

# An Employer Guide to Tobacco: LEGAL ISSUES

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**This unit addresses** legal principles and issues that may come into play, particularly in unionized workplaces, when an employer seeks to modify an existing smoking policy, introduce a new policy, or address problems that may arise following the implementation of a policy.

Smoking issues can be contentious in workplace settings. Careful planning, involving participation of all stakeholders—management and labor—will help yield the best policy with the highest level of acceptance among workers. The bottom line is that when new rules, including smoking policies, are negotiated in good faith, employers, employees and unions will be best served.

In this unit, you will learn about smoking policies as a mandatory subject of bargaining, the scope of management’s bargaining authority under management rights clauses, and the application of the **just cause standard** to smoking violations by employees. A succinct summary of state and federal laws and regulations that address smoking and exposure to secondhand smoke in workplace settings is also included.

## Bargaining Authority & Related Policy Implementation Issues

Two core legal concepts come into play when an employer seeks to introduce a new workplace smoking policy or make changes to an existing policy in workplaces that employ union members.

- The obligation to negotiate a mandatory subject of bargaining; and
- The authority granted to an employer under a contract's management rights language.

### The obligation to negotiate a smoking policy as a mandatory subject of bargaining under the NLRA

The National Labor Relations Board (NLRB), which is charged with enforcing the National Labor Relations Act (NLRA), has ruled fairly consistently that a smoking policy is a mandatory subject of bargaining. In the absence of clear contract language to the contrary, any proposed change to an existing workplace smoking policy can be implemented unilaterally only if both parties have bargained to impasse and have reached a good-faith deadlock on the policy issue. An employer's failure to bargain in good faith may be met by a union's filing of an 'unfair labor practice' (ULP) charge under Section 8(a)(5) of the NLRA.

- **Union action required: Notice of intent to bargain**  
A union can argue against an employer's unilateral implementation of a smoking policy by stating its intent to bargain over the policy to an employer as soon as learning of the employer's intent to take action—before a policy change is implemented. Unions have been found to have waived their rights to bargain by waiting too long to give notice of the intent to bargain or by never making a proper request. Please note that this differs from several other types of policy grievances wherein a grievance is filed after actual harm is incurred.
- **The impact on negotiations of a legislative mandate for a workplace smoking policy**  
When legislation mandates a change to an existing smoking policy or the establishment of a new policy, such as when changes are required as the result of recent amendments to the Minnesota Clean Indoor Air Act or a municipality's adoption of a new smoke-free workplace ordinance, a union has a right to request to bargain over the employer's new smoking policy terms, to the extent

that all proposed terms remain within the bounds of law. The NLRB has held that an employer may implement a smoking policy unilaterally as long as the policy change is mandated by legislation that does not allow any discretion in implementation of the policy. If discretion is allowed in the implementation of the law, the union retains the right to bargain over the **implementation of**, but not the **substance of**, the policy.

### The scope of an employer's authority to make unilateral changes in smoking policies

Almost every labor-management contract contains a management rights clause that grants management the authority to make policy changes unilaterally under certain conditions. When questioning whether management rights apply, it is essential to remember that every management rights clause is unique and must be examined independently.

- **Unilateral implementation**  
Disputes over an employer's right to implement a new smoking policy almost always occur when an employer attempts to implement a new policy unilaterally. When this happens, a union is apt to file a grievance, questioning whether a specific contract's management rights clause gives an employer this right. In contrast to unfair labor practice charges that are reviewed by the NLRB, smoking policy grievances are usually resolved through a grievance-arbitration process.
- **Duty of fair representation**  
Unions have an obligation to represent smokers and nonsmokers and to enforce contracts. An employer may argue successfully that a union's failure to grieve the unilateral implementation of a smoking policy constitutes a waiver of the union's right to bargain over the smoking policy change, thereby ceding to management the right to implement the change.

- **Grievance proceedings inquiries**

As a guideline in grievance proceedings, arbitrators examine the scope of an employer's authority under the existing contract's management rights clause and inquire whether the policy in question is reasonable. Unions may charge that the employer failed to fulfill its obligation to bargain, lacked authority to implement the policy change unilaterally, or was prohibited from doing so by specific contract language or past practice. They also may charge that the policy itself is unreasonable in that it is not implemented fairly, is discriminatory, creates undue hardship, or the like.

### **What authority does an employer retain under a management rights clause?**

An arbitrator may elect to sustain management's right to implement a smoking policy unilaterally if:

1. The management rights clause of the contract in question gives an employer the right to promulgate work rules and the rules are reasonable.
2. The applicable contract language obligates management to provide a *safe* or a *safe and healthy workplace*. To sustain such a claim, an employer may be required to document that smoking, as well as exposure to secondhand smoke, are hazardous to employees or to the safe operation of the employer's facility.
3. The policy prohibits smoking in workplace interior spaces only. Arbitration outcomes have been mixed when employers have sought to unilaterally prohibit smoking on a company's entire premises.

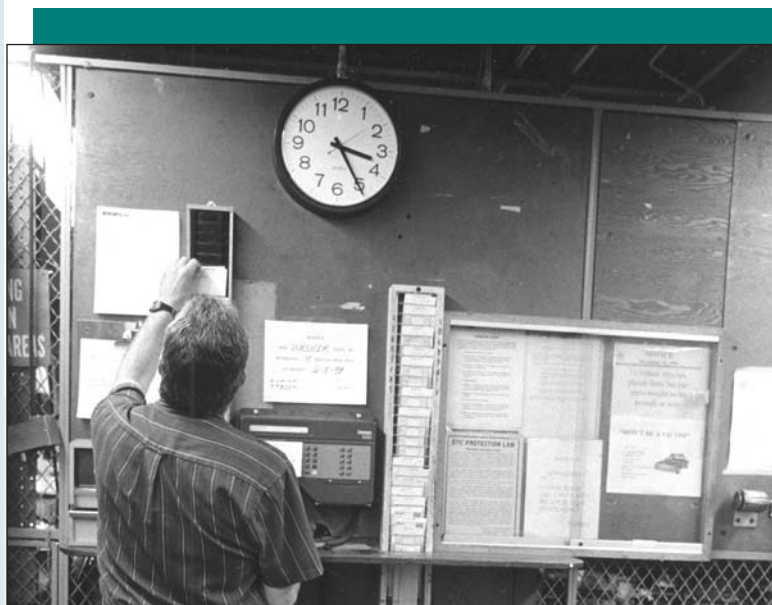
Generally speaking, arbitrators try to weigh an employer's obligation to maintain a safe workplace, including the corresponding right to promulgate reasonable work rules, against a union's arguments in favor of past practice, and make decisions based on the weight of evidence provided to substantiate each claim. Increasingly, rulings appear to favor employers' arguments that new scientific data demonstrating the hazards of secondhand smoke should overrule past practices.

### **Is the policy related to a legitimate business interest?**

Smoking policies have been upheld when they are reasonably related to a legitimate business interest. A smoking policy may prevail when an employer can show successfully that the policy will have a positive impact on employee productivity, absenteeism and health, or reduce safety hazards or workers' exposure to secondhand smoke. The latter rationale has met with greater success recently, in response to growing public awareness of the magnitude of the health risks caused by the presence of secondhand smoke in workplace settings.

Arbitrators apply conventional standards of reasonable work rules to smoking policies, asking:

- **Is the rule justified?** Is the smoking policy justified by demonstrable safety, health, and productivity concerns?
- **Is the rule balanced?** Does the policy attempt to address the interests and rights of both smokers and nonsmokers?
- **Is the rule fair?** Is the smoking policy arbitrary and capricious? Does it target specific workers for reasons other than smoking? Is the policy overly burdensome?



## Other contract language that may be disputed

Although most contractual disputes over smoking policies involve interpretations of management rights clauses, other contract provisions may be disputed, too. Each contract is unique and must be examined independently. Below are examples of additional contract provisions that may be disputed.

- **Specific smoking provisions.** Contracts may contain specific smoking language. Typically, the presence of specific contract language would suffice to prohibit an employer from implementing a change unilaterally, unless new legislation mandates that a change be made to the provision in question.
- **Safety committee provisions.** Some contracts establish a safety committee that is run jointly as a labor–management partnership. Safety committee language may apply to a smoking policy, especially when an employer’s rationale for implementing a policy is to protect employee safety.
- **Break language.** Break language within a contract may grant employees certain rights to use company premises during their breaks. In such a case, a smoking policy that permits smoking during breaks, but limits where smoking breaks may occur, may violate the existing contract in question.
- **Past practice.** Unions often charge that a new smoking policy violates past practice. Employers respond by arguing that what was once considered a legitimate past practice must now be understood differently in light of new scientific data demonstrating the dangers of secondhand smoke. Arbitrator rulings on past practice issues have been mixed. Unions have prevailed in some disputes in which contracts have contained specific maintenance of existing conditions language.

## Smoking Policy Violations

Employers may discipline or terminate employees for violating smoking policies, just as they may discipline them for violating any other legitimate workplace policy. Discipline is warranted when specific and direct safety issues are involved (e.g., an employee is smoking near flammable or hazardous materials). Disciplinary measures taken by an employer to address an employee’s alleged violation of a smoking policy involve **just cause** analyses.

Put simply, **just cause** means with good reason. The basic elements of the just cause standard have been reduced to seven tests that arbitrators apply routinely in disciplinary cases. An employer must satisfy all seven tests, but an arbitrator may give the tests varying weights when issuing a ruling. The seven tests are paraphrased below as they apply to smoking policy disciplinary issues.

1. **Notice.** Did the employer give the employee forewarning or foreknowledge of a change to the smoking policy?
2. **Reasonable Rule or Order.** Is the employer’s smoking policy reasonable?
3. **Investigation.** Did the employer make an effort to discover whether the employee violated or disobeyed the smoking policy before disciplining the employee?
4. **Fair Investigation.** Did the employer conduct a fair and objective investigation before issuing the discipline?
5. **Proof.** Did the employer have substantial proof that the employee violated the policy?
6. **Equal Treatment.** Has the employer applied its smoking policy evenhandedly and without discrimination?
7. **Penalty.** Was the disciplinary action appropriate in light of the alleged offense and the employee’s prior discipline record? Were there any mitigating circumstances?

## State Laws & Regulations

One of the most effective ways to eliminate people's exposure to secondhand smoke and reduce the rate of smoking among youth and adults is by enacting clean indoor air laws and adopting policies that limit or prohibit smoking in indoor settings. To date, the federal government has played a lesser role than cities or states in regulating smoking. Most restrictions have been enacted by state and local government.

This section provides a brief overview of key provisions of Minnesota laws that regulate smoking in workplaces and the impact of smoking on employees. For more information, or to inquire about the applicability of laws to specific settings or circumstances, please contact WorkSHIFTS.

### Minnesota Department of Health

The Minnesota Department of Health has primary responsibility for enforcement of the Minnesota Clean Indoor Air Act (MCIAA). In some instances, this authority is delegated to city or county health departments. Below is a summary of the applicability of the Clean Indoor Air Act to common types of workplaces, including restaurants, bars, hotels and other workplaces where the Act's reach remains in flux.

#### Minnesota Clean Indoor Air Act (MCIAA)

Minnesota's Clean Indoor Air Act, enacted in 1975, was the first in the nation. The Act has been amended several times since then, most recently in 2002. The latest amendments, which took effect in 2003, have strengthened existing requirements regulating ventilation in smoking-permitted areas of offices, factories, warehouses and similar workplaces, by prohibiting smoking in those locations except in specific, designated smoking areas that conform to MCIAA regulations. Bars, restaurants, portions of hotels, and certain other hospitality venues remain subject to less restrictive requirements. [Please note that some, but not all, types of workplaces are referenced below. For specific inquiries, please contact WorkSHIFTS or the Minnesota Department of Health, Indoor Air Unit, 651-215-0909 or 800-798-9050.]

##### 1. Bars and Bar Areas of Restaurants

Under the MCIAA, a bar is defined as any establishment or portion of an establishment where one can purchase and consume alcoholic beverages, where there are tables and seating facilities for fewer than fifty people at one time, and where licensed food service is limited. If a bar does not provide food service during hours of operation, it may allow smoking on its entire premises, provided this information is posted at the entrance of the bar. If the bar has a license for limited food service and seating facilities for fifty or fewer people, it may designate all seating as smoking-permitted. If the bar seats more than fifty or serves more than a very limited food service, it is considered to be a restaurant. Bar operators who witness violations must ask violators to refrain from smoking in designated nonsmoking areas. Violators are guilty of a petty misdemeanor. Bar owners who violate this provision may be fined or lose their licenses. The Minnesota Department of Health or local public health inspectors may order violators to correct violations, when necessary. The Department may impose fines up to \$10,000 via administrative penalty orders.

##### 2. Food Handling, Processing and Manufacturing Establishments

Employees of food handling establishments (including grocery stores, restaurants, delicatessens, and other retail and wholesale food handlers; wholesale food processors or manufacturers; and food brokers) are prohibited from using tobacco in any form where exposed food, equipment, utensils, linens, unwrapped single-service or single-use articles or other items can be contaminated. Violators are guilty of a petty misdemeanor. Food handling establishments that violate this provision may be fined or lose their licenses. The Minnesota Department of Health may impose fines up to \$10,000 by administrative penalty order.

##### 3. Health Care Facilities

Smoking is prohibited in any interior area of a hospital, healthcare clinic, doctor's office, or other healthcare-related facility. No patient, staff, guest, or visitor on the grounds or in a state regional treatment center, the Minnesota security hospital, the Minnesota sex offender program, or the Minnesota extended treatment options program may possess or use tobacco or a tobacco-related device. There are some notable exceptions: The prohibition does not apply to nursing homes, boarding care facilities or licensed residential facilities; and the

provision applying to state treatment centers and security hospitals does not prohibit adult Indians from possessing or using tobacco or a tobacco-related device as part of a traditional Indian spiritual or cultural ceremony. Violations are misdemeanors. Fines up to \$10,000 may be imposed by administrative order.

#### 4. Hotels and Motels

The MCIAA requires lodging establishments, such as hotels, motels and resorts, to comply as follows:

**Lobbies and Common Areas:** Smoking in lobbies and other common areas is restricted to designated areas. A nonsmoking area must be at least 200 square feet, have appropriate signs, and be separated from the smoking-permitted area by a 4-foot wide unoccupied or occupied space, a physical barrier 56 inches or more in height, or outdoor air ventilation of not less than 15 cubic feet per minute per person. Smoking is prohibited in lobbies that are less than 200 square feet in size.

**Registration Desks:** Neither guests nor employees may smoke at a registration desk.

**Guest Rooms:** Lodging operators may leave the decision to smoke in rooms up to guests; designate nonsmoking and smoking-permitted rooms and assign guest rooms accordingly; or establish a smoke-free policy for an establishment.

**Meeting Rooms:** Lodging operators may designate nonsmoking and smoking-permitted areas in meeting rooms or leave this to the discretion of the organization that has rented the meeting room.

**Banquet Rooms:** Lodging operators or organizations renting the banquet room may designate nonsmoking and smoking-permitted areas within a banquet room. If the banquet room is rented for a private social function, smoking need not be restricted. A "private social function" means a specific social event, such as a wedding, for which an entire room or building has been reserved for entertainment or pleasure and not for the principal purpose of education, sales, or business; the function is limited in attendance to people who have been specifically designated and their guests; and seating arrangements for the function, if any, are under the control of the function's sponsor and not the person otherwise responsible for the banquet room.

**Employee Lunchroom/Lounge:** Employee lunchrooms or lounges must meet all requirements for lunchrooms and lounges described under "Offices, Factories and Warehouses" in this section, with the exception of ventilation and separation requirements.

**Indoor Swimming Pool Areas:** Smoking is restricted to designated areas. Nonsmoking space and separation must be provided, along with the appropriate signs.

**Nonsmoking Sleeping Rooms:** Smoking is prohibited in any hotel sleeping room designated as nonsmoking. Innkeepers must post signs conspicuously in all nonsmoking sleeping rooms stating that smoking is not permitted. Lodging management may adopt more restrictive nonsmoking policies. If management establishes a smoke-free policy for an entire building, it must post this policy at the main entrances.

The Minnesota Department of Health is the lead enforcement agency and may delegate enforcement activities to city or county health departments. Lodging operators who observe violations are responsible for asking people to refrain from smoking in designated nonsmoking areas. Each violation is a petty misdemeanor. The Minnesota Department of Health may impose fines up to \$10,000 by administrative penalty order. In addition, anyone convicted of violating the rule against smoking in a nonsmoking room may be required to reimburse the innkeeper for cleaning costs up to \$100.

#### 5. Nursing Homes

Any nursing home, boarding care facility or other licensed residential facility that allows a smoking-permitted area must provide a comparable nonsmoking area. Smoking-permitted areas in nursing homes and boarding care facilities must comply with ventilation requirements. If smoking is permitted in the facility, prospective patients or residents must be assigned smoking-permitted or nonsmoking rooms depending on their preferences. Otherwise, smoking is prohibited in all rooms except those occupied exclusively by those who smoke or permit others to smoke. Visitors and staff cannot smoke in patient or resident rooms. Medical centers, nursing homes, or domiciliary care facilities operated by the U.S. Department of Veterans Affairs must allow a suitable indoor designated smoking area, which is ventilated as required by law or is in an area detached from the facility, is accessible to patients or residents, and has appropriate heating and air conditioning for those persons receiving care or services who wish to smoke tobacco products. An exception applies to minors in licensed residential treatment centers, including rehabilitation and other care facilities. Minors are not permitted to possess or use tobacco products.

The Minnesota Department of Health may impose fines up to \$10,000 by administrative penalty order. The Department has discretion to suspend or revoke nursing home and boarding care licenses.

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The Minnesota Department of Health is the lead enforcement agency and may delegate enforcement activities to city or county health departments. Lodging operators who observe violations are responsible for asking people to refrain from smoking in designated nonsmoking areas. Each violation is a petty misdemeanor. The Minnesota Department of Health may impose fines up to \$10,000 by administrative penalty order. In addition, anyone convicted of violating the rule against smoking in a nonsmoking room may be required to reimburse the innkeeper for cleaning costs up to \$100.

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If the entire restaurant is entirely smoke-free, this policy must be posted at the main entrances. Areas where food is handled and prepared must comply with requirements described under "Food Handling, Processing and Manufacturing Establishments." Lunchrooms or lounges provided for employee breaks must meet all but the ventilation requirements described for lunchrooms and lounges under "Offices, Factories, Warehouses and Similar Workplaces." An exception applies where seating is controlled by a host or hostess. In those settings, nonsmoking and smoking-permitted areas do not have to be posted with signs. Where patrons seat themselves, the areas must be posted appropriately.

Inspectors may issue orders to correct violations, when necessary. Restaurant and bar operators who observe violations are responsible for asking people to refrain from smoking in designated nonsmoking areas. Smoking in a designated nonsmoking area is a petty misdemeanor. The Minnesota Department of Health may fine restaurants up to \$10,000 by administrative penalty order and revoke or suspend their licenses.

## 8. Stores

Smoking is prohibited in all customer-accessible areas of retail stores, except for designated smoking-permitted areas. If a smoking area is created in an area used by customers, the same goods and services must be available in a separate nonsmoking area of the store. The main entrances of a smoking-permitted area must be posted with signs stating: "Smoking is prohibited except in designated areas" or a similar statement. If no smoking is allowed in the building, the main entrances must be posted with signs stating, "No smoking in this entire facility" or a similar statement. If management establishes a smoke-free policy for the entire building, it must post no-smoking signs at main entrances. Lunchrooms or lounges provided for employee breaks must meet all but the ventilation requirements described for lunchrooms and lounges under "Offices, Factories, Warehouses and Similar Workplaces." Restaurants located within a retail store must comply with state requirements described under "Restaurants." Retail operators who observe violations are responsible for asking people to refrain from smoking in designated nonsmoking areas. Smoking in a designated nonsmoking area is a petty misdemeanor. The Minnesota Department of Health may impose penalties up to \$10,000 by administrative penalty order and revoke or suspend licenses.

## Minnesota Department of Labor and Industry

### Workers' Compensation Act

Minnesota's Workers' Compensation Act provides benefits to injured employees when an injury is related to work activity, regardless of fault or negligence. All Minnesota employers, with very limited exceptions, are subject to the Act. Injured employees must demonstrate that the risk of harm was increased by being at work or by performing job functions, and that the injury took place during the course of employment. Worker's compensation claims can be exceedingly complex and usually require the assistance of legal counsel. A growing body of case law supports the receipt of workers' compensation claims for workers who become ill as the result of exposure to secondhand smoke at the workplace. The merits of each claim must be determined on a case-by-case basis. In general, an injured employee must establish a causal relationship between the workplace exposure to secondhand smoke and the injury, must have notified the employer of the harmful effect from tobacco smoke and requested that this concern be addressed, and, after being notified about the employee's concern, the employer must fail to make a reasonable accommodation to eliminate the source of the injury, such as exposure to secondhand smoke.

### Employee Right to Know Act

This act requires employers to evaluate their workplaces for the presence of hazardous substances and harmful physical agents and to provide training to alert employees about their potential exposure to any such substances or agents. Tobacco products and other products intended for personal consumption by employees in the workplace are specifically exempted from these provisions. Penalties can range from \$1 to \$70,000.

## Prohibited Employer Conduct

Employers may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in, or has engaged in, the use or enjoyment of a lawful consumable product, such as tobacco, if the use or enjoyment takes place off-premises during nonworking hours; however, an employer may restrict employees' use of tobacco products during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees, or is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by an employee to the employer. Violators may be subject to a civil action for damages, limited to wages and benefits lost because of a violation. The court may award the prevailing party court costs and reasonable attorney fees.

## Whistleblower Act

An employer may not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, condition, location or privileges of employment because the employee or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law (such as a company smoking violation) to an employer or to any governmental body or law enforcement official. Civil penalties may include all damages recoverable at law, costs and disbursements, reasonable attorney's fees, and any injunctive or equitable relief determined by the court.

## Minnesota Department of Human Rights

### Human Rights Act

The Minnesota Human Rights Act, like the federal Americans with Disabilities Act, may afford legal protections to employees affected by smoke in the workplace, including places of public accommodation, such as restaurants and bars. A disabled person is defined as one who (1) has a physical, sensory, or mental impairment that materially limits one or more of the person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. The Human Rights Act protects qualified disabled persons or those who, with reasonable accommodation, can perform essential functions required of all employees performing the job in question. Disabled persons who wish to be protected from secondhand smoke in the workplace may file a complaint with the Department of Human Rights or bring a lawsuit under the Minnesota Human Rights Act. Any person who commits a prohibited discriminatory act, or aids, abets, incites, compels, or coerces another to do so, is guilty of a misdemeanor. Damages may include back pay, compensation for lost benefits or mental pain and suffering, reinstatement, punitive damages up to \$8,500, and a civil penalty.

## Minnesota Department of Employment and Economic Development

### Unemployment Insurance Law

Under both federal and Minnesota law, employers who employ individuals within the state must contribute unemployment taxes to the federal and state reemployment insurance fund. The purpose of the fund is to provide weekly payments to employees who have lost their jobs through no fault of their own and who, although physically able, have not found suitable reemployment. Employees who are discharged for reasons other than misconduct and employees who quit their employment due to a serious illness or injury or for a good reason caused by the employer may qualify for the receipt of unemployment benefits. Nonsmoking employees who leave employment because they are unable to continue working due to the effects of workplace secondhand smoke have been found to be eligible for benefits.

## Related Federal Laws & Regulations

### Environmental Protection Agency (EPA)

Although the EPA has classified tobacco smoke as a Group A carcinogen for which there is no known safe level of exposure, it does not regulate secondhand smoke in the workplace and has no indoor air quality standards for tobacco smoke. The EPA maintains that secondhand smoke is a carcinogen that "causes cancer and other significant health threats to children and adults," and recommends that employers protect nonsmokers from exposure by allowing smoking only in outdoor spaces or in isolated indoor spaces that are separately ventilated to the outdoors and sponsoring employer-paid cessation programs.<sup>36</sup>

### National Institute for Occupational Safety and Health (NIOSH)

Like the EPA, NIOSH has not established indoor air quality standards for secondhand smoke. NIOSH recommends that employers "reduce environmental tobacco smoke to the lowest feasible concentration."

### Occupational Safety and Health Administration (OSHA)

In Minnesota, the Occupational Safety and Health Division of the State's Department of Labor and Industry adopts and enforces federal OSHA standards, as well as local standards. Even though secondhand smoke has been classified as a Group A carcinogen, known to cause cancer in humans, it is the only Group A carcinogen that is not specifically regulated by OSHA. In 1994, OSHA proposed restrictions under its Indoor Air Quality Rules. Under pressure from the tobacco industry, no final regulations were issued. Today, OSHA regulates secondhand smoke in very limited circumstances, such as when manufacturing process contaminants combine with smoke to create a dangerous air supply that fails OSHA standards.

Minnesota Statute §182.653, Subdivision 2, requires each employer to furnish "conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees." Minn. Stat. §182.657 requires the Department of Labor and Industry to "promulgate...such rules as may be deemed necessary to carry out the responsibilities of this chapter."

### Americans with Disabilities Act (ADA)

The ADA prohibits discrimination against an employee with disabilities and requires an employer to provide **reasonable accommodation** to a qualified disabled employee, as long as the accommodation does not cause the employer an **undue hardship**. The law applies to employers with at least fifteen employees, including those who operate places where the public is invited, such as restaurants, hotels, and theaters, and those who receive government services. The ADA defines **disability** as (1) a physical or mental impairment that **substantially limits one or more major life activities**; (2) a record of such impairment; or (3) being regarded as having such impairment. If an employee specifically requests reasonable accommodation or notifies the employer of the seriousness of the problem, the employer is obligated to accommodate the employee.

A person with respiratory problems may succeed in proving that a sensitivity to smoke is disabling, in that it impairs the ability to perform a major life activity (breathing freely), and that a reasonable accommodation would be a smoke-free workplace policy or an appropriate ventilation system. An employer may argue that a proposed accommodation will create an undue hardship, imposing an extraordinary financial or other burden on an employer or interfering substantially with the ability to run an enterprise. Although an effective, reasonable accommodation must be made, the ADA does not require an employer to make the accommodation preferred by the disabled employee or recommended by experts. The Equal Employment Opportunity Commission (EEOC) must investigate all properly filed complaints. If the EEOC does not pursue an action, an individual may file a private lawsuit. ADA penalties include monetary damages, court orders to stop the violation in question, and attorneys' fees.