

TOBACCO USE AND EMPLOYER COSTS TASK FORCE

FINAL REPORT & RECOMMENDATIONS

- This report details the findings and recommendations developed by the task force established by N.M. Senate Memorial 22

FACILITATOR

New Mexico First

FUNDER

Presbyterian Healthcare Services

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EXECUTIVE SUMMARY

Rising costs of healthcare have prompted some employers to explore ways to influence the health-related behaviors of their employees. Health insurance costs comprise about one fourth of all non-wage compensation. As a result, the New Mexico Legislature passed Senate Memorial 22 in 2013. The memorial, sponsored by Senator Jerry Ortiz y Pino, called for the “formation of **a task force to study the relationship between tobacco use and employer costs**, including the impacts on organizations that employ tobacco users.” Specifically, the task force was asked to recommend changes in law to decrease workplace productivity losses and reduce costs due to tobacco use.

Senate Memorial 22 specified organizations and interests to be included in the project. The 22-member task force included health, healthcare, employer, and tribal stakeholders. The task force was facilitated by New Mexico First, a nonpartisan, nonprofit public policy organization. Funding for the facilitation was provided by Presbyterian Healthcare Services.

This report details the task force findings and recommendations, which will be submitted in November 2013 to the NM Legislative Health and Human Services Committee as stipulated by the memorial.

Task force members offered the following recommendations. Regarding the New Mexico Privacy Act, the task force developed three options, each of which received different levels of support from the group.

Legislative Policy Recommendation	Level of Task Force Support
1. Modify the New Mexico Privacy Act to revoke protection of smoker’s rights so that businesses can choose whether to hire smokers. (Option 1)	42%
2. Modify the New Mexico Employee Privacy Act so that certain sectors for which smoking is particularly inappropriate (e.g., healthcare and education) are allowed to choose whether to hire smokers. (Option 2)	50%
3. Modify the New Mexico Employee Privacy Act to allow employers to prohibit smoking off premises during work hours, including during breaks, meal times, and when employees are working off-site. (Option 3)	67%
4. Require all health insurance plans (including exchanges and self-insured plans) to include evidence-based comprehensive treatment for tobacco dependence in their benefit packages.	84%
5. Task the appropriate legislative committee to evaluate wellness programs, with a specific focus on smoking cessation programs. The committee should address at least three programs for large employers and three for small employers to determine best practices.	94%
Funding and Tax Policy Recommendation	
6. Fund tobacco use prevention and cessation programs at the Centers for Disease Control recommended level (currently \$23.4 million) and use funds for tobacco cessation and prevention programs.	82%
7. Reinstate tobacco cessation and prevention funding for collaborative work with Tribes and the NM Department of Indian Affairs.	84%
8. Increase state excise tax on cigarettes.	71%
9. Increase state excise tax on non-cigarette tobacco products (including electronic cigarettes).	82%
10. Provide tax credit incentives to employers offering evidence-based tobacco cessation programs.	94%
Voluntary Employer or Insurer Recommendation	
11. Encourage voluntary policies to expand smoke-free workplaces, including outdoor spaces.	100%
12. Encourage employers and unions to collaborate in efforts to decrease tobacco dependence.	89%

Additional details on each item are provided in the complete report that follows.

FOREWORD

Purpose of the Task Force

The New Mexico Legislature passed Senate Memorial 22 in 2013.¹ The memorial, sponsored by Senator Jerry Ortiz y Pino, called for the “formation of a task force to study the relationship between tobacco use and employer costs, including the impacts on organizations that employ tobacco users.”² Specifically, the task force was asked to **recommend changes in law** to decrease workplace productivity losses and reduce costs due to tobacco use (incurred by employers and employees).

This report details those findings and recommendations. The task force will submit this report to the Legislative Health and Human Services Committee as stipulated by the memorial.

Task Force

Senate Memorial 22 requested participation by specific organizations, all of which received invitations. These entities were the Association of Commerce and Industry, New Mexico Chambers of Commerce, the New Mexico Hospital Association, leading healthcare providers in New Mexico, the Insurance Division of the Public Regulation Commission or its successor, the American Lung Association, the New Mexico Medical Society, the American Cancer Society, and the Greater Albuquerque Medical Association.

New Mexico First prepared this report with assistance from the task force. Task force members offered all the recommendations.

TASK FORCE AND COMMITTEE CHAIRS

- **NM Senator Jerry Ortiz y Pino (D), Task Force Co-chair**
- **NM Senator Mark Moores (R), Task Force Co-chair**
- Matthew Gonzales, Association of Commerce and Industry, Cost and Data Committee Chair
- H. Diane Snyder, Greater Albuquerque Medical Association, Law and Policy Committee Chair
- Dona Upson, University of New Mexico, Health and Workplace Committee Chair

TASK FORCE MEMBERS

- Sandra Adondakis, American Cancer Society Cancer Action Network
- Arthur Allison, NM Department of Indian Affairs
- Allison Biles, Modrall Sperling Law Firm
- Jessica Burnham, Greater Albuquerque Chamber of Commerce
- Lance Chilton, University of New Mexico
- Sandra Dominguez, CHRISTUS St. Vincent Regional Medical Center
- Erin Engelbrecht, American Lung Association
- Denise Gonzales, PHS Rust Medical Center
- Jack Hogan, R.J. Reynolds
- Benjamin Jacquez, NM Department of Health, Tobacco Use, Prevention & Control
- Beth Landon, NM Hospital Association
- Randy Marshall, NM Medical Society
- Linda Peñaloza, UNM, Health Services Center & NM Chronic Disease Prevention Council
- Natalie Thomas, Laguna Pueblo
- Liz Thomson, Representative (D)
- David Tompkins, NM Department of Health, Tobacco Use, Prevention & Control
- Monica Youngblood, Representative (R)

¹ (New Mexico State Senate-51st Session, 2013)

² (State of New Mexico, 2013)

Facilitator

New Mexico First engages people in important issues facing their state or community. Established in 1986, the public policy organization offers unique town halls and forums that bring together people from all walks of life to develop their best ideas for policymakers and the public. New Mexico First also produces nonpartisan public policy reports on critical issues facing the state. These reports – on topics like water, education, healthcare, the economy, and energy – are available at nmfirst.org.

Our state's two U.S. Senators – Tom Udall and Martin Heinrich – serve as New Mexico First's honorary co-chairs. The organization was co-founded in 1986 by Senators Jeff Bingaman (retired) and Pete Domenici (retired).

For this project, New Mexico First was contracted by **Presbyterian Healthcare Services** to manage the task force and its reports.

ISSUE BRIEF

Rising costs of healthcare and health insurance premiums have been a catalyst for some employers to explore ways to regulate the health-related behaviors of their employees. It is estimated that health insurance costs comprise one quarter of all non-wage compensation, and about \$4 per hour of wages goes to pay for healthcare costs.³ Both incentive and penalty approaches have been taken by employers.

State government is one of New Mexico's largest employers, providing health insurance to state employees as well as to all New Mexicans through programs such as Medicaid and the Children's Health Insurance Program. There are 500,000 New Mexicans insured through Medicaid alone.⁴ As a result, state budgets are impacted by smokers and children of smokers insured by these plans. In 2004, direct costs related to smoking for state Medicaid programs averaged \$607 million per state, or almost 11% of all Medicaid expenditures.⁵ New Mexico could spend its portion of this money elsewhere if smokers insured through Medicaid quit smoking. Further, a study by Penn State University demonstrated that for every dollar a state spends to help smokers quit, the average return on investment is \$1.26.⁶

Federal healthcare reform is another factor in the discussion of tobacco use. The Affordable Care Act allows for a 50% premium surcharge for smokers buying coverage through the Health Insurance Exchanges. Surcharges are waived if a Healthcare Exchange member is enrolled in a tobacco cessation program, and states can choose to reduce or waive the surcharge. The surcharge is opposed by the American Cancer Society.⁷ However, it appears that a majority of Americans support this type of strategy, with 58% saying that insurance companies would be justified in setting higher rates for smokers.⁸

Employee Incentives

In 2010, the Society for Human Resource Management estimated that 59% of companies offered wellness programs; 28% paid bonuses for smoking cessation, weight loss, or other health goal achievements; and 10% provided insurance discounts for not smoking, getting a health risk assessment, or joining a weight loss program.⁹

While employers pay more for tobacco cessation than wellness programs, the investment appears to pay off. Research shows that the return on investment is higher among private sector employers than the state government ROI mentioned above. One Florida investigation found that for every dollar spent on cessation treatments, employers could save \$1.90 to \$5.75.¹⁰ Another study calculated the net savings to be \$542 per smoker who quits, even after factoring in the cost of providing the cessation program.¹¹ Savings for employers can be immediate. One study found first year savings of at least \$210 in annual medical and life insurance costs per employee or dependent who quits.¹² The National Commission on Prevention Priorities estimated that lifetime savings in tobacco-related health expenditures for every former smoker who does not relapse is \$22,434, and employers see some of these savings in reduced premiums.¹³

A 2008 study found strong evidence that self-help interventions and social support are less effective than direct interventions such as counseling and pharmacological treatment.¹⁴ Incentives and competitions have not been shown to enhance long-term cessation

³ (Barton, 2006)

⁴ (New Mexico Department of Human Services, 2013)

⁵ (Centers for Disease Control and Prevention, 2006)

⁶ (American Lung Association, 2010)

⁷ (Mahar, 2013)

⁸ (Wilke, 2013)

⁹ (O'Brien, 2009)

¹⁰ (Washington Economics Group, Inc., 2008)

¹¹ (Edwards, Maciosek, & Soberg, 2006, p. 128)

¹² (American Legacy Foundation and McMilliman Consultants and Actuaries, 2006)

¹³ (Edwards, Maciosek, & Soberg, 2006)

¹⁴ (Cahill, K; Lancaster, T; Moher, M.; 2008)

rates, with early success tending to dissipate when the rewards are no longer offered.¹⁵

CASE STUDY: GENERAL ELECTRIC

In 2005, General Electric commissioned a study to evaluate an employee smoking cessation program. Nearly 1,000 employees who indicated they were smokers with a desire to quit participated in the study. Two random groups were formed and members in both groups were given information about local smoking cessation programs offered in their area. Members of one group were offered financial rewards for participating in a smoking cessation program and for remaining tobacco-free for six and 12 months as evidenced by a nicotine test. Employees who did not remain tobacco-free paid higher health insurance premiums. The study showed the odds of quitting reached 15% for the incentivized group and were 3.29 times higher than the non-incentivized group. Because of study results, the company began offering a modified incentivized smoking cessation program for all employees in 2010.¹⁶

Employee Penalties

Some employers, both in the private and public sectors, have gone a step further by imposing strict policies that attempt to curb the off-duty habits of their employees, specifically tobacco use.¹⁷ Some employers have created financial penalties related to health insurance premiums, and others have created hiring and firing policies and practices requiring employees to be tobacco-free at all times, even during their off-duty hours.¹⁸

While these practices may result in having fewer smokers on payroll, it appears that researchers do not know whether decreased tobacco use is due to higher costs for insurance premiums (surcharges) or differential hiring practices. Organizations that oppose these penalties, such as the American Lung Association, argue that people who smoke tend to need more healthcare and thus insurance. Family members of smokers also have higher rates of tobacco-related illness such as asthma, and could lose their health insurance if the household's provider lost coverage.

Opponents also point to enforcement concerns regarding the limit of tobacco use. Tests for cotinine, a metabolite of nicotine, that use blood, urine, or saliva can show false positives resulting from nicotine replacement therapy, secondhand smoke, ceremonial use of tobacco, or e-cigarettes.¹⁹ Exhaled carbon monoxide tests also may present false positives from exposure to other sources of carbon monoxide.²⁰ Using other employees as "informants" could potentially affect workplace morale and camaraderie among coworkers.²¹

CASE STUDY: SCOTTS MIRACLE-GRO COMPANY

In 2003, Scotts Miracle-Gro Company, a \$2.7 billion lawn care company headquartered in Marysville, Ohio, doubled what the workers were paying for their health insurance. This increase led to a severe loss of morale. In response, the company hired an outside company to implement a wellness program that included strict rules about smoking. Smokers were offered assistance with smoking cessation. Scotts no longer hires anyone who smokes. At least one probationary employee was fired in 2006.²² As of 2013, the number of employees who smoke had decreased from 30% to about 5%, and the company's healthcare cost increases and premium increases have trended below the national average.²³

¹⁵ (Cahill, K; Perera, R;, 2008)

¹⁶ (Gionti, 2012)

¹⁷ (Schleiter, 2008, pp. 740-746)

¹⁸ (Gionti, 2012)

¹⁹ (Cook, D; Doig, M; Ebrahim, D; Feyerabend, C; Jefferis, B; Lawlor, D; McMeekin, L; Wannamethee, S; Whincup, P;, 2010)

²⁰ (Becker, P; Engelbrecht, R; Groenewald, M; Hazelhurst, L; Van Staden, S, 2013, pp. 865-868)

²¹ (Katainen, A, 2012, pp. 134-150)

²² (Gionti, 2012)

²³ (Santus, 2013)

CASE STUDY: WEYCO INC.

In 2005, Weyco Inc., a Michigan-based insurance and medical benefits company, implemented a policy requiring employees to be tobacco-free, even during their off-duty hours. Employees were subject to random breath or urine tests and were fired if a test showed positive results for nicotine or tobacco. Two years prior to enforcing the policy, Weyco set up smoking cessation programs that included hypnosis, acupuncture, and other methods to help employees quit smoking. After the two-year program, employees who refused to quit smoking or take the breath or urine test were required to leave the company. Of the 200 people employed, 14 chose to leave the company before the policy was implemented. As of 2008, at least four employees had been terminated for refusing to take the breath or urine test. Presumably, the remainder of the workforce was non-smoking.²⁴

New Mexico Smoking Facts

In New Mexico, one in five adults and one in four youth smoke.²⁵ There are disproportionately high rates of smoking among people who are unemployed or have lower incomes. The average age someone begins smoking is 15, with 80% of smokers doing so by the age of 18.²⁶ Table 1 shows the percentages of adults, as well as high school and middle school students, who smoke. The table also shows the total number of deaths attributable to smoking.

TABLE 1: NEW MEXICO SMOKING RATES AND SMOKING ATTRIBUTABLE DEATHS²⁷

Smoking Rate		Smoking Attributable Deaths*	
Adult (2011)	21%	Total	2,104
High School (2011)	20%	Lung Cancer	555
Middle School (2009)	7%	Other Respiratory Disease**	682

*Smoking attributable deaths reflect average annual estimates for the period 2000-2004 and are calculated for persons aged 35 years and older. They do not take into account deaths from burns or secondhand smoke.

**Other respiratory diseases include pneumonia, influenza, bronchitis, emphysema, and chronic airway obstruction.

TABLE 2: ADULT SMOKING IN NEW MEXICO BY INSURANCE, EMPLOYMENT, INCOME, AND EDUCATION (2011)²⁸

Factor	Percent (rounded to nearest whole number)
Insurance Status	
No Health Insurance	34
Has Health Insurance	18
Employment Status	
Employed	22
Unemployed	36
Homemaker	15
Student	19
Retired	10
Annual Household Income	
< \$10,000	40
\$10,000-19,999	33
\$20,000-49,999	23
> \$50,000	12

²⁴ (Gionti, 2012)

²⁵ (New Mexico Department of Health, 2012)

²⁶ (Centers for Disease Control and Prevention, 2010)

²⁷ (American Lung Association in New Mexico, 2013, p. 117)

²⁸ (Behavioral Risk Factor Surveillance System Survey Data, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, with New Mexico Department of Health and Injury and Behavioral Epidemiology Bureau, 2011)

Factor	Percent (rounded to nearest whole number)
Education	
< High school	33
High school grad/GED	23
Some college/technical school	23
College graduate	10

Tobacco Use Costs

Smoking and exposure to tobacco smoke create costs for society and employers. According to the Centers for Disease Control and Prevention (CDC), during 2000-2004, annual costs to society were over \$193 billion, including \$97 billion in lost productivity and \$96 billion in healthcare expenditures.²⁹ In New Mexico, approximately 2,100 people die from tobacco use each year and another 42,000 are living with tobacco-related diseases. Annual smoking-related costs in New Mexico are estimated at \$928 million (\$461 million in direct medical costs and \$467 million in lost productivity).³⁰

In 2013, Ohio State University researchers estimated the excess annual costs that an employer may attribute to employing a smoker compared to a non-smoker. The researchers examined costs associated with absenteeism, presenteeism,³¹ smoking breaks, healthcare, and pension benefits for smokers. They estimated the annual excess cost to employ a smoker is \$5,816.³²

TABLE 3: TOTAL ANNUAL EXCESS COST OF A SMOKING EMPLOYEE TO A PRIVATE EMPLOYER³³

Category	Best Estimate Annual Cost	High Range	Low Range
Excess Absenteeism	\$517	\$576	\$179
Presenteeism*	\$462	\$1848	\$462
Smoking Breaks	\$3077	\$4103	\$1641
Excess Healthcare Costs	\$2056	\$3598	\$899
Pension Benefit	\$ (296)**	\$0	\$ (296)**
Total Costs	\$5816	\$10,125	\$2885

*Defined as decrease in effectiveness of a smoking employee due to fluctuations in the stimulant effect of nicotine.

**For employers with defined benefit pension plans

Drawing from the same data in the chart above, the task force's Cost and Data Committee estimated the following increased annual cost to employing a smoker.³⁴

TABLE 4: TOTAL ANNUAL EXCESS COST OF A SMOKING EMPLOYEE BY HEALTH PLAN

Employer Characteristics	Best Estimate of Increased Costs	Low Estimate	High Estimate
Self-insured health plan, defined benefit pension plan	\$5816	\$2885	\$10,125
Self insured health plan, set benefit pension plan	\$6012	\$3181	\$10,421
Employer-provided health insurance, defined benefit pension plan	\$3760	\$1244	\$6527
Employer-provided health insurance, set benefit pension plan	\$4056	\$1540	\$6527

²⁹ (Centers for Disease Control and Prevention, 2008, pp. 1226-1228)

³⁰ (New Mexico Department of Health, 2012)

³¹ Presenteeism is the act of attending work while sick.

³² (Berman, 2013)

³³ (Berman, 2013)

³⁴ (Berman, 2013)

State Smoking Protection Laws

As of 2010, 29 states and the District of Columbia have statutes that protect employees from adverse employment actions based on their off-duty activities.³⁵ New Mexico is one of 18 jurisdictions with "tobacco only" statutes.³⁶

In New Mexico, "it is unlawful for an employer to refuse to hire or discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions, or privileges of employment because the individual is a smoker or non-smoker, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours. It is also unlawful for an employer to require as a condition of employment that any employee or applicant for employment abstain from using tobacco products during non-working hours. This does not apply to any activity that materially threatens an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information, or other proprietary interests; or relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer. Any employee claiming to be aggrieved by any unlawful action of any employer may bring a civil suit for damages."³⁷

Privacy and Legal Issues

Some employees, advocacy groups, and legal professionals have been critical of employer policies regarding off-duty tobacco use, claiming that they interfere in the private lives of employees and penalize them for participating in a lawful activity.³⁸ Some also view smoking hiring/firing practices as a gateway for lifestyle discrimination for other factors, including weight, alcohol consumption, or risky recreational activities.³⁹ The Tobacco Institute argued that "reasonable people agree that no one should be able to dictate what legal activities we can or can't do in our own homes."⁴⁰ The American Civil Liberties Union has denounced "employment discrimination" based on off-duty smoking as an infringement on one's civil liberties or inherent right to privacy. The ACLU has focused on state legislation as the best method for protecting employee privacy in off-duty activities. Currently, two states have passed comprehensive laws against "lifestyle discrimination," and 21 other states have laws that provide partial protection.⁴¹

However, in states without such laws, employers instituted a range of tobacco policy changes for their employees. These policies have stood up to legal challenges brought by employees. For example, the employer's right to hire and fire employees based on tobacco use has been legally protected.⁴² Employee lawsuits based on federal laws such as the American with Disabilities Act have also been unsuccessful as the ADA does not consider nicotine addiction a disability.⁴³ There are no federal statutes that prohibit employers from refusing to hire smokers, and the right to be free from employer scrutiny of employee off-duty smoking is not protected by tort law.⁴⁴

Another legal issue related to employer tobacco cessation policies is the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA prohibits discriminating against health plan participants based on a health factor. In addition, it requires wellness programs that provide an incentive based on a health factor to satisfy specific criteria:

- 1) A reward cannot be more than 20% of the total coverage.
- 2) The program must promote health or prevent disease and be available to all similarly situated employees.
- 3) An alternative must be available to those for whom it is unreasonably difficult or medically inadvisable to meet the standard.

³⁵ (National Conference of State Legislatures, 2010)

³⁶ (National Conference of State Legislatures, 2010)

³⁷ (New Mexico Legislature, 1991)

³⁸ (Schleiter, 2008, pp. 740-746)

³⁹ (Schleiter, 2008, pp. 740-746)

⁴⁰ (Chadwick, 2006)

⁴¹ (American Civil Liberties Union, 2002)

⁴² (Chadwick, 2006)

⁴³ (Berman, 2013)

⁴⁴ (Chadwick, 2006)

Companies that have implemented wellness programs with a tobacco cessation component have been able to withstand legal challenges, if the program meets the HIPAA criteria.⁴⁵

HEALTHCARE EXAMPLES: PROS AND CONS OF NON-SMOKING HIRING POLICY ADOPTION

Cleveland Clinic: In 2007, Cleveland Clinic in Ohio implemented a nonsmoking hiring policy, a legal practice in that state. All job applicants are required to take a cotinine test during their pre-placement physical exam. Cotinine is a biomarker for tobacco use. Offers of employment are revoked for applicants who test positive for nicotine and applicants are referred to a tobacco cessation program paid by Cleveland Clinic. They can reapply for the position if, after 90 days, test results indicate they are tobacco-free. In response to criticism that this is a harsh policy, clinic spokesman Dr. Paul Terpeluk responded in a USA Today editorial, "To ignore [health issues associated with cigarettes] would be to undermine our commitment to health and wellness, which includes providing a healthy environment for our employees, visitors, and patients."⁴⁶ Roughly five years after the policy was enacted, "less than 2% of job offers – about 300 out of 20,000 – have been rescinded due to positive nicotine tests."

Hospital of the University of Pennsylvania (HUP): Though Pennsylvania is one of the states that allows employers to screen job applicants for signs of smoking, HUP chooses not to. Screening out smokers "underestimates the nature of the problem," explained Frank Leone, Director of Penn's smoking treatment programs. Since applicants with diabetes and hypertension are not being targeted, Leone sees targeting smokers as discriminatory. He also believes that companies test for tobacco to save on insurance premiums, and that the practice unfairly impacts lower socioeconomic groups. Another rationale provided for HUP's policy is a concern that nicotine testing may be an unreliable method to identify smokers. The hospital instead focuses on encouraging healthy practices among their employees and within their community. It also offers an incentive for employees who smoke if they enroll in cessation programs.

Nicotine Versus Tobacco Products

Nicotine does not cause cancer, according to current data.⁴⁷ Existing research indicates that the act of smoking and using tobacco causes cancer and other chronic health problems, not nicotine itself.⁴⁸

E-cigarettes may be seen as an alternative to smoking. However, the U.S. Food and Drug Administration points out that clinical studies on the safety of the products are not available. The FDA says "e-cigarettes may contain ingredients that are known to be toxic to humans, and may contain other ingredients that may not be safe."⁴⁹ E-cigarettes are regulated as a tobacco product in the United States.⁵⁰

PRODUCT EXAMPLES

Tobacco products: Cigarettes, pipes, cigars, smokeless tobacco, flavored cigarettes, hookahs, e-cigarettes. (Mayo Clinic reports concerns about the safety of e-cigarette vapor and the amount of nicotine provided, and lists the other tobacco products as never safe.)⁵¹

Nicotine products: Nicotine patch, gum, lozenge, prescription inhaler, prescription nasal spray. (Mayo Clinic lists all these products as viable nicotine replacement products to help smokers quit.)⁵²

⁴⁵ (Gionti, 2012)

⁴⁶ (Terpeluk, P, 2012)

⁴⁷ (Mayo Clinic, 2013) (Murray, R; Connett, J; Zapawa, L., 2009)

⁴⁸ (Medical News Today, 2005)

⁴⁹ (U.S. Food and Drug Administration, 2013)

⁵⁰ (United States Court of Appeals for the D.C. Circuit, 2010)

⁵¹ (Mayo Clinic, 2013)

The lack of data and the use of nicotine products, creates a policy dilemma. If, for example, New Mexico were to amend its Employee Privacy Act to allow employers not to hire smokers, would that ban extend to all nicotine users? If so, is there a clear health-based rationale for that policy? If not, what screening method would enable employers to distinguish between nicotine versus tobacco users?

These questions would need to be addressed before a final state policy is determined.

State Tobacco Prevention and Control Report Card

The American Lung Association tracks and compares state laws, taxes, and practices associated with prevention and control of tobacco. Each year the association publishes a report card based on the most current and recognized criteria for effectiveness. The A grade indicates excellent policies while an F grade indicates inadequate policies.⁵³

SMOKE-FREE AIR LAWS – SCORE: A

Smoke-free air laws help protect the public from secondhand smoke. New Mexico is one of 25 states, plus the District of Columbia, that received an A grade, meaning the state has strong smoke-free air laws in place. Currently, 92% of the NM population is covered by state clean air laws.

CIGARETTE EXCISE TAX – SCORE: C

Higher cigarette taxes are used to prevent young people from starting to smoke and to encourage current smokers to quit. Research indicates that one of the best ways to lessen tobacco use among youth is by raising taxes on cigarettes and making taxes on other tobacco products equivalent to cigarette taxes.⁵⁴ State tax ranges from below \$.73 to over \$2.92 per pack. New Mexico is one of 14 states that received a C grade, meaning the excise tax fell within the range of \$1.46 to \$2.189.⁵⁵ New Mexico's current cigarette excise tax is \$1.66 per pack of 20.⁵⁶

TOBACCO PREVENTION AND CONTROL SPENDING – SCORE: F

States receive money from tobacco settlement payments⁵⁷ and tobacco taxes that can be spent on programs that prevent and reduce tobacco use, such as advertisements to counter tobacco industry messages. Many believe that fully funding and sustaining these evidence-based, statewide tobacco prevention and cessation programs will lead to significant decreases in tobacco use and thus employer healthcare costs.⁵⁸ The CDC recommends an amount each state should spend on tobacco prevention and control programs in order for these programs to be successful. New Mexico's recommended level of funding is \$23.4 million annually.⁵⁹ New Mexico is one of 41 states, plus the District of Columbia, that received an F grade, meaning the state spent less than 50% of the money available from settlement payments and taxes on programs to prevent or reduce tobacco use.⁶⁰

⁵² (Mayo Clinic, 2013)

⁵³ (American Lung Association, 2013)

⁵⁴ (U.S. Department of Health and Human Services, 2012)

⁵⁵ (American Lung Association, 2013)

⁵⁶ (American Lung Association, 2013)

⁵⁷ New Mexico is one of 46 states that benefits from the Master Settlement Agreement. In this agreement, large tobacco companies responded to lawsuits by agreeing to make ongoing annual payments to states. The monies are for tobacco education and health programs. A dispute over 2003 payment amounts resulted in six states being found in breach of contract. New Mexico is among the six that are charged with not ensuring they receive proper fines from smaller tobacco companies. (*Albuquerque Journal*, Dan Boyd, 10/12/13). In an update to staff from the NM Attorney General, the "potential liability to future tobacco distributions is likely to be at least half of the 2003 distribution of \$34 million," though other venues indicate that the loss could be as high as \$25 million. (Email from Greg Geiser, Principal Analyst, NM Legislative Finance Committee.) At the time this report was compiled, a ruling found NM out of compliance. The penalty will be set in early 2014. This arbitration applied only to 2003; there could be penalties for years 2004 to the present.

⁵⁸ (Centers for Disease Control and Prevention, 2007)

⁵⁹ (Centers for Disease Control and Prevention, 2007)

⁶⁰ (American Lung Association, 2013)

TOBACCO CESSATION – SCORE: C

There is evidence that tobacco cessation and prevention efforts can be successful. Participation rates for treatment programs are higher when there is no cost-sharing.⁶¹ Combining treatments (e.g., counseling with cessation medications) is recommended. The ALA grade is an indicator for how well a state is helping tobacco users quit. The probability of quitting increases if smokers have easy access to medications and counseling, including quitlines (over the phone services). New Mexico is one of six states that received a C grade. No states received an A or B.⁶²

CIGARETTE EXCISE TAX: PROS AND CONS

Pros: There is a strong and well-established relationship between the price of cigarettes and the smoking rate, as evidenced by data provided in Appendix B. Higher cigarette price leads to less smoking among both youth and adults. Given that most people try their first cigarette by age 15, and nicotine addiction is usually established by age 18, it follows that reducing smoking in youth leads to fewer overall smokers. Presumably, many of these youth are insured through their parents' employers, thus affecting employer health costs. In addition, tobacco tax increases are a source of new state revenue.⁶³ New Mexico's collections from the state cigarette excise tax increased by \$42 million in FY11 due to the \$0.75 increase in the cigarette tax in 2010, according to the NM Taxation and Revenue Department.⁶⁴

Con: One consequence of high state cigarette tax rates has been increased smuggling, as criminals procure discounted packs from low-tax states to sell in high-tax states.⁶⁵ Smuggling takes many forms: counterfeit state tax stamps, counterfeit versions of legitimate brands, hijacked trucks, or officials turning a blind eye.⁶⁶ New Mexico ranks third nationally in states for cigarette smuggling. The consumption of smuggled cigarettes was 53% in 2011, up from 39.9% in 2006.⁶⁷

⁶¹ (U.S. Department of Health and Human Services, 2008)

⁶² (American Lung Association, 2013)

⁶³ (Campaign for Tobacco-Free Kids Homepage, 2013)

⁶⁴ (New Mexico Taxation and Revenue Department, 2011)

⁶⁵ (Drenkard, S; Henschman, J., 2013)

⁶⁶ (Drenkard, S, September)

⁶⁷ (LaFaive, M; Nesbit, T, 2013) (LaFaive, M, 2010) (Fleenor, P; LaFaive, M; Nesbit, T., 2008)

RECOMMENDATIONS

The Tobacco Use and Employer Costs Task Force developed a range of potential solutions for state lawmakers and employers. These options were developed after conscientious review of data and considerable discussion. Regarding the New Mexico Privacy Act, the task force developed three different options, each of which received different levels of support from the committee.

Many of these recommendations could also be adopted by sovereign tribal governments if they chose. This report will be shared with tribal governments for their consideration.

Legislative Policy

Recommendation	Pros/Cons	Level of Task Force Support
<p>1. Modify the New Mexico Privacy Act⁶⁸ to revoke protection of smoker's rights so that businesses can choose whether to hire smokers. (Option 1 re: privacy act)</p>	<p>Pros:</p> <ul style="list-style-type: none"> a. Reduces employer health insurance costs. b. Reduces exposure to second-hand smoke in the workplace. c. Spares co-workers, patients, customers, or others who come in contact with employees from experiencing the lingering cigarette smell on people who smoke. d. Potentially reduces smoking by employees (though there is insufficient data to know for sure). <p>Cons:</p> <ul style="list-style-type: none"> a. Insufficient data to know for sure if hiring/firing policies reduce tobacco use. b. Reduces an already limited field of employment opportunities in New Mexico, especially for those with low levels of education. c. Singles out tobacco users when obesity, alcohol addiction, and prescription drug addiction also carry high cost burdens. d. Potentially increases insurance costs to the state (by transferring people who would otherwise be insured through the workplace to the Medicaid rolls). e. Leads to problems regarding enforcement since nicotine tests can produce false positives.⁶⁹ f. If using other employees as smoking informants, workplace morale may be negatively affected. g. Potentially increases insurance costs for the unemployed smoker, who would have to pay the tobacco surcharge through the New Mexico Insurance Exchange. h. Potentially backfires on the goal of decreasing smoking, since unemployment is a major barrier to quitting smoking. 	42%
<p>2. Modify the New Mexico Employee Privacy Act so that certain sectors for which smoking is particularly inappropriate (e.g., healthcare and education) are allowed to choose whether to hire smokers. (Option 2 re: privacy act)</p>	<p>Pros:</p> <ul style="list-style-type: none"> a. All pros in recommendation 1. b. Eliminates problematic role modeling (i.e., teachers or healthcare workers smoking across the street from their workplace). <p>Con:</p> <ul style="list-style-type: none"> a. All cons in recommendation 1. 	50%

⁶⁸ Refer to Appendix A for text of the New Mexico Privacy Act.

⁶⁹ Note: It appears that other states that allow nicotine testing as a hiring condition have addressed the false positive issue by allowing applicants to request a second confirmatory test.

Recommendation	Pros/Cons	Level of Task Force Support
3. Modify the New Mexico Employee Privacy Act to allow employers to prohibit smoking off premises during work hours, including during breaks, meal times, and when employees are working off-site.⁷⁰ (Option 3 re: privacy act)	Pro: a. Potentially increases productivity by eliminating time away from work due to nicotine addiction (e.g., eliminating smoke breaks).	67%
4. Require all health insurance plans (including exchanges and self-insured plans) to include evidence-based⁷¹ comprehensive treatment for tobacco dependence in their benefit packages.	Pros: a. Increases access to tobacco cessation programs. b. Places burden of cost on health insurance companies rather than the state. Cons: a. Additional health benefit may increase the cost of insurance. b. Creates potential backlash against the state if insurance companies refuse to comply.	84%
5. Task the appropriate legislative committee to evaluate wellness programs, with a focus on smoking cessation programs. The committee should address three programs for large employers and three for small employers to assess best practices.	Pro: a. Establishes a data set for evidence-based practices, with specific emphasis on smoking, that work best in New Mexico. Con: a. Adds burden to state budget, one that could continue if initial data set is questioned or if future recommendations require greater data set.	94%

Funding and Tax Policy

Recommendation	Pros/Cons	Level of Task Force Support
6. Fund tobacco use prevention and cessation programs at the Centers for Disease Control recommended level (currently \$23.4 million)⁷² and use funds for tobacco cessation and prevention programs.⁷³	Pro: a. Employs proven strategy to decrease tobacco use in youths and adults, thus saving tobacco-related healthcare costs. ⁷⁴ Con: a. Negatively affects current state budget (particularly with the recent Master Settlement Act ruling).	82%
7. Reinstate tobacco cessation and prevention funding for collaborative work with Tribes and the NM Department of Indian Affairs.	Pros: a. Increases support of tribal communities to reduce nicotine addiction from tobacco use among their population. b. Contributes to overall health of New Mexicans. Con: a. Negatively affects current state budget.	84%

⁷⁰ The law currently allows employers to set smoking policies on their premises. Current law does not provide employers with any authority over employee behavior during working hours if the employee is off the premises.

⁷¹ An “evidence-based” approach calls on healthcare providers to recommend treatment based on data and the best available peer-reviewed documentation for what is proven to be most effective. Systematic reviews and guidelines for evidence-based practices are available for a number of medical specialties including tobacco cessation. (Centers for Disease Control and Prevention, 2012)

⁷² New Mexico’s fiscal year 2014 funding level is 32.7% of the CDC recommendation.

⁷³ Currently the Master Settlement Act funds tobacco control and a variety of health education programs.

⁷⁴ (Centers for Disease Control and Prevention, 2007, p. 9)

Recommendation	Pros/Cons	Level of Task Force Support
8. Increase state excise tax on cigarettes.	Pros: a. Employs a proven strategy to decrease smoking in youths and adults. ⁷⁵ b. Increases a reliable source of income for the state. Con: a. Potentially increases smuggling, as criminals procure discounted packs from low-tax states to sell in high-tax states. ⁷⁶	71%
9. Increase state excise tax on non-cigarette tobacco products (including electronic cigarettes).	Pros: a. Employs a proven strategy to decrease tobacco use. ⁷⁷ b. Increases a reliable source of income for the state. Cons: a. Potentially increases smuggling, as criminals procure discounted packs from low-tax states to sell in high-tax states. ⁷⁸ b. Penalizes use of non-cigarette tobacco products, which some studies indicate have less severe health consequences than cigarettes.	82%
10. Provide tax credit incentives to employers offering evidence-based tobacco cessation programs.	Pro: a. Increases access to cessation programs. Con: a. Negatively affects current state budget.	94%

Voluntary Employer or Insurer Actions

Recommendation	Pros/Cons	Level of Task Force Support
11. Encourage voluntary policies to expand smoke-free workplaces, including outdoor spaces.	Pros: a. Reduces impact of smoking on non-smokers. b. Assists smokers interested in quitting by reducing access to cigarettes.	100%
12. Encourage employers and unions to collaborate in efforts to decrease tobacco dependence.	Pro: a. Creates alliances that better assist employees who are genuinely trying to quit smoking. ⁷⁹	89%

Conclusion

Members of the Tobacco Use and Employer Cost Task Force worked thoughtfully and diligently to explore issues relevant to their charge outlined in Senate Memorial 22. They found, through the research they reviewed, that the issues and policy responses are complicated and controversial. Despite that complexity, concrete reforms were identified for consideration by the legislature and private sector.

⁷⁵ (Centers for Disease Control and Prevention, 2007, p. 25)

⁷⁶ (Drenkard, S; Henchman, J, 2013)

⁷⁷ (Institute of Medicine of the National Academies, 2007, p. 3)

⁷⁸ (Drenkard, S; Henchman, J, 2013)

⁷⁹ (Erickson, D; Jones, R; Mitchell, R; Weisman, S, 2009)

APPENDIX

APPENDIX A: Employee Privacy Act⁸⁰

Employee Privacy ARTICLE 11

50-11-1. Short title.

This act [50-11-1 to 50-11-6 NMSA 1978] may be cited as the "Employee Privacy Act". History: Laws 1991, ch. 244, § 1.

50-11-2. Definitions.

As used in the Employee Privacy Act [50-11-1 NMSA 1978]:

- A. "employee" means a person that performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, and includes a person employed by the state or a political subdivision of the state;
- B. "employer" means a person that has one or more employees and includes an agent of an employer and the state or a political subdivision of the state; and
- C. "person" means an individual, sole proprietorship, partnership, corporation, association or any other legal entity.

History: Laws 1991, ch. 244, § 2.

50-11-3. Employers; unlawful practices.

- A. It is unlawful for an employer to:
 - 1. refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or nonsmoker, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours; or
 - 2. require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours.
- B. The provisions of Subsection A of this section shall not be deemed to protect any activity that:
 - 1. materially threatens an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information or other proprietary interests; or
 - 2. relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer.

History: Laws 1991, ch. 244, § 3.

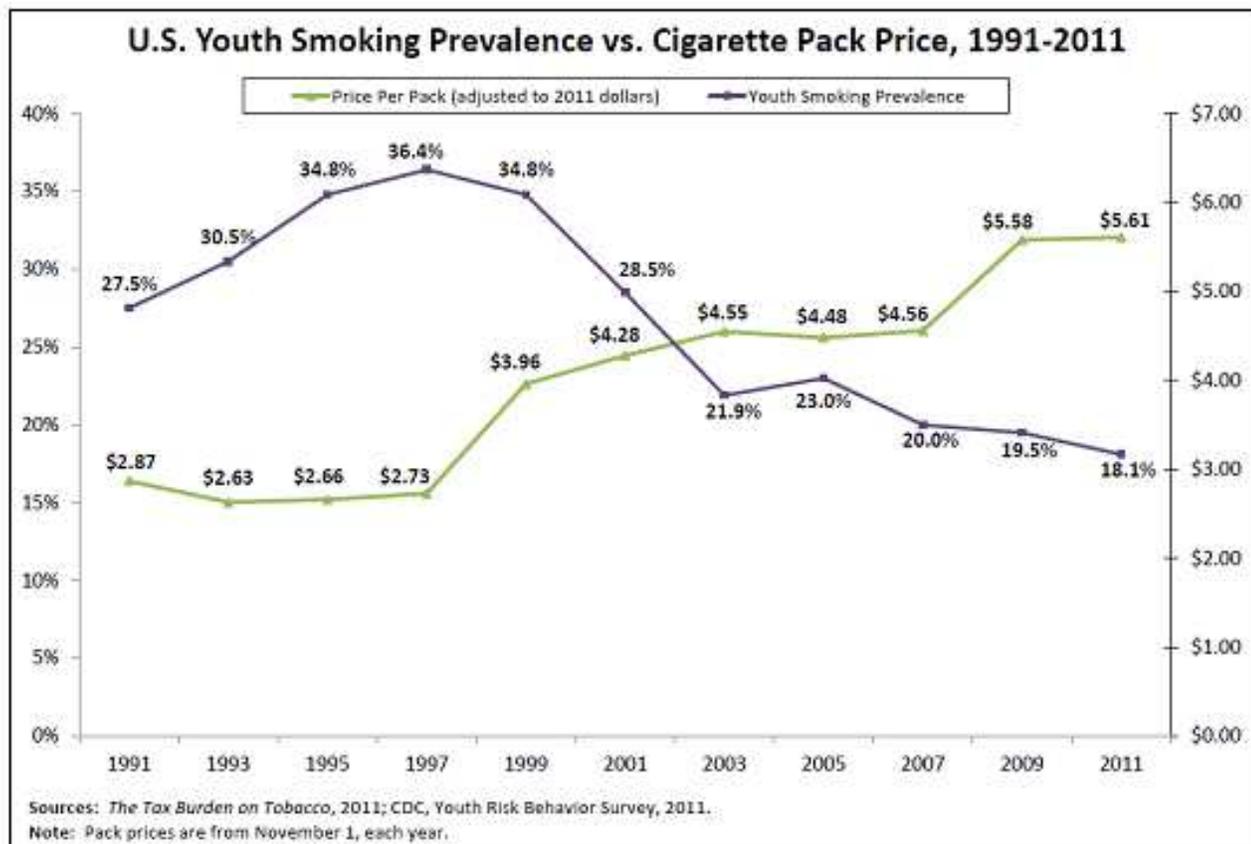
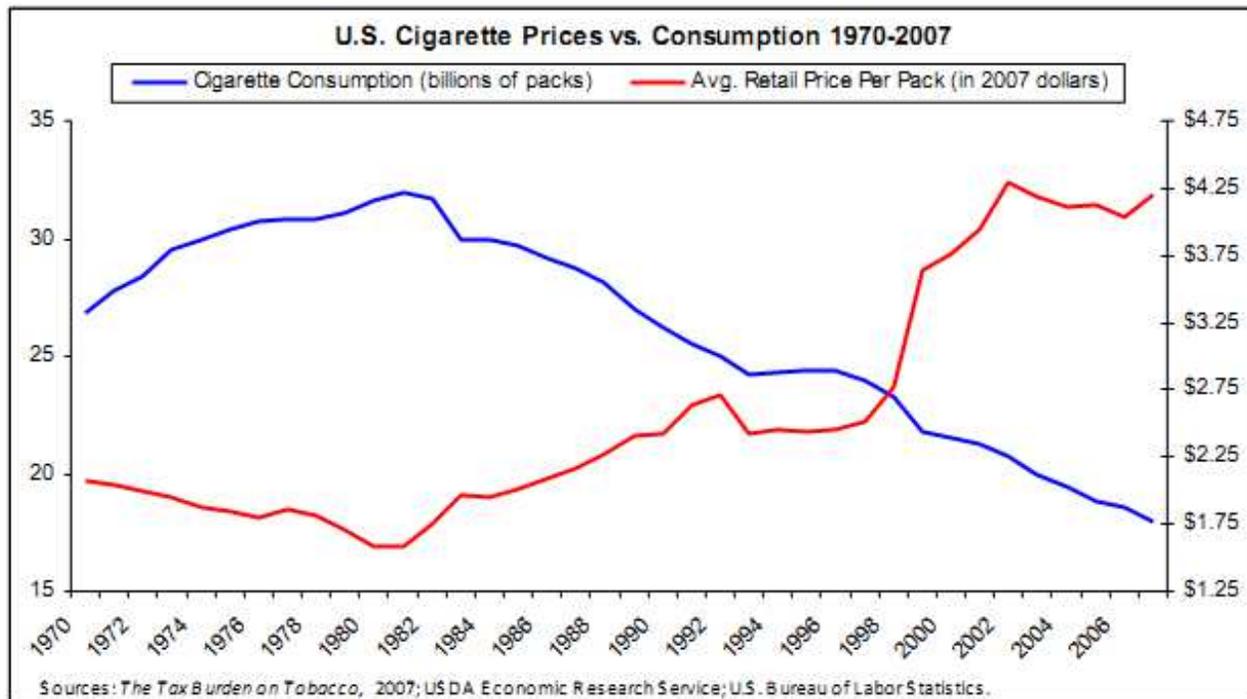
50-11-4. Remedies.

Any employee claiming to be aggrieved by any unlawful action of an employer pursuant to Section 3 [50-11-3 NMSA 1978] of the Employee Privacy Act may bring a civil suit for damages in any district court of competent jurisdiction. The employee may be awarded all wages and benefits due up to and including the date of the judgment.

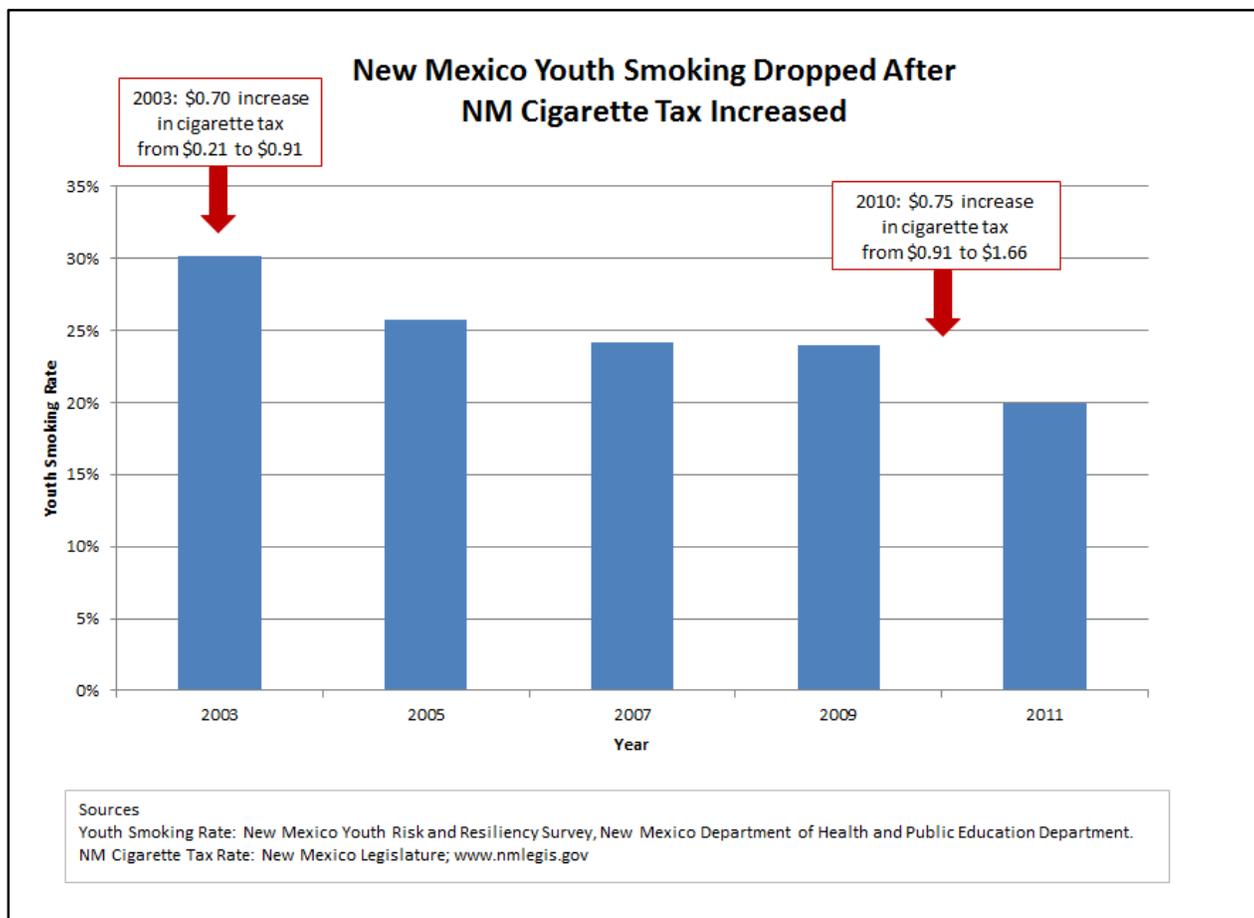
History: Laws 1991, ch. 244, § 4.

⁸⁰ (New Mexico Legislature, 1991)

APPENDIX B: Cigarette Excise Tax⁸¹



⁸¹ (Boonn, A, 2012, pp. 2-3)



Additional information on the correlation between cigarette price and smoking prevalence include the following:

1. Ending the Tobacco Problem: a Blueprint for the Nation. Institute of Medicine of the National Academies. (2007) Page 3. Report brief found at <http://www.iom.edu/~media/Files/Report%20Files/2007/Ending-the-Tobacco-Problem-A-Blueprint-for-the-Nation/Tobaccoreportbriefgeneral.pdf>
2. Recommendations Regarding Interventions to Reduce Tobacco Use and Exposure to Environmental Tobacco Smoke. American Journal of Preventive Medicine. 2001;20(2S)
3. 2012 Surgeon General's Report, Preventing Tobacco Use Among Youth and Young Adults.
4. Sustaining State Programs for Tobacco Control: Data Highlights. Centers for Disease Control and Prevention. 2006.
5. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.
6. Chaloupka FJ. "How Effective are Taxes in Reducing Tobacco Consumption?" Available at http://tigger.uic.edu/~fjc/Presentations/Papers/taxes_consump_rev.pdf.
7. Centers for Disease Control and Prevention. Consumption of Cigarettes and Combustible Tobacco – United States. 2000-2011. MMWR 2012; 61(30): 565-569.

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