EMPLOYEE PRIVACY LAW AND PRACTICE

EMPLOYEE PRIVACY LAW AND PRACTICE

KURT H. DECKER
Counsel to
Stevens & Lee
Reading, Pennsylvania

and

Adjunct Professor of Industrial Relations
Graduate School of Industrial Relations
Saint Francis College
Loretto, Pennsylvania

Wiley Law Publications
JOHN WILEY & SONS
New York • Chichester • Brisbane • Toronto • Singapore

exposure records without individual employee consent.[182] OSHA also has an access right to these individual employee exposure records.[183]

Employees can access their entire medical files regardless of how the information was generated or is maintained.[184] Excluded from an "employee medical record" are certain physical specimens, records concerning health insurance claims, and records concerning voluntary employee medical assistance programs.[185] Limited discretion is given physicians to deny access when a diagnosis of a terminal illness or psychiatric condition exists.[186] Collective bargaining representatives must obtain written consent before gaining access to employee medical records.[187]

Corrections or removal of inaccuracies must be made under a state employment record statute.[188] OSHA's access procedures do not provide for this. This access rule does not violate an employment privacy right because there is security for dealing with personally identifiable information and the rule carefully limits information use.[189]

§ 7.7 Smoking

Smoking in the workplace no longer is viewed as a non-issue, a situation accepted by non-smokers as an inevitable part of employment or by smokers as a right. What was once an individual decision is today becoming increasingly regulated by private and public sector employers through work rules[190] and statutes.[191] This regulation requires a balancing of the affected employee's interests with employer responsibilities toward other employees.

Tolerance of smoking in the workplace is changing rapidly.[192] Employers of virtually every size and description are taking steps to curtail workplace

---

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] See § **2.30.**

[189] Louisiana Chem. Ass'n v. Bingham, 550 F. Supp. 1136 (W.D. La. 1982).

[190] Rossie v. State of Wisconsin, 133 Wis. 2d 341, 395 N.W.2d 801 (1986).

[191] See § **2.39.**

[192] *See* M. Rothstein, Medical Screening of Workers (1984); Employee Relations and Human Resources Bulletin, Company Smoking Policy Manual—Freshstart in the Workplace (Report No. 1622, Section III, Aug. 21, 1986); Blodgett, *The New Outlaws—Smokers Who Light Up at Work*, 72 A.B.A. J. 31 (February, 1986); Kent & Cenci, *Smoking and the Workplace: Tobacco Smoke Health Hazards to the Involuntary Smoker*, 24 J. Occup. Med. 469 (1982); Swingle, *The*

smoking. While the majority of employers have not yet restricted workplace smoking, the growth of nonsmoking policies is unmistakable.[193]

Awards for unemployment,[194] disability,[195] and medical treatment[196] have been made to nonsmokers while union grievances under collective bargaining agreements are increasingly dealing with this issue.[197] Employers permitting or not regulating workplace smoking are highly vulnerable to challenges by nonsmoking employees. Mounting concern over smoking's effects on the health, productivity, and morale of smokers and nonsmokers has combined with changing social attitudes about smoking reversing the notion that smoking is an acceptable public practice.

As a privacy issue, smoking is becoming an activity that an employee does within the confines of his or her home, but not at the workplace or in public. This is similar to the taboo associated with sexual activities.

Employment privacy questions concern the employer's liability if smoking is or is not restricted and whether employers can hire only nonsmokers. While discrimination against smokers does not rise to that prohibited by federal and state fair employment practice (FEP) statutes,[198] it certainly affects a privacy-related interest. It may be non-job-related criteria that controls employment distribution, especially when employers do not hire smokers or restrict smoking outside the workplace. By not confining job-relatedness criteria to the workplace, employers could deny opportunities based on what occurs outside it. When using the powerful employment incentive to control how employees act at home employers decide or circumscribe what is done in private.[199] This could be a guise to discriminate if statistics establish that certain minority, national origin, or age groups smoke more than others. Before banning workplace smoking, it may be wise for employers to consult their employees or the union when a collective bargaining agreement exits.[200]

Connecticut's smoking
This statute requires resta
and prohibits smoking i
must establish written r
separate areas but permi
posted where employees
who request them.[203]

Besides posing a hea
equipment and can be a
nonsmoker must be bal
reasonable accommodat
this.[205]

Employment privacy i
ment may be enforced
contractual[209] litigation
and state FEP statute

Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air, 45 Mo. L. Rev. 444 (1980); Weis, *No Smoking*, 63 Personnel J. 53 (No. 9, September, 1984); Weis, *Can You Afford to Hire Smokers?* 60 Personnel Ad. 71 (No. 5, May, 1981); Note, *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 Harv. L. Rev. 809 (1986).

[193] *See* Brown, *Smokers' Rights vs. Health Concerns: Smoking Emerges As New Controversy*, 1987 Resource 3 (February 1987).

[194] *See* Lapham v. Unemployment Comp. Bd., ____ Pa. Commw. ____, 519 A.2d 1101 (1987); McCarthy v. State Dept. of Social and Health Serv., 46 Wash. App. 125, 730 P.2d 681 (1986).

[195] *See* Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (1980); Fuentes v. Workmen's Comp. Appeals Bd., 16 Cal. 3d 1, 547 P.2d 449, 128 Cal. Rptr. 673 (1976).

[196] *See supra* note 195.

[197] *See, e.g.*, Nicolet Indus., Inc., 79-2 Lab. Arb. Awards (CCH) ¶ 8398 (1978) (Rock, Arb.).

[198] *See* §§ **2.7–2.12, 2.25.**

[199] See **ch. 8.**

[200] In the private or public sectors, an employer with a union may be required to negotiate over the implementation of a non-smoking policy because it relates to terms and conditions of employment. *See* Town of Employee Bargaining Cas. of Pa. v. Labor Relations B Labor Rel. Bd., 60 Pa. Cc schoolteachers); H-N Adv Arb.) *(employer's failure t* make recommendations re agreement); *but see* Natio Arb.) (unilateral employer

[201] Conn. Gen. Stat. Ann. §

[202] Conn. Gen. Stat. Ann. § .

[203] *Id.*

[204] Town of Rocky Hill & AFS ¶ 44,547 (Conn. St. Bd. of free environment).

[205] Smith v. Western Elec., 6

> [T]he tobacco smoke of employees in gener defendant (employer) k that defendant has the au requiring a smoke-free assume its responsibilit defendant has breache place. . . . *Id.* at 13.

[206] See **ch. 2.**

[207] See **ch. 3.**

[208] See §§ **4.3–4.10.**

[209] See §§ **4.12–4.15.**

[210] See §§ **2.7–2.12, 2.25.**

Connecticut's smoking statute is typical of those that have been enacted.[201] This statute requires restaurants seating 75 or more to provide a nonsmoking area and prohibits smoking in government buildings.[202] Employers of 50 or more must establish written rules regulating smoking. The statute does not require separate areas but permits employers to establish separate areas. Rules must be posted where employees can see them and a copy must be made available to those who request them.[203]

Besides posing a health risk, smoking can also affect sensitive technical equipment and can be a safety hazard.[204] The privacy rights of smoker and nonsmoker must be balanced with the nonsmoker's rights prevailing when reasonable accommodation is not possible. Courts are strongly suggesting this.[205]

Employment privacy interests in obtaining a smoke-free workplace environment may be enforced through statutory,[206] constitutional,[207] tort,[208] and contractual[209] litigation theories. Statutory remedies may exist under federal and state FEP statutes when handicap is covered.[210] Under the federal

employment. *See* Town of Rocky Hill & AFSCME, Local 1303-112, Council No. 4, Pub. Employee Bargaining Cas. (CCH) ¶ 44,547 (Conn. St. Bd. of Lab. Rel. 1986); Commonwealth of Pa. v. Labor Relations Bd., 74 Pa. Commw. 1, 459 A.2d 452 (1983); Chambersburg v. Pa. Labor Rel. Bd., 60 Pa. Commw. 740, 430 A.2d 740 (1981) (not required for Pennsylvania schoolteachers); H-N Advertising & Display Co., 88 Lab. Arb. (BNA) 329 (1986) (Heekin, Arb.) (employer's failure to convene joint safety committee to review plant conditions and to make recommendations regarding employer's smoking policy violated collective bargaining agreement); *but see* National Pen & Pencil, 87 Lab. Arb. (BNA) 1081 (1986) (Nicholas, Jr., Arb.) (unilateral employer smoking prohibition in restrooms permitted).

[201] Conn. Gen. Stat. Ann. § 31–40q (West 1987); see § **2.39**.

[202] Conn. Gen. Stat. Ann. § 31–40q (West 1987).

[203] *Id.*

[204] Town of Rocky Hill & AFSCME, Local 1303-112, Council No. 4, Pub. Bargaining Cas. (CCH) ¶ 44,547 (Conn. St. Bd. of Lab. Rel. 1986) (service policy on computer conditioned on smoke-free environment).

[205] Smith v. Western Elec., 643 S.W.2d 10 (Mo. Ct. App. 1982). It was stated that:

> [T]he tobacco smoke of co-workers smoking in the work area is hazardous to the health of employees in general and plaintiff in particular. The allegations also show that defendant (employer) knows the tobacco smoke is harmful to the plaintiff's health and that defendant has the authority, ability, and reasonable means to control smoking in areas requiring a smoke-free environment. Thereby, by failing to exercise its control and assume its responsibility to eliminate the hazardous condition caused by tobacco smoke, defendant has breached and is breaching its duty to provide a reasonably safe workplace. . . . *Id.* at 13.

[206] See **ch. 2**.

[207] See **ch. 3**.

[208] See §§ **4.3–4.10**.

[209] See §§ **4.12–4.15**.

[210] See §§ **2.7–2.12, 2.25**.

Vocational Rehabilitation Act of 1973,[211] *handicap* includes those who are unusually sensitive to tobacco smoke.[212] Hypersensitivity to smoke limits a major life activity by being unable to work except in a smoke-free environment.[213] The employer is not required to provide a completely smoke-free environment. A reasonable accommodation in separating smokers from nonsmokers or offering an alternative job is sufficient.[214]

State unemployment compensation statutes can be used to recover benefits when workplace smoking is a compelling and necessitous reason for terminating employment.[215] Likewise, state workers compensation statutes may be used to assert employer liability.

As yet, constitutional privacy protections have been found inapplicable.[216] Requests for injunctive relief, however, have been successful.[217] Nonsmokers have been granted injunctions when it was the employer's duty to provide a workplace environment reasonably free of recognized hazards and smoking was classified as a recognized hazard.[218]

Tort theories may be applied to employment privacy rights of smokers and nonsmokers.[219] Defamation may arise when a smoker or nonsmoker is held in disrepute among fellow employees.[220] It may also arise if a smoker or nonsmoker who asserts his or her rights is terminated for a false reason.[221] A false imprisonment could possibly occur if a nonsmoker is required to work in a smoke-filled environment.[222] The false imprisonment exists because the employee cannot remove himself or herself from the environment without risking employment loss. This is the confinement that is necessary; however, the employer must be aware of the employee's condition and should have refused a reasonable accommodation.[223] Public policy violations may arise when a nonsmoker asserts rights under a state smoking statute and suffers disciplinary action.[224]

---

[211] 29 U.S.C. § 701–796 (1982).

[212] Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982).

[213] *Id.*

[214] *Id.*

[215] *See* Lapham v. Unemployment Comp. Bd., ____ Pa. Commw. ____, 519 A.2d 1101 (1987); McCarthy v. State Dept. of Social and Health Serv., 46 Wash. App. 125, 730 P.2d 681 (1986).

[216] *See* Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (1980); Fuentes v. Workmen's Comp. Appeals Board, 16 Cal. 3d 1, 547 P.2d 449, 128 Cal. Rptr. 673 (1976).

[217] See **ch. 3**; *see also* Rossie v. State of Wisconsin, 133 Wis. 2d 341, 395 N.W.2d 801 (1986).

[218] *See* Smith v. Western Elec., 643 S.W.2d 10 (Mo. Ct. App. 1982); Shimp v. New Jersey Bell, 145 N.J. Super. 516, 368 A.2d 408 (1976).

[219] See **§§ 4.2–4.10.**

[220] See **§ 4.4.**

[221] *Id.; see* Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875 (Minn. Ct. App. 1985).

[222] See **§ 4.5.**

[223] *Id.*

[224] See **§ 4.10.**

Contract litigation t
ment handbooks and p
successful. However,
promised a smoke-fre
the time it signed her
mention the subject. T
for a time and the emp
ment. Nothing showed
supply a smoke-free er
knowledge of her pre
concluded.[230]

When employers im
enforce them.[231] This r
smoking designated ar

§ 7.8

Employee assistance p
recognize and overcom
performance. They are

Initially, EAPs dealt
ened to include career
areas covered may invol
job performance anxie
problems, gambling pr

EAPs can be develop
provide these program
privacy can be guarante
be privy to the details o
should assure personal
prevent inadvertent ide

---

[225] See **§ 4.12.**

[226] See **§ 4.14.**

[227] See **§ 4.15.**

[228] Bernard v. Cameron &

[229] *Id.*

[230] *Id.* at 323, 491 N.E.2d

[231] *See* McCarthy v. State D
(1986) (employee allege
maintain negligence actio

[232] *See* Iiandiorio v. Kriss &
alleged liability for gas
smoking area).

Contract litigation theories arising out of employment contracts,[225] employment handbooks and policies,[226] or collective bargaining agreements[227] may be successful. However, an employee with a written employment contract was not promised a smoke-free environment merely because her employer was aware at the time it signed her contract that she preferred this.[228] The contract did not mention the subject. The employee was provided with a smoke-free environment for a time and the employer knew of her preference for a smoke-free environment. Nothing showed that the employer entered into a contractual obligation to supply a smoke-free environment either temporarily or permanently.[229] "Mere knowledge of her preference is not tantamount to . . . assent," the court concluded.[230]

When employers implement smoking policies they may be under a duty to enforce them.[231] This may even extend to preventing employees from entering a smoking designated area because they could be injured.[232]

§ 7.8 Employee Assistance Programs

Employee assistance programs (EAPs) aid employees and their families to recognize and overcome personal problems that interfere with employee work performance. They are an extension of the performance evaluation process.

Initially, EAPs dealt with alcoholic employees. Today, they have been broadened to include career and personal problem counseling components. Problem areas covered may involve job dissatisfaction, supervisor or co-worker conflicts, job performance anxiety, alcohol and drug abuse, emotional problems, marital problems, gambling problems, or financial problems.

EAPs can be developed by the employer or contracted through agencies that provide these programs. Privacy is an essential element of any EAP. Unless privacy can be guaranteed, the EAP will not be utilized. A supervisor should not be privy to the details of the employee's EAP participation. EAP record keeping should assure personal privacy. Records of participation should be coded to prevent inadvertent identification of those who are enrolled. All EAP records

---

[225] See § **4.12.**

[226] See § **4.14.**

[227] See § **4.15.**

[228] Bernard v. Cameron & Colby Co., Inc., 397 Mass. 320, 491 N.E.2d 604 (1986).

[229] *Id.*

[230] *Id.* at 323, 491 N.E.2d at 606.

[231] *See* McCarthy v. State Dept. of Social and Health Serv., 46 Wash. App. 125, 730 P.2d 681 (1986) (employee allegedly injured by tobacco smoke in office environment could possibly maintain negligence action if disease was not occupational).

[232] *See* Iiandiorio v. Kriss & Senko Enter., Inc., 512 Pa. 392, 517 A.2d 530 (1986) (employer alleged liability for gasoline drenched person's injury who entered employer designated smoking area).