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OFF THE JOB DISCRIMINATION BY EMPLOYERS AGAINST SMOKERS

CHAPTER I:
NATURE AND EXTENT OF PROBLEM

Private Employers Enjoy Latitude to Discriminate

Every night tens of thousands of employees take their employer's rules and regulations home. As health care insurance costs have skyrocketed, employers more and more try to control employees' off-the-job conduct in hopes of producing a healthier -- and less costly -- work force.

In the 1960s and 1970s the federal government, "Big Brother," was more often than not viewed as the primary threat to privacy. As a result the Congress and state legislature enacted several protective legislation aimed at governmental behavior, including the Privacy Protection Act of 1974; privacy amendments to the Freedom of Information Act; the Financial Privacy Act of 1978; the Computer Matching and Privacy Act. At the state level, numerous privacy protection acts regulate state agencies. Moreover, during the 1970s and 1980s almost a dozen states added express privacy protection provisions to their constitutions.

Neither the congress nor the state legislators, however, were similarly active in protecting the privacy rights of individuals in relationship to private institutions. This lack of privacy protection activity left private sector institutions with wide latitude to regulate employee activities. In addition, of course, soaring health care costs gave employers real incentives to find ways to trim health care payment claims. Finally, surveys indicate that during the 1980s the American public came to accept a more restricted vision of what an individual should be "free" to do.[1] Increasingly, the public is intolerant of activities even though legal if they are outside the mainstream. This shift in the public's level of tolerance for idiosyncratic behavior further helped to create a climate in which employers could control employees' off-the-job behavior.

Not surprisingly, the last few years have seen a surge in efforts by employers to regulate employees off-the-job behavior including eating and drinking habits, tobacco smoking and, as well, participation in sports and hobbies. Employers also discriminate on the basis of non-volitional factors, such as an individual's genetic predisposition to diseases or conditions.

This article concludes that legislatures must act forcefully to prohibit employers from regulating employees' (and

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[1] Louis Harris & Associates and Alan F. Westin, the Equifax report on Consumers in the Information Age, at VII (1990).

applicants') off-the-job lawful activities. If legislatures do not act wide segments of the public may become unemployable and uninsurable.

Discrimination Against Smokers

Easily the most common type of employer lifestyle discrimination targets lawful tobacco smoking.[2/] Restrictions on smoking in the workplace are now the rule. Eighty-nine percent of large employers restrict smoking on the job.[3/] Employers, however, also target smoking outside the workplace. As of 1989 it was estimated that at least 6,000 U.S. companies refused to hire smokers.[4/]

Furthermore, about 2 percent of employers fire employees who are found smoking off-the-job. Janice Bone, for example, was fired by the Ford Meter Box Company in Wabash, Indiana when nicotine was found in her urine after a routine drug screening exam. Bone has sued claiming, among other things, that terminating an employee from smoking away from work represents a

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2/ Dan Cordtz, For Our Own Good, Fin. World, Dec. 10, 1991, at 48.

3/ Smoking Policy Analysis of Fortune 500 Companies, Public Policy Research Group (Fall 1991).

4/ John Elson, Busybodies: New Puritans, Time, Aug. 12, 1991, at 20.

wrongful termination because it violates Indiana's public policy of protecting privacy.[5/]

Turner Broadcasting Systems, the Atlanta-based media corporation, argues that smokers can do what they want, but if they want to smoke, they can't work for Turner. Alaska Airlines refuses to hire otherwise qualified persons if they smoke at home.[6/] Fortunoff, to department store chain, banned smokers in 1983, and continued the ban smokers until 1992 when New York enacted legislation prohibiting discrimination against employees for lawful, off-the-job conduct.[7/]

An even larger number of companies offer incentives to employees in an effort to regulate off-the-job smoking. Cybertek Corporation of Los Angeles, for example, pays its workers $500 if they can quit smoking for a year.[8/] Bonne Bell Inc., a cosmetic company in Cleveland, pays workers $250 to quit smoking but if they resume smoking workers must pay the company $500.[9/] And

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5/ Bone v. Ford Meter Box Co., Wabash Cir. Ct., Indiana, No. 85C01-9101-CP-28 1991.

6/ Editorial, Seattle Times, Sept. 7, 1992, at A11.

7/ See, Paula Span, Smokers' New Hazard: No Work, The Washington Post, Nov. 12, 1991, at A1.

8/ Julia Lawlar, Smokers Are Put Out As Firms Crack Down, USA Today, Nov. 15, 1990, at B1.

9/ Julia Lawlar, Smokers Are Put Out As Firms Crack Down, USA Today, Nov. 15, 1990, at B1.

Texas Instruments charges employees who smoke $10 additional a month for health insurance.[10/]

Discrimination on the Basis of Other Lifestyle Choices

Discrimination against obese people is also common -- and evidently increasing. In fact, the National Association for Advancement of Fat Acceptance (NAAFA) asserts that discrimination against fat people may be more frequent than that against smokers.[11/]

U-Haul International in Phoenix, Arizona, for example, docks the pay of overweight workers $130.00 per year to compensate for alleged, additional health insurance costs. U-Haul even applies the penalty to workers' spouses. If an employee or his or her spouse sheds enough pounds, U-Haul restores lost pay and returns the employee's salary to its previous level.[12/] Until the recently adopted Americans with Disabilities Act prevented the practice, the Adolph Coors Company took smoking, cholesterol and blood pressure into account in hiring decisions. Even today, Coors' policy is to pay 90 percent of employees' medical bills

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[10/] Julia Lawlar, Smokers Losing Battle But Continue to Fight, USA Today, Nov. 21, 1991, at B1.

[11/] Gina Kolata, The Burdens of Being Overweight: Mistreatment and Misconceptions, N. Y. Times, Nov. 22, 1992, at A1.

[12/] Rundle, U-Haul Puts High Price on Vices of Workers, Wall St. J. Feb. 4, 1990, at B1, B7.

but a lesser percent for employees that do not participate in the company's health program.[13] The Town Council of Athens, Georgia voted not to hire qualified prospective employees with unacceptably high cholesterol levels.[14]

Drinking alcoholic beverages off-the-job has also come under fire. The Best Lock Corporation in Indianapolis, for instance, fired an employee for admitting that several years earlier he had consumed two drinks in a bar.[15]

Not all forms of lifestyle discrimination focus on what employees smoke, eat or drink. IBM, for example, terminated an employee for continuing to date a co-worker after the co-worker left IBM to join a competitor.[16] Jonathan's Family Restaurant in suburban Detroit recently fired a waitress for having an abortion. The Cracker Barrel Old Country Store and Restaurant chain in Tennessee briefly adopted a policy of firing employees who failed "to demonstrate normal heterosexual values." The Company fired nine allegedly homosexual workers before rescinding

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[13] Sharlene A. McEvoy, Fat Chance: Employment Discrimination Against the Overweight, Lab. L.J., Jan. 1992, at 3.

[14] James J. Luck, Keeping the Boss Out of The Living Room, State Government News, July, 1992, at 26.

[15] Best Lock Corp. v. Review Board, 572 N.E.2d 520 (Ind. App. 1991).

[16] Rulon-Miller v. IBM Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

the rule.[17] An employee of a medical laboratory in San Bernardino, California was fired from her job after a routine employee health screening test showed she was infected with HIV.[18] Surveys estimate that 2 million employees each year are required to take written personality tests that probe everything from family relationships, to bathroom habits to sexual preferences.[19]

An ACLU report, "A State of Emergency in the American Workplace," worries that, "[a]s the data mount concerning the health care cost implications of lifestyle choices, employers will have an economic incentive to try to dominate their employees' lives totally."[20]

Public Reaction to Lifestyle Discrimination

The Equifax 1990 Survey found that 79 percent of the American public is deeply worried about privacy.[21] What's more,

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17/ John Elson, Busybodies: New Puritans, Time, Aug. 12, 1991, at 20.

18/ Steve Taravella, Infected Worker Sues Over Firing, Modern Healthcare, Aug. 17, 1992, at 9.

19/ Editorial, Seattle Times, Sept. 7, 1992, at A11.

20/ See Smoker's Rights - New Phenomenon, Fair Employment Practices, Sept. 30, 1991 at 111.

21/ Consumers in the Information Age, a national opinion survey conducted for Equifax Inc. by Louis Harris & Associates and Dr. Alan F. Westin (1990).

studies show that the American public favors laws to protect employee privacy off-the-job. A Los Angeles newspaper recently concluded, "Americans believe that what workers do on their own time is their own business."[22/] A recent survey conducted by the National Consumers League (NCL), found that more than 80 percent of Americans oppose employment decisions made on basis of off-the-job activity. The NCL survey revealed that, nationwide, 87 percent of Americans are opposed to employers refusing to hire smokers and 88 percent are opposed to employers basing employment decisions on whether an employee drinks alcoholic beverages after work hours. Furthermore, 87 percent of those polled opposed employers' refusal to hire overweight people and 95 percent opposed employer imposed restrictions on an employee's diet.[23/]

Editorial pages across the nation have decried the trend to discriminate on the basis of off-the-job lifestyle. A New York Times editorial remarked that: "employers would do well to refrain from invading an employee's personal life with edicts

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22/ Jeff Thompson, Gov. Wilson Should Sign Bill Securing Employees' Right to Privacy Off the Job, Los Angeles Daily Journal, Nov. 3, 1992, at 6.

23/ Poll released by the National Consumers League and the Michigan Citizens Lobby -- Whose Right Is It Anyway? Michigan Featured in Major Public Opinion Poll on What the Boss Needs to Know About Employees, PR Newswire Ass'n, Aug. 7, 1991. See also, Workplace Privacy Poll: Pennsylvanians Concerned About Personal Privacy, Employers Probing Into Workers' Lifestyles, Activities, PR Newswire Ass'n, June 11, 1992.

that do not bear on fitness for work."[24/] A USA Today editorial was more direct: "Employers should butt out of their employees' private lives and base hiring and firing decisions on the most important factor: performance on the job."[25/]

Should Employees and the Public Be Upset About Lifestyle Discrimination?

Employers have always had concerns about their employees' off-hours activities. Early in this century, for example, Henry Ford's so called "Sociology Department" routinely visited automotive plant employees' homes searching for, among other things, forbidden alcohol and unmarried live-ins.[26/]

Employees and labor groups, however, have long resisted this kind of employer snooping. Employment after all, is a vital relationship. Not only is employment a primary source of income

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24/ None of an Employer's Business, N. Y. Times, July 7, 1991, at E10.

25/ See James J. Lack, Keeping the Boss Out of the Living Room, State Government News, July, 1992, at 26, 27. Other editorials opposing lifestyle discrimination have been featured in the Chicago Tribune; Indianapolis Star; Atlanta Constitution; Arkansas Gazette; Florida Sentinel; and the St. Louis Post Dispatch.

26/ Alan F. Westin, Privacy in the Workplace, in Critical Issues in Labor and Employment Law 235, 240 (CCH 1990).

it also provides a gateway to vital benefits such as health and disability insurance.[27]

Lifestyle policies, in and of themselves, are intrusive. The methods available to employers to enforce lifestyle policies, however, are also likely to pose a threat to privacy. Some employers have already established hotlines for co-workers to snitch on fellow employees who are suspected of using drugs. Employers seeking to put teeth into lifestyle codes may hire "spies" to watch employees or they may require frequent medical tests such as urinalysis.

Furthermore, employer interference with lifestyle decisions violates a primary principle in employment law -- employer decisions should be work-related, i.e. there should be a nexus between the restriction and on-the-job performance.

Once this principle is abandoned the path is clear for employers to discriminate on a variety of arbitrary and idiosyncratic bases.

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[27] Kurt A. Decker, Employment Privacy Law for the 1990's, 15 Pepp. L. Rev., 551, 554 (1988).

Genetic Profiling

From an employee and civil liberties standpoint, genetic profiling is easily the most threatening type of discrimination. The Human Genome Project, a 15-year, $3 billion federal research project aimed at "mapping" the 50,000 to 100,000 genes that comprise the human DNA, is expected to make it possible before the end of this century to predict susceptibility to perhaps 1,000 genetic disorders. Scientists will be able to construct "genetic profiles" predicting from before birth of the extent to which an individual is susceptible to heart disease, various types of cancers, diabetes, or even mental illness.[28/]

A four-year study ending in October, 1992, conducted at the California Pacific Medical Center, has already found 93 cases of "genetic discrimination." In each case insurers and employers limited or denied health care coverage based upon the results of genetic tests.[29/] The director of the study concluded: "In their [insurers] eyes, if you carry a gene it equals having the

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28/ Carla Schurr, Perils of Technology, Chi. Trib., Dec. 17, 1992, at C7.

29/ Alex Barnum, Down Side to Scientific Success: Insurers Use Genes to Deny Coverage, San Francisco Chronicle, Dec. 2, 1992, at A1.

disease, and therefore you are dysfunctional, uninsurable and unemployable."[30/]

In one case an employee was found to be a carrier for Gaucher's disease, a potentially fatal condition, and denied a government job, even though he was not symptomatic.[31/] In another case, an Akron, Ohio lawyer was turned down for health insurance, not because there was anything wrong with her, but because the insurance company suspected that her father had Huntington's chorea, a debilitating hereditary disorder.[32/]

As of 1989, 6 percent of the Fortune 500 companies were conducting genetic testing. Another 15 percent report that they plan to do so by the year 2,000.[33/] As costs for conducting genetic testing decrease, more companies are expected to

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30/ Carla Schurr, Some Benefit, Others Risk Bias From Genetic Screening, The Atlanta Journal and Constitution, Nov. 21, 1992, at E1.

31/ Alex Barnum, Down Side to Scientific Success: Insurers Use Genes to Deny Coverage, San Francisco Chronicle, Dec. 2, 1992, at A1.

32/ Carla Schurr, Some Benefit, Others Risk Bias From Genetic Screening, The Atlanta Journal and Constitution, Nov. 21, 1992, at E1.

33/ Larry Gostin, Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employees and Insurers, 17 Am. J.L. & Med., 1991, at 116.

institute similar programs in the hopes that genetic screening can lower health insurance costs.[34/]

What's Being Done About Lifestyle Discrimination

With increasing frequency legislatures and courts are attacking employer policies that proscribe or restrict non-work related employee behavior. In the last four years, for instance, twenty-nine states have adopted statutes that prohibit employers from refusing to hire a prospective employee or from discharging or taking other adverse action against a current employee on the basis of off-the-job use of lawful tobacco products. Several of these statutes also protect off-the-job consumption of lawful food or beverages. A few of these statutes also prohibit restricting participation in lawful hobbies, sports or other activities. Many of these statutes contain exemptions for religious organizations, or schools, or other organizations for which a smoking restriction may be considered to be a bona fide occupational qualification.

Eight states have recently adopted statutes that prohibit employers from making employment decisions based on genetic histories.[35/] Seventeen states are considering adopting similar

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34/ Sandra Blakeslee, Ethicists See Omens of An Era of Genetic Bias, N. Y. Times, Dec. 27, 1990, at B9.

35/ Natalie Angier, Many Americans Say Genetic Information Is Public Property, N. Y. Times, Sept. 29, 1992, at C2.

legislation. Seven states and 70 municipalities have enacted laws that prohibit discrimination against homosexuals, mostly with respect to housing and employment.[36] So far, only one state, Michigan, expressly prohibits discrimination against persons who are overweight.[37]

On the federal level, employment privacy initiatives have received some attention. In 1988, Congress enacted comprehensive legislation which prohibits private employers in almost every circumstance from using polygraphs for pre-employment screening.[38] More recently, Congress enacted the Americans With Disabilities Act, which prohibits employers from conditioning job offers on the results of a medical exam, unless the medical condition is job related and meets a business necessity test.[39]

In 1994, during the 103rd Congress, both the House and the Senate gave serious consideration to the Employee Surveillance Protection Act. That legislation would prohibit surreptitious electronic surveillance in the workplace; create a relevant standard for electronic surveillance; provide for employee access

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[36] Ralph Z. Hallow, Moderate Lawmakers Open GOP Offensive, The Washington Times, Dec. 16, 1992, at A4.

[37] Gina Kolata, Obese People Fight Ridicule, Long Odds of Becoming Thin, The Houston Chronicle, Nov. 22, 1992, at A7.

[38] Employee Polygraph Protection Act, Pub. L. No. 100-347, 102 Stat. 646 (1988); 29 U.S.C. § 2001 et seq.

[39] Andrew M. Kramer & Laurie F. Calder, Emergence of Employees' Privacy Rights, 8 Labor Lawyer 313, 321 (Spring 1992).

to information generated from the surveillance; and provide for third party confidentiality.[40] The 102nd Congress also looked at legislation that would prohibit private employers from using genetic profiling information in any type of personnel decision.[41] Most observers expect that employment privacy , along with medical privacy and issues relating to access to public records, will be active privacy issues in the 103rd Congress.

Judicial Protections

Exceptions to the employment-at-will doctrine also may provide remedies for employees who are terminated on the basis of off-the-job lifestyle activities. Under the employment-at-will doctrine private employers have enjoyed relatively broad discretion to hire or fire employees for good cause, bad cause, or no cause. Indeed it is estimated that the doctrine is used to fire 1.4 million employees each year. Over the last 25 years, however, courts and legislatures have grafted exceptions onto the doctrine in an effort to soften its otherwise harsh effects. The public policy exception is the most important. This exception provides employees with a cause of action for wrongful discharge

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40/ Privacy for Consumers and Workers Act, S. 516, 102nd Cong. 1st Sess. (1991).

41/ Human Genome Privacy Act, H.R. 2045, 102nd Cong. 1st Sess. (1991).

where a termination contravenes a state's established public policy.

Does an employer which terminates an employee for smoking off-the-job or other lawful behavior off-the-job violate a state's public policy of protecting privacy? To date, no published opinions have squarely addressed this issue.

At least one court, however, has found that off-the-job smoking comes within the scope of constitutional privacy protections. Grusendorf v. City of Oklahoma City, involved a constitutional challenge to the Oklahoma City Fire Department's smoking ban for firefighter trainees. The plaintiff argued that the policy contravened his constitutional privacy rights.[42] The court found that: "It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the privacy of their own homes."[43]

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[42] Grusendorf v. Oklahoma City, 816 F.2d 539 (10th Cir. 1987).

[43] Id. at 541.

Contract law may provide another basis to address employment privacy concerns. Contract claims can arise out of oral and written employment contracts, restrictive covenants, implied covenants of good faith and fair dealing, employment handbooks and policies, or collective bargaining agreements.[44] Similarly, tort theories such as invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, fraudulent misrepresentation, and intentional interference with contractual relations also provide some degree of protection for employees faced with off-the-job lifestyle restrictions.[45]

After hundreds of years of struggling to protect an individual's right to engage in private behavior without fear of governmental surveillance or interference, perhaps the greater threat today comes not from the public sector but the private sector. Prohibitions against smoking in your own home; eating fatty foods; drinking a beer; or participating in a contact sport are likely to be taken just as seriously and have just as burdensome an impact if their violation leads to loss of employment as they would if their violation led to a fine or

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[44] See Kurt H. Decker, Employment Privacy Law for the 1990's, 15 Pepp. L. Rev. 551, 573 (1988).

[45] See Kurt H. Decker, Employment Privacy Law for the 1990's, 15 Pepp. L. Rev. 551, 570 (1988).

other governmental sanction. In either case, the individual loses some measure of freedom to engage in private behavior.

It is no justification for this loss that employer inspired prohibitions may save employers money or increase workplace productivity. Restrictions on freedom and threats to privacy often hold the promise of saving money or boosting productivity. The better question is whether the financial benefit to society outweighs the burden that the regulation places upon individual liberty and privacy. In the case of employer imposed restrictions on lawful off-the-job behavior the answer surely must be "no."

CHAPTER II:
EMPLOYMENT PRIVACY STATUTES AND THE EMPLOYMENT-AT-WILL DOCTRINE

INTRODUCTION

If an employee -- on his or her own time and away from the work place -- smokes cigarettes, drinks a beer, or indulges a taste for high cholesterol foods -- should these activities be any of an employer's business? Many employers think so, citing "sticker shock" from escalating employee health insurance costs not to mention concerns about employee absenteeism and productivity as well as the employer's image. Civil liberties and employee's rights advocates, however, contend that even if off-the-job consumption of lawful foods and products has adverse financial effects upon employers (and this is not a point that is readily conceded) employers should be prohibited from regulating their employee's off-the-job behavior because this kind of "Little Brother" regulatory activity threatens employee interests in privacy and liberty.

Historically, conflict between employee privacy and employer productivity have favored employers thanks to the employment-at-

will doctrine. Under the employment-at-will doctrine private employers had nearly complete discretion to hire or fire employees for good cause, bad cause, or no cause at all. Over the last twenty-five years, however, courts and legislatures, in an effort to ameliorate the harsh effects of the doctrine, have developed numerous exceptions. For example, statutes in over 20 states expressly prohibit private employers from conditioning employment on the passing of a polygraph test.

Another reflection of the concern for employee rights is the enactment in the last ~~three~~ several years of employment privacy statutes in 29 states. Employment privacy legislation is also pending in several other states. Employment privacy statutes prohibit private employers from discriminating on the basis of an applicant's or employee's off-the-job use of lawful foods, beverages or products.

Understandably, business associations and employers worry that these statutes will further erode the employment-at-will doctrine and invite expanded employee litigation. On analysis, however, it becomes clear that employment privacy statutes accomplish the goal of protecting legitimate employee privacy interests without challenging the employment-at-will doctrine; in fact, this legislation may actually strengthen the doctrine where it is still observed in state law.

EMPLOYMENT PRIVACY STATUTES

In nine states, employment privacy statutes prohibit discrimination based upon off-the-job consumption of any lawful product. In 29 states, these statutes prohibit employment discrimination on the basis of off-the-job use of tobacco products. In most of these 29 states, however, employment privacy statutes include exceptions that permit discrimination when the employer can demonstrate that prohibiting off-the-job use of a lawful product serves a bona fide occupational requirement. A few statutes also make exceptions for charitable or religious organizations, or for organizations for which smoking by employees, even off-the-job, would be inconsistent with the employer's central mission. Several of these statutes also expressly permit employers to charge smokers higher health insurance premiums.

Most employment privacy statutes expressly authorize aggrieved employees and prospective employees to bring a civil or administrative action against the offending employer. In most states these remedies are exclusive.

EMPLOYEE REMEDIES IN STATES WITHOUT EMPLOYMENT PRIVACY STATUTES

If an employer in a state that has not adopted employment privacy legislation terminates an employee on the basis of the employee's use of lawful products off-the-job, the remedies available to the aggrieved employee are uncertain. As an exception to the employment-at-will doctrine, most states do recognize a cause of action for wrongful discharge where the employment termination contravenes the state's public policy. Depending upon the state, courts find public policy in the state constitution, statutes and regulations or common law.

In any particular state, the outcome of a wrongful discharge claim that relies upon public policy arguments is likely to vary depending upon numerous factors such as, the employee behavior at issue; the location in which the product was consumed; the employee's job description; the industry or business in which the employer operates; and the extent to which privacy is a part of the state's public policy.

To date, not a single opinion has been published involving a wrongful discharge claim on the basis of off-the-job use of a lawful product. Best Lock Corporation v. Review Board of the Indiana Department of Employment and Training Services,[1/] a 1991 Indiana state appellate court decision, comes closest. In this

case, Daniel Winn was fired for violating Best Lock's off-the-job drinking rule.

Under Indiana law a fired employee is entitled to unemployment compensation unless he is fired for "just cause." Indiana state authorities granted Winn's application for unemployment on the grounds that he was not terminated for just cause. Best Lock appealed, arguing that the termination was just because their off-the-job anti-drinking prohibition was reasonable. The Indiana Court of Appeals held that Best Lock's off-the-job drinking prohibition was not reasonable in that Best Lock had failed to present evidence establishing any connection between the rule and Best Lock's business interests.

EMPLOYMENT PRIVACY STATUTES COMPLEMENT THE EMPLOYMENT-AT-WILL DOCTRINE

Despite employers' understandable fears, close analysis indicates that employment privacy statutes, from an employment-at-will standpoint, are actually helpful to legitimate concerns of employers, not harmful. First, most employment privacy statutes establish express and exclusive remedies for violations of the statute and thereby discourage judicial invocation of the employment-at-will doctrine in such situations. Second, legislative action with respect to off-the-job consumption of lawful products is better for employer interests than court

action because legislatures are better suited than courts to develop narrow and tailored exceptions to the employment-at-will doctrine. Third, and most importantly, the enactment of employment privacy statutes effectively signals legislative preemption of the issue and thereby discourages courts from developing judicially authored exceptions to the employment-at-will doctrine.

Employment privacy statutes effectively bar aggrieved employees from using the public policy exception to the employment-at-will doctrine to challenge a termination or other adverse action. Instead, the remedies established by the employment privacy statute customarily become the exclusive remedy for employer discrimination involving consumption or use of lawful products. Thus, not only do employment privacy statutes pose no threat to the development of case law adverse to the employment-at-will doctrine but, to the contrary, they often work to shield the doctrine from judicial scrutiny.

Moreover, from an employer's standpoint, legislative action with respect to off-the-job use of lawful products is more attractive than court action. Legislatures can obtain input from all participants in the debate, not merely litigation adversaries. This kind of consultative process makes legislatures more likely than courts to draft a comprehensive,

balanced approach. Legislatures also are better positioned to craft socially valid exceptions.

Finally, judicially authored exceptions to the employment-at-will doctrine provide precedents for the development of additional judicially authored exceptions to the employment-at-will doctrine. The result, over time, is substantial erosion of employment-at-will principles. By contrast, the enactment of employment privacy statutes would be a factor discouraging courts from developing their own exceptions to the employment-at-will doctrine. Based on the hoary legal maxim "expressio unius est expressio alterius," courts should view the enactment of an employment privacy statute as a signal that in such states, legislative action is required in order to create additional exceptions to the employment-at-will doctrine.

Numerous courts have applied this maxim in employment-at-will cases. For example, in Remba v. Federation Employment & Guidance Service,[2/] a New York trial court emphasized that once the legislature has spoken with respect to employment-at-will, courts should exercise restraint. In Remba, an employee contended that she was discharged for her refusal to participate in an allegedly fraudulent scheme to bill New York City for services never rendered. The court rejected the wrongful discharge claim, relying upon legislative history to New York's whistleblower law indicating that the law protected public and

private employees only in situations where the whistleblower's disclosures related directly to public health and safety. The court stated that any effort to expand the statute's protections is for the legislature, not the courts. Simply stated, the more active the legislature has been in articulating public policy exceptions to the employment-at-will doctrine, the less active the courts are likely to be. The result is a net plus for the employment-at-will doctrine.

CONCLUSION

Protection for off-the-job, lawful consumption of products seems certain to remain an important public and employee priority through the 1990s. The underlying public policy question is whether *pin-pointed legislatively authored exceptions* or judicially initiated public policy exceptions to the employment-at-will doctrine will be the mechanism to provide such protection in the 27 states without employment privacy statutes. For the reasons discussed earlier, statutory protection should be the more attractive option to both legislatures and courts.

Employers and the business associations should not view the passage of well-tailored employment privacy statutes with alarm. Indeed, to the contrary, the enactment of carefully drawn employment privacy statutes should help to preserve employer

interests in continuing the availability and useful application of the employment-at-will doctrine in those states that still give the doctrine strong application.

CHAPTER III:

EMPLOYERS ARE NOT JUSTIFIED IN DISCRIMINATING AGAINST EMPLOYEES, AND PROSPECTIVE EMPLOYEES, BASED ON LIFESTYLE AND HEALTH CHARACTERISTICS

INTRODUCTION

Employers increasingly discriminate against applicants and employees who engage in a wide range of what are deemed to be dangerous or unattractive off-the-job activities or who are deemed to have undesirable health characteristics. For example, employers have fired, failed to hire, or penalized workers who smoke or drink while off duty, are overweight, have high cholesterol, or ride motorcycles. Multi-Developer, Inc., for instance, a Georgia property development company, refuses to hire applicants who drive motorcycles or who participate in other hobbies deemed to be hazardous.[1/] Similarly, Fortunoff and Turner Broadcasting terminate employees who smoke off the job,[2/] and U-Haul International docks the pay of overweight workers, allegedly to compensate for additional health care costs.[3/] The Town Council of Athens, Georgia voted to turn away prospective

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1/ See Zachary Schiller & Walecia Konrad, If You Light Up on Sunday, Don't Come in on Monday, Business Week, Aug. 26, 1991, at 68.

2/ See Janny Scott, "Smokers' Rights" Asserted Under New Job Bias Laws, Los Angeles Times, July 23, 1991, at A5.

3/ See James J. Luck, Keeping the Boss Out of The Living Room, State Government News 26 (July 1992) (hereinafter "Living Room"); Barbara Durr, Get Thin, Or Get Out, Financial Times, Aug. 19, 1991, at 10.

employees with high cholesterol levels, but later changed its position after receiving widespread criticism.[4]

This paper examines and questions the validity of employer justifications for asserting this kind of control over their employees' personal lives. This paper does not examine the extent to which or the way in which these invasive practices harm employees and applicants because other papers have addressed that issue. In other words, this paper does not look at whether the benefits of employer discrimination outweigh the costs to employers arising from such discrimination. Rather, the paper argues that these alleged benefits are negligible. Employers customarily advance three reasons for controlling their employees' off-duty activities and distinguishing between applicants and employees with certain health characteristics. First, employers assert that such policies are cost effective. They claim, for example, that employees who smoke, or engage in other high risk conduct, cost employers more in health insurance and other benefits. Such employees, employers contend, also tend to get in more accidents, cost employers more in disability leave and accident-related property damage, and are more frequently absent from work. Second, employers contend that smoking, or similar conduct such as drinking off the job, adversely affects their employees' work performance by causing employees to be less productive while at work and frequently absent. Finally, some

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[4] Id.

employers claim that they have an image to build or uphold, and that employees who smoke, drink, are overweight, ride motorcycles, etc., present images that clash with the image employers wish to convey.

Not one of these considerations appears to have merit. First, the fact is that employers have not come close to conclusively demonstrating any connection between smoking, and other lifestyle choices, and higher employer costs. Although employers and anti-smoking forces have compiled statistics purporting to show the costs employees who smoke impose upon their employers, their findings have been criticized and countered with studies coming to opposite results. Furthermore, employers have, for the most part, not studied the costs of conduct other than smoking, and those few studies that have been done on other conduct are also inconclusive.

Second, there is virtually no empirical evidence that links targeted off-the-job behavior with employee productivity. Furthermore, employers can use less intrusive means to attempt to cut costs and insure an efficient workforce. For example, they can simply fire employees who are not productive or are excessively absent from work. They might also conduct optional wellness programs to encourage employees to pursue more healthy and less risky lifestyles.

Finally, allowing employers to discriminate against certain employees and intrude upon their personal lives, in the hopes of

creating a particular employer image, is dangerous. Where do we draw the line between conduct that is permissible to control in the name of "image" and conduct that is not? Simply stated, allowing employer policies that regulate off-the-job behavior in order to enhance an employers image takes the nation down a slippery slope.

DO SMOKING, AND OTHER EMPLOYEE ACTIVITIES AND CHARACTERISTICS, INCREASE EMPLOYER COSTS?

Cost Statistics That Employers Rely Upon

Employers rely on studies finding that current and former smokers or drinkers cost employers more in sick leave, absenteeism, turnover, and similar costs.[9] One problem with such studies is that their accuracy can never be verified because their results depend upon numerous characteristics of the subjects used in the study. Furthermore, most of these studies focus on smoking. There are very few, if any, studies on other types of employee conduct or characteristics. Thus, the studies do not consider potential costs incurred by other groups of employees, such as those who are overweight, have children, have high cholesterol, are genetically prone to certain diseases, ride

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[9] See Mark A. Rothstein, Refusing to Employ Smokers: Good Public Health or Bad Public Policy, 62 Notre Dame L. Rev. 940 (1987) (citing a number of studies); Chwee Lye Chng, The Smoking Policy in the Workplace: A Justification and a Model, Health Education 32, 36 (Apr./May 1986); George F. Will, Koop's Splendid Legacy, Washington Post, July 16, 1989, at B7.

motorcycles, or bungee jump. Consequently, it is impossible to tell if money will be saved by banning certain activities or employees with particular characteristics.

Employers, and the studies upon which they rely, also tend to overlook other cost factors. As one commentator noted about charging certain employees more for health insurance: "Trying to determine a surcharge, given such factors as family history and health problems that can't be dieted or exercised away, will require elaborate calculations."[6/] Similarly, another commentator stated: "[T]he assumption that lifestyle choices are the prime contributors to rising health care costs is controversial. Other factors such as the cost of technology, aging of the population and unnecessary use and abuse of the health care system have all been cited as contributory factors in rising health care costs."[7/]

Statistics That Employers Rely Upon Have Been Criticized and Countered

Employers and the studies that they rely on have not established that lifestyle choices and health characteristics indeed affect employer costs. As one commentator observed, a

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6/ Paula Span, Smokers' New Hazard: No Work; Health Costs Behind Job Bias Issue, Washington Post, Nov. 12, 1991, at A1.

7/ John M. Scholerb, Employment Discrimination Based on Employee Lifestyles, Draft Report for the American Civil Liberties Union, March 8, 1991.

company discriminating on the basis of lifestyle or health "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."[8/] In fact, a number of studies have come to conclusions contrary to those upon which employers rely. The Bureau of National Affairs, for example, conducted a study in which it found that 95% of companies that banned smoking reported no financial savings. Similarly, in a U.S. Chamber of Commerce study absolutely "no connection between smoking and absenteeism" was found.[9/] A National Chamber Foundation 1989 Nationwide Survey found that consumption of alcohol and tobacco products proved to have "no significant affect on absenteeism."[10/] Some studies have even found that nonsmokers are absent from work more often than smokers.[11/] Other studies question findings that smokers are less productive. For example, a survey of bank executives found that smokers used their time

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[8/] Legislative Briefing Series, Introduction to Lifestyle Discrimination in the Workplace (hereinafter "Intro To Lifestyle Discrimination"); see also Elizabeth B. Thompson, Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out? 43 Vand. L. Rev. 491 (1990) (hereinafter "Constitutionality").

[9/] Intro to Lifestyle Discrimination, supra note 8, at 2.

[10/] Marketing Resource Group, Inc., Michigan Views on Employee Privacy Issues (Oct. 1990) (hereinafter "Michigan Survey").

[11/] See id.

2.5% more efficiently than nonsmokers,[12] and some research suggests that smoking increases mental efficiency and improves mental performance.[13] Thus, studies upon which employers rely have, at best, questionable validity.

Lifestyle Discrimination Could Increase Employer Costs

There are some indications that lifestyle discrimination may actually increase employer costs. Lifestyle discrimination could cause a drop in employee productivity, because employees must concentrate on altering their lifestyles rather than on performing job duties. Furthermore, employers that retain lifestyle discrimination policies may be unable to recruit the most qualified and efficient employees. A business that discriminates against its employees based on lifestyle choices may also alienate clients that engage in activities prohibited by that business.[14] In fact, one company, Fortunoff, that refuses

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[12] Id.

[13] Constitutionality, supra note 8, at 497, citing Wesnes, Nicotine Increases Mental Efficiency: But How?, in Tobacco Smoking & Nicotine: A Neurobiological Approach (W. Martin Ed. 1987).

[14] See, e.g., Jo-Ann Armao, Smoking Bill Draws Fire, Washington Post, Jan. 17, 1990, at B1.

indicate that these statutes have caused employers economic harm. There are no reports that employees have filed lawsuits under these statutes, and no reports that these laws have had any impact on employers' health insurance premiums.[17] Thus, if prohibiting lifestyle discrimination does not appear to adversely affect employer costs, allowing such discrimination is not likely to be cost efficient.

Employer "Cost Saving" Programs Have Not Been Proven Effective

Programs adopted by employers to control costs perceived to be generated by lifestyle choices and certain health characteristics have not proven to be effective. Some employers, for example, have begun charging employees who engage in certain activities or have particular health characteristics more for health insurance. "While the share-the-higher costs argument

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[16] (...continued)
23-20.7.1-1 (Supp. 1990)); South Carolina S981, enacted June 25, 1990 (codified at S.C. Code Ann. § 41-1-85 (Law. Co-op. Supp. 1991)); South Dakota SB102, enacted March 1, 1991 (codified at S.D. Codified Laws Ann. § 60-4-14 (Supp. 1991)); Tennessee H2516, enacted March 29, 1990 (codified at Tenn. Code Ann. § 50-1-304 (1991)); Virginia S607, enacted March 27, 1989 (codified at Va. Code Ann. § 15.1-29.18 (Michie 1989)); West Virginia S458, enacted March 12, 1992 (to be codified at 21 West Virginia Code § 19); Wisconsin, SB292, enacted May 1, 1992 (to be codified as amended at Wisc. Stat. § 111.31); Wyoming S45, enacted March 19, 1992 (to be codified as amended at W.S. 27-9-105(a)).

[17] See Hearings on Substitute for Michigan Senate Bill 484, Committee on Labor, Michigan House of Representatives, January 28, 1992 (statement of Robert Belair) (hereinafter "Belair Testimony").

seems logical, [however,] there is little evidence that it really saves money."[18/] Similarly, of the companies that have instituted on-the-job smoking policies "very few [have] reported any noticeable effects on cost and productivity."[19/] Employers that have instituted wellness programs to encourage healthy employee lifestyles believe that such programs decrease costs, but it has proven "problematic" to demonstrate the programs' good effects.[20/]

Even Employers And Proponents of Lifestyle Discrimination Question Whether Lifestyle Discrimination Saves Money

Even employers and proponents of lifestyle discrimination question whether such discrimination reduces costs, and disagree over which activities they believe adversely affect employer costs. One employer that considered charging overweight employees more for health insurance "decided not enough studies had been made to draw a clear enough connection between weight and health costs to justify such treatment."[21/] Similarly, some

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18/ Editorial, When Business Should Mind Its Own Business, Business Week, Aug. 26, 1991, at 80.

19/ See Constitutionality, supra note 8, at 497, citing Where There's Smoke, supra note 15, at 7.

20/ Dan Cordtz, For Our Own Good, Financial World, Dec. 10, 1991, at 48.

21/ Employers Look at Employee Lifestyles In Attempt to Control Escalating Costs, 17 Pens Rep. (BNA) No. 24, 1026 (June 11, 1990).

employers who have engaged in lifestyle discrimination will not discriminate based on cholesterol levels because too many factors, including genetic ones, affect cholesterol.[22/]

The fact that employers disagree among themselves about which behaviors affect costs and which they have a right to penalize suggests that the connection between lifestyle and costs is tenuous. Indeed, even proponents of lifestyle discrimination have recognized that the link between employee lifestyle and health costs is tenuous. Rafael E. Castillo, risk manager of Coors, noted that it is difficult to measure the success of a wellness program, like the one his company sponsors, because "no one can say with authority how much poor health and unhealthy lifestyles actually cost an employer."[23/]

In sum, lifestyle and health characteristic discrimination has not been shown to save employers costs, and in fact may increase such costs. Employers who claim they engage in lifestyle discrimination in order to reduce costs do not appear to be on firm ground.

22/ Id.

23/ Id., citing Mark A. Hofmann, Wellness Programs' Extra Benefits Praised, Business Insurance, May 7, 1990, at 33.

LIFESTYLE CHOICES ARE NOT REASONABLY RELATED TO JOB PERFORMANCE AND SHOULD NOT BE RELEVANT IN EMPLOYMENT DECISIONS

It should also be emphasized that cost studies have not established any connection between lifestyle and job productivity. In addition, state legislators, the courts, public opinion, and employers themselves indicate that lifestyle choices should not be relevant in employment decisions because there is no connection between such choices and job performance.

Employment Privacy Statutes and the ADA Demonstrate Legislative Findings That Lifestyle Choices Are Not Related To Job Performance

Employment privacy statutes have been enacted in twenty-eight states.[24/] Most of these statutes prohibit employers from discriminating against employees who smoke off the job,[25/] but a few prohibit virtually all types of lifestyle discrimination.[26/] Many employment privacy statutes permit discrimination against smokers if an employer can demonstrate that the discrimination serves a bona fide occupational requirement.[27/] Thus, legislators have found that in general such discrimination is not

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24/ See supra note 16.

25/ See, e.g., Ariz. SB 1153, enacted June 25, 1991 (codified at Arizona Rev. Stat. § 36-601.02)

26/ See, e.g., Colo. H.1123, enacted Apr. 17, 1990 (codified at Colorado Rev. Stat. § 24-34.402.5).

27/ See, e.g., Oklahoma HB150, enacted May 8, 1991 (codified at 40 Oklahoma Stat. § 500-03).

related to job performance or requirements. In fact, enactment of privacy legislation demonstrates a national trend to ban discriminatory workplace policies that have nothing to do with job qualifications or performance.[28/]

This trend has also been demonstrated on the federal level by the enactment of the Americans With Disabilities Act of 1990 ("ADA").[29/] The ADA prohibits employers from conditioning job offers on the results of a medical exam, unless the medical condition is job related and consistent with business necessity.[30/] As one commentator noted, the ADA represents a congressional finding that financial burden alone is insufficient to justify discrimination.[31/] According to this same commentator, the fact that an employee may impact on insurance costs is irrelevant.[32/]

28/ Michael R. Stone, Worker Privacy, Workforce 25, 27 (Summer 1992).

29/ Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213).

30/ Andrew M. Kramer & Laurie F. Calder, Emergence of Employees' Privacy Rights, 8 Labor Lawyer 313, 321 (Spring 1992) (hereinafter "Emergence").

31/ Larry Goslin, Genetic Discrimination: Employers and Insurers, Amer. J. Of L. & Med., vol. XVII Nos. 1 & 2 (1991).

32/ Id.

Courts Have Found That There Is Not A Rational Relationship Between Lifestyle Choices and Job Performance

In addition to legislatures, courts have also examined the relationship between certain employer policies and work performance, and have only upheld policies rationally related to job performance.

Employer Drug Testing

Courts have generally upheld employee drug testing because employers have convinced them that in many cases the link between drug use and job performance more than justifies the intrusion.[33/] For instance, courts have determined that drug tests can root out potential problems among employees in safety and security-sensitive positions and among applicants.[34/] Thus, unlike smoking, or other off-the-job conduct, drug use has been shown to have a direct impact on job performance and work safety.

Furthermore, courts have held that public employers must tailor drug testing policies to further important workplace goals without impinging unnecessarily on privacy rights. While this constitutional standard does not apply to private employers, "if private employers stray too far from a reasonableness standard,

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33/ Emergence, supra note 30, at 317-18.

34/ Id. at 320.

courts and legislatures will react."[35] As discussed above, legislatures have reacted to other employer policies not rationally related to job performance by enacting privacy statutes. Employers have not demonstrated that lifestyle policies, like drug policies and testing, are reasonably related to job performance, nor have they tailored their policies to prevent unnecessary intrusion.

According to The Court of Appeals of Indiana Off-Duty Drinking Is Not Sufficiently Related to Job Performance: Best Lock Corporation

The Court of Appeals of Indiana has opined that lifestyle choices, specifically off-duty drinking, are not rationally related to job performance. Best Lock Corp. v. Review Bd. of the Indiana Dept. of Employment and Training Services.[36] In Best Lock, a company rule prohibited employees from smoking and drinking both on and off the job. An employee was terminated when he admitted to drinking while off duty. In examining the employee's right to unemployment benefits, the court struck down the company policy because it did not bear a reasonable relationship to the employer's interests.[37] Specifically, the court found that the employer presented no evidence "that such a

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[35] Id. at 320-21.

[36] 572 N.E.2d 520 (Ind. Ct. App. 1991).

[37] Id. at 523.

rule is reasonable or necessary for proper conduct or production at work."[38/]

Lifestyle Policies Are More Analogous To Polygraph Tests Than Drug Tests

Thus, employers have not convinced courts or legislators that there is a sufficient link between job performance and lifestyle choices to justify invasions of employee privacy. Judicial and legislative hostility to polygraph testimony reflects an insistence that workplace policies which impact upon personal privacy must be job related. In 1988, Congress passed the Employee Polygraph Protection Act which forbids almost all private employers from using polygraph tests. "The evolution of federal and state polygraph laws sends an important message to employers. Workplace policies that are perceived as both intrusive and unlinked to job performance ultimately will not withstand judicial or legislative scrutiny."[39/]

Public Opinion Indicates That Lifestyle Discrimination is Unrelated to Job Performance and Should Not Be Permitted

Even without the help of legislatures or courts, the public feels that lifestyle and health considerations should not affect employment decisions or security. Seventy-five to ninety-seven

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38/ Id. at 522.

39/ Emergence, supra note 30, at 317.

percent of the American public believes that it is improper to make employment decisions on the basis of off-the-job smoking.[40] Even the anti-smoking establishment understands that employer policies should be related to job performance. Professor Mark Rothstein, Director of the Health Institute at the University of Houston, and an avid anti-smoking advocate, has stressed: "Unless an employee's off-work activity has a direct bearing on his or her ability to perform job-related tasks or significantly interferes with the business operations, then there is no justification for obtaining information about off-work activities or using that information in employment decisions."[41]

Employers Should Not Be Permitted to Discriminate Against Employees To Preserve Their Image

Intrusive employer policies designed to preserve employer image off the job are also not work related. Employment decisions should be based on job performance. Whether an employee smokes, drinks, or bungee jumps after work is not job related and is really no business of his or her employer. In fact, what an employee does off the job most likely goes unnoticed by an employer's clients and has no affect on employer image. Admittedly, in a few very limited instances off-duty conduct and employee image may relate to job performance. For

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[40] See Belair Testimony, supra note 17; see also Living Room, supra note 3.

[41] Michigan Survey, supra note 10.

example, limiting management positions at the American Cancer Society to nonsmokers may be acceptable because part of the Society's function is to discourage smoking. In fact, many employment privacy statutes include exceptions for such circumstances. Such instances, however, are rare, and in general, employers should be prohibited from controlling off-duty conduct that does not significantly affect employer interests.

EMPLOYEES CAN USE LESS INTRUSIVE MEANS TO ATTEMPT TO REDUCE COSTS AND ENHANCE JOB PERFORMANCE

In attempting to regulate employee lifestyle, employers are overreacting and doing more than is needed to accomplish legitimate workplace goals.[42/] If a particular employee is not productive or is excessively absent from work, the employer can terminate that employee. There is no reason for the employer to guess which employees may prove to be less productive or absent based on lifestyle or health characteristics. Such projections about future behavior or medical conditions likely encompass employees or prospective employees who will be as or more productive as other employees and rarely absent from work.

In lieu of outright conduct bans, employers can adopt narrowly tailored on-the-job policies to ban certain activities that may affect work performance and the health and morale of other employees. On-the-job smoking policies for example, affect

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42/ See Emergence, supra note 30, at 325.

only worktime behavior and are generally less intrusive and more job-related than total smoking bans.[43] Designating certain areas for smoking or certain times that employees may take breaks to smoke, or even banning smoking altogether in the workplace, is much less intrusive than dictating that an employee shall not smoke on his or her own time. Similarly, employers concerned about their image can institute on-the-job requirements, such as proper attire, to preserve their professional image.

Employers that really believe that they can cut costs by employing employees with healthier lifestyles could, as many companies have, institute wellness programs. Through such programs, employers encourage employees to live healthier lifestyles by, for example, providing exercise and smoking and drinking cessation programs. Such programs, however, ultimately leave lifestyle choices with employees, where they belong.[44]

In lieu of a ban on off-the-job activities or the hiring of applicants with certain health characteristics, some employers have charged high risk employees more for health insurance. To avoid discrimination, employers can pay a certain amount of health insurance for all employees and have the individual

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[43] Id. at 330.

[44] See Rothstein, 62 Notre Dame L. Rev. at 964; Dan Cordtz, For Our Own Good, Financial World, Dec. 10, 1991, at 2; Mark A. Hofmann, Wellness Programs' Extra Benefits Praised, Business Insurance 33, May 7, 1990.

employees purchase the health insurance and other benefits.[45] Passing along health insurance, and other benefit, costs to high risk employees is less broad and intrusive than an outright ban on conduct, but it is not an alternative that should be encouraged.

The very purpose of insurance is to spread risks. High risk employees customarily are subsidized by low risk employees. A policy that passes costs, and the responsibility of obtaining insurance, to employees makes it problematic for certain high risk employees to secure insurance.[46] A target-the-cost policy could, therefore, cause whole categories of employees to become uninsurable.[47] Furthermore, such cost-adjusting measures could be taken to disturbing extremes. For example, employers could target workers with children to pay more insurance.[48]

Employers can use less intrusive policies to control employer costs. They should not be permitted to use overbroad and intrusive measures, or even less restrictive alternatives, such as target-the-cost health care policies, that may adversely affect many employees. Indeed, lifestyle policies should be

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[45] See Rothstein, 62 Notre Dame L. Rev. at 965.

[46] See id.

[47] See id.

[48] See Tony Mauro & Julia Lawlor, Do Workers Have Private Lives? USA Today, May 13, 1991, at 1A.

prohibited for the same reasons as polygraph testing, that such measures are overly intrusive.[49/]

ALLOWING EMPLOYERS TO ENGAGE IN WHAT NOW APPEARS TO BE SELECTIVE LIFESTYLE DISCRIMINATION IS A DANGEROUSLY SLIPPERY SLOPE

If We Allow Some Policies Regulating Off-Duty Conduct, Such As Off-the-Job Smoking, Where Do We Draw The Line?

Condoning certain lifestyle policies, such as those prohibiting employees from smoking at home, likely encourages employers to discriminate based on a wide range of activities and characteristics that employers may deem to be undesirable, such as: diet, weight, alcohol consumption, high cholesterol, hypertension, sky diving, mountain climbing, and sexual promiscuity.[50/] In fact, a company in Pennsylvania has barred its managers from riding motorcycles, and a Georgia firm has warned its employees to avoid such life-threatening activities as cliff climbing and surfing.[51/] These policies demonstrate what employers may do if they are permitted to institute policies based on potential costs.[52/]

[49/] See Emergence, supra note 30, at 316.

[50/] See Belair Testimony, supra note 17; To Your Health, Indiana Star, Apr. 14, 1991.

[51/] John Elson, Busybodies: New Puritans, Time, Aug. 12, 1991, at 20.

[52/] Id.

Once employers are allowed to intrude upon employees' personal lives, the door is open for increasingly intrusive policies. Even the anti-smoking establishment, that would presumably like to see smoking banned, acknowledges that off-work smoking restrictions are likely to lead to even more intrusive forms of lifestyle discrimination, such as genetic testing. As one anti-smoking advocate explained:

> [An] unsettling trend likely to be fostered by off-work smoking restrictions is the refusal of employment based upon perceived future illness or increased health insurance costs. New developments in genetics, epidemiology, and other disciplines will enable scientists to make long-range predictions about the probabilities of an individual's future health risks. In some instances, employers have relied upon unproved predictive tests as a basis for employment decision. Even if such predictions were accurate, it is difficult to justify denying employment and other opportunities based upon one's genetic makeup, family health history, diet, hobbies, or other such factors.[53]

Employers Could Use Genetic Testing To Weed Out Prospective Employees Who Show A Tendency Towards Particular Illnesses

It is quite possible that employer lifestyle and health characteristic policies could lead employers to institute genetic testing to eliminate applicants or employees who have a genetic tendency towards particular illnesses. Most scholars agree that

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[53] Michigan Survey, supra note 10 (quoting Professor Mark Rothstein, Professor of Law and Director of Health Law Institute at the University of Houston).

it will soon be possible to do a DNA genetic profile for every individual.[54] A federal effort is currently underway to identify all human genes.[55] Recently, scientists were able to create the first crude DNA map.[56]

Genetic advances, and more cost-efficient genetic testing, could put employers and insurance companies in a position to reject applicants that they view as high genetic risks. Such discrimination is not farfetched, as is demonstrated by discrimination suffered by carriers of sickle cell. In the 1970s, carriers of sickle cell anemia "were harshly discriminated against . . . after the military, schools and employers adopted screening tests."[57] As one expert on sickle cell anemia said, "They were treated like Typhoid Marys . . . even though they would never develop the disease."[58]

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[54] Sandra Sugawara, Biotech Debate: Who Will Read The Gene Maps?, Washington Post, July 5, 1992, at H1 (hereinafter Post, July 5, 1992).

[55] Id.

[56] See Robin Herman, Stepping Up the Pace: Three Chromosomes -- Including X -- On The Map, Washington Post, Oct. 6, 1992, at Z7; David Brown, First 'Maps' of Human DNA Created: Data May Have Use In Combatting Disease, Washington Post, Oct. 1, 1992, at A1. Interestingly, some genetic studies have shown that certain people are predisposed towards cigarette smoking or nicotine addiction. See Janny Scott, Studies Link Depression to Smoking, Los Angeles Times, Sept. 26, 1990, at A14; Marguerite Holloway, RX for Addiction, 264 Scientific American 94 (March 1991).

[57] Sandra Blakeslee, Ethicists See Omens of An Era of Genetic Bias, New York Times, Dec. 27, 1990, at B9 (hereinafter "Omen"); see also Post, July 5, 1992.

[58] Omen, supra note 57, at B9.

Presently, few companies are using genetic testing due to the tests' high costs. Costs are, however, expected to drop, which could prompt additional companies to institute genetic testing programs.[59/] A leading advocate of restrictions on genetic testing explained that the "big issue for employers has been the rising cost of benefits," and that "there is the perception that this genetic screening can lower the costs of benefits although there is no data that says this is true."[60/] Thus, the same motivation -- cost considerations -- that have motivated employers to adopt policies barring smoking or alcohol consumption could encourage employers to engage in genetic testing.

Genetic testing is almost certain to exacerbate privacy, as well as social, problems. Besides being intrusive, genetic testing could heavily impact upon racial, ethnic or sex groups, and could render a large number of people unemployable or uninsurable.[61/] For example,

> Fears of insurance problems have [already] prompted many people at risk for inherited disorders . . . to avoid tests that would show whether they carry a genetic defect. In some cases, people avoid the tests even if knowledge might help them begin early

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[59/] Id.

[60/] Id.

[61/] Larry Goslin, Genetic Discrimination, Amer. J. of L. & Med., Vol. XVII, Nos. 1 & 2, 137, 142 (1991).

up to require employees in the way of personal behavior in order to receive health benefits. . . ."[64] For example, people who have children routinely incur more costs; skiers are likely to break more bones; and people who drive small cars are more likely to get hurt in an accident. "People make choices, most of which include elements of risk and cost. If we must confess to our bosses and underwriters every possible chance we might take, we may as well give up on the idea of group insurance, and perhaps the whole notion of living and working together as well."[65]

Employers Could Use Increasingly Intrusive Means To Enforce Lifestyle Policies

Should employers be permitted to travel down the slippery slope of regulating employee conduct, they may also employ in an ever-increasing array of techniques to insure that employees comply with off-duty policies. Employers may, for instance, try to electronically survey employees while at home, or may encourage employees to report any prohibited behavior by fellow employees. In short, "Little Brother" would be watching.

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[64] Editorial, Protecting Liberty, Not Smoking, St. Louis Post-Dispatch, April 9, 1989.

[65] Editorial, Personal Freedoms Go Up In Smoke, Chicago Tribune, Sept. 21, 1991, at C18.

CONCLUSION

In a democracy, is it wise to allow employers to institute policies that intrude upon employees' off-work conduct or discriminate against them based on health characteristics? Understandably, employers are seeking to cut business costs. Yet, it has not been proven that particular types of conduct or health characteristics increase employee costs. Even if a relationship between employee conduct/characteristics and costs were established, solely cost-based policies, unrelated to job performance, should not be tolerated. This is especially true when employers have less intrusive and more work related means available to cut costs, and considering that allowing some lifestyle/characteristic discrimination likely leads to even more intrusive employer policies. Employers are not justified in controlling their employees' lives or discriminating based upon potential health problems. We should not allow employers to make 1984 a reality in the 1990s.