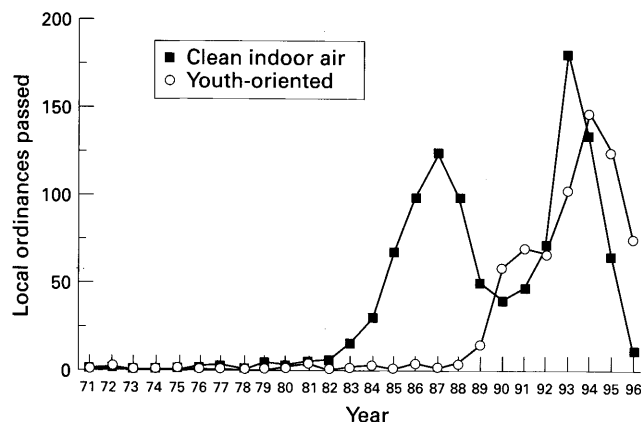


## Back to basics: getting smoke-free workplaces back on track

In 1971 US Surgeon General Jessie Steinfeld<sup>1</sup> called for a "Nonsmokers' Bill of Rights", and in the mid-1980s Surgeon General C Everett Koop transformed the public debate over tobacco use by calling for a smoke-free society by the year 2000. He was the first major public official to clearly articulate the message that smoking need not be a part of American life. The tobacco industry went wild and aggressively attacked Koop, because his message went to the core of the tobacco issue: tobacco use in public was no longer socially acceptable. Koop's call for a smoke-free society, combined with the mushrooming evidence that secondhand smoke is dangerous, accelerated the trend towards smoke-free workplaces and public places. The first Surgeon General's report devoted entirely to the effects of tobacco smoke on non-smokers, *The health consequences of involuntary smoking*,<sup>2</sup> issued in 1986 (as well as a complementary report by the National Academy of Sciences<sup>3</sup>), was associated with an acceleration in the passage of local clean indoor air ordinances (figure). The release of the US Environmental Protection Agency<sup>4</sup> risk assessment of the effects of secondhand smoke on lung cancer and lung disease in 1993 led to another group of local clean indoor air ordinances. Since then, the pace of progress on clean indoor air ordinances has slowed, through a combination of state laws preempting local tobacco control ordinances<sup>5</sup> and a shift in focus away from non-smokers' rights to working to limit youth access to tobacco. In this issue of *Tobacco Control*, Gerlach *et al*<sup>6</sup> show that, although there has been considerable progress in providing protection of workers from the toxins in secondhand tobacco smoke, there is much work left to be done.

Although most workers (81.6%) reported that their employers had some sort of policy addressing smoking in the workplace, only 46% reported completely smoke-free workplaces. Moreover, they found that men were more likely to be exposed to secondhand smoke at work, as were poor people and younger workers. Food service occupations had the lowest rate of coverage by smoke-free policies among different occupations (21.1%); Siegel<sup>7</sup> has reported that these workplaces have the highest rate of lung cancer among non-smokers. Gerlach *et al* end by



Number of local clean indoor air ordinances passed (or amended to strengthen) each year in the United States. Passage of local clean indoor air ordinances accelerated in the mid-1980s, around the time of the first Surgeon General's report on involuntary smoking<sup>2</sup> and again in the early 1990s, around the time of the US Environmental Protection Agency report on passive smoking.<sup>4</sup> As in California,<sup>24</sup> passage of youth-oriented ordinances has fallen off as activity on clean indoor air has fallen. This result suggests that clean indoor air ordinances, rather than youth-oriented ordinances, are the best tool for mobilising the public on issues related to tobacco control. Source: Americans for Nonsmokers' Rights local ordinance database.

recommending that the proposed regulation by the US Occupational Safety and Health Administration (OSHA),<sup>8</sup> which would require that all workplaces be made smoke-free (except for separately ventilated smoking lounges), be implemented.

Creation of smoke-free workplaces is important not only because of the intrinsic value of protecting people from the toxins in secondhand smoke, but also because creation of smoke-free environments is probably the most effective strategy for reducing tobacco consumption,<sup>9-20</sup> including preventing children from starting.<sup>12</sup>

While the OSHA rule has promise, it also poses some serious practical difficulties. The first, and most obvious, is the fact that the tobacco industry has succeeded in sandbagging the process and prevented the rule from moving forward. The public health community was almost invisible in the crucial formative stages of the rule and the administrative procedures surrounding it. In contrast to the recent US Food and Drug Administration rules<sup>8, 21</sup> regulating nicotine as a drug and tobacco products as drug-delivery devices, the public health community has not mobilised to effectively support OSHA's proposed rule or to influence its content. Perhaps as a result of the manifest disinterest on the part of health groups, the Clinton administration has not pushed the rule.

Indeed, the Clinton administration has taken a much more passive position on the issue of secondhand smoke and protection of non-smokers than did the George Bush administration that preceded it. Although Hillary Clinton made the White House smoke-free, President Bill Clinton took five years to sign an executive order (prepared under the Bush administration) to make the entire federal government smoke-free. The Clinton administration also quietly stopped further research and risk assessments (such as one dealing with heart disease) on secondhand smoke at the US Environmental Protection Agency. Even the US Centers for Disease Control and Prevention's Office on Smoking and Health has throttled back activities related to clean indoor air, to focus on smoking and youth issues. All these activities have led to a *de facto* abandonment of the proven effective strategy of controlling tobacco by promoting clean indoor air, by focusing on less effective—and probably ineffective—efforts to keep kids from getting tobacco.<sup>22</sup>

Given that the US federal government's activities on clean indoor air are in the doldrums, the question remains as to what the future of the OSHA rule *should* be. On the one hand, it offers the potential for a sweeping national standard that would mandate smoke-free workplaces everywhere. There are, however, two issues that go beyond the content of the standard itself and the politics of getting it implemented: preemption and enforcement.

It is likely that an OSHA standard would preempt state and local clean indoor air laws. In 1992, the US Supreme Court, on a 4-3 vote, held (*Gade vs National Solid Wastes Management Association*, 112 S. Ct. 2374 (1992)) that the federal Occupational Safety and Health Act preempted an Illinois law that required equipment operators at hazardous waste sites to have specified levels of training because the Illinois law overlapped with OSHA's standards on handling hazardous wastes (29 CFR § 1910.120). The Court stated that Congress intended "to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive regulation." This decision suggests that an OSHA standard would

preempt state and local laws designed to regulate smoking in the workplace to protect workers from secondhand smoke. The Gade decision was very broad; the Illinois law in question was a "dual purpose" law designed not only to protect workers, but also to protect the public health from non-occupational exposures through the environment. Nevertheless, the Court held that this dual purpose would not save the Illinois law from preemption because it qualified as a workplace standard.

The Court did, however, leave some room for state and local regulation that might be left in place if OSHA were to issue a national smoke-free workplace rule. It stated that "state laws of general applicability (such as laws regarding traffic safety or fire safety)" would not be preempted as long as they did not conflict directly with OSHA rules even if they had a "direct and substantial" effect on worker safety" because these laws "regulate the conduct of workers and non-workers alike"—that is, they treat workers "simply as members of the general public".

Why is preemption important, particularly if OSHA were to issue a standard similar to the proposed standard, which would make virtually all workplaces smoke free?

First, there is the issue of enforcement. If only OSHA is permitted to enforce the law, it eliminates local and state authorities from a productive role in implementing smoke-free workplaces and (to the extent that they are workplaces) public places. This centralisation of power and authority increases the risk that the agency will be taken over by a hostile administration or have its hands tied (through legal or budgetary restrictions) by a hostile US Congress under the influence of the tobacco industry. Indeed, in California, which passed a statewide workplace smoking law, there has been virtually no state-level implementation or enforcement because of the pro-tobacco position of California Governor Pete Wilson.<sup>23</sup> The law allows for local enforcement, which has allowed some communities—mostly those that had passed local clean indoor air ordinances—to enforce it. It is not clear that OSHA could allow for such local enforcement.

Indeed, the tobacco industry is already using the pending OSHA rule as a reason that local governments should not pass clean indoor air laws. At the same time that the tobacco industry is vigorously opposing issuance of the final OSHA regulation, it is telling local city councils that the final rule is imminent and that they are preempted from acting.

Second, a single national standard will cut off local debate and involvement in the tobacco issue. This debate and involvement play an important role in educating the public about the dangers of secondhand smoke and prepare the ground for implementing the smoke-free ordinance. At the same time, battles over clean indoor air create tobacco control constituencies more effectively than any other issue and these coalitions often go on to deal with other issues. In California, when a state law preempted local clean indoor air legislation, local organising around youth-centered issues stopped, too.<sup>23</sup>

Does this mean that efforts to pass a national smoke-free workplace standard should be abandoned? There needs to be careful attention to the issue of preemption to see if it is possible for OSHA to issue a rule that will not preempt local and state clean indoor air laws and that will build, rather than destroy, local community involvement in clean indoor air. In fact, it could be that an OSHA rule could be a way around the state laws preempting local clean indoor air ordinances that exist in half the states. If, however, there cannot be a suitable solution to the issue of preemption, the public health community should concentrate its efforts on local legislation designed to promote smoke-free workplaces and public places.

Regardless of what the consensus among the tobacco control community is regarding OSHA, however, it should be an explicit decision made on the basis of informed legal and policy analysis, not simply the result of being pulled forward by events, as it has been to date. There needs to be a careful, independent analysis of the issue of preemption and how, if at all, OSHA can avoid preemption. There needs to be proactive consideration of the implications of a potential OSHA rule in the drafting of new clean indoor air ordinances to see that they are "laws of general applicability". There needs to be planning for the inevitable legal challenges by the tobacco industry to both an OSHA rule and local and state clean indoor air laws to prevent these challenges from slowing progress towards clean indoor air.<sup>24</sup> There needs to be an informed debate about the desirability of the OSHA rule or the possibility of a limited rule that would clearly leave room for local action. There needs to be careful consideration of the impact of an OSHA rule in states that already have state preemption of local tobacco control ordinances.<sup>5</sup>

In the meantime, we should redouble our efforts to enact local clean indoor air ordinances and repeal preemption in the states that have it.

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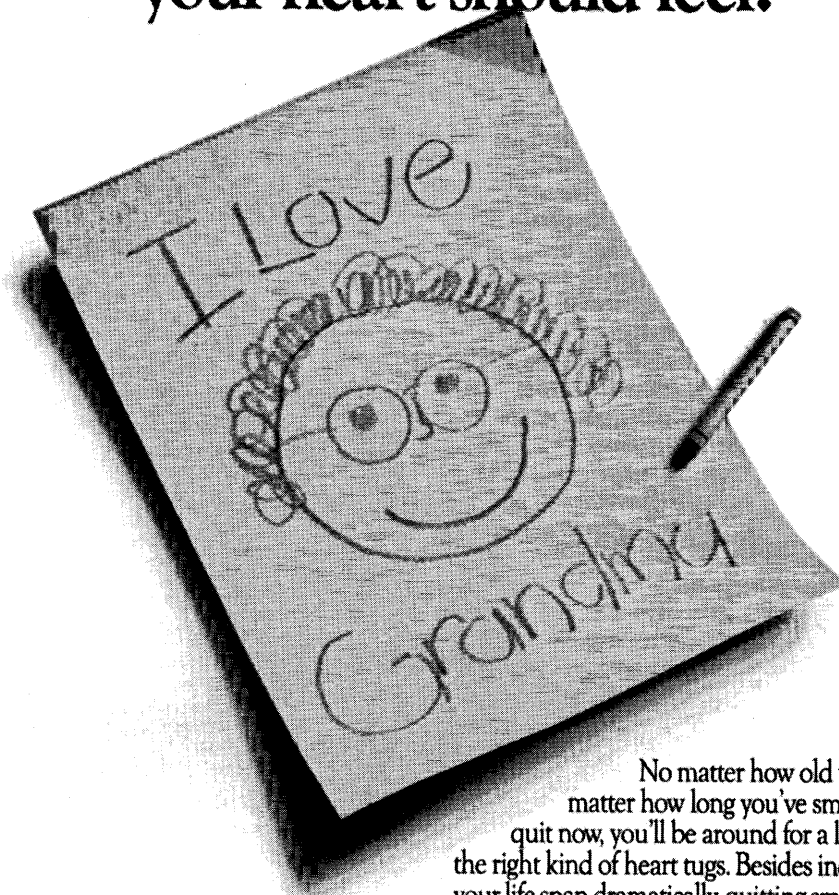
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*From a public information campaign by the US Centers for Disease Control and Prevention targeting the elderly with messages about the benefits of quitting smoking at older ages.*