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## *State Law Protects Workers Who Smoke Away From Job*

by Tanja L. Darrow

With the skyrocketing cost of health care, coupled with an overall concern for the health of employees, a company in Michigan recently implemented a tobacco-free policy that ultimately led to the termination of some employees because they smoked in the privacy of their homes. Criticism and praise were swift.

Weyco Inc. is a business that helps other companies improve employee health and save money through innovative benefit plans. Weyco explained that in light of the nature of its own business, it wanted a proactive plan for promoting healthy lifestyles for its employees.

Weyco believes that healthy employees are more productive and that the long-term financial impact was significant enough to justify the new policy. For instance, according to Weyco, Michigan's smoking-related health care costs amount to \$2.65 billion a year, not including costs related to loss of productivity because of smoking.

Weyco implemented its tobacco-free policy in gradual stages beginning in the fall of 2003. Weyco gave its employees 15 months to either stop smoking or face termi-

nation. During that time, Weyco offered and paid for its employees' smoking-cessation classes, wellness counseling, medication and acupuncture therapy. In fact, Weyco's tobacco-free policy rendered very positive results.

According to Weyco, of the 15 to 20 employees who used tobacco prior to the policy, about a dozen stopped smoking, many of them thanking Weyco for assisting them in quitting a life-threatening habit. Only three employees opted out of the program and decided to work elsewhere. (The employees dispute that they voluntarily left their employment, stating that they were terminated. This is of no consequence because although some may disapprove of the policy, in Michigan it is not illegal to terminate an employee for smoking off-duty.)

That aside, the dismissed employees argued that Weyco's tobacco-free policy, which governed their conduct outside of work, violated their right to privacy. Weyco, on the other hand, pointed out that people do not have a constitutional right to smoke, and that smoking is nothing more than a poor personal choice. Weyco noted its own right to choose nonsmoking employees.

As one can imagine, questions and concerns grew.

There are many legitimate and legal reasons an employer may impose policies that govern off-duty conduct of its employees, including smoking. Smoking has a direct financial impact on employers. The American Lung Association reports that, compared with a nonsmoking worker, a smoking employee costs his or her employer at least \$1,000 a year in total excess direct and indirect health care costs.

Smoking-related illnesses alone cost an estimated \$16 billion a year - almost half of which employers pay - and account for 80 million lost work days annually. According to the Bureau of National Affairs, additional costs, estimated at \$300 to \$6,000 a year per smoker, are attributable to:

- Absenteeism (smoking workers are reported to be 50 percent more likely than nonsmokers to be absent from work.)
- Accidents (smokers are said to have twice as many job-related accidents as nonsmokers).
- Fire insurance premiums;
- Property damage to carpets, furniture and equipment.

- Increased expenses for building ventilation and maintenance.

Those who criticize Weyco or companies with similar policies should be mindful that employers have a legal duty to provide a safe and healthful workplace, which may include smoke-free air. While smokers complain that these types of policies invade their right to privacy, nonsmokers complain that the absence of such a policy constitutes an invasion of their right to a quality of life or an invasion of their personal space from the secondhand smoke.

Employers are faced with the challenge of balancing the two interests, while maintaining costs and improving profits.

It is unlikely that this off-duty smoking prohibition will lead to bans on other legal lifestyle choices. Advocates for privacy rights argue that the next step for employers is to ban conduct such as overeating or drinking, since these activities also lead to health issues. However, there are state and federal laws that protect people with conditions such as obesity, alcoholism and AIDS. It is unlawful to discriminate against a job applicant or employee based upon a legally recognized disability or status.

Some people question whether this is legal or indicative of a trend. In Michigan, it is legal - but the law varies from state to state. Many states require employers to establish policies protecting nonsmoking employees from the hazards of environmental tobacco smoke. Other states prohibit employers from restricting smoking by employees during nonwork hours. While smoking is not a constitutional right, it is also not a habit (or condition) afforded any protection by federal law.

Many states have indeed implemented bans similar to Weyco's or, alternatively, offered wellness programs to promote the health of their employees and assist with preventing disease. For instance, the home improvement retailer Lowe's, based in North Carolina - a major tobacco producing state with "smokers' rights" laws - recently announced a smoking ban.

San-Antonio-based USAA, a company that provides financial services to the military community, also has a no-tobacco policy, but

the company waived co-payments for prescription smoking cessation medications and offered on-site cessation programs and limited free membership in the company's fitness center. The company also offered a \$200 stipend for purchase of over-the-counter medications and other remedies such as acupuncture and hypnosis. Pitney-Bowes implemented similar incentives and programs to assist with its no-smoking policy.

Many states, including tobacco-producing states, have taken steps to ensure smoke-free workplaces. The states with the highest rates of smoke-free coverage include Utah, Maryland, Massachusetts, Vermont and California.

Employers in California may not deny employment or terminate a person because of smoking, however - at least not yet. The state is one of 29 that have an anti-discrimination law based on smoking or other legal conduct. California implemented its "lifestyle discrimination" law in 1999 (AB1689), prohibiting employers from discriminating against employees (or job applicants) based upon legal off-duty conduct.

However, California businesses may limit smoking in public areas, including the workplace. More than 76 percent of all California businesses report having smoke-free work environments.

There are pros and cons to having a no-smoking policy. Among the pros are the savings associated with absenteeism, high health care costs and earnings lost to sickness or premature death; lower premiums for fire and casualty insurance, and better protection against fire or other safety hazards; improved morale; reduced costs of maintenance and repair bills for equipment (furnishings damaged by smoke); and freedom from liability associated with nonsmokers' claims of secondhand smoke damage.

The cons of such a policy include having a more limited pool of qualified job applicants; difficulty in monitoring employees' after-hours and rest period activities; and increased exposure to lawsuits for discrimination and invasion of privacy.

After determining whether the pros outweigh the cons for the employer's needs, as with

any new policy consideration, an employer should consult legal counsel prior to implementing a policy. More importantly, the employer should ensure that the proposed policy is properly communicated and administered consistently without regard to the employee's race, gender, national origin, age or religion.

A qualified labor and employment law attorney can assist the employer with alternatives to a Weyco-style policy, which would have been unlawful in California. For instance, the employer could provide its employees with a variety of work-site health promotion and disease programs, financial incentives for cessation, or even provide fresh vegetables in a company cafeteria for those in cessation to help satisfy cravings.

While there always will be legitimate debate over the privacy rights of smokers versus the right to a decent quality of life for nonsmokers, an employer can indeed take steps to find a balance that also produces substantial financial and healthy lifestyle benefits for itself and its employees.