

Where There's Smoke, You're Fired!

Employer Health Care Costs, Unhealthy Behaviors, and Employee Rights

Issues Summary

Can a private employer legally charge higher premiums to smokers?

Yes, within limits established by the Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, an employer cannot require employees to pay more for company health insurance because of certain "health factors." Nicotine addiction is considered a health factor. Companies may, however, qualify for the "wellness program exception." The wellness program exception allows employers to charge premium differentials as part of an overall "wellness program." To meet the criteria for exemption, employers must meet the following conditions:¹

1. Employers will only be able to add a premium surcharge of up to twenty percent of the total cost of employee-only coverage;
2. The wellness program will have to be reasonably designed to promote good health or prevent disease;
3. The wellness program will have to allow any employee for whom it is unreasonably difficult to quit tobacco use to satisfy a reasonable alternative to quitting (e.g., smoking cessation classes, counseling sessions, pharmacotherapy); and
4. All health insurance plan materials describing the wellness program will have to disclose the availability of the reasonable alternative to quitting.

Why are wellness and health promotion programs, including smoking cessation, becoming more popular among employers?

Smoking and other lifestyle choices play a role in the development and management of some chronic health conditions (e.g., hypertension, heart disease, lung disease, lung cancer, obesity). Such conditions contribute heavily to the cost of health care and result in higher health insurance premiums. While the average rate of growth of health insurance premiums across all employers declined for the second year in a row in 2005, the 9.2 percent rate of increase outpaced inflation (3.5 percent) and wage growth (2.7 percent).² If health care costs continue to rise, employers offering health care benefits will find it more and more difficult to stay in business.

Wellness and health promotion programs, including smoking cessation, are one way to try to rein in health care costs. Encouraging employees to adopt healthier lifestyle behaviors can prevent the development or worsening of chronic health conditions.

What types of laws have been adopted to address workplace discrimination for lifestyle choices, including smoking? How many states have adopted such laws?

Laws addressing workplace discrimination for lifestyle choices vary according to the scope of protection offered.

Examples of such laws, in order of increasing protection, are as follows:³

- Make it illegal for employers to make hiring or firing decisions based on off-duty smoking by workers or applicants;
- Prohibit discrimination against employees and applicants on the basis of off-duty use of all legal substances;
- Prohibit discrimination against employees and applicants on the basis of on *any* legal, off-duty behavior; and
- Prohibit discrimination against employees and applicants on the basis of anything not related to job performance.

Thirty states and the District of Columbia have made it illegal for employers to make employment decisions based on off-duty smoking; 13 of these laws go further to prohibit discrimination on the basis of off-duty use of legal substances or products.⁴

There are two states—California and Connecticut—that prohibit discrimination on the basis of *all* legal behavior.⁵

Two states—New York and Connecticut—specify additional activities that are protected as grounds for employment decisions. For example, New York prohibits discrimination on the basis of political activities, recreational activities, and union activities. Connecticut bans discrimination on the basis of involvement in different judicial or other legal proceedings, such as seeking a restraining order.⁶

No states require an absolute connection between the conduct considered and job performance.⁷

Should an employer have the right to take adverse employment actions against employees or applicants who smoke, even during non-work hours?

	YES	NO
	<p><i>“Management is facing tough decisions with regard to controlling [health] costs. You really have two choices: make everyone share more of the cost burden, or use your legal right to go after those who are demonstrably reckless with their health. Since a small minority uses the majority of health-care resources, they need to be held accountable for their actions.”</i></p> <p>- Uwe Reinhardt, professor of economics & public affairs at Princeton University⁸</p>	<p><i>“Once you cross the line and allow employers to control any type of behavior that’s not related to job performance, there’s no limit to the harm that can and will be done.”</i></p> <p>- Lewis Maltby, President of the National Workrights Institute⁹</p>
Financial Concerns	<ul style="list-style-type: none"> • Businesses lose \$3,400 per year for every employee who smokes. • Smokers average 6.16 missed days of work per year due to illness compared to 3.86 days for non-smokers.¹⁰ • Employees who smoke have almost twice as much lost production time per week as non-smokers.¹¹ • Businesses average \$2,189 in workers’ compensation costs for smokers compared to \$176 for non-smoking employees.¹² • Employees who smoke cost more to insure. 	<ul style="list-style-type: none"> • A company pays their employees for what they do during working hours and should not impose upon what they do outside those hours. • If it becomes acceptable to deny employment to smokers, some workers will not be able to provide for themselves and their dependents.¹³
Privacy Rights	<ul style="list-style-type: none"> • To address privacy concerns, companies often contract with an external vendor to gather and store employee health-risk information – information that is not available to employers in a way that would identify specific employees.¹⁴ 	<ul style="list-style-type: none"> • Wellness and health promotion programs, including smoking cessation, pose a threat to employees’ privacy because they require the collection and storage of personal health and lifestyle behavior information. • It violates the personal freedom of employees to indulge in whatever habits they choose during their off-hours. • The testing policy restricts all of an employee’s recreational activities. Will employees have to avoid smoky restaurants and bars for fear of second-hand smoke? What about workers who live with others who smoke?
Legal Issues	<ul style="list-style-type: none"> • Ohio law provides for “employment at-will.” In the absence of a specific law or contract to the contrary (e.g., federal law that prohibits basing employment decisions on race, ethnicity, religion, gender, disability, or age), a private employer may set all terms of hiring and firing and may terminate an employee at their discretion.¹⁵ • Ohio has not adopted a right-to-smoke law. Therefore, smoking is not a legally protected right in Ohio. Ohio’s employers are free to base hiring and firing decisions on whether or not an employee or applicant smokes.¹⁶ • No court has ever found that smoking is included in the right to privacy under the U.S. Constitution.¹⁷ • Courts have consistently rejected claims that the right to smoke is legally protected under the Americans with Disabilities Act or the Equal Protection Clause of the 14th Amendment.¹⁸ 	<ul style="list-style-type: none"> • Many states have passed so-called right-to-smoke laws, making it illegal for employers to discriminate against smokers in employment or hiring decisions.¹⁹ • Most right-to-smoke laws retain an employer’s right to charge smokers a higher rate for medical insurance. • Unlike illegal drug use, smoking cigarettes is a legal habit.

Should an employer have the right to take adverse employment actions against employees or applicants who smoke, even during non-work hours? (continued)

	YES	NO
“Slippery Slope” Argument	<ul style="list-style-type: none"> • Wellness and health promotion programs that go beyond smoking cessation to include the encouragement of other healthier lifestyle behaviors show a positive impact on employee health status, employee morale, medical care costs, and business efficiency measures such as absenteeism.²⁰ • Health experts predict that health-improvement initiatives will begin to pay off in the near future. A study by Mercer found that a comprehensive program to promote a healthy lifestyle could reduce health care costs by as much as 3 to 5 percent.²¹ 	<ul style="list-style-type: none"> • Some states have passed laws that prohibit discrimination based on any legal, off-duty behavior.²² • The only difference between smoking and other less healthy or risky behaviors (e.g., unhealthy eating habits, tanning, not wearing a seat belt, jaywalking, sky-diving) is the ability to test for it. • If it becomes acceptable to deny employment to workers with potentially higher health care costs, some workers will be banned from employment and not be able to provide for themselves and their dependents.²³

Policy Questions to Consider

1) Should Ohio lawmakers consider adopting a statute that prohibits employers from hiring or firing workers on the basis of smoking?

If so, should Ohio lawmakers consider expanding that protection to include workplace discrimination on the basis of other lifestyle choices or behaviors?

If so, what would be the test to determine which lifestyle behaviors and choices qualify for protection?

2) If workplace discrimination protections extended to lifestyle behaviors, what would be the opportunities for countering urine tests and the like?

3) Should employers be able to charge higher health insurance premiums to smokers and others engaging in risky or unhealthy lifestyle behaviors? If so, for which behaviors should this be allowed?

4) What, if any, responsibility should the state government and local communities have for providing smoking cessation services to employees who are fired from their jobs and who want to quit but were not offered a cessation program through the employer?

Endnotes

¹ Tobacco Public Policy Center at Capital University Law School. An Ohio Employer’s Guide to Reducing Expenses Associated with Employee Tobacco Use. October 6, 2005. Available at <http://www.law.capital.edu/Tobacco/TobaccoInTheWorkplace/EmployerFactSheet.pdf>. (Accessed 3/28/06).

² The Kaiser Family Foundation (KFF) and the Health Research and Educational Trust (HRET) (2004). *Employer Health Benefits: 2005 Annual Survey Summary of Findings*. Available at <http://www.kff.org/insurance/7315/index.cfm>. (Accessed 3/3/06).

³ National Workrights Institute. Lifestyle Discrimination: Employer Control of Legal Off-Duty Employee Activities. Available at http://www.workrights.org/issue_lifestyle/ldbrie2.pdf. (Accessed 3/28/06)

⁴ Gruber, J. National Workrights Institute. Email correspondence April 7, 2006.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Hennessy, M. Putting a Premium on Health. Employers are giving workers a new reason to get in shape: cash. *CFO Magazine*, February 15, 2006. Available at http://www.cfo.com/article.cfm/5491075/c_5514415?f=magazine_alsoinside. (Accessed 3/28/06).

⁹ Peters, J. Company’s Smoking Ban Means Off-Hours, Too. *The New York Times on the Web*. February 8, 2005. Available at http://www.workrights.org/in_the_news/in_the_news_nytimes2-08-05.html. (Accessed 3/28/06).

¹⁰ Tobacco Public Policy Center at Capital University Law School. Business Costs Associated with Tobacco Use. October 6, 2005. Available at <http://www.law.capital.edu/Tobacco/TobaccoInTheWorkplace/BusinessCostsFactSheet.pdf>. (Accessed 3/28/06).

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Hennessy (2006).

¹⁵ Tobacco Public Policy Center at Capital University Law School. The Legal Ability to Mandate a Smoke-Free Workforce. February 2, 2006. Available at <http://www.law.capital.edu/Tobacco/TobaccoInTheWorkplace/Scotts.pdf>. (Accessed 3/28/06).

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Christensen, R. Employment-Based Health Promotion and Wellness Programs. *Employee Benefit Research Institute Notes*. July 2001, Vol. 22, Number 7.

²¹ Hennessy (2006).

²² The National Workrights Institute.

²³ Ibid.

About the Health Policy Institute of Ohio

The Health Policy Institute of Ohio is an independent, nonpartisan, statewide center that informs Ohio health policy by forecasting health trends, analyzing key health issues, and communicating current research to policymakers, state agencies and other decision-makers. The following foundations provide core funding to the Institute:

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