

DON'T ROLL THE DICE ON RESPIRATORY HEALTH: HOW COVID-19 CAN SPARK CHANGE IN CASINO SMOKING LAWS

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I. INTRODUCTION

The Silver State has been attractive to people from all around the globe who seek a getaway filled with entertainment, cuisine, and gambling. One seemingly inevitable experience when visiting the fabulous Las Vegas Strip is waltzing across the casino floor while inhaling cigarette smoke. Although returning to one's hotel room after a night at the craps table reeking of Marlboro Reds may seem like a rite of passage when visiting the Las Vegas Strip, there are many unsavory ramifications that loom.

It has been known for some time that secondhand smoke is far from harmless, but still, Nevada casinos are exempt from state smoking laws.¹ While the Silver State's top priority is likely the revenue generated from tourists, the health and safety of those tourists does not appear to be of concern. The state needs tourists to survive, but their health is of little importance. How ironic. Nevada needs tourists to survive as a state, but it does not need tourists themselves to survive.

Patrons are not the only ones who are at risk. Casino employees are also in danger of the harsh side effects of secondhand smoke exposure, yet the state is hesitant to implement a smoking ban. This hesitation seems to originate in a fear of the loss of revenue that a ban may create. However, in the midst of the COVID-19 pandemic, a virus spread by respiratory droplets, Nevada lawmakers have the opportunity to revisit a smoking ban in an effort to clean up the casino air once and for all.

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¹ NEV. REV. STAT. § 202.2483(3)(a) (2020).

A proposal pertaining to a smoking ban would likely not gain much support, especially from the Nevada Gaming Control Board. It just seems that smoking in casinos is the “norm,” and we as humans have the tendency to be comfortable with tradition and strongly oppose change. While a smoking ban in the midst of a pandemic would benefit everyone involved, it does not seem feasible. Groups of people have advocated for a ban in Nevada for quite some time with no luck.²

History has shown that it is not enough for the U.S. Surgeon General to express how horrible secondhand smoke inhalation is for our health. History has also shown that it does not matter if the majority of people oppose smoking in casinos. Smoking cigarettes has not been popular for some time and many people are aware of the harmful side effects of cigarette smoke, but not enough seem to care about these grave consequences.

Perhaps those seeking a smoking ban have overlooked an important issue, and therefore their pleas have been falling on deaf ears. The state legislature has the ability to add secondhand smoke to the list of compensable occupational diseases in the Nevada Occupational Disease Act. Essentially, if casino workers could sue when the cigarette smoke they inhale at work harms their lungs, casinos would go bankrupt defending themselves from all of their employees bringing claims under the Nevada Occupational Disease Act. If defending these claims seems like too big of a burden to bear, the only option that the casinos have left is to simply ban smoking inside their properties altogether.

The state legislature must act, and this seems to be the most efficient way to do so. Nevada should not *mandate* the casinos at all. Rather, the state should let casinos choose to ban smoking or litigate workers’ compensation claims when their employees are inevitably harmed by the secondhand smoke that they are forced to inhale while on the job.

In an effort to eradicate smoking in Nevada casinos once and for all, this article will emphasize the dangers of secondhand smoke inhalation to patrons and employees, and propose a solution to those dangers. Especially now, in the wake of the COVID-19 pandemic, Nevada has a unique opportunity to spark change in its casino smoking laws. In order to analyze secondhand smoke in casinos, it is first important to gain some background on the evolution of smoking and the laws pertaining to it. This background will detail the plethora of risks associated with smoking and secondhand smoke inhalation. This article will also explain lawsuits relating to secondhand smoke in casinos and provide insight from health experts during the COVID-19 pandemic. By the end of this article, it should be clear why the Nevada State Legislature should add secondhand

² Caitlin Lilly, *Nevada Tobacco Prevention Coalition Challenges All Nevada Casinos to Adopt Smoke-Free Policies*, FOX5 VEGAS (Sept. 25, 2020), https://www.fox5vegas.com/news/nevada-tobacco-prevention-coalition-challenges-all-nevada-casinos-to-adopt-smoke-free-policies/article_1d352a92-ff4b-11ea-a35a-1792dfc69d1d.html.

smoke to the list of compensable occupational diseases within the Nevada Occupational Disease Act in order to eradicate smoking in casinos.

II. BACKGROUND

A. *General History of Smoking*

The cultivation of tobacco likely began in 5000 BC in Central Mexico.³ Tobacco was originally used in religious ceremonies and for medical purposes by Native Americans.⁴ In its early history, tobacco was used as a remedy for many different ailments, including toothaches, wound dressing, and pain.⁵ In the late fifteenth century, tobacco became popular among Europeans, because they believed that it had magical healing powers.⁶ This popularity soon led to the plant being smoked as a practical way for a person to get their “daily dose” of the substance.⁷

In the early seventeenth century, scientists and philosophers started to discover the repercussions of smoking tobacco—specifically, addiction and breathing troubles.⁸ While popular in Europe, cigarettes were not made or sold as a major tobacco product in the United States until the 1900s.⁹ Around 3.5 billion cigarettes were sold in the United States in 1901 as tobacco companies began popping up around the country.¹⁰ This quick establishment created a very powerful industry.¹¹ Originally, cigarettes were sold as a luxurious good for the elite, but after mass-production methods and heavy marketing, traditional methods of tobacco consumption dwindled nationwide.¹² Cigarette smoking rapidly increased during the 1950s, as it became the “epitome of cool and glamour.”¹³

Perhaps people started to rethink cigarettes in 1964 when the Surgeon General released a report that highlighted the serious health effects that smoking causes.¹⁴ For example, the report concluded that cigarette smoking was the

³ *History of Tobacco Use in America*, SWEDISH HEALTH SERVICES, <https://www.swedish.org/classes-and-resources/smoking-cessation/history-of-tobacco-use-in-america> (last visited Oct. 26, 2021).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Jason Rodrigues, *When Smoking Was Cool, Cheap, Legal and Socially Acceptable*, THE GUARDIAN (Mar. 31, 2009), <https://www.theguardian.com/lifeandstyle/2009/apr/01/tobacco-industry-marketing>.

¹³ *Id.*

¹⁴ *History of Tobacco Use in America*, *supra* note 3.

leading cause of chronic bronchitis in the United States, was associated with an increased risk of dying from pulmonary emphysema, and was found to be associated with a reduction in ventilatory function.¹⁵ As if the contents of the report were not enough cause for concern, it was discovered in 1985 that lung cancer had become the number one cause of death in women.¹⁶

In 1965, the Federal Cigarette Labeling and Advertising Act (FCLAA) was passed.¹⁷ This Act required manufacturers, packagers, and importers to place one of four statutorily prescribed health warning statements on cigarette packages and in advertisements on a rotational basis, as reviewed and approved by the Federal Trade Commission.¹⁸ In 1969, when the FCLAA was nearing expiration, Congress passed the Public Health Cigarette Smoking Act to regulate the advertising of tobacco products.¹⁹ This Act set more stringent guidelines for the warnings that were to be placed on cigarette packages.²⁰ Beginning in January 1971, the new Act banned the television and radio advertisement of cigarettes.²¹ Consequently, cigarette makers were required to include the same warning in their newspaper, magazine, and billboard advertisements as were on their packaging, by early 1972.²²

B. *The Evolution of State Smoking Laws*

It seems that the health hazards that smoking was found to pose influenced the states to implement new laws. For instance, the number of states with laws prohibiting smoking in indoor areas of worksites, restaurants, and bars increased from zero at the end of 2000 to twenty-six at the end of 2010.²³ The Centers for Disease Control and Prevention (CDC) considers a state smoke-free law to be comprehensive if it prohibits smoking in the three aforementioned

¹⁵ U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 302 (1964).

¹⁶ *History of Tobacco Use in America*, *supra* note 3.

¹⁷ *Selected Laws Enacted by the U.S. Government Regarding the Regulation of Tobacco Sales, Marketing, and Use*, CTRS. FOR DISEASE CONTROL & PREVENTION: SMOKING & TOBACCO USE https://www.cdc.gov/tobacco/data_statistics/by_topic/policy/legislation/index.htm (last visited Oct. 11, 2021).

¹⁸ Cigarette Labeling and Advertising, 15 U.S.C. §§ 1331–1340 (2018).

¹⁹ Dennis Miles, *Public Health Cigarette Smoking Act of 1969*, FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1089/public-health-cigarette-smoking-act-of-1969> (last visited Oct. 11, 2021).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Michael Tynan, *State Smoke-Free Laws for Worksites, Restaurants, and Bars --- United States, 2000-2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 22, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6015a2.htm>.

venues.²⁴ Delaware was the first state to implement a comprehensive smoke-free law in 2002, followed by New York in 2003, Massachusetts in 2004, and both Rhode Island and Washington in 2005.²⁵ Many other states followed suit in the following years, either through a state legislative process or through ballot measures.²⁶ Although ten other states did not pass comprehensive smoke-free laws, they enacted laws prohibiting smoking in one or two, but not all three of the venues needed for the CDC to consider the law “comprehensive.”²⁷

These states began to enact comprehensive smoking laws undoubtedly because the Surgeon General concluded that the only way to fully protect nonsmokers from secondhand smoke exposure was to prohibit smoking in all indoor areas.²⁸ It was also noted that separating smokers from nonsmokers, cleaning the air, and ventilating buildings was not sufficient to eliminate that secondhand smoke exposure.²⁹

The Nevada Clean Indoor Air Act (NCIAA) was passed by Nevada voters in 2006.³⁰ This Act sought to protect children and adults from secondhand smoke in most indoor public areas and indoor places of employment.³¹ Under the NCIAA, smoking is prohibited in most indoor public places and indoor places of employment including, but not limited to, bars, taverns, and saloons that allow minors under the age of twenty-one to enter and all indoor areas within restaurants, including those in casinos or gaming establishments.³² In order to comply with the NCIAA, the person in control of any establishment subject to the Act’s laws must post signs banning smoking and remove all smoking paraphernalia such as ashtrays.³³

While many establishments are included in the NCIAA, some are exempt, meaning that smoking is still allowed in certain places.³⁴ Specifically, smoking is still allowed in casinos on the gaming floor where, by law, children are not allowed to loiter.³⁵ However, many casinos do offer smoke-free areas or rooms that are designated as “non-smoking.”³⁶ There are some casino facilities, however, that do not allow smoking, especially where children are permitted.³⁷

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Nevada Clean Indoor Air Act*, NEV. TOBACCO PREVENTION COAL., <http://www.tobaccofreenv.org/priorities/clean-indoor-air/nevada-clean-indoor-air-act/> (last visited Nov. 7, 2021).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

C. *The Dangers of Secondhand Smoke*

The dangers of cigarettes do not stop at the individuals smoking them. When you are around a person who is smoking, you are inhaling the same chemicals as them.³⁸ There is no safe amount of secondhand smoke, and breathing in even a miniscule amount can be dangerous.³⁹ Secondhand smoke is known to contain chemicals and poisons that cause heart disease and lung cancer.⁴⁰ Secondhand smoke contains cancer-causing chemicals, such as formaldehyde (a chemical used to embalm dead bodies), benzene (a chemical found in gasoline), and cadmium (a metal used to make batteries).⁴¹

Children and adults alike are at risk when they breathe in secondhand smoke.⁴² The longer a person is around secondhand smoke, the more likely it is to hurt them or have harsh long-term side effects.⁴³ Nonsmokers who breathe smoke at home or work are more likely to become sick and die from heart disease and lung cancer.⁴⁴

Secondhand smoke is undoubtedly prominent in the lives of casino employees. Even in casinos that are ventilated, nicotine levels in casino workers are 300% to 600% higher than employees in other workplaces where smoking is allowed during a work shift.⁴⁵ By the nature of their work, casino workers cannot remove themselves from smoking areas, even for small amounts of time during a shift.⁴⁶ This is because secondhand smoke can seep into other areas of casino buildings, such as restaurants and retailers.⁴⁷ Again, according to the Surgeon General, separating smokers and nonsmokers, cleaning the air, and ventilating buildings are not effective measures to protect against the dangers of secondhand smoke.⁴⁸

³⁸ U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: SECONDHAND SMOKE WHAT IT MEANS TO YOU 3 (2006), <https://www.hhs.gov/sites/default/files/secondhand-smoke-consumer.pdf>.

³⁹ *Id.* at 2.

⁴⁰ *Id.*

⁴¹ *Id.* at 5.

⁴² *Id.* at 11.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ STATE System Gaming Facilities Fact Sheet, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2021), <https://www.cdc.gov/statesystem/factsheets/gaming/Gaming.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

The casino industry is one of the top job sectors in many states.⁴⁹ Inside a casino, all workers and patrons share the same air.⁵⁰ Consequently, the smoking laws that a casino has implemented (or lack thereof) can have a substantial impact on the health of a community.⁵¹ As noted above, there is no safe level of secondhand smoke exposure, and there are no effective measures to protect against exposure aside from banning smoking altogether.⁵²

Longstanding policy from the National Institute for Occupational Safety and Health (NIOSH) and the Surgeon General both share the same position on secondhand smoke and recommend not involuntarily exposing workers to tobacco smoke.⁵³ An investigation was performed in 2009 that evaluated secondhand smoke inhalation by dealers at various Las Vegas casinos.⁵⁴ NIOSH investigators conducted health evaluations to measure casino dealer exposure to secondhand smoke and to determine whether they reported health symptoms seemingly related to that exposure.⁵⁵ The dealers were selected for the study if they reported that they did not use any tobacco products, did not live with someone who smokes in their home, or were not exposed to secondhand smoke in any setting other than their job at the casino.⁵⁶ Urine samples of the dealers were collected before and after their shifts to determine the level of two secondhand smoke components in their urine.⁵⁷ The dealers were found to have increasing levels of the cigarette carcinogen in their urine over an eight-hour work shift, showing that the secondhand smoke was, in fact, entering their bodies.⁵⁸

NIOSH completed another evaluation regarding air quality.⁵⁹ The air sampling found that components of secondhand smoke were present in the air of all of the casinos tested.⁶⁰ Additionally, casino dealers were found to have more respiratory symptoms than the administrative and engineering employees.⁶¹ After the evaluations, NIOSH recommended that casinos institute casino-wide smoking bans, form a health and safety committee to address workplace health

⁴⁹ *Focus on Health and Safety of Gaming Hospitality Workforce: It's a Great Job, but Not Worth Dying For*, AM. NONSMOKERS' RTS. FOUND., <https://no-smoke.org/at-risk-places/casinos/> (last visited Nov. 7, 2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Christine West, *Secondhand Smoke and Casino Dealers*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2009), <https://blogs.cdc.gov/niosh-science-blog/2009/06/16/smoke/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

and safety concerns, and eliminate smoking near building entrances, among other things.⁶²

In recent years, casino dealers have been speaking out about their experience with secondhand smoke exposure. One woman was a dealer for thirty-five years until 2017, when she took medical leave after being diagnosed with non-Hodgkin's lymphoma and heart disease.⁶³ According to other dealers, this woman's story is similar to that of other casino workers.⁶⁴ Some dealers have voiced concern that they have developed a "smoker's cough" and suffer from bronchitis, sinus infections, and chest congestion.⁶⁵

D. Lawsuits Involving Secondhand Smoke

As casino dealers are becoming increasingly concerned about the health issues related to secondhand smoke exposure at work, some lawsuits have been filed. A dealer at the Wynn Las Vegas filed a class action lawsuit, not for the money, but because she sought improved air quality for casino workers everywhere.⁶⁶ However, the state legislature may not want to clear the casinos of smokers out of fear of incurring the tobacco industry's wrath or losing the revenue that gaming brings to the state.⁶⁷

Even beyond Las Vegas, casino workers in other localities are pushing back in a fight for clean air at work. For instance, in 2010, an Atlantic City casino settled a lawsuit after a former employee who had never smoked a cigarette brought a claim against his ex-employer asserting that his lung cancer was caused by twenty-five years of secondhand smoke exposure at the casino.⁶⁸ In that case, the man brought the suit in hopes of banning smoking in the nation's second-largest gambling market, but his effort was unsuccessful.⁶⁹ While on the verge of banning smoking in 2007 and 2008, eleven Atlantic City casinos ultimately decided against a ban out of a fear that they would lose business to neighboring states that allowed their gamblers to smoke.⁷⁰

⁶² *Id.*

⁶³ Miranda Wilson, *Casino Workers Find Chips are Stacked Against Them in Battle Against Secondhand Smoke*, LAS VEGAS SUN (Nov. 24, 2019, 2:00 AM), <https://lasvegassun.com/news/2019/nov/24/casino-workers-health-battle-secondhand-smoke/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Despite Health Risks, Casino Dealers Still Exposed to Cigarette Smoke*, LAS VEGAS SUN (Feb. 14, 2010, 2:00 AM), <https://lasvegassun.com/news/2010/feb/14/smoky-casino-good-business/>.

⁶⁷ *Id.*

⁶⁸ Wayne Parry, *NJ Casino Secondhand Smoke Suit Settled for \$4.5M*, SAN DIEGO UNION-TRIB. (Dec. 3, 2010, 8:07 AM), <https://www.sandiegouniontribune.com/sdut-nj-casino-secondhand-smoke-suit-settled-for-45m-2010dec03-story.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

While it seems like common knowledge that secondhand smoke is a problem, casino workers have a minute chance of remedying it.⁷¹ According to Las Vegas attorney Gabriel Martinez, secondhand smoke is a very difficult case to prove. “You not only have to prove that it’s incidental to the job, you have to prove that it came from the job and it’s a very difficult standard to meet,” Martinez said.⁷² He further noted that the Nevada Supreme Court has not recognized those types of cases, and he does not expect that to change any time soon.⁷³

E. Unsuccessful Results: The Kastroll Case

Casino employees have tried to bring suits in the past regarding their prolonged exposure to secondhand smoke while on the job. In a 2013 case, a blackjack dealer, Kanie Kastroll, brought a class action lawsuit against the Wynn Las Vegas, seeking to represent “[a]ll former, current, and future nonsmoking employees of the Wynn Las Vegas who were, are, or in the future will be exposed to unsafe levels of second-hand smoke.”⁷⁴ The dealer, who sought only injunctive relief on behalf of the class, asserted that the Wynn breached its common-law duty to provide a reasonably safe workplace for its employees.⁷⁵ The dealer alleged that the Wynn did not provide a safe work environment because it failed to take reasonable measures to protect its employees from secondhand smoke while they were on the job.⁷⁶ In an order denying the Wynn’s motion to dismiss, the Wynn argued that it “cannot be made liable [to its employees] for allowing its patrons to smoke freely in a place where the law specifically says that they can.”⁷⁷

Ultimately, the case failed because the court found that the Wynn showed that a majority of the dealer’s supposed class are, or would be, citizens of Nevada.⁷⁸ The Wynn Las Vegas was granted summary judgment because the entire alleged class would be citizens of Nevada and therefore the court would not be able to exercise subject matter jurisdiction.⁷⁹

While Kastroll’s case did not get very far in court, it shows just how dedicated a casino dealer can be to the fight for clean air at work. In filing the

⁷¹ Heather Mills, *Secondhand Smoke Still a Problem, but Casino Workers Have Little Recourse*, KSNV NEWS 3 LAS VEGAS (July 31, 2019), <https://news3lv.com/news/local/secondhand-smoke-still-a-problem-but-casino-workers-have-little-recourse>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-CV-2034-LDG-VCP, 2013 U.S. Dist. WL 496409, at *1 (D. Nev. Feb. 6, 2013).

⁷⁵ *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-CV-02034-LDG-LRL, 2010 U.S. Dist. WL 3829398, at *1 (D. Nev. Sept. 23, 2010).

⁷⁶ *Id.*

⁷⁷ *Id.* at *2.

⁷⁸ *Kastroll*, 2013 WL 496409, *supra* note 74, at *4.

⁷⁹ *Id.*

suit, Kastroll was not seeking any sort of monetary resolution; she simply wanted injunctive relief for those past, present, and future employees in her position. Not only does this show how difficult it must be to work in an environment that is bad for one's health, but it shows how tough it is to try to challenge casino smoking laws.

F. Gambling in Nevada in the Midst of a Pandemic

Normally, a trip to the Las Vegas Strip would consist of crowded craps tables and casino floors. Now, in the middle of a pandemic that has claimed the lives of over 800,000 people in the United States, the Strip does not look the same.⁸⁰ As COVID-19 cases in Nevada hit "wildfire levels," the Governor issued a statewide restriction that forced all casinos in the state to reduce their capacity to twenty-five percent.⁸¹ Conspicuously absent from the statewide restrictions issued by the Governor in late November was a ban on smoking inside casinos.⁸²

In the midst of COVID-19, casino-goers are required to wear masks at all times to prevent the spread of the virus, but are then allowed to remove their masks to smoke a cigarette. The president of the Nevada Tobacco Prevention Coalition noted that among the concerns with smoking in casinos are secondhand smoke exposure and people removing their masks and potentially projecting the virus into the air.⁸³ Further, she mentioned that putting something in your mouth, taking it out, and subsequently touching things, is rather concerning during a pandemic.⁸⁴

Smoking policies across the different Strip properties vary. For instance, Wynn Resorts Ltd.'s policy requires players smoking at table games with plexiglass to wear a mask unless they are actively smoking.⁸⁵ Similarly, Caesars Entertainment Corporation allows guests to smoke, but they must also wear a

⁸⁰ *United States COVID-19 Cases and Deaths by States*, CTRS. FOR DISEASE CONTROL & PREVENTION https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Dec. 21, 2021).

⁸¹ Ed Komenda, *What Do Nevada's New COVID-19 Restrictions Mean for Las Vegas? Here's What You Need to Know*, RENO GAZETTE J. (Nov. 23, 2020, 9:30 AM), <https://www.rgj.com/story/news/2020/11/23/nevadas-covid-19-restrictions-and-las-vegas-what-you-need-know/6391161002/>.

⁸² Ed Komenda, *Could Smoking be Banned in Nevada Casinos in Wake of COVID-19? Don't Count On It*, RENO GAZETTE J. (May 28, 2020, 12:22 PM), <https://www.rgj.com/story/news/2020/05/28/could-smoking-las-vegas-casinos-banned-wake-covid-19/5275542002/>.

⁸³ Mike Prevatt, *Will COVID-19 Kill Smoking in Casinos?*, NEV. PUB. RADIO (Oct. 6, 2020), <https://knpr.org/knpr/2020-10/will-covid-19-kill-smoking-casinos>.

⁸⁴ *Id.*

⁸⁵ Bailey Schulz, *Las Vegas Casinos Modifying Smoking Policies Amid Pandemic*, NEV. TOBACCO PREVENTION COAL. (July 21, 2020), <http://www.tobaccofreenv.org/news/las-vegas-casinos-modifying-smoking-policies-amid-pandemic/>.

mask inside the property.⁸⁶ Guests at Caesars properties are advised to lower their mask to smoke and raise it back up once they are finished.⁸⁷

In May 2020, there was concern that smoking inside casinos could potentially cause the virus to spread if smokers were putting their hands to their mouth and then subsequently touching the machines.⁸⁸ Another concern was the coughing that could be triggered by those smoking or breathing in the secondhand smoke, which could also cause the virus to spread.⁸⁹ Ultimately, one of the biggest problems for casino patrons during COVID-19 is the inability for smokers to wear a mask and smoke simultaneously.⁹⁰

In September 2020, Park MGM Las Vegas reopened after a temporary closure with a new policy that prohibited cigarette smoking indoors.⁹¹ There, the president and CEO noted that the continued guest requests to have a non-smoking facility sparked the restriction.⁹² However, it does not appear that all casinos will use COVID-19 as an opportunity to change their smoking laws.⁹³ Some say that the problem may be that while people can see who *will not* gamble because of non-smoking rules, it is more difficult to see who *would* visit the casinos if they became smoke-free.⁹⁴ Ultimately, the fear of losing patrons and revenue seems to be a major hurdle standing in the way of a Strip-wide smoking ban.⁹⁵

G. *Concerned Patrons*

There are many disparities among the way our society has handled the COVID-19 pandemic, and Nevada received a lot of criticism for its shutdown. However, there is evidence that patrons of Nevada casinos have been concerned about the lack of a smoking ban in the midst of a pandemic that is known to be spread through respiratory droplets.⁹⁶ A woman wrote to the Nevada Gaming Control Board and said that she would not visit a casino again so long as people were allowed to smoke, while the casinos claimed they were “doing everything they can to protect people’s health.”⁹⁷ Further, the Las Vegas Advisor conducted a poll that found that seventy-two percent of respondents wish to restrict smoking

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Ken Ritter, *MGM Resorts Adopt Smoke-Free Policy for Vegas Strip Casino*, AP NEWS (Sept. 14, 2020), <https://apnews.com/article/smoking-las-vegas-virus-outbreak-archive-monte-carlo-d5715c81afb4160790e9668d12e23fbc>.

⁹² *Id.*

⁹³ See Prevatt, *supra* note 83.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Komenda, *supra* note 82.

⁹⁷ *Id.*

on the casino floors.⁹⁸ However, the number of participants in the poll was relatively low, with only 1,523 individuals answering.⁹⁹

A non-smoker that participated in the poll said that smokers should be given at least one place in America to “do their thing,” and “[w]hen you go to Vegas, you expect smokers and nonsmokers . . . just as you expect kids in [C]ircus [C]ircus and Excalibur.”¹⁰⁰ Additionally, a majority of those who commented on the poll indicated that with a decrease in visitors at the casinos during the COVID-19 pandemic, now is a better time than ever to just “rip off the band-aid and be rid of smoking entirely.”¹⁰¹

While an immediate change to the current casino smoking laws may be so fervently desired by patrons, the Nevada Chief Deputy Attorney General noted that it is a legislative issue that would need to be discussed by the legislators when they meet in 2021.¹⁰² As of right now, smoking in casinos is protected by Nevada law since the Nevada Clean Indoor Air Act does not apply to the Strip.¹⁰³

H. *Gambling Elsewhere During COVID-19*

Gambling has not looked the same everywhere since the pandemic began. Many casinos closed but had differing restrictions and COVID-19 guidelines once they reopened.

In July, the casinos in Pennsylvania and New Jersey reopened, but with a ban on smoking indoors.¹⁰⁴ In Pennsylvania, there were no provisions outlined in the Department of Health rules for lifting one’s facemask to smoke.¹⁰⁵ The communications director for the State Gaming Control Board said they decided “that it was important to ban all smoking from the casino floor to try to ameliorate any additional problems in the spread of the virus.”¹⁰⁶

In New Jersey, it was asserted that people were just happy to be able to visit the casinos again, suggesting that the smoking ban was not taking much of a toll on them.¹⁰⁷ On the other hand, it was acknowledged that the smoking ban was not as positive from the business side of things, but that the first priority of

⁹⁸ Derek Tonin, *Majority Want Smoking to End in Nevada Casinos*, CALVIN AYRE (Aug. 25, 2020), <https://calvinayre.com/2020/08/25/casino/majority-want-smoking-to-end-in-nevada-casinos/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Komenda, *supra* note 82.

¹⁰³ *Id.*

¹⁰⁴ Sabrina Emms, *Casinos in Pa. and N.J. Have Finally Banned Smoking. Why Now?*, WHYY (July 25, 2020), <https://whyy.org/articles/casinos-in-pa-and-n-j-have-finally-banned-smoking-why-now/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Atlantic City casinos was in fact safety.¹⁰⁸ However, it is not clear whether the smoking bans in Pennsylvania and New Jersey will remain in effect once COVID-19 clears and the dust settles.¹⁰⁹

Clearly, Nevada had the chance to ban smoking as part of its COVID-19 protocol, but simply chose not to do so. Some casinos, of course, chose to ban smoking, but there was no blanket rule issued by casino regulators in Nevada. In other states, bans on smoking did not seem to impact patrons all that much, as they still visited casinos and were happy to simply be able to walk inside.

I. What Health Experts Have Said

Health experts give advice all the time, but insights shared to stop the spread of a highly contagious disease like COVID-19 seem to have much more weight. Since the pandemic claimed the lives of so many, and the country was unable to control the spread, the state of Nevada should have stepped in and banned smoking in casinos, not because of individual risk, but because of the risk of spread to others.

A Stanford University School of Medicine professor and researcher said that COVID-19 may be spread through cigarette smoking not because of the airborne particulates that smoking produces, but because of the likelihood of a smoker putting their fingers to their mouth and then to gambling devices repeatedly.¹¹⁰ Another health expert agreed and wondered how to reconcile the ability to smoke in a casino with the health recommendation to wear a face mask.¹¹¹ Again, both smoking and secondhand smoke exposure can irritate one's lungs, which can lead to coughing and the spread of the virus.¹¹² Additionally, health professionals have agreed that those who smoke are at a higher risk of experiencing worse outcomes if exposed to COVID-19.¹¹³

Furthermore, smokers obviously do not wear masks while vaping or smoking a cigarette, and they often exhale more forcefully, pushing the particles out of their lungs in a way that makes them travel even farther.¹¹⁴ Experts say that secondhand smoke from cigarettes can transmit COVID-19 farther than usual.¹¹⁵ For example, there are competitions called "cloud chasing," where vape

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Richard N. Velotta, *Las Vegas Casinos Should Ban Smoking, Health Experts Say*, LAS VEGAS REV. J. (May 22, 2020), <https://www.reviewjournal.com/business/casinos-gaming/las-vegas-casinos-should-ban-smoking-health-experts-say-2033764/>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Bob Curley, *Can Secondhand Smoke Transmit the Novel Coronavirus?*, HEALTHLINE (Aug. 17, 2020), <https://www.healthline.com/health-news/can-secondhand-smoke-transmit-the-novel-coronavirus>.

¹¹⁵ *Id.*

users push clouds of visible vapor from their lungs up to six feet.¹¹⁶ A pulmonary specialist noted that the visible clouds give a good idea of how far you should stay away.¹¹⁷ Obviously these cloud-chasing competitions are not happening on the casino floor, but the fact that smokers are capable of exhaling visible vapor up to six feet away from them is problematic, especially when the virus is known to travel by respiratory droplets.

Despite the advice proffered by health experts in regard to smoking in casinos, casino operators are not biting.¹¹⁸ One reason for this hesitation may be because smoking inside casinos has been appealing to international tourists for a quite some time—the same tourists who spend the most money when they come to Las Vegas.¹¹⁹ In 2018, of the 5.8 million international visitors in Las Vegas, nearly four percent were from China, which is the largest cigarette market in the world.¹²⁰

Visitors from the largest cigarette market in the world are extremely valuable to the United States, spending an average of \$6,700 per trip or fifty percent more than the average international visitor when they visit.¹²¹ “Las Vegas Convention and Visitors Authority data shows that visitors to Southern Nevada from China in 2018 spent an average of \$3,127 per trip compared to the average \$819.”¹²²

Accordingly, it is easy to see why Nevada is hesitant to ban smoking. It can be quite scary to have hard, fast numbers in front of you that you know are accurate and then take a gamble as to what those numbers would look like if a ban on smoking was implemented. However, Nevada may be able to look to other states for guidance.

III. A STATE TO FOLLOW? THE ILLINOIS MODEL

Since a ban on smoking in casinos can be a scary notion for Nevada, perhaps some insight can be gained by looking at other states. For instance, in 2008, Illinois enacted the Smoke-Free Illinois Act.¹²³ The Act placed a prohibition on smoking in all public places of employment, even privately owned bars, restaurants, and casinos.¹²⁴ The Illinois ban was the first to include a

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Velotta, *supra* note 110.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Thomas A. Garrett & Michael R. Pakko, *No Ifs, Ands or Butts: Illinois Casinos Lost Revenue After Smoking Banned*, FED. RES. BANK OF ST. LOUIS (July 1, 2009), <https://www.stlouisfed.org/publications/regional-economist/july-2009/no-ifs-and-or-butts-illinois-casinos-lost-revenue-after-smoking-banned>.

¹²⁴ *Id.*

smoking prohibition on the gambling floors of commercial casinos.¹²⁵ Although the casino industry and many other industries argued for an exemption from the statewide ban during the debate prior to the Act's passage, they were unsuccessful.¹²⁶

It was reported that in the first year after the smoking ban in Illinois took effect, revenue at the casinos in the state fell dramatically compared to the prior year.¹²⁷ According to the Illinois Gaming Association, the ban caused a nineteen percent drop in revenue during its first year in action.¹²⁸

Even with this negative feedback, many people support the smoking ban in the state. According to a study conducted by the Bureau of Economic Research, the smoking ban did not really impact commercial casinos in their football or gambling revenues.¹²⁹ Some people believe that revenues are not what they *would* have been if patrons were still allowed to “puff away to their heart's content without fear of prosecution,” but there seems to be a misconception.¹³⁰ For example, the Smoke-Free Illinois Act came into effect only one month before the Great Recession began in 2008.¹³¹ People may associate the decline in revenue or the “lost” potential revenues to the smoking ban, rather than the Great Recession.

The Bureau of Economic Research's study analyzed casino football revenues for ten years before and eight years after the smoking ban went into effect, and then compared that data with numbers from the surrounding states of Iowa, Indiana, and Missouri.¹³² Dr. John Tauras of the National Bureau of Economic Research and the University of Illinois said, “[E]stimates from our study clearly indicated that the Illinois law that banned smoking in casinos has had no significant negative economic consequences for casinos in terms of per-capita admissions or revenues.”¹³³ This information should be comforting for any state that is toying with the idea of a smoking ban.

Overall, Illinois provides clear evidence that a smoking ban will not kill the casino industry. Even in the midst of the Great Recession, Illinois casinos were able to bounce back and did not seem to lose revenue related to its smoking ban. While it may seem intimidating, Nevada has the opportunity during this pandemic to follow suit.

Nevada seems to fear public backlash that might ensue if it were to ban smoking in casinos. Nevertheless, there is plenty of public support for smoking

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ David Sheldon, *Illinois Smoking Ban Has Not Damaged Casino Revenue, Study Claims*, CASINO (Jan. 30, 2018), <https://www.casino.org/news/illinois-smoking-ban-has-not-damaged-casino-revenue-study-claims/>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

bans in casinos from various states across the country. For instance, the American Lung Association conducted a survey in 2020 that showed that sixty-five percent of Indiana voters favored a prohibition on smoking and vaping inside casinos.¹³⁴ Just like Nevada, casinos are among the few facilities that are exempt from Indiana's indoor-smoking ban.¹³⁵ However, since the pandemic, the Indiana Gaming Commission directed casinos to limit smoking areas to prevent the spread of COVID-19.¹³⁶ An advocacy director at the American Lung Association said that Indiana casinos should take the next step and ban smoking altogether, since that is what residents want and they are prepared to support casinos that decide to go smoke-free.¹³⁷

IV. WHY NEVADA SHOULD ELIMINATE SMOKING ONCE AND FOR ALL

The state legislature should add secondhand smoke to the list of compensable occupational disease in the Nevada Occupational Disease Act. Like an article from *The Nevada Independent* said, "Walk into any bar or casino in Las Vegas right now and you'll invariably encounter a smoker doing their thing with mandatory face covering pulled aside or loosely draped over an ear, or completely off but nearby to keep the charade of protection alive."¹³⁸ Why is this acceptable? In the middle of a pandemic that has claimed the lives of so many people, why are we allowing patrons to remove their masks and exhale their respiratory particles all over?

It is clear that smoking in casinos is not just a Nevada issue, but Nevada has the opportunity to take a huge step and become a role model for casino industries around the globe. The COVID-19 pandemic has provided not just Nevada, but all states, with a unique opportunity to implement change that could save lives. However, this desired change will require a great deal of effort.

A. *What Would Have to Happen to Ban Smoking*

Absent private regulation, in order to ban smoking inside casinos, the Nevada legislature would have to consider amendments to the Nevada Clean Indoor Air Act, which bans smoking in certain public places but does not apply

¹³⁴ Dan Carden, *Lung Association Poll Finds Two-Thirds of Hoosiers Favor Smoke Free Casinos*, NORTHWEST IND. TIMES (Aug. 10, 2020), https://www.nwitimes.com/business/gambling/lung-association-poll-finds-two-thirds-of-hoosiers-favor-smoke-free-casinos/article_826b2d3e-5ae5-594c-aad1-9ab22b4944b7.html.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ David Figler, *Committed: How Crazy Are You About Las Vegas?*, NEV. INDEP. (Jan. 6, 2021), <https://thenevadaindependent.com/article/committed-how-crazy-are-you-about-las-vegas>.

to casinos.¹³⁹ Since banning smoking seems to be a legislative concern, lawmakers would not even be able to consider such a ban until the Nevada legislature convenes per its regular schedule or until a special session is called. However, it may be simpler to approach smoking eradication from the employee-benefit perspective, using the Nevada Occupational Disease Act (NODA).

B. The Palmer Rule

In 1992, casino employee James Palmer sought workers' compensation benefits for lung disease that he thought was caused by secondhand smoke at his place of employment.¹⁴⁰ The issue before the court was whether a worker who claimed to suffer from a disease caused by secondhand smoke at work is eligible for compensation under the NODA. The trial court in this case ruled that "[u]ntil such time as the Legislature so decides, the claim must fail."¹⁴¹ The Nevada Supreme Court agreed with the lower court and held that until the legislature decides otherwise, occupational disease claims based on secondhand smoke in the workplace must fail.¹⁴²

The Nevada Supreme Court further explained that while environmental smoke is usually present in a casino, it is not uniquely "incidental to the character" of that business.¹⁴³ The court drew a distinction between environmental smoke in a casino and dust in a coal mine.¹⁴⁴ Unlike the dust, which is "incidental to the character of coal mining, tobacco smoke is not part of the nature or character of a bar or casino business."¹⁴⁵ Further, the Nevada Supreme Court concluded that secondhand smoke is a hazard that workers can be exposed to outside their place of employment.¹⁴⁶

Nothing has changed since 1992, casino employees and patrons are still waiting for the state legislature to decide that secondhand smoke in the workplace is eligible for compensation under NODA. However, there has been at least one plaintiff who raised the question of whether the Clean Indoor Air Act could change the *Palmer* rule.¹⁴⁷

In 2014, a dealer who had worked at the Silver Legacy Resort Casino for seven years filed an occupational-disease claim contending that his metastatic

¹³⁹ *Id.*

¹⁴⁰ *See generally* Palmer v. Del Webb's High Sierra, 838 P.2d 435, 435 (Nev. 1992).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 437.

¹⁴⁴ *Casino Employees and Secondhand Smoke*, GGRM L. FIRM, <https://ggrmlawfirm.com/blog/personal-injury/casino-employees-and-secondhand-smoke/> (last visited Apr. 22, 2021).

¹⁴⁵ *Id.*

¹⁴⁶ Palmer, 838 P.2d at 448 (Young, J., Concurrence).

¹⁴⁷ GGRM L. FIRM, *supra* note 145.

lung cancer was caused by exposure to secondhand smoke at work.¹⁴⁸ Less than a month after filing the claim, the employer denied it on the grounds that the evidence did not establish that his lung cancer was caused by his employment.¹⁴⁹ Ultimately, the dealer's claim was repeatedly denied due to reliance on the rule established in *Palmer*.¹⁵⁰ The dealer died from his advanced lung cancer nearly one year after filing the original claim.¹⁵¹ Again, in *Palmer*, the Nevada Supreme Court determined that the legislature has the exclusive province to decide whether exposure to secondhand smoke is a compensable occupational disease:

[U]ntil the legislature so decides, occupational disease claims based on inhalation of environmental smoke in the work place must fail The legislature, of course, is free to declare that any person who contracts some secondary smoke related disease at work is eligible for occupational disease compensation. The courts, we believe, do not have this power.¹⁵²

C. Nevada Occupational Disease Act

If an employee is exposed to a health hazard while on the job, in most cases, they can file a claim to be compensated for that exposure.¹⁵³ If this is the case for many employees around the state, why can't casino dealers be compensated when exposed to secondhand smoke for eight-plus hours per day? Currently, NODA lists twenty-two ailments that are considered occupational diseases and compensable as such when contracted by an employee out of and in the course of the employment.¹⁵⁴ For an occupational disease to be compensable, it must arise out of and in the course of employment.¹⁵⁵ However, an occupational disease is only deemed to arise out of and in the course of employment if:

(a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;

¹⁴⁸ *Heng v. Appeals Office of the Nev. Dep't of Admin.*, CV 15-00377, 2016 Nev. Dist. LEXIS 2829, at 2 (Nev. 2d Dist. Ct. 2016).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 3.

¹⁵³ OCCUPATIONAL SAFETY & HEALTH ADMIN., WORKERS' RIGHTS 17 (2020) <https://www.osha.gov/sites/default/files/publications/osha3021.pdf>.

¹⁵⁴ NEV. REV. STAT. § 617.450 (2020).

¹⁵⁵ NEV. REV. STAT. § 617.430 (2020).

- (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
- (c) It can be fairly traced to the employment as the proximate cause; and
- (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.¹⁵⁶

Using this framework, it seems that secondhand smoke exposure for casino workers *does* arise out of and in the course of employment. First, there is a causal connection between smoking in a casino and secondhand smoke exposure. Second, the smoke exposure follows as a natural incident of being a casino worker because people are allowed to smoke while they gamble, and workers are exposed to secondhand smoke whether they like it or not. Third, secondhand smoke exposure can be traced to the employment as the proximate cause, especially in instances where employees are not around secondhand smoke in any other setting. Finally, unless casino workers are frequently exposed to secondhand smoke outside of the workplace, it is clear that being around smoking individuals for eight-plus hours per day while on the job is the cause of their secondhand smoke exposure.

D. Doesn't Life Contain All Kinds of Risks?

Many counterarguments loom when discussing secondhand smoke exposure and the risks it poses to patrons and employees in casinos. Perhaps the most easily anticipated counterargument is that life contains all kinds of risks, so why is this risk so much worse? Especially in Nevada, a state that is so heavily reliant on the casino industry, one might ask, "Isn't some risk tolerable when the benefit to state revenue is so high?" The short answer is, "absolutely not." The moment one starts comparing patron and employee health to state revenue, one inches closer to the notion that the legislature is okay with people dying so long as it does not go into the red. Sure, if the inhalation of secondhand smoke had no repercussions, this would not be a topic of discussion and maybe the benefit of an increased revenue *would* outweigh the risk. However, that is simply not the case here.

Further, there is the argument that secondhand smoke is a risk that workers assume by working at a casino. Still, this argument only furthers the need to include secondhand smoke exposure on the list of compensable occupational diseases. If we recognize that this exposure is a risk that workers assume, then it should be included on the list.

A straight ban on smoking in the casino does not seem feasible or even desirable by those who are impacted most. Nonetheless, perhaps Nevada can implement a workaround so the public is less offended by a "ban," but is prevented from smoking by way of a different law.

¹⁵⁶ NEV. REV. STAT. § 617.440 (2020).

E. Realistic Outcome in an Economy Driven by the Casino Industry

It is no secret that the casino industry is the driving force behind Nevada's economy. To some, a proposal to place a complete ban on smoking may bring up a variety of different concerns. For instance, there would likely be a lot of opposition to this proposal, enough that the Nevada Gaming Control Board would not even take it up. Essentially, unless there is an interested party, there probably will not be much success with this proposal. It would be beneficial to get some buy-in from hotels and casinos, but there would likely be pushback there. A union (i.e., culinary, bartenders, or gaming workers) may have better luck with such proposal.

However, in order to bring the proposal by way of a union, union members would need to be on board. When thinking about this logically, why would a union member want to ban something that has been shown to bring in revenue, like smoking? It would be interesting to see how much people actually care about their respiratory health when their pay is on the line. Perhaps employees think that if patrons cannot smoke at the blackjack table, they will not come to their casino, and if they do not come their casino, they cannot tip the workers.

F. Overall Proposal

It seems that the only way that Nevada will ever completely eradicate smoking in casinos is if the state approaches the issue from the employee-benefit perspective. In a perfect world, the employees who are exposed to secondhand smoke would be eligible for compensation under NODA. It is clear that the state has no desire (or ability) to reverse the rule laid out in *Palmer* absent legislative action. Therefore, the Nevada Legislature must recognize that secondhand smoke has just as terrible (if not more terrible) side effects as some of the occupational diseases that are currently eligible for compensation under NODA. The state legislature adding secondhand smoke to the list of occupational diseases will clear the path for smoke-free casinos. Once Nevada allows employees to sue when the cigarette smoke they breathe in while at work harms their lungs, casinos will be forced to either go bankrupt defending themselves from all the employees bringing claims under NODA or simply ban smoking inside their properties once and for all.

At this point, it is not enough for people to oppose smoking. Smoking cigarettes has not been "in" for quite some time, and people are generally aware of the harmful side effects of cigarette smoke inhalation. The state legislature must act, and this seems to be the most efficient way to do so. Nevada should let casinos choose to ban smoking or litigate workers' compensation cases when their employees are inevitably harmed by the secondhand smoke that they are forced to breathe in on a daily basis.

G. Opportunity in the Midst of the COVID-19 Pandemic?

While the COVID-19 pandemic has shook the entire world, perhaps a silver lining could be clean casino air for those who visit Las Vegas in the future. It seems like the state of Nevada allowed casinos to be exempt from the laws of the NCIAA strictly for monetary reasons. However, there is now an abundance of research explaining how dangerous secondhand smoke is, regardless of any precautions to try to lessen its effects.

Secondhand smoke is known to contain chemicals and poisons that cause heart disease and lung cancer, such as formaldehyde, benzene, and cadmium.¹⁵⁷ If the Surgeon General is telling the whole country that the longer a person is around secondhand smoke, the more likely they are to have harsh, long-term side effects,¹⁵⁸ then why does Nevada refuse to recognize a smoking environment as an occupational hazard? Nonsmokers who breathe smoke at home or work are more likely to become sick and die from heart disease and lung cancer.¹⁵⁹ Again, if this information is so widely known, then Nevada should have no reason *not* to go back and reverse the *Palmer* decision and protect casino employees once and for all.

Ultimately, in the midst of a pandemic that has killed millions of people worldwide, Nevada has been given the opportunity to use COVID-19 to spark change in the smoking laws within the state. Even though countless Surgeon General reports, research on secondhand smoke from the top institutions around the globe, and secondhand smoke-related deaths have not been enough to urge Nevada to rethink smoking laws, perhaps COVID-19 has allowed new arguments to surface because of the contagion rate of the virus, coupled with the long-established dangers related to secondhand smoke.

Prior to COVID-19, the Nevada Supreme Court explained that even though secondhand smoke is present in a casino, it is not uniquely “incidental to the character” of that business.¹⁶⁰ The court drew a distinction between environmental smoke in a casino and dust in a coal mine, saying that unlike the dust, which is “incidental to the character of coal mining, tobacco smoke is not part of the nature or character of a bar or casino business.”¹⁶¹

However, in the wake of COVID-19, the Nevada Supreme Court’s reasoning in *Palmer* seems to be flawed. In fact, it seems that one of the main arguments in favor of casinos continuing to allow smoking is that it is the “norm” in Las Vegas. Isn’t that the same as saying that cigarette smoking is “incidental to the character” of visiting a property on the Strip? It makes sense to assume that during a pandemic spread by respiratory droplets, the lack of a smoking ban is directly linked to the “norm” that smoking always has been allowed on the Strip properties and therefore always should be.

¹⁵⁷ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 38, at 2.

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.* at 12.

¹⁶⁰ *Palmer v. Del Webb’s High Sierra*, 838 P.2d 435, 437 (Nev. 1992).

¹⁶¹ *Id.* at 436.

Now, however, this notion seems to undermine the rule in *Palmer* that has eliminated the ability for a casino employee to successfully bring a workers' compensation claim related to secondhand smoke. If the rule from *Palmer* was that a claim under NODA would fail if the ailment was not incidental to the character of the business, then the reasoning behind that rule has been completely uprooted by COVID-19. For example, if people are still allowed to remove their government-mandated masks to smoke cigarettes, and employees are unable to escape that secondhand smoke, it seems that secondhand smoke inhalation is now entirely incidental to the character of casino operation.

Now is the perfect time for the Nevada Legislature to make some big changes. Of course, the legislature does not have to amend the Nevada Clean Indoor Air Act, nor does it have to add a law banning all smoking inside casinos. Rather, Nevada has a unique opportunity to use COVID-19 as a catalyst for change. Casino employees are currently being required to work inside casinos where masks are mandated but can be removed so that patrons can enjoy their cigarettes or cigars while they gamble. Instead of banning smoking altogether, the state legislature can finally recognize secondhand smoke as an occupational disease under NODA because of the known harsh impacts of secondhand smoke, coupled with the deadly virus sweeping the globe.

Once secondhand smoke is added to the list of already twenty-two occupational diseases eligible for compensation in the state of Nevada, casinos will have discretion to do whatever they deem necessary. Perhaps no employees will take advantage of the classification of secondhand smoke as an occupational disease. More likely, however, properties will be forced to choose between either (1) continuing to allow smoking in the casinos and go bankrupt attempting to litigate the workers' compensation claims that are bound to ensue, or (2) banning smoking altogether to provide safe air for patrons and employees alike.