

Legislative
Briefing
Series

Lifestyle Discrimination

Introduction, pg. 1 & 2
Questions and Answers, pg. 3 & 4
Current Legal Status, pg. 5, 6, 7
Model Bill, pg. 8, 9, 10
Lobbying Strategies, pg. 11, 12, 13
Bibliography, pg. 14

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INTRODUCTION TO LIFESTYLE DISCRIMINATION IN THE WORKPLACE

In 1989, Daniel Winn, an employee at the Best Lock Corporation in Indiana, admitted to his superiors that several years earlier he had a few drinks in a bar with friends. Mr. Winn was promptly fired on the basis of Best Lock's policy that its employees cannot drink alcohol under any circumstances.

"Two officials at the Ford Meter Box Co. in Wabash, Ind. pulled [Janice Bone] aside and escorted her from the plant." Bone is a smoker, and although she did not smoke on the job, Ford's policy barred her from smoking at all. "I was very shocked. It's devastating when this happens to you", said Bone.¹

In Michigan, Donna O'Leary, a bus driver, was unable during a physical exam to run in place for three minutes. O'Leary, who weighs over 368 pounds was simply terminated after 26 years employment.²

Americans have long accepted that employers have a certain degree of control over what we do while at the workplace. But increasing numbers of employers are dangerously broadening the sphere of their control to include what employees do in their own homes. Many employers now refuse to hire people whose private lives are deemed "unhealthy". A few even fire existing employees who don't change their lifestyle to meet new company demands. The most common victims of this type of discrimination are smokers and fat people.³ According to a 1988 survey taken by the Administrative Management Society, 6% of all employers (about 6,000 companies) now discriminate against off-duty smokers. The number has almost certainly increased since then. It is more difficult to estimate the number of companies which discriminate against fat people, since this is seldom an official corporate policy. However, anecdotal evidence collected by the National Association for Advancement of Fat Acceptance (NAAFA) suggests that discrimination against fat people is even more common. Other employers refuse to hire people who drink alcohol, have high cholesterol, or ride motorcycles.

The driving force behind this trend is economics. Health care costs for employers are increasing by at least 15% per year⁴, almost 3 times as fast as inflation. Although several factors contribute to these rising costs, the only factor employers have control over is their employees. With such an incentive, employers may well try to dominate every health-related aspect of their employees' lives, including diet, exercise and sleep habits -- and without protective legislation they will succeed.

The early Americans adopted the Bill of Rights to limit the government's involvement in their lives and modern Americans demonstrate the same unwillingness to tolerate intrusion whether by government or by employer. According to a 1990 poll by the National Consumers League⁵, 81% of Americans believe that an employer has no right to refuse to hire an overweight person. 76% believe employers have no right to refuse to hire a smoker. 73% believe employers have no right to require an employee or applicant to change their diet.

1. "Private lives becoming employers' business," *Philadelphia Inquirer*, March 31, 1991
2. Schlorb, John *Employment Discrimination Based on Employee Lifestyles*, A.C.L.U. Document Bank #P13 (1991)
3. This is the term fat people have chosen to describe themselves.
4. Stascia, A *New Look at Wellness Plans: Well-Designed Programs Trim Fat from Health Care Tab*, *Bus. Ins.* February 18, 1991
5. See A.C.L.U. Document Bank #P4.

Recognizing that refusing to hire people for reasons unrelated to job performance is unfair and often prevents the company from hiring the best qualified person, some employers have adopted a different strategy. Employees who have lifestyles the employer considers unhealthy are required to pay more for their company health insurance. Some employers say they are charging unhealthy employees a premium over their "normal" rate, some say they are giving healthy employees a discount. Either way, one employee is paying more for their health care than another.

This may not be wrong in principle, but such programs should be based on sound actuarial data. The company should be able to demonstrate that the behavior in question increases employer health care costs by a measurable amount. While such relationships may exist, the data currently available does not demonstrate it clearly. For example, the Bureau of National Affairs reports that 95% of companies banning smoking reported no financial savings⁶, and the U.S. Chamber of Commerce has found no connection between smoking and absenteeism.

The methods used to enforce these policies raise independent civil liberties issues. Most employers currently take an employee's word that they are not violating the rules for off-duty behavior. As discrimination grows more common, however, it will become more difficult to simply avoid companies with whose policies one doesn't comply. People will take jobs, not reveal their lifestyle, and hope the employer doesn't find out. When this occurs, employers will have to hire spies to follow people away from work and/or require frequent universal medical testing (such as urinalysis) in order to enforce the policy.

6. Bureau of National Affairs, Where There's Smoke: Problems, Policies Concerning Smoking in the Workplace, 2nd ed., 1987

QUESTIONS AND ANSWERS: LIFESTYLE DISCRIMINATION

Which companies practice lifestyle discrimination?

There is no comprehensive list of companies which practice lifestyle discrimination. A few examples of employers who discriminate include:

Cardinal Industries refuses to hire smokers stating it "only hires nonsmokers and gives every applicant a urine test and promises to fire those who say they have quit, but don't."

U-Haul International charges its smoking employees an extra \$130 per year for health insurance.

Pointe Resorts, which operates 3 hotels in Phoenix, pays 40% more of the insurance costs of employees with a normal weight than of those who are overweight.

In 1990, the city government of Athens, Georgia initiated a health screening for prospective city workers. Applicants whose cholesterol level was in the worst 25% of national ranges were simply ineligible for any position.

Shouldn't employers be able to keep their costs down by hiring employees who won't generate high medical bills?

It is unfair and dangerous to allow employers to discriminate against certain employees because they believe their private lifestyle choices are unhealthy and lead to higher health insurance costs. To begin with, it is unclear that employers can achieve significant savings through lifestyle discrimination. Also, if it becomes acceptable to deny employment because of potentially higher health care costs, people who are capable of working will be effectively banned from any employment, preventing them from providing for themselves or their dependents. Finally, even if employers can achieve substantial savings, sacrificing the private lives of all working Americans is too high a price to pay.

Why shouldn't employers be able to restrict their employees' high-risk behavior?

Risks are associated with nearly every personal lifestyle choice we make -- from smoking cigarettes, to sitting in the sun, to having children. Where do we draw the line as to what our employer can regulate? The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives.

Isn't it wrong to encourage people to smoke with protective legislation?

The government has the obligation to insure that people understand the health risks of smoking. Government and employers ought to help people who want to quit smoking. Ultimately, however, it is up to the individual to decide if they want to engage in risky behavior such as smoking or riding a motorcycle. What is wrong is using the power of the government or the paycheck to tell other people how to live.

Isn't this creating a right to smoke?

No. The A.C.L.U. does not oppose smoking bans in public buildings, in the workplace, or in other locations where non-smokers may be subjected to sidestream smoke.

We object only to bans on smoking (or beer or junk food) in a person's own home.

Isn't lifestyle discrimination legislation just a tool of tobacco companies?

No. Lifestyle discrimination legislation is supported by a variety of civil rights and labor organizations and by the majority of Americans.

Current Legal Status of Lifestyle Discrimination

Federal Law

At the federal level, civil rights laws barring discrimination on the basis of race, gender or disability may apply to lifestyle discrimination.

Race and Gender

There is demographic data showing that blacks and young women smoke in disproportionately large numbers. It is possible that this disproportion is large enough to constitute disparate impact under Title VII. However, even a minimal showing of increased medical costs would constitute "business necessity" under current supreme court caselaw.

If the Civil Rights Act of 1991 passes, restoring the original, more stringent, definition of business necessity, a Title VII challenge to discrimination against smokers might become viable.

Disability

The new Americans with Disabilities Act (ADA) prohibits employment discrimination against people with "any physical or mental impairment that substantially limits one or more of an individual's major life activities" and also people who are "regarded as having such an impairment."

While the ADA does not take effect until July of 1992, employees of federal agencies and federal contractors already have this protection under section 504 of the federal Rehabilitation Act of 1973.

While there is not yet caselaw on point, it can be argued that certain forms of lifestyle discrimination are illegal under ADA. The critical issue is whether the individual's limitation (real or perceived) is serious enough to qualify as a "disability".

State Law

Most states have statutes parallel to the federal Rehabilitation Act of 1973, which cover both public and private sector employees. There have already been state court decisions holding that under these statutes fat people are protected from discrimination. For example, New York Court of Appeals held that Xerox Corp. violated New York Human Rights Law by denying Catherine McDermott a job because of her obesity. The Court rejected the company's claim that it had a right to deny employment because of the likely future health costs her condition would create for the company. The Court said that "employment may not be denied because of any actual or perceived undesirable effect the person's employment may have on disability or life insurance programs."⁷

Even the best state disability laws, however, provide no protection for lifestyle choices that are recreational rather than medical.

To correct the shortcomings of current law, twenty states have passed lifestyle discrimination statutes. The majority of these protect only smokers, but a few are broader. Colorado and North Dakota ban discrimination based on any form of legal off-duty behavior.

7. Schlorb, *Supra*. (Note 2)

Here is a complete list of state lifestyle discrimination statutes:

ENACTED PRIVACY LEGISLATION
1989 - 1991
 (As of August 7, 1991)

<u>STATE</u>	<u>LANGUAGE</u>	<u>BILL NUMBER</u>	<u>ENACTED</u>
Virginia	Specific	S607	March 27, 1989
Oregon	Specific	S986	July 28, 1989
Tennessee	Specific	H2516	March 29, 1990
Kentucky	Specific	H628	April 9, 1990
Colorado	Legal Activities	H1123	April 17, 1990
S. Carolina	Specific	S981	June 25, 1990
Rhode Island	Specific	H8768	July 12, 1990
S. Dakota	Specific	SB102	March 1, 1991
New Mexico	Specific	S132	April 4, 1991
North Dakota	Legal Activities	SB2498	April 5, 1991
Mississippi	Specific	SB2172	April 16, 1991
Indiana	Specific	H1439	May 4, 1991
Oklahoma	Specific	HB1590	May 8, 1991
New Hampshire	Specific	S171	June 10, 1991
Nevada	Lawful Products	AB667	June 14, 1991
Maine	Specific	LD1696	June 18, 1991
Connecticut	Specific	H7211	June 25, 1991
Arizona	Specific	SB1153	June 25, 1991
New Jersey	Specific	A4699	July 15, 1991
Louisiana	Specific	HB499	July 19, 1991

Government Employees

Government employees are protected by equal protection and due process clauses of the federal constitution.

There are comparable clauses in many state constitutions.

These constitutional provisions should protect public employees from discrimination based on non-job related criteria. Perhaps for this reason, lifestyle discrimination by public employers is rare.

The city of North Miami, however, recently adopted an ordinance barring smokers from any municipal employment. The Florida A.C.L.U. has challenged this policy in court⁸, and the result will shed much light upon the extent to which public employees are already protected.

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MODEL ACT

1. It shall be illegal for an employer to discriminate against any employee or applicant on the basis of that person's conduct during non-working hours away from the employer's premises or on the basis of personal characteristics unless that conduct or characteristic affects the person's ability to properly fulfill the responsibilities of the position in question.
2. No employer shall require employees or applicants to provide information about off-duty behavior or personal characteristics which would not be a legitimate basis for personnel decisions under section 1.
3. Nothing in sections 1 and 2 shall be construed to make it illegal for an employer to:
 - a. Make hiring or disciplinary decisions on the basis of off-duty use of illegal drugs.
 - b. Require employees from refraining from working for the employer's competitors. This section applies only to current employees and does not affect the law of this state regarding restrictive covenants for former employees.
 - c. Refuse to employ a person whose off-duty conduct, while not incompatible with the requirements of the position, is incompatible with the fundamental objectives of the organization.
4. Any person who has been aggrieved by a violation of this act shall have a private right of civil action in any court of competent jurisdiction in this state.
5. In any such civil action the plaintiff shall have the burden of proving that he or she was qualified for the position in question. The defendant shall then have the burden of producing a basis for its decision which is consistent with this statute. The plaintiff then has the burden of proving by a preponderance of the evidence that the actual reason for the decision was off-duty behavior or a personal characteristic. The defendant then has the burden of proving that this behavior or characteristic is job related.
6. A prevailing plaintiff in a civil action under this action is entitled to:
 - a. Injunctive relief.
 - b. An award of damages equal to the harm caused by the violation (both economic and non-economic) or \$1,000, whichever is greater.
 - c. Full costs of action plus reasonable attorney's fees.
7. The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

Comments on Drafting a Lifestyle Discrimination Statute

The crucial choice in drafting a statute is deciding how broad the protection should be. There are four basic alternatives:

1. Prohibit Discrimination Based on Off-Duty Smoking

This is the most limited form of protection. While it protects the largest group of victims, it leaves many unprotected. It also lends credence to the charge that the legislation is about smoking rather than autonomy and privacy. Its only real benefit is that its impact is limited and clearly defined. This can reduce, or even eliminate, opposition from organized business.

2. Prohibit Discrimination Based on Off-Duty Use of All Legal Substances

This formulation expands the coverage to off-duty drinking and, possibly, people with high cholesterol or other conditions related to diet.

3. Prohibit Discrimination Based on Any Legal Off-Duty Behavior

This is the broadest coverage that has yet been obtained. It clearly protects all dietary lifestyle choices and also choices of hobbies (skiing, motorcycles, etc.). It also prohibits discrimination based on sexual preference in the 25 states that have repealed their sodomy laws. The protection for fat people, however, is incomplete, since many of them are fat for reasons of genetics rather than diet.

The pragmatic problem with this approach is that it is so sweeping that its exact impact is hard to determine in advance. This uncertainty increases opposition from organized business. While we have addressed all the legitimate concerns they have raised (see "exceptions"), there is concern that not all the legitimate concerns have yet been identified.

4. Prohibit Discrimination Based on Anything Not Related to Job Performance

This is the ideal way to write the statute. It not only prevents discrimination based on off-duty conduct, but prevents discrimination based on personal characteristics unrelated to job performance. All fat people are clearly protected under this approach. So are short people, the physically unattractive, and others who are often discriminated against, but whose condition is not serious enough to be classified as a "disability".

The second question is the position you want to take on illegal off-duty behavior. The ideal position is that the employer's legitimate interest is limited to behavior that is related to job performance, and that even illegal off-duty behavior that does not affect a person's fitness for duty should not be grounds for discrimination.

This position is probably politically untenable at the present time, especially where illegal drugs are involved. The least damaging compromise is to carve out an exception for illegal drugs. If this is inadequate, the general protection can be limited to legal off-duty behavior.

...Assuming you choose general coverage option 3 or 4 above, there are a series of proposed exceptions from the business community to consider. Each of these purports to be a situation where a certain form of off-duty behavior is legal, but the employer has a legitimate reason for prohibiting it. These include:

1. **Conflict of Interest:** This is straightforward, and we have included it in the model.
2. **Anti-nepotism Policies:** Having relatives working together can create conflict. Many companies, however, have found ways to manage this without discriminating against relatives of employees. This is a judgment call. Our model does not include this exception.
3. **Conduct Incompatible with Organizational Goals:** The American Lung Association believes it should have the right to refuse to hire smokers. The A.C.L.U. might decline to hire David Duke. The model incorporates language which would allow this practice.

Lobbying Strategies

The political landscape is much different for lifestyle discrimination legislation than for other workplace rights bills.

We do not have strong opposition from organized business. The U.S. Chamber of Commerce has taken the position that it is wrong for an employer to refuse to hire (or fire) someone because of off-duty conduct unrelated to job performance. At least one state chamber (New Jersey) has actually supported lifestyle discrimination legislation.

In most states, disagreements over statutory drafting (especially damages) and a general reluctance to support legislation that restricts business led the chamber to remain neutral or offer lukewarm opposition. Seldom, if ever, have we encountered the strident opposition that has frustrated our efforts on other issues.

The real opposition comes from anti-smoking groups. This includes both national groups like the American Lung Association and local voluntary organizations. Although they are loath to admit it, these people are prohibitionists. They believe that smoking is so harmful that it should not be a matter of personal choice but should be stamped out by any available means. They are not very articulate or candid, but they have a great asset in public antipathy toward smoking, and they know how to play to it.

Our best friends on this issue, as usual, are organized labor. In addition to the AFL-CIO, the Communications Workers of America (CWA) have been very helpful. We have also had support from police and firefighters unions (those most likely to be victims). You should also contact the local Carpenters and Joiners union. Their President, Sigurd Lucassen, has been labor's spokesman against outright bans on workplace smoking.

Unlike many other issues, however, labor will not automatically provide serious support on lifestyle discrimination. While their position is clear, this is an emerging issue that many unions are not in the habit of working on. You can get real support, but you have to go out and ask for it.

Other progressive groups, including religious organizations, should support this legislation, but have generally not yet been asked.

One excellent way to organize these often unacquainted groups into an effective coalition is to hold a one day training and strategy conference. The national office will fund all the expenses for such a conference (including your postage, telephone, and temporary office help). We will also provide speakers and materials. Please call the workplace rights taskforce if you'd like to discuss this opportunity.

Presenting the Issue

It is always true that the way an issue is framed influences, and often determines, the response. That is especially true here. Opponents will claim that the issue is smoking, even if the bill covers all legal off-duty behavior. The public's tendency to think in the concrete rather than the abstract, the fact that smokers are among the most common victims, and the fact that tobacco companies support the legislation, all work in our opponents' favor. If they succeed in casting the issue this way, we will surely lose.

The real issue here is privacy -- the right of all adults to live as they choose in their own homes. The public strongly supports this value. They are not inclined to view the issue this way, and you will have to repeat our position ad nauseum. But experience has shown that, with enough repetition, the public will understand the real issue. Once this happens, we will win.

Supporting Organizations

Here are some of the organizations which support lifestyle discrimination legislation. The addresses and phone numbers listed are for national offices, but you can use these contacts to reach the appropriate state and local offices.

AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

Communications Workers of America
501 3rd Street, N.W.
Washington, D.C.
(202) 434-1300

Fraternal Order of Police
2100 Gardiner Lane
Louisville, Kentucky 40205
(502) 451-2700

National Association for Advancement of Fat Acceptance (NAAFA)
P.O. Box 188620
Sacramento, California 95818
(916) 443-0303

Philip Morris U.S.A.
120 Park Avenue
New York, New York, 10017
(212) 880-4131

Smokers' Right Alliance
20 East Main Street
Suite 710
Mesa, Arizona 85201
(602) 461-8882

United Brotherhood of Carpenters and Joiners of America
101 Constitution Avenue, NW
Washington, DC 20001
(202) 546-6206

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