

Can you fire an employee for smelling like tobacco smoke?

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Since 2007, when Minnesota's Freedom to Breathe Act took effect, smoking has been banned in Minnesota workplaces. Now, new studies about the harmful effects of "third-hand smoke"—the toxic residue left by tobacco smoke on hair, clothes and other surfaces—have caused some employers to take their no-smoking policies to new heights.

Many employers are now considering policies banning even the smell of tobacco smoke in the workplace.

However, in many states, including Minnesota, employers are generally prohibited from taking adverse action against applicants or employees for their use of lawful consumable products off site during nonwork hours.

That means a no-tobacco-smoke-smell policy could run afoul of other legal obligations.

Smell like smoke, you're fired

Frauenshuh Cancer Center in St. Louis Park made national news this summer when it fired an employee for smelling like tobacco smoke. The hospital may now find itself defending the legality of its actions.

The employee worked as a receptionist. She never smoked at work, and although she tried to minimize the lingering smell, the hospital felt that the still-present odor created an occupation-related hazard. The hospital offered to help her quit smoking and asked her to take showers at work to more effectively eliminate the smell. When she refused, she was fired.

Minnesota law

Minnesota's Lawful Consumable Products Act (LCPA) generally prohibits employers from disciplining, terminating or refusing to hire a worker for his or her consumption of lawful products off site during nonworking hours. Lawful consumable products include food, alcohol and tobacco.

The act does, however, provide for limited exceptions to this general prohibition. Among other exceptions, it is not unlawful for an employer to restrict the use of lawful consumable products by employees during nonworking hours if the employer's restriction:

- Relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees, or
- Is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer.

Employers that adopt policies aimed at reducing third-hand smoke by prohibiting employees from smelling of tobacco smoke in the workplace may argue that the LCPA shouldn't apply because the employer isn't actually

restricting an employee's use of cigarettes during nonwork hours. Employees are still permitted to smoke; they just can't smell like smoke at work.

While this argument is worth making, it is unclear whether it will win the day.

Employers looking to implement such policies should strive for language that falls within one of the act's two exceptions.

For example, if the hospital could demonstrate that cancer patients are more susceptible to the harms of third-hand smoke, it should be able to establish that it has a valid reason for requiring employees who come in contact with patients to be free of such hazards. Alternatively, the hospital might argue that it prohibits employees from smelling like smoke to avoid an actual or apparent conflict of interest between the employee's acts and the employee's duty to his or her employer.

Creating an effective policy

Employers that are considering prohibiting employees from smelling of tobacco smoke while at work should do the following to minimize legal risks:

- 1. Articulate your needs.** Explaining why you prohibit third-hand smoke is the first step to creating a policy that satisfies legal requirements. Is the smell of tobacco smoke the problem, or is it the harmful, toxic residue that smoking leaves behind?
- 2. Do some research to justify the policy.** Be prepared to establish that your policy is designed to protect people (such as customers or employees) or to adhere to your business mission. The more evidence you have that the policy is necessary, the easier it will be to demonstrate that it is either a bona fide occupational requirement or a necessary way to avoid a conflict of interest.
- 3. Construct a narrowly tailored policy.** Regulate only the employees reasonably related to the needs and justifications articulated in steps one and two.
- 4. Apply the policy uniformly.** Whether it is a neutral no-fragrance policy or a targeted third-hand smoke policy, you must follow the terms of your policy and treat like cases alike.

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