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Employment Law Commentary

Thank You For Not Smoking

By Teresa Burlison

By now most people in the United States are accustomed to working in mandatory smoke-free environments. No smoking in the workplace has become such a cultural norm that seeing otherwise can be weirdly startling. Take the hit TV show *Mad Men*, for example. Its office scenes of chain-smoking ad men and prettily puffing secretaries have inspired scores of articles, blog posts, and commentary. To imagine a time when the hallways of work were clouded with cigarette smoke seems, to entire generations in the job force, well, *un*imaginable. The irony is that most of the actors on *Mad Men* are smoking herbal cigarettes on set instead of tobacco[1] —and that's, of course, because they work in modern-day California, which, like most states, prohibits any smoking of tobacco products in the workplace.[2]

Over the years, some employers outside of California have been taking their "no-smoking" requirement a dramatic step further by imposing outright bans on hiring smokers. The impetus behind such bans is a desire to control employee healthcare costs and increase productivity. While this no-hire trend is not new, it appears to be ongoing and possibly even gaining traction in some job sectors. As reported recently by the *New York Times*, no-smoker policies "reflect a frustration that softer efforts—like banning smoking on company grounds, offering cessation programs and increasing health care premiums for smokers—have not been powerful-enough incentives to quit."[3] The Times article in particular focused on hospitals and medical businesses, noting that "hospitals in Florida, Georgia, Massachusetts, Missouri, Ohio, Pennsylvania, Tennessee and Texas, among others, stopped hiring smokers in the last year and more are openly considering the option."

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Reaction to employers refusing to hire or retain smokers has been mixed. Many states have adopted laws prohibiting employers from requiring employees to refrain from off-duty tobacco use. For instance, Connecticut, Indiana, Louisiana, Maine, New Mexico, Oklahoma, Rhode Island, South Dakota, West Virginia, Wyoming New Jersey, and the District of Columbia prevent employers from discriminating against employees who use tobacco products.[4] These laws do not interfere with an employer's ability to maintain a smoke-free workplace, but are intended to prevent employers from forbidding the use of tobacco by employees outside work.

Elsewhere, courts have rejected privacy-based challenges to smoker bans and upheld the lawfulness of employers refusing to employ those who light up. The Florida Supreme Court has ruled, "[g]iven that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of privacy is not implicated . . ."[5] In reaching this conclusion, the Court relied upon the Tenth Circuit's holding in *Grusendorf v. City of Oklahoma City*, 816 F.2d. 539 (10th Cir. 1987), which deemed the City of Oklahoma's prohibition on smoking for newly-hired firefighters acceptable under the Fourteenth Amendment. Similarly, a federal district court in Massachusetts found that an employee fired for violating his employer's no-smoker policy after he tested positive for nicotine had not suffered an actionable invasion of privacy. *See Rodrigues v. EG Systems, Inc. d/b/a Scotts Lawnservice*, 639 F. Supp.2d 131, 134 (2009). ("Rodrigues does not have a protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private.")

California so far has not weighed in on the debate.[6] But even if an off-duty ban on smoking were to pass muster under California's strict privacy laws, an employer's policing of this ban would be difficult to manage from a legal perspective. California law generally does not permit the random drug testing of employees. Further, medical testing is not a viable option because most employers would be hard pressed to explain how screening for signs of smoking-related ailments is "job-related and consistent with business necessity," as required under the Americans with Disabilities Act.

California employers concerned with the costs of business associated with smoking employees are not without options. They can encourage healthy habits, offer discounted gym memberships, provide employees with smoking cessation help through an Employee Assistance Program (EAP), and consider sponsoring a wellness program.[7] Prohibiting workers from *ever* smoking, however, may be viewed as crossing the line. While California law does not allow workplaces to resemble the smoke-filled offices of *Mad Men*, an employer's reach does not necessarily extend to an employee's living room where he or she is watching the show off-duty. In that case, the employee is free to smoke as many Lucky Strikes as the characters on TV—and they don't even have to be herbal cigarettes.

1. Witchel, Alex (2008-06-22). "'Mad Men' Has Its Moment." *New York Times* (The New York Times Company). http://www.nytimes.com/2008/06/22/magazine/22madmen-t.html.
2. *See* California Labor Code § 6404.5. Section 6404.5(d)(9) does, however, create an exception for theatrical production sites "if smoking is an integral part of the story . . . " California Labor Code § 6404.5(d)(9). *Mad Men*'s creator and executive producer, Matthew Weiner, nevertheless has explained, "You don't want actors smoking real cigarettes . . . they get agitated and nervous. I've been on sets where people throw up, they've smoked so much." Witchel, Alex (2008-06-22). "'Mad Men' Has Its Moment." *New York Times* (The New York Times Company). http://www.nytimes.com/2008/06/22/magazine/22madmen-t.html.
3. Sulzberger, A.G. (2011-02-10). "Hospitals Shift Smoking Bans to Smoker Ban." *New York Times* (The New York Times Company). http://www.nytimes.com/2011/02/11/us/11smoking.html.
4. CONN. GEN. STAT. ANN. §31-40s; D.C. CODE ANN. §7-1703.03; IND. CODE ANN. §22-5-4; LA. REV. STAT. ANN. §23:966; 26 ME. REV. STAT. ANN. §597; N.M. STAT. ANN. §50-11-3; OKLA. STAT. ANN. tit. 40, §500; R.I. GEN. LAWS §23-20.10-14; S.D. CODIFIED LAWS §60-4-11; W. VA. CODE §21-3-19; WYO. STAT. ANN. §27-9-105; N.J. STAT. ANN. §34:6B-1. In these states, it could be problematic for employers not only to ask job applicants whether they smoke, but also to take subsequent action against anyone who is believed to have answered such a question untruthfully.
5. *Kurtz v. City of North Miami*, 653 So. 2d 1025, 1028 (1995) (upholding municipality's requirement that all job applicants refrain from using tobacco products for one year before applying for employment).
6. Californians arguably have been more focused on the right to smoke something other than tobacco, based on the high-profile litigation and legislative efforts surrounding medical marijuana use. And although California Labor Code §§ 96(k) and 98.6(a) appear to prohibit employers from discriminating against employees engaged in lawful off-duty conduct, courts have narrowly construed these statutes to shield only such conduct that already is protected under law. *See Grinzi v. San Diego Hosp. Corp.* 120 Cal. App. 4th 72, 87 (2004); *Barbee v. Household Auto. Fin. Corp.*, 113 Cal. App. 4th 525, 533–36 (2003).
7. Wellness programs are regulated by various laws, however, and should not be implemented without first consulting an attorney.

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