Boston College Law Review

Volume 33
Issue 4 *Number 4*

Article 5

7-1-1992

Smokers' Rights Legislation: Should the State "Butt Out" of the Workplace?

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SMOKERS' RIGHTS LEGISLATION: SHOULD THE STATE "BUTT OUT" OF THE WORKPLACE?

Cigarette smoking kills approximately 350,000 Americans each year.[1] It is responsible for more deaths than AIDS, cocaine, heroin, alcohol, fire, automobile accidents, homicide and suicide combined.[2] Furthermore, the toll from smoking is not limited to its adverse health effects.[3] The economic costs of smoking are also extremely high, for the smoker, for employers and for society at large.[4] The Office of Technology Assessment estimated that in 1985 alone, smoking cost society sixty-five billion dollars.[5] Employers have discovered that workers who smoke can be costly to their businesses as well.[6] Estimates of the cost to employers for each smoking employee have ranged as high as $4,611 per year.[7]

As a result, many states and municipalities have passed statutes and ordinances to control smoking.[8] Some employers, both public and private, have gone beyond imposing restrictions on smoking in the workplace and have banned off-duty smoking by their employees as well.[9] To date, no court has found any of these bans on smoking to be unconstitutional or otherwise illegal.[10]

In response to these prohibitions, twenty-one states have passed "smokers' rights" laws.[11] These laws are generally of two types. The majority of the statutes specifically prohibit employers from discrim-

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[1] Kenneth Warner, *Health and Economic Implications of a Tobacco-Free Society*, 258 JAMA, 2080, 2081 (1987).

[2] *Id.*

[3] *See* Elizabeth B. Thompson, Note, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?*, 43 VAND. L. REV. 491, 496 (1990).

[4] *Id.*

[5] *Id.*

[6] *See* Lawrence Garfinkel, *Advocates Ban, in Do Puffing Employees Send Profits Up in Smoke?* [hereinafter *Puffing Employees*], BUS. & SOC'Y REV., Spring 1984, 4, 5.

[7] *Id.*

[8] Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 946 (1987).

[9] *See id.* at 951.

[10] *See* Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987). In *Grusendorf*, the only case to date dealing with the constitutionality of bans on off-duty smoking, the court upheld a city ordinance banning off-work smoking by beginning firefighters. *Id.* at 543.

[11] The twenty-one states that have passed smokers' rights laws are Arizona, Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee and Virginia.

inating against employees or applicants who smoke off the job.[12] Four states, however, do not mention smoking specifically but instead prohibit discrimination against employees or applicants who engage in legal activities or use lawful products while off-duty.[13]

This note analyzes the evolution of these smokers' rights laws, and critically examines their public policy implications.[14] To resolve the conceptual and practical problems that current smokers' rights laws raise, this note proposes a model smokers' rights statute.[15] Section I describes the health and economic factors that have caused employers to resort to off-duty smoking bans.[16] Section II examines the legal status of these bans, focusing on the decision in *Grusendorf v. City of Oklahoma City*,[17] the only case to date involving the constitutionality of an off-duty smoking ban for public employees.[18] Section III analyzes the smokers' rights laws passed in response to these bans.[19] This section examines the provisions of the two major types of smokers' rights statutes, tobacco-specific laws,[20] and general prohibitions against discrimination based on the off-duty use of lawful products,[21] and discusses their policy justifications.[22] Section IV addresses the public policy implications of smokers' rights laws,[23] and proposes a model statute that avoids the flaws of current statutes.[24] This section concludes that by extending protection only to em-

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[12] IND. CODE § 22–5–4 (1991); KY. REV. STAT. ANN. § 344.040 (Baldwin 1990); ME. REV. STAT. ANN. TIT. 26, § 597 (West 1991); 1991 Miss. Laws 610(17); 1991 N.H. Laws 275:37-a; 1991 N.M. Laws 244; OR. REV. STAT. § 659.380 (1989); R.I. GEN. LAWS § 23–20.7.1–1 (1989); S.C. CODE ANN. § 41–1–85 (Law. Co-op. 1990); 1991 S.D. CODIFIED LAWS ANN. § 60–4–14 (1991); TENN. CODE ANN. § 771(1–2) (1990); VA. CODE ANN. § 15.1–29.18 (Michie 1989); 1991 Ariz. Legis. Serv. 284(2)(F) (West); 1991 Conn. Legis. Serv. 271(3) (West); 1991 La. Sess. Law Serv. 762(966) (West); 1991 N.J. Sess. Law Serv. 207(34:6B) (West); 1991 Okla. Sess. Law Serv. 172(11–14) (West). All of the above statutes specifically prohibit employer discrimination against applicants or employees who smoke or use tobacco products while off-duty.

[13] COLO. REV. STAT. § 24–34–402.5 (1990); 1991 Nev. Stat. 359(1–4); 1991 N.D. Laws 142(14-02.4-01); and 1991 Ill. Legis. Serv. 87–807 (West) all contain a more general prohibition of employer discrimination against applicants or employees who use lawful products or engage in legal activities while off-duty.

[14] *See infra* notes 26–205 and accompanying text.

[15] *See infra* notes 172–205 and accompanying text.

[16] *See infra* notes 26–76 and accompanying text.

[17] 816 F.2d 539 (10th Cir. 1987).

[18] *See infra* notes 77–114 and accompanying text.

[19] *See infra* notes 115–71 and accompanying text.

[20] *See infra* notes 120–45 and accompanying text.

[21] *See infra* notes 146–52 and accompanying text.

[22] *See infra* notes 153–71 and accompanying text.

[23] *See infra* notes 172–205 and accompanying text.

[24] *See infra* section IV.D.

ployees, and not to applicants, states can resolve many of the difficulties involved with current smokers' rights laws, and can more fairly balance the right of employers to hire whom they want with the right of smokers to be free from unfair discrimination.[25]

I. Reasons Why Employers Have Banned Off-Duty Smoking by Their Employees

According to a 1988 survey, six percent of all employers in the United States currently discriminate against off-duty smokers.[26] Some companies, such as U-Haul International, assess smoking employees more than nonsmokers for health insurance.[27] Others go even further and refuse to employ anyone who smokes at home or at work.[28] For example, Turner Broadcasting System, Inc. ("TBS") implemented an off-duty ban after its employees voted to prohibit employing smokers.[29]

The primary motivation of employers in implementing these policies is to reduce the costs associated with employees who smoke.[30] These costs result from the enormous health risks attributed to smoking.[31] The following section addresses these health risks, particularly the relationships between smoking and cancer, heart disease and chronic obstructive lung disease.

A. *The Health Consequences of Smoking*

The overall cancer mortality rate for smokers is substantially greater than that of nonsmokers.[32] Indeed, smoking is the principal cause of lung cancer in the United States, with mortality rates for heavy smokers as high as twenty-five times those of nonsmokers.[33] Smoking is also the major cause of laryngeal cancer in the United States, with mortality rates for heavy smokers up to thirty times

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[25] *See infra* section IV.E.

[26] ACLU, Legislative Briefing Series: Lifestyle Discrimination 1 (1991).

[27] *Id.* at 3.

[28] *See id.*

[29] Alexa Bell, *Companies Increasingly Police Employees' Lifestyles*, Investor's Bus. Daily (Los Angeles), Oct. 18, 1991, at 10.

[30] ACLU, *supra* note 26, at 1.

[31] Garfinkel, *supra* note 6, at 5.

[32] C. Everett Koop, The Health Consequences of Smoking: Cancer 5 (1982). According to the Surgeon General's report, male smokers have twice the cancer death rate of male nonsmokers, and female smokers have a thirty percent greater death rate than female nonsmokers. *Id.*

[33] *Id.*

those of nonsmokers.[34] In addition, smoking is a major cause of cancers of the oral cavity and of the esophagus, and is a contributing factor in the development of cancers of the bladder, kidney and pancreas.[35]

In addition, according to the United States Surgeon General, cigarette smoking is the most important of the known, modifiable risk factors for coronary heart disease in the United States.[36] Heavy smokers, those who smoke more than two packs a day, have four times the incidence of coronary heart disease of nonsmokers.[37] Smoking also acts synergistically with other risk factors such as elevated serum cholesterol and hypertension to increase greatly the risk of coronary heart disease.[38] Overall, smokers have a two to four times greater risk of sudden death than do nonsmokers.[39]

Perhaps the strongest connection between smoking and disease exists in the area of chronic obstructive lung disease ("COLD").[40] According to the Surgeon General, the contribution of cigarette smoking to COLD illness and mortality far outweighs the contribution of other factors.[41] The death rate for COLD in smokers as compared with nonsmokers is as large or larger than it is for lung cancer, the disease most people associate with smoking.[42]

The dangers of smoking are not confined only to smokers themselves.[43] According to a 1986 Surgeon General's report, involuntary smoking is a cause of disease, including lung cancer, in otherwise healthy nonsmokers.[44] The 1986 report found that children of parents who smoke have an increased frequency of respiratory symptoms and infections.[45] The report also found that children of smokers had slightly smaller rates of increase in lung function as their lungs matured.[46]

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[34] *Id.* at 7.

[35] *Id.*

[36] C. EVERETT KOOP, THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE 4 (1983).

[37] *Id.* at 9.

[38] *Id.*

[39] *Id.* The risk of death increases with increasing dosage as measured by the number of cigarettes smoked per day. *Id.*

[40] C. EVERETT KOOP, THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE at vii (1984).

[41] *Id.*

[42] *Id.* at ix.

[43] C. EVERETT KOOP, THE HEALTH CONSEQUENCES OF SMOKING: INVOLUNTARY SMOKING 7 (1986).

[44] *Id.*

[45] *Id.*

[46] *Id.*

B. *The Economic Costs of Smoking*

While the health impact of smoking is staggering, its economic costs are also quite high.[47] Both former and current smokers incur more hospitalization, use more medical services and visit doctors more frequently than nonsmokers.[48] For example, the Dow Chemical Company discovered that one of its divisions was losing nearly $600,000 per year due to absenteeism of ill smokers.[49]

Employees who smoke, because of their greater use of medical services, have increased health insurance costs for employers.[50] Rates for both individual and group health insurance are six to twenty-two percent lower for nonsmokers than for smokers.[51] Thus, by hiring only nonsmokers, employers can significantly reduce their health insurance costs.[52]

Evidence also suggests that nonsmokers may be more productive employees than smokers.[53] Employers who hire only nonsmokers can achieve significant savings on sick leave, absenteeism, turnover and similar costs.[54] One study found smokers were absent from work an extra 2.2 days per year, costing employers an average of $220 per year.[55] The study also estimated that smokers cost employers $1,820 per year in lost productivity due to smoking rituals.[56] Other studies suggest that smokers may be more prone to anxiety and depression than nonsmokers.[57]

Another reason employers may prefer to ban off-duty smoking is that such bans make it easier to enforce workplace smoking restrictions.[58] Many companies impose severe restrictions on workplace smoking, either voluntarily or because they are required to by law.[59] By hiring only nonsmokers, these companies can reduce or eliminate "time-consuming and dissension-producing efforts" to enforce worksite smoking bans.[60]

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[47] *See* Rothstein, *supra* note 8, at 945.
[48] *Id.*
[49] Athena Mueller, *Smokers' Segregation, in Puffing Employees, supra* note 6, at 7.
[50] *See* Rothstein, *supra* note 8, at 954.
[51] *Id.*
[52] *Id.* at 953.
[53] Joseph W. Cullen, *Health is Key Concern, in Puffing Employees, supra* note 6, at 9.
[54] Rothstein, *supra* note 8, at 954.
[55] Thompson, *supra* note 3, at 496.
[56] *Id.* at 497.
[57] Bell, *supra* note 29, at 10.
[58] Rothstein, *supra* note 8, at 953.
[59] *Id.* at 949–50.
[60] *Id.* at 953.

Many state and local governments have banned off-duty smoking by firefighters because of presumptions in state workers' compensation laws.[61] These laws often contain provisions that create an irrebuttable presumption that all heart and lung illnesses suffered by firefighters are related to work.[62] State and local governments often believe that many of these ailments are caused by smoking, either instead of, or in addition to, work-related causes.[63] By employing only firefighters who do not smoke, governments can reduce the cost of workers' compensation benefits related to respiratory and cardiovascular illnesses.[64]

A related problem is that cigarette smoke often acts synergistically with other environmental factors to greatly increase the risk of disease.[65] While asbestos workers have five times the lung cancer death rate of other blue collar workers, asbestos workers who smoke have fifty times the death rate of other blue collar workers who do not smoke.[66] Gold mine and certain rubber industry exposures also act synergistically with smoking to increase greatly the risk of disease in employees.[67] In addition, employees who smoke may suffer cumulative effects if they are exposed to chlorine, cotton dust or coal dust.[68] By prohibiting off-duty smoking, employers in these fields can reduce health care and insurance costs as these synergistic or cumulative effects are likely to be produced by off-duty smoking as well as by smoking at work.[69]

There is no universal agreement, however, about the extent of the economic costs of smoking. According to Horace Kornegay, chairman of the Tobacco Institute, a trade association for the tobacco industry, much of the research linking smoking with increased absenteeism, decreased productivity and higher insurance rates is biased and inaccurate.[70] Kornegay claims that implementing smok-

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[61] *Id.* at 952.

[62] *Id.*

[63] Rothstein, *supra* note 8, at 953.

[64] *Id.*

[65] *Id.* at 951.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 951–52.

[69] *Id.* at 952.

[70] Horace R. Kornegay, *Disputed Research, in Puffing Employees*, *supra* note 6, at 9. Kornegay cites research done by Dr. Lewis Solomon, an economist at the University of California at Los Angeles. *Id.* Solomon's research calls into question the reliability and accuracy of a study made by Dr. William Weiss of Seattle University that attributed increased absenteeism, decreased productivity and higher insurance rates to smoking. *Id; see also Puffing Employees*, *supra* note 6, at 4.

ing prohibitions would impose unnecessary costs on many businesses, such as creating separate smoking areas.[71] Kornegay also claims that smoking prohibitions could have a negative impact on employee morale, and thus could lead to a decrease in productivity and profits.[72] Some experts also claim that a refusal to hire smokers will increase costs to businesses because it will lead to a large reduction in the pool of employable persons.[73]

Whatever the actual economic costs of employing smokers, an increasing number of employers are banning both on and off the job smoking by their employees.[74] In a survey of Seattle-area hiring managers, almost ninety percent said they would give preference to applicants who did not smoke when told that smokers were twice as likely as nonsmokers to be absent from work.[75] Given this trend, it is not surprising that legal challenges have been raised against these employer policies.[76]

II. Legal Challenges to Off-Duty Smoking Bans

A. *Public Employees*

In the 1987 case of *Grusendorf v. City of Oklahoma City,* a trainee firefighter raised the first constitutional challenge to an off-duty smoking ban for public employees.[77] In *Grusendorf,* the United States Court of Appeals for the Tenth Circuit rejected a substantive due process challenge to an off-duty smoking ban for new firefighters.[78] After giving the smoking ban a presumption of validity, the court of appeals held that the ban was constitutional because it was a rational way to promote the health and safety of firefighter trainees.[79]

In *Grusendorf,* the city hired Grusendorf as a trainee firefighter.[80] On December 14, 1984, he took three puffs from a cigarette while on his lunch break.[81] The city fire chief fired him that after-

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[71] *See* Kornegay, *supra* note 70, at 9.

[72] *Id.*

[73] Thompson, *supra* note 3, at 497.

[74] ACLU, *supra* note 26, at 1.

[75] *Advice to Applicants—Looking for a Job? Don't Smoke,* 25 L. Off. Econ. & Mgmt. 340 (1984).

[76] *See infra* notes 77–105 and accompanying text.

[77] 816 F.2d 539, 540 (10th Cir. 1987).

[78] *Id.* at 543.

[79] *Id.*

[80] *Id.* at 540.

[81] *Id.*

noon on the grounds that he had violated a signed agreement not to smoke on or off the job.[82] The fire chief learned of Grusendorf's smoking through another city employee who observed the incident and reported it to the city fire department.[83] When Grusendorf admitted he had smoked, the fire chief fired him.[84]

Grusendorf brought suit against the city and his supervisors at the Oklahoma City Fire Department, claiming that his constitutional rights to liberty, privacy, property and due process had been violated.[85] In an unreported decision, the United States District Court for the Western District of Oklahoma dismissed Grusendorf's claim.[86] On appeal, Grusendorf argued that the smoking ban required him to give up his constitutional rights of liberty and privacy.[87] The defendants argued that the nonsmoking regulation did not infringe upon any constitutionally-protected liberty or privacy interest.[88] They claimed that because the right to smoke did not rise to the level of a fundamental right, there was no need to apply any type of balancing test, or provide any rationale to justify the off-duty ban.[89]

With little explanation, the court of appeals agreed with the defendants that smoking did not rise to the level of a fundamental right.[90] The court stated, however, that recognizing this did not effectively dispose of Grusendorf's claim.[91] The court pointed out that the defendants' reasoning would suggest that the state could arbitrarily condition employment on an agreement to refrain from an almost unlimited number of harmless private and personal activities.[92]

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[82] Grusendorf v. City of Oklahoma City, 816 F.2d 539, 540 (10th Cir. 1987).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See id.*

[87] *Id.* The court of appeals stated that while the right to privacy is not clearly spelled out in the Constitution, the Supreme Court has recognized this right in several decisions. *Id.* The court of appeals noted that the rights to privacy and liberty have been described as "penumbras" emanating from the Bill of Rights, citing Griswold v. Connecticut, 381 U.S. 479, 484 (1964), "zones of privacy" implicit in the Fourteenth Amendment's concept of liberty, citing Palko v. Connecticut, 302 U.S. 319, 325 (1937), or simply "the right to be left alone," citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Grusendorf*, 816 F.2d at 540–41.

[88] *Grusendorf*, 816 F.2d at 541.

[89] *Id.*

[90] *See id.*

[91] *Id.*

[92] *Id.* at 542.

Instead, the court followed the approach taken by the United States Supreme Court in the 1975 case of *Kelley v. Johnson*.[93] In *Kelley*, the Supreme Court rejected a policeman's claim that a department hair-length regulation violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[94] In sustaining the regulation, the Court gave it a presumption of validity as a valid exercise of the state's police power.[95] The Court framed the issue as whether the regulation was so irrational that it was arbitrary and therefore a deprivation of a constitutionally-protected liberty interest.[96] The Court held that the hair-length regulation was a rational way to make police officers readily recognizable to the public and to foster an "esprit de corps" among officers.[97]

The *Grusendorf* court noted that *Kelley* was "similar" to the case at hand, even though the plaintiff in *Kelley* was a police officer rather than a firefighter and claimed a Fourteenth Amendment right to grow a beard rather than a right to smoke a cigarette.[98] Consequently, the court of appeals gave the off-duty smoking regulation the same presumption of validity that was given to the hair-length regulation in *Kelley*.[99] The *Grusendorf* court then applied the same minimum rationality test that the Supreme Court applied in *Kelley*.[100] The *Grusendorf* court held that the nonsmoking regulation was a rational way to promote the health and safety of firefighter trainees.[101] In support of this conclusion, the court stated, "We need look no further for a legitimate purpose and rational connection than the Surgeon General's warning on the side of every box of cigarettes sold in this country . . . ."[102]

The *Grusendorf* court did state that one aspect of the regulation, its application only to first-year firefighter trainees, did not seem entirely rational.[103] The court noted that other firefighters, whose health and conditioning were also important, could smoke as many

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[93] *Id.* (citing Kelley v. Johnson, 425 U.S. 238 (1975)).
[94] *Kelley*, 425 U.S. 238, at 249.
[95] *Id.* at 247.
[96] *Id.*
[97] *Id.* at 248.
[98] Grusendorf v. City of Oklahoma City, 816 F.2d 539, 542 (10th Cir. 1987).
[99] *Id.* at 543.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 543.

cigarettes as they liked.[104] The court declined to resolve this issue by noting that Grusendorf did not raise an equal protection challenge to the regulation.[105]

B. *Private Employees*

To date, there have been no successful legal challenges to private employer restrictions on off-duty smoking.[106] Commentators have suggested several possible arguments, however, that an employee might raise against these restrictions.[107] A smoking employee might claim that his or her addiction to cigarettes is a protected handicap under the new Americans with Disabilities Act ("ADA"), which prohibits discrimination against individuals who are mentally or physically disabled.[108] One commentator argues that the structure of the ADA indicates congressional intent to include smoking as a protected handicap under the Act.[109] The ADA lists several disorders and conditions that are specifically excluded from the definition of disability, but does not include tobacco addiction among these exclusions.[110] Smoking, however, is mentioned specifically elsewhere in the Act, and the commentator infers from this statutory scheme that Congress tacitly recognized tobacco addiction as a defined disability.[111]

A private employee might also argue that an off-duty smoking ban violates title VII of the Civil Rights Act of 1964.[112] An employer's refusal to hire smokers could lead to a disparate impact on African Americans and Hispanics, since statistical studies show that these groups smoke more than whites.[113] This disparate impact could constitute illegal employment discrimination under title VII.[114]

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[104] *Id.*

[105] *Id.*

[106] *See* Rothstein, *supra* note 8, at 956.

[107] *See,* e.g., Rothstein, *supra* note 8, at 956; Thompson, *supra* note 3, at 522–23.

[108] *See* 42 U.S.C.A. §§ 12101– 12213 (West 1991).

[109] Jimmy Goh, Note, *"Smokers Need Not Apply": Challenging Employment Discrimination Against Smokers Under The Americans With Disabilities Act,* 39 KAN. L. REV. 817, 820 (1991).

[110] *Id.* at 832–33.

[111] *Id.* at 833.

[112] Thompson, *supra* note 3, at 523.

[113] *Id.*

[114] *Id.; see also* 42 U.S.C. § 2000e (1988). It should be noted, however, that the Supreme Court rejected the use of statistical evidence to prove the disparate impact of an employer's policy of refusing to hire methadone users. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979); Thompson, *supra* note 3, at 523.

III. Legislative Responses to Off-Duty Smoking Restrictions: Smokers' Rights Laws

The lack of success of public employees' constitutional challenges to off-duty smoking bans and the uncertainty of possible remedies for private employees have led opponents of these restrictions to wage their battle in another arena—state legislatures.[115] To date, twenty-one states have enacted legislation that prohibits employers from discriminating against employees who smoke off the job.[116] Of these twenty-one states, seventeen expressly prohibit discrimination against employees who smoke while off-duty.[117] For example, Indiana's smokers' rights statute provides, "An employer may not . . . require, as a condition of employment, an employee or prospective employee to refrain from using . . . or discriminate against an employee . . . based on the employee's use of tobacco products outside the course of the employee's or prospective employee's employment."[118] Four states—Colorado, North Dakota, Nevada and Illinois—have a more general prohibition against discrimination based on an employee's off-duty participation in legal activities or use of lawful products.[119]

A. *Tobacco-Specific Legislation*

Presently, seventeen states have enacted legislation that specifically prohibits employers from discriminating against employees who smoke off the job.[120] Although there are many similarities among these laws, there are also important differences among them. A comparison of the provisions of various tobacco-specific smokers' rights laws demonstrates these similarities and differences in terms of the employer practices they prohibit, the exceptions they make, and the remedies they make available to employees.

1. Prohibited Employer Practices

Tobacco-specific laws prohibit employer discrimination against off-duty smokers primarily in two ways. First, all of the statutes prohibit employers from requiring, as a condition of employment,

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[115] *See* ACLU, *supra* note 26, at 5.

[116] See *supra* note 11 for the list of states that have passed smokers' rights laws.

[117] See *supra* note 12 for the list of tobacco-specific smokers' rights laws.

[118] Ind. Code § 22-5-4-1 (1991).

[119] *See supra* note 13.

[120] *See* statutes cited *supra* note 12.

that any employee or prospective employee refrain from smoking outside work.[121] Second, many of the statutes also prohibit employers from discriminating against off-duty smokers with respect to compensation and other terms of employment.[122] For example, Connecticut's smokers' rights law prohibits employer discrimination against smokers with respect to "compensation, terms, conditions or privileges of employment."[123]

An important difference between these statutes is that while some states issue a blanket prohibition against discrimination based on the off-duty use of tobacco,[124] others, such as Oregon and New Jersey, allow restrictions on off-duty smoking if those restrictions are rationally related to the employee's job.[125] The Oregon statute, for example, prohibits employer discrimination against smokers "except when the restriction relates to a bona-fide occupational requirement."[126] To date, there is virtually no case law on what jobs qualify as being rationally related to smoking restrictions.[127]

2. Exceptions To Smokers' Rights Laws

Some smokers' rights statutes exempt certain organizations and make other exceptions to the prohibition of employer discrimination against off-duty smokers.[128] Rhode Island's smokers' rights law exempts nonprofit organizations, such as the American Cancer Society, which have a primary purpose to discourage smoking by the general public.[129] Other states, such as Indiana, exempt religious organizations and churches.[130]

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[121] *See,* e.g., ME. REV. STAT. ANN. tit. 26, § 597 (West 1991); 1991 N.H. Laws 275:37-a; 1991 Conn. Legis. Serv. 271(3) (West).

[122] *See, e.g.,* 1991 N.H. Laws 275:37-a.

[123] 1991 Conn. Legis. Serv. 271(3) (West); *see also* 1991 N.J. Sess. Law Serv. 207 § 34:6B1 (West) (prohibiting an employer from taking "any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment"); 1991 La. Sess. Law Serv. 762(966) (West) (making it unlawful for an employer to discriminate against an employee "with respect to discharge, compensation, promotion, any personnel action or other condition, or privilege of employment because the individual is a smoker").

[124] *See* IND. CODE § 22-5-4-1 (1991); 1991 N.H. Laws 275:37-a.

[125] *See* OR. REV. STAT. § 659.380 (1989) (prohibiting restrictions on off-duty smoking "except when the restriction relates to a bona fide occupational requirement").

[126] *Id.*

[127] As noted in section II, Grusendorf v. City of Oklahoma City is the only case to date involving a constitutional challenge to an off-duty smoking ban for public employees. *See* 816 F.2d 539, 541 (10th Cir. 1987).

[128] *See, e.g.,* R.I. GEN. LAWS § 23-20.7.1-1 (1989).

[129] *Id.*; *see also* 1991 Conn. Legis. Serv. 271(3) (West).

[130] IND. CODE § 22-5-4-4 (1991).

An important exception made by some states relates to the provisions of collective bargaining agreements in those states.[131] Connecticut's smokers' rights law provides, "Nothing contained in this section shall be construed to affect . . . any collective bargaining agreement between a municipality and paid firefighters or paid police officers."[132] Oregon's statute does not apply if a collective bargaining agreement prohibits the off-duty use of tobacco products.[133]

3. Remedies Available to Employees

Almost all states provide aggrieved employees only civil remedies under smokers' rights statutes.[134] Oregon's smokers' rights statute, however, provides for criminal as well as civil penalties.[135] States generally allow employees to sue for damages, injunctive relief or both.[136]

Under South Dakota's smokers' rights law, an aggrieved employee may only sue for lost wages and benefits up to the date of the judgment.[137] Other states provide employees with more extensive remedies.[138] Rhode Island's statute provides that a court may "[a]ward up to three times the actual damages to a prevailing employee or prospective employee [and] . . . [a]ward court costs to a prevailing employee or prospective employee . . . ."[139] Under Indiana's and New Jersey's smokers' rights laws, a court can award a prevailing employee reasonable attorney's fees in addition to damages and court costs.[140]

In addition to damages, court costs and attorney's fees, smokers' rights statutes often authorize courts to grant aggrieved employees injunctive relief.[141] The New Jersey statute specifically authorizes a court to reinstate an employee to the same position he or she held before the violation, or the position the employee would have held but for the violation, including full fringe benefits and

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[131] *See, e.g.*, 1991 Conn. Legis. Serv. 271(3) (West).
[132] *Id.*
[133] OR. REV. STAT. § 659.380 (1989).
[134] *See, e.g.*, 1991 S.D. CODIFIED LAWS ANN. § 60–4–14 (1991).
[135] OR. REV. STAT. § 659.380 (1989).
[136] *See, e.g.*, 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
[137] S.D. CODIFIED LAWS ANN. § 60–4–14 (1991).
[138] *See, e.g.*, R.I. GEN. LAWS § 23–20.7.1–1 (1989).
[139] *Id.*
[140] IND. CODE § 22–5–4–2 (1991); 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
[141] *See, e.g.*, IND. CODE § 22–5–4–2 (1991); R.I. GEN. LAWS § 23–20.7.1–1 (1989).

seniority rights.[142] Indiana's smokers' rights law provides simply that a court may "[e]njoin further violation of this chapter."[143] One state, Louisiana, does not offer employees any civil remedy whatsoever for employer violations of its smokers' rights law.[144] Instead, the statute provides for employer fines of up to five hundred dollars per violation.[145]

B. *General Privacy Legislation*

To date, four states have enacted legislation that would prevent employers from discriminating against employees because they smoke off-duty, but that does not specifically mention smoking or tobacco.[146] Illinois, for example, prohibits employer discrimination against employees or applicants who use "lawful products off the premises of the employer during nonworking hours."[147] Other states, like North Dakota, prohibit discrimination against employees or applicants who engage in legal activities while off-duty.[148] While these laws cover a broader range of discriminatory practices, they are similar to tobacco-specific statutes in terms of the employer policies they prohibit, the exceptions they make and the remedies they make available to aggrieved employees.[149] The Illinois workplace privacy law prohibits employer discrimination with respect to compensation or other conditions of employment.[150] The Illinois law also exempts nonprofit organizations that have a primary purpose to discourage the use of certain lawful products.[151] With respect to remedies, the Illinois law allows a court to award a prevailing employee damages, costs and reasonable attorney's fees.[152]

C. *Policy Rationales for Smokers' Rights Laws*

1. Employees Right to Privacy

The primary justification for smokers' rights legislation is the protection of employees' rights to privacy and autonomy.[153] The

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[142] 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
[143] IND. CODE § 22–5–4–2 (1991).
[144] 1991 La. Sess. Law Serv. 762(966) (West).
[145] *Id.*
[146] *See supra* note 11.
[147] 1991 Ill. Legis. Serv. 87–807 (West).
[148] 1991 N.D. Laws 142(14-02.4-01).
[149] *See supra* notes 118–45 and accompanying text.
[150] 1991 Ill. Legis. Serv. 87–807 (West).
[151] *Id.*
[152] *Id.*
[153] ACLU, *supra* note 26, at 3.

American Civil Liberties Union ("ACLU") takes the position that sacrificing the privacy of working Americans is not justified by any possible economic savings to employers from off-duty smoking bans.[154] The ACLU points out that risks are associated with almost all personal lifestyle choices that individuals make.[155] They claim that if employers are permitted to ban off-duty smoking, there will be no way to draw a line as to what behaviors they can or cannot regulate.[156] The real issue involved in smokers' rights legislation, according to the ACLU, is the right of individuals to lead their lives as they choose.[157]

2. Problems with Enforcing Off-Duty Smoking Restrictions

Some commentators have argued that enforcing off-duty smoking bans would require intrusive verification techniques, which could create significant legal and moral problems.[158] Mark A. Rothstein, Professor of Law and Director of the Health Law Institute at the University of Houston, has noted such problems with several possible methods, including employer monitoring of employee health insurance claims and medical records.[159] Rothstein claims that because access to medical records is already too widespread, this method of verification by employers should be avoided.[160]

Employers could also rely on reports of observations of employees smoking as a means of verification.[161] In order to facilitate reporting of these observations, employers could establish "hotlines" where observations could be reported anonymously.[162] Rothstein claims that even if this method were effective in reducing cigarette smoking, it would be an untenable method of verification because it would create disruptions in employee relations and other problems.[163]

Rothstein also rejects the use of polygraphs to verify employee statements that they did not smoke, pointing to polygraphs' intrusiveness and inaccuracy.[164] Finally, he rejects the use of urine or

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[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Rothstein, *supra* note 8, at 961; *see also* Thompson, *supra* note 3, at 524–27.
[159] Rothstein, *supra* note 8, at 961.
[160] *Id.* at 961–62.
[161] *Id.* at 962.
[162] *Id.*
[163] *Id.*
[164] *Id.*

blood tests to detect the biochemical changes caused by smoking.[165] According to Rothstein, these tests are controversial even for public safety positions.[166] He argues that because off-duty smokers do not pose significant health or safety risks to others, it is unlikely that the public would accept the use of these tests to verify employee compliance with off-duty smoking bans.[167]

3. The Involuntary Nature of Smoking Due to the Addictiveness of Cigarettes

Another policy justification for smokers' rights laws is based on the addictive nature of cigarette smoking.[168] According to a 1988 Surgeon General's report, cigarettes and other forms of tobacco are addictive, and not merely habit-forming.[169] The report also found that the pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.[170] Employer policies that discriminate against off-duty smokers thus may be unfair in that they punish employees for behavior that they are arguably unable to control.[171]

IV. Public Policy Implications of Smokers' Rights Laws

A. *Smokers' Rights Laws as a Means to Protect Employees' Right to Privacy and Autonomy*

While smokers' rights laws purport to protect the right to privacy and autonomy of smoking employees,[172] their actual effect is to interfere with the right of employers to make rational business judgments about employment decisions. Given the evidence of higher costs, increased absenteeism and lower productivity associated with employees who smoke,[173] employer policies favoring nonsmokers over smokers are clearly reasonable. Thus, the ACLU's claim that off-duty smoking bans violate employees' right to

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[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] C. Everett Koop, The Health Consequences of Smoking: Nicotine Addiction 9 (1988) [hereinafter Nicotine Addiction].

[169] *Id.*

[170] *Id.*

[171] *See* Rothstein, *supra* note 8, at 963.

[172] ACLU, *supra* note 26, at 3.

[173] *See supra* notes 47–76 and accompanying text.

privacy[174] mischaracterizes the issue as it relates to smokers' rights laws. Employer bans of off-duty smoking do not prevent any individual from smoking in the privacy of his or her home. On the other hand, smokers' rights laws, backed by the coercive power of the state, prevent employers from drawing their own conclusions about the importance of smoking as a criterion in employment decisions.

That several smokers' rights statutes contain certain exceptions also undermines the ACLU's privacy rationale.[175] For example, Rhode Island's smokers' rights law exempts nonprofit organizations that have a primary purpose to discourage the use of tobacco products by the general public.[176] Nevertheless, employees of such organizations have the same right to privacy as do other employees protected by the statute. By exempting such organizations, the Rhode Island statute is, in effect, admitting that smoking is an appropriate criterion for employment decisions under some circumstances. Yet instead of allowing employers to decide for themselves when smoking is relevant to employment, state legislatures have taken it upon themselves to decide the issue. Given the evidence linking employees who smoke with higher costs and lower productivity, employers should be permitted to make such a determination for themselves.

Another justification offered for smokers' rights laws is that if employers are allowed to ban off-duty smoking, there will be no way to prevent them from requiring employees to refrain from other "risky," but legal activities, such as eating high-fat foods, or drinking alcohol.[177] This argument, however, assumes that there is no meaningful difference between smoking and these other activities. The magnitude of the health and economic costs of smoking,[178] and the highly addictive nature of tobacco,[179] make employees who smoke a significantly greater problem for employers than employees who engage in other supposedly risky behaviors. Smoking, unlike other behaviors, causes several hundred thousand premature deaths each year,[180] is a major cause of heart disease, and is the major cause of chronic obstructive lung disease and certain cancers

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[174] ACLU, *supra* note 26, at 3.

[175] *See id.*

[176] R.I. GEN. LAWS § 23–20.7.1–1 (1989).

[177] ACLU, *supra* note 26, at 3.

[178] *See supra* notes 26–76 and accompanying text.

[179] *See supra* notes 168–71 and accompanying text.

[180] Warner, *supra* note 1, at 2081.

in the United States today.[181] Each employee who smokes has been estimated to cost employers approximately $4,600 per year due to increased absenteeism, extra insurance costs and lower productivity.[182] Indeed, the evidence of smoking's enormous health and economic costs is precisely what has led many employers to ban smoking, and *not* other supposedly risky activities.[183]

The highly addictive nature of cigarette smoking also creates special problems for employers in dealing with employees who smoke off the job.[184] Many companies, either by law or by choice, impose significant restrictions on workplace smoking.[185] Employees who smoke off the job, because of their addiction, are more likely than nonsmokers to create problems with enforcing workplace restrictions.[186] The compulsive behavior of smokers, like the compulsive behavior of heroin or cocaine addicts, creates problems for employers that are not created by other risky, but non-addictive activities.[187]

Even if off-work smoking bans implicate some privacy interests of employees,[188] these statutes do not provide employees who smoke any meaningful protection against discrimination. Many employers, because of the costs associated with employees who smoke,[189] will still want to hire only nonsmokers. Consequently, instead of protecting applicants or employees who smoke, smokers' rights laws will merely lead employers to give other explanations for not hiring, or firing smokers. Thus, according to Professor William Weiss of Seattle University, smokers will be penalized doubly by employers who refuse to disclose that it is smoking, and not other factors, costing them a job.[190]

B. *Vagueness of Smokers' Rights Laws*

Another problem with smokers' rights statutes is that they do not state precisely what employer practices they prohibit. For ex-

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[181] *See supra* notes 32–46 and accompanying text.

[182] Garfinkel, *supra* note 6, at 5; *see also* Thompson, *supra* note 3, at 496–97.

[183] *See supra* notes 47–76 and accompanying text.

[184] *See* KOOP, NICOTINE ADDICTION, *supra* note 168, at 9.

[185] Rothstein, *supra* note 8, at 946.

[186] *See id.* at 953.

[187] *See* KOOP, NICOTINE ADDICTION, *supra* note 168, at 9.

[188] In Grusendorf v. City of Oklahoma City, the United States Court of Appeals for the Tenth Circuit stated that off-duty smoking bans did implicate some liberty and privacy interests of employees, but that these interests did not rise to the level of fundamental rights. 816 F.2d 539, 541 (10th Cir. 1987).

[189] *See supra* notes 47–76 and accompanying text.

[190] *Advice to Applicants—Looking for a Job? Don't Smoke*, *supra* note 75, at 340.

ample, the New Jersey statute provides that "[n]o employer shall refuse to hire or employ any person . . . because that person does or does not smoke . . . ."[191] It is not clear from this language whether employers are prohibited from giving *any* consideration to whether an applicant smokes, or if employers are only prohibited from basing an employment decision solely on whether an applicant smokes. If the statute is interpreted as prohibiting employers from giving any consideration to whether an applicant smokes, it will also be necessary to prevent employers from finding out if an applicant smokes. Without this restriction, it will be impossible to ensure that employers do not consider the information in hiring decisions. If on the other hand the statute is construed as permitting some consideration of whether an applicant smokes, it may be difficult for a court to sift through an employer's motives in refusing to hire an applicant and decide when smoking played too great a role in the employment decision.

The New Jersey statute also permits an employer to discriminate against smokers if the employer "has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."[192] The issue of under what circumstances a smoking ban would be rationally related to public employment was discussed by the United States Court of Appeals for the Tenth Circuit in *Grusendorf v. City of Oklahoma City*.[193] Although *Grusendorf* itself dealt with a public employment situation, the court's approach may be helpful in predicting how a state court, interpreting a smokers' rights statute, might resolve the issue of whether a smoking ban by a private employer is rationally related to employment.

Grusendorf held that an off-duty smoking ban for trainee firefighters was constitutional because it was rationally related to the health and safety of those firefighters.[194] It is not clear, however, how far that holding should be extended in the context of smoking bans for other employees. Both *Grusendorf* and *Kelley v. Johnson* involved regulation of the off-duty conduct of public safety employees, whose health and fitness are clearly important to their ability to carry out their duties.[195] It is not certain that the health

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[191] 1991 N.J. Sess. Law Serv. 207(34:6B1) (West).

[192] *Id.*; *see also* OR. REV. STAT. § 659.380 (1989) (permitting restrictions on off-duty smoking where the restriction "relates to a bona fide occupational requirement").

[193] 816 F.2d 539, 543 (10th Cir. 1987).

[194] *Id.*

[195] As noted in section II, *Grusendorf* involved the off-duty conduct of firefighters, and *Kelley* involved the hair-length regulations for police officers. *See* Kelley v. Johnson, 425 U.S. 238, 240 (1975); *Grusendorf*, 816 F.2d at 540.

and safety rationale used by the *Grusendorf* court would be as applicable to employees with, for example, desk jobs, whose fitness is not as critical to their performance. On the other hand, because of the overwhelming evidence of smoking's adverse health effects,[196] a court could find a rational relationship between a smoking ban and the health and safety of any employee, irrespective of that employee's job.[197] While there have not yet been any cases interpreting smokers' rights statutes, the "rational relation" exception contained in the New Jersey[198] and Oregon[199] laws is likely to be the subject of considerable litigation in the future, given the ambiguity of the statutory language and the uncertainty under current law as to when smoking is rationally related to employment.[200]

C. *The Failure of Smokers' Rights Laws to Distinguish Between Applicants and Employees*

The biggest problem with smokers' rights laws is that they generally fail to make any meaningful distinction between applicants and employees.[201] The two groups, however, are in very different situations with respect to off-duty smoking bans. A smoker employed at a company that now wants to implement an off-duty ban probably took his or her job with the expectation that he or she would be permitted to smoke off-duty. The employee may well have taken steps, such as moving or selling a home, in reliance on that expectation. It would be unfair for an employer to upset that employee's expectation and suddenly make not smoking a continuing condition of employment.

Furthermore, the unfairness of imposing an off-duty ban on an employee who smokes is magnified by the highly addictive nature of tobacco.[202] Even an employee who in good faith tries to quit smoking to comply with a smoking ban will probably find quitting extremely difficult because of his or her addiction.[203] Thus, imposing off-duty bans on employees who smoke is unfair not only because those employees may have relied on being able to smoke

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[196] *See supra* notes 32–46 and accompanying text.
[197] *See Grusendorf*, 816 F.2d at 543.
[198] 1991 N.J. Sess. Law Serv. 207(34:6B1) (West).
[199] OR. REV. STAT. § 659.380 (1989).
[200] *See* OR. REV. STAT. § 659.380 (1989); 1991 N.J. Sess. Law Serv. 207(34:6B1) (West).
[201] *See, e.g.*, 1991 Conn. Legis. Serv. 271(3) (West).
[202] *See supra* notes 168–71 and accompanying text.
[203] *Id.*

when they were hired, but also because it punishes them for behavior that they may not be able to control.

The equitable considerations in favor of job applicants, however, are not nearly as compelling as those for employees. Unlike an employee, an applicant who smokes has not taken any steps in reliance on his or her ability to smoke. While it may be unfair to punish applicants for behavior that is arguably beyond their control, such considerations must be weighed against an employer's right to make rational employment decisions. While the equities in favor of an employee who smokes may outweigh the right of an employer to implement an off-duty smoking ban for all employees, no such balance of equities favors job applicants over employers who wish to hire only nonsmokers.

Thus, the distinction in the Oklahoma City ordinance between new and old firefighters that the *Grusendorf* court implied was irrational was, in fact, a reasonable balancing of equities.[204] Oklahoma City's interest in having healthy firefighters may well be outweighed by current firefighters' reliance on being able to smoke when they were hired. Firefighter trainees, however, who took their positions on the condition that they not smoke, have no such equitable interests to balance against the city's interest in having a healthy fire department.

D. *A Proposal for Legislation: A Model Smokers' Rights Statute*

Current smokers' rights laws suffer from several serious problems. They are unfair to employers because they prevent them from weighing in hiring decisions the enormous health and economic costs of smoking. Current laws purport to protect employees' rights to privacy and autonomy, but exceptions contained in several of the statutes leave many employees vulnerable to unfair employer discrimination. Finally, current smokers' rights laws fail to distinguish between applicants and employees, who are in very different positions with respect to the fairness of off-duty smoking bans. As a way to resolve these difficulties, this note proposes the following model smokers' rights statute:

> 1. Discrimination Against Employees Who Smoke Is Illegal
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> a. It shall be illegal for an employer to discriminate against any employee who was permitted by the

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[204] *See* Grusendorf v. City of Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987).

employer to smoke when hired, with respect to that employee's compensation, terms, conditions or other privileges of employment, because that employee smokes outside the scope of his or her employment. An employer may require that an employee participate in a wellness or smoking cessation program, provided that such program is provided free of charge to the employee.

b. Nothing in section (a) shall be construed as prohibiting an employer from requiring, as a condition of employment, that a prospective employee refrain from smoking outside the scope of his or her employment.

2. Enforcement

a. An employee may bring a civil action against an employer to enforce section (1)(a) of this chapter.

b. If an employer violates section (1)(a) of this chapter, a court may:

1. Award actual damages, court costs, and reasonable attorney's fees to a prevailing employee, and/or:
2. Enjoin further violation of this chapter.

E. *Issues Raised by the Model Statute*

By viewing employer off-duty smoking bans in the context of a balancing of equities rather than as a right to privacy issue, and by distinguishing between applicants and employees, states can draft smokers' rights statutes that avoid many of the problems involved with current laws. Under this approach, there is no need to make exceptions for organizations like the American Cancer Society, which have a primary purpose to discourage smoking by the general public. Employees of such organizations who had accepted their jobs in reliance on their being able to smoke would suffer the same hardships if they were fired as would other employees and thus deserve the same protections. Current statutes, by treating employees the same as applicants and by exempting such organizations, thus both go too far, and not far enough, in protecting the rights of smokers. They go too far in that they prohibit employers from using a relevant and reasonable criterion in their hiring decisions. They don't go far enough in that they allow certain employers to decide one day that smoking employees, who were previously permitted to smoke while off-duty, suddenly must quit or lose their

job. The model statute, by distinguishing between employees and applicants, and by eliminating the exceptions, more fairly balances the rights of employees who smoke with the right of employers to shape the structure of their workforce in accordance with their own business judgment.

By protecting employees, but not applicants, the model statute also reduces the problems associated with enforcing off-duty smoking bans. Once an individual has been "screened" for smoking before he or she is hired, employers no longer need to use intrusive verification techniques to determine whether an employee is continuing not to smoke. The number of applicants who manage to conceal their smoking when they are hired, or who take up smoking afterwards, will probably be small enough so that employers could rely on informal verification methods, such as third-party observations, to enforce an off-duty ban.

The model statute also solves some of the practical problems involved in enforcing smokers' rights laws. Current statutes do not provide much real protection to applicants because employers can easily fabricate generic, hard-to-challenge reasons for refusing to hire a smoker. In not extending protection to applicants, the model statute eliminates the need for employers to invent reasons for employment decisions, and at least allows the smoking applicant to learn the real reason he or she was not hired.

In addition, the model statute does not incorporate vague, litigation-provoking provisions permitting discrimination against smokers that is rationally related to an employer's business. Instead, it permits employers, not the courts, to decide when smoking is rationally related to their businesses, but prohibits discrimination against smoking employees who were permitted to smoke when hired. The model statute also removes any doubt as to whether employers may give any consideration at all to whether an applicant smokes. Under the statute, employers may give the matter whatever consideration they deem appropriate.

The remedies available to an aggrieved employee under the model statute—injunctive relief, damages, costs and reasonable attorney's fees—are similar to the remedies available under several current smokers' rights laws.[205] If a prevailing employee could not recover his or her costs and reasonable attorney's fees, it is likely that a significant number of aggrieved employees would as a prac-

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[205] *See, e.g.*, IND. CODE § 22–5–4–2 (1991); 1991 Ill. Legis. Serv. 87–807(d) (West).

tical matter have no legal recourse, because they might not be able to afford an attorney. Thus, the availability of costs and attorney's fees to prevailing employees is necessary to afford employees meaningful protection under smokers' rights statutes against discrimination.

V. Conclusion

Current smokers' rights laws suffer from several serious shortcomings. While they purport to protect smoking employees' right to privacy, their actual effect is to infringe on the right of employers to make rational employment decisions. Current statutes often exempt certain organizations, leaving employees of these organizations vulnerable to discrimination that could cause significant hardships. Current smokers' rights laws also often contain vague provisions permitting employer discrimination against smokers where there is a rational relation between smoking and the job at issue. Given the current uncertainty in the law regarding under what circumstances smoking is rationally related to employment, these provisions are a likely source of future litigation. Most significantly, current smokers' rights laws fail to distinguish between employees and applicants, who are in very different situations with respect to the fairness of off-bans by employers.

By protecting employees but not applicants, and by eliminating certain exceptions, the model statute eliminates or reduces many of the problems involved with current smokers' rights laws and more fairly balances the rights of employers and employees. Employers would be able to take into account the health and economic costs of smoking in their hiring decisions, and employees who were permitted to smoke when hired would be protected against unfair employer discrimination.

Thomas W. Sculco