

EMPLOYER REGULATION OF OFF-DUTY SMOKING: MEETING THE NEEDS OF EMPLOYERS AND EMPLOYEES WITH SMOKING CESSATION PROGRAMS

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ABSTRACT

While attempting to reduce costs stemming from debilitating health conditions of their employees, many employers have implemented policies regulating off-duty smoking. Consequently, a majority of the states have passed laws which protect the smoker's right to be free from discrimination. These laws are unsatisfactory due to their uncertain reach and their elevation of smokers to the status of a protected class. Also, employers must have some freedom to strive toward reducing the costs they bear as a result of their employees' smoking habits. However, a tension exists between the needs of employers and the privacy expectations of individuals. Invasive off-duty smoking policies may negatively affect employee attitudes, loyalty, and performance. Smoking cessation programs are a less intrusive means to achieve employers' legitimate goals.

As American companies have confronted increasing competitive pressures and sought means to operate in a lean and efficient manner, many have implemented employee policies geared toward cost reduction. Because health care costs are rising rapidly, some companies have endeavored to alter those behaviors of their employees that contribute to debilitating and costly health conditions. Cigarette smoking is the primary preventable cause of illness and premature death in this country [1, p. 43] and is consequently an employee behavior that most employers would desire to modify. Some organizations have actually adopted policies that either prohibit their employees from smoking on and off the job or preclude the hiring of smokers.

Partially as a response to employer policies prohibiting off-duty smoking, twenty-seven states have passed laws which protect the smoker's right to be free

from discrimination in private sector employment. Although these laws protect employees from the privacy intrusion that occurs when their employers regulate their off-duty behavior, the laws have drawbacks. The strongest argument in opposition to smokers' rights laws is that they elevate smokers to the status of a protected class. Unlike the immutable characteristics and attached stigma of other protected classes, smoking is a discretionary activity harmful to societal interests and without a history of stigma. Due to the problems inherent in the smokers' rights laws, the burgeoning state legislation in this area is ill-advised.

The stated need to eliminate state smokers' rights laws as they presently exist does not, however, mean employer policies prohibiting off-duty smoking should be sanctioned. A tension exists between the privacy expectations of individuals in today's society and the legitimate needs and concerns of employers. The proper balance that must be struck will vary among organizations, depending on their purpose, management philosophy, and employee composition. Workplace smoking cessation programs may be an appropriate, creative, and nonintrusive means for many employers to achieve their legitimate goals while improving the health of their work force and society in general.

This article first discusses the costly impact of smoking and society and American businesses. Second, it describes typical company policies prohibiting off-duty smoking. Third, the article reviews the general provisions of state smokers' rights laws and provides arguments for and against such laws. Fourth, it explains the concept of organizational privacy and examines research results demonstrating the negative consequences for employers resulting from their implementation of intrusive policies. Finally, the article presents a viable alternative means of meeting both employers' and employees' needs with regard to the problem of off-duty smoking: workplace smoking cessation programs.

THE ROOT OF THE PROBLEM: AN EXPENSIVE HABIT

Costs of Smoking to Society

The costs of cigarette smoking to society are extensive. Smoking is a primary cause of lung cancer, cardiovascular disease, and chronic obstructive lung disease (bronchitis and emphysema) [2]. The impact smoking has on health is exemplified by the fact that smokers have ten times the risk of developing lung cancer that nonsmokers have. In fact, sixteen percent of all deaths in the United States are related to smoking [3]. This amounts to approximately 434,000 deaths each year. In terms of monetary costs, the estimated annual cost associated with smoking is over \$100 billion in health care costs and lost productivity [4].

Smoking not only affects the lives and expenses of current members of today's society, but it also affects those of the future generation. Babies born to smoking mothers and fathers are at a significantly greater risk for infant mortality, deficiencies in physical growth and emotional development, neurological disorders,

and lower intelligence scores [5]. In light of all the costs to society of smoking, it is not surprising that former Surgeon General C. Everett Koop expressed his hope for a smoke-free society by the year 2000 [2, p. 1].

Costs of Smoking to Employers

Studies have demonstrated higher rates of absenteeism, disability payments, and work-related accidents [6] among smoking employees. Moreover, smokers use the health care system up to fifty percent more than nonsmokers [7]. All of these factors result in higher costs to the employers of smokers.

In terms of absenteeism, the smokers' rate of absenteeism exceeds that of nonsmokers by 33-35 percent. Men who smoke at least forty cigarettes a day have an absenteeism rate nearly twice as great as nonsmokers. Approximately eighty-one million workdays are lost each year due to smoking-related illnesses [5, p. 321]. Although wages may be withheld from absent employees, costs to employers still result due to lost productivity and general inconvenience.

The annual business cost of the smoking habit of a single employee has been estimated to be anywhere from \$400 to \$4600. One researcher calculated the total annual cost to business in 1980 to be between \$336 and \$601 per smoker. Of this amount, \$75-\$150 was attributed to health care costs, \$80-\$166 to productivity losses, and \$40-\$80 to higher absenteeism. Other costs included those due to fires, accidents (workers' compensation costs), premature deaths (life insurance costs), and health difficulties for nonsmokers [3, p. 11]. Another study found a smoking employee uses between \$500 and \$600 more in medical care each year than a nonsmoking employee (and is absent 2 days more each year) [3, p. 7]. If a hiring employer were aware of the above facts, it would hardly seem surprising or unreasonable for the employer to choose, given two equally qualified job candidates, a nonsmoker rather than a smoker.

Of particular concern to many employers are the harmful interactive effects between some workplace substances and tobacco smoke. Substances that interact in an injurious manner with tobacco smoke include asbestos, cotton, fluorocarbons, and many industrial chemicals [3, p. 7; 7, pp. 13-16]. Cigarette smoking and these workplace substances may interact by influencing the fraction of inhaled carcinogen deposited and retained in the lung, by causing the metabolic activation of the carcinogen, or by negatively affecting the response of cells to the carcinogen [7, pp. 106-7]. In any case, the interactive effect may be dramatic. For example, the risk of developing lung cancer is five times greater for a nonsmoking asbestos worker than for a nonsmoking worker not exposed to asbestos; smoking alone increases a person's chances of developing lung cancer ten times. However, the risk of developing lung cancer is increased more than fifty times for an asbestos worker who is a smoker [3, p. 7]. In industries where such interactive substances are used routinely, it is understandable why employers would take action to regulate their employees' on- and off-the-job smoking habits.

Employer Policies Prohibiting Off-Duty Smoking

As a response to the increased expenses related to employing smokers, some companies in the private sector have adopted policies that prohibit employees from smoking on and off the job [8]. Other companies have hiring policies under which they refrain from employing smokers. Employers' justifications for such policies have included: 1) cost containment, 2) safety (smoking off-duty may reduce an employee's on-the-job ability to perform), and 3) an organizational purpose or mission incompatible with tobacco use. Although spokespersons for the American Civil Liberties Union and others state that such policies are offensive to individual privacy interests and have dubbed them "lifestyle discrimination," [8, p. 7] there has been little litigation on the subject.

Many employers have implemented their off-duty smoking policies successfully. For example, in 1986, Turner Broadcasting System, Inc. adopted a policy under which tobacco users were not hired. The goal behind the policy was not to reduce costs, but simply to ensure a smoke-free workplace in the future. The company's employees supported the policy and no job applicants instituted a lawsuit [10, p. 10]. The Fortunoff's retail chain in New York and New Jersey had a similar policy until it became illegal under state law. Fortunoff's goal was to reduce the risk of accidental fires resulting from employees "sneaking" cigarettes on the job [9, p. 7]. U.S. Gypsum adopted a no-smoking "anytime, anywhere" policy for the 1,300 employees of one of its subsidiaries. The policy was implemented due to the potential health hazard created by the interaction of tobacco smoke and the mineral fibers generated in the company's production process. As a result of the policy, no employees lost their jobs, no legal action was initiated against U.S. Gypsum, and there was no change in the number of job applicants or employee resignations [3, p. 48]. Both Fortunoff's and U.S. Gypsum utilized the honor system as their method of policy enforcement [9, p. 7].

One company, Ford Meter Box in Wabash, Indiana, was sued by a former employee who had been terminated for violating the company rule prohibiting tobacco use. The employee admitted she had smoked during her job interview but had agreed to quit. Six weeks later, she was given the drug test administered to all new employees and was fired when nicotine was detected in her blood. The employee claimed wrongful termination, invasion of privacy, and intentional infliction of emotional distress [10, pp. 10-11]. She did not get her job back, but her case probably influenced the passage of the Indiana smokers' rights law in 1991 [9, p. 7].

STATE SMOKERS' RIGHTS LAWS

As of January 1993, twenty-seven states have enacted laws protecting smokers' rights to be free of employment discrimination in the private sector due to smoking [11]. Twenty-one of these state statutes were enacted in 1991 and 1992.

Thus, legislative activity in this area has been recent and prolific. The reasons for the sudden passage of these state laws may include: 1) an increase in employers' adoption of policies prohibiting off-the-job smoking, 2) an increase in public awareness and concern for employee rights to privacy [12], and 3) the lobbying efforts of a powerful tobacco industry that foresees declining sales due to the first reason [9, p. 7].

Even though state smokers' rights laws are similar to one another in their basic protection of individuals who smoke from discrimination in employment-related decisions, there are some differences between the statutes. Some do not mention smoking or tobacco specifically, but prohibit employment discrimination against an individual because of the individual's engagement in any legal activity or use of any lawful products [13]. Some prohibit an employer from discriminating against an individual because of the individual's use of tobacco or legal agricultural products [14]. Many of the state laws adopt the previous prohibition and, in addition, contain language that bars an employer from refusing to hire or otherwise disadvantage any individual with respect to compensation, terms, conditions, or privileges of employment because the individual is a smoker [15]. Finally, two states actually incorporate the prohibition of discrimination against smokers into their civil rights statute, which prevents discrimination on the basis of race, sex, color, religion (creed), national origin, and age [16].

Arguments in Support of State Smokers' Rights Legislation

Laws prohibiting employers from making employment decisions based on smoking behavior have advantages for both employers and employees. First, employers who do not hire smokers are significantly limiting their pool of potential employees [3]. Some of the most qualified prospective job candidates are quite possibly smokers, and employers with restrictive hiring policies are excluding smoking individuals from consideration without reflecting that their value to the organization may be greater than their cost. In addition, although it has not been empirically demonstrated that policies prohibiting off-duty smoking decrease employee motivation, such a result seems intuitively sound. As the president of Philip Morris Companies suggested in a speech to other managers, "we need employees who will bust their fannies for us. They're not going to do that if they think you and I are going to bust *them* for something they may or may not be doing off the job" [17, p. 146].

The strongest argument for smokers' rights laws is that they prevent employers from extending their supervisory authority to the private lives of their employees, a prospect that is discomfoting to many. Although employers' attempts to reduce health costs seem reasonable, supporters of the smokers' rights laws fear that this concern for costs will merely be an excuse for directing employees on how to lead their lives, which would seriously distort the employer-employee relationship

[18, p. 10]. The “slippery slope” argument is also common: if employers can lawfully discriminate against smokers to reduce health costs, their next step will be to refrain from employing people who eat high-fat foods, people who have family histories of heart disease, and people who ride motorcycles or engage in other high-risk activities [9, p. 7]. The laws prevent employers from getting started down this “slope” toward what are perceived as unreasonable practices.

Arguments In Opposition to State Smokers’ Rights Legislation

Although the passage of state smokers’ rights laws is advantageous in some ways, the drawbacks of these laws far outweigh the benefits conferred on citizens and employers in states where such laws now exist. In states that have laws specifically protecting smokers or tobacco users, smokers are elevated to the status of a protected class. In recent history, society has properly placed individuals who have been discriminated against because of their race, sex, religion, ancestry, or national origin into protected classes; individuals in these groups have had a rightful need for protection. Their status as a member of a protected class may be traced to the following: 1) their status is permanent and not of their choice or consent, 2) their historical mistreatment by others is extreme, irrational, and the product of ignorance, and 3) their protection as a class member has positive social consequences [4]. In contrast, smokers do not meet any of the above criteria and do not deserve civil rights protection. “To confer protection upon such a widely diverse class of individuals would send a message that smoking is socially positive and commendable, despite overwhelming evidence in terms of deaths, health care, and lost productivity [19].

The state laws that contain language prohibiting an employer from discriminating against individuals due to the individual’s engagement in any lawful activity or use of a lawful product are highly problematic also. These laws are vague and provide sweeping protection to employees whose conduct may be unethical or damaging to their employer. For example, such a law may prevent an employer from terminating an employee who covertly worked for a competitor. The law would also apparently prevent an employer from making an employment decision based on a person’s history of alcohol or prescription drug abuse, incompetence, or conflict of interest [20]. Such broad protection is at least as unreasonable as an employer’s decision to adopt a policy preventing its employees from engaging in high-risk behaviors off the job.

Although the smokers’ rights laws are described as preventing employers from firing, refusing to hire, or discriminating against individuals because they smoke, most of the laws are vague and would be problematic because they have an uncertain reach [19]. The laws could be construed to give smokers rights in the work place as well as off the job, so as to undermine any on-the-job smoking policies. Some opponents of the laws have suggested that the tobacco industry, in

lobbying for the laws by asserting workers' rights to privacy, has actually been attempting to cleverly and underhandedly prevent employers from restricting smoking in the workplace to boost decline cigarette sales [21].

Many of those opposed to smokers' rights laws claim that the decision of an employer to refrain from hiring smokers is a business decision that should be within the employer's discretion in a free-market system. Although historically a need has existed for legislation that places restraints on employers' business decisions due to their adverse effect on society, the smokers' rights laws unnecessarily impinge on employers' decision-making processes. First, the laws address a problem that is not pervasive; only 2 percent of companies hire nonsmokers exclusively [22]. This fact tends to show the tobacco industry's lobbying efforts are, indeed, the product of an underlying motive, as suggested previously. Second, the laws prevent employers from adopting legitimate policies for the protection of their workers or the purpose of their organization. Although some state laws provide exemptions for organizations that adopt policies for a specific legitimate purpose, many do not. Therefore, employers that use chemicals or materials which interact with tobacco, employers that are in the public health area, and employers that depend on a highly physically fit workforce may all be precluded by smokers' rights laws from adopting policies prohibiting off-duty smoking [23, p. 11]. Finally, higher health care costs and absenteeism are legitimate concerns for all employers, especially small ones, in the current economic environment. It does seem unjust that employers and fellow nonsmoking employees should bear the excess costs that smoking workers bring to an organization.

Because most state smokers' rights laws have so recently been enacted, interpretative case law does not yet exist. Those opposed to the laws predict the statutes will result in a flood of litigation. Many of the laws allow actions to bypass the state human rights commissions and gain direct access to a jury trial. Even if the laws do not directly result in overcrowded dockets [24], they will almost certainly lead to an additional, and often frivolous, cause of action in many wrongful discharge lawsuits [25].

Alternative Causes of Action

In the twenty-three states without laws protecting the right of employees in the private sector to smoke off the job, alternative legal protection exists for employees with legitimate causes of action. A smoking employee may have a cause of action under federal statutory law or under state law. For example, a smoker who has been discriminated against for smoking off-duty may have a cause of action under the Americans with Disabilities Act (ADA) [26]. Congress did not explicitly address whether smoking is a protected disability under the ADA; however, an argument can be made that smoking does qualify as such [27], especially because it is not one of the conditions that is specifically excluded from the definition of "disability" under the act [28]. Congress did provide in the ADA

that workplace smoking restrictions are permissible [29]. Therefore, although an employer may regulate workplace smoking, discrimination against employees from off-duty smoking may be prohibited under the ADA [30].

Smoking employees subjected to differential treatment may also have recourse under the Rehabilitation Act [31], the National Labor Relations Act (NLRA) [32], or the Employee Retirement Income Security Act (ERISA) [33]. The Rehabilitation Act contains a definition of handicap parallel to that found in the ADA for disability [34]. The Rehabilitation Act prohibits discrimination on the basis of handicap by the federal government, federal government contractors, and recipients of federal financial assistance [31]. Thus, although no case law exists on the subject, it might be argued that these federal employers are precluded from discriminating against smokers [35]. Under the NLRA, the regulation of off-duty smoking is likely to be considered a condition of employment that is a mandatory subject of bargaining [32]; thus, unionized employees would have this federal statutory protection [35, p. 958]. The ERISA prohibits termination of an employee caused by the employer's motivation to deprive the employee of benefits under an employee benefit plan [36]. Therefore, a smoking employee who has been discharged to save his or her employer health care costs may have a cause of action under ERISA [35, p. 959].

An employee who has received discriminatory treatment from his or her employer also may have protection under state law, even in the absence of state smokers' rights laws. First, some state constitutions protect against actions of private individuals as well as against government actions. In states that explicitly recognize a constitutional right to privacy, it could be argued that attempts by private employers to restrict the off-duty smoking of their employees violate this right [35, p. 958]. Second, several states currently recognize a common law right to privacy, under which smoking employees could potentially have a cause of action. However, it should be noted that this common law right to privacy has been closely circumscribed, and it is doubtful a smoking employee making a claim under this right would be successful [37].

Several state courts have considered whether an employee who has been terminated for the knowing violation of his or her employer's rule against off-duty use of tobacco, alcohol, or drugs is properly entitled to unemployment benefits. For example, in *Best Lock Corp. v. Review Board of Indiana*, an employee was terminated after having admitted to drinking at a bar in violation of Best Lock's rule prohibiting the use of tobacco, alcohol, and drugs on and off the job [38]. The employee claimed he was entitled to unemployment compensation because he had been fired without just cause; discharge for just cause was defined under state law as "knowing violation of a *reasonable* and uniformly enforced rule of an employer" [39]. The court held Best Lock failed to meet its burden of presenting prima facie evidence that its company rule was reasonably related to the employer's business interest, which was the requirement for proving an employer rule regulating an employee's off-the-job conduct is reasonable [40]. Thus, it

appears some employees terminated for violation of a company policy prohibiting off-duty smoking would, at a minimum, have valid claims for unemployment compensation.

The foregoing discussion of potential protection for smokers under federal and state law indicates that in the absence of state smokers' rights statutes, many smoking employees with legitimate concerns would have valid causes of action. Thus, in states where smokers' rights laws have not been enacted, adequate protection does exist. This is especially the case in light of the low number of employers with policies prohibiting off-duty smoking and the lack of litigation in this area. Because of the numerous drawbacks and uncertainties inherent in the state smokers' rights statutes currently in existence, as well as their lack of need, legislatures in the twenty-three states that have not passed smokers' rights laws should refrain from doing so. The continuance of the statutes currently in existence should also be discouraged.

HUMAN RESOURCE MANAGEMENT ISSUES

The need to stem the recent flood of state smokers' rights legislation does not lead to the conclusion that employers should be encouraged to adopt policies prohibiting their employees from smoking off duty. A tension exists between the legitimate needs and concerns of employers and the privacy expectations of individuals in today's society. The appropriate balance that must be struck between the needs of employers and employees will vary among organizations, depending on each organization's purpose, management philosophy, and employee composition.

The Concept of Organizational Privacy

Within the last decade, an increasing awareness has developed among American workers of their rights as employees within the modern organization [12, p. 5]. Although case law has not reflected it to any great extent, one issue of concern is employee smoking and the degree to which an employer infringes on employees' rights to privacy by restricting their right to smoke. Research has been conducted on employees' responses to invasions of their privacy within the organizational context in general; information derived from these studies is helpful in examining the effect on employees of restrictive off-duty smoking policies.

First, what exactly is encompassed within the concept of organizational privacy? Organizational privacy has been defined as the

state or condition in which an individual [in the context of dealing with an organization] has the capacity to (a) control the release and possible subsequent dissemination of information about him or herself, (b) regulate both the amount and nature of social interaction, (c) exclude or isolate him or herself from unwanted . . . stimuli in an environment, and, as a consequence,

can (d) behave autonomously (i.e., free from the control of others) [41, pp. 349, 357-8].

It is this last component, the freedom from control by the employer, that is most critical in the consideration of employer policies prohibiting off-duty smoking. However, preemployment inquiries concerning smoking habits may also be regarded as invasive due to the factor in *a* above, because of the relinquishment of information by a prospective employee that s/he may view as personal and not job-related. Generally, inquiries by employers regarding off-the-job activities are viewed as inappropriate [42].

Individual factors have an effect on the degree to which an employer's intrusions into an individual's privacy will be perceived as acceptable [41, p. 383]. Therefore, the composition of a workforce may influence whether an employer policy prohibiting off-duty smoking will be regarded as intrusive by employees. Specifically, individuals of lower socioeconomic status (SES) have been found to regard personnel selection procedures as more invasive than those of middle SES, as do those of lower income compared with those of higher income [41, p. 385]. Also, the greater the level of educational attainment of an individual, the less concern he or she will likely have about answering personal questions [43]. Younger individuals tend to view personnel selection procedures as more invasive than older ones [41, p. 385]. Finally, perceptions of privacy invasion may be influenced by individual differences in needs for privacy, expectations of privacy, tendencies to self-disclose, previous experiences, and physiological variables [41, p. 386].

Reactions of Employees to Drug Testing and the Importance of Procedural Justice

Studies have not been conducted assessing the effects of employee policies prohibiting off-duty smoking on employee motivation and performance. However, research examining the reactions of employees to drug testing procedures provides clues to likely employee reactions. Reactions of employees to drug testing vary dramatically depending on: 1) how individuals are selected for testing, 2) the nature of the job, 3) the employer's stated reason for testing, and 4) the consequences of a positive test result [44]. Factors two and three would be relevant in the context of an employer's smoking policy. Employee reactions to testing may affect decisions concerning whether to accept a job and loyalty to the employer after being hired [44, p. 2]. Negative employee attitudes and reduced performance may also result from employees' perceptions that an invasion of privacy has occurred [45].

Research on employee drug testing procedures indicates that the negative impact on employees resulting from drug testing policies may be ameliorated by the employer's use of certain practices. For example, employees believe employer

actions are fairer when employees are provided information about such actions and explanations of why certain procedures are being used [46]. In addition, the importance of procedural justice cannot be overemphasized when considering an employer's decision to adopt a policy concerning off-duty smoking. Procedural justice refers to the structural characteristics of an employer's decision and the quality of interpersonal treatment associated with it [45, p. 699]. The latter refers to treating employees with politeness and adequately explaining decision-making procedures. Procedural justice is associated with employee loyalty because the use of fair procedures generates expectations of fair treatment by the employer in the long term which, in turn, leads to a "generalized sense of positive regard for, and attachment to, the organization and its leaders" [45, p. 699].

One 1990 study of employees in a pathology laboratory, in which a drug-testing program had been implemented, found that procedural justice predicted both an emotional attachment to the company and trust in management. Explanations by managers of the drug-testing policy increased job satisfaction; procedural justice increased job performance and decreased turnover intentions [45, pp. 701-4]. These results demonstrate managers need to be particularly sensitive to issues affecting justice perceptions. Although an employer policy may lead to reduced costs in terms of reduced absenteeism and lower health care costs, the policy must be implemented in a manner employees view as procedurally fair. Otherwise, costs such as reduced performance, higher turnover, and fewer job applicant acceptances will likely result [45, pp. 705-6].

The results of studies of employer drug-testing policies indicate that invasive employer practices, such as policies prohibiting off-duty smoking, may negatively affect employee attitudes, loyalty, and performance. The fact that these negative effects can be ameliorated has been borne out through the experiences of companies such as Ford Meter Box and Turner Broadcasting, where policies prohibiting employee smoking have been implemented without negative consequences. The lack of litigation on the subject also suggests that companies have been procedurally just and have provided adequate information about their off-duty smoking policies. However, employee sensitivity to privacy invasions at the workplace will not decline. Off-duty smoking policies are likely to be viewed as even more invasive than drug-testing policies, since smoking is not an illegal behavior and the impact of smoking on job performance is not as pronounced or perceptible as drug use. Therefore, although the employer's need to have a workplace that is smoker-free is recognized, the employer's adoption of policies prohibiting off-duty smoking is discouraged, except in special cases. These include situations where there are safety considerations or where workplace substances interact with tobacco smoke to create enhanced risks. Alternative and less intrusive means to achieve employers' legitimate goals, such as smoking cessation programs, are more appropriate than off-duty smoking policies for many organizations.

WORKPLACE SMOKING CESSATION PROGRAMS AS A VIABLE SOLUTION

If employer intervention in the smoking habits of employees is to be successful, the smokers themselves must want to alter their behavior. In fact, many smokers do want to quit smoking and would probably welcome employer intervention and assistance; survey results indicate that 40-75 percent of smokers would prefer to quit smoking but are unable to do so [2, p. 39]. Because numerous individuals have been responsive to assistance offered by their employers and because the advantages of employing nonsmokers are so great, some employers have adopted programs to help their employees quit smoking.

Employer efforts to assist their employees to quit smoking have included the distribution of self-help literature, medical advice, educational programs, incentives to quit, and multicomponent, company-sponsored, smoking cessation programs [47]. The latter may involve one or more of the following treatment methods: 1) the distribution of self-help materials, 2) group clinics, 3) buddy programs, 4) the distribution of nicotine-containing chewing gum, 5) financial or other incentives, and 6) hypnosis [48]. Large companies are far more likely to have made some attempt to help their employees quit than small ones [49]. The distribution of quit-smoking literature has been the most popular method of assisting employees, but in a survey of companies using this method, only 11 percent of managers believed it to be effective [3, p. 27]. Workplace smoking cessation programs, however, have been demonstrably successful in assisting employees to quit smoking and therefore have beneficial consequences for employers as well.

The United States surgeon general has reported that on-site employer smoking cessation programs are significantly more effective than self-help or off-site programs. Although initial success rates are similar, on-site programs have a 60-65 percent long-term rate of success compared to only a 20-30 percent long-term success rate for off-site programs [50]. The higher rate of success for on-site programs is due to their numerous advantages: 1) convenience, 2) savings in time and commuting costs, 3) the opportunity to participate with friends and colleagues rather than strangers, 4) increased motivation stemming from incentives and social support, and 5) the creation of nonsmoking norms at the location where people spend much of their time [1, p. 48; 3, pp. 31-3; 7, p. 478]. The greater the success of employees in quitting, the greater are the benefits sustained by the employer.

An effective smoking cessation program is highly advantageous for an employer. Although a good quality smoking cessation program costs approximately \$100 per employee, it is a one-time cost; each smoking employee, in contrast, costs an employer \$400-\$4600 per year [51]. The cost savings to an employer with a smoking cessation program would reflect decreased medical costs, higher productivity, and lower absenteeism. Moreover, workplace programs

have a positive impact on employee morale and public relations, resulting from the caring company image projected by the adoption of such a program [1, p. 48; 7, p. 478]. Finally, from a public policy standpoint, workplace smoking cessation programs are advantageous because they have the potential to reach a large percentage of the population. Existing information channels may be used to promote programs, encourage participation, and influence employees. The continuity that a workplace provides makes health promotion activities more effective, which may result in healthier values and lasting behavior change among much of the population [1, p. 48].

CONCLUSION

Because of the tremendous costs imposed on American businesses by their employment of smokers, it is understandable that companies would attempt to implement policies regulating the off-duty smoking of their employees. However, public sensitivity to privacy issues is far too great for such policies to be an acceptable solution. Employers that implemented them would suffer detriment as a result. Moreover, if employers did implement off-duty smoking policies, they might be tempted to also restrict other costly off-duty behaviors. One envisions a frightening scenario in which employers could prohibit us from eating high-fat foods, prevent our participation in dangerous hobbies such as motorcycle riding, or restrict the number and identity of those with whom we have sexual relations.

The broad and sweeping smokers' rights laws now in existence in the majority of states do not, however, solve the problem. These laws are unacceptable due to their vague terms, uncertain reach, and elevation of smokers to the status of a protected class. What is acceptable is the fact that employers must be able to work toward reducing the costs they bear as a result of the smoking habits of their employees. Workplace smoking cessation programs are an effective means for companies to reduce their costs in the long term. Such programs engage management and workers in a joint effort to achieve a common goal advantageous to both. The improved health of our workforce has beneficial and lasting consequences for society as well.

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The views expressed in this article are solely those of the author and do not represent the position of Kirkpatrick & Lockhart.

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9. Paula Span, A New Hazard for Smokers, *Washington Post*, Dec. 13, 1991.
10. Christine Woolsey, Off-Duty Conduct: None of Employer's Business?, *Bus. Inst.*, February 17, 1992.
11. Colo. Rev. Stat. § 24-34-402.5 (Supp. 1992); Conn. Gen. Stat. Ann. P.A. No. 91-271 (West Supp. 1992); 1991 Ill. Laws 807; Ind. Code Ann. § 22-5-4-1 (Burns 1991); Ky. Rev. Stat. Ann. § 344.040 (Baldwin 1992); La. Rev. Stat. Ann. § 966 (West 1992); Me. Rev. Stat. Ann. tit. 26, § 597 (1991); 1992 Minn. Laws 538; Miss. Code Ann. § 71-7-33 (1991); 1992 Mo. SB 509; Mont. Code Ann. § 39-2-313 (1992); Nev. Rev. Stat. Ann. § 613.333 (Michie 1991); N.H. Rev. Stat. Ann. § 275-37-a (Supp. 1991); 1991 N.J. Laws 207; N.M. Stat. Ann. § 50-11-3 (Michie Supp. 1991); N.Y. Labor Law § 201-d(2)(b) (Consol. 1993); 1992 N.C. Sess. Laws 1023; N.D. Cent. Code § 14-02.4-03 (1991); Okla. Stat. tit. 40, § 500 (1991); Or. Rev. Stat. § 659.380 (1991); R.I. Gen. Laws § 23-20.7.1-1 (1991); S.C. Code Ann. § 41-1-85 (1990); S.D. Codified Laws Ann. § 60-4-11 (1992); Tenn. Code Ann. § 50-1-304(d) (1991); W. Va. Code § 21-3-19 (1992); 1991 Wis. Laws 310; Wy. Stat. § 27-9-105 (1992).
12. See Chimezie A. B. Osigweh, *The Challenge of Responsibilities: Confronting the Revolution In Workplace Rights in Modern Organizations*, 1 Employee Resps. & Rts. J., 5, 1988.
13. *E.g.*, Colo. Rev. Stat. § 24-34-402.5; 1991 Ill. Laws 807; Nev. Rev. Stat. Ann. § 613.333.
14. *E.g.*, S.C. Code Ann. § 41-1-85; W. Va. Code § 21-2-19.
15. *E.g.*, La. Rev. Stat. Ann. § 966; N.M. Stat. Ann. § 50-11-3; Okla. Stat. tit. 40, § 500.
16. Ky. Rev. Stat. § 344.040; 1991 Wis. Laws 310.

17. John A. Murphy, *Whose Business Is It?*, *Vital Speeches of the Day*, Dec. 15, 1988.
18. Francis J. McManimon, *Employees Who Smoke Have a Right to Privacy*, *HR Focus*, Nov. 1991.
19. [4]. *See also* Letter from Bill Clinton, Governor, State of Arkansas, to David P. Cook, American Lung Association of Arkansas (March 4, 1991) (on file with The Coalition on Smoking and Health); Letter from Jim Florio, Governor, State of New Jersey, to "Friend" (February 25, 1991) (on file with The Coalition on Smoking and Health) [4].
20. [4]. *See also* Letter from Mario M. Cuomo, Governor, State of New York, to The Assembly (July 22, 1990) (on file with The Coalition on Smoking and Health).
21. [9, p. 7]. Legal opinion of Clayton R. Blackstock, Attorney, Little Rock, Arkansas (on file with The Coalition on Smoking and Health). It is interesting to note that in response to a telephone inquiry by the author to the American Tobacco Institute asking for resources or research in support of the tobacco industry's position, the spokesperson responded that there were no specific resources. She stated that "one's privacy off the job is protected and that is a position everyone agrees with." The American Lung Association and The Coalition on Smoking and Health, of course, were generous in providing information in opposition to the smokers' rights laws.
22. *Smoking in the Workplace: 1991*, *Bulletin to Management*, (Bureau of Nat'l Affairs, Washington, D.C.), Aug. 29, 1991.
23. *See* Stephen F. Gambescia & William T. Godshall, *Smokers Do Not Deserve a Special Status*, *HR Focus*, Nov. 1991.
24. *Smoke Got in Their Eyes*, *Baltimore Sun*, Mar. 29, 1986, A16.
25. Interview with William H. Hutchens III, Associate General Counsel, West Virginia University, in Morgantown, W. Va. (Sept. 24, 1992).
26. 42 U.S.C.A. §§ 12101-12213 (Supp. 1992).
27. An individual is disabled under 42 U.S.C. § 12102(2)(A) if the person suffers from a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." According to the legislative history of the ADA, "physical or mental impairment" includes drug addiction, and nicotine is indeed a drug. Moreover, smoking interferes with breathing and working, both of which are arguably major life activities. Jimmy Goh, Comment, "*Smokers Need Not Apply*": *Challenging Employment Discrimination Against Smokers Under the Americans With Disabilities Act*, 39 Kan. L. Rev. 817, 827-29 (1991); smoking may also be a disability under § 12102(1)(C) because a smoker is a person who is regarded by society as suffering from the type of impairment described above [pp. 830-32].
28. 42 U.S.C. § 12201(b); Goh [27, p. 833]. For example, homosexuality, compulsive gambling, and abuse of illicit drugs are not covered disabilities under the ADA. 42 U.S.C. §§ 1211(a), 1211(b)(2), 12114(a).
29. 42 U.S.C. § 12201(b).
30. Goh [27, p. 834]. *See also* Woolsey [10, p. 11] (stating that since the ADA calls for case-by-case determinations and smoking affects each individual differently, employers may be prohibited from lumping smokers into a class).
31. 29 U.S.C. §§ 701-796 (1988).
32. 29 U.S.C. §§ 158(a)(5), (d) (1988).
33. 29 U.S.C. 1001-1461 (1988).

34. 29 U.S.C. § 706(7)(B).
35. Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?* 62 Notre Dame L. Rev. 940, 956-57 (1987). Rothstein also suggested that an argument that smoking is a handicap may be made under state handicap discrimination laws.
36. 29 U.S.C. § 1140.
37. See David S. Hames and Nickie Diersen, *The Common Law Right to Privacy: Another Incursion Into Employers' Rights to Manage Their Employees?*, 42 Lab. L.J. 757 (1991). See also *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W. Va. 1990) (court recognized a legally protected privacy interest for employees and delineated exceptions).
38. 572 N.E.2d 520 (Ind. Ct. App. 1991).
39. [38, at 523] (quoting Ind. Code § 22-4-15[1(d) (1992)]).
40. [38, at 525]. Although Best Lock also argued that its health insurance costs were lower due to its policy and that there was a direct relationship between absenteeism and on the job inquiries and employee's use of alcohol, tobacco, and drugs, the court did not consider this evidence since it was not part of the record. See also *Barkley v. Peninsula Transp. Dist. Comm'n*, 398 S.E. 2d 94 (Va. 1990) (unemployment benefits properly withheld from a bus driver even though she smoked marijuana when she was not scheduled to work that day or the next and was not on call); *Olson v. Job Serv.* N.D., 379 N.W.2d 285 (N.D. 1985) (plaintiff could not be denied unemployment benefits because no evidence existed that off-duty alcohol consumption presented a threat to employer's business interest); *Gregory v. Anderson*, 109 N.W.2d 675 (Wis. 1961) (employer rule prohibiting employees from drinking on or off duty was reasonably related to employer's business interest of reduced vehicle insurance).
41. Eugene F. Stone and Dianna L. Stone, *Privacy in Organizations; Theoretical issues, Research Findings, and Protection Mechanisms*, in 8 Research in Personnel and Human Resources Management 349, pp. 357-58 1990.
42. [41, pp. 366-76]; Janice L. Miller and Joseph G. Rosse, *Behavioral Responses to Privacy Invasion Resulting from Employment Procedures* 6 (1992) (unpublished manuscript, presented at the annual meeting of the Academy of Management, Las Vegas, Aug. 1992). See also "Whose Business Is It Anyway," PR Newswire, April 15, 1992 (results of a 1992 national opinion poll indicate that a large majority of Americans believe a prospective employer has no right to ask whether a job applicant smokes).
43. This is generally so because the greater level of cognitive ability associated with advanced educational attainment enables a person to structure information flows or physical environments in ways that protect privacy [41, p. 385].
44. Joseph G. Rosse et al., *Personality and Drug Testing: An Exploration of the Perceived Fairness of Alternatives to Urinalysis* 2 (1992) (unpublished manuscript, presented at the annual meetings of the Academy of Management, Las Vegas, Aug. 1992) (citing Kevin R. Murphy et al., *Influence of Job Characteristics on the Acceptability of Employee Drug Testing*, 76 J. Applied Psychol. 447053 (1991)).
45. Mary A. Konovsky & Russell Cropanzano, *Perceived Fairness of Employee Drug Testing as a Predictor of Employee Attitudes and Job Performance*, 76 J. Applied Psychol. 698, 704 (1991).

46. [44, p. 8]. One 1992 study found that employees who received higher levels of information regarding a company smoking ban perceived the ban to be more fair than those who received low levels of information [44, p. 8]. (citing Jerald Greenberg, *The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice*, in *Justice in the Workplace: Approaching Fairness in Human Resource Management* (Russell Cropanzano ed., 1992)).
47. Geary W. Olsen et al., A Smoking Cessation Incentive Program for Chemical Employees: Design and Evaluation, *Am. J. Preventive Med.*, 6, pp. 200, 200, 1990.
48. [47, pp. 202-03]; Michael R. Manning et al., Work-Related Consequences of Smoking Cessation, *Acad. Mgmt. J.*, 32, p. 606, 1989.
49. However, a higher percentage of employees in small workplaces join workplace smoking cessation programs than in large workplaces. This fact suggests that greater efforts need to be made to encourage smaller organizations to adopt such programs, because that is where they will be most effective. Russell E. Glasgow et al., Employee and Organizational Factors Associated with Participation in an Incentive-Based Work-site Smoking Cessation Program, *J. Behav. Med.*, 13, pp. 403, 415, 1990.
50. [35, p. 964] (citing *Surgeon General's Report on Smoking Intervention Programs in the Workplace*, in *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace*, pp. 477-510, (1985)).
51. See [7] and accompanying text.

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