





Smoking is the largest cause of preventable illness and death in the United States, and the Secretary of Health and Human Services recently observed that “cigarettes are responsible for approximately ... 1 in every 5 deaths — every year in the United States.”¹ The US Centers for Disease Control and Prevention (CDC) estimates that businesses lose approximately \$3,400 each year for every employee who uses tobacco because of increases in health costs and decreases in productivity related to smoking breaks. Another national study of the US workforce found that tobacco use is one of the greatest causes of lost worker production time — greater than alcohol consumption, family emergencies, age or education.² On average, smokers miss 6.16 days of work per year due to sickness, compared to nonsmokers, who miss 3.86 days of work per year.³

NO SMOKERS ALLOWED

BY ELIZABETH RADER, ROBERT WOLFF AND LISA A. ORLANDO

Given these factors, it is hardly surprising that employers are seeking lawful ways to decrease the number of smokers in the workforce. Many have addressed this problem solely through incentivizing healthy lifestyle choices, while some have adopted stronger policies that prohibit hiring smokers altogether. For example, Cleveland Clinic adopted a policy of not hiring smokers. If an applicant fails a drug screen for nicotine, she will be offered free smoking cessation counseling and will be re-tested in 90 days. A second positive test precludes hire. This is how Delos M. Cosgrove, MD, CEO and president, Cleveland Clinic, and a cardiothoracic surgeon, responded to critics of the program:

Some also have claimed that our new policy is not really about health, but about saving money. Let me answer that in two ways.

First, with our new policy, any applicant who fails the nicotine screening will be referred to a free tobacco cessation program that we pay for. Those who are successful in quitting will be encouraged to reapply after 90 days. ... We also are committed to taking a lead role in shifting the national focus from “sick” care to “health” care.

As a true “health care” provider, we must create a culture of wellness that permeates the entire institution, from the care we provide, to our physical environment, to the food we offer, and yes, even to our employees. If we are to be advocates of healthy living and disease prevention, we need to be role models for our patients, our communities and each other. In other words, if we are to “talk the talk,” we need to “walk the walk.”

Those who are successful in quitting will be encouraged to reapply after 90 days. The fact that we offer this shows how serious we are about helping people quit, and I am hopeful that it will encourage many more people to kick this awful habit and join our organization.⁴

State laws prohibiting employment discrimination against smokers

Many health care and other organizations have instituted policies against hiring smokers. Whether an employer can lawfully do so is primarily a question of state law.

With most of its hospitals located in Ohio, Cleveland Clinic is able to lawfully exclude from consideration for hire candidates who test positive for nicotine. However,



ELIZABETH (BETSY) RADER is associate counsel at the Cleveland Clinic, a nonprofit academic medical center in Northeast Ohio that employs 42,000 physicians and other caregivers. Rader received her B.A. from The Ohio State University and her J.D. from Yale Law School. She can be contacted at raderb@ccf.org.



ROBERT M. WOLFF is a civil trial attorney with more than 30 years of experience who has represented large and small companies in the healthcare, energy, transportation, financial and retail industries. He's a frequent lecturer on employment discrimination and litigation topics and is the co-chair of the Healthcare Practice Group at Littler Mendelson. Wolf received his B.A. from Oberlin College and his J.D. from the University of Illinois College of Law. He can be contacted at rwolff@littler.com.



LISA A. ORLANDO is an attorney at Littler Mendelson. Her areas of practice include both labor relations and employment litigation, with a particular emphasis on leaves of absence and disability accommodation issues. She practices before Ohio federal and state courts, the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission. Orlando received her B.S. from Boston College and her J.D. from Case Western Reserve University School of Law. She can be contacted at lorlando@littler.com.

employers with operations in other states are cautioned to review state laws to determine whether they are restricted in the ability to take action against an applicant based on that applicant's lawful off-duty conduct. Currently, at least 29 states and the District of Columbia prohibit employers from making employment decisions based on lawful activity in which applicants engage while off duty. These laws vary by state, with some of them generally covering off-duty conduct (California, Colorado, New York, North Dakota and Wisconsin), while others expressly prohibit discrimination against tobacco users (Connecticut, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Wyoming).

Many of the state laws that prohibit employment discrimination based on lawful off-duty conduct and/or smoking,

carve out exceptions that may, in certain circumstances, allow employers to lawfully refuse to hire smokers. For instance, in Missouri, employers may refuse to hire smokers if the use of tobacco products interferes with the duties and performance of the employee or overall operation of the employer's business; and nonprofit entities with health care promotion as their principal business are completely exempted from Missouri's law prohibiting discrimination against smokers in employment. In Connecticut, Rhode Island and West Virginia, nonprofit entities whose primary purpose is to discourage the general public's use of tobacco products are exempted from the smokers' rights protection laws. Likewise, the laws of Illinois, Montana and Wisconsin do not apply to any nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

Montana's prohibition against discrimination against smokers excludes from coverage the use of a lawful product that affects in any manner a person's ability to perform job-related employment responsibilities, other employees' safety, or conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment. The District of Columbia and Wyoming have statutes prohibiting discrimination against smokers in employment but permit employers to restrict or prohibit tobacco use when such

policies are justified as bona fide occupational qualifications. In Colorado and Minnesota, employers can exclude individuals from employment based on lawful off duty conduct so long as the reason for doing so either relates to a bona fide occupational requirement and is reasonably related to an employee's or a group of employees' job duties (rather than all employees); or is necessary to avoid an actual or apparent conflict of interest with an employee's job duties. New Jersey permits employers to refuse to hire smokers if they have a "rational basis" for doing so that is reasonably related to employment, including the prospective employee's job responsibilities. New Mexico, North Carolina, North Dakota and South Dakota laws do not apply to any activity that relates to a bona fide occupational requirement that is reasonably related to the employment activities and responsibilities of a particular employee or a particular group of employees (as opposed to the entire workforce). In Oklahoma and Oregon, the prohibition against discrimination does not apply when the smoking restriction relates to bona fide occupational requirements or where a collective bargaining agreement prohibits off-duty use of tobacco products. Similarly, the law in California prohibiting employers from discriminating against employees who engage in lawful off-duty conduct does not invalidate any collective bargaining agreement or employment contract protecting an employer against conduct directly conflicting with its essential interests.

The exceptions for job relatedness and bona fide occupational qualifications could arguably be applied if the employer is a health care organization that has a strong mission of promoting heart-healthy behaviors to the community at large, its patients and its workforce. Under these circumstances, where the rationale for excluding smokers from employment is consistent with and furthers the employer's mission — and not because of a perception that smokers are unhealthy and likely to lead to increased insurance costs — a strong argument could be made that the job-relatedness exception should apply. However, employers should be cautioned that the exceptions for bona fide occupational requirements or job-relatedness in the laws prohibiting employment discrimination against smokers have generally been untested and may be narrowly construed. For example, a court could find that being a nonsmoker is a bona fide occupational requirement or related to the job duties and responsibilities of nurses in a hospital's pulmonary department, but is not appropriate for clerical staff in a hospital's records department.

Smokers' rights and federal law considerations

There is no federal law establishing a "right to smoke," and federal courts have decided that the United States Constitution provides no such right. *Grusendorf v. Oklahoma City*, 816 F.2d 539 (10th Cir. 1987); *Operation Badlaw, Inc. v. Licking County General Health Dist.*, 866 F. Supp. 1059

(S.D. Ohio 1992). Even though smokers are not expressly protected under any federal statutes regarding employment rights, there is an argument — although not a compelling one — that individuals suffering from nicotine addiction are disabled and therefore entitled to protection from discrimination under the Americans with Disabilities Act Amendments Act (ADAAA).

Alcohol addiction can be a disabling condition under the ADAAA, but it remains to be seen whether nicotine addiction will receive similar treatment under the law. The EEOC has not offered any guidance on the subject, nor has any court gone so far as to say that nicotine addiction is a covered disability. In fact, in *Brashear v. Simms*,⁵ a federal judge opined that "common sense compels the conclusion that smoking, whether denominated as 'nicotine addiction' or not, is not a 'disability' within the meaning of the [Americans with Disabilities Act (ADA)]. Congress could not possibly have intended the absurd result of including smoking within the definition of 'disability,' which would render somewhere between 25 percent and 30 percent of the American public disabled under federal law because they smoke."⁶ However, the *Brashear* case was decided before the ADAAA went into effect, under a different, significantly more stringent standard for establishing a disability under the ADA. With the promulgation of regulations under the ADAAA, the EEOC has stated its intention to broaden the definition of disability and create a less demanding standard for determining whether an individual is disabled. Accordingly, *Brashear's* determination that smoking is not a disability may have lost some of its impact in cases to be decided under the ADAAA.

Another aspect of the *Brashear* decision that may no longer be applicable is its determination that neither smoking nor nicotine addiction qualified as an ADA-covered disability because "both smoking and 'nicotine addiction' are readily remediable, either by quitting smoking outright through an act of willpower (albeit easier for some than others), or by the use of such items as nicotine patches or nicotine chewing gum."⁷ The court based this aspect of its opinion on the Supreme Court's decision in *Sutton v. United Airlines*,⁸ which held that an impairment is not a disability within the meaning of the ADA, if it could be mitigated by corrective measures. The ADAAA, however, expressly rejected *Sutton*. For cases that arise after the ADAAA went into effect, courts may no longer consider the effect of any mitigating measures on an individual's condition. Instead, they must analyze the condition without regard to the ameliorative effects of mitigating measures. The ADAAA's abrogation of *Sutton* is likely to result in many more individuals being covered, including — perhaps — smokers addicted to nicotine.

Although there is some air yet to clear regarding the status of smoking or nicotine addiction under the ADAAA, an individual is still required to demonstrate a "physical

Employers Implementing Bans on Hiring Tobacco Users

In addition to Cleveland Clinic, these employers have reportedly implemented bans on hiring tobacco users in recent years:

- The Massachusetts Hospital Association
- Missouri's St. Francis Medical Center,
- St. Luke's Hospital & Health Network
- Tennessee's Memorial Health Care System
- Bethlehem Hospital
- ProMedica hospital network
- Crittenton Hospital Medical Center
- Baylor Health Care Systems
- Alaska Airlines
- The Scotts Co. LLC
- Union Pacific Railroad
- Turner Broadcasting System Inc.
- Cardinal Industries, Inc.
- Litho Industries, Inc.
- New Brunswick Scientific Co.


or mental impairment” that “substantially limits” a major life activity to invoke the Act’s protection. See 42 U.S.C. § 12102(2)(A). The EEOC defines physical impairment under the ADA as a “physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine.” Mental impairment is defined as “any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” It is difficult to envision how smoking or nicotine addiction itself, without an accompanying physical condition such as cancer, emphysema, asthma, etc., would satisfy the definitions of a physical or mental impairment that substantially limits a major life activity. In contrast, alcohol addiction, which in and of itself may be a covered impairment under the ADA under certain circumstances, may result in substantial limitation of one or more major life activities. See, e.g., *Andrews v. Ohio*, 104 F.3d 803, 809 (6th Cir. 1997) (quoting *Cook v. State of Rhode Island, Dep’t of Mental Health, Retardation and Hospitals*, 10 F.3d 17, 24 (1st Cir. 1993)) (noting that the ADA “indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism ... [and] ... *cancer resulting from cigarette smoking.* ...”) (emphasis added). If, however, smoking or nicotine addiction without the manifestation of an associated physiological condition could qualify as a physical or

mental impairment, then a court might easily conclude that it also “substantially limits” a “major life activity” given the ADA’s less rigorous “substantially limits” standard and expanded definition of “major life activity.” “Major life activity” now includes the operation of major bodily functions, such as the functions of the respiratory, circulatory and cardiovascular systems. Still, even if smoking or nicotine addiction could be construed as a disability, it has always been the case — and remains so under the ADA — that employers can enforce their rules against the use and influence of drugs and alcohol at work. In the same vein, any argument that a smoker needs to be reasonably accommodated by being allowed to smoke at work would be futile. In fact, the ADA specifically states that its provisions do not prohibit employers from prohibiting smoking in the workplace. 42 U.S.C. § 12201(b).

Perhaps a more plausible claim that a rejected applicant who tests positive for nicotine could raise is under the “regarded as disabled” prong of the ADA, which contrasts the law prior to the ADA. The former law required an individual to show that an employer believed his impairment (or perceived impairment) substantially limited performance of a major life activity. To qualify for coverage under the prong now, the individual need only show that he was subjected to an action prohibited by the ADA (such as refusal to hire) because of an actual or perceived impairment, despite whether he actually has an impairment that limits a major life activity. Accordingly, if a smoker is not hired due to the results of a pre-employment nicotine test or because of an admission on an employment application that she is a smoker, it is not inconceivable that an applicant could claim that the failure to hire was because of a perceived impairment. Nevertheless, there are defenses an employer can assert in a “regarded as” claim. For example, the final regulations to the ADA specifically provide that an employer may challenge such a claim by showing that “the impairment in question, whether actual or perceived, is both transitory, which is defined as lasting less than six months, and minor. The term minor is not defined, and it will take some time to see how the EEOC and courts treat the “regarded as” claims and defenses.

An employer might also successfully argue that rejection of an applicant who smokes is simply akin to a hiring decision based on a physical characteristic, not a perceived disability. See, e.g., *Sutton*, 527 U.S. at 490 (stating that employers may prefer particular physical characteristics to others and that they are permitted to make hiring decisions based on factors such as height or build). For instance, in granting a weight loss center’s motion to dismiss the “regarded as disabled” ADA claim of an obese applicant for a sales position, the trial court reasoned that the center’s decision to reject the applicant “for fear that his appearance did not accord with the

company image is not improper.” *Goodman v. L.A. Weight Loss Centers Inc.*, 2005 U.S. Dist. LEXIS 1455, *7 (E.D. Pa. Feb. 1, 2005). According to the court, “[t]o hold otherwise would render an employer’s ability to hire based on certain physical characteristics entirely void.” *Goodman*, 2005 U.S. Dist. LEXIS 1455, at **7-8 (citing *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996)). A tobacco user whose application for employment is rejected by an employer with a primary business objective of promoting health care and wellbeing might be similarly unable to maintain a viable “regarded as disabled” claim under the rationale of *Goodman*.

Although the scope and effect of many of the ADAAA changes to the ADA have not yet been subject to administrative or judicial interpretation, and potential questions remain, individuals bringing federal disability discrimination claims must still prove that the employer’s actions were due to unlawful discrimination rather than the result of legitimate nondiscriminatory business reasons. In sum, under the right circumstances, employers may choose to “extinguish” smokers from the pool of potential candidates for hire without violating the ADAAA. However, employers seeking to implement no-smoking bans on new hires should carefully consider all potential legal issues, including applicable state laws, before doing so. 

Editor’s Note: Additional sidebar discussing the *Rodrigues v. EG Systems, Inc. d/b/a Scotts LawnService* case is available in the Digital Docket.

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NOTES

- 1 US Department of Health and Human Services. *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010).
- 2 Stewart W., Ricci J., Chee E., Morganstein D., “Lost productivity work time costs from health conditions in the United States: Results from the American productivity audit.” *JOEM*. 2003;45(12):1234-1246.
- 3 Halpern, M.T., Shikiar, R., Rentz, A.M., Khan, Z.M., “Impact of smoking status on workplace absenteeism and productivity,” *Tobacco Control* 2001;10(3): 233-238.
- 4 http://my.clevelandclinic.org/tobacco/a_message_about_smoking.aspx.
- 5 138 F. Supp. 2d 693, 695 (D. Md. 2001).
- 6 See also *Stevens v. Rusch*, 220 Mich. App. 212, 559 N.W.2d 61 (1996) (smoking not a disability under Michigan state law that tracks the ADA).
- 7 *Brashear*, 138 F. Supp. 2d at 695.
- 8 527 U.S. 471 (1999).