

# Legal Update



Tobacco Control  
Legal Consortium



## Dear Tobacco Control Professional:

Welcome to the latest issue of the *Legal Update*, the newsletter of the Tobacco Control Legal Consortium. The Consortium is a national network of legal programs supporting tobacco control policy change across the United States. We invite you to visit our website at [www.tclconline.org](http://www.tclconline.org).

## Congress to Consider FDA Legislation

Congress is considering legislation to grant the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products. On February 15, 2007, U.S. Senators Edward Kennedy (D-MA) and John Cornyn (R-TX) and U.S. Representatives Henry Waxman (D-CA) and Tom Davis (R-VA) introduced identical bipartisan bills, known as the Family Smoking Prevention and Tobacco Control Act (S. 625 / H.R. 1108). The stated purpose of the legislation is to protect public health by giving the FDA the necessary tools and resources to regulate the manufacturing, marketing, labeling, distribution and sale of tobacco products. Both bills are still in committee. To read Senate Bill 625, click [here](#); to read House of Representatives Bill 1108, click [here](#).

## U.S. Supreme Court Hears Oral Arguments in Watson "Light" Cigarette Case

On April 25, the U.S. Supreme Court heard oral arguments in *Lisa Watson v. Philip Morris* (No. 04-1225), an important consumer protection lawsuit from Arkansas that alleges Philip Morris (Altria) violated the state's deceptive advertising law with fraudulent claims about its so-called "light" cigarettes. Philip Morris succeeded in having this class action lawsuit transferred from state court to the federal court, where tobacco-related claims have met with less success. The cigarette manufacturer, invoking a law called the Federal Officer Removal Statute, claimed that because its advertising rests on the Federal Trade Commission's discredited testing methodology and is not prohibited by the FTC, it is a "person acting under a federal officer," and thus entitled to remove this case to federal court. The district court denied the plaintiffs' motion to remand the case to state court, and in August 2005, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's ruling.

The central issue is whether, simply by following policies which a federal agency has said will avert federal prosecution, a private company becomes a "person acting under a federal officer," and thus entitled to remove to federal court a civil action brought in state court under state law. This case will be watched closely because it involves basic principles of federalism, including the right of states to be the primary forum for adjudicating state laws, and the right of consumers harmed by corporate fraud to achieve a remedy in state court. Moreover, Philip Morris argues that the federal government's decision to acquiesce to advertising that uses FTC testing methods somehow "preempts" deception claims based on state consumer fraud laws. In its broadest reading, this argument could strip states of all power to regulate

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### Affiliated Legal Resource Centers:

**California**  
[Technical Assistance Legal Center \(TALC\)](#)

**Colorado**  
[Tobacco Advocacy Resource Partnership](#)

**Maryland**  
[Legal Resource Center for Tobacco Regulation, Litigation & Advocacy \(LRC\)](#)

**Massachusetts**  
[Tobacco Control Resource Center \(TCRC\)](#)

**Michigan**  
[Smoke-Free Environments Law Project \(SFELP\)](#)

**Minnesota**  
[Tobacco Law Center](#)

**New Jersey**  
[Tobacco Control Policy and Legal Resource Center](#)

**Ohio**  
[Tobacco Public Policy Center](#)

deceptive advertising by any industry—a radical result that would trash the dual state-federal law enforcement that has protected the commercial marketplace since the nation’s founding.

To read petitioner Watson’s brief, click [here](#); to read respondent Philip Morris’ brief, click [here](#). For a transcript of the *Watson* U.S. Supreme Court oral arguments (No. 05-1284), click [here](#).

## More States Move Toward Smoke-free Environments

Since the year began, one state—New Mexico—has joined the ranks of smoke-free jurisdictions. Several others, including Maryland and Illinois (where comprehensive bills await signature by the governors), and Minnesota (where the issue has reached conference committee), are poised to act. Other states debating smoke-free legislation include Alabama, Iowa, Michigan, North Carolina, Oregon, Tennessee, Texas, and Wisconsin. Still others, including Colorado, Idaho, and Utah, have recently modified their previous legislation. For a summary of the status of these bills, check ANR’s website at [www.protectlocalcontrol.org](http://www.protectlocalcontrol.org).

The proposed bills vary in scope and comprehensiveness, and are not all supported by the public health community. In South Carolina, for example, recently amended legislation that was originally touted as a statewide “smoke-free restaurant bill” allows many bars and restaurants to convert into smoking-allowed establishments with little effort. The proposed legislation nullifies all local smoke-free workplace ordinances passed over the last year, and it includes a preemptive provision that prevents local municipalities from setting their own comprehensive smoke-free workplace laws.

## Legal Challenges to Smoke-free Laws

- **Hawai‘i.** On April 11, 2007, the Hawai‘i State Circuit Court dismissed the Hawai‘i Bar Owners Association’s challenge to that state’s smoke-free statute. The court found that the plaintiff did not have standing to challenge the law as being vague, because no bar owners have been cited for violating the law. The Court also stated that the plaintiffs failed to prove the law was unconstitutional on other grounds.
- **Indiana.** On April 12, 2007, attorneys representing the City of West Lafayette, Indiana, moved to dismiss a lawsuit challenging its smoke-free ordinance. The City noted that the plaintiff’s allegations rest on a provision of the Indiana Constitution that is similar to the Equal Protection Clause of the Federal Constitution, and argued that it is not unconstitutional for West Lafayette’s law to exempt certain types of businesses from its smoke-free law. The court has not yet ruled on the motion.
- **Kansas.** On April 25, 2007, the Kansas Supreme Court heard arguments in a challenge to the City of Lawrence’s smoke-free ordinance, which has been in effect since July of 2004. *Steffes v. City of Lawrence*. The plaintiff, a nightclub owner, alleges that the city does not have the authority to pass its ordinance and that the ordinance’s enforcement provisions are unconstitutionally vague. No decision is expected before June 8, 2007.
- **Nebraska.** On April 25, 2007, the Douglas County District Court found that the City of Omaha did not violate Nebraska’s open meetings law when drafting its smoke-free ordinance. The *O’Connor’s Irish Pub v. City of Omaha* case was the second decision that upheld Omaha’s law. In September 2006, the court denied the plaintiff’s request for a temporary injunction in *Hug & Henstock v. City of Omaha*. The court found that the ordinance had a rational relationship to protecting public health. That case recently was appealed to the Nebraska Supreme Court.
- **Ohio.** Back in December, two lawsuits were filed challenging Ohio’s Smoke Free Workplace Act (see January [Legal Update](#)). That same month, the two suits were placed on hold and the State agreed not to enforce the Act until the Ohio Health Department developed rules for enforcing the law. Ohio’s rules were approved on April 16, and will go into effect on May 3. In the meantime, one of the lawsuits from December, *Buckeye Liquor Permit Holders Ass’n v. Ohio Dept. of Health*, was taken off hold. The plaintiffs filed a motion for a preliminary injunction on April 11, and the motion was heard on April 25, 2007.

In another interesting development, the Ohio Licensed Beverage Association and the American Cancer Society sued the Ohio Department of Health on April 13 and April 18, respectively. The plaintiffs in both lawsuits allege that the Department of Health exceeded its authority when it exempted private clubs with employee members from the Ohio law. On April 30, the court granted a temporary restraining order in the Ohio Licensed Beverage Association case.

## Strong Global Guidelines Proposed for Smoking Regulation

One of the key provisions of the historic WHO Framework Convention on Tobacco Control obligates countries to protect their citizens against secondhand smoke. While the treaty itself is broadly worded, the Parties have agreed to give high priority to developing more specific guidelines for implementation of this requirement. On April 26, the WHO released proposed guidelines for effective smoke-free legislation, developed by a working group of countries, with the participation of the WHO and representatives of civil society. The proposed guidelines call for the elimination of smoking in all indoor workplaces, indoor public places, and public transport. They specifically reject the use of ventilation systems or designated smoking rooms as alternatives to smoke-free environments. The proposal will be considered and debated by the 146 Parties to the treaty at the Second Conference of the Parties in Bangkok in July. To read the proposed guidelines, click [here](#).

## United Kingdom Goes Smoke-free

On April 2, Wales joined Scotland, Northern Ireland, and England by enacting a smoke-free law that makes all indoor public places smoke-free, including hundreds of pubs and rugby clubs. With this development, the entire U.K. will become smoke-free. Although Wales was the first country in the United Kingdom to vote for a law prohibiting smoking in enclosed public places, it took four years of negotiations to obtain the necessary legislation from the UK. Scotland's smoke-free law went into effect a year ago, while England's smoke-free law goes into effect in July. To read the Wales smoke-free regulations, click [here](#).

Northern Ireland's smoke-free law took effect on April 30. The law prohibits smoking in most indoor spaces, including businesses, bars and cafes. Smokers who light up in a pub or other enclosed public place will be fined £50, while business premises face fines of up to £2,500 if they fail to enforce the law. Government officials say that public support for the law is high and they anticipate this will translate into a high compliance rate. To read Northern Ireland's smoke-free law, click [here](#).

## Resource Roundup

- **Smoke-free Housing.**
  - o Check out this article titled "Q&A on Restricting Smoking at Affordable Housing Sites" in the May 2007 issue of the *Assisted Housing Management Insider* newsletter. This publication goes to thousands of owners and managers of public and subsidized housing. To read the article, click [here](#).
  - o Smoke-free Housing Video for Landlords. The Smoke-Free Housing Coalition of Maine has produced an 8 1/2 minute video to educate landlords about smoke-free housing policies. The video can be used as a tool to introduce the topic at landlord association meetings, board/management meetings, landlord classes, public health functions, and other events. The project was funded by the Partnership for a Tobacco-Free Maine and the Robert Wood Johnson Foundation. The video is available on the coalition's website at [www.smokefreeforme.org](http://www.smokefreeforme.org).
  - o "Legal Options for Tenants Suffering from Drifting Tobacco Smoke." The Legal Consortium's California affiliate, the Technical Assistance Legal Center, has just released a fact sheet for apartment residents who are considering legal action against a neighbor or landlord because of continued exposure to drifting secondhand smoke. To download a copy of the fact sheet and glossary, visit TALC's website at [www.talc.phi.org](http://www.talc.phi.org).
- **Smoke-free Laws and Children.** The British Medical Association recently published a 72-page report entitled "Breaking the cycle of children's exposure to tobacco smoke." To download a copy of the report, click [here](#).
- **Toward a Smoke-free World.** The policy revolution that is making clean air the social norm worldwide was reviewed and summarized in an April commentary in the *New England Journal of Medicine*. Koh H.K., Joossens, L.X., and Connolly, G.N., "Making Smoking History Worldwide," *NEJM* (2007) 356: 1496-1498. To read the article, click [here](#). The *Journal of the National Cancer Institute* looked at public attitudes toward this trend in an article by Charlie Schmidt entitled "Public Support for Smoking Bans Diffusing to Developing Countries" *JNCI* 2007 99 (8) 585-586. To read an abstract of the paper, click [here](#).

If you have a question about a tobacco law-related issue that you'd like us to address in this column, or a topic you'd like us to cover in future publications, please send us an e-mail at [tobaccolaw@wmitchell.edu](mailto:tobaccolaw@wmitchell.edu). Thank you!

**Q** “When local smoke-free laws are challenged in court, plaintiffs often file motions seeking a temporary restraining order or a temporary injunction. What’s the difference between the two?”



**A** A temporary restraining order and a temporary (or preliminary) injunction are two fairly common types of pre-trial motions that plaintiffs file to get temporary relief. They are both vehicles for asking a court to order a party to do something or, more commonly, to stop doing something or refrain from doing something that could irrevocably affect the rights of one party to a lawsuit before the court has time to decide the rights of each party. Thus, both motions are used to maintain the *status quo* – meaning, to freeze a situation – until all parties have time to air their positions in court. Also, as their names suggest, they are both designed to be temporary.

The court applies a similar legal test in considering whether to grant a temporary restraining order or a temporary injunction. A court typically looks at four factors: (1) how likely it is that the party seeking the motion will win the case; 2) whether the party seeking the motion will suffer any irreparable harm if the motion isn't granted; 3) whether the potential harm to the party seeking the motion outweighs the potential harm to the other side if the court grants the motion; and 4) whether granting the temporary restraining order or temporary injunction is in the public interest.

The basic difference between the two measures is that a temporary restraining order is designed to be used in an emergency situation, where there's no time to follow standard court procedures, or even to give the other side advance notice. For example, say an environmental group learns a logging company plans to cut down (illegally, in the group's belief) some old growth trees the next day. The group might seek a temporary restraining order to stop the trees from being cut; once the trees are felled, nothing can be done to restore them even if the environmental group wins a lawsuit.

A temporary injunction, however, is more appropriate when a party is seeking to stop something from occurring in the near future, but there's still time to follow standard court procedures. For example, a citizens' group that believes a new law scheduled to go into effect in a month is unconstitutional might file a lawsuit and seek a temporary injunction to ask the court to delay the effective date of the law until it can decide whether the law is in fact constitutional.

While plaintiffs challenging a smoke-free law might seek a temporary restraining order to stop the law from going into effect, a temporary injunction motion is more common in such cases.

— Julie Ralston Aoki

## Upcoming Events

- May - May is Asthma Awareness Month.
- The Wyoming Department of Health is sponsoring a Rocky Mountain Smoke-free Symposium, May 23 - 25, 2007, in Jackson, Wyoming, to increase awareness of the benefits of smoke-free workplaces. For more information about this symposium, click [here](#).
- Russia is hosting its first international forum addressing tobacco control issues. The Russian National Forum on "Health or Tobacco" will be held in Moscow and St. Petersburg, May 28–31. For more details, click [here](#).
- The World Health Organization has designated May 31, 2007 as “World No Tobacco Day.” The theme for 2007 is “Smoke-free Environments.” For more details about this event, click [here](#).

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Note: While we make every effort to ensure the information in this newsletter is accurate and complete, the Tobacco Control Legal Consortium is unable to guarantee this information. Material is provided for informational purposes and is not intended as legal advice. We encourage readers with questions to consult an attorney familiar with the laws of their jurisdictions.

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