

# Virtual Mentor

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## HEALTH LAW

### Practicing Preventive Medicine through Preventive Employment Practices

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As the cost of health insurance cuts deeper and deeper into company bottom lines, employers have taken a critical eye to employee health and its effect on health care costs. Wellness programs and exercise facilities have become standard as large corporations promote the health and wellness of their employees. Yet some employers have gone a step further, imposing strict policies that attempt to curb the off-duty smoking habits of their employees. These policies range from positive reinforcement with monthly bonuses to nonsmokers, to negative reinforcement, the most severe of which triggers the immediate termination of individuals known to smoke during work or nonworking hours. Employers point to effects on employee health and productivity to justify these policies.

Critics call these policies “lifestyle discrimination” and charge that they interfere in the private lives of employees and penalize them for participating in what is, after all, a lawful activity. Critics also employ a “slippery slope” argument, calling attention to the risk that allowing employers to consider smoking habits in their hiring and firing practices will serve as a gateway for considering such lifestyle factors as weight, alcohol consumption, and risky recreational activities. The concern is not unmerited; Alabama will soon become the first state in the nation to impose a surcharge on overweight workers who do not attempt to slim down [1]. Some states have responded by enacting policies that bar employers from making employment-related decisions based on an employee’s off-duty activities [2]. Nevertheless, off-duty smoking policies have withstood state and federal court challenges that have attempted to label them discrimination and violations of individual privacy rights.

### Economic and Health Threats of Tobacco

Tobacco use is tied to negative consequences on health and economy. Tobacco is unique in that it is the only legal consumer product that causes harm to those who use it as intended [3]. The World Health Organization (WHO) has called the tobacco epidemic a “global problem with serious consequences for public health,” in recognizing that “tobacco consumption and exposure to tobacco smoke cause death, disease, and disability” [4]. Despite widespread awareness of smoking, approximately 20 percent of the U.S. population continues to smoke [5].

Hundreds of billions of dollars are lost each year as a result of tobacco use [3]. Employers of smokers in the United States suffer a substantial loss of productivity attributable to smoking—an estimated \$92 billion annually [3, 5]. Loss of production costs arise due to an increase in absenteeism for smokers, as well as a greater use of

health care services for smokers younger than age 65 [5]. Health care costs borne by employers who subsidize employee health insurance plans are also increasing. In the United States, annual tobacco-related health care costs are estimated at between \$24 billion and \$81 billion [3, 6], as much as 40 percent higher than those for nonsmokers [5].

Costs for nonsmokers are also influenced by tobacco. Second-hand smoke exposure in the United States costs an estimated \$5 billion annually in direct medical costs and more than \$5 billion in indirect medical costs such as disability and lost wages [3]. As employer health care costs have risen—companies such as General Motors spend as much as \$5 billion annually on health care [7]—tension has inevitably escalated between employees' personal choices and the employer's bottom line.

### **Employer Consideration of Off-Duty Smoking**

It is undisputed that employers incur costs as a result of employing smokers. The attempts by employers to control costs by screening job applicants and implementing no-smoking policies that have received most attention are those that broaden workplace bans on smoking to off-duty smoking bans.

In 2005, Weyco, a Michigan-based insurance and medical-benefits company, implemented a policy that required its employees to maintain a tobacco-free status at all times or be subject to termination of employment [2, 5]. Employees were subjected to random breath tests for carbon monoxide, as well as confirmatory urine tests in the event of a positive breath test result [5]. Employees were given a 15-month grace period to quit smoking before the policy went into effect [2]. Weyco offered hypnosis, acupuncture, and other programs to assist with smoking cessation [2]. Fourteen out of 200 employees quit before the policy went into effect, and at least four employees have been terminated for refusing to take an antismoking test since the policy went into effect [2].

Scotts Miracle-Gro, an Ohio-based lawn-care company, made a similar effort to control health care costs after it experienced a 42 percent increase in its annual health care bill [8]. Scotts implemented a policy in October 2006 stating that on- and off-duty smoking would cost employees their jobs [2]. Employees, 25 percent of whom were smokers at the time [8], were given 1 year to quit smoking and offered assistance programs including free counseling, nicotine patches, and cessation classes [2]. To address the fact that half of its employees were overweight or morbidly obese, the company also opened an extensive fitness facility, instituted a wellness program, and improved the nutritional aspects of the food served in its cafeteria and vending machines [2].

Some employers have taken a less severe approach than Weyco's and Scotts' by charging higher insurance rates to employees who smoke or offering perks such as lower health insurance rates to employees who do not. Health insurer Humana, for example, offers a \$5 bonus per pay period to employees who indicate that they have not used tobacco in the past 12 months [2]. Gannett Company, Inc., publisher of the

*USA Today*, gives employees who smoke the option of enrolling in a company-funded cessation program or paying a \$50 monthly surcharge for health insurance [2]. Other employers such as PepsiCo and General Mills charge employees who smoke higher annual health insurance premiums [2].

Some public-sector employers follow similar practices. Alabama, Georgia, Kentucky, and West Virginia all impose a health insurance surcharge for government employees who smoke [2]. And the WHO has implemented a hiring policy that rejects applicants who smoke. These and the employment policies described above demonstrate the range of programs employers have enacted to control health insurance and other costs incurred as a result of employing smokers. These policies have not come without resistance.

### **Legal Challenges to Off-Duty Smoking Policies**

Employers have generally been successful in defending smoking policies in the face of lawsuits brought by disgruntled employees. Challenges to off-duty smoking policies rely on privacy considerations, alleging that employer regulation of leisure-time activities, such as smoking, constitutes an unlawful infringement on an individual's right to privacy. Smoking is not yet an interest protected by the privacy protections of the U.S. Constitution, however, and because nicotine addiction is not yet considered a disability protected by the Americans with Disabilities Act [9], company no-smoking policies have generally been upheld.

*Grusendorf v. City of Oklahoma City*. Brought before the Tenth Circuit Court of Appeals, this case challenged the constitutionality of a no-smoking rule imposed by the Oklahoma City Fire Department on its firefighter trainees [10]. A trainee was terminated for violating the department's no-smoking policy after he was caught smoking during a lunch break. The firefighter argued that the no-smoking rule required him to surrender his constitutional rights of liberty and privacy. The Tenth Circuit Court found that the rule did not infringe upon a federal constitutional right to privacy.

The court considered whether the right to smoke was a fundamental right subject to heightened constitutional protection. While holding that smoking was distinguishable from recognized fundamental rights such as marriage, procreation, contraception, family relationships, child rearing, and education, the court acknowledged that the list of fundamental rights is not absolute and that, in the future, currently unprotected rights might be given the added strength of constitutional protection. Nonetheless, the court did not use the case as an opportunity to add smoking to the list of rights protected by the Constitution's right to privacy.

While holding that the no-smoking regulation did infringe upon the liberty interest of the firefighter trainees, the court recognized that "governments have interests sufficient to justify comprehensive and substantial restrictions upon the freedoms of their employees that go beyond the restrictions they might impose upon the rest of the citizenry" [11]. For a restriction of this type to be overturned, its challengers

must demonstrate that the regulation is so irrational as to be branded arbitrary and therefore a deprivation of liberty. Conversely, the government must offer a sufficiently rational justification for the regulation to outweigh the challenger's claim.

The Tenth Circuit Court found a rational connection between the no-smoking regulation and the promotion of health and safety of the firefighter trainees. In supporting its decision, the court cited the Surgeon General's warning on every box of cigarettes sold in the United States, as well as the good health and physical conditioning essential for performance of firefighters' duty. Ultimately the court upheld the no-smoking regulation as a valid and enforceable rule not in violation of the of the firefighter's liberty and privacy interests under the Fourteenth Amendment.

*City of North Miami v. Kurtz*. In this case, the Supreme Court of Florida considered a challenge to the constitutionality of a regulation that required government job applicants to sign affidavits stating that they had not used tobacco during the preceding year as a precondition of having their applications considered [12]. The policy represented the city's attempt to reduce costs and increase productivity by eventually eliminating a substantial number of smokers from the workforce. Evidence presented at trial—such as the estimate that the city incurred more than \$4,000 per year in additional costs for every employee who smoked—indicated that the city's regulation would accomplish its stated goals. The court held that the Florida state constitution did not provide a right of privacy regarding their smoking habits to applicants seeking government employment.

Florida's state constitution provides for a right of privacy that protects Florida's citizens from the government's uninvited observation of or interference in areas of activity that fall within the provision's zone of privacy. The court examined the privacy provision under a strict "compelling state interest" standard and took a four-step approach to the challenge, asking: (1) Was the action performed by the government? (2) Did the individual have a legitimate expectation of privacy? (3) If yes, did the state have a compelling interest to justify its intrusion? (4) If yes, did the state use the least-intrusive means to accomplish that goal?

The court found the answer to the first question to be affirmative; when Kurtz applied for a job as a typist with the city, the applicant was asked to sign a no-smoking affidavit. But the court answered the second question in the negative, reasoning that in today's society smokers are constantly required to reveal whether they smoke. The court used car rental, hotel reservations, and restaurant seating as examples of situations in which smoking preference is revealed. Since the answer to this question was "no," the court did not continue with questions 3 and 4.

Given that the Florida constitution does not guarantee a reasonable right of privacy in revealing whether an applicant for a government position is a smoker, the court

moved on to address whether the Florida statute violated the right of privacy under the U.S. Constitution. The court held that the right to smoke was not included in the Constitution's implicit privacy provisions. It then distinguished the right to smoke from fundamental rights, such as marriage, procreation, contraception, family relationships, and the rearing and education of children.

Moreover, the court commented that, even if it found that a protected interest existed under the Constitution, the city's regulation would still pass the "rational basis" test. The city had a legitimate and compelling interest in attempting to increase productivity and reduce health insurance costs—it was a self-insured employer that paid all of its employees' medical expenses. The court found that the city's policy gradually eliminated employees from the workforce through attrition and restricted hiring, rather than by preventing current employees from smoking or affecting the present health care benefits of employees. During its discussion of the constitutionality of Florida's statute, the court noted the existence of a compelling interest accomplished by minimally intrusive means, thus providing answers to questions 3 and 4 above. In the end, the court found that the city had a rational basis for the regulation, given the cost savings of the city in refusing to hire smokers.

Note that *Kurtz* did not address the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking. The same can also be said for *Grusendorf* since it can be assumed that applicants for firefighting positions who refused to sign the affidavit of compliance would not have been hired by the city. More importantly, neither *Grusendorf* nor *Kurtz* discussed the legality of no-smoking policies implemented by non-governmental employers. *Rodrigues v. Scotts Miracle-Gro* [13] is currently working its way through the Massachusetts federal court system. *Rodrigues*, which has withstood a motion to dismiss, challenges the legality of Scotts Miracle-Gro's above-described policy against employing smokers.

### **Conclusion**

Employers face billions of dollars in lost revenues due to decreased productivity and increased health costs incurred by smoking employees. Their attempts to control costs through management of employee health are sure to rise in number as a result. Quite possibly employers will focus next on obesity prevention through wellness programs and preventive hiring practices. For the time being, however, antismoking policies have gained support through federal and state courts in states that have not implemented "lifestyle discrimination" statutes that ban such policies.

Given the wealth of information on the health risks and correlative financial effects of smoking, in addition to the adoption of no-smoking policies by organizations such as the WHO, it is not surprising that no-smoking policies have been upheld by courts confronted with the topic. But have employers reached too far into the personal lives of their employees? Is it ethical to allow employers to consider legal off-duty behavior in their hiring and firing practices? If so, where will the line be drawn? Until the day that smoking gains status as a protected behavior or disability covered by the Americans with Disabilities Act, it is likely that current trends toward

adoption of no-smoking policies will continue, with severe employment consequences for smokers.

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