoking***. Thus, the written policy should state every objective of the employer. For example, an employer who restricts ***smoking*** in order to protect the health of nonsmoking ***employees*** and to reduce maintenance costs should state both reasons. When the policy is challenged, the scientific evidence concerning health risks to nonsmokers from ETS may be challenged. However, the painting, **[\*954]** carpet cleaning, and related maintenance expenses may be undeniable. In other words, the policy will stand a better chance of surviving a smoker's attack if it includes all the reasons that underlie the need for the policy.

If possible, any assumption advanced to support the policy should be substantiated in the written policy statement. Thus, if the policy is implemented to protect the health of nonsmokers, the policy should discuss the Surgeon General's Report, [[316]](#footnote-316)316 the EPA Report, [[317]](#footnote-317)317 or other credible evidence of health risks.

Finally, to eliminate claims of confusion or ambiguity, the consequences of violation of the policy should be clearly explained. If ***smoking*** restrictions apply to certain areas of the workplace, they should be identified with exactitude. The punishments for infractions should be spelled out in detail. Enforcement can be a major problem with ***smoking*** policies. The more detail the employer provides, the better the odds that the policy will be applied fairly and survive attack.

A policy that contains no reasoning or supporting details may be perceived as arbitrary or excessive. [[318]](#footnote-318)318 A policy that simply states broad generalizations may be perceived as no policy at all. [[319]](#footnote-319)319 Such a policy may afford no protection against nonsmoking ***employees*** who claim ETS-related injuries.

Any employer who is considering a ***smoking*** policy will want to ask the following questions:

1. Have any ***employees*** complained about ***smoking*** or the health risks associated with exposure to ETS? If the answer is yes, implementation of a policy should be seriously considered. The complaint of a nonsmoker tilts the tables in favor of the ***employee*** in litigation. [[320]](#footnote-320)320 In addition, the ***employee*** who complains about ETS may be able to sue for wrongful termination in the event of termination. [[321]](#footnote-321)321

2. Is there a union? If so, the employer may not have a free hand in crafting a suitable policy. [[322]](#footnote-322)322

3. Are there any nonsmoking ***employees*** with special sensitivity? Some people react very negatively to ETS. While an employer may not act negligently in failing to protect them, the employer may have a duty to accommodate their special circumstances. [[323]](#footnote-323)323

**[\*955]** 4. Are there any laws that apply? Numerous state and local laws exist that ***regulate*** ***smoking*** in public places and the workplace. [[324]](#footnote-324)324 Some states even have laws that prohibit hiring decisions or compensation differentiation based on a person's ***smoking*** status. [[325]](#footnote-325)325 Obviously, an attorney should be consulted to assist in formulation of an effective policy and to ensure compliance with applicable laws. [[326]](#footnote-326)326

CONCLUSION

As knowledge about the dangerous effects of ETS increases and becomes more widespread, the tension between smokers and nonsmokers will increase unless measures are taken to protect nonsmokers. Because many workforces consist of smokers and nonsmokers, employers must cope with the tension and accept the responsibility of protecting nonsmokers. For the most part, employers have broad ***rights to regulate*** ***employee*** ***smoking***. With increasing pressure to control costs, curtailment of ***smoking*** by ***employees*** often appears to be the most prudent response by the employer. Indeed, ***employee*** ***smoking*** restrictions can help employers to improve the bottom line. Therefore, a carefully considered policy may help to reduce costs, increase productivity, and reduce the likelihood or frequency of litigation. Employers that successfully face the challenges of ***employee*** ***smoking*** will be those who arm themselves with the facts and address the situation before it addresses them.

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1. 1 See, e.g., Tim Falconer, No ***Butts*** About It, CANADIAN BUS., Feb. 1987, at 66; Elaine H. Fry, Not ***Smoking*** in the Workplace: The Real Issue, BUS. HORIZONS, Nov.-Dec. 1990, at 13; William S. Hubbartt, ***Smoking*** at Work -- An Emerging Office Issue, ADMIN. MGMT., Feb. 1986, at 21. [↑](#footnote-ref-1)
2. 2 See Nancy R. Gibbs, All Fired Up Over ***Smoking***: New Laws and Attitudes Spark a War, TIME, Apr. 18, 1988, at 64. [↑](#footnote-ref-2)
3. 3 See, e.g., Andrew M. Kramer & Laurie F. Calder, The Emergence of ***Employees***' Privacy ***Rights***: ***Smoking*** and the Workplace, 8 LAB. LAW. 313, 322 (1992) ("[A]pproximately 6,000 United States companies now refuse to employ smokers."); Mark A. Rothstein, Refusing to Employ Smokers: Good Public Health or Bad Public Policy?, [*62 NOTRE DAME L. REV. 940 (1987);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-27N0-00CT-S17P-00000-00&context=) Jimmy Goh, Comment, "Smokers Need Not Apply": Challenging Employment Discrimination Against Smokers Under the Americans with Disabilities Act, 39 KAN. L. REV. 817 (1991) ("[S]ome employers are taking the extreme measure of refusing to hire smokers -- even if these individuals only ***smoke*** ***off*** duty."). [↑](#footnote-ref-3)
4. 4 Many smokers say they would like to quit ***smoking*** if they could. Thus, some argue that smokers' ***rights*** groups are a product of the tobacco industry, not individual smokers. See Bruce Samuels & Stanton A. Glantz, The Politics of Local Tobacco Control, 266 JAMA 2110 (1991). While it may be true that the tobacco industry finances and organizes many smokers' ***rights*** groups, anyone who has witnessed the confrontations that take place in public when nonsmokers ask smokers to stop ***smoking*** can verify that there are many smokers who strongly believe in their ***right*** to ***smoke***. [↑](#footnote-ref-4)
5. 5 See, e.g., David Reuben, "Mind if I Give You Cancer? ": The Thoughtless Behavior of Smokers Creates Thousands of Innocent Victims, READER'S DIG., May 1991, at 119. [↑](#footnote-ref-5)
6. 6 Former United States Surgeon General C. Everett Koop has called for a "***smoke***-free" society by the year 2000. See AMERICAN LUNG ASS'N, SECOND-HAND ***SMOKE*** (1985) [hereinafter SECOND-HAND ***SMOKE***]. Secretary of Health and Human Services, Dr. Louis Sullivan, has echoed Dr. Koop's call for a ***smoke***-free society by the year 2000. See Louis Sullivan, An Opportunity to Oppose: Physicians' Role in the Campaign Against Tobacco, 264 JAMA 1581 (1990). Indeed, Dr. Sullivan has gone so far as to suggest that tobacco companies "trade death for corporate profits." Don Oldenburg, Dilemmas: A Smoky Ethical Issue, WASH. POST, June 29, 1990, at B5. However, Surgeon General Antonia Novello backed away from the call for a ***smoke***-free society by the year 2000, and instead endorsed an objective of reducing ***smoking*** among the adult population of the United States to 15% by the year 2000. See Antonia C. Novello, Health Hazards of Cigarette Use, TRIAL, Mar. 1992, at 46.

   Some evidence exists that the trend toward nonsmoking is becoming international. A British health minister has called for a ban on ***smoking*** in the main areas of all workplaces in England. Passive ***Smoking***: Emission of Guilt, ECONOMIST, Apr. 2, 1988, at 76. France has also recently taken dramatic steps to reduce ***smoking*** in public places. See William Drozdiak, Liberty, Equality, ***Smoke***-Free, WASH. POST, Nov. 2, 1992, at A18. An Australian court recently ruled in an exhaustive opinion in excess of 200 pages that tobacco companies falsely advertised by proclaiming that tobacco ***smoke*** does not cause disease in nonsmokers. Australian Fed'n of Consumer Org., Inc. v. Tobacco Inst. of Australia Ltd., reprinted in 6.1A TOBACCO PRODUCTS LIABILITY REP. 2.77 (Special Supp. 1991). An appellate tribunal subsequently restricted the scope of the ruling and rejected the judiciaries' ability to conclusively decide the science issues. See Francis J. Nolan, Comment, Passive ***Smoking*** Litigation in Australia and America: How an ***Employee***'s Health Hazard May Become an ***Employer's*** Wealth Hazard, [*9 J. CONTEMP. HEALTH L. & POL'Y 563, 580 (1993).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-V840-00CV-P138-00000-00&context=) [↑](#footnote-ref-6)
7. 7 ETS is commonly used to refer to the tobacco ***smoke*** byproduct produced by smokers and their cigarettes that remains in the atmosphere. When nonsmokers are exposed to this ***smoke*** byproduct, the event is characterized as secondhand ***smoke***, involuntary ***smoking***, or passive ***smoking***. Involuntary ***smoking*** best describes the phenomenon from the standpoint of the nonsmoker. ETS best describes the phenomenon from the standpoint of the smoker. I use the term ETS not out of bias for smokers, but rather, in the interest of brevity.

   ETS consists of two basic components: "mainstream ***smoke***" and "sidestream ***smoke***." ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE ***SMOKING***: LUNG CANCER AND OTHER DISORDERS, 3-1 (1992) [hereinafter EPA REPORT]. Mainstream ***smoke*** is the ***smoke*** which the smoker inhales through the lungs and then exhales back into the atmosphere. Id. Sidestream ***smoke*** is the ***smoke*** which emanates directly from an idly burning cigarette. Id. Mainstream ***smoke*** is filtered by both the cigarette's filter and the smoker's lungs. Id. Sidestream ***smoke***, however, is largely unfiltered, and accounts for more than half of the particulate matter in ETS. Id. Chemically, mainstream and sidestream ***smoke*** are very similar. Id. at 3-4. For a more detailed discussion of mainstream and sidestream ***smoke***, see U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY ***SMOKING***: A REPORT OF THE SURGEON GENERAL 125-37 (1986) [hereinafter INVOLUNTARY ***SMOKING***]. [↑](#footnote-ref-7)
8. 8 The American Heart Association (AHA) has called for an absolute ban on public ***smoking***. Heart Association Calls for Public Ban on Secondhand ***Smoke***, L.A. TIMES, June 11, 1992, at A43. The AHA has suggested that ETS causes more than 40,000 Americans to die of heart disease each year. Id. [↑](#footnote-ref-8)
9. 9 See Stanton A. Glantz & William W. Parmley, Passive ***Smoking*** and Heart Disease: Epidemiology, Physiology, and Biochemistry, 83 CIRCULATION 1 (1991). At 53,000 deaths per year, ETS is the nation's third leading cause of premature death. Jon Van, Report: 2nd-Hand ***Smoke*** Kills 53,000 A Year, CHI. TRIB., Jan. 11, 1991, at C4. It trails only active ***smoking*** (400,000 per year) and alcohol-related deaths (100,000 per year). Id. [↑](#footnote-ref-9)
10. 10 EDWARD DOYLE & SAMUEL LIPSMAN, THE VIETNAM EXPERIENCE: SETTING THE STAGE 9 (1981) (reporting 57,605 American military deaths during the Vietnam War). [↑](#footnote-ref-10)
11. 11 Perhaps it is not surprising that the tobacco industry views the public attention on passive ***smoking*** as a primary threat to its existence. See ROBERT H. MILES, COFFIN NAILS AND CORPORATE STRATEGIES 217 (1982). [↑](#footnote-ref-11)
12. 12 See Gibbs, supra note 2, at 64 ("All across the country, in large towns and small, in the skies, the offices, the courts, in every cranny of common space, Americans are fighting where, when and whether a smoker may ***smoke***."); Peter Manso, Smokers' Revolt, PENTHOUSE, Sept. 1988, at 131 (citing numerous examples of smokers who ardently opposed restrictions on ***smoking***, often to the point of violence); Sidney Zion, ***Smoking*** Mad, PENTHOUSE, Apr. 1993, at 84 (arguing that cigar smokers are also upset at restrictions on ***smoking***).

    Sometimes, smokers and nonsmokers really do go to battle. See, e.g., [*Ricci v. American Airlines, 544 A.2d 428 (N.J. Super. Ct. App. Div. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WN20-003C-P2HB-00000-00&context=) (negligence suit brought by a ***smoking*** passenger injured when assaulted by a nonsmoking passenger). [↑](#footnote-ref-12)
13. 13 See Tracy E. Benson, ***Smoke*** Signals ***Get*** Mixed Readings, INDUS. WK., May 7, 1990, at 18. Tragically, in September of 1993 at a northern California restaurant, a nonsmoker who asked a smoker to extinguish a cigarette was shot and killed. See Murder Charge in Cigarette Killing, SAN FRANCISCO CHRON., Oct. 1, 1993, at D4. [↑](#footnote-ref-13)
14. 14 John C. Fox, ***Smoking*** in the Workplace: Who Has What ***Rights***?, 11 CAMPBELL L. REV. 311, 312 n.2 (1989) ("According to the most recent (1987) government statistics compiled by the Centers for Disease Control, over one-fourth (26.5%) of adult Americans ***smoke***"). [↑](#footnote-ref-14)
15. 15 ***Smoking*** in the workplace is increasingly becoming the subject of legal literature. See, e.g., Mollie H. Bowers, What Labor and Management Need to Know About Workplace ***Smoking*** Cases, 43 LAB L.J. 40 (1992); John C. Fox & Bernadette M. Davison, ***Smoking*** in the Workplace: Accommodating Diversity, 25 CAL. W. L. REV. 215 (1989); Jim M. Hansen, What Employers Need to Know About ***Smoking*** in the Workplace, 21 COLO. LAW. 421 (1992); Raymond L. Paolella, The Legal ***Rights*** of Nonsmokers in the Workplace, 10 U. PUGET SOUND L. REV. 591 (1987); Donna S. Stroud, When Two "***Rights***" Make a Wrong: The Protection of Nonsmokers' ***Rights*** in the Workplace, 11 CAMPBELL L. REV. 339 (1989); Carolyn Cliff, Comment, Limited Relief for Federal ***Employees*** Hypersensitive to Tobacco ***Smoke***: Federal Employers Who'd Rather Fight May Have to Switch, [*59 WASH. L. REV. 305 (1984);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-4JW0-00CV-64YY-00000-00&context=) Molly Cochran, Comment, The Worker's ***Right*** to a ***Smoke***-Free Workplace, 9 U. DAYTON L. REV. 275 (1984); Christian G. Krupp II, Comment, Warning! Working in a ***Smoke*** Filled Room Is Dangerous to ***Your*** Health: Protecting Michigan Workers from Exposure to Environmental Tobacco ***Smoke***, 7 COOLEY L. REV. 509 (1990); Jeffrey W. Bates, Note, Smokers vs. Nonsmokers: The Common Law ***Right*** to a ***Smoke***-Free Work Environment, 48 MO. L. REV. 783 (1983); Larry Bracken, Note, 9 TEX. TECH. L. REV. 353 (1978); Nancy Kornblum, Note, Extinguishing ***Smoking*** in the Workplace, 38 WASH. U. J. URB. & CONTEMP. L. 183 (1990); Thomas G. Fischer, Annotation, ***Employer's*** Liability to ***Employee*** for Failure to Provide Work Environment Free from Tobacco ***Smoke***, [*63 A.L.R. 4TH 1021 (1988).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5MYC-8YP0-00CR-1511-00000-00&context=) [↑](#footnote-ref-15)
16. 16 See, e.g., J. Linn Allen, Firms Under New Pressure to Ban ***Smoking***, CHI. TRIB., Jan. 8, 1993, at N1. [↑](#footnote-ref-16)
17. 17 About 60% of nonsmokers who work in places that allow ***smoking*** report that ETS in the workplace is a source of discomfort. EPA REPORT, supra note 7, at 3-11. [↑](#footnote-ref-17)
18. 18 As of 1987, it was estimated that slightly more than half of all companies in the United States had some form of ***smoking*** policy. See Ron Borland et al., Protection From Environmental Tobacco ***Smoke*** in California: The Case for a ***Smoke***-Free Workplace, 268 JAMA 749 (1992). Forty-five percent of employed adults reported some degree of employer ***smoking*** restrictions. Id. [↑](#footnote-ref-18)
19. 19 This Article assumes that the ***employer's*** perspective on ***smoking*** focuses on the following factors: (1) cost, (2) productivity, (3) liability exposure, and (4) ***employee*** morale. [↑](#footnote-ref-19)
20. 20 See generally Les Nelkin, Note, No ***Butts*** About It: Smokers Must Pay for Their Pleasure, 12 COLUM. J. ENVTL. L. 317 (1987). [↑](#footnote-ref-20)
21. 21 On the economic costs of ***smoking***, see generally GERRY OSTER ET AL., THE ECONOMIC COSTS OF ***SMOKING*** AND BENEFITS OF QUITTING (1984). [↑](#footnote-ref-21)
22. 22 See generally Fry, supra note 1, at 13. [↑](#footnote-ref-22)
23. 23 See, e.g., JUDITH A. DOUVILLE, ACTIVE AND PASSIVE ***SMOKING*** HAZARDS IN THE WORKPLACE 69 (1990) ("The employed smoker also imposes a much greater maintenance burden on the employer for cleaning, repairing, repainting, and replacing furnishings and equipment."). [↑](#footnote-ref-23)
24. 24 See, e.g., id. at 68 (based on 1980 dollars, one study estimated that each ***smoking*** ***employee*** costs the employer an additional $ 274 annually in insurance). [↑](#footnote-ref-24)
25. 25 Ironically, some extremely addicted tobacco smokers claim that their work performance suffers when they are deprived of the ability to ***smoke*** tobacco with regularity. See, e.g., In re Hoover Co., 95 Lab. Arb. Rep. (BNA) 419 (1990) (Lipson, Arb.) (worker complained of becoming "jittery" when unable to ***smoke*** tobacco). [↑](#footnote-ref-25)
26. 26 Nelkin, supra note 20, at 329 (***smoking*** causes more than 100,000 fires per year which result in more than 2,500 deaths and almost $ 150 million in property damage). According to a National Safety Council report, of the 4,770 civilian fire deaths in 1986, 1,400 (29%) resulted from fires caused by cigarettes. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 96 (1989). Cigarettes caused more than twice as many fire-related deaths as the next leading cause -- heating equipment. Id.; see also U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE HEALTH CONSEQUENCES OF ***SMOKING***: A PUBLIC HEALTH SERVICE REVIEW 187-88 (1967); JAMES WILKINSON, TOBACCO: THE TRUTH BEHIND THE SMOKESCREEN 50 (1986). [↑](#footnote-ref-26)
27. 27 Stroud, supra note 15, at 356-57. In a case where the court enjoined workplace ***smoking***, the judge seemed particularly disturbed by the fact that the employer had banned ***smoking*** in some areas to protect its expensive equipment, but had refused a nonsmoking ***employee***'s request for a ***smoke***-free work environment. See [*Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408, 416 (N.J. Super. Ct. Ch. Div. 1976).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) [↑](#footnote-ref-27)
28. 28 So-called ***smoking*** rituals are estimated to take up to thirty minutes per workday per smoker. Goh, supra note 3, at 823. [↑](#footnote-ref-28)
29. 29 It is estimated that ***smoking*** will kill one out of every five people in industrialized countries over the next thirty years. ***Smoking*** and World Health, N.Y. TIMES, May 30, 1992, at A18. [↑](#footnote-ref-29)
30. 30 See, e.g., Janet Raloff, An Economic Case for Banning ***Smoking***?, 129 SCI. NEWS 3, 40 (1986). These costs are in addition to the $ 30 billion spent each year on tobacco itself. Id.; see also Sullivan, supra note 6 (estimating cost of tobacco ***smoking*** at $ 52 billion per year); Goh, supra note 3, at 823-24 (acknowledging that many employers try to avoid hiring smokers because they are less productive, absent two additional days per year on average, and drive up maintenance costs by burning carpets and dirtying windows). But see ROBERT D. TOLLISON & RICHARD E. WAGNER, ***SMOKING*** AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY (1988) (arguing that ***smoking*** does not result in increased worker absenteeism, increased maintenance costs, or reduced productivity); Judy Powell, Dividing is not Conquering: A Manager's Perspective on Workplace ***Smoking***, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO ***SMOKE*** (Robert D. Tollison ed., 1988) [hereinafter CLEARING THE AIR]. [↑](#footnote-ref-30)
31. 31 William L. Weis, "No Ifs, Ands or ***Butts*** -- Why Workplace ***Smoking*** Should Be Banned, MGMT. WORLD, Sept. 1981, at 39. William Weis explains that a two-prong policy that: (1) restricts all new hiring to nonsmokers, and (2) prohibits all ***smoking*** on company premises could save companies almost $ 5,000 per year per smoker. Id. Savings would result from reductions in absenteeism, maintenance costs, property damage, lost earnings from early mortality, insurance and medical costs, and time lost on the job (it takes time to enjoy a cigarette). Id. at 39-40. [↑](#footnote-ref-31)
32. 32 Nelkin, supra note 20, at 324. [↑](#footnote-ref-32)
33. 33 See infra notes 36-62 and accompanying text. [↑](#footnote-ref-33)
34. 34 See, e.g., Larry Kraft, ***Smoking*** in Public Places: Living with a Dying Custom, 64 N.D. L. REV. 329, 335-41 (1988). The legal ***right*** of nonsmokers to avoid exposure to ETS has received significant scholarly attention in recent years. See Kraft, supra; see also H. Ward Classen, Restricting the ***Right*** to ***Smoke*** in Public Areas: Whose ***Rights*** Should Be Protected?, 38 SYRACUSE L. REV. 831 (1987); William D. Hostetler, Tobacco Pollution and the Nonsmoker's ***Rights***, 4 ENVTL. L. 451 (1974); Osborne M. Reynolds, Jr., Extinguishing Brushfires: Legal Limits on the ***Smoking*** of Tobacco, [*53 U. CIN. L. REV. 435 (1984);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-XP90-00CW-5271-00000-00&context=) Jerry R. Brink, Comment, The Non-Smoker in Public: A Review and Analysis of Non-Smokers' ***Rights***, 7 SAN FERN. V. L. REV. 141 (1979); Alan S. Kaufman, Comment, Where There's ***Smoke*** There's Fire: The Search for Legal Paths to Tobacco-Free Air, 3 COLUM. J. ENVTL. L. 62 (1976); Eric J. Morrison, Comment, The ***Rights*** of Nonsmokers in Tennessee, [*54 TENN. L. REV. 671 (1987);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-W6P0-00CW-1117-00000-00&context=) Morley Swingle, Comment, The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the ***Right*** to Clean Air, 45 MO. L. REV. 444 (1980); David B. Ezra, Note, Smoker Battery: An Antidote to Second-Hand ***Smoke***, [*63 S. CAL. L. REV. 1061 (1990);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-67N0-00CV-52D7-00000-00&context=) Nelkin, supra note 20, at 317; David W. Opderbeck, Note, Blowin' in the Wind: A Federal Answer to Environmental Tobacco ***Smoke***, 15 SETON HALL LEGIS. J. 213 (1991); Lynn F. Vuich, Note, Toward Recognition of Nonsmokers' ***Rights*** in Illinois, 5 LOY. U. CHI. L.J. 610 (1974). [↑](#footnote-ref-34)
35. 35 Allen, supra note 16, at 1; Richard A. Daynard & Edward L. Sweda, Jr., Redressing Injuries From Secondhand ***Smoke***, TRIAL, Mar. 1992, at 53; Jeffrey S. Merrick, ***Smoking*** in the Workplace -- Is It Hazardous to ***Your*** Legal Health?, 48 OR. ST. B. BULL., Nov. 1987, at 5; ***Smoking*** in the Workplace: New Employer Liability?, CAL. EMPLOYER ADVISOR, Feb. 1993, at 6; ***Smoking*** Liability Scares Employers, L.A. DAILY J., Nov. 14, 1991, at 4. But see Dennis H. Vaughn, ***Smoking*** in the Workplace: A Management Perspective, 18 ***EMPLOYEE*** REL. L.J. 123 (1992) (pointing out that, at least so far, there has been no flood of nonsmoker litigation). [↑](#footnote-ref-35)
36. 36 See, e.g., DOUVILLE, supra note 23, at 4; INVOLUNTARY ***SMOKING***, supra note 7, at 229-39; Michael Eriksen et al., Health Hazards of Passive ***Smoking***, 9 ANN. REV. PUB. HEALTH 47, 51-52 (1988); Jonathan E. Fielding, ***Smoking***: Health Effects and Control, 313 NEW ENG. J. MED. 491, 495 (1985); Stanton A. Glantz & Richard A. Daynard, Health Hazards of Secondhand ***Smoke***, TRIAL, June 1991, at 37-38; Hostetler, supra note 34, at 453. [↑](#footnote-ref-36)
37. 37 See [*Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) INVOLUNTARY ***SMOKING***, supra note 7, at 239; Cochran, supra note 15, at 291 n.10; Swingle, supra note 34, at 465 n.185. But see Mark J. Reasor, Scientific Issues Regarding Exposure to Environmental Tobacco ***Smoke*** and Human Health, in CLEARING THE AIR, supra note 30, at 7, 11 ("It has not been established that such reactions are true allergies, although certain persons do appear to be highly sensitive to the irritative effects of ETS."). [↑](#footnote-ref-37)
38. 38 See U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE HEALTH CONSEQUENCES OF ***SMOKING***: A REPORT OF THE SURGEON GENERAL, 12 (1971). [↑](#footnote-ref-38)
39. 39 U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE HEALTH CONSEQUENCES OF ***SMOKING*** 83 (1975). The report indicated that the phrase "involuntary ***smoking***" was used instead of "passive ***smoking***" because the phrase more accurately reflected the situation of most nonsmokers forced to breathe others' ***smoke***. Id. at 87. [↑](#footnote-ref-39)
40. 40 Id. at 107. The report also concluded that ETS adversely affected psychomotor performance, including attentiveness and cognitive performance, adversely affected the health of children, and could cause serious problems for persons with cardiovascular conditions. Id. at 98-108. [↑](#footnote-ref-40)
41. 41 Id. According to the 1992 EPA Report, the first study linking ETS exposure to lung cancer in nonsmokers was published in 1981. EPA REPORT, supra note 7, at 5-2. [↑](#footnote-ref-41)
42. 42 INVOLUNTARY ***SMOKING***, supra note 7. [↑](#footnote-ref-42)
43. 43 Id. at 13. In addition, the report stated that "[c]igarette ***smoke*** is . . . a [known] human carcinogen." Id. at 10. [↑](#footnote-ref-43)
44. 44 As recently as 1984, a tobacco company official contended that "passive ***smoking*** is a political issue, not a health hazard." Tom Post, Preserving Endangered Products, FORTUNE, Mar. 5, 1984, at 70, 71. [↑](#footnote-ref-44)
45. 45 In one recent poll conducted for the American Lung Association, 30% of the persons surveyed said that they favored a total ban on workplace ***smoking*** -- an increase of almost 50% from a similar poll conducted in 1989. Health Coalition Urges ***Smoking*** Ban, Citing Research on Secondhand ***Smoke***, DAILY LAB. REP., June 11, 1992, at A12. Other surveys have yielded even stronger showings of antismoking sentiments. For example, one poll showed that 55% of all persons favored a total ban on ***smoking*** in public places. See Stroud, supra note 15, at 358-59. [↑](#footnote-ref-45)
46. 46 See, e.g., Eriksen et al., supra note 36, at 62 (estimating annual ETS-related, nonsmoker, lung cancer deaths between 2,490 and 5,160); Eliot Marshall, Involuntary Smokers Face Health Risks, SCI., Nov. 28, 1986, at 1066 (citing a study that claimed more than 2,400 ETS-related, nonsmoker, lung cancer deaths occurred annually). [↑](#footnote-ref-46)
47. 47 Russell Seitz, When a Lovely Flame Dies: ***Smoking*** vs. Other Carcinogens, NAT'L REV., Jan. 28, 1991, at 19. [↑](#footnote-ref-47)
48. 48 See Glantz & Parmley, supra note 9, at 1. [↑](#footnote-ref-48)
49. 49 Id. at 4. [↑](#footnote-ref-49)
50. 50 Id. [↑](#footnote-ref-50)
51. 51 Id.; see also Kyle Steenland, Passive ***Smoking*** and the Risk of Heart Disease, 267 JAMA 94 (1992). Possibly, far more than 53,000 nonsmokers die each year as a result of exposure to ETS. All of the studies analyzed by Glantz and Parmley involved exposure to ETS in the home. Home exposure is generally much less than exposure in the workplace. See Glantz & Parmley, supra note 9, at 4.

    A point which appears fairly obvious -- but which is made infrequently -- is that ETS may make a significant contribution towards smoker mortality. Smokers have to breathe too. Thus, exposure to ETS could conceivably be a factor in some ***smoking***-related diseases. Indeed, the current trend towards nonsmoking has probably increased smokers' exposure to ETS, since smokers are now frequently forced to congregate in small areas to ***smoke***. [↑](#footnote-ref-51)
52. 52 See Death from a ***Smoke*** Ring: Passive ***Smoking*** is One of Top Causes, L.A. TIMES, May 24, 1990, at B6. [↑](#footnote-ref-52)
53. 53 See David B. Ezra, Assaulted by Cigarettes, L.A. DAILY J., Jan. 24, 1992, at 6. [↑](#footnote-ref-53)
54. 54 There are now at least 31 separate epidemiological studies on the connection between ETS and lung cancer in nonsmokers. See EPA REPORT, supra note 7, at 5-3. [↑](#footnote-ref-54)
55. 55 Judith S. Novick, Use of Epidemiological Studies to Prove Legal Causation: Aspirin and Reye's Syndrome, a Case in Point, [*22 TORT & INS. L.J. 536, 549 n.96 (1987).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3RK3-K0X0-00C2-M4VT-00000-00&context=) [↑](#footnote-ref-55)
56. 56 Glantz & Parmley, supra note 9, at 1. [↑](#footnote-ref-56)
57. 57 Curiously, this "insufficient evidence" argument is exactly the same attack that the tobacco industry made against the landmark 1964 Report of the Surgeon General, which declared that ***smoking*** could cause cancer in smokers. See ROBERT SOBEL, THEY SATISFY 190 (1978) ("The tobacco companies rushed to print with rebuttals, featuring charges that the committee had not produced evidence to substantiate its findings."). [↑](#footnote-ref-57)
58. 58 See, e.g., B. Bruce-Briggs, The Health Police are Blowing ***Smoke***, FORTUNE, Apr. 25, 1988, at 349 (describing epidemiology as part of a "politically motivated hypochondria" and arguing that the statistics can't possibly be correct since they show that ETS can be as dangerous as light primary ***smoking***); Patrick Cooke, Kick Me I ***Smoke***, HIPPOCRATES, July-Aug. 1989, at 66; Geoffrey Cowley, Secondhand ***Smoke***: Some Grim News, NEWSWEEK, June 11, 1990, at 59 (reporting that a Philip Morris spokesperson responded to studies, which showed that ETS resulted in more than 50,000 annual deaths of nonsmoking Americans, by stating that the researchers had "tortured the data").

    One author has even suggested that "[i]n fact, no causal link has been scientifically established between ETS and chronic adverse health effects." See Fox, supra note 14, at 329 n.98. Ironically, the author cited the Surgeon General's 1986 Report in support of his assertion. Id. (citing INVOLUNTARY ***SMOKING***, supra note 7). But the Surgeon General's Report actually concluded that "[i]nvoluntary ***smoking*** is a cause of disease, including lung cancer, in healthy nonsmokers." INVOLUNTARY ***SMOKING***, supra note 7, at 7. [↑](#footnote-ref-58)
59. 59 See Dimitrios Trichopoulos et al., Active and Passive ***Smoking*** and Pathological Indicators of Lung Cancer Risk in an Autopsy Study, 268 JAMA 1697 (1992); Autopsies Link Cancer, ETS in Nonsmokers; Finding Supports Other Research, Study Says, 22 O.S.H. Rep. (BNA) No. 20, at 1062 (Oct. 14, 1992). [↑](#footnote-ref-59)
60. 60 Id. Further hard evidence of the impact of ETS was obtained in a study performed on rabbits. See Study Shows How Secondhand ***Smoke*** Hurts Heart, N.Y. TIMES, Nov. 22, 1992, at A39. Researchers found that after exposure to ETS, accumulation of fat in the rabbits' arteries nearly doubled. Id. [↑](#footnote-ref-60)
61. 61 According to one recent study, the vast majority of people think ETS is generally harmful to their health. See Passive ***Smoking***: Beliefs, Attitudes, and Exposures -- United States, 1986, 259 JAMA 2821 (1988). [↑](#footnote-ref-61)
62. 62 EPA REPORT, supra note 7, at 6-31 ("In summary, our analyses support a total of approximately 3,000 as an estimate for the annual U.S. lung cancer deaths in nonsmokers attributable to ETS exposure."). The EPA concluded that ETS is a "Group A (known human) carcinogen." Id. at 1-8. The EPA Report did not consider heart disease. [↑](#footnote-ref-62)
63. 63 R. Emmett Tyrell, Zealots Against Science, PHILIP MORRIS MAG., Winter 1992, at 24, 25. The EPA Report almost immediately triggered private and public ***smoking*** restrictions. There is even some possibility that it will lead to broad antismoking legislation -- including workplace ***smoking*** bans. See, e.g., Allen, supra note 16, at 1; Attacks Mount on Tobacco's Tort Immunity, L.A. DAILY J., Mar. 17, 1993, at 1, Bradley Inman, Legislator Again Fanning Flames to ***Get*** a ***Smoking*** Ban in the Workplace, L.A. TIMES, Apr. 4, 1993, at D2. Several tobacco companies have even filed a legal action against the EPA in an effort to have the report declared a product of faulty science. See Jerry E. Bishop, Statisticians Occupy Front Lines in Battle Over Passive ***Smoking***, WALL ST. J., July 28, 1993, at B1. [↑](#footnote-ref-63)
64. 64 See, e.g., Walker Merryman, Don't Ostracize Smokers, USA TODAY, Oct. 7, 1992, at 12A (author, vice president of the Tobacco Institute, argues that a study of the effects of ETS on nonsmokers "raises many more questions than it answers"); see also Oldenburg, supra note 6, at B5. Indeed, the passive-***smoking*** issue has been singled out as the greatest threat to the viability of the tobacco industry. See MILES, supra note 11, at 217. [↑](#footnote-ref-64)
65. 65 See Ezra, supra note 53, at 6 ("[D]oes a nonsmoker have the ***right*** to 'just say "no"' to secondhand ***smoke***?"). The United States Supreme Court has ruled that a prisoner who is forced to share a cell with a smoker may have a claim for cruel and unusual punishment under the ***Eighth Amendment to the United States Constitution.*** See [*Helling v. McKinney, 113 S. Ct. 2475 (1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-K480-003B-R3BR-00000-00&context=) The case appears indicative of a significant shift in attitudes toward nonsmokers' ***rights***. [↑](#footnote-ref-65)
66. 66 See supra note 17. [↑](#footnote-ref-66)
67. 67 The tobacco industry attacks epidemiological studies as scientifically inconclusive. However, nonsmokers who sue for injuries caused by ETS will not need to prove their case by "conclusive" evidence. All that is ordinarily required is proof by a preponderance of the evidence. See generally Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, [*98 HARV. L. REV. 1357 (1985).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-2MJ0-00CV-52GK-00000-00&context=) [↑](#footnote-ref-67)
68. 68 See generally Harvey M. Sapolsky, The Political Obstacles to the Control of Cigarette ***Smoking*** in the United States, 5 J. HEALTH POL. POL'Y & L. 277 (1980). [↑](#footnote-ref-68)
69. 69 See generally Kraft, supra note 34. [↑](#footnote-ref-69)
70. 70 See generally Kaufman, supra note 34, at 68-80; Opderbeck, supra note 34, at 220-29. Nonsmokers have unsuccessfully asserted constitutional theories to protect their ***right*** not to breathe tobacco ***smoke*** in public places. For example, in [*Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) aff'd, [*577 F.2d 897 (5th Cir. 1978),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XXJ0-0039-M50F-00000-00&context=) cert. denied, ***439 U.S. 1073 (1979),*** nonsmokers tried to enjoin the defendant stadium operators from permitting ***smoking*** during events held at the Louisiana Superdome. [*Id. at 716-17.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) The plaintiffs claimed that forced inhalation of secondhand tobacco ***smoke*** during stadium events caused physical harm and discomfort to nonsmokers and interfered with their enjoyment of the events in violation of the First, Fifth, Ninth, and ***Fourteenth Amendments to the United States Constitution.*** [*Id. at 717.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=)

    The nonsmokers in Gasper based their First Amendment claim on ***smoking***'s "chilling effect" on the plaintiffs' ***right*** to receive information at the stadium. [*Id. at 718.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) The district court dismissed the claim on the ground that the chilling effect of ***smoking*** was no greater than that of charging admission or even selling beer, since some people would choose not to attend events at which beer was sold. Id.

    The court's reasoning ignores the significant difference between beer and ***smoke*** -- liquid and gas. "Beer fumes" do not rise into the air to intoxicate or poison nearby persons. On the other hand, ***smoke*** from a lit cigarette enters the surrounding atmosphere and causes physical discomfort to bystanders.

    The court in Gasper also dismissed the nonsmokers' claim that the ***right*** to breathe clean air is a fundamental ***right*** protected by the Ninth Amendment. [*Id. at 721-22.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) The district court held that the ***right*** to breathe ***smoke***-free air did not warrant constitutional protection. Id. The court reasoned that recognizing the ***right*** to breathe ***smoke***-free air as a fundamental ***right*** would lead to judicial regulation "of every conceivable ill." [*Id. at 722;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) see also [*Kensell v. Oklahoma, 716 F.2d 1350 (10th Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YHW0-003B-G4R4-00000-00&context=) (affirming dismissal of state ***employee***'s claim that exposure to ETS violated his First Amendment ***rights*** by interfering with his ability to think); [*GASP v. Mecklenburg County, 256 S.E.2d 477 (N.C. Ct. App. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-18G0-003G-01VD-00000-00&context=) (dismissing plaintiffs' claim that the county violated their First and Fourteenth Amendment ***rights*** by allowing ***smoking*** in public facilities). [↑](#footnote-ref-70)
71. 71 See, e.g., [*CAL. LAB. CODE § 6400*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-H1V1-66B9-853W-00000-00&context=) (West 1989) ("Every employer shall furnish employment and a place of employment which are safe and healthful for the ***employees*** therein."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 569 (5th ed. 1984). [↑](#footnote-ref-71)
72. 72 The leading cases are summarized in Bates, supra note 15. [↑](#footnote-ref-72)
73. 73 [*368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) see also [*Smith v. Western Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-FDB0-003F-C3B9-00000-00&context=) (employer breached duty to provide safe workplace when employer had knowledge of the harm of ETS and had the ability to curtail ***smoking*** but did not do so when nonsmoking ***employee*** complained). [↑](#footnote-ref-73)
74. 74 See [*Shimp, 368 A.2d at 408;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) INVOLUNTARY ***SMOKING***, supra note 7. [↑](#footnote-ref-74)
75. 75 Id. at 410, 416. [↑](#footnote-ref-75)
76. 76 Id. at 410. [↑](#footnote-ref-76)
77. 77 Id. at 414. [↑](#footnote-ref-77)
78. 78 In the court's words:

    Cigarette ***smoke*** . . . is not a natural by-product of N.J. Bell's business. Plaintiff works in an office. The tools of her trade are pens, pencils, paper, a typewriter and a telephone. There is no necessity to fill the air with tobacco ***smoke*** in order to carry on defendant's business, so it cannot be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary.

    Id. at 411. Thus, "[i]t is evident that plaintiff is confronted with a work environment contaminated by the presence of a nonnecessary toxic substance." Id. [↑](#footnote-ref-78)
79. 79 Id. at 416. [↑](#footnote-ref-79)
80. 80 Id. [↑](#footnote-ref-80)
81. 81 By way of analogy, one might say that ***employees*** have a "***right***" to swing their arms in the workplace. However, few would actually argue that if ***employees*** swung their arms in a manner that caused harmful physical contact with other ***employees***, the injured ***employees***' ***right*** to avoid injury would have to be balanced against the other ***employees***' arm-swinging ***rights***. Yet, Shimp appears to say that this argument is plausible, insofar as it states that the ***smoking*** ***employees***' ***rights*** must be balanced against the nonsmoking ***employees***' ***rights***. [↑](#footnote-ref-81)
82. 82 [*759 P.2d 351 (Wash. 1988).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) [↑](#footnote-ref-82)
83. 83 [*Id. at 356.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) [↑](#footnote-ref-83)
84. 84 [*Id. at 352.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) [↑](#footnote-ref-84)
85. 85 Id. [↑](#footnote-ref-85)
86. 86 [*Id. at 355-56.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) Conceivably, a worker could also seek to recover for the increased risk of cancer which results from exposure to ETS, or even the fear of cancer as a result of exposure to ETS. See e.g., Fournier J. Gale, III & James L. Goyer, III, Recovery For Cancerphobia and Increased Risk of Cancer, 15 CUMB. L. REV. 723 (1985); Keith J. Klein, Fear of Cancer -- A Legitimate Claim in Toxic Tort Cases?, 33 A.F. L. REV. 193 (1990); Scott D. Marrs, Mind Over Body: Trends Regarding Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases, [*28 TORT & INS. L.J. 1 (1992);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3RK3-K3T0-00C2-M541-00000-00&context=) Barton C. Legum, Note, Increased Risk of Cancer as an Actionable Injury, [*18 GA. L. REV. 563 (1984).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-4F50-00CW-G3HG-00000-00&context=) [↑](#footnote-ref-86)
87. 87 [*McCarthy, 759 P.2d at 356.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) A rule allowing an employer who is unaware of certain health risks to escape liability is subject to criticism. Obviously, such a rule provides an incentive for employers to avoid obtaining knowledge about ETS and other health risks. Presumably, a better rule would encourage employers to stay informed with respect to workplace health and safety issues. [↑](#footnote-ref-87)
88. 88 Easily accessible groups such as Americans for Nonsmokers' ***Rights*** are happy to give ***employees*** information about the perceived dangers of ETS. [↑](#footnote-ref-88)
89. 89 [*McCarthy, 759 P.2d at 356.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) [↑](#footnote-ref-89)
90. 90 Id. [↑](#footnote-ref-90)
91. 91 The plaintiff in Shimp said her allergic reaction, which included rather severe symptoms, could be triggered by "as little as one smoker adjacent to [her]." [*Shimp, 368 A.2d at 410.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) [↑](#footnote-ref-91)
92. 92 See supra notes 39-61 and accompanying text. One court has refused to hold that an employer has a duty to provide a ***smoke***-free workplace for a particular ***employee*** with "special sensitivity." [*Gordon v. Raven Sys. & Research, Inc., 462 A.2d 10 (D.C. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRT-9K70-003G-154C-00000-00&context=) In Gordon, the court affirmed a directed verdict in favor of the employer because the ***employee*** had "presented no scientific evidence of the deleterious effects of tobacco ***smoke*** on nonsmokers in general." [*Id. at 15.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRT-9K70-003G-154C-00000-00&context=) Obviously, the substantial scientific evidence of the harms of ETS, which has accumulated in the years since Gordon was decided, renders Gordon a very questionable shield for employers to use against the claims of nonsmoking ***employees***. Modern nonsmoking ***employees*** will not find it difficult to produce evidence of the generally harmful effects of ETS on nonsmokers. [↑](#footnote-ref-92)
93. 93 [*WASH. REV. CODE ANN. § 70.160.010*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BB3-WG61-66P3-24NB-00000-00&context=) (West 1992). [↑](#footnote-ref-93)
94. 94 [*McCarthy, 759 P.2d at 355.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W2H0-003F-W47G-00000-00&context=) [↑](#footnote-ref-94)
95. 95 See, e.g., [*CAL. HEALTH & SAFETY CODE §§ 25948*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-GHM1-66B9-8091-00000-00&context=)-25949.8 (West Supp. 1984). The California Legislature, in eliminating all ***smoking*** upon public transportation vehicles, adopted several findings of the Surgeon General's 1986 Report, The Health Consequences of Involuntary ***Smoking***. [*CAL. HEALTH & SAFETY CODE § 25948*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-GHM1-66B9-8091-00000-00&context=). The findings include assertions that ETS ***smoke*** causes lung cancer in healthy nonsmokers and that nonsmokers have no adequate means of protection against "the damage inflicted upon them when they involuntarily inhale tobacco ***smoke***." Id. Thus, the legislature has apparently articulated a state policy which favors protecting nonsmokers from the effects of ETS. [↑](#footnote-ref-95)
96. 96 Judicial adherence to legislative fact-finding concerning the harmful nature of ETS could quickly undermine the traditional argument that ETS is merely an annoyance. At the very least, nonsmokers will argue that such legislative findings evidence a strong public policy in favor of protecting nonsmokers from ETS. [↑](#footnote-ref-96)
97. 97Assault and battery go together like ham and eggs." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10, at 41 (4th ed. 1971). An action for battery is based on harmful or offensive contact. Id. An action for assault is based on the apprehension that an offensive or harmful contact will occur. Id. [↑](#footnote-ref-97)
98. 98 [*RESTATEMENT (SECOND) OF TORTS §§ 13*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HNY0-00YF-T00M-00000-00&context=), 18 (1965). [↑](#footnote-ref-98)
99. 99 See, e.g., Kraft, supra note 34, at 367-68; Paolella, supra note 15, at 624; Stroud, supra note 15, at 346; Daynard & Sweda, supra note 35, at 53. [↑](#footnote-ref-99)
100. 100 Opderbeck, supra note 34, at 219 n.43. [↑](#footnote-ref-100)
101. 101 Cf. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 31-32 (5th prtg. 1954) ("'***Your*** ***right*** to swing ***your*** arms ends just where the other man's nose begins.'"). [↑](#footnote-ref-101)
102. 102 DAN B. DOBBS, REMEDIES § 3.9, at 204-06 (1973). [↑](#footnote-ref-102)
103. 103 Punitive damages, which are imposed above and beyond the actual damage sustained by the plaintiff, are awarded in order to punish wrongful conduct and to discourage similar behavior from reoccurring. Id. Obviously, to punish large and successful companies, awards must be substantial. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, [*56 S. CAL. L. REV. 1, 3-10 (1982).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-6H80-00CV-52RK-00000-00&context=) The potential for large monetary awards increases the incentive for plaintiffs' lawyers to take the cases on a contingency fee. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9, at 534-35 (3d ed. 1986). [↑](#footnote-ref-103)
104. 104 See, e.g., [*Ford Motor Co. v. Home Ins. Co., 172 Cal. Rptr. 59 (Cal. Ct. App. 1981);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S11-SKY0-003C-R3FT-00000-00&context=) [*Hartford Accident & Indem. Co. v. Village of Hempstead, 397 N.E.2d 737 (N.Y. 1979);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-9X50-003C-F23S-00000-00&context=) BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 14.02 (5th ed. 1992). [↑](#footnote-ref-104)
105. 105 Workers' compensation laws typically provide for somewhat smaller -- but more prompt and certain -- payments than ordinary tort claims. See William J. Maakestad & Charles Helm, Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards, 17 N. KY. L. REV. 9, 20 (1989). [↑](#footnote-ref-105)
106. 106 See, e.g., KEETON ET AL., supra note 71, § 80, at 575 ("Nearly all of the [workers' compensation] acts are limited to injuries arising 'by accident . . . .'"). It is also possible that injuries caused by workplace ETS -- whether caused by intentional or negligent conduct -- would not fall within the basic workers' compensation scheme of some states. See, e.g., Paolella, supra note 15, at 608-12 (concluding that ETS-related injuries would not be compensable under Washington's workers' compensation laws). [↑](#footnote-ref-106)
107. 107 See KEETON ET AL., supra note 71, § 9. [↑](#footnote-ref-107)
108. 108 Bodily harm is commonly defined as "any physical impairment of the condition of another's body, or physical pain or illness." [*RESTATEMENT (SECOND) OF TORTS § 15*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HNY0-00YF-T00P-00000-00&context=) (1965). "Harm" can occur when "the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." Id. cmt. a. Thus, acute physical reactions to ETS, such as burning or watery eyes, sinus irritation, cough, and sore throat constitute bodily harm. [↑](#footnote-ref-108)
109. 109 See Ezra, supra note 34, at 1098-100. [↑](#footnote-ref-109)
110. 110 [*252 S.E.2d 250 (N.C. Ct. App. 1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-19B0-003G-02F4-00000-00&context=) For criticisms of McCracken, see Paolella, supra note 15, at 624-25 & n.199; Swingle, supra note 34, at 472; and Ezra, supra note 34, at 1096. [↑](#footnote-ref-110)
111. 111 [*McCracken, 252 S.E.2d at 251.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-19B0-003G-02F4-00000-00&context=) [↑](#footnote-ref-111)
112. 112 Id. [↑](#footnote-ref-112)
113. 113 Id. The postal ***employee*** was allergic to tobacco ***smoke***. Id. He had even applied for sick leave as a result of his allergy. Id. At one of the meetings the postmaster allegedly told the ***employee***, "Bill, I know you claim to have an allergy to tobacco ***smoke*** and you have presented statements from ***your*** doctor stating this, but there is no law against ***smoking***, so I'm going to ***smoke***." Id. [↑](#footnote-ref-113)
114. 114 [*Id. at 251-52.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-19B0-003G-02F4-00000-00&context=) [↑](#footnote-ref-114)
115. 115 [*Id. at 252.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-19B0-003G-02F4-00000-00&context=) [↑](#footnote-ref-115)
116. 116 While McCracken involved an employer ***smoking*** near an ***employee***, an employer can also face liability for permitting ***employees*** to ***smoke*** near nonsmoking ***employees***. Such an employer may be liable for the battery committed by the ***smoking*** ***employees*** under several alternative legal theories. First, the employer may be vicariously liable based on the notion that the ***smoking*** falls within the course and scope of the employment. KEETON ET AL., supra note 71, § 70, at 500-05. Second, an employer is liable for conduct of ***employees*** that the employer authorizes or ratifies. See, e.g., [*CAL. CIV. CODE § 2339*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DSV1-66B9-810X-00000-00&context=) (West 1985). Ratification or authorization of ***employee*** ***smoking*** appears likely where the employer knows ***employees*** ***smoke*** in the workplace and has no restrictive policy. On the other hand, an employer with a no-***smoking*** policy could ratify an ***employee***'s ***smoking*** conduct by failing to reprimand smokers who violate the policy. Cf. ***Coats v. Construction & Gen. Laborers Local No. 185, 93 Cal. Rptr. 639 (Cal. Ct. App. 1971)*** (holding that employer ratified conduct when employer failed to discharge ***employees*** who committed assault and battery). [↑](#footnote-ref-116)
117. 117 For example, in [*Parodi v. Merit Sys. Protection Bd., 690 F.2d 731 (9th Cir. 1982),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4860-003B-G3DT-00000-00&context=) the court characterized the plaintiff's permanent disability, which resulted from respiratory illness caused by ETS, as an "environmental limitation." [*Id. at 738.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4860-003B-G3DT-00000-00&context=) For a text book example of the environmental approach to ETS, see STEVE COFFEL & KARYN FEIDEN, INDOOR POLLUTION 14 (1990), and compare W. David Slawson, The ***Right*** to Protection from Air Pollution, [*59 S. CAL. L. REV. 672, 685 (1986),*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-6DM0-00CV-52MC-00000-00&context=) which describes ***smoking*** as "essentially just self-administered air pollution." [↑](#footnote-ref-117)
118. 118 Ironically, some nonsmokers' ***rights*** groups fall into the trap of viewing ***smoking*** conduct as simply another form of air pollution. See, e.g., STEVE ALLEN & BILL ADLER, JR., THE PASSIONATE NONSMOKERS' BILL OF ***RIGHTS*** 52 (1989) ("Hawaii's nonsmokers' ***rights*** group, the Hawaii Clean Air Team, has attracted attention by redefining 'nonsmokers' as being 'clean air advocates.'"). [↑](#footnote-ref-118)
119. 119 See MILES, supra note 11, at 221. A good example of this approach is the one page article by a reader of Philip Morris Magazine, who vehemently complained about being denied the ***right*** to ***smoke*** at a symphony, even though she was expected to endure such "olfactory assaults" as perfume, hairspray, bus exhaust, and industrial fumes. See Juanita B. White, Secondhand Scent, PHILIP MORRIS MAG., Spring 1991, at 26. In a similar manner, tobacco companies attempt to shift the blame for the physical discomfort associated with ETS to numerous other "environmental" factors. Thus, in a short piece on the "Top Ten Reasons Why Anti-Smokers Do What They Do," the Smokers' Advocate listed as reason number six, "Anti-smokers erroneously believe that cigarette ***smoking*** is the cause of poor indoor air quality. Actually, cigarette ***smoke*** has been sited [sic] as the source of only 2-4 percent of all indoor air quality complaints." Smokers' Advocate, May 1992, at 4.

     Similarly, a recent issue of Philip Morris Magazine identified ceiling tiles, old filter systems, poorly maintained ventilation ducts, office furnishings, computers, and copy machines as the real culprits of workplace health risks. See Indoor Air Solution, PHILIP MORRIS MAG., Winter 1992, at 23. [↑](#footnote-ref-119)
120. 120 [*462 A.2d 10 (D.C. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRT-9K70-003G-154C-00000-00&context=) [↑](#footnote-ref-120)
121. 121 [*Id. at 14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRT-9K70-003G-154C-00000-00&context=) (citing [*Tanner v. Armco Steel Corp., 340 F. Supp. 532, 636-37 (S.D. Tex. 1972)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-N3S0-003B-31NH-00000-00&context=) Similarly, in [*Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) aff'd, [*577 F.2d 897 (5th Cir. 1978),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XXJ0-0039-M50F-00000-00&context=) cert. denied, ***439 U.S. 1073 (1979),*** the court stated that protecting nonsmokers from involuntary exposure to tobacco ***smoke*** would lead to judicial regulation "of every conceivable ill." [*Id. at 721-22.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-J7P0-0054-62B3-00000-00&context=) [↑](#footnote-ref-121)
122. 122 At least three smoker battery lawsuits have been filed in recent years. Portenier v. Republic Hogg Robinson, Inc., No. BC 028990 (Cal. Super. Ct., filed June 3, 1991), was filed in the County of Los Angeles. The defendants' motion for summary judgment was denied by the trial judge. See Second-Hand ***Smoke*** Case Going to Trial, L.A. DAILY J., Oct. 14, 1993, at 1. Leichtman v. WLW Jacor Communications, Inc., No. A9206918 (Ohio Ct. Common Pleas, filed Aug. 5, 1992), was filed in Hamilton County, Ohio. A Georgia appellate court recently upheld a nonsmoker's ***right*** to sue a smoker for battery in Richardson v. Hennly, No. A93A0680 (Ga. Ct. App., filed July 15, 1993). [↑](#footnote-ref-122)
123. 123 [*RESTATEMENT (SECOND) OF TORTS § 46*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HP00-00YF-T01W-00000-00&context=) (1965) states, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Comment d of § 46 defines extreme and outrageous conduct as that which is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. § 46, cmt. d. [↑](#footnote-ref-123)
124. 124 See [*Bernard v. Cameron & Colby Co., 491 N.E.2d 604 (Mass. 1986).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4V80-003C-V2DR-00000-00&context=) In Bernard, a woman sued for intentional infliction of emotional distress after her employer, knowing of her allegery to tobacco ***smoke***, reassigned her from a ***smoke***-free area to an area in which ***smoking*** was permitted. [*Id. at 605.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4V80-003C-V2DR-00000-00&context=) The court held that the facts alleged failed to state a claim for emotional distress. [*Id. at 607.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4V80-003C-V2DR-00000-00&context=) The court stressed that the plaintiff's only allegation was that she was required to work in an 1100-square-foot office with two smokers. According to the court, the case did not involve "conduct which is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency . . . ." Id. Thus, Bernard stands for the proposition that, in light of the continuing, albeit abating, prevalence of tobacco ***smoking***, an employer does not act outrageously by merely permitting ***smoking*** in the workplace. [↑](#footnote-ref-124)
125. 125 KEETON ET AL., supra note 71, § 12, at 62 ("[A]nother basis on which extreme outrage can be found is the defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct." (footnote omitted)). [↑](#footnote-ref-125)
126. 126 See Arthur S. Leonard, A New Common Law of Employment Termination, [*66 N.C. L. REV. 631, 635 n.29 (1988);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-3D50-00CV-62WK-00000-00&context=) see also WALTER K. OLSON, THE LITIGATION EXPLOSION 147 (1991). [↑](#footnote-ref-126)
127. 127 Frequently, liability insurance does not cover wrongful discharge lawsuits. See, e.g., [*Dyer v. Northbrook Property & Casualty Ins. Co., 259 Cal. Rptr. 298 (Cal. Ct. App. 1989);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-J470-003D-J43J-00000-00&context=) Mary T. Sobnosky, Note, Wright Line and Wrongful Discharge Actions: A Uniform Standard of Review, [*33 CASE W. RES. L. REv. 404, 422 (1983).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-Y4Y0-00CW-52Y6-00000-00&context=) [↑](#footnote-ref-127)
128. 128 The average jury verdict in wrongful discharge cases tried in California between 1982 and 1986 was $ 652,100. William B. Gould, IV, Stemming the Wrongful Discharge Tide: A Case for Arbitration, 13 ***EMPLOYEE*** REL. L.J. 404, 405-06 (1987). [↑](#footnote-ref-128)
129. 129 See generally Note, Protecting ***Employees*** At Will Against Wrongful Discharge: The Public Policy Exception, [*96 HARV. L. REV. 1931 (1983).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-2S50-00CV-52TR-00000-00&context=) [↑](#footnote-ref-129)
130. 130 See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 1.01, at 2 (1988) ("[T]raditionally, American employers possessed an absolute ***right*** to discharge any ***employee*** not protected by an express contract."). [↑](#footnote-ref-130)
131. 131 Id. at 3. [↑](#footnote-ref-131)
132. 132 A leading case in the creation of the public policy exception is [*Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WWP0-003C-N15V-00000-00&context=) Pierce described the exception as follows: "[A]n ***employee*** has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." [*Id. at 512.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WWP0-003C-N15V-00000-00&context=) [↑](#footnote-ref-132)
133. 133 See, e.g., [*CAL. LAB. CODE § 6400*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-H1V1-66B9-853W-00000-00&context=) (West 1989); [*N.Y. LAB. LAW § 200*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-15D1-6RDJ-84JC-00000-00&context=) (McKinney 1986); [*Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) see also [*Smith v. Western Elec. Co., 643 S.W.2d 10, 12 (Mo. Ct. App. 1982).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-FDB0-003F-C3B9-00000-00&context=) Even the federal government has identified workplace safety as an important public policy objective. See [*29 U.S.C. § 651*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-420J-00000-00&context=)(b) (1988). [↑](#footnote-ref-133)
134. 134 [*188 Cal. Rptr. 159 (Cal. Ct. App. 1982).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-134)
135. 135 Id. [↑](#footnote-ref-135)
136. 136 [*Id. at 160.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-136)
137. 137 [*Id. at 162, 168.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-137)
138. 138 [*Id. at 164.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-138)
139. 139 [*Id. at 168.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-139)
140. 140 [*Id. at 164.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-140)
141. 141 [*Id. at 162.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-MD70-003D-J44K-00000-00&context=) [↑](#footnote-ref-141)
142. 142 Id. [↑](#footnote-ref-142)
143. 143 For example, one study of 120 California cases revealed that the average net recovery for successful plaintiffs is about $ 188,000. Cornelius J. Peck, Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge, [*66 WASH. L. REV. 719, 743 n.131 (1991).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-3D90-00CV-62WT-00000-00&context=) Companies spent about $ 85,000 just to defend the average case. Id. [↑](#footnote-ref-143)
144. 144 KEETON ET AL., supra note 71, § 80, at 573. [↑](#footnote-ref-144)
145. 145 Id. [↑](#footnote-ref-145)
146. 146 See, e.g., Glantz & Daynard, supra note 36, at 40 (citing successful ETS-related workers' compensation claims of $ 95,000 and $ 29,000); Psyche Pascual, Woman Wages Anti-***Smoking*** Fight, L.A. TIMES, April 28, 1992, at B3 (teacher awarded $ 29,999 in workers' compensation claim arising from tobacco ***smoke*** that drifted into her classroom from a nearby ***smoking*** area); see also Kraft, supra note 34, at 360-63; Stroud, supra note 15, at 355; Krupp, supra note 15, at 519-21. But see Paolella, supra note 15, at 608-12 (ETS-related injuries may not be compensable under Washington's Workers' Compensation Act). [↑](#footnote-ref-146)
147. 147 See Maakestad & Helm, supra note 105, at 21. [↑](#footnote-ref-147)
148. 148 See generally Kraft, supra note 34, at 359-60; see also [*McCrocklin v. Employment Dev. Dep't, 205 Cal. Rptr. 156 (Cal. Ct. App. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-KX90-003D-J1K9-00000-00&context=) (reversing administrative decision to deny unemployment benefits to an occasional pipe smoker who was concerned about the carcinogenic effect of ETS in the workplace); [*Alexander v. California Unemployment Ins. Appeals Bd., 163 Cal. Rptr. 411 (Cal. Ct. App. 1980);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S11-SWK0-003C-R4TW-00000-00&context=) [*Lapham v. Pennsylvania Unemployment Compensation Bd. of Review, 519 A.2d 1101 (Pa. Commw. Ct. 1987).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-1C40-003C-S0Y5-00000-00&context=) Of course, the granting of unemployment benefits to workers who would rather quit work than breathe ETS is a relatively recent phenomenon. See, e.g., [*Beecham v. Falstaff Brewing Corp., 36 N.W.2d 233 (Neb. 1949)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YHF-KK20-00KR-D28C-00000-00&context=) (denying benefits to a worker who refused a janitorial job that would have entailed exposure to ETS).

     One unemployment benefits case is particularly interesting because of its reasoning. In [*Rotenberg v. Industrial Comm'n, 590 P.2d 521 (Colo. Ct. App. 1979),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5360-003D-90R7-00000-00&context=) the court denied unemployment benefits to a computer programmer who quit his job after the employer refused to consider establishing nonsmoking areas. The court specifically mentioned that the computer programmer had not previously informed his employer of any particular sensitivity to ETS. [*Id. at 522.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5360-003D-90R7-00000-00&context=) Thus, Rotenberg is yet another case which demonstrates that a nonsmoking ***employee*** may create ***rights*** by complaining about the irritating or harmful effects of ETS. In the law of workplace ETS, the squeaky wheel ***gets*** the grease. [↑](#footnote-ref-148)
149. 149 See [*Parodi v. Merit Sys. Protection Bd., 690 F.2d 731 (9th Cir. 1982).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4860-003B-G3DT-00000-00&context=) Parodi exemplifies the reduced productivity that ETS in the workplace may cause. Irene Parodi had been a successful ***employee*** of the Defense Logistics Agency for almost twelve years when a transfer to a ***smoke***-filled workplace immediately resulted in respiratory problems that caused her disability. [*Id. at 733.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4860-003B-G3DT-00000-00&context=) Recognizing the wasted productivity inherent in the situation, the court allowed Parodi's employer sixty days to accommodate Parodi's health concerns by curtailing ***smoking*** of other ***employees*** as an alternative to disability payments. [*Id. at 740.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4860-003B-G3DT-00000-00&context=) [↑](#footnote-ref-149)
150. 150 See, e.g., Cliff, supra note 15. [↑](#footnote-ref-150)
151. 151 [*277 Cal. Rptr. 557 (Cal. Ct. App. 1991).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-151)
152. 152 [*Id. at 563.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-152)
153. 153 [*Id. at 562-63.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-153)
154. 154 [*Id. at 563.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-154)
155. 155 Id.; see supra notes 117-21 and accompanying text for a discussion of the environmental approach to ETS. [↑](#footnote-ref-155)
156. 156 [*County of Fresno, 277 Cal. Rptr. at 566.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-156)
157. 157 [*Id. at 563.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-157)
158. 158 [*Id. at 566.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-158)
159. 159 Id. [↑](#footnote-ref-159)
160. 160 Id. In the words of the court, "The evidence in this case . . . reflects the environment in Clerical 207 was like a ***smoke***-filled bar in which everyone 'gagged together.'" Id. [↑](#footnote-ref-160)
161. 161 [*Id. at 566.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HFX0-003D-J1CJ-00000-00&context=) [↑](#footnote-ref-161)
162. 162 Id. [↑](#footnote-ref-162)
163. 163 The creation and maintenance of outgroups, or the "Other," as part and parcel of the process of conflict and discrimination is explored in SIMONE DE BEAUVOIR, THE SECOND SEX (1949). In the context of ***smoking***, nonsmokers see smokers as contaminating the air with foul smelling ***smoke*** and threatening their lives with ETS. Smokers see nonsmokers as interfering with their most basic human ***rights***. Thus, in one recent survey a nonsmoking worker wrote of smokers, "'Take them out and shoot them! !'" Benson, supra note 13, at 18. A ***smoking*** worker wrote, "I believe in freedom of choice, the ***right*** to life, free speech, and the ***right*** to be stupid with ***your*** own health." Id. Obviously, forcing smokers and nonsmokers to share space can lead to prolonged conflict and can damage workplace morale. [↑](#footnote-ref-163)
164. 164 One study aptly illustrates this point. The study measured ETS exposure on airline flights. Margaret E. Mattson et al., Passive ***Smoking*** on Commercial Airline Flights, 261 JAMA 867 (1989). The study found that flight attendants who worked in the nonsmoking section of the plane had the same amount of exposure as the flight attendants who worked in the ***smoking*** section. Id. [↑](#footnote-ref-164)
165. 165 See EPA REPORT, supra note 7, at 3-51 ("Air sampling conducted in a variety of indoor environments has shown that nonsmoker exposure to ETS-related toxic and carcinogenic substances will occur in indoor spaces where there is ***smoking*** occupancy."). [↑](#footnote-ref-165)
166. 166 See INVOLUNTARY ***SMOKING***, supra note 7, at 7. [↑](#footnote-ref-166)
167. 167 Indeed, the tobacco industry itself now apparently favors separate ***smoking*** and nonsmoking sections in the workplace -- at least as an alternative to widespread restrictions. See, e.g., Common Sense, PHILIP MORRIS MAG., Spring 1991, at 23 (advising smokers to "[p]rotest to the president of any business that refuses to give its ***employees*** somewhere to ***smoke***"); Survey Shows That Most Americans Favor ***Smoking*** Sections, SMOKERS' ADVOCATE, Sept. 1992, at 1. [↑](#footnote-ref-167)
168. 168 For example, one smoker recently complained in an article submitted to Philip Morris Magazine that her workplace had restricted ***smoking*** to one small break room. See Connie Plant, Office ***Rights*** and Wrongs, PHILIP MORRIS MAG., Fall 1991, at 25. The embittered smoker concluded that the unfair segregation had probably resulted from smokers being "too nice." Id. [↑](#footnote-ref-168)
169. 169 See supra notes 36-62 and accompanying text. [↑](#footnote-ref-169)
170. 170 While some very spacious workplaces could probably be effectively segregated, nonsmokers may still take legal action for relatively minor amounts of exposure to ETS. For example, a California teacher received a substantial workers' compensation award for injuries (including a chronic loss of voice) that resulted from ETS blowing from a first-floor smokers' lounge into her second-floor classroom. See Pascual, supra note 146, at B3. [↑](#footnote-ref-170)
171. 171 See supra notes 130-46 and accompanying text. [↑](#footnote-ref-171)
172. 172 See infra notes 297-314 and accompanying text. [↑](#footnote-ref-172)
173. 173 See supra notes 20-32 and accompanying text. [↑](#footnote-ref-173)
174. 174 One book that was funded by a grant from the Tobacco Institute argues that higher absenteeism for smokers is really just a result of the fact that smokers are more likely to be blue-collar workers who have less enjoyable jobs than nonsmokers. See TOLLISON & WAGNER, supra note 30, at 27-29. [↑](#footnote-ref-174)
175. 175 Smokers are far more likely than nonsmokers to suffer from disease associated with exposure to other workplace substances. For example, asbestosis is far more likely to affect smokers than nonsmokers. See Goh, supra note 3, at 824 ("Smokers working in purified asbestos plants . . . were ninety-two times more likely to die from lung cancer than their nonsmoking colleagues."); see also DOUVILLE, supra note 23, at 19-20. [↑](#footnote-ref-175)
176. 176 See generally Elizabeth B. Thompson, Note, The Constitutionality of an ***Off***-Duty ***Smoking*** Ban for Public ***Employees***: Should the State ***Butt*** Out?, [*43 VAND. L. REV. 491, 509-21 (1990).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S0M-DF30-00CW-70HN-00000-00&context=) While a privacy claim based on the Federal Constitution is not available to ***employees*** of private companies, it is possible that privacy claims could be asserted under some state constitutions. See Rothstein, supra note 3, at 958. [↑](#footnote-ref-176)
177. 177 The problems of monitoring ***employees***' ***off***-site ***smoking*** are noted in Rothstein, supra note 3, at 961-62. Professor Rothstein suggests that the monitoring efforts could create serious legal and ethical problems for employers. Id. [↑](#footnote-ref-177)
178. 178 See, e.g., Fox, supra note 14, at 324-26. [↑](#footnote-ref-178)
179. 179 See, e.g., [*Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-4557-00000-00&context=) ("Absent a collective-bargaining agreement . . . state common law generally permits an employer to run the workplace as it wishes."). [↑](#footnote-ref-179)
180. 180 Companies that have banned workplace ***smoking*** have not faced serious challenges from ***smoking*** ***employees***. See Joan O'C. Hamilton et al., 'No ***Smoking***' Sweeps America, BUS. WK., July 27, 1987, at 40. Pacific Northwest Bell Telephone Company banned workplace ***smoking*** in 1985. [*Id. at 42.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-4557-00000-00&context=) ***Employees*** received three months advance notice. Id. Of the company's 4,000 ***smoking*** ***employees***, almost 10% quit ***smoking*** altogether within six months. No litigation resulted from the ban. Id. North American Life Assurance Company also banned ***smoking*** in 1985. Falconer, supra note 1, at 66-68. At first, about 10% of the ***employees*** were upset. Id. However, after the policy was explained at several forums during which the company's chief medical officer reviewed the health concerns, the ***employees***' animosity quickly died out. Id. Moreover, as the public's awareness of the harms of ETS increases, legal challenges to ***smoking*** restrictions become less likely to succeed. [↑](#footnote-ref-180)
181. 181 See generally Bowers, supra note 15, at 46 ("While the courts have often found a duty to bargain over ***smoking*** policies, arbitrators have not. As public opinion changed about ***smoking***, and as health concerns about the effects of passive ***smoke*** have intensified, arbitrators are finding increasingly that ***smoking*** is not a condition of employment subject to negotiation.") [↑](#footnote-ref-181)
182. 182 See generally Thompson, supra note 176. [↑](#footnote-ref-182)
183. 183 See, e.g., [*Gordon v. Raven Sys. & Research, Inc., 462 A.2d 10 (D.C. 1983);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRT-9K70-003G-154C-00000-00&context=) [*Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-22J0-003C-N0TW-00000-00&context=) KEETON ET AL., supra note 71, § 80, at 569; see also [*Smith v. Western Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-FDB0-003F-C3B9-00000-00&context=) [↑](#footnote-ref-183)
184. 184 See supra notes 36-62 and accompanying text. [↑](#footnote-ref-184)
185. 185 See, e.g., David B. Ezra, Who Should Take Chance that ***Smoking*** is Dangerous?, L.A. DAILY J., Feb. 1, 1991, at 7. [↑](#footnote-ref-185)
186. 186 Medical doctors noticed a link between ***smoking*** and lung cancer as early as the 1930s. Charles Kenney, The Tobacco Wars: The Antismoking Guerillas Face Their Biggest Battle Yet Taking the Industry to Court, BOSTON GLOBE, May 11, 1986, at 17. But warnings were not placed on packages of cigarettes until the mid-1960s. See Rivka Widerman, Tobacco Is a Dirty Weed. Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation, 38 LOY. L. REV. 387, 391 (1992). [↑](#footnote-ref-186)
187. 187 Contact lens wearers may have especially adverse reactions to ETS. See Contact Lenses and ***Smokes*** -- A Bad Combination, REVIEW OPTOMETRY, Oct. 1990, at 101. [↑](#footnote-ref-187)
188. 188 See supra notes 36-37 and accompanying text. [↑](#footnote-ref-188)
189. 189 Of course, in many jobs, accuracy is extremely important. Employers can suffer when the immediate effects of ETS, such as headaches and eye irritation, impair ***employee*** concentration, vision, and accuracy. According to the 1986 Report of the Surgeon General, "The eyes appear to be especially sensitive to irritation by ETS. . . ." INVOLUNTARY ***SMOKING***, supra note 7, at 11. The results of ***employee*** inaccuracy can be extremely costly. See, e.g., David Margolick, How Three Missing Zeros Brought Red Faces and Cost Millions of Dollars, N.Y. TIMES, Oct. 4, 1991, at B16 (reporting that a typographical error made by law firm ***employees*** in a mortgage document cost a client at least $ 31 million). [↑](#footnote-ref-189)
190. 190 See supra notes 30-31 and accompanying text. [↑](#footnote-ref-190)
191. 191 See, e.g., David S. Hames, Key Concerns in Shaping a Company ***Smoking*** Policy, 14 ***EMPLOYEE*** REL. L.J. 223, 226-27 (1988). [↑](#footnote-ref-191)
192. 192 See Hansen, supra note 15, at 426 (noting that workplace bans have generally withstood legal challenges). [↑](#footnote-ref-192)
193. 193 See Morelite Equip. Co. v. International Bhd. of Elec. Workers, 88 Lab. Arb. Rep. (BNA) 777 (1987) (upholding ***smoking*** restrictions against a collective bargaining requirement where working conditions created a risk of fire if ***employees*** were permitted to ***smoke***); Southwest Forest Indus., Inc. v. United Paper Workers Int'l Union, 84-2 Lab. Arb. Awards (CCH) P 8432 (1984) (approving the discipline of ***employee*** who ***smoked*** in violation of ***employer's*** policy where a large stock of paper products enhanced the risk of ***smoking***-related fire). [↑](#footnote-ref-193)
194. 194 For example, a gasoline filling station would have a strong argument that absolute ***smoking*** restrictions are required to prevent explosions or fires. Cf. In re Cereal Food Processors, Inc., 96 Lab. Arb. Rep. (BNA) 1179 (1991) (Madden, Arb.) (upholding the ***employer's*** ***smoking*** ban against union grievance where flour mill presented a relatively high risk of explosion). [↑](#footnote-ref-194)
195. 195 Since the mid-1960s, Congress has required that each package of cigarettes sold contain a health warning. The current warnings are:

     (1) Surgeon General's Warning: ***Smoking*** Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.

     (2) Surgeon General's Warning: Quitting ***Smoking*** Now Greatly Reduces Serious Risks to ***Your*** Health.

     (3) Surgeon General's Warning: ***Smoking*** By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

     (4) Surgeon General's Warning: Cigarette ***Smoke*** Contains Carbon Monoxide.

     [*15 U.S.C. § 1333*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ31-NRF4-41SW-00000-00&context=)(a) (1988). Manufacturers are required to display the warnings on a rotational basis. § 1333(c); see also Note, Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, [*99 HARV. L. REV. 809, 813 (1986)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-2JM0-00CV-5290-00000-00&context=) ("Knowledge that ***smoking*** has potential health risks has become widespread in the two decades since the first Surgeon General's Report on ***smoking*** and the subsequent public debate over ***smoking***'s health hazards."). [↑](#footnote-ref-195)
196. 196 For a discussion of the slippery slope argument technique, see Frederick Schauer, Slippery Slopes, [*99 HARV. L. REV. 361 (1985).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-2JB0-00CV-5281-00000-00&context=) Schauer states that the slippery slope argument actually concedes that "the proposed resolution of the instant case is not itself troublesome." [*Id. at 368-69.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S41-2JB0-00CV-5281-00000-00&context=) [↑](#footnote-ref-196)
197. 197 See, e.g., Fry, supra note 1, at 13, 16 ("Smokers and their defenders are beginning to demand consistency by the employer who wants to dictate what an ***employee*** does at home. If you are penalized for ***smoking*** at home, why not for driving without seat belts or eating fatty foods? And as the cries become louder, more courts may listen.").

     In addition, employers could account for the economic costs of ***smoking*** by adjusting compensation. Bonuses, differential pay, paid vacations, or other creative compensation approaches could be used to reward nonsmokers and encourage smokers to quit. Pay differentials would be far less intrusive than lifestyle regulations. However, some states have laws that preclude employers from discriminating against smokers in compensation or other terms of employment. See, e.g., [*KY. REV. STAT. ANN. § 344.040*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5D87-RSJ1-66PR-P52V-00000-00&context=) (Baldwin 1992). [↑](#footnote-ref-197)
198. 198 On the problems associated with pervasive litigation, see generally WALTER K. OLSON, THE LITIGATION EXPLOSION (1991). [↑](#footnote-ref-198)
199. 199 See, e.g., [*International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KV60-003B-R2R0-00000-00&context=) (discussing whether an ***employer's*** fear of tort liability to fetuses of pregnant workers would justify employment discrimination based on sex); In re Witco Corp., 96 Lab. Arb. Rep. (BNA) 499 (1991) (Nelson, Arb.) (noting that successful litigation against employers was a reason for upholding the ***employer's*** unilateral ban of workplace ***smoking*** against union challenge); see also In re Hoover Co., 95 Lab. Arb. Rep. (BNA) 419 (1990) (Lipson, Arb.) (citing nonsmoker liability suits for exposure to ETS as one reason, among many, to uphold the ***employer's*** ***smoking*** ban against union challenge). [↑](#footnote-ref-199)
200. 200 See supra notes 70-150 and accompanying text. [↑](#footnote-ref-200)
201. 201 The concern over employer liability stemming from ETS in the workplace is expressed frequently by commentators, lawyers, and companies that are establishing ***smoking*** restrictions. See Kraft, supra note 34, at 375 ("[T]he prudent manager of a place open to the public will work toward a total ban of ***smoking*** on the premises."); Benson, supra note 13, at 18 (quoting a professor of management as stating, "Companies should consider the potential liabilities of not adopting 'no ***smoking***' policies. The day is coming when companies will be held liable for some of the secondhand ***smoke***-related illnesses of their ***employees***."); Falconer, supra note 1, at 66 ("[B]anning it outright also means a healthier workplace -- and eliminates employers' vulnerability to lawsuits involving exposure to secondhand ***smoke***."); Michael A. Verespej, ***Smoking*** & Drug Policies: Whose ***Rights***?, INDUSTRY WK., Feb. 1, 1988, at 39, 40 (quoting an attorney as stating, "In the ***smoking*** arena, virtually all the legal decisions favor the non-smoker."). [↑](#footnote-ref-201)
202. 202 See Veronique Mistiaen, ***Smoke*** Signals Danger for Restaurant Help, CHI. TRIB., Nov. 22, 1992, at CN1; see also Steenland, supra note 51, at 94 (noting that nonsmoking restaurant workers are "perhaps the worst case for occupational ETS exposure"). [↑](#footnote-ref-202)
203. 203 Id. [↑](#footnote-ref-203)
204. 204 See, e.g., Edmund Newton, Restaurants to City Council: ***Butt*** Out, L.A. TIMES, Apr. 23, 1992, at J7 (reporting on a "parade" of restaurant owners who urged the Pasadena City Council not to restrict ***smoking*** in city restaurants on the ground that it would reduce their incomes). [↑](#footnote-ref-204)
205. 205 See supra notes 20-32 and accompanying text. [↑](#footnote-ref-205)
206. 206 Where foodstuffs are concerned, workplace ***smoking*** restrictions have been upheld, at least in part, in order to preserve the wholesomeness of the foodstuffs. See In re Cereal Food Processors, Inc., 96 Lab. Arb. Rep. (BNA) 1179 (1991) (Madden, Arb). [↑](#footnote-ref-206)
207. 207 See Stroud, supra note 15, at 356-57. [↑](#footnote-ref-207)
208. 208 In re City of Hartford, 97 Lab. Arb. Rep. (BNA) 768 (1991) (Torres, Arb.) (upholding restrictions where ETS could have damaged "sensitive computer equipment"). [↑](#footnote-ref-208)
209. 209 NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO ***SMOKE***: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS 8 (1986) ("Tobacco ***smoke*** has a distinct and persistent odor, making control through ventilation particularly difficult."). [↑](#footnote-ref-209)
210. 210 See Hostetler, supra note 34, at 451. [↑](#footnote-ref-210)
211. 211 See Glantz & Daynard, supra note 36, at 36. [↑](#footnote-ref-211)
212. 212 See, e.g., Florence King, I'd Rather ***Smoke*** Than Kiss, NAT'L REV., July 9, 1990, at 32 (describing antismoking public service advertisements that focused on tobacco-related odor and the smoker's fear of "being physically disgusting and smelling bad"). [↑](#footnote-ref-212)
213. 213 Tertiary or thirdhand ***smoke*** emanates from the body, hair, and clothing of the smoker. It must be distinguished from the bad breath of a smoker. However, both tertiary ***smoke*** and "smokers' breath" operate to make smokers unpleasant people to be near -- even when there are no lit cigarettes in the room. [↑](#footnote-ref-213)
214. 214 See Flora Johnson, The Crusade Against ***Smoking***, STUDENT LAW., Mar. 1979, at 15, 17 ("[N]icotine-stained fingers, yellow teeth, and essence de cigarette ***butt*** detract from the sex appeal a smoker was previously thought to exude."). Medical literature on the so-called smoker's face, the premature and excessive facial wrinkling which typically accompanies ***smoking***, is reviewed in Bret E. Davis & Howard K. Koh, Faces Going Up in ***Smoke***, 128 ARCH. DERMATOLOGY 1106 (1992). [↑](#footnote-ref-214)
215. 215 See, e.g., [*Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GSC0-0039-P3M4-00000-00&context=) cert. denied, ***475 U.S. 1058 (1986)*** (employer had ***right*** to require appropriate clothing and makeup); [*Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0NS0-0039-M2DR-00000-00&context=) (affirming ***employer's*** ***right to regulate*** ***employee*** dress and grooming standards); [*Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1MR0-0039-M2NX-00000-00&context=) (citation omitted) ("The ***right*** to wear long hair is clearly protected against government interference. But as against an employer, even a government employer, a grooming regulation will be sustained unless the decision to enact . . . the regulation itself [is irrational]."); [*Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-DKY0-0054-727N-00000-00&context=) (upholding ***employer's*** termination of a woman for wearing pants against her sex discrimination claim on the ground that employers have every ***right to regulate*** dress and grooming standards). [↑](#footnote-ref-215)
216. 216 [*507 F.2d 1084 (5th Cir. 1975).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4710-0039-M3BP-00000-00&context=) [↑](#footnote-ref-216)
217. 217 [*Id. at 1086.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4710-0039-M3BP-00000-00&context=) [↑](#footnote-ref-217)
218. 218 [*Id. at 1088.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4710-0039-M3BP-00000-00&context=) [↑](#footnote-ref-218)
219. 219 [*Id. at 1092.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4710-0039-M3BP-00000-00&context=) [↑](#footnote-ref-219)
220. 220 [*Id. at 1087.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4710-0039-M3BP-00000-00&context=) [↑](#footnote-ref-220)
221. 221 Id.; see also Lawrence A. Katz, Personal Appearance Regulations in Public Contact Jobs Under Title VII of the Civil ***Rights*** Act of 1964, 1976 ARIZ. ST. L.J. 1 (arguing that an ***employer's*** need to please customers justifies some degree of discrimination in employer-established dress and grooming policies); Peter F. Ziegler, Note, Employer Dress and Appearance Codes and Title VII of the Civil ***Rights*** Act of 1964, 46 S. CAL. L. REV. 965, 997-1000 (1973) (arguing that an employer should be permitted to establish dress and grooming standards designed to prevent "customer ill will" even if the standards discriminate on the basis of sex). [↑](#footnote-ref-221)
222. 222 See, e.g., [*Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TD40-0039-X14C-00000-00&context=) cert. denied, ***422 U.S. 1046 (1975)*** (upholding men's hair length restriction against sex discrimination claim); [*Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YSV0-0039-X31T-00000-00&context=) (upholding men's hair length restriction against sex discrimination claim). [↑](#footnote-ref-222)
223. 223 See Phillip E. Hassman, Annotation, Unemployment Compensation: Eligibility as Affected by Claimant's Refusal to Comply With Requirements as to Dress, Grooming, or Hygiene, [*88 A.L.R. 3d 150, 153 (1978)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5MX5-JMX0-00CM-M54N-00000-00&context=) ("The most common reason for employers' dress and grooming codes seems to be the ***employer's*** desire to present a pleasing image of his business to the public, although in food service enterprises sanitation is also a factor, and in industry safety is important."). [↑](#footnote-ref-223)
224. 224 Of course, an ***employee*** might argue that extra good grooming could compensate for the ***smoking***. For example, more frequent showering or liberal use of deodorizers, perfumes, and smoker's toothpastes could help a smoker to achieve an acceptable level of grooming. Alternatively, a ***smoking*** ***employee*** might argue that singling out ***smoking*** for regulation is unfair because there are many ways that an ***employee*** can practice bad grooming. For example, the bad smell of a ***smoking*** ***employee*** could equal an ***employee*** who refused to bathe. But this argument misses the point. The employer is entitled to establish certain specific requirements of good grooming. Thus, even though the requirement of short hair and a clean-shaven face may not make every male ***employee*** a movie-star look-a-like, the requirement is valid because it is reasonably related to the ***employer's*** desire to ensure that ***employees*** present a positive image.

     It is equally true that not every ***employee*** who ***smokes*** at home or on the way to work will have yellowed teeth, tobacco-stained fingers, and an offensive body odor. Nevertheless, an employer may reasonably conclude that ***employee*** ***smoking*** must be prohibited in order to ensure that ***employees*** do not contact customers while reeking of the foul smell of tertiary tobacco ***smoke***. [↑](#footnote-ref-224)
225. 225 [*481 F.2d 1115 (D.C. Cir. 1973).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G80-0039-X0M2-00000-00&context=) [↑](#footnote-ref-225)
226. 226 [*Id. at 1126.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G80-0039-X0M2-00000-00&context=) [↑](#footnote-ref-226)
227. 227 [*Id. at 1117.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G80-0039-X0M2-00000-00&context=) [↑](#footnote-ref-227)
228. 228 Id. [↑](#footnote-ref-228)
229. 229 [*Id. at 1117 n.3.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G80-0039-X0M2-00000-00&context=) [↑](#footnote-ref-229)
230. 230 Most of the cases on appearance and grooming have examined the claim of an ***employee*** who charged the employer with impermissible discrimination on the basis of a protected classification (such as sex or religion). In contrast, smokers are not a protected class. Thus, the chance of a successful discrimination claim being advanced by a smoker appears remote. [↑](#footnote-ref-230)
231. 231 See Cindy L. Pressman, "No ***Smoking*** Please." A Proposal for Recognition of Nonsmokers' ***Rights*** Through Tort Law, 10 N.Y.L. SCH. J. HUM. RTS. 595, 601-08 (1993). For an analysis of the legal aspects of the ***right*** to ***smoke***, see Cochran, supra note 15, at 277-78. [↑](#footnote-ref-231)
232. 232 See SUSAN WAGNER, CIGARETTE COUNTRY 14 (1971). [↑](#footnote-ref-232)
233. 233 A concise overview of the history of American ***smoking*** prevalence through 1930 is set forth in RONALD J. TROYER & GERALD E. MARKLE, CIGARETTES: THE BATTLE OVER ***SMOKING*** 31-47 (1983). [↑](#footnote-ref-233)
234. 234 See 1 SAMUEL E. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 90 (1972) ("[Tobacco's] value for export was discovered in 1613 when John Rolfe . . . imported seed from the West Indies, crossed it with local Indian-grown tobacco, and produced a smooth ***smoke*** which captured the English market. Virginia then went tobacco-mad; it was even grown in the streets of Jamestown."); WAGNER, supra note 232 at 14-17; see also DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 108 (1958) ("Virginia was, as some complained, 'a colony founded on ***smoke***,' and [Thomas] Jefferson, like others before him, pleaded for a more diversified economy."). [↑](#footnote-ref-234)
235. 235 U.S. DEP'T OF HEALTH, EDUC., & WELFARE, ***SMOKING*** AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 37-38 (1964). [↑](#footnote-ref-235)
236. 236 See Brink, supra note 34, at 148. [↑](#footnote-ref-236)
237. 237 [*Austin v. State, 48 S.W. 305, 306 (Tenn. 1898),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X88-5610-00KR-D2V7-00000-00&context=) aff'd, [*179 U.S. 343 (1900).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CTS0-003B-H0C1-00000-00&context=) [↑](#footnote-ref-237)
238. 238 See Cassandra Tate, In the 1800s, Antismoking was a Burning Issue, SMITHSONIAN, July 1989, at 107. [↑](#footnote-ref-238)
239. 239 One commentator suggests that one of the basic reasons for the anticigarette laws that were enacted near the turn of the century was to protect cigars from the rising competition of cigarettes. See Widerman, supra note 186, at 415. [↑](#footnote-ref-239)
240. 240 Id. at 418-19. By 1927, antismoking laws in Arkansas, Idaho, Indiana, Kansas, Minnesota, Nebraska, South Dakota, Utah, Washington, and Wisconsin had been repealed. Brink, supra note 34, at 149. [↑](#footnote-ref-240)
241. 241 See Brink, supra note 34, at 150. During World War II, cigarettes were sold at military stores and posts at prices just slightly above cost. John A. Meyer, Cigarette Century, AM. HERITAGE, Dec. 1992, at 72, 76. Cigarettes were even part of the K-rations.

     Id. [↑](#footnote-ref-241)
242. 242 Victor Cohn, Yes, "Mere Words" Have Cut Our ***Smoking***, WASH. POST, Mar. 18, 1979, at D1, D2. [↑](#footnote-ref-242)
243. 243 Reynolds, supra note 34, at 435 n.1. [↑](#footnote-ref-243)
244. 244 A. BRODY & B. BRODY, THE LEGAL ***RIGHTS*** OF NONSMOKERS 76 (1977). [↑](#footnote-ref-244)
245. 245 According to one scholar, "Twenty-five years ago, not only was there absolutely no thought given to banning cigarette ***smoking***, but there was virtually no regulation of tobacco sale or use. Indeed, there was a long history of governmental promotion of ***smoking***. . . ." Robert L. Rabin, Some Thoughts on ***Smoking*** Regulation, [*43 STAN. L. REV. 475, 476 (1991)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-4BD0-00CW-83BV-00000-00&context=) (reviewing ROBERT E. GOODIN, NO ***SMOKING***: THE ETHICAL ISSUES (1989)). [↑](#footnote-ref-245)
246. 246 See, e.g., John Gorman, Report of Tobacco Industry Death More ***Smoke*** than Fire, CHI. TRIB., Aug. 24, 1986, at C1 ("Despite headlines that shout about proposals to outlaw all cigarette advertising, and about health issues, increased taxes, nonsmoking areas and declining consumption, the tobacco companies' corporate profits have increased an average of 15 percent each year over the last decade."). Tobacco is a very profitable product. For example, in 1985 RJR Nabisco reported only $ 8.1 billion in gross revenues from its tobacco products and more than $ 8.5 billion from its food and beverage sales. Id. But profits from the tobacco were almost twice the profit from food and beverages. Id. According to The Wall Street Journal, Philip Morris is "the world's richest peddler of consumer goods." Janet Guyon, Tobacco Companies Race for Advantage in Eastern Europe While Critics Fume, WALL ST. J., Dec. 28, 1992, at B1. [↑](#footnote-ref-246)
247. 247 Raloff, supra note 30, at 40. [↑](#footnote-ref-247)
248. 248 See LARRY C. WHITE, MERCHANTS OF DEATH: THE AMERICAN TOBACCO INDUSTRY 18 (1988). A few companies dominate the U.S. tobacco market. The two leading companies are Philip Morris and RJR Nabisco. [↑](#footnote-ref-248)
249. 249 See Edward Giltenan, Beverages and Tobacco, FORBES, Jan. 9, 1989, at 100, 102 ("The U.S. is still the most profitable cigarette market in the world, but hope for volume growth lies overseas. American-made cigarettes are thriving in recently opened foreign markets like Japan, Taiwan and Hong Kong."); see also William Ecenbarger, America's New Merchants of Death, READER'S DIG., Apr. 1993, at 50; Guyon, supra note 246, at B1. [↑](#footnote-ref-249)
250. 250 For example, the nation's two largest tobacco companies, Philip Morris and RJR Nabisco, have made steady strides into the food and beverage business. See John Merwin, Tobacco, FORBES, Jan. 2, 1984, at 222. Smaller tobacco companies are also diversifying their businesses. Id. [↑](#footnote-ref-250)
251. 251 See Charles Kenney, Battle on ***Smoking*** Intensifies in U.S., BOSTON GLOBE, Sept. 30, 1984, at N1. [↑](#footnote-ref-251)
252. 252 Clara S. Ross, Comment, Judicial and Legislative Control of the Tobacco Industry: Toward a ***Smoke***-Free Society?, [*56 U. CIN. L. REV. 317, 332 (1987).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-XK90-00CW-520R-00000-00&context=) [↑](#footnote-ref-252)
253. 253 The tobacco industry and smokers' ***rights*** groups frequently oppose local-level, antismoking legislation by arguing that smokers will stop patronizing nonsmoking businesses. See, e.g., Samuels & Glantz, supra note 4, at 2110. [↑](#footnote-ref-253)
254. 254 As Representative Horace Kornegay of North Carolina explained during the 1964 House hearings on tobacco, banning ***smoking*** to protect the health of Americans would cripple an entire region of the country. See SOBEL, supra note 57, at 196. After leaving Congress, Kornegay became vice president of the Tobacco Institute. [↑](#footnote-ref-254)
255. 255 See Harvey M. Sapolsky, The Political Obstacles to the Control of Cigarette ***Smoking*** in the United States, 5 J. HEALTH POL. POL'Y & L. 277, 280-82 (1980). Tobacco is grown in twenty-three states, but concentrated in Georgia, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia. Ross, supra note 252, at 331. [↑](#footnote-ref-255)
256. 256 See, e.g., Kraft, supra note 34, at 332 n.14 (describing the ability of tobacco interests to influence members of Congress); see also Samuels & Glantz, supra note 4, at 2110 (describing the efforts of the tobacco companies to oppose local restrictions on ***smoking*** and noting the tobacco companies' use of the argument that ***smoking*** restrictions harm the economy). [↑](#footnote-ref-256)
257. 257 MARK GREEN, WHO RUNS CONGRESS? 88 (1984) ("'We have never lost anything' in Congress, boasts Jack Mills, [the industry's] top lobbyist."). [↑](#footnote-ref-257)
258. 258 See STEVE ALLEN & BILL ADLER, JR., THE PASSIONATE NONSMOKER'S BILL OF ***RIGHTS*** 29-35 (1989). Tobacco advertising targets young people. See, e.g., Daniel H. Lowenstein, "Too Much Puff": Persuasion, Paternalism, and Commercial Speech, [*56 U. CIN. L. REV. 1205, 1212-15 (1988);*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-XKY0-00CW-5222-00000-00&context=) John P. Pierce et al., Does Tobacco Advertising Target Young People to Start ***Smoking***?: Evidence From California, 266 JAMA 3154 (1991).

     It is interesting to note that the 1992 presidential candidates spent approximately $ 600 million to advertise their "messages" to the American people. Bruce Horovitz, Image Crafters: Candidates Signing Up Top Advertising Firms, L.A. TIMES, July 14, 1992, at D1. Tobacco companies spend $ 2 billion per year to advertise their "message." See Charles Kenney, ***Smoking***'s Deadly Trail, BOSTON GLOBE, Sept. 22, 1987, (National/Foreign) at 1. [↑](#footnote-ref-258)
259. 259 See, e.g., Marc Z. Edell, Cigarette Litigation: The Second Wave, [*22 TORT & INS. L.J. 90, 92*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3RK3-K0P0-00C2-M4V7-00000-00&context=) ("The defense tactics in these early cases convinced plaintiffs' counsel that suing a cigarette manufacturer was financially prohibitive and that they would have a 'tiger by the tail.'"). [↑](#footnote-ref-259)
260. 260 Mary Ann K. Bosack, Note, Cigarette Act Preemption -- Refining the Analysis, [*66 N.Y.U. L. REV. 756 (1991).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S0M-C390-00CW-7467-00000-00&context=) [↑](#footnote-ref-260)
261. 261 See e.g., Bruce A. Levin, The Liability of Tobacco Companies -- Should Their Ashes Be Kicked?, 29 ARIZ. L. REV. 195, 245 (1987). [↑](#footnote-ref-261)
262. 262 Two cases from the early 1900s held that a ban on ***smoking*** in open places where there was no one else who would be affected by the tobacco ***smoke*** would exceed the police power of the state. See [*City of Zion v. Behrens, 104 N.E. 836 (Ill. 1914);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-34N0-003F-01NT-00000-00&context=) [*Hershberg v. City of Barbourville, 133 S.W. 985 (Ky. Ct. App. 1911).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y25-S890-00KR-D1PJ-00000-00&context=) [↑](#footnote-ref-262)
263. 263 For an extensive discussion of ***smoking*** conduct as an aspect of protected privacy, see Victoria L. Wendling, Note, ***Smoking*** and Parenting: Can They be Adjudged Mutually Exclusive Activities?, [*42 CASE W. RES. L. REV. 1025, 1040-57 (1992).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-XYC0-00CW-52M6-00000-00&context=) [↑](#footnote-ref-263)
264. 264 Other than the ***rights*** specifically catalogued in the Bill of ***Rights***, the list of fundamental ***rights*** that have been articulated as deserving of heightened protection by the United States Supreme Court are freedom of association, the ***right*** to vote, ***right*** to interstate travel, and the ***right*** to a certain degree of freedom in life's personal decisions, including marriage, childbearing, and childrearing. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 11.7, at 370-71 (3d ed. 1986). [↑](#footnote-ref-264)
265. 265 In particular, one city's ban of ***off***-duty ***smoking*** by firefighters has been held to be constitutional as rationally related to the governmental interest in promoting health and safety of its firefighters. See [*Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) The court upheld the ban even though it found the ban to invade "the private sanctuary" of the firefighters' own homes. [*Id. at 541.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-265)
266. 266 See ***State v. Kantner, 493 P.2d 306*** (Haw.), cert. denied, ***409 U.S. 948 (1972)*** (rejecting argument that individual has a constitutional ***right*** to ***smoke*** marijuana). Moreover, the power to ban an activity necessarily includes the power to impose lesser restrictions on the activity. See [*Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6850-0039-N31V-00000-00&context=) (deciding that a lesser restriction on advertising of casino gambling was justified due to the fact that casino gambling could have been banned entirely). [↑](#footnote-ref-266)
267. 267 [*816 F.2d 539 (10th Cir. 1987).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-267)
268. 268 [*Id. at 540.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-268)
269. 269 Id. [↑](#footnote-ref-269)
270. 270 [*Id. at 543.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-270)
271. 271 [*Id. at 541.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-271)
272. 272 [*Id. at 543.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) The court said that it had to look no further than the warning on every box of cigarettes to determine that ***smoking*** was dangerous to the health of the smoker. Id. [↑](#footnote-ref-272)
273. 273 [*Id. at 541.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF90-001B-K1S5-00000-00&context=) [↑](#footnote-ref-273)
274. 274 Id. Commentators have pointed out that terminating ***employees*** for ***smoking*** outside the workplace entails some degree of risk for the employer. Hansen, supra note 15, at 428. In part, this is because the tobacco industry has lobbied hard for laws preventing such actions. Id. [↑](#footnote-ref-274)
275. 275 Id. at 540. [↑](#footnote-ref-275)
276. 276 Id. The grant of certain individual liberties set forth in the United States Constitution does not restrict the actions of private employers. See generally JOHN E. NOWAK ET AL., supra note 264, § 12.1-12.5 (discussing the requirement of state action). Some states have constitutional protections similar to those of the Federal Constitution but which apply even absent action by the state. See, e.g., [*Chico Feminist Women's Health Ctr. v. Butte Glenn Medical Soc'y, 557 F. Supp. 1190 (E.D. Cal. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-V1G0-0054-539H-00000-00&context=) [↑](#footnote-ref-276)
277. 277 [*395 N.W.2d 801 (Wis. Ct. App. 1986).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-YNJ0-003G-30SS-00000-00&context=) [↑](#footnote-ref-277)
278. 278 [*Id. at 806-07.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-YNJ0-003G-30SS-00000-00&context=) [↑](#footnote-ref-278)
279. 279 [*Id. at 807.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-YNJ0-003G-30SS-00000-00&context=) [↑](#footnote-ref-279)
280. 280 Id. [↑](#footnote-ref-280)
281. 281 Id. For example, the court cited public conveyances, hospitals, and public waiting rooms as areas that the public may not easily avoid. Id. [↑](#footnote-ref-281)
282. 282 One author has also mentioned the possibility that workplace ***smoking*** restrictions could amount to age discrimination. See Rothstein, supra note 3, at 957-58. [↑](#footnote-ref-282)
283. 283 Title VII of the Civil ***Rights*** Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin. ***42 U.S.C. § 2000e*** (1988 & Supp. II 1990). [↑](#footnote-ref-283)
284. 284 For explanations of the argument that workplace ***smoking*** restrictions unlawfully discriminate against blacks, see Rothstein, supra note 3, at 957-58, and Fox, supra note 14, at 324-26. [↑](#footnote-ref-284)
285. 285 See, e.g., Cigarettes in Search of a Target, NEWSWEEK, Mar. 5, 1990, at 19; Richard Pollay et al., Separate, But Not Equal: Racial Segmentation in Cigarette Advertising, 21 J. ADVERTISING 45 (1992); Ben Wildavsky, Tilting at Billboards, NEW REPUBLIC, Aug. 20, 1990, at 19. [↑](#footnote-ref-285)
286. 286 For example, in 1980, 47.7% of black, adult males ***smoked*** tobacco, compared to only 40.2% of white, adult males. Fox, supra note 14, at 324-25 & n.67. But by 1986, the gap had closed with only 32.5% of black, adult males ***smoking*** and 29.3% of white, adult males ***smoking***. Id. To complicate matters further, black men are much less likely to be heavy smokers than are white men. See DOUVILLE, supra note 23, at 77. [↑](#footnote-ref-286)
287. 287 See Wildavsky, supra note 285, at 19. Indeed, according to one recent study, the rate of ***smoking*** among blacks is projected to decline more sharply than among whites. John P. Pierce et al., Trends in Cigarette ***Smoking*** in the United States: Projections to the Year 2000, 261 JAMA 61 (1989). [↑](#footnote-ref-287)
288. 288 Fox, supra note 14, at 324-25 & n.67. [↑](#footnote-ref-288)
289. 289 [*440 U.S. 568 (1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8D50-003B-S2KP-00000-00&context=) [↑](#footnote-ref-289)
290. 290 Id. The Fourteenth Amendment provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." [*U.S. CONST. amend. XIV, § 1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHD1-NRF4-40SD-00000-00&context=). [↑](#footnote-ref-290)
291. 291 [*Beazer, 440 U.S. at 585;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8D50-003B-S2KP-00000-00&context=) see supra note 283. [↑](#footnote-ref-291)
292. 292 [*Beazer, 440 U.S. at 585.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8D50-003B-S2KP-00000-00&context=) [↑](#footnote-ref-292)
293. 293 [*Id. at 587.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8D50-003B-S2KP-00000-00&context=) [↑](#footnote-ref-293)
294. 294 Id. In addition, the Court in Beazer noted that the restriction on the hiring of persons in the methadone program was sufficiently job-related to rebut any inference of discrimination. Id. For the most part, employers will find it easy to establish that ***smoking*** restrictions are supported by valid business needs. See Hames, supra note 191, at 227-30. [↑](#footnote-ref-294)
295. 295 See, e.g., [*Moore v. Inmont Corp., 608 F. Supp. 919 (W.D.N.C. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-FYW0-0039-R4R9-00000-00&context=) (upholding discharge of black ***employee*** who was observed ***smoking*** in a nonsmoking area against a charge that termination based on ***smoking*** was merely a pretext for racial discrimination). [↑](#footnote-ref-295)
296. 296 See supra notes 150-62 and accompanying text. [↑](#footnote-ref-296)
297. 297 [*29 U.S.C. § 794*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVJ1-NRF4-42X8-00000-00&context=) (1988). [↑](#footnote-ref-297)
298. 298 Id. [↑](#footnote-ref-298)
299. 299 [*42 U.S.C. § 12101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GP51-NRF4-40G1-00000-00&context=) (Supp. II 1990). [↑](#footnote-ref-299)
300. 300 Id. § 12111(5)(a). Beginning in 1994, it will apply to all employers with fifteen or more ***employees***. Id. [↑](#footnote-ref-300)
301. 301 Id. § 12112. [↑](#footnote-ref-301)
302. 302 See [*Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-B8Y0-0039-S44P-00000-00&context=) Cliff, supra note 15, at 319 n.64. Indeed, nonsmokers have already asserted the ADA as a reason to extend or implement ***smoking*** restrictions in public places. See ASH Seeks Airport ***Smoking*** Ban, ASH REV., Jan.-Feb. 1993, at 7. Action on ***Smoking*** and Health (ASH) is a nonsmoking activist group. [↑](#footnote-ref-302)
303. 303 See, e.g., Cliff, supra note 15, at 317 n.64; Goh, supra note 3, at 817. [↑](#footnote-ref-303)
304. 304 Smokers would probably be reluctant to argue for a ***right*** to ***smoke*** in the work area that they share with nonsmokers. However, smokers might argue that the employer must accommodate their ***smoking*** by setting aside segregated areas for ***smoking***. [↑](#footnote-ref-304)
305. 305 [*29 U.S.C. § 794*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVJ1-NRF4-42X8-00000-00&context=) (1988); ***42 U.S.C. § 12112***(a) (Supp. II 1990). [↑](#footnote-ref-305)
306. 306 [*29 U.S.C. § 794;*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVJ1-NRF4-42X8-00000-00&context=) [*42 U.S.C. § 12102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-4485-00000-00&context=)(2). [↑](#footnote-ref-306)
307. 307 Rothstein, supra note 3, at 956-57; Goh, supra note 3, at 827-32. [↑](#footnote-ref-307)
308. 308 Goh, supra note 3, at 828. [↑](#footnote-ref-308)
309. 309 Id. at 828 n.90. [↑](#footnote-ref-309)
310. 310 See Kenney, supra note 251, at N1. [↑](#footnote-ref-310)
311. 311 By way of example, California's recent educational advertising campaign resulted in a 4% reduction in the number of smokers in just three years. Edwin Chen, Taxed-Fired Drive Against ***Smoking*** in California Seen as Model Effort, L.A. TIMES, Jan. 30, 1992, at A5. [↑](#footnote-ref-311)
312. 312 Goh, supra note 3, at 827. [↑](#footnote-ref-312)
313. 313 The nicotine skin patch helps smokers stop ***smoking*** by secreting small amounts of nicotine into the bloodstream. The patch enables 10% to 20% of users to stop ***smoking***. Shari Roan, Poll on the Patch, L.A. TIMES, Feb. 23, 1993, at E1. Increased use of the patch or other similar devices could eliminate the problems associated with ETS. [↑](#footnote-ref-313)
314. 314 ***42 U.S.C. § 12112***(b)(6) (Supp. II 1990). [↑](#footnote-ref-314)
315. 315 A brief overview of available ***smoking*** policies is set forth in DOUVILLE, supra note 23, at 104-11. [↑](#footnote-ref-315)
316. 316 See INVOLUNTARY ***SMOKING***, supra note 7. [↑](#footnote-ref-316)
317. 317 See EPA REPORT, supra note 7. [↑](#footnote-ref-317)
318. 318 See, e.g., In re VME Americas, Inc., 97 Lab. Arb. Rep. (BNA) 137 (1991) (Bittel, Arb.) (rejecting a conclusory and unsupported ***smoking*** policy to the extent that it precluded ***smoking*** in areas outside of the worksite). [↑](#footnote-ref-318)
319. 319 For an example of the nonpolicy policy, see Fox, supra note 14, at 336. [↑](#footnote-ref-319)
320. 320 See supra notes 87-125 and accompanying text. [↑](#footnote-ref-320)
321. 321 See supra notes 126-43 and accompanying text. [↑](#footnote-ref-321)
322. 322 Bowers, supra note 15, at 43; Stroud, supra note 15, at 357-58. [↑](#footnote-ref-322)
323. 323 See supra notes 150-62 and accompanying text. [↑](#footnote-ref-323)
324. 324 See Nancy A. Rigotti & Chris L. Pashos, No ***Smoking*** Laws in the United States: An Analysis of State and City Actions to Limit ***Smoking*** in Public Places and Workplaces, 266 JAMA 3162 (1991). See generally DOUVILLE, supra note 23, at 91 - 101; Thomas W. Sculco, Note, Smokers' ***Rights*** Legislation: Should the State "***Butt*** Out" of the Workplace?, 33 B.C. L. REV. 879 (1992). [↑](#footnote-ref-324)
325. 325 See Vaughn, supra note 35, at 133 n.27. [↑](#footnote-ref-325)
326. 326 Suggestions for drafting and implementing ***smoking*** policies are set forth in Merrick, supra note 35, at 8. [↑](#footnote-ref-326)