



Feature

Butting In: Employers Penalize Smokers and Overweight Workers

By Ursula Furi-Perry

Some companies are enticing employees to lead healthier, more productive lives with a variety of “wellness” initiatives, including smoking-cessation counseling and products, weight maintenance plans, and exercise programs. Companies are promoting everything from a discount on smoking replacement aids and health club memberships to substantial discounts on health insurance premiums.



But in recent months, some companies have gone further, imposing what some critics say are stiff and unfair penalties against smokers and overweight workers.

A handful of companies, for instance, are charging employees who smoke higher insurance premiums. In states like Minnesota, that choice is protected by legislation. State law expressly allows employers to charge different premium rates as long as the differences reflect actual differential costs to the company.

Sandra Sandell, director of the Secondhand Smoke Resource Center at the Association of Nonsmokers in Minnesota, said that employers who are self-insured—those that offer health insurance to all their employees and bear its costs—may determine that it costs more to insure its smokers and then charge the extra amount to their employees who smoke.

“Smokers are not a protected class,” she said. “If the employer determines that it costs more to insure its smokers, it can charge the extra amount to its employees who smoke.” In fact, the laws of the state expressly allow employers to do so.

Nonetheless, employers must square their decision to provide different health premiums with the federal Health Insurance Portability and Accountability Act (HIPAA,) which prohibits employers offering health insurance from requiring similarly situated individuals to pay higher premiums on the basis of any health-status-related factor.

“Employers may offer special discounts, rebates, and incentives in return for employees’ adherence to wellness programs,” said James McElligott, a partner practicing employer benefits law at McGuireWoods, LLP, in Richmond, VA. “To do so, they must meet some standards: the program

has to be reasonably designed to promote health and prevent disease; the rewards must be proportionate; the employer must measure the reward strictly based on employees’ adherence to the program; employees must have the opportunity to qualify for the program at least once a year; and employers must provide a reasonable alternative to those employees whose entry into the program may be unreasonably difficult.”

Statutes such as Minnesota’s may appear to be contradictory to HIPAA’s standards, but states have the ultimate trump card in enacting insurance legislation. “The Minnesota statute is an attempt at balance,” said Douglas N. Silverstein, partner at Kesluk & Silverstein in Los Angeles, who has substantial experience representing both employers and employees in labor and employment suits. “It reflects the legislative intent to protect lawful off-duty conduct while recognizing that smoking results in higher costs, which should be shared by employer and employee.” Depending on interpretation, smoking in particular may or may not qualify as a health-status-related factor.

“Laws dealing with discrimination have traditionally made a distinction between immutable characteristics and (voluntary) behaviors,” Mr. McElligott said. “Smoking is a mixed bag. While it is addictive and a difficult habit to break, it’s also a behavior,” rather than an innate characteristic. “It’s also important to recognize that HIPAA is fairly new,” said Mr. Silverstein. “The issue may ultimately be resolved through the courts.”

A growing number of companies are even beginning to refuse to hire candidates who smoke. Union Pacific Corporation reportedly recently implemented a trial program in several of the 23 states where it does business, vowing to hire only nonsmokers wherever possible.

The Pinellas Sheriff’s office in Florida reportedly will not consider applicants who are smokers or have used tobacco



Feature

products for six months prior to employment. In Washington State, the Tacoma-Pierce County Health Department not only refuses to hire smokers, it even asks employees to sign an affidavit promising not to smoke.

The reasons behind not hiring smokers are manifold. Simply put, experts say, smokers can be a great nuisance-and expense-in the workplace. In a recent survey of 47,000 workers in six companies, the MEDSTAT Group, a market resource and intelligence firm specializing in healthcare, determined that smokers cost employers \$1,714 more per year than nonsmoker employees. Smokers also take more sick days and breaks during the workday, experts say. Furthermore, in a world of growing awareness about the detrimental effects of both smoking and secondhand smoke, employers simply do not want to project an image of endorsing tobacco use.

Employers are not barred from excluding smokers, experts say, because smoking is considered a lifestyle choice, not a disability or health problem. Therefore, smokers are technically not a protected class under anti-discrimination statutes, such as the Americans with Disabilities Act. In those states where smokers are not expressly protected by statute, not hiring tobacco users is basically legal. "Smokers are not a protected class," said V. James DeSimone, partner at Schonbrun DeSimone Seplow Harris and Hoffman, an employment rights law firm in Venice, CA.

In fact, some courts have found for employers on the issue. "Where job applicants had to sign an affidavit of nonsmoking for a year, the Florida Supreme Court upheld that policy," explained Mr. Silverstein. "In effect, the court said that because smokers are constantly required to reveal whether they smoke, they do not have (a reasonable expectation of privacy)."

But not every state offers employers free reign to decline hiring smokers. Many states have enacted "lifestyle discrimination" statutes, prohibiting employment discrimination based on smoking, and even obesity and moderate alcohol use in some cases.

In New Jersey, for instance, the law prevents employers from denying employment or discharging from employment or taking any other adverse action against smokers unless

the employer has a "rational" employment-related reason for doing so. New Jersey's statute explicitly prohibits employers from deciding between applicants on the basis of smoking.

California, Maine, New Mexico, New Hampshire, and Kentucky also have enacted legislation to protect smokers. "In those states, employees would probably have a pretty strong argument against adverse discrimination," Mr. Silverstein said.

Most of these "smokers' rights" statutes do allow employers some leeway: for example, employers may declare a smoke-free workplace and have smoke-free policies during work hours.

Some measures also protect against other forms of lifestyle discrimination, shielding those who may overeat or drink alcohol in the privacy of their own homes. In fact, obesity is becoming a growing concern among employers, so much so that employer-based weight management plans are becoming the next wave of smoking cessation programs.

But employers may not get away with charging obese employees higher health insurance premiums. Obesity is likely to be considered a health factor protected by HIPAA, even a disability in some instances.

"Chronic obesity has been recognized as a disability. Here, more clearly defined standards apply," said Mr. McElligott.

"Whether obesity is considered a medical condition may depend on its medical causes," Mr. DeSimone explained.

It is important to recognize the wider societal issues behind smoking and the workplace, experts say. "On one end of the spectrum, there's an individual's constitutional right to privacy," Mr. Silverstein explained, "on the other, there's well-accepted scientific data that smoking causes maladies, costs employers more, and makes healthcare more expensive. It's tough to resolve disputes when societal behaviors stand otherwise."

The effectiveness of employers' tough-arm smoking cessation techniques remains to be seen, although some experts prefer milder solutions. "Investing in employees through counseling programs and other methods is a better solution than charging higher health premiums as a type of punishment," said Dawn



Feature

Robbins, Health Policy Coordinator for Tobacco Free Oregon, a statewide smoking cessation initiative. "I would rather see laws that encourage individuals than employers prohibiting

people from seeking employment" based on smoking, Mr. DeSimone agreed.

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