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WHAT MAY NORTH CAROLINA'S LOCAL GOVERNMENTS DO TO RESTRICT SMOKING?

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Abstract: In no state do local governments have less power over tobacco use and exposure than they do in North Carolina. This results largely from the conjunction of two events: the passage of a 1993 state statute preempting the authority of state agencies and local governments to regulate smoking (further limited by other legislation) and a state court of appeals decision thought to invalidate most rules on smoking that had been adopted by boards of health before the effective date of the preemption statute.

The preemption statute prevents the local regulation, with a few exceptions, of smoking in restaurants and other public accommodations. It also prevents eliminating smoking in government work places and public buildings. Another state statute prohibits job discrimination based on off-hours use of tobacco, and until now the state's ban on youth access to tobacco has been unenforceable. Finally, despite the Fourth Circuit Court of Appeals' approval of a Baltimore ordinance, North Carolina localities are forbidden, again by state statute, to regulate tobacco advertising.

Still, commissioners and council members retain some authority and may need to use it to avoid claims for workers' compensation, unemployment benefits, violations of handicapped protection statutes and constitutional violations. State law allows local officials to designate as smoke free up to 80 percent of public space. This percentage is higher at certain sites such as health departments. Federal statutes protect people

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disabled by smoking or secondhand smoke and preempt state law if the two conflict. People being detained have the right to a minimally healthy environment guaranteed by the Eighth Amendment to the United States Constitution. Local efforts to combat tobacco use are bolstered by the possibilities that the state court of appeals decision is narrower than it first appeared, that the minors' access statute can now be enforced, and that encouraging voluntary restrictions may prove effective.

Introduction

These days local officials receive requests to restrict smoking from residents who dislike encountering smoke in public facilities; people who don't want to work close to where others are smoking; the federal government, which is increasingly willing to condition health and education funding on smoking restrictions; and local health departments, which usually consider health education and smoking prevention or cessation programs essential to their missions.

This bulletin responds to questions directed to the Institute of Government in recent years, most often by county attorneys or health directors, about the extent of the legal power to accommodate these requests and the advisability of doing so as a means of limiting local government's liability. The bulletin focuses on two areas: the permissible limits of controlling smoking within the local government workforce and local government's ability to protect the public from environmental tobacco smoke (also called ETS or secondhand smoke).

Smoking and the Local Government Workforce

Among the issues local governments face as employers are restricting on-the-job and off-hours tobacco use; assessing employees' eligibility for workers' compensation or unemployment benefits for smoking-related illness; determining whether smokers, nonsmokers, or both can claim employment discrimination under state or federal law; and figuring out whether different rules might apply in certain workplaces, for example, in health facilities.

On-the-Job and Off-Hours Tobacco Use

All employers may establish and enforce workplace smoking rules.[1] In North Carolina private employers may choose any policy, while public employers are far more constrained as a result of state preemptive legislation[2] discussed below in the section entitled "Enforcing existing local rules and ordinances."

Also as a result of state legislative action, most local government agencies may not refuse to hire smokers or penalize employees for tobacco use outside work.[3] One source states, "These laws were passed in response to the anti-smoking sentiment that swept the country. As health insurance rates climbed, employers began requiring [that] workers be non-smokers. The American Civil Liberties Union spearheaded a campaign to protect the rights of employees who smoke and the result was legislation in more than half of the states prohibiting discrimination solely on the basis of an employee's smoking habits."[4]

In 1992 North Carolina joined the states that forbid adverse employment action for off-the-job tobacco use.[5] Our statute has several exceptions, however,

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1. Moore v. Inmont Corp., 608 F.Supp. 919 (W.D.N.C. 1985); Crockett v. Eckerd Drugs of N.C., Inc., 615 F.Supp. 528 (W.D.N.C. 1985).

2. N.C. GEN. STAT. Chapter 143, Article 64 (hereinafter G.S.), *Smoking in Public Places.*

3. Without such action employers likely could have refused to hire or retain smokers. "Smoking: Preferential Hiring and Retaliation," 509 Lab. Rel. Rep. (BNA) (9A Individual Empl. Rights Man.) 502 (1994). The Florida Supreme Court has ruled that requiring applicants to attest that they have not used tobacco for a year does not violate their rights under the state or federal constitutions. North Miami, Florida v. Kurtz, 653 So. 2d 1025 (1995). A federal appellate court has held that discharge for violating a municipal fire department's rule against smoking off duty does not violate the United States Constitution. Grusendorf v. Oklahoma City, 816 F.2d 539 (10th Cir. 1987).

4. "State Smokers' Rights Laws Comparison Chart," 451 Lab. Rel. Rep. (BNA) (8A Fair Empl. Prac. Man.) 113-14 (1997), showing 28 states and the District of Columbia with such laws.

5. S.B. 1032, Ch. 1023, SL 1992, codified as G.S. 95-28.2. The others are Arizona (state employees only), Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin and Wyoming, plus the District of Columbia. "Smoking: Preferential Hiring and Retaliation," 509 Lab. Rel. Rep. (BNA) (9A Individual Empl. Rights Man.) 501 (1994).

which are said to reflect business concerns.[6] One exception is for restrictions that are "bona fide occupational requirements . . . reasonably related to the employment activities."[7] While the statute has never been construed or applied, one commentator thinks the language is intended to allow employers to refuse to place smokers in positions where the risk of acquiring or worsening an occupational disease is greater for a smoker than it would be for a nonsmoker.[8] Another possible interpretation, discussed below under "Tobacco use rules for health departments," is that the provision lets certain employers require that some workers be nonsmokers in order to maintain credibility in the job and serve as good examples. Prohibiting off-hours smoking is also permitted "if the restriction relates to the fundamental objectives of the organization."[9] On this point, again, health workers come to mind. An example where this restriction could apply is to the staff of a wellness program for county employees. A third exception lets employers who meet certain conditions pass on to smoking employees higher premiums for health, life, and disability insurance.[10] A fourth exception, allowing employers to take adverse action for an employee's failure to comply with a substance abuse program, may or may not apply to smokers who refuse to try or do not succeed in quitting.[11]

Availability of State Benefits for Smoking-Related Illness

Workers' compensation. The North Carolina Industrial Commission has never received a claim under the Workers' Compensation Act[12] based solely on illness or death from a worker's, from customers', or from co-workers' use of tobacco.[13] Successful workers' compensation claims have been made, however, when tobacco use is one of several causes of the illness or death. If the employee's own tobacco use is at issue, he or she must prove that a work-related condition was a significant cause of the occupational disease[14] and resulting disability or death. If the employee can prove this, compensation will not be denied or even lessened because tobacco use also contributed to the disease.[15]

Of course government employers, like other employers, may be relatively unconcerned about workers' compensation claims. Although employers must fund the program,[16] they may prefer having injured employees recover under the act to other alternatives. Workers' compensation awards preclude other legal remedies and are usually quite small compared with tort judgments.

Unemployment benefits. Employees, including local government workers,[17] who lose jobs or have their hours substantially reduced may be eligible for unemployment benefits.[18] Although workers cannot claim benefits if they "left work without good cause attributable to the employer,"[19] they are not disqualified by leaving for health reasons[20] as long as they

6. Stephen Allred, "Public Personnel," in *North Carolina Legislation 1992* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1992) 97.

7. G.S. 95-28.2(c)(1).

8. *See supra*, note 6.

9. G.S. 95-28.2(c)(2).

10. The conditions are that the differential be actuarially justified, the employee get written notice of it, and the employer contribution be equal for all employees. G.S. 95-28.2(d). The BNA summary (*see supra*, note 3) describes such a differential as an inducement offered by employers to persuade employees to quit smoking.

11. G.S. 95-28.2(c)(3). The statute does not define "substance abuse" and other statutory definitions of substance abuse are general [G.S. 90-113.31; G.S. 122C-3(37)] and do not specifically name tobacco. The definition in G.S. Ch. 112C is "pathological use or abuse of alcohol or other drugs in a way or to a degree that produces an impairment in personal, social, or occupational functioning." The BNA summary, writing of North Carolina's discrimination statute and others with a similar exception, finds it "unclear whether these provisions would apply to the use of tobacco." 509 Lab. Rel. Rep. (BNA) (9A Individual Empl. Rights Man.) at 505. *See infra*, text accompanying note 35, as to whether North Carolina's Handicapped Protection Act protects addicted smokers.

12. G.S. Ch. 97.

13. Telephone Interview with William H. Stephenson, member, North Carolina Industrial Commission, 1970 to 1990 (October 7, 1997). Currently, Mr. Stephenson is a consultant in the field of worker's compensation.

14. *See* G.S. 97-52.

15. Rutledge v. Tultex Corp., 308 N.C. 85, 301 S.E.2d 359 (1983).

16. G.S. 97-7 requires local governments to participate in the program.

17. G.S. 96-8(5)p.

18. G.S. Ch. 96, Art. 2.

19. G.S. 96-14.

20. The employee need only show that 1) a disability or condition justified leaving and prevented doing alternative work for the employer that paid the minimum wage or 85 percent of the actual wage, whichever was higher and 2) that the employee notified the employer of the health problem a reasonable time before leaving. G.S. 96-14(1)a and b.

register for work, file a claim for unemployment benefits, and are available to work elsewhere.[21]

Although no case has yet been reported in North Carolina requesting benefits because of a reaction to smoke, several claims of this kind have been filed with the Employment Security Commission (ESC) and have been paid.[22] The most analogous North Carolina precedent may be *Ray v. Broyhill Furniture Industries*.[23] There the court of appeals directed the ESC to award benefits to a woman who quit her job as a furniture finisher because chemical fumes used at work aggravated her bronchitis and asthma (conditions that would also be aggravated by tobacco fumes). The court found that the plaintiff had "established *both* that her resignation was involuntary due to compelling health reasons *and* that she had good cause attributable to her employer to leave."[24] On the first point, plaintiff Ray testified about her condition, and in a note written after she left her job, her doctor confirmed the condition and issued health warnings to her, and the employer offered no contrary evidence. As to the second point, Ray had asked her supervisor for protective equipment or a transfer. He refused the requests and threatened to fire her if she went beyond him. In light of these circumstances, the court rejected the company's claim that the supervisor was not 'the employer,' and also held that an employer's inaction as well as action can give an employee good cause to leave.[25]

21. "[A] claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer and is entitled to unemployment benefits as long as he meets the three qualifications in G.S. 96-13(a)." Milliken & Co. v. Griffin, 65 N.C. App. 492, 497, 309 S.E.2d 733, 736 (1983).

22. A few North Carolina workers have claimed that ETS caused or aggravated a serious health condition, proved it to the satisfaction of the staff of the Employment Security Commission, and received benefits. These claims have not been appealed to the full Commission or the courts. Telephone Interview with Thomas S. Whitaker, Assistant Attorney General (October 6, 1997). Only one analogous (unreported) case from another state could be located. Gardner v. Hercules, Inc. and Standard Indus. Maintenance, Inc., No. 2240-94-3 (Va. Ct. App. 1996) (divided panel held that plaintiff quit before trying to resolve problem and thus was without "good cause.")

23. 81 N.C. App. 586, 344 S.E.2d 798 (1986).

24. *Id.* at 589, 344 S.E.2d at 800.

25. "Broyhill's inaction placed Ms. Ray in the untenable position of having to choose between leaving her job and becoming unemployed or remaining in a job which exposed her, without even minimal protection, to harmful chemicals and fumes that exacerbated her asthma and bronchitis conditions." *Id.* at 592–3.

The principal North Carolina statute[26] that preempts the power of local governments to restrict smoking probably defines the outer limit of a local government's duty for purposes of workers' compensation. If an employer were completely prohibited, by statute, from providing protection from smoke, it seems unlikely that the Employment Security Commission or the courts would approve unemployment benefits for a smoke-sensitive worker. But North Carolina's statute does let employers offer some protection: local governments and state agencies can ban smoking in some buildings or parts thereof.[27] Therefore, an employer's failure to do as much as the law allows can be expected to continue to produce successful claims for unemployment benefits.

Workers' Protection from Discrimination under State and Federal Law

Smokers. Current or former smokers suffering from a disease associated with smoking are covered by

26. G.S. Ch. 143, Art. 64, especially G.S. 143-597, as incorporated through G.S. 143-601(a). The intended effect of Article 64 at the local level has been described as follows: "Effective October 15, 1993, [the Article] limits dramatically local governments' power to regulate smoking by specifically setting out the permissible manner and scope of such regulations. Under these restrictions, local governments must provide at least 20 percent of the interior space in their own facilities for smokers. Local governments may also regulate the following places as they deem appropriate: schools and day care centers (except for teachers' lounges); public school buses; enclosed elevators; hospitals; nursing homes; rest homes; local health departments; nonprofit organizations whose primary purpose is to discourage the use of tobacco by the general public; tobacco manufacturing, processing, and administrative facilities; libraries open to the public; museums open to the public; public meetings (defined as any "assemblage" authorized by state or local government or any subdivision thereof, and including, apparently, meetings held under the auspices of the General Assembly itself); and public transportation vehicles owned or leased by local governments and used by the public. Finally, local governments may regulate smoking in auditoriums, arenas, and similar buildings so long as smoking is permitted in some part of the lobby. Chapter 367 prohibits all other local government regulation of smoking, except regulations enacted as of October 15, 1993." Jeffrey S. Koeze, "Health," in *North Carolina Legislation 1993* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1993), 71–72.

27. *See especially* G.S. 143-597 and -599.

federal handicapped protection acts.[28] Despite the voluntary element in their illnesses and American society's growing intolerance of tobacco use, smokers who become disabled are entitled to job protection.[29] Although juries continue to apply the assumption of risk doctrine so as to prevent compensation for smokers from tobacco companies,[30] it seems likely that legislators will continue to protect workers with chronic smoking-related illnesses from job discrimination for at least two reasons. First, the cause of a particular worker's illness can never be proved since nonsmokers also contract heart disease, lung cancer, emphysema, asthma, and other smoking-related conditions. Second, because tobacco is so widely used and highly addictive,[31] the public would likely be uneasy about denying smokers all legal recourse when they are disabled.

However, workers who want to smoke on the job cannot rely on the federal and state statutes that forbid discrimination in employment against people with disabilities who are otherwise qualified and can work with "reasonable accommodation" by the employer. This is true despite the addiction of most smokers and recent indications that heavy smokers who experience great difficulty in quitting probably suffer from depressive or anxiety disorders which nicotine allays.[32] Despite these facts, rules promulgated under the latest federal anti-discrimination statute, the Americans with Disabilities Act (ADA),[33] and the guidelines of federal agencies charged with enforcing it[34] specifically allow employers to ban smoking at work.

As for North Carolina, the statute preventing job discrimination based on off-hours tobacco use has been previously noted. The state also has a Handicapped Persons Protection Act (HPPA)[35] about which several observations can be made in the context of tobacco use. First, the act surely covers people with smoking-related conditions who require accommodation—a worker who must use portable oxygen, for example, or one who cannot speak as a result of cancer of the larynx. Yet it is not clear whether North Carolina employers would have to accommodate a person who is, for example, disabled by emphysema and who requires a smoke-free work area. (See the discussion in the following section on this point.) Second, the HPPA, like the federal acts it resembles, probably does not protect anyone who wants to smoke at work (although the preemption statute, by preventing most public employers from making their facilities smoke-free, tends to have that effect). Without specifically mentioning nicotine or tobacco, the act does exclude drug addiction or abuse from the definition of "physical or mental impairment" that renders a person handicapped.[36] A court construing the act might consider a smoker drug-addicted—and hence excluded from coverage. Even if this does not happen, a court could find that the smoker's need is outweighed by either the harm to other workers, the employer's duty to provide a reasonably safe workplace, or both.

Nonsmokers. By now employers are likely concerned, if they have not been earlier, about possible claims of discrimination from applicants or employees who say they require a smoke-free environment in order to work. Many states require employers to restrict smoking in the workplace, and in August 1997 President Clinton banned smoking in federal workplaces under executive branch control.[37]

28. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (1973); Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (1990).

29. For a discussion of entitlement to benefits despite the secondary effects of alcoholism, see Traynor v. Turnage, 485 U.S. 535 (1988). The dissenters in that case quote from a Veterans Administration ruling that equates alcohol's long-term effects with those of smoking and notes that "smoking has not been considered misconduct." *Id.* at 567.

30. Glenn Collins, *Tobacco Industry Cleared in Florida Smoker's Death*, N.Y. TIMES, May 6, 1997, at A10; Laura T. Barrow, *Why My Jury Let R. J. Reynolds Off*, WASH. POST, May 25, 1997, at C1.

31. SURGEON GENERAL C. EVERETT KOOP, CTRS. FOR DISEASE CONTROL, PUB. HEALTH SERV., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, 88-8406 (Washington, D.C.: GPO, 1988).

32. Gina Kolata, *Hard-Core Smokers, Last-Ditch Remedies*, N.Y. TIMES, July 29, 1997, at B9; Jane E. Brody, *Many Smokers Who Can't Quit Are Mentally Ill, a Study Finds*, N.Y. TIMES, August 27, 1997, at B10, citing Cynthia S. Pomerleau in *Addiction*, Spring 1997. Apparently, a subgroup of smokers are in effect treating themselves for serious mental health problems.

33. EEOC ADA Employment Regulations, 29 C.F.R. § 1630.16(d) (1991); Department of Justice, ADA Public Accommodations Regulations, 28 C.F.R. § 36.210 (1991).

34. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE ON TITLE II OF ADA, Sec. 3.12000 (1994); TECHNICAL ASSISTANCE ON TITLE III OF ADA, Sec. III-3.1000 (1994) (Manuals).

35. G.S. Ch. 168A.

36. G.S. 168A-3(4)(a).

37. Exec. Order No. 13,058, 62 Fed. Reg. 43,451 (1997). The ban, effective a year later, affects every federal agency and building owned or leased by the federal government except those belonging to Congress or the judiciary.

In North Carolina as in the rest of the nation, private employers often ban smoking.[38] However, as noted earlier, a preemption statute significantly limits what public employers in our state can do to reduce ETS. While most employers would probably accommodate an employee's health-related need if they could without significant costs, it is not clear that they must do so as a matter of state law. Nearly twenty years ago a North Carolina appellate court said no to a closely related question—whether smoke allergic members of the public are entitled to smoke-free public facilities.[39]

Three claims resting on the federal handicapped protection acts[40] have been filed by smoke-sensitive individuals in the federal Fourth Circuit, which includes North Carolina. In the first a district court refused to find that a disabled plaintiff was entitled to an entirely smoke-free work area. The court concluded that the plaintiff could still perform the essential functions of his job with only minor restrictions on ambient smoke.[41] In the only appeals court case, *Gupton v. Virginia*,[42] the plaintiff failed to convince the court that she was disabled. The judges conceded only that she could not work in the particular job she had held. To qualify as a disability, the court held, a condition must prevent one's holding a certain *type* of employment. That situation obviously did not exist, the court said, since the employer had offered the plaintiff a job in the same field in a smoke-free, nearby office. Subsequently, a second district court applied the *Gupton* standard to find a plaintiff not disabled.[43]

Although the Fourth Circuit may appear unsympathetic to claims of discrimination by smoke-affected workers claiming disability, a future plaintiff might succeed under the three existing precedents. In *Gupton* the court identified the criteria, taken from an earlier decision,[44] that it will use in deciding whether a worker is handicapped. The test for relief under the ADA in the Fourth Circuit is this: The decision is to be individualized and relevant factors are "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training."[45]

Gupton relies on the Fourth Circuit's earlier decision in *Forrisi v. Bowen*. In *Forrisi*, the plaintiff, an engineer, was hired to repair utility systems at a federal agency in the Research Triangle Park. The job description stated that the employee would need to climb stairways and ladders in emergencies and for routine maintenance. Thus, when plaintiff reported for work and explained that he was frightened to climb to certain heights, he was fired. To prove the plaintiff was not handicapped, the court used his admission that fear of heights had never before caused job problems for him and that at time of trial he was again working as an engineer. The court concluded, "Far from being regarded as having a 'substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more."[46]

Tobacco Use Rules for Health Departments

A few local government enterprises are exempt from the smoking preemption statute.[47] Since health

38. Four years ago in North Carolina, "[w]hen asked to describe their rules on smoking, respondents at 81 to 86 percent of worksites reported that smoking was not allowed anywhere inside or that smoking was restricted to separately designated areas." Most cited employee requests as the reason for the policy. Jack K. Leiss & Melinda S. Burt, *Private Sector Worksite Health Promotion Activities in North Carolina: Results from the 1994 Survey*, CHES Studies 92 (North Carolina Department of Environment, Health, and Natural Resources, March 1995).

39. Group Against Smokers' Pollution (GASP) v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979). For a decision to the contrary, see Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995). For further discussion of *GASP*, *see infra*, text accompanying notes 88 and 89.

40. The Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) are intended to offer the same protection to covered workers. 42 U.S.C. § 12117(b) (1995 & Supp. 1997); 29 C.F.R app. § 1630.4 (1992). More workers are covered under the ADA, however. It applies to all employers engaged in an industry affecting commerce who have 15 or more employees. 42 U.S.C. § 12111(5) (1995 & Supp. 1997).

41. Harmer v. Virginia Elec. & Power Co., 831 F.Supp. 1300 (E.D.Va. 1993) (summary judgment for defendant).

42. 14 F.3d 203 (4th Cir. 1994). The court also emphatically affirmed summary judgment for defendant on a claim under 42 U.S.C. § 1983 (deprivation of civil rights under color of state law), finding the claim "completely without merit." 14 F.3d at 205, n.1.

43. Rhoads v. FDIC, 956 F.Supp. 1239 (D.Md. 1997). "Thus applying the *Forrisi/Gupton* foreclosure test, Rhoads cannot argue that a class of jobs free from all exposure to smoke has been foreclosed as a result of her impairments, and hence, Rhoads cannot show her ability to work is substantially limited." *Id.* at 1246.

44. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

45. *Id.* at 933 (quoting Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

46. *Id.* at 935.

47. G.S. 143-599.

departments are among them, smoking may be entirely prohibited in health department facilities.[48]

A few departments want to go further and decline to hire smokers. Is such a policy consistent with Section 95-28.2 of the North Carolina General Statutes (hereinafter G.S.), which forbids job discrimination based on tobacco use outside work? Perhaps. Such a hiring policy might be acceptable for health departments under either or both of two exemptions in the statute, which have been noted earlier. Under one, an employer can forbid off-hours use of tobacco "if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities."[49] This language might cover medical professionals, health educators, administrators, or others who advise on health issues. The other provision allows a restriction if it "relates to the fundamental objectives of the organization."[50] Arguably, this broader language might cover all health department employees, whatever their particular function. Although there is no court decision or opinion from the attorney general interpreting the provisions, they would seem to be as applicable to health institutions as to any other employers. That is, a local health department could argue that employees' smoking, at any time or place, would counter an important message about health that the department tries to deliver to the community.

Local Government, Smoking, and the Public

The claim dismissed years ago in the *GASP* case is once again being raised in many North Carolina localities. Polls indicate that a sizable majority of residents want to see secondhand smoke removed from public places, and many North Carolina boards of commissioners, town councils, schools, and boards of health have tried to do so. Some municipalities outside the state restrict tobacco advertising as well. Particular attention focuses on the need to protect certain populations: those with allergies or other conditions that make them especially sensitive to ETS, minors, and people in confinement.

However, local officials' ability to respond is now sharply limited by state statutes and by a state court of appeals ruling. The remainder of the bulletin discusses possible strategies for dealing with the court decision, the viability of discrimination claims from smoke-sensitive individuals, the law on inmates' smoke exposure, enforcement of the minors' access ban, and voluntary efforts undertaken in some localities.

48. G.S. 143-599(5).
49. G.S. 95-28.2(c)(1).
50. G.S. 95-28.2(c)(2).

Enforcing Existing Local Rules and Ordinances

North Carolina is one of 29 states that forbid local governments to restrict tobacco use.[51] Our preemption statutes, especially Article 64 of G.S. Chapter 143,[52] are remarkable for their breadth. (See note 26 for a description of the principal statute.) Only six states appear to go as far.[53]

Local governments in North Carolina had several months after enactment of the new statute to adopt stricter ordinances or rules;[54] that is, to avoid preemption. In half of the counties one or more local government entities—twenty-one boards of county commissioners, twenty-seven boards of health, and forty-one city councils—took advantage of the opportunity.[55] Considered as a group, the board of health rules were more restrictive than the ordinances adopted by boards of commissioners or city councils.[56] The authority of boards of health to adopt such rules was quickly challenged, and in December 1996 the North

51. Michael Siegel, et al., "Preemption in Tobacco Control: Review of an Emerging Public Health Problem," *JAMA* 28 (September 10, 1997): 858–63.
52. The article was enacted in 1993 after an earlier effort failed. House Bill 149, introduced in the 1991 Session of the General Assembly, was similar in many respects to the act adopted.
53. Like North Carolina, these six (Louisiana, Mississippi, Nevada, Oklahoma, South Carolina, and Tennessee) preempt the local regulation of clean indoor air, youth access, and advertising or promotion of tobacco. See table showing types of regulations preempted in Siegel, *supra*, note 51, at 860.
54. G.S. 143-601.
55. Nathan S. Bearman, Adam O. Goldstein, and Deborah C. Bryan, "Legislating Clean Air: Politics, Preemption, and the Health of the Public," in *Ashes to Ashes: Snuffing Out the Tobacco Epidemic; North Carolina Medical Journal* 56 (January 1995): 16; Elizabeth Conlisk, et al., "The Status of Local Smoking Regulations in North Carolina Following a State Preemption Bill," *JAMA* 273 (March 8, 1995): 805–7, at 806.
56. "Twenty-four percent of boards of health adopted regulations that met the criteria for minimal or partial protection, compared with only 2% of county commissioners and 4% of city councils." Conlisk, *supra*, note 55, at 806.

Carolina Court of Appeals struck down a Halifax County Board of Health rule.[57]

The Halifax rule forbade smoking in most public places but excepted restaurants seating fewer than thirty people and all bars. Larger restaurants were required to ban smoking in 80 percent of seating space but could delay full compliance until 1996. These exceptions proved fatal to the rule. The court held that *if* boards of health have authority to regulate smoking,[58] then they may not base a rule on any factor besides health. Such factors as minimizing the hardship for local businesses and difficulty of enforcement, the court said, were appropriate factors for elected bodies with legislative powers (city councils and boards of commissioners) to consider, but not permissible considerations for boards of health. The board of health rule was invalid because it created "discriminatory distinctions between similar businesses"[59] and exposed "some employees and patrons to a health risk...[others] do not face."[60]

Following the court of appeals decision, the Halifax County Board of Commissioners voted against funding an appeal to the state supreme court.[61] Thus, the case establishes a statewide precedent with respect to board of health rules on tobacco. After the decision governmental smoking restrictions largely disappeared in North Carolina and concern was expressed for the validity of board of health rules on other subjects as well.[62] Immediately after the court ruling most boards of health suspended enforcement of rules similar to Halifax's[63] in order to consider the impact of the decision. At least one repealed its rule.[64] A number of boards, however, continue to express uncertainty about the effect of the *Peedin* decision and interest in reinstating enforcement of their rules.

Peedin presents difficult choices for a board of health with a similar rule: should the board suspend or repeal the rule or continue to enforce it? What are the factors to weigh in deciding? What liability risks attach to each decision? While the commentary below may help a board consider these questions, boards are strongly advised to consult legal counsel and resign themselves to the possibility that, whatever their choice, litigation may result.

In *Peedin* the court relies most heavily on a ten-year-old decision of the highest court of New York,[65] adopting its holding that a board of health usurps legislative authority (policy-making power) when it issues a rule containing exceptions based on factors other than health. The New York court viewed a health entity as operating without guidelines and beyond statutory authority insofar as it tries, through exceptions to rules, to balance health "with economic and social concerns."[66] However, a factor that was important in the New York decision was not present in North Carolina. The New York court objected to the state Public Health Council's 'legislating' after the legislature itself failed to resolve the controversial issue of smoking

57. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578; 478 S.E.2d 528 (1996).

58. Plaintiffs did not raise in this case any question of smokers' rights or of whether scientific evidence showed that the rule actually protected public health. Instead, plaintiffs argued that boards of health can only regulate on topics addressed by the Environmental Management Commission or Commission for Health Services and that regulating smoking is forbidden by Dillon's Rule, which requires specific statutory grants before local governments may act. The court, however, was willing to assume for the time being a local board's power to regulate tobacco in order to reach the validity of this particular rule.

59. *Peedin*, 124 N.C. App. At 584, 478 S.E.2d at 532.

60. *Id.* at 588, 478 S.E.2d at 534.

61. The vote was 3 to 3. Telephone Interview with Turner Stephenson, Halifax County Attorney (July 2, 1997). Because the court of appeals' decision was unanimous there was no appeal as of right; however, a petition for discretionary review could have been presented to the state supreme court. Several boards of health considered contributing funds for a Halifax appeal or, when that opportunity had passed, inviting a challenge to their own rule. So far none has done so.

62. Editorial, *Blue Smoke, No Mirrors*, CHARLOTTE OBSERVER, Jan. 18, 1997, at 16A; Timothy Roberts, *Gaston Abandons '93 Smoking Rules*, CHARLOTTE OBSERVER, Jan. 11, 1997, at 1C.

63. "Similar" in this context would mean a rule with greater restrictions than G.S. Ch. 143, Art. 64; adopted by a local board of health (hence by an unelected body); and containing exemptions for certain establishments or any other provision not based entirely on health. *Peedin* does not discuss the validity of phase-in periods for health rules.

64. The Guilford County Board of Health repealed its rule. Smoking ordinances enacted by the city councils of High Point and Greensboro, located within Guilford County, were unaffected by the decision because they were enacted by elected bodies. Telephone Interview with Gregory L. Gorham, Guilford County Attorney (June 1997).

65. Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987). The court in *Peedin* also cited several times a municipal court decision from Franklin County, Ohio, that is based on *Boreali*. Cookie's Diner, Inc. v. Columbus Bd. of Health, 65 Ohio Misc. 2d 65 (Ohio Mun. Ct. 1994). As in *Peedin*, but without citing it or *Cookie's Diner*, a federal district court has also used *Boreali* to strike down a county health regulation. Nassau Bowling Proprietors Ass'n. v. County of Nassau, 965 F. Supp. 376 (E.D.N.Y. 1997).

66. *Boreali*, 517 N.E.2d at 1355.

restrictions.[67] In North Carolina, by contrast, the General Assembly *had* resolved the matter—and its resolution included a specific invitation to local government agencies to enact more stringent restrictions than those adopted by the legislature.[68]

Another problem with *Peedin* is that the three North Carolina cases cited therein seem inapposite for establishing that a board of health may only consider health. Stating that " 'important choices' should be made by elected officials," the court cites *Adams v. Department of Natural & Econ. Resources and Everett v. Department of Natural & Econ. Resources*.[69] Yet, in that case, the state supreme court *upheld* the General Assembly's delegation of authority to an administrative body, saying that "important policy choices" *could* be delegated unless they "might just as easily be made by the elected representatives in the legislature."[70] A second cited case forbade boards of health from imposing criminal penalties, but did not address whether a board may consider matters other than health when enacting rules.[71] The third case, upholding a city ordinance that closed most businesses on Sunday, simply noted that the government's decision to treat businesses differently may not be discriminatory, arbitrary, or unreasonable.[72]

Peedin may also be vulnerable on the grounds that a board of health's statutory duty to protect public health and make rules to that end cannot be carried out if the rules may not take account of practical considerations affecting their coverage, scope, and timing.[73] After all, lawmakers frequently attach a "necessary and proper" clause to a grant of power in a particular matter. Indeed, G.S. 130A-39 states, "A local board of health shall have the responsibility to protect and promote the public health. The board shall have the authority to adopt *rules necessary for that purpose*" (emphasis added). The provision does not limit boards to adopting health-related rules and for a court to impose such a limitation may prevent the adoption or meaningful implementation of any rule.

Future litigation may resolve these questions and others about *Peedin*. Meanwhile, it may be possible to reason from the preemption statute itself to the conclusion that a rule similar to Halifax's remains valid. For example, a board of commissioners might try to preserve a board of health rule by reissuing it as a county ordinance, taking the position that this would not be adopting a new ordinance.[74] (The court of appeals acknowledged that elected boards may make exceptions for nonhealth reasons.)

Alternatively, a board of health might amend its rule to eliminate the exceptions for certain business establishments. While local agencies are forbidden to amend a tobacco rule or ordinance so as to "impose a more stringent standard,"[75] it can be argued that expanding the *number* of covered businesses or individuals does not alter the *standard* applied to them. The board might also contend that, when the General Assembly forbade amendments after the cutoff date that would regulate tobacco more stringently, it never contemplated an amendment required by the state constitution, as interpreted by an appellate court.

Local government must consider its possible liability in deciding whether to continue enforcement of a smoking rule. Suppose an applicant for a restaurant permit installs separate ventilation systems to comply with a local rule, and then after learning about the Halifax decision thinks this may not have been necessary. May the applicant sue, and if so, who, for what, and with what prospects? Under North Carolina law local governments may not be sued for most of the harm caused by governmental activities.[76] However, if the county has waived governmental immunity by purchasing insurance, the owner may sue the county

67. *Id.* at 1356. In Ohio the legislature also had not preempted smoking regulation. See *Cookie's Diner*, 65 Ohio Misc. at 78.

68. G.S. 143-601(a) and (b).

69. 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978).

70. 295 N.C. 683, 698, 249 S.E.2d 402, 411.

71. State v. Curtis, 230 N.C. 169, 52 S.E.2d 364 (1949).

72. Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964).

73. A commentator notes, "Public health traditionally concerns itself with a number of social, economic and other factors that may contribute to a particular public health problem without being part of a specific disease process." Jill Moore, "Public Health Services," in *County Government in North Carolina, 4th ed.* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, forthcoming Winter 1998–99).

74. G.S. 143-601(b) forbids adopting a "local ordinance, law, or rule" stricter than state statute after October 15, 1993.

75. G.S. 143-601(a).

76. The law of governmental immunity distinguishes discretionary acts from those that are merely ministerial. The latter type of act is "one that must be done in a prescribed manner and that does not require the exercise of independent judgment to perform." Public officials are immune from liability for negligence in performing discretionary acts. Michael R. Smith, "Civil Liability of the County and County Officials," in *County Government in North Carolina, 3d ed.* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1988), 44–5. While the distinction is sometimes elusive, promulgating a rule to protect public health would seem to be discretionary.

and, if successful, collect damages from the governmental unit.[77]

Peedin has raised concern in some quarters that members of a board of health, like health directors and other public officials, could be individually—that is, personally—liable to a person harmed by a rule. Although the court did not deal directly with the issue, it held that board of health members could not lawfully act in a legislative capacity. This holding may deprive them of legislative immunity, in which case health board members have only the more limited protection of public official immunity.[78] The latter covers discretionary acts of state and local officials, even when they are grossly negligent,[79] but it can be lost in a few circumstances. The presumption of good faith necessary for official immunity can be dispelled by proof that officials acted from corruption or malice, or that their actions exceeded the scope of their authority.[80] Although board of health members are presumably safe on the first two grounds, it is possible that they would be open to the last charge if they continue to enforce a rule similar to the one invalidated by the Halifax decision.

Should local governments also be concerned about liability for failing to protect employees or the public from smoke? Employers, including public employers, have a common law duty to provide a safe workplace. A few older decisions in other jurisdictions have identified the duty as requiring smoke restrictions[81] and the issue of damage from exposure to secondhand smoke in the workplace continues to be litigated.[82] Today most states, many localities, and the federal government severely limit smoking exposure in public places. County officials have a duty under North Carolina law to protect the public's health.[83] It seems possible, given the known effects of secondhand smoke and current practice elsewhere, that North Carolina boards of health would breach that duty by failing to protect citizens from smoke.

The preemption statute, however, prevents local governments from imposing severe restrictions and *Peedin* threatens to eliminate most of those adopted by boards of health. In those circumstances, are counties relieved of liability under state law for failure to protect workers and citizens against smoke? Yes. Although the statute does not mention immunity for local governments from claims filed by those harmed by environmental smoke, it defines state and local governments' duty with respect to smoking so narrowly as to have the same effect.[84]

If a board of health decides not to continue enforcing its rule, should it formally suspend or even repeal the rule? Probably that is not necessary—and has a serious disadvantage. No jurisdiction enforces all its rules with equal vigor at all times; there is no obligation to do so. However, in order to prevent anyone's incurring costs unnecessarily, a board might want to notify affected parties, new restaurant owners, for example, that they need not comply with a smoking rule.[85] As for formal actions, suspending a rule would still allow the board to reactivate it if the state supreme court or court of appeals reversed or decisively modified the Halifax holding in another case. Repealing the rule, on the other hand, probably eliminates future enforcement since the preemption statute set October 15, 1993, as the deadline for adopting a local smoking rule.[86]

The ADA and Smoking in Public Places

As stated earlier, the state preemption statute lets local governments restrict or ban smoking in specified public places; namely, with certain exceptions, in libraries, museums, meetings, arenas, coliseums, audi-

77. G.S. 153A-435.

78. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992).

79. Reid v. Roberts, 112 N.C. App. 222, 225, 435 S.E.2d 116, 120, *disc. rev. denied*, 326 N.C. 231, 388 S.E.2d 439 (1993). In Robinette v. Barringer, 116 N.C. 197, 203, 447 S.E.2d 498, 502 (1994), an allegation of reckless indifference was insufficient to destroy the immunity.

80. "Public officials enjoy no special immunity for unauthorized acts, or acts outside their official duty." Gallimore v. Sink, 27 N.C. App. 65, 68, 218 S.E.2d 181, 182 (1975).

81. See Anne Dellinger, "Smoking at Work," HEALTH LAW BULLETIN 71 (August 1988): 3 (citing Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976); Smith v. Western Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982); and McCarthy v. Washington Dep't of Soc. & Health Servs., 110 Wash. 2d 812 (1988).

82. In the most publicized recent case, however, the plaintiffs, nonsmoking flight attendants, sued tobacco companies rather than their employer. The suit was settled after four months of trial. Mireya Navarro, *Cigarette Makers Reach Settlement in Nonsmoker Suit*, N.Y. TIMES, Oct. 11, 1997, at A1.

83. Preeminently, G.S. 130A-34, 130A-39(a) and 130A-41.

84. The preemption statute is a shield against the consequences of a board of health's breach of duty. That is, the statute allows a board the defense of impossibility.

85. An unenforced rule might still exact subtle costs such as a 'chilling effect' on investment, but this would probably be difficult to prove.

86. G.S. 143-601(b).

toriums, and on public transportation, and up to 80 percent of any building owned, leased, or occupied by local government.[87] Even if a government took full advantage of what the law permits, its restrictions would not meet all residents' needs. As an example, consider a smoke-sensitive citizen who wants to visit the county assessor's office to contest a tax bill, but cannot because, although most of the building is smoke free, the visit would still expose her to enough smoke to make her ill. Does she have any recourse under federal law? Yes, in theory. Just as North Carolina's state statute preempts local bodies' ability to legislate about tobacco, the state law would itself be preempted by federal law if the two conflicted.[88]

In 1979 a group of citizens filed an action in state court against Mecklenburg County, alleging that permitting smoking in public facilities effectively denied them access to the buildings. The plaintiffs, Group Against Smokers' Pollution (GASP), claimed violation of First and Fourteenth Amendment rights as well as discrimination against themselves as people with handicaps, discrimination they claimed was forbidden by both federal[89] and state[90] statutes. The group lost on each ground and although the *GASP* precedent is old, it still stands. There is no reported federal case in North Carolina on similar claims.

Still, a federal circuit court of appeals has recently held that plaintiffs, three children with asthma and a woman with lupus, stated a valid ADA claim against the McDonald's restaurant chain for failure to ban smoking,[91] and it is possible that claims brought today in North Carolina state or federal courts under the Rehabilitation Act or the ADA might produce a different result than *GASP*. There are at least two reasons why a challenge to smoking in public accommodations might be more successful now.

First, nearly all that is known of the danger of ETS has come to light since 1979,[92] making nonsmokers' complaints far more reasonable than they could have appeared then. Second, the court in *GASP* found the class of plaintiffs too broad to claim handicapped status, stating "It is manifestly clear that the legislature did not intend to include within the meaning of 'handicapped persons' those persons with '*any* pulmonary problem' however minor, or *all people* who are harmed or irritated by tobacco smoke."[93] The court reserved judgment, however, on whether a smaller group, those with serious smoke-induced allergies or illnesses, might meet the definition of handicapped.[94] Thus, future plaintiffs might overcome the *GASP* court's objection, either through the recent evidence showing that a broad class is in fact harmed or because plaintiffs might be chosen who would represent a narrower group than those in *GASP*.

Inmates' Exposure to ETS

With some frequency now inmates, in federal or state prison or a local jail, assert that exposure to smoke is an unacceptable condition of confinement. Some penal institutions, including a few North Carolina jails, forbid smoking entirely. Every facility must shield from smoke an inmate who has a serious health need for that protection, either because of a current condition or because the extent or duration of the exposure creates a significant future risk. Until 1993, though, it was common to ignore inmates' requests for effective restrictions, possibly because of space limitations and architectural barriers in the facilities as well

87. G.S. 143-601(b).

88. Article VI, Section 2, of the United States Constitution.

89. 29 U.S.C. § 794 (1985 & Supp. 1996).

90. G.S. 168-1.

91. Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995).

92. Widespread public knowledge of ETS effects can be traced to PUB. HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (Washington, D.C.: GPO, 1986). Public understanding continues to grow. The summer 1997 trial of claims brought by nonsmoking flight attendants with smoking-related diseases focused attention on ETS as a work hazard. *Ex-surgeon general testifies on secondhand-smoke hazards*, NEWS & OBSERVER, July 17, 1997, at 9A. Scientific proof of the danger of ETS was slow in coming but is now extensive. Between 1985 and 1994 a dozen studies showed a 30 percent elevated risk of heart disease among those exposed and also indicated that nonsmokers are far more severely affected than was previously understood. Testimony given to the Occupational Safety and Health Administration (OSHA) in August 1994 was described thus: "whereas smokers' bodies adapted to the toxic and abrasive effects and reduced oxygen supply due to their chronic inhalation, nonsmokers' systems were more sensitive when exposed to ETS, even though absorbing much smaller doses." Richard Kluger, *Ashes to Ashes* (New York: Vintage, 1997) 699. Either home or workplace exposure to ETS doubles the chance of heart disease. Ichiro Kawachi, et al., "A Prospective Study of Passive Smoking and Coronary Heart Disease," *Circulation* 95 (May 20, 1997): 2374. ETS hastens the progression of atheroschlerosis (hardening of the arteries) by 20 percent. Howard et al., "Cigarette Smoking and Progression of Atheroschlerosis," *JAMA* 279 (January 14, 1998): 119.

93. GASP v. Mecklenburg County, 42 N.C. App. 225, 227, 256 S.E.2d 477, 479 (1979).

94. *Id.*

as tobacco's usefulness in that setting as a reward and a sedative. Even so, a federal district court here had years earlier been willing to entertain claims that failure to provide certain inmates with a smoke-free environment might amount to deliberate indifference to those inmates' health needs.[95]

In 1993 ETS came to the attention of the United States Supreme Court through an inmate's assertion that involuntary exposure to it amounts to "cruel and unusual punishment" under the Eighth Amendment. A strong majority held that an inmate may make such a claim.[96] To prove this claim the inmate must show, first, "that he himself is being exposed to unreasonably high levels of ETS;"[97] second, "that the risk of which he complains is not one today's society chooses to tolerate;"[98] and third, that he is suffering "deliberate indifference . . . determined in light of the prison authorities' current attitudes and conduct. ..."[99] The Court firmly rejected the argument that the Eighth Amendment applied only to current health impairments, stating "[t]hat the Eighth Amendment protects against future harm is not a novel proposition."[100] Subsequently, the Fourth Circuit court of appeals has entertained several ETS claims, but disposed of them without establishing a precedent.[101] A district court decision within the circuit found that the inmate failed to establish authorities' deliberate indifference to his health.[102]

Although the "cruel and unusual punishment" standard is hard for an inmate to meet, it may be the only legal remedy. In a recent opinion the Fourth Circuit exhaustively considered whether the ADA and the Rehabilitation Act apply to state prisons.[103] (If so, they should apply to local facilities too.)[104] The court concluded that, at least as of 1994, it was not clearly established that the federal handicapped acts cover state correctional facilities. Subsequently, two district court decisions in the Fourth Circuit held that the ADA does not apply to prisons.[105]

Advertising Restrictions

In 1995 the Fourth Circuit became the only federal court of appeals to uphold a local ordinance limiting tobacco advertising.[106] The court approved Baltimore's ordinance restricting the placement of cigarette advertisements,[107] which the city had enacted to reduce underage smoking. North Carolina, however, cannot take advantage of the ruling because G.S. 14-313(e) preempts local authority to regulate tobacco advertising.[108]

Unfortunately, the provision seems to have been adopted on the basis of incorrect information. The subsection begins with the General Assembly's statement that preemption is necessary to keep the state eligible for certain federal funds. In fact, preemption has no effect on a state's eligibility.[109] The funds referred to are those for substance abuse prevention and treatment, which are now conditioned on a state's efforts and success in reducing teen smoking.[110] Only a few months after the effective date of North Carolina's preemption provision,[111] the U.S. Depart-

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95. Beeson v. Johnson, 668 F.Supp. 498 (E.D.N.C. 1987).

96. Helling v. McKinney, 509 U.S. 25 (1993). Justices Thomas and Scalia dissented.

97. *Id.* at 35.

98. *Id.* at 36.

99. *Id.* at 36.

100. *Id.* at 33.

101. Gaster v. Campbell, 4 F.3d 985 (4th Cir. 1993), *vacated without published op.*; Johnson v. Laham, 9 F.3d 1543 (4th Cir. 1993), *aff'd in part, vacated in part without published op.*; Proctor v. South Carolina Dep't of Corrections, 86 F.3d 1152 (4th Cir. 1996) (per curiam), *aff'd in part, vacated in part, and remanded.*

102. Bobblett v. Angelone, 942 F. Supp. 251 (W.D.Va. 1996).

103. Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995).

104. Local governments are political subdivisions of the state and exercise power delegated by it. The Fourth Circuit decision rests on the theory that law enforcement is at the heart of state power and therefore is not subject to federal control. *Id.* at 1345.

105. Staples v. Virginia Dep't of Corrections, 904 F. Supp. 487 (E.D.Va. 1995); Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996).

106. *See* Penn Adver. v. Mayor and City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996).

107. Ordinance 307 forbids ads on outdoor billboards, sides of buildings, and free-standing signboards. It contains exceptions for commercial and industrial zones, in or on public transportation and commercial vehicles used to transport cigarettes, and at businesses licensed to sell cigarettes.

108. "[N]o political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules or regulations concerning the sale, distribution, display or promotion of tobacco products or cigarette wrapping papers...."

109. Eleven states preempt local rulemaking on advertising. No state has become ineligible for the federal funds for failure to enact a preemption.

110. Pub. L. No. 102-321, 106 Stat. 394 (1992).

111. SL 1995, Ch. 241 was ratified June 13, 1995, and made effective December 1, 1995, with one exception. Subsection (e) was made effective as to laws enacted after

ment of Health and Human Services (HHS) published a Final Rule on state's duties in regard to teen access. The rule said this about preemption of local measures:

"[T]he Federal statute and regulation are minimum requirements to which the States are held. In no way should they be considered as limiting, or requiring states to limit, the powers of local governments to enact or enforce tobacco control laws....[T]he majority of minors laws and enforcement efforts regarding the sale of tobacco have taken place at the local level. The Department encourages States to allow localities the flexibility to enact stricter laws or to more rigorously enforce tobacco control laws."[112]

Enforcing the State's No-Sale-to-Minors Statute

North Carolina's century-old criminal law forbidding sale of tobacco to minors[113] gained new vitality in the 1997 session of the General Assembly and may yet prove an effective mechanism for protecting minors' health. Although the statutory prohibition dates from 1891, it has almost never been enforced. In 1991 the age for lawful purchase was raised to 18, but the legislature made enforcement more difficult than ever by adding a requirement that the seller *know* the buyer was underaged.

In the 1997 session, perhaps for several reasons,[114] the Assembly amended the statute to remove the word "knowingly."[115] In addition, as of December 1, 1997, new restrictions on sales apply. Retailers must post a prominent sign near the point of sale stating the legal age and stating that proof of age is required. The size and exact wording of the sign are specified. A seller must ask for proof of age if he or she has "reasonable grounds to believe" the prospective customer is under 18, and then the customer must produce a photo identification (ID) showing date of birth. A seller who reasonably relies on a false ID does not violate the statute, but one who does not check and sells to a minor is guilty of a Class 2 misdemeanor. Thesame penalty attaches to a minor who tries to buy tobacco, anyone who helps a minor get tobacco, and anyone not complying with the new limitations on vending machine sales.[116] Vending machines selling tobacco are only allowed in bars and other adult facilities[117] or where a responsible adult controls the machine at all times.[118]

Encouraging Voluntary Efforts

Given the majority's preference for smoke-free facilities and the very high level of public support for keeping minors from using tobacco, voluntary efforts relying on these points may well succeed. Numerous local governments and health institutions encourage voluntary limitations and one health department, in Catawba County, now focuses primarily on this strategy. The department discusses customer complaints about smoking with business people, provides non-smoking signs, presents certificates to smoke-free businesses, and categorizes restaurants' policies on smoking and describes the policies in local papers bimonthly.[119] The department is also, with some success, seeking grants to pay for counseling and education about tobacco use and it cooperates with other organizations sponsoring similar activities.[120] Voluntary programs should gain strength from recent evidence in the nation and the state that smoking restrictions do not hurt business.[121]

September 1, 1995. The HHS Final Rule was published January 19, 1996.

112. U.S. DEP'T OF HEALTH AND HUMAN SERVICES. TOBACCO REGULATION FOR SUBSTANCE ABUSE PREVENTION AND TREATMENT BLOCK GRANTS, 61 FED. REG. 1492, 1496 (1995).

113. G.S. 14-313.

114. Among those reasons, apparently, were compliance with the federal rule determining eligibility for substance abuse prevention and treatment block grant funds. Moreover, the Food and Drug Administration rule on youth access to tobacco already imposed far more stringent requirements, 61 FED. REG. 44396-618 (1996). In addition, by 1997 it was clear that both teen smoking rates and public sentiment for tighter control of them were rising.

115. SL 97-434 (S 143).

116. A violator of the statute is eligible for deferred prosecution if he or she has not previously received probation for violation of the statute. G.S. 14-313(f).

117. Specifically, "any establishment which is open only to persons 18 years of age and older," G.S. 14-313(b1).

118. *Id.*

119. *These Restaurants Permit, Restrict Or Prohibit Smoking*, HICKORY DAILY RECORD, June 21, 1997; *Health agency lists smoke-free establishments*, OBSERVER-NEWS ENTERPRISE, June 10, 1997.

120. *Grant Awarded To Council*, HICKORY DAILY RECORD, June 29, 1997.

121. Stanton A. Glantz, & Lisa R. A. Smith "The Effect of Ordinances Requiring Smoke-Free Restaurants and Bars on Revenue: A Follow-Up," AM. J. OF PUBLIC HEALTH 87 (October 1997): 1687-1693; Adam O. Goldstein, *Abstract* (comparing revenue of North Carolina restaurants with and without smoking restrictions), presented at Associated Departments of Family Practice Conference, Fort Lauderdale, Fla., November 1997.

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