

ISSUE BRIEF

EMPLOYMENT DISCRIMINATION AND SMOKER ACCOMMODATION

ISSUE

Over the past few years the tobacco industry has turned from simply defending the rights of smokers to promoting an affirmative strategy to protect its customers. Two principle categories of "pro-industry" legislation deal with anti-discrimination in employment practices and smoker accommodation. Employment discrimination legislation calls for the protection of smokers from hiring, firing or promotion discrimination in the workplace. Smoker accommodation legislation mandates the designation of smoking areas in various places including government buildings and certain public places.

BACKGROUND

Employment discrimination legislation responds to the recent increase in discriminatory workplace policies directed against employees and prospective employees who smoke. These actions include refusal to hire smokers, and disciplining or discharging those who do not stop smoking. Numerous states and localities have adopted legislation or enacted policies discriminating against public safety employees who smoke. Some employers have gone so far as to subject employees to polygraph tests and urinalysis to ensure that they do not smoke on their own time off-the-job.

Such practices are the subject of much controversy. First, discriminatory policies are not justified by health considerations. Second, discriminating against smokers disproportionately harms the employment opportunities of minorities, who smoke in larger numbers. Third, discrimination -- particularly when a product of unilateral action by an employer -- can undermine employee collective bargaining rights. Finally, such discrimination is inconsistent with the fundamental values of equal protection. Legislation to end these unfair and discriminatory practices is warranted.

In response to legislation that unreasonably restricts or bans smoking, the industry has been seeking legislation ensuring the designation of smoking areas. The objective is to accommodate the needs of both smokers and nonsmokers. Cooperation and accommodation are the key ingredients to responding effectively to the needs and wants of both smokers and nonsmokers.

PROPOSERS

Advocates who support equal rights in employment practices include the American Civil Liberties Union (ACLU), various organized labor unions, tobacco distributors, manufacturers and wholesalers and government and private sector employers. Smoker accommodation advocates include labor unions and many private businesses.

OPPONENTS

Those who oppose such legislation include, Action on Smoking and Health (ASH), Americans for Nonsmokers Rights, Coalition on Smoking OR Health and Group Against Smokers' Pollution (GASP).

INDUSTRY POSITION

The industry is a catalyst for these types of legislation, aiding proponents in seeing that legislation is adopted. The industry is and will continue to work diligently to see that more states and localities adopt not only employment discrimination and smoker accommodation legislation, but other legislation to protect the legal rights of its customers.

LEGISLATIVE HISTORY

Since 1989, employment discrimination measures have been enacted in Delaware, Oregon, Virginia, Colorado, Kentucky, South Carolina, and Tennessee. The first employment discrimination bill to be adopted on the state level was in Virginia last year. The law prohibits governments from requiring an applicant or employee "to abstain from smoking or using tobacco products outside the course of his employment." Police and firefighters are exempt from the provision.

While the ensuing bills may differ in language, their intent is similar -- protect against employment discrimination. In Oregon, the law prohibits employers from requiring employees to refrain from smoking off-the-job except when the restriction relates to a bona fide occupational requirement or if off-duty smoking is prohibited by collective bargaining agreement. And in Kentucky, the law provides for fair and equal treatment of employees who smoke, forbidding bias in hiring, firing and promotions.

Industry proactive activity concerning smoker accommodation emerged as a separate issue in 1989. While there are some previously-enacted smoking restriction laws which require designated smoking areas, this issue brief will concentrate only on those efforts pursued since last year. A total of five states have adopted smoker accommodation legislation. In 1989, the Nevada legislature approved a bill requiring smoking areas to be designated in publicly-owned buildings (schools were exempt). And in Oklahoma, state agencies are now required to designate at least one indoor smoking area.

So far in 1990, South Carolina, Tennessee and Virginia have also adopted accommodation measures which ensure the designation of smoking areas.

**STATE ACTIVITIES DIVISION
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- . **Employment policies that discriminate against smokers are contrary to public policy and may violate state and federal laws.**

- . **Legal questions aside, who would want to discriminate against smokers if the primary motive in hiring is to employ the best individual for the job? A smoking secretary will not make more typographical errors than a nonsmoker.**

- . **Policies that allow an employer to discharge an individual who smokes during his or her time away from the job open the door to measures that may have a chilling effect on other protected employee activities.**

- . **Employment discrimination against smokers is also a clear violation of personal privacy.**

- . **Left with enough flexibility to address the concerns of all employees, most employers generally find that they can resolve smoking disputes by undertaking practical accommodations -- designated areas for smoking and nonsmoking. The question of when and how workers may smoke in the office is best settled by employer and employee consensus rather than by city council, state legislature, or office management fiat.**

- . **Smoking and nonsmoking areas can be equitably assigned in most public places. There needs to be consideration for both sides; allowing for individual preferences is a sign of individual respect.**

- . **Smoking discrimination also disproportionately harms the career advancement opportunities of blue collar workers. Of the 30 percent of adult Americans who smoke, a disproportionate percentage tend to hold blue rather than white collar jobs. They will be unequally disadvantaged by policies that base promotions in whole or in part on whether an individual smokes.**

- . **Policies that allow an employer to discharge an individual who smokes during his or her time away from the job may have a chilling effect on other protected employee activities. Blue collar workers in particular are vulnerable to seemingly neutral discriminatory policies that may be used selectively against those viewed as "troublesome" by employers. Workers who engage in otherwise protected activities, such as political advocacy or union participation easily could be disciplined or discharged under the pretext of anti-smoker policies.**