



# Smoking Discrimination

## Who, What, Why . . .

*Who does it apply to:* All employers who have employees or prospective employees that smoke.

*What is the issue:* According to recent statistics 18.5% of the adult population in Texas smokes. Smoking affects productivity of the smoker and can affect the health of all employees. A lot of publicity has come to ideas regarding charging higher healthcare premiums for smokers, requiring employees not smoke at all, and offering health programs to stop smoking. Employers want to know what options are legally available to them for regulation of smoking among employees.

*What is the law:* Smoking at work implicates a variety of laws, but most importantly the Americans with Disabilities Act (“ADA”) and the Health Insurance Portability and Accountability Act (“HIPAA”).

Smoking and nicotine addiction were not disabilities under the ADA before the amendments of 2009. After 2009, the question has been reopened and there have not yet been any determinative cases to provide a clear cut answer. Employers may still be required to accommodate employees who suffer consequences of smoking. That said, the act of smoking still should not be protected. Employees claiming difficulty breathing or emphysema will have their condition improved if an employer restricts their ability to smoke in the workplace. An employee who claims a nicotine addiction can be reasonably accommodated in a no-smoking workplace by using a nicotine patch or chewing nicotine gum. In fact, the ADA may be used to prohibit smoking. Employees with asthma or allergies to smoke may require a smoke-free environment.

HIPAA comes into play in two areas – charging different pricing for healthcare and the use of wellness programs. Under the law, an employer cannot discriminate against or charge certain employees more for health coverage due to “health factors” which include smoking and nicotine addiction. Employers and health plans cannot require an individual to pass a physical examination for eligibility for coverage or use a questionnaire

to exclude coverage (a questionnaire can be used to determine overall, but not individual premiums). Nor can employers charge a higher premium to employees with a higher risk or incidence of claims.

When it comes to wellness plans, HIPAA requires that programs with a reward component meet certain criteria. These requirements include: (1) limitations on reward size; (2) purpose of plan to promote overall health; (3) eligibility to qualify once a year; (4) rewards available to all employees; and (5) offer a reasonable alternative for employees who cannot qualify under the primary program. When it comes to smoking in particular, all efforts geared at stopping smoking must be voluntary. Employers cannot force smokers to participate in a program to stop smoking. (Wellness programs will be covered in a later EH piece).

*Are smoke breaks required:* Businesses are not required to offer employees breaks of any kind during the work-day. Employers who do allow employees to take short breaks during the day on company premises can regulate where\whether the employees smoke by regulating smoking on the company’s premises. Employees on a lunch break who are free to leave company premises are generally free to engage in whatever conduct they choose during that time.

*What about union businesses:* Smoking policies are generally a mandatory subject of bargaining under a collective bargaining arrangement. Be sure to consider this issue before implementing any smoking related policy.

## Common Situations:

*This is the 5th degree:* Angie’s Ashtrays decides to become proactive about the smoking issues in all phases of her relationship with employees. Angie begins asking potential hires whether they smoke or are addicted to nicotine and starts a pre-hire health screening to find out if applicants are lying about smoking. Has the company stepped on any laws? Yes and

maybe. The ADA prohibits employers from asking questions about disabilities in advance of an employment offer. It could be interpreted that the company wants to find out about smokers to avoid dealing with nicotine addicts and people who may have other health issues. So, Angie cannot ask the question before an offer of employment. Pre-hire screenings are also illegal under the ADA except under certain circumstances. If Angie can provide a legitimate business and position related reason for the screening, she may do so after a conditional offer of employment is made.

*Residual what:* Red, the owner of Red's BBQ Pit, simply cannot stand the smell of smoke. Of course he has a rule that employees may not smoke during work hours, but Red wants to take it a step further and institute a regulation that employees may not come to work with "tobacco residuals" on their clothing, i.e. they cannot smell of smoke. Has Red gone too far? Nope. There is no law preventing an employer from requiring that employees present to work free of tobacco smells. In fact, in a workplace with a particularly sensitive asthmatic, it may be a reasonable accommodation for that person to implement such a rule.

*Smoking away from work:* Cancer Hospital decides that regulating smoking is not enough to promote its image as a cancer fighting organization. The Hospital decides to require employees not to smoke in their off-duty hours. Is this legal? If it is very clearly to promote an image, the restriction is probably legal in Texas. A number of states have adopted laws ranging from preventing discrimination based on lawful off duty activities to specific prohibition of discrimination based on smoking. Texas is not one of those states, having no laws at the state level regulating smoking. The risk will be that the restriction is a

HIPAA violation, so Cancer Hospital must be careful. As long as the hospital's goal is to promote its image and not to drive down its insurance premiums, there is not anything preventing Hospital from creating such a rule.

### What should I do:

*Good:* Not everyone has a problem with employees smoking in the workplace. If you don't, you simply have to watch out for the complaint of a disability, like asthma aggravated by smoking, and reasonably accommodate the employee if a claim is made. If you want to stamp out smoking in your workplace, institute no-smoking policies on company premises to clear out the atmosphere. Don't connect these policies to reducing healthcare costs or claims.

*Better:* If a clear atmosphere is not enough, consider stepping the policy up to prohibit tobacco residual so that smokers are not allowed to have the smell of smoke on their clothes, hair, or breath. Again, avoid connecting the policies to reducing healthcare costs or claims. Consider also, eliminating the availability of smoking breaks during the day.

*Best:* Institute a workplace wellness program where voluntary information is made available to all employees regarding smoking with the hope that some of the smokers will make their own decision to stop smoking.



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This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@lrmlaw.com](mailto:mkelsheimer@lrmlaw.com) or by phone at 214.237.6346