

Smoking in the workplace

BY LAWRENCE R. LEVIN

Employers have been increasingly caught in the middle of a war between opposing groups of workers over whether to ban smoking in the workplace. Balancing the competing and often militant demands of smokers and non-smokers is not simple. A complete ban on smoking in the workplace "ignites smoker hostility," while the failure to impose a complete ban "inflames non-smokers."

For beverage companies, the tremendous increase in litigation over this issue—coupled with enormous potential liability for wrong choices—makes it no laughing matter.

Where there's smoke...

The battle over smoking being fought in state and federal courts and agencies raises constitutional privacy and due process issues, as well as ADA, OSHA and EEOC problems. It is now well established that employers may—and often under the law must—regulate smoking in the workplace.

Usually, this takes the form of a ban on smoking except in limited, designated areas. More recently, the focus has been on: 1) should there be a total ban on smoking in the workplace, and 2) can employers refuse to hire persons who smoke away from the workplace during non-work hours?

Two recent cases illustrate the division in the courts over non-employment smoking bans. The City of North Miami refused to hire persons who had smoked within one year prior to applying for employment. The court recognized that employers could require a smoke-free environment at work, but struck down the ban on off-hours smoking as a violation of the "right of privacy." The court rejected the idea that reduction of health insurance costs and increased productivity override the right of privacy.

A federal appellate court came to just the opposite conclusion involving an Oklahoma City fire fighter. The court approved a one-year, pre-employment smoking ban as promoting health and safety. Thus, it found no violation of due process or privacy rights by the total smoking ban both on and off the job.

In response to this trend, some states—like Kentucky, where tobacco companies are major employers—have enacted laws which protect smokers' rights outside the workplace. Even these states recognize the right of employers to regulate smoking in the workplace.

Employers also have found themselves in the middle of the Americans with Disabilities Act (ADA). Non-smokers with asthma, bronchial conditions and the like have sued for totally smoke-free environments. On the other side, suits have been brought claiming that smoking is a disability—the curtailing of which causes great mental

stress—and asking that smoking not be banned. The courts have so far endorsed neither approach. Employers have not been required to adopt total bans on smoking under the ADA, while, at the same time, employers have been protected when they do adopt a total ban on smoking in the workplace.

Moreover, state workers' compensation laws have acted as a shield against liability for companies which have permitted smoking when sued for employee illnesses. Can beverage companies prudently rely on these types of decisions and not totally ban smoking in the workplace?

Recent studies have documented substantial new risks from second-hand smoke. It is now accepted that second-hand smoke causes numerous health related problems in non-smokers, including cancer.

Permitting smoking in lunch rooms or other areas where non-smokers are present forces non-smokers to be exposed to substantial risks. If individuals are permitted to smoke in their work area, anyone who must go into it is exposed. Given the inability of ventilation systems to purify air and confine smoke to specified areas in a building, it leaves few—if any—alternatives to a totally smoke-free environment.

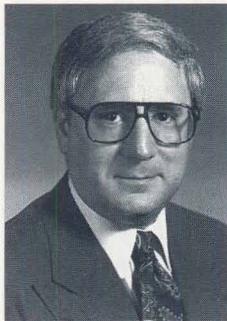
...there's fire

Given the severity of second-hand smoking problems, the Occupational Health and Safety Act (OSHA) may soon be used to prohibit smoking in the workplace. Of greater concern to beverage companies is exposure to individual civil or criminal law litigation with all of the associated costs. Even though an employee who has a miscarriage or a child with birth defects cannot sue under workers' compensation laws, that does not protect the employer from suits by the child or the state.

The child may sue for gross negligence with compensatory damages possibly in the millions. Knowing the link between cancer deaths, miscarriages and second-hand smoke, the state may view the failure to institute a total ban on smoking in the workplace as intentional conduct undertaken with reckless disregard of the consequences. Under developing law, such conduct may be prosecuted criminally.

For those executives with the authority to institute a total ban on smoking in the workplace, the state may choose to prosecute them as well as their company.

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