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FOR HOWARD J. RUBENSTEIN

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BROADCAST EXCERPT

CAROL MARTIN: You may have heard the story last week about a major American corporation headquartered in Chicago that recently instituted a policy that forbids their employees from smoking on the job and also off the job.

Now the company threatened to fire any employees who failed to comply. Understandably, a lot of employees are fuming over that ruling. How can the company do it? Well our legal expert Jack Ford is here now with some answers. This is pretty unusual. Is it an unprecedented...?

JACK FORD: ...it is Carol. We've seen over the last few years a lot of governments are taking some actions to support the non-smokers by saying in public buildings, or in restaurants there have to be non-smoking sections. But this is the first time we've seen an employer saying to his employees, hey, not only can you not smoke on the job, but if you smoke off the job we're still going to fire you. It's the first time.

MARTIN: Now obviously a lot of questions. First of all, how are they going to check?

FORD: Well what they've said is this. That they have, first of all, offered to the employees to help out in counselling types of programs. Smoke-Enders types of programs.

MARTIN: They will pay for that?

FORD: Yes. But they have said too that some point in time in the very near future we're going to start doing some tests. And apparently there's some tests that they can do that

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determines the amount of smoke in the lungs. And it will determine whether somebody has actually been smoking.

Obviously if they're doing it on the job that's very obvious. But this is the way they'll determine whether they're doing it off the job too.

MARTIN: This is not a violation of the employee's personal life?

FORD: Well you know, employers historically have had the ability to say to their employees these are the terms and conditions of your employment here. What you ordinarily see are things such as an employer saying you have to have certain skills or you have to have certain background or experience. Or maybe you have to be able to do certain physical tasks.

The employer here, the company said what we're saying is this is going to effect your productivity because we have studies that say that smokers don't work as well. They have a lot of down time, so to speak. And the employer says we think it's well within our rule as a private company to say to you if you want to work for us that's fine, but you're going to have to follow our rules. And our rules say you can't smoke.

MARTIN: Is it discrimination of a sort though?

FORD: Well it is discrimination but the question is is it illegal discrimination? Illegal. We go through our lives and there's all sorts of little episodes of discrimination we might come up against. But it's only illegal if there's a law someplace that says you can't do this.

Historically what we've seen are laws that say you can't discriminate based on age. On sex, on religion. But the employer here said nowhere is there a law that says you can't discriminate based on somebody's personal habits. And as long as there's not a law that says you can't do it, we're taking the position that we can do it.

MARTIN: They (unclear) found a hole supposedly for the employers and their own good, but they're not violating the law.

FORD: Well according to the way it's set up. Now there's an interesting argument that was raised. There is a part of federal statutes and state statutes that says you can't

discriminate against somebody because they have a particular handicap. And the question has been raised, and I think we'll probably see it at some litigation down the road, because I can't imagine that all of the smokers in the world are going to be pleased about this.

I think what you're probably going to see is somebody's going to take the position that says, look I've got an addiction here to smoking and my addiction is my handicap. And if it is you can't fire me because of my handicap. I don't know what the courts are going to do with that. But I suspect, because of the novelty of this issue, you're going to see somebody making that argument somewhere down the road.

MARTIN: I think you're probably right. We'll hear more on it later. Jack, thank you.

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