

Smoking in the Workplace

Introduction

This chapter reviews federal laws relevant to smoking in the workplace, including the Occupational Safety and Health Administration (OSHA) proposed standards on indoor air quality. It also outlines ways to prevent or minimize the problem of secondhand smoke in the workplace and provides a checklist of considerations for implementing a company smoking policy. Additionally, the chapter discusses state and local regulations on smoking in the workplace.

Smoking in the workplace has long been under attack from a variety of sources. The campaign against workplace smoking involves health, financial, and legal issues. The current focus of the controversy is environmental tobacco smoke (ETS) or secondhand smoke.

Federal Laws

A U.S. Supreme Court decision noted that 37 percent of adult nonsmokers reported ETS at work. In response to concerns about the effect of exposure to tobacco smoke in the workplace, President Clinton issued an executive order in August 1997, prohibiting the smoking of tobacco products in most interior spaces owned, rented, or leased by the executive branch of the federal government.

Workers' Compensation

Workers' compensation laws are generally not based upon fault. Thus, workers who can show that ETS caused an injury or disease in the workplace can receive compensation even if the employer can demonstrate lack of knowledge of the harmfulness of secondhand smoke. If the Environmental Protection Agency (EPA) report survives legal challenge, it will be easier to establish the required relationship between ETS and disease.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) applies to employers with 15 or more employees. Under the ADA, an *individual with a disability* is anyone with "a physical or mental impairment that substantially limits one or more of such person's major life activities." The act may affect employers' smoking policies. If an employee has suffered impairment to the respiratory system (such as allergies, asthma, etc.), which precludes that employee from working in an environment with tobacco smoke, that individual may have a disability that requires a reasonable accommodation to allow that individual to perform the job's essential functions.

Employers may be required to provide a smoke-free environment for employees whose sensitivity to tobacco smoke is deemed a disability. Providing a smoke-free environment may require something as simple as moving the employee away from the source of the smoke, or it may require installation of special ventilation systems to reduce the amount of second-hand smoke.

Employers covered by the ADA as a place of public accommodation may also be required to reasonably accommodate patrons with allergies or sensitivity to smoke, if these allergies or sensitivities constitute disabilities. A court recently held that a total ban on smoking in fast-food restaurants would constitute a reasonable accommodation for three children with asthma and a woman with lupus. In contrast, other courts have held that a total ban would fundamentally alter the nature of the services provided and would not be a reasonable accommodation. Employers faced with this sort of dilemma should ensure that the economic realities of their businesses and of similar businesses support whatever decision will be made.

Rehabilitation Act of 1973

The federal Rehabilitation Act of 1973 bars disability discrimination by the federal government, federal contractors, and recipients of federal financial assistance. Employees have filed lawsuits under the Rehabilitation Act alleging that their employers' failure to prohibit or limit workplace smoking or accommodate their respiratory affliction was unlawful discrimination.

National Labor Relations Act

Under 29 U.S.C.A. § 158(a)(5), the National Labor Relations Act (NLRA) requires bargaining with union representatives on conditions of employment. This includes a nonsmoking policy. Employers that create such a policy without following collective-bargaining procedures risk union filed charges with the National Labor Relations Board (NLRB).

State and Local Regulations

With no federal regulations restricting smoking in the workplace, a number of states have adopted legislation regulating smoking in the workplace by requiring that nonsmoking areas be provided for members of the public and employees. Other governmental bodies within the state (for example, city governments) may have adopted restrictions on smoking in the workplace or in public buildings. Some state courts have imposed on employers a duty to provide a safe workplace for employees, and this may require the imposition of smoking restrictions.

Controlling ETS

Limiting or prohibiting smoking in the workplace and the resulting control of ETS may have the following practical and legal benefits for employers:

- ◆ Decreased injuries, illnesses, and deaths among smoking employees.
- ◆ Reduced health-insurance costs.
- ◆ Lower repair and maintenance bills for equipment and furnishings damaged by smoke.
- ◆ Reduced danger of fire and other safety hazards.
- ◆ Less irritation of nonsmoking employees, thus fewer claims resulting from secondhand smoke.
- ◆ Increased worker productivity.

Smoking Bans

An employer may be able to totally or partially ban smoking in the workplace. Such bans have generally withstood legal challenges, except where imposed unilaterally by a unionized employer in derogation of its duty to bargain.

Total Bans

A total ban on smoking in the workplace has obvious problems. Certainly, such a ban will be hard on employees who smoke and may lead to employee alienation, organized resistance, or clear and malicious violation of the rules. On balance, it may be welcomed by a majority of employees who do not smoke. Employers should carefully study the possible effects of a total smoking ban on employee morale.

Employers who do decide to implement a total ban on smoking should consider this two-step approach:

- ◆ The workforce — including management, the union, and the employees — should be familiarized with the dangers of ETS and the reasons for imposing a ban on smoking.
- ◆ The ban should be accompanied by a company-paid wellness program designed to help employees and their families quit smoking. Wellness programs designed to help people quit smoking are generally recognized as providing a good return on investment because of reduced health-insurance costs and improved productivity.

Partial Bans

Partial bans on smoking are generally more acceptable to the smoking employees. Under a partial smoking ban, employees can still smoke in specified areas and segregated lunchrooms, while work areas, hallways, restaurants, conference rooms, private offices, and employee lounges are usually designated as no-smoking areas.

Note: A negative side effect of specifying nonworking areas as smoking areas is that smoking employees may take more frequent or longer breaks away from their work areas.

Engineering Controls

The most effective engineering control for ETS is to create separate smoking lounges with separate ventilation directly to the outside. Such areas should be under negative pressure so that smoke does not migrate to adjacent hallways and other areas of the building. A less effective control is to create separate smoking lounges on the same ventilation system as the nonsmoking areas but accompanying this setup with an air-filtration system.

The American Society of Heating, Refrigerating, and Air-Conditioning Engineers recommends that up to 60 cubic feet of outdoor air per minute be provided to smoking lounges. Effective ventilation measures include ensuring that outdoor air supply dampers are open, removing partitions that might interfere with fresh-air flow, and locating outside air intakes away from potential sources of contaminants. Fans should be installed within the smoking areas to improve the dilution of pollutants. If necessary, the entire air distribution system should be redesigned or rebalanced to ensure proper replacement of air and the proper inflow and outflow of contaminated and replacement air.

Air can be treated for the removal of contaminants through the use of filtration, electronic air cleaners, or by chemical treatment with activated charcoal or other absorbents. Keeping the temperature under 76°F and the humidity between 20 and 60 percent will also help reduce airborne pollutants. Filters should be replaced regularly and regular maintenance should be performed on the air handling system.

Administrative Controls

Some reduction of ETS may be achieved through such administrative controls as designating separate times for smokers and nonsmokers to use a specific area, such as the cafeteria. Smoking should be allowed only during breaks and lunch and not at the workplace. Employees who are hypersensitive to ETS should be evaluated and the problem identified and corrected before returning to work. If the illness persists, they should be reassigned to another area. Reward benefits such as lower health-insurance rates can be offered to employees as incentives for not smoking or to quit smoking. Such nonsmoking incentives tie in well with employer-supported programs to stop smoking.

Workforce Screening

The U.S. Supreme Court refused to hear an appeal from a Florida woman who would not sign an affidavit stating that she had not used tobacco products for one year before applying for a job with the city of North Miami. Because the Supreme Court refused her appeal, it left intact a ruling by the Florida Supreme Court that the city of North Miami has a legitimate interest in reducing health care costs due to smoking and the use of tobacco products. The Florida Supreme Court also ruled that it was not a violation of privacy rights to require an applicant to provide information regarding the use of tobacco products. However, it would be unwise for employers to have a policy of employing only nonsmokers. Such a policy might bring the risk of a reverse handicap or disability discrimination lawsuit based upon perceived addiction to nicotine. There may also be adverse impact based on race, sex, or national origin that could lead to accusations of violating Title VII.

Implementing a Smoking Policy

Employers should consider what they are attempting to accomplish by developing and implementing a smoking policy. Is the policy a response to complaints by nonsmokers? Is the goal an attempt to cut insurance costs? Specifying these goals in advance will help the policy meet its intended goals. Employee concerns should also be addressed in developing a company smoking policy. If employees are already following their own informal rules, for example, the policy may simply require a formalization of these rules. Employees should be included in the process of developing any smoking policy to help gain the cooperation of employees who smoke. Employers should also be sure they have defined the ways by which a smoking policy will be enforced. The policy must clearly state disciplinary procedures, which must be followed closely and administered uniformly. Some issues which must be addressed in considering and designing a smoking policy are as follows:

- ◆ Will a smoking policy affect productivity, insurance costs, or customer or client relations?
- ◆ Should the smoking policy include a total or a partial ban on smoking?
- ◆ In cases of partial bans on smoking, are designated smoking areas truly isolated or can smoke be transmitted through vent or air-conditioning systems?
- ◆ Would confining smoking to certain areas protect those working near those areas?
- ◆ Should a smoking policy include all forms of tobacco use, such as cigars and smokeless tobacco?
- ◆ Does the smoking policy apply during nonworking hours, weekends, or holidays?
- ◆ Who will the smoking policy apply to — employees, managers, supervisors, directors, administrators, customers, and/or clients?
- ◆ If smoking employees are given additional smoke breaks during the workday, should nonsmoking employees also receive additional breaks?
- ◆ If a smoking policy is implemented, should guidance services or workshops be offered to encourage employees to quit smoking?