

Instituting Tobacco-Free Employee Policies: An Invasion of Privacy or an Employer's Legal Right?

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Abstract: Rising health care costs are causing some employers to assess and regulate the health behaviors of their employees. Different approaches and levels of non-smoking regulations are discussed, and the legal parameters and challenges of regulating employees' private behaviors are explored.

Faced with staggering increases in the costs of health insurance premiums and health care, employers are starting to focus on the health behaviors of their employees as a way to manage and potentially reduce these corporate health care expenditures. It has always been in the best interest of employers to have workers who are healthy, productive, and satisfied, but now employers are using incentives - and disincentives - to deal with the rising costs of health care and the choices of their employees (Hand, 2009). Wellness programs and exercise facilities have become standard as large corporations promote the health and wellness of their employees, yet some employers have gone a step further by imposing strict policies that attempt to curb the off-duty smoking habits of their employees (Schleiter, 2008). Leading the way are some large, well-known US companies such as Scotts Miracle-Gro and General Electric. Public employers such as the states of Alabama and Georgia are also addressing employee wellness incentives, and even small businesses are instituting programs that connect their employees' health behaviors with health care costs (Hand, 2009; Parekh 2005; Schilling, 2009).

While employers try to manage their health care expenditures with the implementation of wellness and smoking cessation programs, employees, watch groups, and some legal professionals wonder if these companies are overstepping their bounds and invading the private choices of their workers (Cohen & Cohen, 2007). Janice Bellace, professor of Legal Studies and Business Ethics at The Wharton School of Business, warns, "Any company moving into this area has to consider what employees think is unreasonable or an invasion of privacy" (as cited in Wharton, 2006, p. 2). Critics call these policies "lifestyle discrimination" and claim that they interfere in the private lives of employees and penalize them for participating in a lawful activity. Critics also call attention to the risk that allowing employers to consider smoking habits in their hiring and firing practices will serve as a "slippery slope" - a gateway - for other lifestyle factors as well (Schleiter, 2008). Lewis Maltby, president of the National Workrights Institute in Princeton, NJ, fears that companies are venturing into dangerous territory by establishing such policies, and he asks, "If employers start controlling one aspect of employee conduct, what else is there to control?" (as cited in Worthington, 2007, p. 67).

When does this concern for healthy employees and a concern for lower health care costs become an inappropriate intrusion or even discrimination? Are employees entitled to privacy in their personal choices even if those choices end up having a negative impact to their workplace and their employer? What control can an employer have of employees' off duty, legal behavior? This article will first explore the increase in health care costs that businesses have faced in recent years and explain the trends in wellness programs, specifically, smoking cessation programs, that have increased along with these rising costs. Next, two approaches to monitoring and

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eliminating employee smoking will be viewed through examples of efforts currently used in American companies. The legal landscape including HIPPA, ADA, and legal outcomes of lawsuits of these approaches will then be explored.

Rising Health Care Costs and Tobacco Cessation

According to a 2011 study published by the Kaiser Family Foundation, a nonprofit research group that tracks employer-sponsored health insurance expenditures, the cost of health insurance coverage has nearly doubled since 2001 (Kaiser, 2011). Employee-sponsored health insurance costs comprise one quarter of all non-wage compensation, and it is estimated that about \$4 per hour of wages goes to pay for health care costs (Barton, 2006).

These rising costs have caused many companies to create ways to steer their employees toward healthier lifestyles. According to a 2008 national survey by Harris Interactive, the vast majority of employers believed that encouraging their employees to adopt healthier lifestyles would greatly reduce their corporate health care costs (Hand, 2008). The Society for Human Resource Management estimated that 59% of companies offered wellness programs in 2010; 28% paid bonuses for smoking cessation, weight loss, or other health goal achievements; and 10% provided insurance discounts for not smoking, getting a health risk assessment, or joining a weight loss program (as cited in O'Brien, 2009).

While companies focus on health issues for their employees, tobacco use becomes a significant target for these wellness programs. According to a study conducted from 2006 to 2008, by the U.S. Substance Abuse and Mental Health Services Administration, 33.6 million full time employees - or 28% - ages 18 to 64 reported they had smoked cigarettes in the last month (as cited in O'Brien, 2009). These high numbers have caused some companies to take a hard look at smoking cessation programs. According to Peter Capelli, director of the Center for Human Resources at The Wharton School of Business, crack-downs on employees who smoke, on or off the job, were the "thin edge of a wedge...It has become socially acceptable to attack smoking and smokers" (as cited in Wharton, 2006, p. 2).

One Approach: Hiring or Firing Based on Tobacco Use

While many companies are instituting smoking cessation programs as part of an overall wellness initiative, some companies are taking a very strict, and more controversial, approach to eliminate smoking from their workforce (Schleiter, 2008). In 2005, Weyco Inc., a Michigan based insurance and medical benefits company, implemented a policy requiring employees to be tobacco free at all times, even during their off-duty hours. Employees were subject to dismissal if random breath or urine tests showed positive results for nicotine or tobacco. In 2003, two years prior to enforcing the tobacco-free policy, Weyco set up smoking cessation programs which included hypnosis, acupuncture, and other methods to help employees quit smoking (Schleiter, 2008). Current employees who refused to quit smoking were forced to leave the company. Fourteen of the 200 employees chose to quit the company before the policy actually went into effect, and at least 4 employees have been terminated for refusing to take the breath or urine test. As Weyco Inc. learned, some states have laws that prohibit employers from discriminating against smokers (Berman & Crane, 2008). As a result, a Weyco employee who smoked and was located in Illinois was able to remain employed and free from smoker related testing (Maher, 2004).

Scotts Miracle-Gro Co., a \$2.7 billion lawn care company headquartered in Marysville, Ohio, also began by taking a "quit smoking or be fired" stance on employee smoking. On September 1, 2006, Scotts fired a probationary employee for a positive drug test for nicotine. Scotts' corporate approach was a long process that developed over time. In the early 2000s,

Scotts' CEO, Jim Hagedorn, watched his company's health care costs explode. In February 2003, as a response to health care costs that had risen 43% in 4 years, Hagedorn doubled what the workers were paying for their health insurance (Hand, 2009). This increase led to a severe loss of morale and Hagedorn knew he needed another approach. After more thought and a news broadcast that prompted an epiphany, Hagedorn ended up hiring an outside company to come in and implement a wellness program at Scotts. Included in this wellness program are strict rules about smoking. Smokers were offered assistance with smoking cessation programs and had one year to quit or be terminated (Schleiter, 2008). Scotts no longer hires anyone who smokes. Hagedorn acknowledges that his programs have "Big Brother" overtones, but he is committed to bringing down health care costs: "If people understand the facts and still choose to smoke, it's suicidal, and we can't encourage suicidal behavior" (as cited in Hand, 2009, p.7).

Another Approach: Financial Incentive Approach

Some employers have taken a slightly less coercive approach with their tobacco-free workplace policies. Focusing on the extra expense of their health insurance premiums, some employers are passing on health insurance surcharges to their employees who smoke and refuse to participate in a smoking cessation program (Hand, 2009). Conversely, some companies are framing this as a "discount" to employees who do not smoke. In February 2005, General Electric went as far as commissioning a study using their employees in a smoking cessation program. Nearly 1,000 employees who indicated they were smokers with a desire to quit were randomly placed in one of two groups. Both groups were given information about local smoking cessation programs in their area. The incentive group, however, was also told about financial rewards they could earn for participating in a smoking cessation program and for remaining tobacco free for six and twelve months thereafter – as evidenced by a biochemical test (Schilling, 2009).

For the incentivized participants, the odds of quitting reached 15% and were 3.29 times higher than the non-incentivized group (Schilling, 2009). Because of the success of the study, in early 2010, General Electric began offering a modified incentivized smoking cessation program for all of its employees. Disincentives - financial penalties related to health insurance premiums - were added to deal with employees who were not remaining tobacco free. Other large US companies such as Humana Health Care, IBM, and PepsiCo also have financial incentives in place in order to help motivate all employees to become tobacco free (Hand, 2009; Schilling, 2008). The public sector is implementing these programs as well. The states of Georgia and Alabama, and Palm Beach County all currently have smoking cessation programs available with financial incentives - and disincentives - in place for their workers (Bolton, 2011; Parekh, 2005).

Legal Challenges

Although some employees appreciate the mandatory employer wellness programs, others fear they are too intrusive and fear negative job repercussions for non-work conduct such as smoking (Hendrix & Buck, 2009). Employers have generally been successful in defending smoking policies that have generated lawsuits by disgruntled employees (Schleiter, 2008). One of the early lawsuits based on a smoking cessation policy involves an employee still in his training period who was fired for a positive result from a nicotine urine test. The employee's suit is based on the fact that he was still in a probationary period and was not yet eligible for health benefits and the smoking cessation program (Schleiter, 2008). The suit also challenged Scotts' legal standing for firing based on an anti-nicotine program. In 2009, this suit was dismissed and Scotts Co. was free to continue its hard-line stand on smoking cessation. This also paved the

way for companies to be more confident that they can regulate the smoking behavior of their employees even when they are not on the job (Berman & Crane, 2008).

Another legal issue that companies need to be concerned with is the Health Insurance Portability and Accountability Act (HIPAA). HIPAA prohibits health plans from discriminating against plan participants based on a health factor. A wellness program that provides a “reward” based on a health factor must satisfy each of the following factors:

- (a) The reward cannot be more than 20% of the total coverage,
- (b) The program must be designed to promote health or prevent disease,
- (c) The program must be available to all similarly situated employees,
- (d) A reasonable alternative must be available for individuals for whom it is unreasonably difficult or medically inadvisable to meet the standard (Friedman & Chagala, 2006, p.7)

Companies that have instituted wellness programs with a smoking cessation component that meets the above HIPAA criteria have been able to withstand the legal challenges that have arisen.

Two other legal issues to be considered are state laws and the federal American with Disabilities Act (ADA). Most states follow the “employment-at-will” doctrine, meaning that they are generally free to set the standards for whom they hire and what they require. Within these parameters, contractual details, federal law, and state law cannot be violated. In 29 states, employee smoking cessation policies are perfectly legal (Hendrix & Buck, 2009). Legal challenges based on federal laws have not been successful either. There is no constitutionally protected “right to smoke,” and the ADA does not consider an addiction to nicotine a disability (Berman & Crane, 2008).

Implications for Higher Education Institutions

As a workplace, American colleges and universities face the same potential employment policy issues as any company. Tobacco free campuses, including student residential housing areas, are becoming more prevalent, and there are now at least 648 100% smoke-free campuses in the U.S. (ANRF, 2012). Qualitative findings are indicating a general support for the smoke-free campus policies (Berg et al., 2010), but more research will be needed to evaluate if any of these colleges or universities are considering an expansion to a complete smoking cessation policy for employees. Colleges and universities will have the track records of public companies, private companies, states, and municipalities to learn from as they determine how deeply they want to interfere with the smoking rights of their employees.

Conclusion

It appears that Peter Capelli of The Wharton School of Business was correct when he stated that, “it has become socially acceptable to attack smoking and smokers,” referring to crack-downs on employees who smoke (as cited in Wharton, 2006, p. 3). The smoking cessation trend among employers is continuing (Hand, 2009; Schilling, 2009) and disgruntled employees are having a difficult time finding a legal way to challenge their employer’s tobacco-free workplace mandates (Berman & Crane 2008; Hendrix & Buck 2009; Schleiter, 2008). Although it has been established that the employers are within their legal rights to mandate smoking cessation, the literature did not make it clear how much money is actually being saved in health care costs. The current literature also does not address any potential “costs” that may be occurring due to issues such as employee resentment or low employee morale. Since there is now a track record of companies that are encouraging and enforcing smoking cessation policies, further research could be conducted that evaluates actual health care cost savings. Studies and surveys could also be utilized in these companies to assess whether there are other “costs”

associated with these programs due to any negative feelings from the employees such as resentment or low morale.

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