

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012

PHILADELPHIA, FRIDAY, MAY 11, 2012

VOL 245 • NO. 92

An **ALM** Publication

EMPLOYMENT LAW

Banning Smokers May Harm Your Company's Health

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Special to the Legal

Companies have been attracting a lot of headlines lately by adopting new policies that prohibit the hiring of smokers. Proponents of these policies recite a number of benefits for the organization and the workforce, including promoting employee health, lowering health insurance costs and improving employee productivity.

Among the employers adopting these policies have been Humana, Geisinger Health System, Alaska Airlines and Union-Pacific Railroad. An estimated 6,000 companies across the country refuse to hire smokers.

As a labor and employment lawyer who primarily represents employers, I have no desire to limit the rights of companies to manage and control their workforces. With the exception of employment in states that ban discrimination against smokers (such as New Jersey), employers are entitled under the law to choose not to hire smokers. And for many employers, especially those in health care, banning smokers is consistent with their missions and makes a lot of sense.

Nevertheless, for a variety of reasons set forth below, a “no smokers” rule may be a terrible business decision for many companies and may create a variety of unintended and undesirable consequences. Perhaps most disturbing, such a policy takes



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the unprecedented step, for most employers, of regulating lawful, off-duty conduct by workers.

Listed below are my top 10 reasons why employers should stop and think before jumping on the bandwagon to adopt a “smokers need not apply” rule:

1. The slippery, smoky slope. If employers decide to exclude employees who smoke at home, what is next? Banning those who drink alcohol, eat fast food, gamble or ride motorcycles? Does anyone really want to have to explain to a fit, 35-year-old sales vice president with excellent productivity — or his boss — why he is being fired for his weekend smoking habit, while the obese alcoholic is allowed to stay on? Wouldn't it be simpler, and make more sense for all involved, to focus on how well the employee does his or her job, as opposed to what legal lifestyle choices he or she makes outside of work?

2. No Einsteins — constricting the candidate pool. About 25 percent of adults in the United States are smokers. This policy eliminates all

such smokers from the candidate pool, statistically guaranteeing that your company will not be able to hire the best candidate for the job one out of every four times. To think about it in another way, such policies would have excluded the following luminaries in science, government, art and industry: Albert Einstein, Sigmund Freud, Winston Churchill and Franklin D. Roosevelt, just to name a few. Our world would be a lesser place without their contributions.

3. Enforcement concerns. If an employer adopts a “no smokers” policy, then it should plan on enforcing it. This is a logistical challenge that should not be overlooked. Some employers have adopted random screening of blood or urine to detect tobacco use. Others require regular sworn oaths. Does your company really want to become Big Brother? And what if the employee lives with a chain smoker and inhales secondhand smoke every day, and thus tests positive? Is he or she in violation of the policy? What about the CEO who has a cigar at his brother's wedding and is photographed with the stogie in the local press? Must he be disciplined for violating the policy? These are headaches and dilemmas that most employers want to avoid, not voluntarily foist upon themselves.

4. Butt out — privacy concerns and claims. Plaintiffs class action lawyers are starting to circle and collect employee complaints about these

policies. They allege that requiring employees to disclose whether they engage in lawful activity, like smoking, inside of their homes and outside of the workplace is an unlawful invasion of privacy (or “intrusion on seclusion” under some state laws). No such claim has prevailed yet, to my knowledge, but there certainly is a plausible argument that such policies unduly intrude on employee privacy, especially when employers start testing urine and blood or spying on employees to determine if they are smoking off-duty. In any event, employers that adopt such policies should be warned of the possibility of such lawsuits.

5. It’s illegal in most states. Currently, 29 states, including New Jersey, prohibit employment discrimination against smokers. Any multistate employer that adopts a policy restricting employment rights of smokers will have to exempt employees in some states but not others, creating unequal policies for workers, depending on work location. Moreover, companies that adopt such policies will have to pay their lawyers to check the law constantly in all applicable states to keep up with new developments or risk violating the law and employee rights.

6. Premium differentials can address health insurance costs. One of the best arguments for workplace bans on smokers is that smokers are, on average, less healthy than nonsmokers, leading to increased health insurance costs and premiums. Smokers have 18 percent higher health care costs, according to the Centers for Disease Control and Prevention. Yet there is a much simpler, more direct and less draconian way to deal with this cost issue — charge higher health insurance premiums for smokers so that they pay for their own risky behavior. This is the solution used by hundreds of prominent companies, including PepsiCo, Macy’s

and Gannett, which charge smokers higher health insurance premiums based on the higher costs associated with smoking.

7. Take positive steps to promote employee health. Related to the previous point, companies that are

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concerned about the health of their employees should not just toss smokers to the curb. If employers really want to make their employees healthier, there are many ways to incentivize healthier lifestyles in positive ways, including offering programs to quit smoking, bonuses and discounts for active gym memberships, and the fostering of employee affinity groups that promote healthy activities such as walking, bicycling, running or hiking. Such efforts build employee loyalty and health without the negativity associated with a ban on smokers.

8. Most Americans oppose these policies. Surveys repeatedly confirm that the vast majority of Americans oppose workplace prohibitions against hiring smokers. According to a Harris poll released in March, 65 percent of Americans oppose employer policies against hiring smokers, with 34 percent being strongly opposed. As such, companies that adopt and publicize such policies are alienating the majority of Americans — their customers and their potential employees, including nonsmokers. That being said, one can assume the public would understand and support such a policy from health care providers, especially those that deal with the often-deadly effects of smoking, such as those involved in providing heart and lung health care.

In any event, deciding whether to adopt such a policy should include a discussion with the company’s public relations and marketing functions.

9. Ban smoking breaks, not smokers. Nothing in the law requires employers to provide smoking breaks to employees. Therefore, if the issue is the alleged loss of productivity due to excessive smoking breaks, employers should require that smokers live by the same rules as nonsmokers, and limit or eliminate breaks for smoking. Employees can be required to take their smoke breaks during meal periods or other general breaks, limit the length of breaks, or whatever other restrictions the employer chooses. This focuses on the important issue — workplace productivity — as opposed to the employee’s status as a smoker.

10. These policies hit the poor hardest. Tobacco use is highest among low-income workers. As a result, when an employer adopts a “no smokers” policy, it has a disparate impact on the janitors and secretaries, not the surgeons and executives. •