

Blog Post

Can Employers Refuse to Hire Smokers?

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Are smokers in a protected class? Can a company refuse to hire them? After all, studies have repeatedly shown that smokers have higher absenteeism, are less productive and carry higher healthcare costs than non-smokers.

Not so fast. While smokers are not a protected class under federal anti-discrimination laws, statutes in more than half the states and the District of Columbia would potentially prohibit implementation of a policy against hiring smokers.

Bans on workplace smoking are nothing new. In 1986 two studies linked exposure to second-hand smoke to lung cancer and respiratory illnesses. At that point, complete bans on workplace smoking were rare, but by 2010, dozens of laws prohibited smoking in indoor workplaces. By 2012, a number of hospitals, universities and other businesses had taken the next step and instituted no-nicotine hiring policies.

It's easy to understand why. In addition to the desire to protect co-workers from harmful second-hand smoke, a number of studies have come out showing that smokers cost companies substantially more a year more than their non-smoking co-workers. A 2013 Ohio State University study put that price tag at about \$6000 a year – no doubt higher now – the bulk of which was from lower productivity lost due to smoking breaks.

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On top of that, studies showed that smokers were absent more often, had an increased risk of short-term illness, and a higher risk of developing chronic illness, resulting in even more missed days and significantly higher health care costs. There was also a negative impact on employee morale, where non-smoking colleagues perceived that smokers abused their breaks and didn't share equally in the workload.

No wonder many employers wanted to stop hiring smokers.

But it's complicated.

While smokers are not a protected class under federal anti-discrimination laws, state law varies. Employers considering implementing a ban on hiring smokers should carefully review the statutes that apply to their workforce and seek legal counsel if needed, as there are significant differences between the statutes.

Right now, 29 states and the District of Columbia have laws which provide smokers some level of protection. Many prevent employers from employment discrimination based on lawful, off-duty conduct, which would include smoking cigarettes. In these states, while an employer cannot refuse to hire an employee solely because the employee is a smoker, there may be exceptions. For example, some of the statutes only apply to employers with a certain number of employees, or to public employers. Many statutes also have exemptions where smoking would pose a safety risk to the employee or the workplace (*e.g.*, volatile chemicals on the premises), where there is a bona fide occupational requirement or qualification that would justify a ban (*e.g.*, employees who need to be physically fit to do their job), or where there is a rational basis for a ban. To this end, some statutes also specifically exempt certain professions such as firefighters or police officers. In addition, some statutes have exemptions for religious or non-profit

organizations if smoking is incompatible with the purpose of objective of the organization (*e.g.*, a non-profit related to lung cancer.) Still other statutes recognize carve-outs if smoking is covered by a collective bargaining agreement.

As yet, we have seen no reported decision in which an employee has successfully argued that the Americans with Disabilities Act bars discrimination against a smoker. At least one court has held that regardless of whether referred to as “nicotine addiction” or not, “smoking is not a disability within the meaning of the ADA.”

In the meantime, employers should ensure their workplace policies ban smoking – including e-cigarettes (“vaping”) – on the premises, and take steps to encourage smokers to quit. In light of the maze of workplace laws to be navigated with an outright ban, one alternative would be to implement a smoking cessation program. Such a program can be designed to help employees quit smoking if they want to through, among other things, nicotine-replacement therapy, counseling and smoking cessation initiatives.

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