

LEMLE & KELLEHER, L.L.P.

MODERN MANAGEMENT

**SMOKING AND THE
WORKPLACE: Conflicts,
Solutions and Laws**

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Introduction

After multiple states filed extremely public lawsuits against the tobacco companies in the 1990s, smoking became a “front-burning” issue in the United States. At the forefront of the movement are the health concerns with smoking and the toll of the health consequences that smoking has on the United States health system. As states became more vigilant in protecting their citizens from the effects of smoking, many turned to employers to assist in the plight to lower the costly effects of smoking. Today, a majority of states have passed laws relating to smoking in the workplace and in public locations (such as bars and restaurants)—a huge number compared to the turn of the century when only two states had such laws in existence.

According to the American Lung Association (“ALA”), secondhand smoke causes approximately 3,400 lung cancer deaths each year, as well as exacerbation of lung disease in nonsmoking adults and respiratory problems in children. Further, secondhand smoke has been linked to nearly 46,000 heart disease deaths each year. In a recent study, the ALA found that employees exposed to secondhand smoke in the workplace were 17 percent more likely to develop lung cancer than those not exposed. Smoking is the leading preventable cause of death in the United States. Nearly 1,100 people die a day from smoking-related illnesses, totaling over 400,000 deaths a year. The top three preventable causes of death, according to the American Heart Association, are active smoking, alcohol abuse and passive smoking (secondhand smoke).

Although for years now many employers have implemented “smoking” and “nonsmoking” areas in the workplace or have used air cleaners and ventilation systems to protect nonsmokers from secondhand smoke, studies are now showing that those systems do not remove the dangers from secondhand smoke. A smoke-free workplace is the only effective way to eliminate an employee’s exposure to secondhand smoke. Still, nearly 21 percent of the United States population smokes despite decades of public education and warnings about the health implications, consuming roughly half a trillion cigarettes each year.

Smoking Costs Companies Money

In 2006, the Surgeon General found that workplace smoking restrictions lead to less smoking among covered employees, thus, helping reduce the overall healthcare costs to employees while protecting nonsmoking employees from secondhand smoke. Employers should heed that statement by the Surgeon General. In a 2005 study, the total costs of secondhand exposure to employers was nearly \$10 billion annually, with \$5 billion attributed to direct medical costs and the remaining \$5 billion to indirect costs such as lost productivity. Further, the United States Environmental Protection Agency (“EPA”) suggests that businesses would save approximately \$8 billion by implementing smoke-free workplaces and eliminating the maintenance costs of removing smoke from its facilities.

Illnesses related to smoking not only raise the cost of healthcare in this country, but also exhibit large strains on the workers' compensation systems, unemployment benefits systems, retirement programs, disability insurances and other secondary benefits and programs. Immediate benefits seen by employers when implementing a smoke-free workplace include:

- Less absence from work by employees;
- Fewer accidents related to smoking and distractions because of attention to smoking;
- Higher productivity;
- Lower maintenance costs by eliminating cleaning of smoke from the premises;
- Cleaner working environment free from cigarette butts, matches, and smoke-stained walls and facilities;
- Longer lasting office equipment, carpet and furniture;
- Lower risk of workplace fires; and
- Potential decrease in health, life and disability insurance coverages.

Finally, one of the greatest benefits an employer receives is the human capital gained through the implementation of a smoke-free workplace. Many employees need help in "kicking the habit" and a smoke-free workplace may just be the assistance they need. Eliminating the frequency of times an employee can smoke during work time indirectly causes the employee to smoke less throughout their entire day. Even if the employee does not quit smoking completely, an employer's smoke-free policy greatly reduces the number of cigarettes employees consume in a day. Reducing an employee's smoking frequency will directly benefit the employee and employer.

Smoking has also resulted in litigation between employers and employees, causing additional costs related to smoking. In California, two clerical workers won nearly \$70,000 in sick leave credits, medical costs and compensatory damages when the county where they worked refused to provide reasonable accommodations for their respiratory ailments. In New York, an employee of a modeling agency received over \$1 million for her successful allegations that the agency exposed her to environmental tobacco smoke (i.e., secondhand smoke) that caused her acute sinusitis.

On the far side of the litigation spectrum, from these lawsuits, are those arising from businesses seeking to prohibit employees from smoking completely. Some employers, in an effort to reduce healthcare costs, and in an effort to encourage a smoke-free culture among employees, have demanded that employees be tobacco-free both at work and in their personal life. Such demands have invoked litigation in a few instances. In Michigan, an employee filed suit against his employer when the company created a tobacco-free policy and instituted testing of its employees for tobacco use. Resulting from this litigation, Michigan introduced anti-discrimination legislation to protect tobacco users. Similarly, many states, including Louisiana, have provisions in their laws preventing discrimination against individuals who choose to smoke in compliance with smoke-free workplace laws.

Today employers must balance the risks of discrimination lawsuits for prohibiting smoking in the workplace with the costs of defending lawsuits brought by employees claiming health issues resulting from smoke in the workplace. State laws may assist in an employer's analysis of balancing these types of litigation.

Dangerous Findings

In 1993, the EPA commissioned an examination of environmental tobacco smoke (ETS). ETS, commonly thought of as secondhand smoke, includes both the smoke exhaled from the smoker as well as the smoke exuded from the end of the cigarette, cigar or pipe. Secondhand smoke contains nearly the same gas and particulars that make up the carcinogenic compounds smokers inhale. Thus, secondhand smoke is nearly as dangerous to the nonsmoker as the individual smoking the cigarette, cigar or pipe. Although this smoke (ETS) may be considered a carcinogen, the EPA has not classified it as such.

The EPA released its findings to this 1993 study relating to the effects of smoking on the general population stating that:

The widespread exposure to environmental tobacco smoke (ETS) in the United States presents a serious and substantial public health impact.

- *In adults, ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in United States nonsmokers.*
- *In children, ETS exposure is causally associated with an increased risk of lower respiratory tract infections such as bronchitis and pneumonia; is causally associated with increased prevalence of fluid in the middle ear, symptoms of upper respiratory tract irritation, and a small but significant reduction in lung function; is causally associated with additional episodes and increased severity of symptoms in children with asthma; and is a risk factor for new cases of asthma in children who have no previously displaced symptoms.*

While this report focuses only on the respiratory health effects of passive smoking, there also may be other health effects of concern. If so, the total public health impact from ETS will be greater.

Although the EPA believes secondhand smoke to be a danger to nonsmokers, it was hesitant in this report to link many of the known health related issues to secondhand smoke, only suggesting that there may be a link between secondhand smoke and bronchitis, pneumonia, asthma and other respiratory infections. This publication stirred tremendous opposition from the tobacco industry, suggesting that the EPA's findings discarded important data, manipulated other data and did not establish a direct link between secondhand smoke and many illnesses and diseases such as lung cancer.

Following the release of this report, the Surgeon General issued a report in 2006 that made several findings about ETS and the workplace. These findings include:

- Secondhand smoke causes premature death and disease in children and in adults who do not smoke;
- Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer;
- Scientific evidence has proven that there is no risk-free level of exposure to second hand smoke; and,
- By eliminating smoking in indoor spaces, nonsmokers will be fully protected from exposure to secondhand smoke. Simply separating smokers from nonsmokers, cleaning the air, and ventilating buildings will not eliminate exposure of nonsmokers to secondhand smoke.

Smoke-Free Work Environments

As statistics continue to mount regarding the dangers of secondhand smoke, more organizations and government entities are demanding employers implement smoking policies and create smoke-free workplaces. Citing many authorities, including the most influential, the Center for Disease Control (“CDC”), many of the smoke-free workplace arguments stem from the findings that secondhand smoke and its effects are not removed from the working environment through filtration and ventilation systems commonly used by businesses. According to the CDC and the ALA, the only solution to providing employees with a smoke-free workplace is to eliminate smoking completely from a workplace or to provide a smoking area that has its own separate ventilation system not linked to the main ventilation system of the building.

Today, nearly 70 percent of the United States workforce is working under some form of a smoke-free policy—a number of Fortune 500 companies have banned smoking on their premises completely. To assist smokers coping with these new policies, many employers have expanded their healthcare coverage to include cessation program coverage, or have offered to assist employees with the costs of cessation programs. In addition to creating a smoke-free workplace, these cessation program offerings have encouraged some employees to stop smoking altogether.

A majority of the states, including the District of Columbia and Puerto Rico, have passed laws prohibiting smoking in almost all public places and workplaces, including restaurants and bars. Virtually every state and the District of Columbia have varying smoke-free air provisions which restrict smoking in certain places. In addition to state actions, both Presidents Clinton and Bush have signed executive orders addressing these concerns as they relate to federally-owned properties and have banned smoking in federal buildings.

Despite these efforts by state and federal governments, and the voluminous studies conducted by government agencies and public organizations, many people continue to smoke causing tension and conflict over smoking in the workplace.

State Laws for Smoke-Free Workplaces

Smoking in the workplace is, and will continue to be, an issue. A majority of states have workplace smoke laws, and in fact, many states are on their second cycle of workplace smoking laws. Most states in the 1990s began providing protections to nonsmoking employees from secondhand smoke and to smokers from discrimination. As time has passed, legislation has become more demanding on employers to create smoke-free work environments. Although each state and some local governments have tackled workplace smoking legislation differently, most have the following similarities:

- Private employers have fewer restrictions on workplace smoking bans than public employers;
- Private and public employers that have “public access” have stricter guidelines than non-publicly accessible workplaces;
- Employers are required to hang signage indicating where smoking is permitted or prohibited; and
- Employers must create, implement and maintain a written smoking policy.

Restaurant and bar employees in many states are far more likely to be subjected to smoke in the workplace than the average employee. A study of New York’s Smoke-Free Law, which prohibits smoking in all restaurants and bars, showed that workers in these facilities experienced fewer sore throats, runny noses and irritated eyes as well as a 78 percent decline in cotinine levels within the first year of the law’s implementation. (Farrelly, Nonemaker, Chou, Hyland, Peterson, Bauer; “Changes in Hospitality Workers’ Exposure to Secondhand Smoke Following the Implementation of New York’s Smoke-free Law (Aug 2005)).

OSHA Requirements for Smoke-Free Workplace

Although they have tried to stay out of the mix, for the past 20 years the United States Department of Labor Occupational Safety and Health Administration (“OSHA”) has played a role in creating smoke-free work environments. Starting in 1991, OSHA instituted a request for information related to indoor air issues and secondhand smoke. This led many to believe that OSHA, with its power to regulate safety and health issues for United States workers, would begin structuring regulations to create a smoke-free work environment. An internal memorandum of options was produced from this initial request. After OSHA decided not to institute regulations, a private anti-smoking group, Action for Smoking and Health, filed administrative petitions to force OSHA’s hand in regulating secondhand smoke as a workplace danger based on the carcinogens found in secondhand smoke. In 1992, after denying these petitions, OSHA suggested that it

would regulate secondhand smoke in the workplace in a broader indoor air quality rulemaking session than being worked on by OSHA. In 1994, OSHA proposed rules that would ban smoking in the workplace.

The 1994 proposed rules never became effective and in 2001, OSHA repealed its proposed workplace smoking prohibition stating that these regulations were no longer needed based on state regulation of the issue and private company policies regulating smoking in the workplace.

Workers' Compensation and Smoking

Employers may be liable to employees under workers' compensation for negative health issues caused by secondhand smoke in the workplace. Specifically, employers may be liable for employees claiming that they have respiratory disease as a result of secondhand smoke exposure during employment. In fact, some workers' compensation decisions have granted benefits to employees whose pre-existing conditions were worsened by secondhand smoke at the workplace. In most cases, an employee/claimant must demonstrate that:

- The employee was healthy when he or she began employment with the employer;
- That the employee was continuously exposed to medically documented carcinogens; and
- That the exposure to carcinogens caused the disabling condition to emerge and noticeably worsen.

As exhibited in cases discussed earlier in this booklet, employees who experience health problems caused by secondhand smoke in the workplace have been successful in receiving damage awards, whether through workers' compensation or claims under state laws or regulations dealing with clean air and smoke-free work environments.

Smoking under the Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") is a double-edge sword for employers dealing with smoke-free work environments. The 1990 final regulations of the ADA state specifically that a covered entity may prohibit or impose restriction on smoking in places of employment. Such restrictions do not violate any provision of this part. Employers may also be required to accommodate employees either based on their need to work in a smoke-free environment, or conversely, based on their addiction to nicotine and tobacco.

Under the ADA, an employee who has negative reactions to smoke could claim a disability based on being subjected to secondhand smoke and request a reasonable accommodation under the ADA. Companies facing this challenge must find a reasonable accommodation within their work environment. A reasonable

accommodation may be moving the employee to another location, be it another floor, another building, an area separated with ceiling partitions, or an area with a separate ventilation system. A total or partial ban on smoking may also be a reasonable accommodation. Remember, there are studies available suggesting that filtration, “smoke-eaters” and ventilation systems do not remove the dangers of secondhand smoke.

Another instance of potential liability for an employer under the reasonable accommodation provisions of the ADA arises under the theory of addiction. Some states and/or employers have banned smoking completely from the workplace. Although this creates a smoke-free environment free from secondhand smoke for nonsmokers, it negatively impacts employees “addicted” to smoking. Some states, under state “ADA-mirror laws”, have considered smokers disabled and entitled to a workplace accommodation. Additionally, other states have anti-discrimination laws banning discrimination against individuals based on their dependency on tobacco products, as such, similar measures may be required under those laws. Some state courts dealing with this issue have suggested an accommodation is to provide an outdoor area reasonably accessible by the employees to permit smoking on designated break times. The accommodation of an addicted employee does not require an employer to permit smoking in the workplace or allow an employee to smoke in the workplace despite a smoke-free workplace policy or local law. Specifically, the regulations of the ADA provide that instituting a smoke-free workplace is permissible. In addressing this issue, the Tobacco Control Legal Consortium stated in its 2004 report that the ADA cannot be used by a smoker to demand that they be allowed to smoke in the workplace. Specifically, the report pointed to the ADA’s language which states, “Nothing in this [law] shall be construed to preclude the prohibition of, or the imposition of restrictions on smoking in places of employment covered by [Title I], in transportation covered by [Title II and Title III], or in places of public accommodation covered by [Title III].”

Policy Ideas

Continuing concern is evolving related to the negative effects of smoking on the general population, including the adverse affects associated with secondhand smoke. As these concerns grow, United States businesses must cope with the proper manner to handle smoking at work facilities. Some employers must deal with smoking on multiple fronts—their company employees and the workplace, as well as dealing with customers or clients smoking in their facilities. Fortunately, in the past 8 to 10 years, many of the pains of dealing with a smoke-free work environment have been eased with state and local regulations governing smoking in the workplace and public places. Whether or not state and local laws have addressed these concerns, an employer should create a policy to protect its workforce and to help reduce the costs associated with smoking.

Before drafting such a policy, employers should be educated on the local and state laws governing each facility. This will eliminate creating a workplace policy that conflicts with

the local and state laws which may be more stringent than a proposed policy. In addition to considering the local and state laws, employers should be familiar with the effects smoking has on a workforce. Scientific support for this policy is important and will translate into a more appropriately written policy and assist in a more effective “selling” of the policy when it is implemented and disseminated to employees.

Finally, any policy designed to regulate smoking should be tailored to the individual employer’s particular workforce. Factors to consider include the number of smokers, nonsmokers, and former smokers employed by the employer, and other local employers’ or competitors’ smoking policies. Input from employees should be obtained as well.

After deciding upon a policy, an employer should determine how it will implement the policy (including any of the policy’s restrictions), and the type of enforcement the policy will have for a violation—a plan also needs to be developed for communicating the policy to employees.

In implementing the policy, employers must remember to emphasize that the policy is not attempting to limit an employee’s freedoms, dictate an employee’s life and free choice, or impose on an employee’s privacy, but rather is being implemented due to health and safety issues and in compliance with local and state laws, if such laws are available. When implementing the policy, an employer may also want to remind employees of any available cessation programs under current healthcare plans or newly established cessation programs. It may also be helpful to make available comment cards or a discussion period to allow employees to express their feelings on the policy to allow them to feel like part of the process and new policy.

Shortly after implementation of the policy, the employer should begin, for a period of time, to note the successes and problems of the policy. During this initial grace period, the employer should make any changes necessary to the policy. In addition to examining the policy after its implementation, the employer should begin communicating and implementing the policy slowly—allowing employees to get acquainted with the policy and its requirements.

In addition to ensuring the policy meets the needs of the business and any legal requirements, employers must also be aware that implementing such a policy may require bargaining under any collective bargaining agreement the employer may have with a union. Contract language or prior practices will dictate whether such a policy can be implemented with or without the consent and bargaining of the union. If the policy is challenged under the contract’s grievance and arbitration procedures, the arbitrator will examine the fairness of the implementation of the rule, looking at how long the employee was given to grow accustomed to the rule and whether the employer clearly indicated the consequences of breaking the rule. Implementing a policy without determining the employer’s requirements under a collective bargaining agreement may result in a court or arbitrator’s requirement that the policy be repealed until proper negotiations with the union are completed.

The key to implementing a smoke-free workplace policy is to remember that the policy, its implementation and its acceptance by the workforce is only as good as it is communicated and enforced by the employer. As with any employment policy that will significantly change an employee's daily routine at the workplace, communication is key to the policy's success or failure. No matter what communication tool is used, employers must focus the message of the new smoke-free policy on the positive aspects of its implementation, such as a healthier work environment and the general wellness of employees. Failing to implement and use effective communications to disseminate this policy may cause resentment of the smoke-free policies among smokers who see it as an infringement on their private lives.

Conclusion

Despite all of the educational efforts to alert people to the harms associated with smoking, the ALA still finds that nearly 20 percent of adults smoke and nearly 30 percent of the youth population smoke as well. Even while taxes are increasing on tobacco products, and smoking in public places is becoming less and less accepted, the challenges of banning/eliminating secondhand smoke and creating a smoke-free work environment are still significant.

While many associations are lobbying against smoking, the tobacco lobby is still strong, and additional support for smokers' rights are coming from groups such as the United Smokers Association of America that claim to represent the newest "underclass" of people.

Employers find themselves put in the middle of these fights—trying to preserve the health rights of nonsmokers in the workforce, while attempting to allow employees that smoke the right to that choice. As smoking regulations and laws become stricter, and more broadly enacted, an employer's battle to walk this fine line may ease. Until then, employers can use the voluminous health reports available to strengthen their positions in the company's policies and procedures for creating a smoke-free workplace.

About Lemle & Kelleher, L.L.P.

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

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