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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 1/31/23

**SPONSOR** Cates/Harper/Chavez/Jaramillo

**BILL**  
**NUMBER** House Bill 168

**SHORT TITLE** Prohibit Smoking in Racinos

**ANALYST** Anderson

### REVENUE\* (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	FY24	FY25		
0	(\$12,800.0)	(\$12,800.0)	Recurring	General Fund

Parentheses ( ) indicate revenue increases.

\*Amounts reflect most recent version of this legislation.

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	(\$2.0-\$4.0)	(\$2.0-\$4.0)	(\$2.0-\$4.0)	(\$6.0-12.0)	Recurring	GCB operating budget
<b>Total</b>	(\$2.0-\$4.0)	(\$2.0-\$4.0)	(\$2.0-\$4.0)	(\$6.0-12.0)	Recurring	

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent version of this legislation.

Duplicates Senate Bill 130  
 Relates to House Bills 94, 123, and 124 and Senate Bill 178

### Sources of Information

LFC Files  
 Analysis of House 249 from 2021 Regular Session

Responses Received From  
 New Mexico Racing Commission (NMRC)  
 Gaming Control Board (GCB)  
 Department of Health (DOH)  
 Administrative Hearings Office (AHO)  
 State Fair Commission

No Response Received  
 Regulation Licensing Department (RLD)  
 Attorney General

## SUMMARY

### Synopsis of House Bill 168

House Bill 168 prohibits smoking in facilities with a racetrack licensed by the state Racing Commission and with a gaming operator's license issued by the Gaming Control Board while still permitting smoking in other state-licensed gaming facilities, casinos, or bingo parlors. The list of indoor locations where smoking areas are permitted under the Dee Johnson Clean Indoor Air Act (Section 24-16-12 NMSA 1978) includes the following:

- Private residences, unless used for day care for children or adults
- Retail tobacco establishments
- Cigar bars
- Tobacco manufacturing facilities
- State-licensed gaming facilities (from which the exception of racinos would now be enacted)
- Private clubs
- Hotels and motels in smoking-permitted rooms
- Cultural use by Native Americans
- Theatrical or movie productions where actors must smoke
- Indoor or outdoor cannabis consumption areas pursuant to the Cannabis Regulation Act (26-2C-1 to 26-2C-42).

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

A smoking ban in racinos would result in an additional basis on which the Gaming Control Board (GCB) or the Racing Commission (NMRC) could issue citations. GCB states additional citations sometimes result in administrative hearings, which can cost each agency between \$2,000 to \$4,000 per hearing. The estimated operating budget impact in the table above reflects this impact to GCB and is not inclusive of fiscal impacts to NMRC. GCB bases these numbers on the assumption that one citation would proceed to a hearing in any given year and stated the information provided represents the minimal fiscal impact. It is possible that no cases will proceed to hearing or that multiple cases will proceed to hearing in any given year.

Should the ban result in patrons choosing alternate gaming venues or nongaming entertainment, the lower attendance rate could result in less money collected in taxes, which are based on racino revenues. The New Mexico Racing Commission (NMRC) states other jurisdictions that have banned smoking at casinos have net revenue declines of approximately 20 percent. Any decline in net amounts could amount to fewer tax dollars to the general fund and less money for purses for the horse races. NMRC states this could have implications on the number of race days run per season. Chapter 60 NMSA 1978 Section 2E-27 states each racetrack must maintain a minimum of four live race days a week with at least nine live races. GCB indicates four of the five racinos are located close to tribal casinos, which provides an alternative for smokers. GCB also states gaming facilities with nonsmoking game rooms have generally proven to be unpopular and underutilized.

Both GCB and NMRC said a smoking ban would put racinos at a competitive disadvantage that could decrease the amount of gaming and racing revenues, as well as taxes paid based on net wins. Increases in funding for state enforcement and prosecution could be warranted, but those impacts were not estimated by GCB.

Both the State Fair Commission and the Administrative Hearings Office report House Bill 168 will have no impact on their agencies.

## **SIGNIFICANT ISSUES**

The adverse risks of smoking and of second-hand smoke have been documented since Surgeon General Luther Terry's 1964 report, *Smoking and Health*. According to the Department of Health (DOH), House Bill 168 would strengthen the Dee Johnson Clean Indoor Air Act to further protect New Mexicans from the harms of secondhand smoke and e-cigarette aerosols. House Bill 168 could be a public health strategy in reducing morbidity and mortality attributable to exposure to secondhand smoke. In the United States, exposure to secondhand smoke causes more than 41 thousand deaths among nonsmoking adults, according to the federal Centers for Disease Control.

DOH summarizes reasons for support of restrictions on smoking in gambling facilities, including gaming facility employees often suffering more severe secondhand smoke exposure than other workers. DOH indicates prohibiting smoking and vaping is the only way to effectively protect employees and patrons from the dangers of secondhand smoke and e-cigarette aerosols. Twenty states, including the neighboring states of Arizona and Colorado, have passed laws making all their state-regulated gambling facilities 100 percent smoke-free, according to the American Nonsmoker's Rights Foundation (attachment 1). Data from the foundation also shows over 200 gaming venues that closed due to Covid-19 restrictions have reopened with smoke-free indoor policies, adding to the nearly 800 gaming venues that were already smoke-free prior to the pandemic.

In addition to health benefits, smoke-free gambling facilities report financial benefits, such as fewer employee sick days, a reduction in employee healthcare-related costs, less money spent cleaning and removing nicotine tar from surfaces, and less money spent on air filters. In a 2007 report by the Tobacco Control Legal Consortium provided by the Department of Health (attachment 2), claims that smoke-free laws push customers toward casinos where smoking is permitted are unsupported by research. Research indicates that smoke-free laws have no adverse economic impact, and in some cases, could have potential to increase revenue.

## **PERFORMANCE IMPLICATIONS**

Enactment of House Bill 168 could positively impact DOH's ability to reach performance targets. DOH states that House Bill 168 is in alignment with its strategic plan for the following objectives and performance measures:

Program Objective 2: Work with health system and surveillance partners to monitor health status to identify community problems

Performance Measure 7: Percent of adolescents who smoke

Performance Measure 8: Percent of adults who smoke

GCB stated that additional citations issued could result in increased workload for the enforcement and legal departments but did not provide a cost estimate of addressing the violations.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB168 duplicates SB130 and relates to

- HB094, which would prohibit the sale, purchase or possession of flavored tobacco products; imposes penalties to minors; and provides a definition for characterizing and flavored tobacco products.
- HB0123, which proposes to increase tax rates for cigarettes and other tobacco products, including e-cigarettes, and reduce tax stamp discounts to distributors,
- HB124, which proposes to increase the rate of tax on tobacco products; including nicotine, regardless of source, in the definition of “tobacco product” in the tobacco products tax act,
- SB178, which proposes to make a distribution from the Tobacco Settlement Permanent Fund to the Tobacco Settlement Program Fund in Fiscal Year 2024 (FY24); introduced to the Legislative Finance Committee and the Tobacco Settlement Revenue Oversight Committee

## **TECHNICAL ISSUES**

NMRC stated House Bill 168 indicates smoking will not be allowed at the racetrack. It is not clear that smoking will also be banned at the casino of a gaming operator that also has a racing license issued by the State Racing Commission. NMRC said these are two different operations, one being a racetrack and one being a casino. Clarification might be needed on the ban on smoking at the racetrack and a ban on smoking at a gaming operator’s casino that is licensed by the state racing commission, NMRC pointed out.

GA/rl/hg

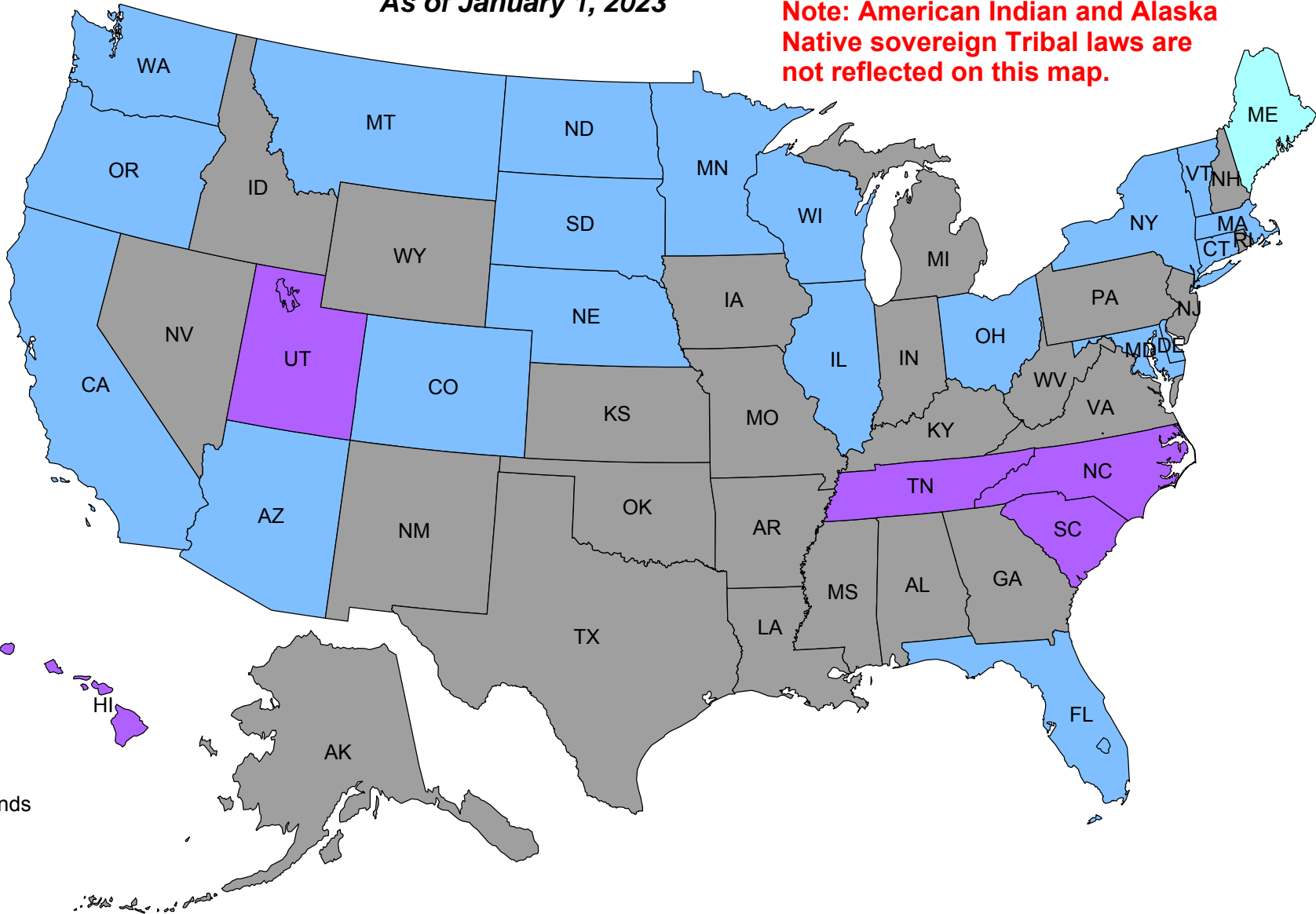
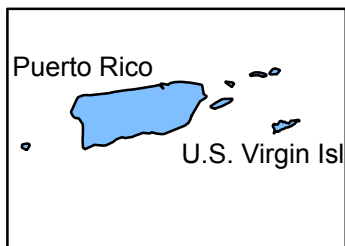
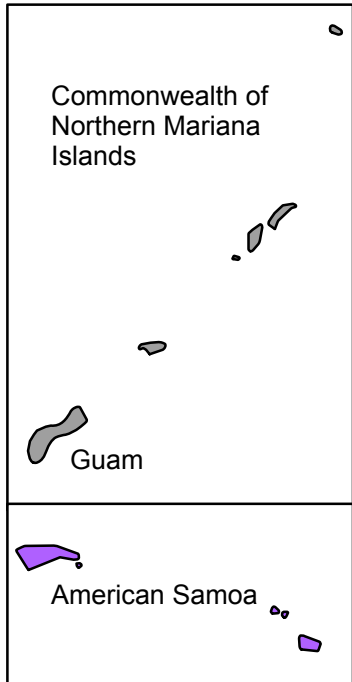
# Statewide Laws Requiring 100% Smokefree Gambling Venues

## American Nonsmokers' Rights Foundation

As of January 1, 2023

**Note: American Indian and Alaska Native sovereign Tribal laws are not reflected on this map.**

### Territories and Commonwealths



**Gambling laws reflected on this map do not include bingo.**

### State and Commonwealth/Territory Law Type

- 100% Smokefree in all State-Regulated Gambling
- State-Regulated Gambling not 100% Smokefree
- Maine\*
- State-Regulated Gambling not permitted

\*Maine: State-Regulated Gambling Venues opened after 6/2003 (including the state's 2 casinos) required to be 100% smokefree

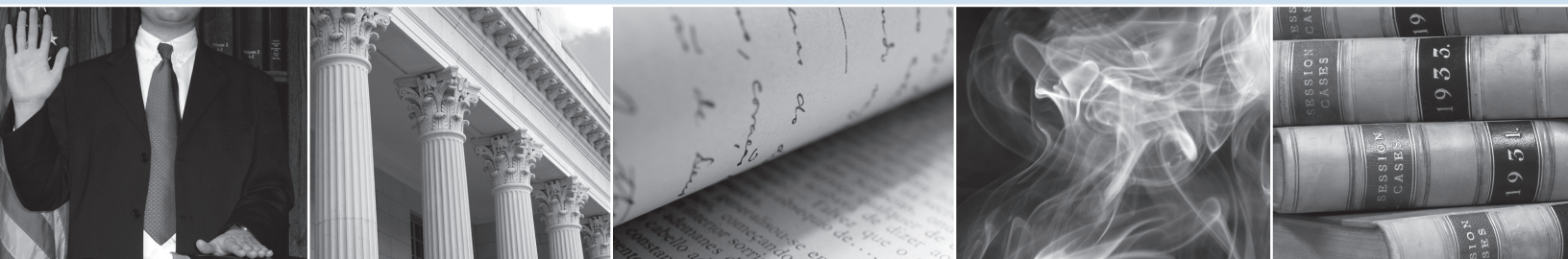
A Law Synopsis by the Tobacco Control Legal Consortium  
January 2007

# Secondhand Smoke and Casinos

Micah Berman & Caris Post



Tobacco Control  
Legal Consortium



Law. Health. Justice.

This synopsis is provided for educational purposes only and is not to be construed as legal opinion or as a substitute for obtaining legal advice from an attorney. Laws cited are current as of October 2006. The Tobacco Control Legal Consortium provides legal information and education about tobacco and health, but does not provide legal representation. Readers with questions about the application of the law to specific facts are encouraged to consult legal counsel familiar with the laws of their jurisdictions.

Suggested citation:

Micah Berman & Caris Post, Tobacco Control Legal Consortium, *Secondhand Smoke and Casinos* (2007).

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This publication was made possible by the financial support of the American Cancer Society and the Robert Wood Johnson Foundation.

# Secondhand Smoke and Casinos

Micah Berman & Caris Post

## Introduction

In recent years, cities and states across the country have enacted smoke-free workplace laws to protect employees from the harms caused by secondhand smoke. The fact that secondhand smoke exposure is a significant public health threat is beyond dispute.<sup>1</sup> The World Health Organization,<sup>2</sup> U.S. Environmental Protection Agency,<sup>3</sup> and U.S. Surgeon General<sup>4</sup> all concur that there is no safe level of exposure to secondhand smoke.

At the same time, casino gambling has been rapidly expanding across the United States. As casino gambling expands, casino employees—like employees in any other workplace—need protection from secondhand smoke. Many existing smoke-free workplace laws, however, do not protect casino employees. This is cruelly ironic, since the secondhand smoke exposure faced by casino employees is often more severe than exposure employees experience in other workplaces. Consider these facts:

- Workers in gambling venues are often exposed to higher levels of secondhand smoke than employees in other workplaces. Secondhand smoke exposure levels in casinos can be 2.4 to 18.5 times higher than in offices and 1.5 to 11.7 times higher than in restaurants.<sup>5</sup>
- A 1998 study found that casino workers in so-called “well-ventilated” casinos had metabolized nicotine levels that were 300 to 600% higher than those in other smoking workplaces during a work shift.<sup>6</sup>
- In 2004, casinos in Delaware were found to have six times more cancer-causing particles in the air than highways and city streets during rush hour traffic. After Delaware implemented its smoke-free workplaces law, indoor air pollution in the casinos virtually disappeared.<sup>7</sup>
- After studying Reno and Las Vegas casinos for five years, University of Nevada-Reno researchers concluded that there is “a direct correlation between exposure to secondhand smoke in the workplace and damage to employees’ DNA.”<sup>8</sup>

## Key Points

- The secondhand smoke exposure faced by casino employees is often more severe than the exposure experienced in other workplaces. Prohibiting smoking inside casinos is the only way to effectively protect casino employees and patrons from the dangers of secondhand smoke.
- Smoke-free workplace laws have been proliferating across the United States and beyond. Although some states have exempted casinos from smoke-free workplace laws, there is no legal requirement for them to do so.
- Even in the absence of a smoke-free law, casino employees may take legal action against their employers if they are injured by exposure to secondhand smoke. The availability of a legal remedy will depend on the specifics of the case, the type of casino, and the applicable state law.
- In some circumstances, casino employees injured by exposure to secondhand smoke in the workplace may be able to combine their cases into a class action lawsuit.
- Although state and local smoke-free laws are not enforceable in Native American tribal casinos, a growing number of Native American tribes are taking the first steps towards protecting casino employees and patrons from secondhand smoke exposure.



This synopsis examines the benefits of establishing smoke-free environments in casinos, various approaches for creating smoke-free casinos, and the potential legal liability for casinos that expose their employees and others to secondhand smoke. Section I reviews smoke-free workplace laws and some relevant policy concerns. Section II discusses the legal options available to casino employees exposed to secondhand smoke in the workplace, and Section III reviews the intersection between smoke-free laws and Native American sovereignty.

## **Section I – Smoke-Free Workplace Laws**

The most effective way to protect casino employees and patrons from the harms of secondhand smoke is to enact and enforce comprehensive laws that include casinos. While more cities and states are passing comprehensive smoke-free workplace laws every month, many of these laws unfortunately exempt casinos. As discussed below, these exemptions are not legally required. Moreover, they are often the result of questionable claims that smoke-free laws hurt casino business. This section reviews this and other common policy concerns underlying smoke-free laws. This section also surveys the manner in which current state smoke-free laws address casinos.

### **A. Health and Safety**

Clearly, smoke-free casinos provide significantly healthier and safer working environments for employees. Secondhand smoke contains acetone, ammonia, arsenic, benzene, cadmium, carbon monoxide, formaldehyde, hydrogen cyanide, lead, toluene and other toxicants.<sup>9</sup> The U.S. Surgeon General has concluded that “[e]xposure to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer.”<sup>10</sup> “Establishing smoke-free workplaces,” according to the Surgeon General, “is the only effective way to ensure that secondhand smoke exposure does not occur in the workplace.”<sup>11</sup>

Indeed, research has shown that a well-implemented smoke-free workplace law virtually eliminates casino employees’ and patrons’ exposure to secondhand smoke. For example, air quality in a Delaware casino was tested before and after its smoke-free workplace law went into effect. The study showed that the level of respirable particles (airborne particulate matter) in the casino declined by 95.4 percent, while the

measurable level of PAAH (a carcinogenic particulate of secondhand smoke) declined by 97.7 percent.<sup>12</sup>

Mandating ventilation standards is a poor alternative to going smoke-free. In fact, the American Society of Heating, Refrigerating, and Air Conditioning Engineers, which sets standards for indoor air quality in residential and commercial building codes, has concluded that current ventilation technology is insufficient to protect building occupants from secondhand smoke.<sup>13</sup> Numerous studies have found ventilation systems used in hospitality venues to be woefully inadequate for reducing secondhand smoke exposure.<sup>14</sup> A 2003 study that focused exclusively on casinos with ventilation systems found average levels of cotinine (metabolized nicotine) among nonsmokers increased by 456% and the average levels of the carcinogen NNAL increased by 112% after four hours of exposure.<sup>15</sup> Exposure levels are undoubtedly much higher for the casino employee whose livelihood depends on spending every work day in this environment.

### **B. Economic Impact**

Casino owners have expressed concern that smoke-free laws may lead to a decline in business. However, published research does not support their concern. To the contrary, most research indicates that smoke-free laws have no adverse economic impact, and in some cases, actually increase revenue. For example, a study on the economic effects of Delaware’s smoke-free law, which compared gaming revenues from before and after implementation of the law, found that going smoke-free did not adversely impact gaming revenues.<sup>16</sup> Likewise, an analysis conducted in Massachusetts revealed that municipal smoke-free laws were not associated with any decline in bingo and charitable gaming revenues.<sup>17</sup>

Claims that smoke-free laws push customers towards casinos where smoking is permitted are also unsupported by research. Consumer surveys indicate that whether or not a casino is smoke-free is unlikely to impact patronage decisions.<sup>18</sup>

Despite past predictions that smoke-free laws would hurt hospitality businesses in general, peer-reviewed studies examining the effects of such laws have concluded that going smoke-free has either no impact or a positive impact on hospitality businesses.<sup>19</sup> Given this history, predictions of economic devastation in casinos should be met with skepticism. In actuality, the adverse economic impact results from medical costs

caused by exposure to secondhand smoke. Smoking-related medical costs are ultimately paid for by workers exposed to secondhand smoke day after day through increased workers compensation insurance premiums and public and private healthcare programs.

### C. Statewide Laws

Although tobacco is a legal, age-restricted product, there is no specially-protected legal right to smoke whenever or wherever one might wish. Neither the U.S. Constitution nor state constitutions bar the passage of smoke-free laws or other restrictions on smoking.<sup>20</sup> Indeed, numerous states and municipalities have already passed smoke-free laws, and these laws have been upheld against legal challenges.<sup>21</sup> Likewise, casinos are not constitutionally entitled to any special

exemptions. States clearly have the authority to pass laws that entirely prohibit smoking in casinos.<sup>22</sup> The only exception, as discussed in Section IV of this synopsis, applies to casinos operated by recognized Native American tribes on tribal lands.<sup>23</sup>

Although they have the legal authority to prohibit smoking in all workplaces, some states have chosen to exempt non-tribal casinos from their smoke-free laws. Some state laws have a blanket exemption for casinos and others permit casinos to designate areas for smoking. These exemptions fail to protect casino employees from the harms of secondhand smoke, and they leave casinos open to potential legal liability as discussed below. Other states, including Delaware and Washington, have comprehensive smoke-free laws that include protection for non-tribal casino employees.

#### Sample Survey of Application of Smoke-Free Laws to Non-Tribal Casinos

State	Non-Tribal Casinos	Casino Status*	Statute**
Arizona	5 racetracks	No exemption	To be codified as ARIZ. REV. STAT. ANN. § 36-601.01
Arkansas	None	Designated smoking areas on the gaming floor of any franchisee of the Arkansas Racing Commission	ARK. CODE ANN. §§ 20-27-1801 et seq.
California	94 card room gaming facilities	Gaming facilities	CAL. LAB. CODE § 6404.5
Colorado	46 casinos, legal in three gaming towns	Casinos <sup>24</sup>	COLO. REV. STAT. ANN. §§ 25-14-201
Connecticut	None	No exemption	CONN. GEN. STAT. § 19a-342
Delaware	3 racetrack casinos	No exemption	DEL. CODE ANN. tit. 16, §§ 2901 et seq.
Florida	Racetrack opening this summer & 15 card room facilities	No exemption	FLA. STAT. ch. 386.201 et seq.
Georgia	2 casino cruise ships	No exemption	GA. CODE ANN. §§ 31-12A-1 et seq.
Hawaii	None	No exemption	HAW. REV. STAT. §§ 328K-1 et seq.
Idaho	None	No exemption	IDAHO CODE ANN. §§ 39-5501 et seq.
Maine	1 racetrack casino	Designated smoking areas in casinos, so long as minors prohibited access and no employees required to work in smoking areas	ME. REV. STAT. ANN. tit. 22, §§ 1541 et seq.
Massachusetts	None	No exemption	MASS. GEN. LAWS ch. 270, § 22
Montana	289 card room gaming facilities	No exemption	MONT. CODE ANN. §§ 50-40-101 et seq. (law takes effect in 2009)

State	Non-Tribal Casinos	Casino Status*	Statute**
Nevada	268 casinos with gross casino gaming revenue of \$1M or more	Areas of casinos where loitering by minors is already prohibited by law	To be incorporated into NEV. REV. STAT. §§ 202.2485 et seq.
New Jersey	3 racetracks & 11 casinos	Gaming area of casinos	N.J. STAT. ANN. §§ 26:3D-55 to 26:3D-64
New York	5 racetrack casinos	No exemption	N.Y. PUB. HEALTH LAW §§ 1399-n et seq.
North Dakota	None	No exemption	N.D. CENT. CODE §§ 23-12-9 to 23-12-11
Ohio	7 racetracks	No exemption	To be codified as OHIO REV. CODE ANN. ch. 3794
Rhode Island	None	Off-track facilities, so long as smoking areas have separate ventilation	R.I. GEN. LAWS §§ 23-20.10-1 et seq.
South Dakota	36 casinos in the Town of Deadwood	Video lottery establishments	S.D. CODIFIED LAWS §§ 22-36-2 & 10-50-64
Utah	None	No exemption	UTAH CODE ANN. §§ 26-38-1 et seq.
Vermont	None	No exemption	VT. STAT. ANN. tit. 18, §§ 37-1741 et seq.
Washington	92 “Mini-Casinos” (limited to 15 tables, \$100 maximum wager, and no slot machines)	No exemption	WASH. REV. CODE §§ 70.160.010 et seq.

\*The term “casino status” indicates whether a state’s statutes explicitly exempt casino or gaming facilities. The term does not indicate whether other exemptions or limitations, such as local governmental laws, are applicable. For example, Section 26:3D-63 of New Jersey’s statutes indicates that municipalities can adopt ordinances that are more restrictive than the state law.

\*\*All citations reference state statutes in effect as of October 2006.

## D. Legal Challenges

The special exemptions created for casinos have led to legal challenges. Opponents of smoke-free laws have filed lawsuits in Colorado,<sup>25</sup> New Jersey,<sup>26</sup> Rhode Island,<sup>27</sup> and Connecticut,<sup>28</sup> asserting that the laws violated the Equal Protection Clause of the Constitution by exempting casinos. None of these challenges have succeeded so far.

The equal protection challenges are based on the misguided premise that the Equal Protection Clause requires legislatures to treat all businesses equally.<sup>29</sup> To the contrary, laws may draw distinctions between different types of businesses, provided that there is a “rational basis” for doing so.<sup>30</sup> A Connecticut court, in rejecting an equal protection challenge, wrote that “[n]umerous court decisions have upheld smoking bans that drew distinctions as to where smoking could and could not occur, acknowledging that ‘it is no requirement of equal protection that all evils of the same genus be eradicated or none at all.’”<sup>31</sup>

Even though states *may* include exemptions for casinos, there is no compelling public health or economic justification for doing so. *All* employees should be

protected from the harms of secondhand smoke. And by ensuring that smoke-free laws are comprehensive, states can avoid having to address these equal protection challenges, however ill-conceived they may be.

## Section II – Potential Legal Options

In places where casino employees are exposed to secondhand smoke, several legal rights may be asserted. The availability of a legal remedy depends in part on the type of casino as well as the health effects suffered by the employee. Several potential causes of action are discussed below. Although beyond the scope of this synopsis, employees may also wish to explore options made available through unions. Resources on working with unions are available at <http://www.tobaccolawcenter.org/WorkSHIFTSresources.html>.

### A. Federal Employer Liability Act/Jones Act

Riverboat casino employees may qualify for protection under the Jones Act, which Congress enacted in 1920 to protect seamen from employer negligence.<sup>32</sup> The

Jones Act applies the standard of liability found in the Federal Employer Liability Act (“FELA”), which gives heightened protection to railway workers.<sup>33</sup> An employer is liable under FELA if “employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.”<sup>34</sup> In FELA cases, employers are barred from asserting common law defenses that are otherwise available in most legal actions.<sup>35</sup>

Recent FELA cases involving secondhand smoke exposure in the workplace have met with increased success. In *Wilhelm v. CSX Transportation, Inc.*, the Sixth Circuit Court of Appeals reversed a grant of summary judgment and allowed an asthmatic railway employee’s claim to proceed. The plaintiff argued that CSX had violated FELA by failing to enforce its no-smoking policy. The appellate court wrote that “the duty to provide a reasonably safe workplace may not always be breached by the presence of secondhand smoke,” but it suggested that failure to eliminate secondhand smoke from the workplace could be a cause for liability if it “aggravates a plaintiff’s existing lung disease.”<sup>36</sup>

More recently, Norfolk Southern Railway faced a FELA claim brought on behalf of a former employee who died of lung cancer.<sup>37</sup> The plaintiff, a lifelong nonsmoker, developed lung cancer after prolonged exposure to secondhand smoke in bunk trailers where he stayed overnight while working for the railroad.<sup>38</sup> The case settled in January 2006 for an undisclosed amount.<sup>39</sup>

In order for riverboat casino employees to succeed with Jones Act/FELA claims, they must first establish that they are “Jones Act seamen” who work aboard a “Jones Act vessel.” Though no court has yet ruled on whether riverboat casino employees are “Jones Act seamen,” deckhands working on riverboat casinos have been found to fall within the protections of the Act.<sup>40</sup> The legal tests applied vary somewhat by circuit, but it is likely that courts would also consider riverboat casino employees to be “Jones Act seamen.”<sup>41</sup>

To qualify as a “Jones Act vessel,” a boat must be “in navigation.” Courts have found that “floating structures are not classified as vessels in navigation if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.”<sup>42</sup> As such, riverboat casinos that are indefinitely moored (moved only periodically to dredge the area around

their hulls) are, by definition, not in navigation. However, those riverboat casinos that regularly can and do traverse navigable waters are likely to be found vessels in navigation and thus “Jones Act vessels.”

In 1996, employees of the Treasure Chest Casino, a riverboat based in Louisiana, sued the casino under the Jones Act for damages caused by exposure to secondhand smoke. The case, *Mullen v. Treasure Chest Casino*, was certified to proceed as a class action.<sup>43</sup> Before trial, the case settled for \$2.6 million.<sup>44</sup> Though no Jones Act cases involving casino employees have proceeded to trial, the result in *Mullen* suggests that FELA claims may provide an effective legal remedy for riverboat casino employees harmed by secondhand smoke in the workplace.

## **B. Workers Compensation Law**

Employees who are injured while performing their jobs are generally entitled to relief through their state’s workers compensation system.<sup>45</sup> However, recovering compensation for secondhand smoke-related injuries in this manner is not without difficulty. While some courts have awarded benefits to employees injured by workplace exposure to secondhand smoke,<sup>46</sup> other courts have reached the opposite result.<sup>47</sup> The courts denying compensation have ruled either that secondhand smoke exposure was not specifically related to the scope of employment or that the claimant could not prove his or her injury was due to workplace exposure. These cases aside, with a well-documented claim, it is possible that objections may be overcome and those injured by secondhand smoke in the workplace can receive compensation.

The likelihood of recovering compensation will depend on the particularities of each state’s workers compensation law and on the employee’s ability to connect his or her injury to secondhand smoke exposure in the workplace. The level and duration of workplace exposure is important, as is evidence that the employee avoided secondhand smoke outside of the workplace. The successful claim will include evidence that directly links the injury to secondhand smoke exposure and rules out potential causes from outside the workplace.

In the only casino-related secondhand smoke workers compensation claim on record, the Supreme Court of Nevada ruled in 1992 that a casino employee was not entitled to compensation for his lung disease caused by secondhand smoke exposure.<sup>48</sup> The court wrote that compensation should be denied because

“secondary tobacco smoke [is] a condition that is not incidental to the ‘character or nature’ of the casino business” but is instead “a condition to which we are generally exposed outside of our employment.”<sup>49</sup> As casinos are increasingly one of the few workplaces where employees are left unprotected by smoke-free workplace laws, such reasoning may be ripe for reconsideration.

### C. Disability Rights Laws<sup>50</sup>

Title I of the Americans with Disabilities Act (“ADA”) prohibits employment discrimination against individuals with disabilities.<sup>51</sup> Persons whose breathing or other “major life activities” are substantially impaired by exposure to secondhand smoke are “disabled” within the meaning of the ADA.<sup>52</sup> This is a fairly high standard. Claimants should be prepared to demonstrate a severe and long-term hypersensitivity to secondhand smoke.<sup>53</sup>

An employer is required to make a “reasonable accommodation” to the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operation of the employer’s business.<sup>54</sup> “Undue hardship” is defined as an “action requiring significant difficulty or expense[] when considered in light of” factors such as an employer’s size, financial resources, and the nature and structure of the operation.<sup>55</sup> Several courts have suggested that it would be a “reasonable accommodation” to provide a smoke-free working environment for an individual with a disability triggered by secondhand smoke exposure.<sup>56</sup>

Casino employees who suffer from serious conditions exacerbated by secondhand smoke can file claims under the ADA if they are not provided with a “reasonable accommodation.” For purposes of the ADA, moving the employee to a non-smoking floor or room may constitute a “reasonable accommodation.” However, casino owners and operators can more fully safeguard the health and welfare of their employees (and also protect themselves against potential ADA liability) by prohibiting smoking in all indoor areas.

Under Title III of the ADA, a casino patron with a disability related to secondhand smoke also may have a cause of action against a casino for allowing smoking in its establishment. While there have been no reported Title III cases involving casinos, courts have allowed



ADA cases to proceed against restaurant chains that allowed smoking.<sup>57</sup> For example, in a 1999 decision involving the Red Lobster and Ruby Tuesday restaurant chains, a Maryland court wrote:

[J]ust as a staircase denies access to someone in a wheelchair, tobacco smoke prevents Plaintiffs from dining at Defendant’s restaurants. Therefore, Plaintiffs have adequately alleged they are disabled within the meaning of the ADA and that their disability bars them from Defendant’s restaurants.<sup>58</sup>

The same logic applies with equal force to casinos.

### D. Common Law Claims

Courts in some states have used common law theories to award damages against employers who permit smoking in the workplace. Again, the reasoning of such cases applies with equal force to casinos.<sup>59</sup>

Employers have a common law duty to provide employees with a reasonably safe workplace, and casino employers may be liable under common law theories of negligence if they allow smoking.<sup>60</sup> Employees who have been injured by secondhand smoke exposure may seek monetary damages as well as an injunction requiring the employer to provide a smoke-free workplace. As early as 1976, courts in several states have granted injunctive relief to employees exposed to secondhand smoke in the workplace.<sup>61</sup> The court in the landmark case *Shimp v. New Jersey Bell Telephone Co.* stated clearly and concisely that “[t]he right of an individual to risk his or her own health does not include

the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.”<sup>62</sup> Other lawsuits alleging that an employer negligently failed to provide a safe workplace have resulted in payment of monetary damages.<sup>63</sup>

A search of case law shows that no casino employee to date has successfully sued an employer for breach of the common law duty to provide a safe workplace. However, in July 2006, a casino employee (and lifelong nonsmoker) diagnosed with lung cancer sued his employer, the Tropicana Casino and Resort in Atlantic City, seeking both monetary and injunctive relief. That lawsuit is ongoing. The complaint states that “[w]hile casinos are one of the types of businesses where smoking is still allowed, the New Jersey Smoke Free Air Act does not contain any provisions granting immunity to casino businesses against tort liability for personal injuries caused by secondhand smoke to which they subject their business invitees.” Indeed, the complaint suggests that the state’s awareness of the harmful effects of secondhand smoke (as evidenced by its promulgation and implementation of the Smoke Free Air Act) requires the courts to similarly recognize that an employer who permits workplace smoking violates the common law duty to provide a “reasonably safe workplace” for employees.

Some states have allowed an assault and battery claim to be brought against an employer for continuing to subject an employee to secondhand smoke exposure. In such cases, physical harm has to be shown and, in most cases, the exposure to secondhand smoke has to be intentional. For example, in *Portenier v. Republic Hogg Robinson*, a woman sued her employer for assault and battery based on her exposure to secondhand smoke at work.<sup>64</sup> She claimed that the company permitted workers to smoke in the workplace even after she had submitted doctors’ notes advising that she should not be exposed to secondhand smoke and that she was “subjected to a series of offensive, hostile, intimidating and retaliatory remarks” after complaining about her continued exposure.<sup>65</sup> The case settled in 1994 for an undisclosed amount after the company’s motion of summary judgment was denied. In cases like *Portenier*, where the employer’s actions are intentional, repeated, and egregious, an assault and battery claim may be viable.

Employers who discharge employees for complaining about secondhand smoke exposure may be liable for the tort of wrongful discharge. As one state court wrote in

such a case, “an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe . . . .”<sup>66</sup> Thus, casino employees may have legal recourse if they are discharged for requesting a smoke-free workplace.

## E. Class Action Lawsuits

An individual casino employee suffering from a secondhand smoke-related ailment may not have the time or resources needed to pursue a legal action. Therefore, casino employees may seek certification as a “class,” allowing a large number of similar claims—for example, by all employees of the same casino—to be consolidated into a single lawsuit. Courts have differed on whether casino employees exposed to secondhand smoke may combine their claims into a class action. All such determinations are made on a case-by-case basis.

Among other prerequisites, class actions must meet requirements of “numerosity”<sup>67</sup> and “commonality.”<sup>68</sup> The class must be large enough that joinder—uniting individual claims in a single lawsuit—is impracticable, and yet there must be “questions of law and fact common to the class” of plaintiffs.<sup>69</sup> Potential cases involving a small number of class members may not meet the “numerosity” requirement, but a class too large may include plaintiffs with claims so dissimilar as to fail the “commonality” test.

Another prerequisite for class certification, the question of “typicality,” may be the most significant hurdle for casino employees exposed to secondhand smoke to overcome. For example, in *Badillo v. American Tobacco, Inc.*, the plaintiffs sought certification of a class involving all casino dealers in Nevada.<sup>70</sup> The court rejected class certification, noting that different casinos are “significantly different environments” from one another and contain different levels of secondhand smoke.<sup>71</sup> It added:

It does not require an expert to conclude that the exposure to secondhand tobacco smoke of an employee who works in one area of a particular casino would be different from that of an employee who works in another area. The permutations are endless and do not lend themselves easily to grouping under the rubric of a class action.<sup>72</sup>



suit only where Congress has authorized the suit or the tribe has waived its immunity.<sup>77</sup> Thus, smoke-free workplace laws passed by states are not enforceable in Native American casinos.

In 1988, Congress passed the Indian Gaming Regulatory Act which authorized tribes to operate full-scale casino gambling on reservations,

provided the details of the operation were set forth under a tribal-state compact.<sup>78</sup> According to the National Indian Gaming Commission, there are now more than 400 tribal casinos in 28 states throughout the United States, including 54 in California.<sup>79</sup> These casinos enjoy the full extent of the tribes' sovereign immunity.<sup>80</sup>

On the other hand, courts have certified more narrow classes of employees. In the case *Mullen v. Treasure Chest Casino*, a federal appellate court approved a class consisting of employees of the Treasure Chest Casino who had been injured by secondhand smoke exposure.<sup>73</sup> The court approved a two-phased process in which common issues, such as whether the casino was a "Jones Act vessel" and whether the employer was liable for negligence, would be tried as one class action. Individual issues regarding damages and causation would then be decided in a second phase of litigation.<sup>74</sup> In approving the class certification, the court wrote, "this case does not involve the type of individuated issues that have in the past led courts to [reject class action certification] . . . Here, by contrast, the putative class members are all symptomatic by definition and claim injury from the same defective ventilation system over the same general period of time."<sup>75</sup>

A review of traditional legal databases revealed little information on possible smoke-free policies adopted by Native American communities. However, some Native American casinos are taking the first steps to prohibit or limit smoking. In Washington State, the Muckleshoot Tribe, which operates the largest casino in the state, recently opened a completely smoke-free casino next to its existing casino.<sup>81</sup> Tribal leaders said that the new, non-smoking casino was built in response to repeated requests from patrons. On the East Coast, Foxwoods Resort Casino and Mohegan Sun advertise the availability of smoke-free gaming areas.<sup>82</sup> And in California, the Valley View Casino in San Diego County recently constructed an entirely non-smoking gaming pavilion.<sup>83</sup> These efforts, though inadequate to protect all casino employees, demonstrate that Native American tribes recognize the harm caused by exposure to secondhand smoke and the public's growing demand for smoke-free environments.

In sum, whether or not a lawsuit will be approved as a class action depends upon the specifics of the case and whether the potential class shares common questions of law and fact that makes class action treatment appropriate. Existing case law suggests that narrowly-drawn classes of injured employees may meet greater success than broader classes involving all casino employees.

### Section III – Native American Tribal Casinos

Many Native American tribes are recognized as sovereign by the Federal Government, and some of these tribes operate casinos on their tribal lands. States may not enforce their civil codes on these tribal lands.<sup>76</sup> Furthermore, the United States Supreme Court has held that Native American tribes are "subject to

### Section VI – Conclusion

Casino employees face higher levels of exposure to secondhand smoke than almost any other profession and, as a result, they more frequently suffer from its devastating health effects. Smoke-free laws can provide protection for casino workers, as they do for employees in other businesses. Unfortunately, several states have created exemptions for casinos and other

gambling sites in their smoke-free laws.

However, even if left unprotected by a smoke-free law, casino employees may have several legal options. Lawsuits may prove an effective strategy for requiring employers to provide a smoke-free environment, and in some cases, injured employees may be entitled to compensation for harms suffered due to secondhand smoke exposure.

Casino employees, like any other employees, need to be protected from secondhand smoke exposure in their workplaces. Whether working at a riverboat casino, a tribal casino, or any other gaming facility, casino employees should not have to risk their lives and health to keep their jobs.

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## **Acknowledgements**

For their research support, the authors would like to thank Kirk Walter, Mehmet Munur and Matthew Fuerst. For their guidance and assistance, the authors would like to thank Christopher Banthin, Doug Blanke, Kerry Cork, and Maggie Mahoney.



## Endnotes

- 1 See Liz Szabo, *Secondhand Smoke Debate “Over,”* USA Today, June 28, 2006, at 4A (quoting U.S. Surgeon General Richard Carmona's statements that “[t]he debate is over,” “[t]he science is clear” and “[s]econdhand smoke is not a mere annoyance but a serious health hazard”).
- 2 See World Health Org., *Air Quality Guidelines for Europe 202-03* (2d Ed. 2000), available at <http://www.euro.who.int/document/e71922.pdf>.
- 3 See *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Env'tl. Prot. Agency*, 313 F.3d 852, 857 (4th Cir. 2002).
- 4 See U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke>.
- 5 Michael Siegel & Mike Skeer, *Exposure to Secondhand Smoke and Excess Lung Cancer Mortality Risk Among Workers in the “5 B’s”: Bars, Bowling Alleys, Billiard Halls, Betting Establishments, and Bingo Parlours*, 12 *Tobacco Control* 333, 335 (2003).
- 6 Douglas Trout et al., *Exposure to Casino Employees to Environmental Tobacco Smoke*, 40(3) *J. Occupational & Env'tl. Med.* 270, 273 (1998).
- 7 James Repace, *Respirable Particles and Carcinogens in the Air of Delaware Hospitality Venues Before and After a Smoking Ban*, 46(9) *J. Occupational & Env'tl. Med.* 887, 895 (Table 2) & 899 (Table 3) (2004).
- 8 Lenita Powers, *Study Could Snuff Casino Smoke*, *Reno Gazette-J.*, May 15, 2006, at A1.
- 9 Cal. Env'tl. Prot. Agency's Office of Env'tl. Health Hazard Assessment, *The Health Effects of Exposure to Environmental Tobacco Smoke*, §2.2 (1997) available at [http://www.oehha.ca.gov/air/environmental\\_tobacco/finalets.html](http://www.oehha.ca.gov/air/environmental_tobacco/finalets.html).
- 10 U.S. Dep't of Health & Human Servs., *supra* note 4, at 11.
- 11 *Id.* at 16.
- 12 See Repace, *supra* note 7, at 899 (Table 3). Smoke-free workplace laws also reduce smoking rates in general by encouraging people to quit and discouraging initiation. See Joseph E. Bauer, et al., *A Longitudinal Assessment of the Impact of Smoke-Free Worksites Policies on Tobacco Use*, 95 *Am. J. Pub. Health* 1024, 1029 (2005).
- 13 See Am. Nat'l Standards Inst., Am. Soc'y of Heating, Refrigerating, and Air Conditioning Eng'rs, Inc., ANSI/ASHRAE Addendum 62o to ANSI/ASHRAE Standard 62-2001, *Ventilation for Acceptable Indoor Air Quality 2* (2003), available at [http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20048514546\\_347.pdf](http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20048514546_347.pdf). See also Am. Nat'l Standards Inst., Am. Soc'y of Heating, Refrigerating, and Air Conditioning Eng'rs, Inc., ANSI/ASHRAE Standard 62.1-2004, *Ventilation for Acceptable Indoor Air Quality* (2004), available at [http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/200542014276\\_347.pdf](http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/200542014276_347.pdf) (incorporating “Addendum 62o” into recommended standards for indoor areas where smoking is allowed).
- 14 See U.S. Dep't of Health & Human Servs., *supra* note 4, at 649 (stating “[e]xposure[] of nonsmokers to secondhand smoke cannot be controlled by air cleaning or mechanical air exchange.”).
- 15 Kristin E. Anderson et al., *Metabolites of Tobacco-Specific Lung Carcinogen in Nonsmoking Casino Patrons*, 12 *Cancer Epidemiology, Biomarkers & Prevention* 1544, 1545 (2003).
- 16 L. L. Mandel et al., *Smoke-Free Law Did Not Affect Revenue from Gaming in Delaware*, 14 *Tobacco Control* 10 (2005).
- 17 S. A. Glantz & R. Wilson-Loots, *No Association of Smoke-Free Ordinances with Profits from Bingo and Charitable Games in Massachusetts*, 12 *Tobacco Control* 411 (2003). Similarly, Britain's largest casino operator concluded that Scotland's nationwide smoke-free law “has not had a material effect on our four casinos in Scotland.” Jim Stanton, *Casino Giant Breathing Easy After Smoking Ban*, *Evening News* (Edinburgh), July 20, 2006, available at <http://news.scotsman.com/topics.cfm?tid=663&id=1055122006> (last visited Nov. 7, 2006).
- 18 See Tobacco Control Section, Cal. Dep't of Health Servs., *2004 Field Research Poll Results*, available at <http://www.no-smoke.org/pdf/fieldresearchpoll2004.pdf> (finding that 91% of respondents “said they would be more likely to visit Indian casinos or would not change patronage if smoking were prohibited in casinos”); see also Caroline Miller & Sophie Kriven, *Community Support for Smoking Bans in Bar and Gaming Venues in South Australia*, in *Tobacco Control Research and Evaluation Report No 1, 1998-2001* 209, 209 (The Cancer Council South Australia ed., 2002) available at [http://www.cancersa.org.au/cms\\_resources/documents/Chapter\\_17.pdf](http://www.cancersa.org.au/cms_resources/documents/Chapter_17.pdf) (surveying South Australian adults and finding that 93% said that a smoke-free law would

make no difference in how often they patronize gaming areas, 4% said they would go more often, and 3% said they would go less often).

- 19 See M. Scollo et al., *Review of the Quality of Studies on the Economic Effects of Smoke-Free Policies on the Hospitality Industry*, 12 Tobacco Control 13 (2003); see also W. J. Bartosch & G.C. Pope, *The Economic Effect of Smoke-Free Restaurant Policies on Restaurant Business in Massachusetts*, 5(1) J. Pub. Health Mgmt. Practice 53 (1999) (evaluating tax receipts to conclude smoke free policies do not adversely effect restaurant business); S. A. Glantz & L. R. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales*, 84 Am. J. Pub. Health 1081 (1994) (finding no adverse economic impact); U.S. Dep't of Health and Human Services, *supra* note 4, at 16 (concluding that "[e]vidence from peer-reviewed studies shows that smoke-free policies and regulations do not have an adverse economic impact on the hospitality industry").
- 20 Samantha K. Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke* 4 (2005), available at <http://www.tobaccolawcenter.org/resources/No+Constitutional+Right+to+Smoke.pdf>.
- 21 See Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Legal Threats and Challenges* 8 (2004), available at <http://www.tobaccolawcenter.org/resources/Sbarra.pdf>.
- 22 Some states preempt municipal or county governments from passing smoke-free laws. See *id.* at 1-2.
- 23 Tribal sovereignty may block the application of smoke-free laws to casinos operated by recognized Native American tribes and located on tribal land. See *infra* Section IV.
- 24 A separate provision of the law provides employees with a "right to work in an area free of environmental tobacco smoke." Thus, casino employees could request that their employer go smoke-free. Colo. Rev. Stat. Ann. § 25-14-204(1)(k)(ii) (2006).
- 25 See Bill Scanlon, *Suit Seeks to Snuff Out Colorado's Smoking Ban*, Rocky Mountain News, June 16, 2006, at 15A. On October 19, 2006, the United States District Court granted summary judgment, finding that the Colorado Clean Indoor Air Act, including its exemption for casinos, is constitutional. *Coalition for Equal Rights, Inc. v. Colorado*, No. 06-cv-01145-LTB-PAC, slip op. at 12, 21 (D. Colo. Oct. 19, 2006).
- 26 See Richard G. Jones & John Holl, *New Jersey Joins 10 States in Banning Indoor Smoking*, New York Times, April 14, 2006, at B6.
- 27 See Scott Mayerowitz, *Group Pushes Ahead with Smoking Suit*, Providence Journal, May 5, 2005, at B1.
- 28 See Christopher Keating, *Judge Upholds Ban on Smoking*, Hartford Courant, Nov. 9, 2004, at B1.
- 29 See Sbarra, *supra* note 21, at 3.
- 30 See *id.*
- 31 *Batte-Holmgren v. Galvin*, No. CV-044000297, 2004 Conn. Super. LEXIS 3313, at \*10 (Conn. Sup. Ct. Nov. 5, 2004).
- 32 See 46 App. U.S.C. § 688 (2006) (providing that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply").
- 33 Federal Employer Liability Act, 45 U.S.C. §§ 51-60 (2006).
- 34 See *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).
- 35 See *id.* at 507-508 (stating that in Jones Act cases, "[t]he employer is stripped of his common-law defenses and . . . [t]he burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference").
- 36 *Wilhelm v. CSX Transp., Inc.*, 65 Fed. App'x 973, 978 (6th Cir. 2003). Ultimately, the plaintiff lost at trial, because the defendant's evidence suggested that CSX did, in fact, enforce the no-smoking policy and that violations of the policy were rare. See *Wilhelm v. CSX Transp., Inc.*, No. 3:00CV7099, 2005 U.S. Dist. LEXIS 2192 (D. Ohio Feb. 14, 2005) (denying motion for new trial).
- 37 *Thaxton v. Norfolk Southern Railway Co.*, 520 S.E.2d 735 (Ga. Ct. App. 1999).
- 38 *Id.* at 736.
- 39 See Press Release, John Moss, Matthews & Steele, *Passive Smoking Lung Cancer Death Case Settled in Favor of Plaintiff* (Jan. 20, 2006), available at <http://www.tobacco.org/resources/lawsuits/thaxton.html> (last visited Nov. 7, 2006).
- 40 See *Rannals v. Diamond Jo Casino*, 265 F.3d 442, 448-49 (6th Cir. 2001).
- 41 See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991) ("All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. . . . It is not the employee's particular job that is determinative, but the employee's connection to a vessel.").

- 42 *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992).
- 43 *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 629 (5th Cir. 1999) (upholding class action certification).
- 44 See Rebecca Mowbray, *Casino Workers Await Lawsuit Cash; Treasure Chest Settles Class Action*, Times-Picayune (New Orleans), June 25, 2002.
- 45 Workers compensation compensates employees for injuries suffered during work. Compensation can include payments in lieu of wages, compensation for economic loss (past and future), reimbursement of medical and like expenses, damages for pain and suffering. Benefits are also available for the dependents of workers killed during employment. See generally 1 Occupational Injuries & Illnesses § 1.01 *et seq.* (Daniel J. Stone, ed., 1993).
- 46 See, e.g., *Eastern Airlines, Inc. v. Crittenden*, 596 So. 2d 112 (Fla. Dist. Ct. App. 1992); *Schober v. Mountain Bell Tel.*, 96 N.M. 376 (N.M. Ct. App. 1980); *In re Johannesen v. New York City Dep't of Housing Preservation & Dev.*, 154 A.D.2d 753 (N.Y. App. Div. 1989); *McCabe v. Workers' Comp. Appeal Board (Dep't of Revenue)*, 738 A.2d 503 (Pa. Commw. Ct. 1999); *Cantalope v. Veterans of Foreign Wars Club of Eureka*, 674 N.W. 2d 329 (S.D. 2004); *Ubhi v. State Comp. Ins. Fund, Cat'n'Fiddle Rest.*, No. SFO-0341691 (California Workers' Compensation Appeals Bd. 1990); *Mittan v. Eastern Airlines, Florida Dep't of Labor & Employment Sec., Div. of Workers' Comp.*, Claim No. 150-40-1829 (1986); *Seiwert v. The Child Center*, 7.1 TPLR 8.6, No. 112490 (Worker's Compensation Bd. of Ind. 1992); *Bena v. Mass. Tpk. Auth.*, 7.1 TPLR 8.1, No. 03922088 (Mass. Dep't of Industrial Accidents 1991); *Thorensen v. U.S. Air*, No. 09521885 (Mass. Dep't of Industrial Accidents 1989); *Magaw v. Middletown Bd. of Educ., New Jersey Dep't of Labor, Div. of Workers' Comp.*, Claim Petition No. 95-005466 (1998); *Kufahl v. Wisconsin Bell, Inc.*, 6.2 TPLR 8.23, No. 88-000676 (Wis. Labor and Indus. Review Comm'n 1990).
- 47 See, e.g., *ATE Fixture Fab v. Wagner*, 559 So.2d 635 (Fla. Dist. Ct. App. 1990); *Palmer v. Del Webb's High Sierra*, 838 P.2d 435 (Nev. 1992); *Keck v. New York State Division of Substance Abuse Services*, 675 N.Y.S.2d 400, 401 (N.Y. App. Div. 1998) (ruling that an employees' exposure to five weeks of pipe smoke from a co-worker and subsequent sore throats, difficulty breathing, headaches, and nausea did not qualify her for compensation because of her own history of smoking); *In re Mack v. County of Rockland*, 71 N.Y.2d 1008 (1988), *affirming* 128 A.D.2d 922 (N.Y. App. Div. 1987); *Kellogg v. Mayfield*, 595 N.E.2d 465 (Ohio Ct. App. 1991); *Stanton v. Illinois Dep't of Lottery, Ill. Indian Comm'n*, Nos. 94 WC 45643, 97 IIC 2054 (1997).
- 48 *Palmer*, 838 P.2d at 437.
- 49 *Id.*
- 50 The scope of this section is limited to the American with Disabilities Act. State disability rights laws should also be reviewed.
- 51 Americans With Disabilities Act, Title I, 42 U.S.C. 12112(a) (2006) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual with regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").
- 52 See Clifford E. Douglas, Tobacco Control Legal Consortium, *The American with Disabilities Act: Effective Legal Protection against Secondhand Smoke* (2004), available at <http://www.tobaccolawcenter.org/resources/Douglas.pdf>.
- 53 See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).
- 54 See 42 U.S.C. § 12112(b) (2006).
- 55 See 42 U.S.C. § 12111(10) (2006).
- 56 See, e.g., *Bond v. Sheahan*, 152 F. Supp. 2d 1055, 1072 (D. Ill. 2001) ("[A] factfinder could reason that enforcement of the non-smoking policy could have been an effective and reasonable accommodation for Ms. Bond's asthma."); see also *Belmarez v. Craig's Pro-Cuts*, No. 3:97-CV-2274-D, 1998 U.S. Dist. LEXIS 19845 (D. Tex. Nov. 24, 1998) (ruling that a reasonable trier of fact could conclude that defendant employer had denied plaintiff a reasonable accommodation by refusing to provide a smoke-free environment).
- 57 See *Staron v. McDonald's Corp.*, 51 F.3d 353, 355 (2d Cir. 1995). The plaintiffs, "three children with asthma and a woman with lupus[,]” filed suit against McDonald's and Burger King claiming that the restaurants' "policies of permitting smoking in their restaurants violated" the ADA. *Id.* at 354. Defendant restaurants conceded that the "plaintiffs qualify[ed] as 'individuals with disabilities' under the ADA." *Id.* at 355. While appeals were pending, McDonald's revised its policy to prohibit smoking in all corporate owned-and-operated restaurants. *Id.*
- 58 *Edwards v. GMRI, Inc.*, Montgomery County (Md.) Circuit Court, No. 179593 (Mar. 1, 1999).
- 59 Note, however, that common law claims and workers compensation claims may be mutually exclusive. In

states that have recognized workers compensation claims for employees exposed to secondhand smoke, the workers compensation system likely functions as the exclusive means by which employees can seek monetary relief. However, in states that have refused to recognize such claims, common law causes of action may be viable. See, e.g., *Hennly v. Richardson*, 444 S.E.2d 317, 320 (Ga. 1994) (holding that since employee's injuries "arose in the course of and out of her employment," she was required to seek relief through the workers compensation system).

- 60 See *McCarthy v. Wash. Dep't of Soc. and Health Servs.*, 759 P.2d 351, 354 (Wash. 1988) ("[T]he employer's common law duty to provide a safe workplace includes a duty to provide a working environment reasonably free from tobacco smoke."); see also *Parodi v. Merit Sys. Prot. Bd.*, 702 F.2d 743 (9th Cir. 1982); *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982).
- 61 Injunctive relief in these cases refers to an order to the employer to stop permitting smoking in the workplace.
- 62 *Shimp v. N.J. Bell Tel. Co.*, 368 A.2d 408, 415 (N.J. Super. Ct. Ch. Div. 1976); see also *Lee v. Dep't of Pub. Welfare*, 1.2 TPLR 2.82, No. 15385 (Bristol County, MA, Super. Ct. 1983) (granting a temporary restraining order against smoking in the open area of an office). In *Lee*, the court stated: "[A]n employer has no duty to make the work place safe if, and only if, the risks at issue are inherent in the work to be done. Otherwise, the employer is required to 'take steps to prevent injury that are reasonable and appropriate under the circumstances.'" *Id.* at 2.83.
- 63 See, e.g., *McCarthy*, 759 P.2d at 352-53 (settling in 1989 for \$27,000).
- 64 *Portenier v. Republic Hogg Robinson*, 9.1 TPLR 3.30, No. BC 028990 (L.A. Cal. Super. Ct. 1991)
- 65 *Id.* at 3.32.
- 66 *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 299-300 (Cal. Ct. App. 1982).
- 67 Fed. R. Civ. P. 23(a)(1).
- 68 Fed. R. Civ. P. 23(a)(2).
- 69 *Id.*
- 70 *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001).
- 71 *Id.* at 264-265.
- 72 *Id.* at 265.
- 73 *Mullen*, 186 F.3d at 629.
- 74 As noted above, the case ultimately settled before proceeding to trial.
- 75 *Id.* at 626-27.
- 76 *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998).
- 77 *Id.* at 754.
- 78 25 U.S.C. § 2701 *et seq.* (2006).
- 79 National Indian Gaming Commission, *Gaming Tribes Listing*, available at <http://www.nigc.gov/TribalData/GamingTribesListing/tabid/68/Default.aspx> (last visited Oct. 21, 2006).
- 80 See *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 644-45 (Cal. Ct. App. 1999).
- 81 Tara M. Manthey, *Bring Luck, Not Lucky Stripes*, The News Tribune (Tacoma, WA) Sept. 3, 2006, available at <http://www.thenewstribune.com/news/local/story/6072870p-5326132c.html>. In 2005, the Blackfeet Reservation in Montana passed a tribal law that will prohibit smoking in tribally owned casinos beginning in 2007. Mike Dennison, *Blackfeet Nation Has Its Own Ban*, Billings Gazette, Sept. 25, 2005, available at <http://www.billingsgazette.com/newdex.php?display=rednews/2005/09/25/build/state/38-smoking-ban3.inc>.
- 82 Press Release, Foxwoods Resort Casino, First World Poker Tour Branded Poker Room to Debut at Foxwoods Resort Casino (Feb. 21, 2006) ("The poker room will be smoke-free and will offer a new 100+ seat restaurant, adjacent to the poker area."), available at <http://www.foxwoods.com/Aboutus/MediaRelations/PressReleases/elementa302bc9.aspx>; Mohegan Sun, *Smoke-Free Guide*, available at [http://www.mohegansun.com/pdf/smoke\\_free.pdf](http://www.mohegansun.com/pdf/smoke_free.pdf).
- 83 The California Rural Indian Health Board's (CRIHB) American Indian Tobacco Education Partnership (AITEP) has been working with American Indian tribes to advocate for smoke-free casinos. More information is available at <http://www.crihb.org/FCHS/sec73.htm> (last visited Oct. 8, 2006).

## About the Tobacco Control Legal Consortium

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



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