

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1216

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1216

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1216

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 2-2-05

Tape Number	Side A	Side B	Meter #
1		x	2.0-end
2	x		6.5-18.2

Committee Clerk Signature



Minutes:

Chairman Keiser: Opened the hearing on HB 1216.

Representative Klemin: Appeared in support of HB 1216 and provided a written statement (SEE ATTACHED TESTIMONY).

Representative Kingsbury: Appeared in support of bill. It is time for ND to jump on board, country by country are going smoke free, and pass smoking regulations.

Bill Shalhoob, ND Hospitality Association: Appeared in opposition of HB 1216 and provided a written statement (SEE ATTACHED TESTIMONY).

Carol Two Eagle: I'm testifying neutral on this bill. As a pipe carrier, who happens also to be the head of a non profit church where tobacco and smoked tobacco is part of our spiritual practice how will this effect us. Tobacco has a function in traditional American Indian religious practice and its function is

automatic and it has been with us for ever. Tobaccos function is to carry every thought, wish, emotions, and a prayer, but it is smoked, and everybody there does not have to smoke but they usually do and this does include young people because if you don't start your young people in your religion early on, they may not come in.

Representative Kasper: Can you tell us what type of tobacco you smoke in your religious process.

Carol Two Eagle: Usually it is just type tobacco, I grow my own, so that I don't have all those pesticides and herbicides on it. It has happened that people will bring us cigarette tobacco and that is up to the pipe carrier how that tobacco is used it might be used in the pipe, usually what I will do is remove the filter, then I will take one puff and offer it to the four directions.

Representative Froseth: I think if you look on line 13 this only pertains to the work place.

Representative Nottestad: I move a **DO PASS** on HB 1216.

Representative Thorpe: I **SECOND** the **DO PASS** motion

Motion carried. **VOTE: 8-YES 4-NO 2-Absent.**

Representative Kasper: I move to **RECONSIDER** or actions on **HB 1216**

Representative Dosch: I **SECOND** the motion

Motion Carried **VOTE: 11-YES 2-NO 1-Absent.**

Representative Kasper: I move a **DO NOT PASS** on HB 1216.

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House Industry, Business and Labor Committee

Bill/Resolution Number HB 1216

Hearing Date 2-2-05

Representative Dosch: I SECOND the DO NOT PASS on HB 1216.

Motion failed **VOTE: 5-YES 8-NO 1-Absent.**

Representative Nottestad: I move a DO PASS on HB 1216

Representative Thorpe: SECOND the DO PASS on HB 1216.

Motion carried **VOTE: 8-YES 5-NO 1-Absent**

Representative Froseth will carry the bill on the floor.

Hearing adjourned.

Roll Call Vote #: 1 Date: 2-2-05

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1216

House **INDUSTRY, BUSINESS AND LABOR** Committee

Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep. Nottestad Seconded By Rep. Thorpe

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman		X
N. Johnson-Vice Chairman	X		Rep. T. Boe		X
Rep. D. Clark	X		Rep. M. Ekstrom	X	A
Rep. D. Dietrich	X		Rep. E. Thorpe	X	
Rep. M. Dosch		X			
Rep. G. Froseth	X				
Rep. J. Kasper		X			
Rep. D. Nottestad	X				
Rep. D. Ruby		X			
Rep. D. Vigasaa	X				

Total (Yes) 8 No 5
Absent (1) Rep. Ekstrom
Floor Assignment Rep. Froseth

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 2, 2005 12:33 p.m.

Module No: HR-22-1678
Carrier: Froseth
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1216: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO PASS** (8 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1216
was placed on the Eleventh order on the calendar.

2005 TESTIMONY

HB 1216

HOUSE BILL NO. 1216
TESTIMONY OF REP. LAWRENCE R. KLEMIN
HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
FEBRUARY 2, 2005

Mr. Chairman and Members of the Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I'm appearing before you today to testify in support of House Bill 1216.

House Bill 1216 specifically authorizes the Labor Commissioner to adopt rules regulating smoking in the workplace. The bill does not require the Labor Commissioner to adopt rules nor does it set any parameters or other criteria for the rules, if adopted. The rules would be promulgated following the rulemaking procedures set out in the Administrative Practice Act contained in Chapter 28-32 of the North Dakota Century Code. In general, this procedure would include a notice of proposed rulemaking, a hearing, and an opportunity to comment on the proposed rules before they are adopted.

On April 14, 2004, the North Dakota Attorney General issued a Letter Opinion on the authority of the Labor Commissioner to adopt rules relating to smoking in workplaces. A copy of the Letter Opinion is attached. The Attorney General determined that based on existing law contained in Section 34-06-05, which dates back to 1919, the Labor Commissioner has the statutory authority to investigate and determine whether smoking in the workplace may be detrimental to employees' health, and if so, to take appropriate administrative action to address the issue, which could include the adoption of administrative rules. The Letter Opinion provides an analysis of **general** statutory authority on the subject of smoking in the workplace, and has the force and effect of law until determined otherwise in court.

The purpose of House Bill 1216 is to provide **specific** statutory authority for the Labor Commissioner for the adoption of rules to regulate smoking in the workplace. It clarifies and confirms that the Labor Commissioner does, in fact, have this authority. Therefore, it will preclude a court challenge contesting whether the Labor Commissioner has the authority under the general statute analyzed by the Attorney General in the event the Labor Commissioner does decide to adopt rules.

The point is – if the Labor Commissioner does adopt rules on smoking in the workplace, we would not want the Labor Commissioner to go through all the time and expense of rulemaking just to have a court rule at a later date that the Attorney General was wrong on the general statutory authority.

I know of at least two other bills pending in the Legislature relating to smoking, HB 1030 and SB 2300. If either of those bills passes, House Bill 1216 will supplement that bill. If neither of them pass, then House Bill 1216 can stand on its own. Mr. Chairman and Members of the Committee, I encourage you to give favorable consideration to this bill.

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

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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

eee/vkk

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).

ND Hospitality Assn. Testimony
House Industry and Labor Committee
HB 1216

Mr. Chairman and members of the committee, my name is Bill Shalhoob and I represent the ND Hospitality Assn. We are appearing in opposition to HB 1216.

HB 1216's intent is extend the Attorney General's opinion issued last year that the Labor Commissioner can "take appropriate administrative action" on smoking in the workforce based on 1919 language in N.D.C.C. 34-06-05(2) which prohibits employment "of women and children under surroundings or conditions, sanitary or otherwise, which may be detrimental to their health or morals." Interestingly, since you can employ men without penalty under these conditions and since 1919 we have tightened restrictions on the employment of children, I assume at this point the protection will be, strictly speaking, aimed solely at the protection of women. We wonder what rules would be considered under the "morals" part of this statute. This language is troublesome and we believe it can be removed from code and would not diminish the authority of the Labor Commissioner to act on present issues in any way.

With all respect to the Labor Commissioner, we believe smoking restrictions are policy issues for any political subdivision and should be decided by policy makers, not administrative appointees. The ND Legislature is the policy making body for the State of North Dakota and should not pass this decision to a rule maker. We believe smoking restrictions of any kind should be decided at the local level. North Dakota is not a state where one size fits all. Our unique combination of urban and rural settings lends itself to this approach. The voters of Dickinson rejected a smoking ban. The voters of Minot approved one that is different from Fargo and West Fargo. In fact, Fargo voters had a

choice of three differing smoking ordinances to select from and in an election chose the ordinance that best suited their desires. Finally, I would point out that there is a real and significant difference between publicly owned property and buildings and privately owned property and buildings open to the public. Property ownership rights and the control of a person's property is among our most basic rights as Americans. Most, and I believe the significant majority of office buildings and workplaces, are already nonsmoking. The decision to do so was based on customer demand and business interests, as it should be. As demand rises, so will the continuing rush to no smoking facilities and workplaces.

Mr. Chairman and members of the committee, we would urge a do not pass on HB 1216. Thank you for your consideration and I would be happy to answer any questions.