

## Snuffing Out Employee Tobacco Use: The Trend Towards No-Nicotine Hiring Policies

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Policies prohibiting employees from smoking while on duty are widespread, but a developing trend represents even stricter regulation of employee smoking habits. An increasing number of employers are considering no-nicotine hiring policies, raising the question of the extent to which employers may influence employee lifestyle choices when those choices spill over to the workplace.

In an era of ever-increasing health-care costs, it is not surprising that employers are seeking new ways to

limit the impact of employee health benefits. Smoking, as the leading factor in controllable healthcare expenses, is a logical target. According to Action on Smoking and Health, an antismoking group in Washington, D.C., each smoker costs his employer an average of \$12,000 a year in health- and disability-related costs. In addition to the expense of associated health benefits, smokers comprise a less efficient workforce. The average smoker takes four 15-minute smoking breaks during the work

day and experiences twice as many illness-related absences from work as his typical non-smoking colleague. Finally, many employers, particularly in the healthcare industry, seek to promote wholesome lifestyle choices and to provide healthy work environments for their staff and customers.

For these reasons, many employers have decided to implement strict no-smoking policies, including no-nicotine hiring practices. This trend has spawned fierce debate over the question of whether such hiring policies are legal – or “fair.”

In fact, many states have enacted legislation specifically prohibiting employers from discriminating against employees on the basis of lawful off-duty activities such as tobacco use. Washington, however, is one of the minority states without a statute to that effect, opening the door to those Washington employers seeking to exclude tobacco users from their hiring pools.

Even in states like Washington where no statute expressly prohibits employers from prohibiting off-duty tobacco use, opponents argue that no-tobacco policies infringe

on employees' privacy by regulating activities outside the workplace. Some argue that employers may begin screening job applicants who engage in other risky (yet legal) off-duty activities, such as over-eating, drinking alcohol, or pursuing high-risk hobbies such as rock-climbing.

However, the courts have thus far rejected the argument that an employer's implementation of no-nicotine policies unlawfully infringes upon applicants' privacy. For example, the Florida Supreme Court dismissed the claim that its state's constitution provides job applicants with a privacy right regarding their smoking habits, noting that there is no reasonable expectation that an individual's status as a smoker will not be publicly revealed in almost every aspect of his life. Courts have likewise

dismissed claims that smokers enjoy a fundamental, constitutional "right to smoke."

Not yet tested before the courts is the claim that refusal to hire an applicant because of tobacco use violates the Americans with Disabilities Act, as Amended ("ADAAA"). In the few cases where lower-level courts have examined the question of whether nicotine addiction constitutes a "disability" under the prior version of the Act and as applied to current employees, that argument has been soundly rejected. As one court articulated: "Congress could not possibly have intended the absurd result of including smoking with the definition of disability, which would render 'disabled' somewhere between 25-30% of the American public." *Brashear v. Simms*, 138 F.Supp.2d 693, 693-94 (D.Md.

2001). The ADAAA, enacted in late 2008, broadened the definition of a "disability" under the Act, and the new definition's application to no-tobacco hiring policies is an untested area of the law. While it is unlikely such practices would be deemed to violate the Act, it is a risk regarding which employers contemplating this type of policy should be aware.

Additionally, employers considering a no-tobacco policy with respect to current employees should be cognizant of the potential pitfalls under the Health Insurance Portability and Accountability Act ("HIPAA") and the Employment Retirement Income Security Act ("ERISA"). HIPAA prohibits health plans from discriminating against a participant on the basis of a health factor, including health status due to tobacco use. ERISA

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prohibits employers from disciplining or dismissing a participant in order to interfere with the individual's attainment of a right to which he is entitled under an ERISA plan; this can encompass dismissal of an employee due to high healthcare costs associated with smoking.

No-nicotine hiring policies are a fairly new trend, presenting certain untried areas of the law. But as an increasing number of employers have determined, such policies, when implemented cautiously and correctly, can provide an effective tool for employers hoping to significantly improve the health and

efficiency of their workforce.

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