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HEADLINE: Police and Fire Depts. Face Massachusetts Smoking Ban

BYLINE: By ALLAN R. GOLD, Special to the New York Times

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BODY:

Massachusetts has become the first state to prohibit newly hired police officers and firefighters from smoking on or off the job.

The state has joined a growing number of cities and towns that are placing restrictions on the ability of public safety employees to smoke at all, either through departmental regulations or collective bargaining.

"It is a small but growing thing on the municipal level," said John F. Banzhaf 3d, executive director of Action on Smoking and Health, an antismoking organization based in Washington. Massachusetts is the only state with such a law, said Steve Weiss, a spokesman for Philip Morris U.S.A. in New York.

The Massachusetts smoking law has been in place since the beginning of the year, but regulations governing its application become effective Thursday. People who violate the smoking prohibition can be dismissed.

New Questions Raised

Most states, including Massachusetts, and hundreds of towns and cities already have laws that restrict smoking in public places. Private companies have also moved to restrict smoking on the job, and some have stopped hiring smokers.

The governmental smoking prohibitions, particularly those that affect activity off the job, have raised questions about the extent to which government can dictate what people do on their own time. But there have been few court challenges to government's right to prohibit public safety employees from smoking. The most prominent case is a widely cited decision by the United States Court of Appeals for the 10th Circuit in 1987 affirming such a governmental action.

Although some lawyers and legislative sponsors are confident the Massachusetts law is constitutional, others think a successful challenge is inevitable. No one has filed suit against the state over the law, according to the state Attorney General's office.

"I wish I were a plaintiff's lawyer in Massachusetts," said John C. Fox, a labor lawyer specializing in smoking issues at the San Francisco firm of Pillsbury, Madison & Sutro. "That's like dialing for dollars."

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Result of a Compromise

The state's smoking prohibition for new public safety employees passed the Legislature late last year as part of a bill on pension law and was signed by Gov. Michael S. Dukakis in January. It arose as a compromise in a dispute between unions representing public safety employees and the state's municipalities.

Towns and cities were concerned about substantial disability pensions they were paying to firefighters and police officers who suffered from heart-and lung-related illnesses, which have been linked to smoking.

The law in Massachusetts, as in many states, is that such illnesses are presumed to be job-related because of the stress associated with their occupations. Municipalities wanted to make the law more flexible in an attempt to protect themselves financially, but the unions resisted giving up this benefit.

Instead, both sides agreed that as of Jan. 1, 1988, newly hired police officers, firefighters and some other public safety employees must not smoke on or off the job. These new employees are not permitted to start smoking once on the job. Current employees are permitted to continue smoking. Violating the rule is grounds for dismissal.

Tobacco Industry Held Back

'We think it's a good idea that people shouldn't smoke,' said Robert B. McCarthy, president of the Professional Firefighters of Massachusetts. Mr. McCarthy added that he would have preferred the provision to have come up in collective bargaining rather than in the legislative process.

The tobacco industry opposed the law but did not lobby against it because the public safety employees were intent on retaining the presumption that heart and lung diseases were job-related, said Dennis M. Dyer, regional vice president of the Tobacco Institute, a trade association.

Mr. Dyer said he would leave to lawyers whether the law was constitutional but criticized businesses and governments that adopt such provisions, saying they will cut themselves off from thousands of qualified employees.

The courts have not recognized a legal right to smoke. Private companies have wide latitude in controlling employee behavior on the job, and courts have allowed companies to test employees for drug use. But there is substantial disagreement about just how far government can go in deciding what an employee can and cannot do off the job.

Oklahoma Case Is Recalled

In the 1987 case that gave Massachusetts legislators confidence that their smoking law was constitutional, the Federal appellate court in Denver upheld the right of the Oklahoma City Fire Department to dismiss a firefighter trainee for smoking off the job. The employee had signed an agreement saying that he would not smoke, on or off duty, for a year from the time he began work. He was found smoking on an unpaid lunch break in December 1984.

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In *Grusendorf v. City of Oklahoma City*, a Federal District Court dismissed the firefighter's suit. On appeal, the appellate court rejected his contention that his rights of liberty and privacy had been violated. Instead, it concluded that the Fire Department's nonsmoking regulation was rational in seeking to promote health and physical conditioning for firefighters.

This decision is a "green light" for other governments that wish to impose similar smoking prohibitions, said Mr. Banzhaf of Action on Smoking and Health. He is also a law professor at George Washington University.

But the appeals court pointed out that Mr. Grusendorf had not raised the constitutional issue of equal protection under the law, in that the smoking law applied only to firefighter trainees, not the rest of the department.

Jealousy Is Predicted

Mr. Fox, of the Pillsbury, Madison law firm, said such an objection could be raised about the Massachusetts law, which restricts the smoking rights of new public safety employees but allows current employees to continue to do what they wish. He said that jealousy could be created in a situation in which a new employee who wants to smoke works with a veteran who can and does smoke.

"You're going to have a lot of unhappy people associated with it," Mr. Fox said.

Several people also raised questions about how the Massachusetts law would be enforced. "I don't know how they're going to monitor it," said John Roberts, executive director of the Civil Liberties Union of Massachusetts.

"The interest here is not to be Big Brother," responded State Representative Kevin P. Blanchette, a leading supporter of the law. The state is leaving enforcement up to the local authorities, he said, but "we meant business on this thing."

SUBJECT: Terms not available

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