

SMOKE, CHEW AND BE MERRY - ON YOUR OWN TIME

QUESTION: I am a reformed smoker and I do not like to be around people who smoke cigarettes because it just reminds me of how much I enjoyed it. If I smell smoke on someone else I find myself craving a cigarette. So far, I've successfully fought the urge to light up, but I don't want any smokers around me at work so that I am not tempted by the delicious odor of the smoke cloud that surrounds them when they return from a smoke break.

Recently I interviewed a woman who would have been perfect for the job except for one major issue - she reeked of tobacco smoke. After she left the interview, I looked out the window and watched her in the parking lot. Sure enough, she lit up a cigarette as soon as she was in her car. I decided right then and there that I would not hire her because she was a smoker.

I hired someone else - a nonsmoker - who seems okay for the job, but when I informed our HR director that I had decided against the smoker (and why) the HR Director pitched a fit! She told me that smoking is a "protected activity" and said she could not believe I would make such a serious mistake.

Is smoking really a protected activity?

ANSWER: Yes, off-duty smoking (and chewing!) is protected under Oregon state law. Employers may not refuse to hire an individual simply because she uses lawful tobacco products during off-duty hours.

This is not to say, however, that an employer must "accommodate" a smoker's habit or provide "smoking" and "non-smoking" areas. In fact, Oregon law now requires almost all employers to maintain a smoke-free workplace and to display "No Smoking" signs in their establishments. There are exceptions for bars and taverns,

bingo parlors, tobacco stores, bowling centers and hotel and motel rooms designated as smoking rooms.

So while it is illegal for most employees to smoke in the workplace anyway, it is also illegal for employers to tell them they won't hire them just because they smoke away from work on their own time.

Which brings up an interesting question: Could this non-discrimination law also be interpreted as prohibiting employers from charging higher insurance rates for employees who smoke, or from rewarding employees who complete company-sponsored smoking cessation programs? Although there has not yet been an Oregon court case or administrative determination on this point, it does not seem at all unlikely that this statute's reach could be interpreted as extending beyond the simple hiring decision since the statute reads as follows:

659A.315 Restricting use of tobacco in nonworking hours prohibited; exceptions. "(1) It is an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours, except when the restriction relates to a bona fide occupational requirement."

And although this may be contrary to the national trend to have our workplaces be as "smoke-free" as possible, it is nevertheless consistent with the equally strong trend to protect privacy and choice (healthy or otherwise). In fact, more than half of the states have similar "lifestyle discrimination" laws making it illegal for an employer to refuse to hire an individual for this reason.

QUESTION: As required under Oregon law, we provide our employees with two ten-minute breaks and a lunch during their eight-hour work shifts. Several of our employees refuse to take the breaks in the 10-minute blocks of time because they smoke and they would prefer

to take four breaks that are five minutes long each throughout the day so they can go have a quick smoke each time.

This is becoming an issue because of several complaints lately that some of the smokers have not been available to take client telephone calls or to assist the non-smoking employees who take their ten-minute breaks in a single block of time.

Can we require the smokers to take their breaks in a single block of time, or must we continue to allow them to break it up into smaller increments as they've been doing?

ANSWER: You must comply with Oregon working conditions law that, as you point out, requires you to provide employees with at least one ten-minute period for every four hours (or the major portion thereof) worked. This break time must be uninterrupted and **may not** be taken - even at the employees' option - in smaller increments.

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