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Tobacco Use as a Factor in Hiring Policy

Policies against hiring tobacco users may be new to Arkansas businesses, but they have been established in other states for several years. No reliable data exist on how many businesses have adopted such policies, but trends indicate that adoption is more widespread in health care than other business sectors. For example, hospitals in Florida, Georgia, Missouri, Tennessee, and Texas, among others, recently stopped hiring smokers and more are openly exploring the option.ⁱ

The adoption of these policies by the health care sector reflects an effort to advance institutional missions of promoting personal health and well-being. Implementing these kinds of policies in non-health business sectors, however, may indicate much broader employer efforts to control health care costs and increase employee productivity. The Centers for Disease Control and Prevention estimates that each tobacco-using employee costs an employer \$3,383 annually, including \$1,760 in lost productivity and \$1,623 in medical expenses.ⁱⁱ The policies also indicate a frustration that subtler efforts—banning tobacco use on company grounds, imposing insurance premium surcharges on tobacco users, and offering cessation programs—have not been formidable enough disincentives or effective enough incentives for employees to quit.

The emergence of policies against hiring tobacco users has not gone without opposition. In fact, 29 states and the District of Columbia have passed laws that prohibit implementing these types of policies, although some laws provide exceptions for non-profit organizations and the health care industry.ⁱⁱⁱ Arkansas currently has no statutory or regulatory ban on such policies and follows the “employment-at-will” doctrine, meaning that Arkansas employers are generally free to set the standards for what types of employees they will hire.

State legislation prohibiting these types of policies was driven by early adopters^{iv,v} over a decade ago, along with a growing realization that federal law would not provide recourse for challengers of the policies. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits Employee Retirement Income Security Act (ERISA) group health plans from discriminating against an employee based on a health condition when determining benefit premiums or contributions; HIPAA does not extend such protection, however, to hiring or promotion decisions or

An Arkansas Case Study

In October 2011, the White County Medical Center (WCMC) in Searcy became the largest Arkansas employer to adopt a policy against hiring people who use tobacco. WCMC President Ray Montgomery noted that he was aware of at least one other Arkansas employer that has adopted a similar policy but that its adoption there was not publicized. “I wouldn’t call us a trendsetter but if you look at the literature, it’s one of the most expensive behavioral choices that we make in our lives,” said Montgomery.

To operationalize the policy, the hospital incorporated nicotine screening into random drug testing for employees. Using tobacco on hospital campuses is already prohibited in Arkansas. If new hires use tobacco when they are away from work or are using patches or gum to kick the habit and test positive for nicotine, they will lose their jobs.

According to Brenda Engle, the WCMC Director of Health Works, “As a health care facility we believe this is the right thing for us to do for our employees.” The adoption of the new smoking policy was part of a broader effort to make the WCMC work environment a healthier one. WCMC concurrently revamped its cafeteria menu, which now offers healthier options. “We want to be able to be role models of living good, healthy lifestyles,” Montgomery said.¹

lifestyle choices.^{vi} Additionally, tobacco users are not recognized as a protected class such that they would be entitled to discrimination protection under Title VII of the Civil Rights Act of 1964.^{vii} Courts have also refused to recognize nicotine addiction as a disability under the Americans with Disabilities Act.^{viii}

Research on the effects of and attitudes towards these hiring policies is limited.^{ix} One study explored corporate policies and employee attitudes towards non-smoker only hiring policies among 287 employees of 76 New York City firms engaged in real estate, insurance, or banking.^x Two percent of the firms surveyed hired only non-smokers. Employees indicated a highly negative view of the policies, with 95 percent opposed. A study of current and former smokers' perception of smoking-related stigma found that self-reported discrimination—including being rejected for a job for which one was qualified due to smoking status—was associated with higher reported levels of stigma.^{xi}

The pros and cons of implementing these policies, however, have been debated for years. Aside from the legal implications, one concern is that the policies represent a “slippery slope” and will lead to employers refusing to hire other employees with certain habits or lifestyle choices, all under the guise of seeking to reduce health care costs or improve worker productivity. Opponents of these policies worry, for example, that the “slippery slope” could lead to bans on hiring people who are overweight. Although there are no reported cases of such bans, those who are overweight earn less than non-overweight people in comparable positions and are less likely to be hired in the first place or considered for a promotion.^{xii}

A second concern is that these policies can limit the hiring pool, which can be especially difficult for sectors such as health care in which employees are already in high demand.^{xiii} The White County Medical Center, for example, eliminated 19 percent of the county's adult population as potential employees by adopting a hiring ban on smokers.^{xiv} Hospital officials have indicated that the policy has not resulted in a shortage of qualified applicants.

Enforcement and administration of the policies are also potentially problematic. If employers do not have an existing drug test for employees, nicotine testing may be costly and difficult to administer. Some tests can detect exposure to secondhand smoke, which can unfairly place some employees or applicants at risk. And, without random or regular testing, employers must rely on an honor system in which applicants and employees self-report tobacco use.

Despite the perceived drawbacks, trends indicate that employers are finding more weight in the benefits of such policies—benefits which have been made more obvious by recent research. For instance, a 2007 study found that smokers take more sick days than their non-smoking co-workers.^{xv} According to the study, even smokers in relatively good health will still have higher medical costs than a comparable non-smoker over a three-year period.

Some employers indicate that the implementation of these policies promotes wellness and healthy lifestyles among employees, regardless of whether they result in reduced costs.^{xvi} Additionally, employers report decreased resentment of smokers who are perceived to take frequent breaks and cause increased health care cost for other employees.

Tobacco use still remains the single most preventable cause of disease, disability, and death in the United States.^{xvii} In Arkansas, an estimated \$1.4 billion in productivity losses were attributable to smoking from 2000 to 2004 while smoking-attributable expenditures in Arkansas total almost \$900 million annually.^{xviii}

A Policy Survives Legal Challenge

In 2006, Scotts LawnService was sued in Massachusetts after the company rescinded an employment offer contingent on a drug test that found nicotine in the employee's urine, a violation of a policy barring employees from smoking on or off the job. The employee argued that the company violated his right to privacy under state law, as well as discrimination provisions under the Employee Retirement Income Security Act (ERISA). The court dismissed the case in 2009, finding that the employee had no privacy protection because there was never an attempt to keep his smoking habit private and that ERISA "...forbids discrimination by a variety of employment-related actions, but it does not...forbid discrimination by means of a decision not to hire."

A hiring ban is just one option for employers attempting to address employee tobacco use. Some employers offer discounts to employees for participation in tobacco cessation or other wellness programs that promote quitting. Other employers reward non-tobacco users by providing discounts or enhanced subsidization of insurance premiums. Irrespective of the avenue chosen, employers are becoming more attentive to the costs associated with tobacco use and are more actively looking to address these concerns.

References

- ⁱ Sulzberger AG. "Hospitals Shift Smoking Bans to Smoker Ban." *New York Times*, February 10, 2011.
- ⁱⁱ Fellows JL, Trosclair A, Adams EK, Rivera CC. "Annual Smoking Attributable Mortality, Years of Potential Life Lost, and Economic Costs-United States, 1995-1999." *MMWR Weekly Reports* 2002; 51(14):300-303.
- ⁱⁱⁱ National Conference of State Legislatures. "Discrimination Laws Regarding Off-Duty Conduct." October 18, 2010. Web. 31 Jan. 2012. <http://www.ncsl.org/documents/employ/Off-DutyConductDiscrimination.pdf>. (Citing Timothy A. Gudas, *State Lawful Products Statutes* (Chicago: American Bar Association, 2005), State statutes available on-line from official state websites, and *Westlaw* statutory database searches, 2010)
- ^{iv} Alaskan Airlines, Turner Broadcasting, and Gulf Power were some early adopters.
- ^v Editorial. "Not hiring smokers crosses privacy line." *USA Today*, January 29, 2102.
- ^{vi} *Rodrigues v. EG Systems, Inc. d/b/a Scotts LawnService*, Civil No. 07-10104-GAO (D. Mass., Jul. 23, 2009).
- ^{vii} *Romer v. Evans*, 517 U.S. 620, 637 (1996) (Scalia, J., dissenting)
- ^{viii} *Brashear v. Simms*, 138 F. Supp. 2d 639, 693-94 (D. Md. 2001)
- ^{ix} McDaniel PA, Malone RE. "Businesses' voluntary pro-health tobacco policies: a review and research agenda." *Tobacco Control* 2012;21(1):66-72.
- ^x Lecker MJ. "The smoking penalty: distributive justice or smokism?" *Journal of Business Ethics* 2009;84(Suppl 1):47-64.
- ^{xi} Stuber J, Galea S, Link BG. "Smoking and the emergence of a stigmatized social status." *Social Science & Medicine* 2008;67(3):420-430.
- ^{xii} Puhl RM, Heuer CA. "The Stigma of Obesity: A Review and Update." *Obesity* 2009;17(5): 941-964.
- ^{xiii} According to ACHI calculations based on long-term employment projections from the Arkansas Department of Workforce Services, 35 percent of total annual job openings from 2008 through 2018 will be in the health care field.
- ^{xiv} "2011 White County, Arkansas." *County Health Rankings, 2011*. Web. 20 Feb. 2012. <http://www.countyhealthrankings.org/arkansas/white>.
- ^{xv} Lundborg P. "Does smoking increase sick leave? Evidence using register data on Swedish workers." *Tobacco Control* 2007;16:114-118.
- ^{xvi} Elliott VS. "Growing number of hospitals ban hiring smokers." *American Medical News*, April 5, 2011: n. pag. <http://www.ama-assn.org/amednews/2011/04/04/bisd0405.htm>.
- ^{xvii} National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. "Tobacco Use: Targeting the Nation's Leading Killer." Atlanta, GA: Centers for Disease Control and Prevention. 2011. Web. 25 Feb. 2012. http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.
- ^{xviii} State Tobacco Activities Tracking and Evaluation (STATE) System. "Tobacco Control Highlights: Arkansas." Atlanta, GA: Centers for Disease Control and Prevention, 2011. Web. 25 Feb. 2012. <http://apps.nccd.cdc.gov/statesystem/HighlightReport/HighlightReport.aspx?FromHomePage=Y&StateName=Arkansas&StateId=AR>.