

**LETTER OPINION
2004-L-27**

April 14, 2004

The Honorable Tim Mathern
State Senate
429 16th Ave S
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter asking whether N.D.C.C. §34-06-05 applies to smoking in workplaces. It is my opinion that the Labor Commissioner has statutory authority to investigate and determine whether smoking in the workplace may be detrimental to employees' health under N.D.C.C. § 34-06-05(2), and take appropriate administrative action to address the issue, if determined necessary.

ANALYSIS

Section 34-06-05, N.D.C.C., states:

It is unlawful to employ in any occupation within this state:

1. Employees for unreasonably long hours.
2. Employees under surroundings or conditions, sanitary or otherwise, which may be detrimental to their health or morals.
3. Employees for wages which are less than the state minimum wage.
4. Minors for unreasonably low wages.

(Emphasis supplied.)

The prohibition in subsection 2 against an employer subjecting its employees to surroundings or conditions that may be detrimental to their health is one way N.D.C.C. § 34-06-05 could apply to tobacco smoke in the workplace. Several studies have analyzed whether environmental tobacco smoke is harmful, including at least one that specifically looked at smoke in the workplace. M. Siegal, Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects, 270 *Journal of the Am. Med. Ass'n* 490 (1993) (determining that exposure to smoke at the workplace increases nonsmoking employees' risk for lung cancer). See also C. Everett Koop, The Health Consequences of Involuntary Smoking, a Report of the Surgeon General, U.S. Dept. of Health & Human Services, (1986) ("[i]t is now clear that disease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale tobacco smoke emitted into the air"); 63 A.L.R. 4th 1021 (1988).

LETTER OPINION 2004-L-27

April 14, 2004

Page 2

The Labor Commissioner has authority to investigate and ascertain employee labor conditions in the state. N.D.C.C. §§ 34-06-02, 34-06-08. The Labor Commissioner also has authority to adopt administrative rules under N.D.C.C. ch. 28-32 to implement N.D.C.C. § 34-06-05, and in particular to prescribe by rule labor condition standards for employees in any occupation and determine whether surroundings or conditions in any occupation are detrimental to the employees' health. N.D.C.C. §§ 34-06-03(2), 34-06-04. Accordingly, it is my opinion the Labor Commissioner has the authority to ascertain whether tobacco smoke in workplaces is detrimental to the employees' health¹ and to address the matter through the rulemaking process. Further, it is my opinion the Labor Commissioner may investigate compliance with and enforce any rules that are adopted, and may prosecute employers who fail to comply with such rules. N.D.C.C. § 34-06-17.

In addition, the prohibition in N.D.C.C. § 34-06-05(2) may create a private cause of action against an employer who subjects employees to tobacco smoke in the workplace. While no reported North Dakota case discussing N.D.C.C. § 34-06-05 involves that statute's use in a private cause of action, courts in other states have upheld claims made by employees against employers based on smoking in the workplace. McCarthy v. Dep't of Social and Health Services, 759 P.2d 351 (Wash. 1988) (pulmonary disease caused by environmental tobacco smoke), Smith v. Western Electric Co., 643 S.W.2d 10 (Mo. App. 1982) (employee may obtain injunction against workplace smoking); Hentzel v. Singer Co., 188 Cal. Rptr. 159 (Cal. App. 1st Dist. 1982) (employee stated cause of action for retaliatory discharge over complaints against smoking), and Shimp v. New Jersey Bell Telephone Co., 368 A.2d 408 (N.J. Super. Ch. Div. 1976) (employee may obtain injunction against workplace smoking). See also 37 A.L.R. 4th 480 (1985) (right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace), 63 A.L.R. 4th 1021 (1988) (employer's liability to employee for failure to provide work environment free from tobacco smoke).

Sincerely,

Wayne Stenehjem
Attorney General

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cc: Labor Commissioner

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

¹ Courts have upheld bans on smoking, rejecting claims that there is a right to smoke. Fagan v. Axelrod, 550 N.Y.S.2d 552, 558 (N.Y. Sup. Ct. 1990), Doughty v. Board of County Comm'rs, 731 F.Supp. 423, 426 (D.Colo. 1989).