

# Smoking in the Workplace: Legal Issue

An interview with  
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**Q: Employers justify inaction on the smoking issue by claiming an obligation to protect the rights of smokers. Does such an obligation exist?**

**A: This fence-straddling policy is a fallacious one because it rests upon a fundamentally unsound premise: that smokers have a legal right to smoke in the workplace. Even Lawrence Ash, attorney for the Tobacco Institute, is quoted in the September 1986 issue of *Fortune* as stating that "Smokers would be hard pressed to find a legal theory that gives them the right to smoke."**

**Q: On what grounds can you make the assertion that smokers have no rights?**

**A: Smokers *do* have rights—exactly the same rights as nonsmokers. By common law, these include the right to a safe and healthful place of work. There is nothing in our common law system which indicates there is any more a right to smoke than there is a right to sing at the top of one's voice or any other activity that is not necessary to the performance of essential elements of an assigned job.**

**Q: Has this assertion been backed by the courts or legislation?**

**A: Since the 1972 Surgeon General's report warned that cigarette smoking was dangerous to nonsmokers, both court rulings and state, county, and city statutes and regulations have provided various rewards or protections to the involuntary smoker. More than 40 states and the District of Columbia have enacted some form of legislation to restrict smoking in public. Many states have gone even further to legislate smoking in certain workplaces. Among those states are Alaska, California, Colorado, Connecticut, Minnesota, Montana, Nebraska, New Jersey, New York, Oregon, and Utah.**

Moreover, there is a rapidly developing body of law resulting in the award of disability benefits, unemployment compensation benefits, injunctive relief and other judicial remedies on discrimination and handicapped theories to workers who suffer from exposure to smoke in the workplace.

Additionally, a recent decision in Washington State (*McCarthy v. Division of Social and Health Services*, June 30, 1988) may have set an important precedent for *negligence* cases and damage awards against employers who do not protect the health and safety of their employees by providing smoke-free environments. This would allow employees to sue their employers for damages directly rather than circuitously through unemployment compensation or disability relief.

**Q: Does this mean that it is *illegal* to smoke at the workplace?**

**A: Nothing is that simple. Although there is a definite trend in favor of the nonsmoker, not every plaintiff will win his or her suit. On the other hand, no smoker has won an absolute or secured right to smoke in the workplace.**

**Q: What about hiring practices and personnel policies? For instance, is it legal to make a workplace smoke free? Or to refuse to hire smokers? Or to reward nonsmokers with benefits or bonuses? Isn't this discrimination?**

**A: All is perfectly legal. Smoking, it must be remembered, is an *acquired* characteristic. Employers legally discriminate every day based on acquired characteristics such as job record, education, performance, absenteeism, etc. Just because smoking is legal doesn't make it a right. Many legal activities (spitting, playing loud music, etc.) are forbidden on the job.**

Hiring bans, however, usually are not to be recommended. It is difficult to enforce employee behavior out of the workplace. Such an inability to control employees' activities has the potential to erode the strength of the policy at the work site.



Smoking  
Policy:  
Questions  
and  
Answers

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a series

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