

**MANDATING A TOBACCO-FREE WORKFORCE: A
CONVERGENCE OF BUSINESS AND PUBLIC HEALTH
INTERESTS**

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A growing number of corporate and public employers are mandating that either prospective or current employees refrain from tobacco use at all times, even off the job.¹ This developing trend has led to catchy headlines in the national press such as “You Smoke? You’re Fired!”² and “A Job or a Cigarette?”³ plus dozens of articles in local newspapers that detail the conflict between company executives determined to cut healthcare costs and “privacy advocates” (or, in some articles, “civil rights activists”).⁴ 60

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1. See, e.g., Tom Anderson, *Smoking Policy Sparks Debate over Wellness Programs*, EMP. BENEFIT NEWS, Apr. 1, 2005; Robert Rodriguez, *If There’s Smoke, You’re . . . Fired*, FRESNO BEE (Cal.), Oct. 14, 2007, at A1.

2. Stephanie Armour, *You Smoke? You’re Fired!*, USA TODAY, May 11, 2005, at 1A.

3. Jennifer Barrett Ozols, *A Job or a Cigarette?*, NEWSWEEK, Feb. 24, 2005, available at <http://www.newsweek.com/id/48517>.

4. *Id.* (“Civil-rights activists accused [Weyco] of discrimination [for

Minutes has run more than one episode about the employees who left Weyco, Inc., in Okemos, Michigan, rather than submit to a nicotine test.⁵

Even among tobacco control advocates, these “tobacco-free workforce” policies are somewhat controversial.⁶ Some have argued that such policies constitute unethical discrimination that tobacco control advocates should not countenance.⁷ Others, however, have heralded them, predicting that “[a] nonsmoker workforce will clearly become the norm of the future,” and noting that such policies, rather than injure smokers by infringing on their rights, help them by encouraging them to quit.⁸

Ultimately, however, it is businesses, not tobacco control advocates or the press, who will decide whether tobacco-free workforce policies make sense for them. We believe that these policies have substantial bottom-line implications for businesses. In fact, making the transition to a tobacco-free workforce may be an easy and cost-effective way for businesses to substantially reduce healthcare costs and increase productivity. Moreover, tobacco-free workforce policies have the potential to dramatically influence general smoking prevalence. This is a case where business interests appear to converge with public health interests.

dismissing employees that refused to submit to a nicotine test], arguing that [CEO Howard] Weyers was punishing workers for engaging in a legal activity on their own time.”). See also Joe Robinson, *Light Up, Lose Your Job*, L.A. TIMES, Feb. 19, 2006, at 3 (“Weyco and Scotts Miracle-Gro, based in Marysville, Ohio, are in the vanguard of a growing effort by businesses to brake soaring medical costs by regulating such unhealthy employee behavior as smoking, even if it's done off-site. Privacy advocates and legal experts call it the opening round of a corporate takeover of personal lives, but company officials defend what they see as a reasonable business decision.”).

5. See *60 Minutes: Whose Life is it Anyway?* (CBS television broadcast Oct. 30, 2005); *60 Minutes: Whose Life is it Anyway?* (CBS television broadcast July 16, 2006).

6. Compare N. John Gray, *The Case for Smoker-Free Workplaces*, 14 TOBACCO CONTROL 143 (2005), with Simon Chapman, *The Smoker-Free Workplace: The Case Against*, 14 TOBACCO CONTROL 144 (2005). Others have argued that the tobacco control community should take no position on these policies, either for or against. See Ronald M. Davis, Letter to the Editor, *A Middle Ground: Don't Condone or Condemn, But Let Employers Decide*, TOBACCO CONTROL, Mar. 27, 2005, available at <http://tobaccocontrol.bmj.com/cgi/eletters/14/2/144#310>.

7. Chapman, *supra* note 6, at 144 (“I am convinced that to extend such a policy [against hiring smokers] to the wider community—into employment situations where smoking was quite irrelevant—would be unethical.”).

8. Action on Smoking and Health, *Employment Policies Against Hiring Smokers*, available at <http://ash.org/papers/h220.htm> (last visited Apr. 27, 2008).

I. BACKGROUND

Scotts Miracle-Gro Company, with \$2.9 billion in annual sales and more than 6000 employees, is the world's largest marketer of branded consumer products for lawn and garden care.⁹ In December 2005, Scotts, based in Marysville, Ohio, announced that it would no longer hire applicants who smoke.¹⁰ The company further announced that current employees who did not quit smoking by October 2006 could lose their jobs, even if they smoked only outside of work.¹¹ The company's CEO cited the rising cost of healthcare coverage and the desire to have a healthy workforce as reasons for the tobacco-free workforce policy.¹²

Scotts' approach in implementing a tobacco-free workforce policy is uncommon, but it is certainly not unique. This summer, the Cleveland Clinic, Ohio's second-largest employer with more than 36,000 employees, announced that it would no longer hire people who smoke.¹³

Likewise, Union Pacific Railroad and Alaska Airlines already refuse to hire smokers in states where it is legal to do so.¹⁴ In all of

9. Scotts Miracle-Gro, *Scotts Miracle-Gro Announces Full-Year Financial Results; Sales Improve 6 Percent Led by Strong International Performance*, PRNEWswire, Nov. 1, 2007, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-012007/0004695132&EDATE=>.

10. Shannon Mortland, *Smoke Screening: Employers Using Policies, Incentives to Keep Workers Smoke-Free*, CRAIN'S CLEVELAND BUS., Mar. 13, 2006, at 1.

11. Monique Curet & Ken Stammen, *Your Smokes or Your Job*, COLUMBUS DISPATCH, Dec. 9, 2005, at 1A. As of this writing, Scotts has not conducted any random nicotine tests or terminated any long-term employees for failure to quit smoking. It still maintains, however, that it may do so in the future. Scotts did fire an employee named Scott Rodrigues at one of its Massachusetts locations. Rodrigues was hired by Scotts but then promptly released when his initial nicotine screening came back positive. Sacha Pfeiffer, *Off-the-Job Smoker Sues Over Firing*, BOSTON GLOBE, Nov. 30, 2006, at A1. Rodrigues sued Scotts, alleging, among other things, wrongful termination and violations of Massachusetts' privacy and civil rights statutes. The case is pending in federal court in Boston. *Rodrigues v. Scotts Co. LLC*, 2008 WL 251971, at *1 (D. Mass.) (filed Jan. 22, 2007).

12. James Hagedorn, Letter to the Editor, *Scotts' Smoking Policy Will Make Employees and Company Healthier*, COLUMBUS DISPATCH, Dec. 17, 2005, at 9A. During the transition period, Scotts provided employees with free counseling, nicotine patches, cessation classes, and other support needed to help them quit. The tobacco-free workforce policy is part of Scotts' comprehensive plan to lower healthcare costs and improve the health of the company's workforce. The company also opened a five-million-dollar fitness and medical center at its Marysville headquarters. Curet & Stammen, *supra* note 11, at 1A.

13. Mary Vanac, *Clinic Will Not Hire Any Smokers*, CLEVELAND PLAIN DEALER, June 28, 2007, at A1.

14. Pfeiffer, *supra* note 11, at A1.

these cases, as at Scotts, the tobacco-free workforce policy is part of an overall workplace wellness program.¹⁵ Tobacco-free workforce policies are still far from the norm, however. According to a recent survey by the Society for Human Resource Management, only 3% of employers ask about smoking when hiring.¹⁶

II. EMPLOYER COSTS

The primary reason that employers have begun considering tobacco-free workforce policies is obvious. According to James Hagerdorn, the CEO of Scotts, “We’re being as aggressive as the law will allow us, to keep our costs under control.”¹⁷ Average healthcare insurance family coverage premium costs have increased by 78% since 2001, more than four times faster than wages or inflation.¹⁸ As a result, employers are increasingly exploring every possible option that could reduce healthcare costs, and tobacco use is an obvious target.

The costs of smoking for employers, individual smokers, their families, and the economy as a whole are enormous. According to the Centers for Disease Control and Prevention (CDC), cigarette smoking and tobacco use is the leading cause of preventable death in the United States, resulting in 438,000 premature deaths each year and an average of 12.6 years of potential life lost per smoker.¹⁹ Smoking causes almost one-fifth of all deaths in the United States, and “at least 6–8% of annual personal health expenditures . . . and quite possibly considerably more, is devoted to treating diseases

15. Union Pacific, for example, was awarded the 2005 C. Everett Koop National Health Award for its innovative worksite wellness programs. Union Pacific, *Union Pacific Receives 2005 C. Everett Koop National Health Award*, available at http://www.uprr.com/newsinfo/releases/human_resources/2005/1208_koop.html (last visited Apr. 27, 2008).

16. Sharon Linstedt, *A Smoker on Payroll Can Cost Firms up to \$3,800*, BUFFALO NEWS, Feb. 21, 2006, at B7.

17. Monique Curet, *Getting Tough on Health*, COLUMBUS DISPATCH, Dec. 9, 2005, at 1G.

18. Press Release, Kaiser Family Found., Health Insurance Premiums Rise 6.1 Percent in 2007, Less Rapidly Than in Recent Years But Still Faster Than Wages and Inflation (Sept. 11, 2007), available at <http://www.kff.org/insurance/ehbs091107nr.cfm>.

19. Ctrs. for Disease Control & Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 1997–2001*, 54 MORBIDITY AND MORTALITY WKLY. REP. 625 (July 1, 2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5425a1.htm> [hereinafter *Annual Smoking*].

caused by smoking.”²⁰ In 2002, the CDC calculated costs associated with smoking and found that smoking-attributable personal healthcare medical expenditures totaled \$75.5 billion per year.²¹

In the same study, the CDC also calculated that productivity losses due to smoking were \$81.9 billion each year.²² The CDC’s calculation of lost productivity costs, however, included only those attributed to premature mortality and did not consider employer-related costs such as absenteeism or diminished on-the-job productivity. Despite this imprecise calculation, it is clear that in comparison to non-smoking employees, employees who smoke are likely to impose considerable extra costs beyond medical care on the companies that employ them. These include daily productivity losses due to smoking breaks, extra time off work due to illness, increased workers’ compensation utilization, and generally lower job-related productivity.²³ For example, despite the difficulty of calculating “presenteeism” (lower on-the-job productivity), studies have consistently demonstrated that employees who smoke are less productive than employees who do not. For example, one recent study reviewed more than 45,000 employee surveys from 147 U.S. employers.²⁴ It found that mean hours of lost productivity per year due to presenteeism were 76.5 hours for a smoker compared to 42.8 hours for a never smoker and 56.0 hours for a former smoker.²⁵ The excess presenteeism of 33.7 hours per year (for a smoker compared to a never smoker) equals approximately 2% of hours worked per year.²⁶ In addition, employers who allow smoking in or around their facilities or vehicles experience extra housekeeping, maintenance, ventilation, and fire insurance costs,

20. Kenneth E. Warner et al., *Medical Costs of Smoking in the United States: Estimates, Their Validity, and Their Implications*, 8 TOBACCO CONTROL 290, 299 (1999).

21. *Annual Smoking*, *supra* note 19.

22. *Id.*

23. See generally Harold S. Javitz et al., *Financial Burden of Tobacco Use: An Employer’s Perspective*, 5 CLINICS IN OCCUPATIONAL & ENVTL. MED. 9 (2006).

24. William B. Bunn, III et al., *Effect of Smoking Status on Productivity Loss*, 48 J. OCCUPATIONAL & ENVTL. MED. 1099, 1100–01 (2006).

25. *Id.* at 1103 tbl.2.

26. See also Wayne N. Burton et al., *The Association of Health Risks with On-the-Job Productivity*, 47 J. OCCUPATIONAL & ENVTL. MED. 769 (2005) (studying a cohort of employees at a Midwestern financial-services company and concluding that smoking was associated with a 2.8% reduction in on-the-job productivity).

as well as potential legal liability for secondhand-smoke exposure to non-smoking employees.²⁷

Beyond these costs are increased risks of occupational disease compensation for those employees who may already have exposure to other health risks such as asbestos, irritant gasses, or inhaled particulates.²⁸ Smoking employees are also more likely to suffer work-related disability and on-the-job accidents, injuries, and fatalities.²⁹ There also may be intangible costs associated with a smoker's personal presentation to customers or the public, especially in health-related industries.³⁰

The only potentially offsetting savings associated with smoking employees is diminished use of pension benefits in defined-benefits plans due to premature death.³¹ This "death benefit," however, is only relevant for employers who use defined-benefit pension plans—currently fewer than one in four private employers.³² It does not impact the larger number of employers who use defined contribution plans such as 401(k)s. Even for employers with defined-benefits plans, however, the amount of the "death benefit" is clearly dwarfed by the aggregate of other costs incurred.³³

27. *Id.* See also Chris Hallamore, Conference Board of Canada, *Smoking and the Bottom Line: Updating the Costs of Smoking in the Workplace* (2006); Leslie Zellers et al., *Legal Risks to Employers Who Allow Smoking in the Workplace*, 97 AM. J. PUB. HEALTH 1376 (2007).

28. Anthony J. DeLucia, *Tobacco Abuse and Its Treatment: Turning Old and New Issues into Opportunities for the Occupational Health Nurse*, 49 AM. ASS'N OF OCCUPATIONAL HEALTH NURSES J. 243, 247 (2001).

29. Javitz, *supra* note 23, at 18, 21. See generally Shirley Musich et al., *The Association of Health Risks with Workers' Compensation Costs*, 43 J. OCCUPATIONAL & ENVTL. MED. 534 (2001).

30. See, e.g., Sarah-Kate Templeton & Nina Goswami, *Job Vacant . . . But Not for Smokers*, SUNDAY TIMES (London), Oct. 3, 2004 at 12 (quoting the managing director of a website design company as saying, "People who smoke smell and that is not acceptable if they are dealing with clients. If someone has been smoking in their car and then they are introduced to a client, it is pretty unpleasant.").

31. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1180 (1998) (considering and rejecting the argument that smokers "produce a windfall social gain because of the savings resulting from cigarette-induced premature deaths—savings mostly in the form of smokers' unclaimed pension and nursing home entitlements").

32. Stephanie L. Costo, *Trends in Retirement Plan Coverage Over the Last Decade*, MONTHLY LAB. REV. 58, 58 (Feb. 2006), available at <http://www.bls.gov/opub/mlr/2006/02/art5full.pdf>.

33. See generally FRANK A. SLOAN ET AL., *THE PRICE OF SMOKING* 177 (2004) (finding that on average, each male smoker in a defined-benefit plan subsidized nonsmoker's pension plans by \$10,123, and each female smoker by \$383). The

Given these healthcare and productivity costs, the smoking employee brings a substantial financial burden with him to work, even if he does not smoke while he is there.³⁴ The extra cost of a smoking employee obviously varies considerably across industries, occupations, and benefit packages. Our review of previously published studies, however, suggests that, on average, private employers incur excess costs exceeding \$4000 per year for each employee who smokes (in comparison to a non-smoking employee).³⁵ These results are summarized in Table 1 on the following page. The CEO of any business would be irresponsible to ignore costs of this magnitude.

study was based on self-reported data collected from more than 10,000 subjects for the Health and Retirement Study at the University of Michigan Institute for Social Research. Annualizing this subsidy over the average years of employment per smoker, the estimated average annual “death benefit” is approximately \$250 per employee who smokes. *Id.*

34. *But see* Chapman, *supra* note 6, at 144. Simon Chapman argues against tobacco-free workforce policies, stating that “while it is true that smokers as a class are less productive through their absences, many smokers do not take extra sick leave or smoking breaks.” *Id.* This may be correct, but it is irrelevant. Employers take group characteristics and tendencies into account all the time, particularly when it is impossible or impractical to make case-by-case determinations. For example, some high school graduates may be better and more productive employees than most college graduates. But companies often require college graduation as a minimum job requirement, using college graduation as a proxy for employees that are likely to be more productive. In some sense, this may be unfair to particular individuals who would excel at a given job if given an opportunity, but it is generally considered to be a reasonable business practice.

35. Mehmet Munur, Micah Berman & Rob Crane, *The Cost of Smoking Employees* (manuscript at 2, on file with authors).

Table 1 - Total Annual Excess Cost of a Smoking Employee to a Private Employer³⁶

Cost	Annual Amount	High Range	Low Range
Excess Absenteeism	489.26	545.71	169.36
Presenteeism	442.21	1768.84	442.21
Smoking Breaks	2916.713	2916.713	782.216
Excess Healthcare Costs	552.480	966.840	Undetermined
Fire Insurance	17.06	17.06	0
Ashtray Costs	25.72	25.72	0
Ventilation	89.59	89.59	0
Pension Benefit	(254.33)	0	(254.33)
Total Costs	\$4278.703	\$6360.473	\$1139.456

Moreover, nicotine-addicted smokers cannot truly leave their addiction at the door when they enter the workplace. Their use of nicotine and its delivery system, the cigarette, has an ongoing impact on their personality and their behavior long after their last inhalation.³⁷ Chronic smokers are in fact drug addicts—even if their addiction is to a legal drug. A pack-a-day smoker takes approximately 200 “puffs” during each twenty-four hour period. Each inhalation drives a pulse dose of nicotine to the brain faster

36. *Id.* This table was assembled by reviewing previously published literature on these subjects and then adjusting the results to reflect the average annual cost for a private sector employee in the United States. For example, if a study found that smokers were on average absent from work 2.6 days more per year than non-smoking employees, we multiplied that number by the average hours worked per day (7.5, according to the Bureau of Labor Statistics) and the average hourly wage (\$25.09, according to the Employee Benefit Research Institute) to arrive at an average annual cost of \$489.26. The high and low range numbers reflect the variation in previous studies examining these issues. The “annual amount” is based on our best effort to average previous studies, in some cases adjusting for outlying results.

37. Regina de Cássia Rondina et al., *Psychological Characteristics Associated with Tobacco Smoking Behavior*, 33 J. BRASILEIRO DE PNEUMOLOGIA 592, 593 (2007) (“The [withdrawal] symptoms vary in intensity among people, and generally start within hours”), available at http://www.scielo.br/pdf/jbpneu/v33n5/en_v33n5a16.pdf.

and more efficiently than even intravenous injection.³⁸ These potent spikes of nicotine to the central nervous system have a nearly instantaneous effect; however, their duration is brief, so that within thirty minutes after finishing the last inhalation, a smoker is already experiencing both physical and psychological withdrawal.³⁹ Manifestations of withdrawal include anxiety, restlessness, anger, irritability, diminished concentration, impaired task performance, sleep disturbance, drowsiness, and fatigue—and these manifestations build over time.⁴⁰ Much of what addicted smokers perceive as a relaxation effect from smoking is actually relief from their acute withdrawal symptoms. Now that the vast majority of workplaces are smoke-free, the repetitive, prolonged withdrawals that smoking employees suffer are likely to diminish both their productivity and affability while at work.⁴¹

This chronic repetitive withdrawal provides an argument beyond medical-care costs for requiring that employees not smoke on or off the job. Most human resource departments have experience in dealing with problems caused by employees who abuse illegal drugs, prescription drugs, and alcohol. Nicotine addiction, however, brings costs to the employer that dwarf the costs imposed by these other addictions.⁴²

III. ARE TOBACCO-FREE WORKPLACE POLICIES LEGAL?

Though many employers instinctively believe that they cannot consider tobacco use when making employment decisions, tobacco-free workplace policies are perfectly legal in at least twenty-one states. The other twenty-nine states have “smokers rights” laws that were passed at the urging of the tobacco industry (with assistance

38. J.E. Henningfield et al., *Higher Levels of Nicotine in Arterial Than in Venous Blood After Cigarette Smoking*, 33 DRUG ALCOHOL DEPEND. 23–29 (1993).

39. Neal L. Benowitz, *Pharmacology of Nicotine: Addiction and Therapeutics*, 36 ANN. REV. OF PHARMACOLOGY & TOXICOLOGY 597, 599–600 (1996).

40. John R. Hughes et al., *Symptoms of Tobacco Withdrawal: A Replication and Extension*, 48 ARCHIVES GEN. PSYCHIATRY 52 (1991). See also Rob Crane, *The Most Addictive Drug, the Most Deadly Substance: Smoking Cessation Tactics for the Busy Clinician*, 34 PRIMARY CARE CLINICAL OFF. PRAC. 117, 119 (2007); Steven A. Schroeder, *What to Do with the Patient Who Smokes*, 294 J. AM. MED. ASS’N 482, 483 (2005).

41. Cf. Joan Arehart-Treichel, *Smoking and Mental Illness: Which One’s the Chicken?*, PSYCHOL. NEWS, Oct. 3, 2003, at 34 (reporting on study finding that employees with nicotine addiction were substantially more likely to suffer from anxiety and depressive disorders than other employees).

42. See generally Javitz, *supra* note 23, at 10.

from the American Civil Liberties Union), mostly between 1989 and 1993.⁴³ These laws may limit the ability of employers in those states to make hiring decisions based on whether employees use tobacco off the job.

Most states follow the “employment-at-will” doctrine, meaning that employers are generally free to set the standards for what type of employees they will hire, and they can terminate the employer-employee relationship at their discretion, absent contrary contractual terms.⁴⁴ However, the “employment-at-will” doctrine is limited by federal law, state and local laws, and, in the case of government employers, constitutional limitations.⁴⁵ Generally speaking, these laws and constitutional guarantees are intended to protect employees from discrimination on the basis of immutable characteristics (like gender, race, and nationality).⁴⁶

Contrary to the imprecise rhetoric sometimes used by opponents of tobacco-free workplace policies (or any other tobacco

43. See *infra* Table 2 (listing these laws). See Christopher Valleau, *If You're Smoking You're Fired: How Tobacco Could Be Dangerous to More than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 484–92 (2007) (discussing the legislative campaign by the ACLU and the tobacco industry).

44. Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 707 (2006) (“The basic rule, applied by the vast majority of jurisdictions, concerning the at-will relationship—that either party may terminate the relationship at any time, for any reason or no reason, and with or without notice—has been the law in the United States for well over a century.”); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153 (Ohio 1985) (“Unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law. This doctrine has been repeatedly followed by most jurisdictions, including Ohio, which has long recognized the right of employers to discharge employees at will.”).

45. See, e.g., Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 362 (2007):

An employer can be civilly liable for wrongful discharge if an employee is dismissed in violation of an applicable employment-related statutory provision. The most obvious example of this type of wrongful discharge is when an employee is discharged (or forced to resign) in violation of Title VII of the Civil Rights Act of 1964, as well as any of its applicable state-law equivalents.

Id.

46. Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 78 (1998) (“Most of those [exceptions to the doctrine of at-will employment] can be characterized as either anti-retaliation doctrines, designed to protect socially valued speech or conduct, or anti-discrimination doctrines, designed to prohibit adverse treatment on the basis of traits—usually *immutable* traits—or group membership.”) (emphasis added).

control policy), there is no “right to smoke” granted by the U.S. Constitution or any state constitution, and no federal law has ever been held to prohibit making employment decisions on the basis of tobacco-use status.⁴⁷ The case law goes back more than twenty years to *Grusendorf v. Oklahoma City*, where a federal court of appeals upheld an Oklahoma City Fire Department policy of prohibiting smoking (on or off the job) by firefighting trainees.⁴⁸ The court wrote that since smoking is not a “fundamental right” entitled to special legal protection, the government need only have a rational basis for its policy.⁴⁹ It concluded that “[w]e need look no further for a legitimate purpose and rational connection than the Surgeon General’s warning on the side of every box of cigarettes sold in this country that cigarette smoking is hazardous to health.”⁵⁰ All courts that have subsequently considered this issue have arrived at the same conclusion.⁵¹

In the case of private employers, the constitutional questions do not apply, and the only issue is whether any federal, state, or local laws prohibit hiring policies that consider tobacco-use status. Plaintiffs have argued without success that federal law imposes such a limitation on employers. For example, courts have rejected the argument that people addicted to nicotine are “disabled” and therefore entitled to the anti-discrimination protections of the Americans with Disabilities Act.⁵²

47. See generally Samantha K. Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke* (2005), available at <http://www.wmitchell.edu/tobaccolaw/resources/No+Constitutional+Right+to+Smoke.pdf>.

48. *Grusendorf v. Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987).

49. *Id.* at 541–43.

50. *Id.* at 543.

51. See, e.g., *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (upholding city’s policy of refusing to hire anyone who had smoked in the past year); *Town of Plymouth v. Civil Serv. Comm’n*, 686 N.E.2d 188, 190 n.4 (Mass. 1997) (upholding town’s decision to fire police officer for tobacco use). Courts have also rejected the claim that smokers are a “protected class” subject to heightened protection under the Equal Protection Clause of the Fourteenth Amendment. For example, in *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 482 (S.D.N.Y. 2004), the court wrote that “[s]moking, as a discretionary or volitional act, does not merit heightened scrutiny because the Supreme Court has rejected the notion that a classification is suspect when entry into the class . . . is the product of voluntary action.” (internal quotation marks omitted).

52. See, e.g., *Brashear v. Simms*, 138 F. Supp. 2d 693, 695 (D. Md. 2001) (writing that “common sense compels the conclusion that smoking, whether denominated as ‘nicotine addiction’ or not, is not a ‘disability’ within the meaning of the ADA.”). Cf. *Stevens v. Inland Waters, Inc.*, 559 N.W.2d 61, 62 (Mich. Ct.

However, some states' "smokers' rights" laws may have an impact on the ability of employers to implement tobacco-free workforce policies.⁵³ These laws come in two forms: seventeen states prohibit employers from making employment decisions on the basis of off-duty tobacco use, while eleven states more generally prohibit employers from making employment decisions on the basis of off-duty lawful activity or off-duty use of legal consumable products.⁵⁴ One state, Virginia, restricts the ability of the state as an employer to make employment decisions based on off-duty tobacco use.⁵⁵ It does not appear that Virginia's statute applies to private employers.⁵⁶

Employers interested in implementing tobacco-free workforce policies should carefully review the laws of the states in which they operate. Even in the twenty-nine states with "smokers' rights" laws governing private employers, there may be legal latitude. For example, several state laws provide an exemption if the off-duty activity "adversely affect[s] [the employee's] ability to perform his job."⁵⁷ Clearly, employers have a solid foundation from which to argue that off-duty tobacco use has an impact on job performance. Other state laws "only offer protection to current employees and do not prevent an employer from discriminating against prospective employees on the basis of tobacco use."⁵⁸

Thus, whether or not a tobacco-free workforce is a viable option will depend upon state law and the specifics of an employer's situation. Employers should consult legal counsel when developing such a policy, but many are likely to find that there are no legal barriers to implementation.⁵⁹

App. 1996) (rejecting claim that firing employee for smoking constituted disability discrimination under the Michigan Handicappers' Civil Rights Act).

53. See *infra* Table 2 (listing these laws).

54. States with statutes specifically focused on off-duty tobacco use: New Jersey, Missouri (alcohol or tobacco), Oregon, Rhode Island, Oklahoma, New Mexico, New Hampshire, Mississippi, Maine, Louisiana, Kentucky, Indiana, Connecticut, West Virginia, South Dakota, South Carolina, Wyoming. States with statutes directed towards off-duty use of lawful products: Nevada, Illinois, Montana, California, North Dakota, North Carolina, New York, Minnesota, Colorado, Tennessee, Wisconsin. For citations, see Table 2.

55. VA. CODE ANN. § 2.2-2902 (2008).

56. *Id.*

57. NEV. REV. STAT. § 613.333(1)(b) (2006).

58. Valteau, *supra* note 43, at 479.

59. This article does not address potential testing for compliance with a tobacco-free workforce policy, which may raise separate legal issues. Any testing mechanism should be able to distinguish between active tobacco users and those

It should also be noted that, in our opinion, the “smokers’ rights” laws in effect in twenty-nine states constitute poor public policy and should be reconsidered. To elevate the nation’s leading cause of preventable death to the status of a protected civil right is illogical, undermines health education messages, and trivializes the concept of civil rights.⁶⁰ Employment-discrimination laws should focus on protecting employees from invidious discrimination based on immutable characteristics or the exercise of constitutionally protected rights. They should not be used as tools to block employers from promoting healthy lifestyle choices.

who are using only nicotine replacement therapies (NRT) such as nicotine patches or nicotine gum. Nicotine use alone does not impose substantial health costs on employers, and employees should be encouraged to use NRT products in their efforts to keep from smoking—not punished for doing so.

60. After vetoing a proposed “smokers’ rights” bill in Arkansas, then-Governor Bill Clinton said:

While Americans plainly may smoke in many circumstances, smoking is an acquired behavior and giving the overwhelming evidence of the toll it takes every year in disease and death, it should not be accorded legal protection like Freedom of Speech, nor should smokers be a protected class like those who have been wrongly discriminated against because of race, sex, age or physical handicaps.

Michael Arbanas, *Smokers Rights’ Bill Vetoed*, ARK. DEMOCRAT-GAZETTE, Feb. 27, 1991 (page number not available). Virginia Governor L. Douglas Wilder vetoed a “smokers’ rights” bill in Virginia, stating that he was “offended by the suggestion that smokers deserve the same type of civil rights shield that had been used to fight prejudice against blacks and other minorities.” Valleau, *supra* note 43, at 487.

Table 2 – State Smoker Protection Laws⁶¹

State	Year	Code Section
Arizona	1991	ARIZ. REV. STAT. ANN. § 36-601.02 ⁶²
California	2003	CAL. LABOR CODE §§ 96(k) & 98.6
Colorado	1990	COLO. REV. STAT. § 24-34-402.5
Connecticut	2003	CONN. GEN. STAT. § 31-40s
District of Columbia	1993	D.C. CODE § 7-1703.03
Illinois	1987	820 ILL. COMP. STAT. 55/5
Indiana	2006	IND. CODE §§ 22-5-4-1 to -3
Kentucky	1994	KY. REV. STAT. ANN. § 344.040
Louisiana	1991	LA. REV. STAT. ANN. § 23:966
Maine	1991	ME. REV. STAT. ANN. tit. 26, § 597
Minnesota	1992	MINN. STAT. § 181.938
Mississippi	1994	MISS. CODE ANN. § 71-7-33
Missouri	1992	MO. REV. STAT. § 290.145
Montana	1993	MONT. CODE ANN. §§ 39-2-313 to -314
Nevada	1991	NEV. REV. STAT. § 613.333
New Hampshire	1991	N.H. REV. STAT. ANN. § 275:37-a
New Jersey	1991	N.J. STAT. ANN. §§ 34:6B-1 to -4.
New Mexico	1991	N.M. STAT. §§ 50-11-1 to -6
New York	1992	N.Y. LAB. LAW § 201-d
North Carolina	1991	N.C. GEN. STAT. § 95-28.2
North Dakota	1993	N.D. CENT. CODE §§ 14-02.4-01 to -09.
Oklahoma	1991	OKLA. STAT. tit. 40, § 500
Oregon	1989	OR. REV. STAT. § 659A.315
Rhode Island	2005	R.I. GEN. LAWS § 23-20.10-14
South Carolina	1990	S.C. CODE ANN. § 41-1-85
South Dakota	1991	S.D. CODIFIED LAWS § 60-4-11
Tennessee	1990	TENN. CODE ANN. § 50-1-304
Virginia	1989	VA. CODE ANN. § 2.2-2902
West Virginia	1992	W. VA. CODE § 21-3-19
Wisconsin	1991	WIS. STAT. §§ 111.31-.322
Wyoming	1992	WYO. STAT. ANN. §§ 27-9-101 to -106

61. Am. Lung Ass'n, *State Legislation Actions on Tobacco Issues: 2007*, available at http://slati.lungusa.org/reports/SLATI_07.pdf.

62. This statute was repealed by the passage of Proposition 201, the "Smoke-Free Arizona Act." The Act became effective on May 1, 2007.

IV. ON OBJECTIONS TO SMOKE-FREE WORKFORCE POLICIES

Aside from legal concerns, two main objections to tobacco-free workforce policies arise. The first is that these policies inappropriately interfere with employees' privacy.⁶³ The second is not a direct objection to the policy, but rather a concern that the policy would constitute a "slippery slope" and lead to employers refusing to hire other types of employees.⁶⁴ Often this is framed as a concern that overweight employees or employees with high cholesterol might be the next target of overzealous employers seeking to reduce healthcare costs. Both of these concerns were eloquently expressed by Lewis Maltby, President of the National Workrights Institute, at the Tobacco Control Legal Consortium's October 2007 symposium.⁶⁵

A. *Privacy Concerns are Overstated*

On the privacy issue, it is clear that tobacco-free workforce policies do not interfere with employee privacy in a legal sense. Although an implied right to privacy has been recognized by the U.S. Supreme Court, and several state constitutions expressly grant the right, no court has ever found that smoking is included in the right to privacy.⁶⁶ The right to privacy in the U.S. Constitution has been limited to a narrow range of family issues including

63. See, e.g., Pfeiffer, *supra* note 11, at A1 ("Employers should be greatly concerned about how employees perform their jobs and what happens in the workplace, but how employees want to lead their private lives is their own business," said Boston lawyer Harvey A. Schwartz, who represents Scott Rodrigues in his civil rights and privacy violation lawsuit against Scotts.).

64. For example, in response to the Cleveland Clinic's decision to hire only non-smokers, an op-ed in the *Cleveland Plain Dealer* asked, "[i]f the Clinic can cut smokers out of the job pool as expensive health risks, might overweight people be next, or sexually active gay males?" Kevin O'Brien, *Tobacco Policy a Breath of Foul Air*, CLEVELAND PLAIN DEALER, July 4, 2007, at B7.

65. As discussed at the symposium, Lewis Maltby was actively involved in the ACLU's efforts (funded in part by the tobacco industry) to encourage states to adopt "smokers' rights" legislation. See *supra* note 43 and accompanying text.

66. See, e.g., *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (finding that the city's policy of refusing to hire applicants who had smoked in the past year did not violate the privacy rights protected by either the U.S. or Florida Constitution). Likewise, the argument "that an employer's consideration of leisure-time smoking violates a legally protected common law privacy interest . . . is without legal merit." Karen L. Chadwick, *Is Leisure-Time Smoking a Valid Employment Consideration?*, 70 ALB. L. REV. 117, 127 (2006).

“marriage, procreation, abortion, contraception, and the raising and educating of children.”⁶⁷

Even though there is no legal objection to tobacco-free hiring policies, many people strongly believe that off-duty conduct—even if dangerous or unhealthy—is simply none of an employer’s business.⁶⁸ This argument would be more convincing if not for the fact that employees, as we have explained, bring their nicotine addiction to work. Their withdrawal symptoms in the workplace reduce productivity and impose substantial costs on their employers and on other employees.⁶⁹ Most employers already prohibit—and often test for—the use of narcotics and other psychoactive and addictive drugs that impact employment performance.⁷⁰ These policies are not implemented because the substances in question are illegal—employers have no obligation (and probably no interest) in assisting law enforcement efforts. Rather, employers have found that employees dealing with drug addiction or withdrawal are less productive, sometimes dangerous, and impose costs on the business as a whole.⁷¹ Nicotine addiction is no different.

It could be argued that even if tobacco use imposes some cost on employers, it is a cost that society must pay for respecting the privacy and autonomy of adults who make the decision to use a legal product. This argument fails for two reasons. First, smoking is rarely an adult decision. The vast majority of smokers begin smoking before the age of eighteen, when they develop a nicotine addiction that keeps them smoking into adulthood.⁷² Indeed, poll

67. Graff, *supra* note 47, at 4.

68. See, e.g., NAT’L WORKRIGHTS INST., LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES, http://www.workrights.org/issue_lifestyle/ldbrie2.pdf (“The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives.”).

69. See *supra* notes 41–42 and accompanying text.

70. Gary White, *Job Applicant? Expect a Drug Test*, THE LEDGER (Lakeland, Fla.), Feb. 6, 2007, at A1 (“A 2006 survey by the Society for Human Resource Management found that 84 percent of employers required new hires to pass drug screenings . . .”).

71. Dalia Fahmy, *Aiming for a Drug-Free Workplace*, N.Y. TIMES, May 10, 2007, at C6 (“Drug users are almost four times as likely to be involved in a workplace accident as sober workers and five times as likely to file a workers’ compensation claim, according to government data. Drug users miss more days of work, show up late and change jobs more often.”).

72. M. Mathers et al., *Consequences of Youth Tobacco Use: A Review of Prospective Behavioural Studies*, 101 ADDICTION 948, 948 (2006) (“Most tobacco users initiate

after poll shows that more than 70% of smokers would like to quit.⁷³ Tobacco use is in most cases an addiction, not—despite the rhetoric of the tobacco industry—an “adult choice.” On the contrary, it is an ongoing public health disaster resulting from years of aggressive tobacco industry marketing to youth and young adults.⁷⁴ However, individuals can and do quit. There are currently more ex-smokers (forty-six million) in the United States than there are current smokers (forty-five million).⁷⁵ Unfortunately, many smokers do not quit until they have already suffered permanent health damage.⁷⁶ A smoke-free workplace provides gentler and timelier motivation for quitting than a heart attack or cancer.

Secondly, the argument that employers are running roughshod over employees’ privacy rights is less convincing where—as in the case of Scotts and Weyco—the employer is willing to provide all the cessation assistance necessary to help the employee break his or her nicotine addiction.⁷⁷ Indeed, the CEO of Scotts said that the company will *not* fire employees who are

and develop their smoking behaviour in adolescence, with very few people beginning their smoking habit as adults.”).

73. Jeffrey M. Jones, *Smoking Habits Stable; Most Would Like to Quit*, GALLUP NEWS SERV., July 18, 2006, available at <http://www.gallup.com/poll/23791/Smoking-Habits-Stable-Most-Would-Like-Quit.aspx>. In 2006, 75% of smokers said they would like to give up smoking, while just 22% said they would not. *Id.* Each time Gallup has asked this question since 1977, at least six in ten smokers have said they would like to quit. *Id.*

74. *See, e.g.*, WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2008 21 (2008), available at http://www.who.int/tobacco/mpower/mpower_report_tobacco_crisis_2008.pdf.

The epidemic of tobacco use and disease as we know it today would not exist without the tobacco industry’s marketing and promotion of its deadly products over the past century. Tobacco companies have long targeted youth as “replacement smokers” to take the place of those who quit or die. The industry knows that addicting youth is its only hope for the future.

Id.

75. Ctrs. for Disease Control & Prevention, *Cigarette Smoking Among Adults—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 1157 (2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5644a2.htm>.

76. *See, e.g.*, Donald H. Taylor et al., *Benefits of Smoking Cessation for Longevity*, 92 AM. J. PUB. HEALTH 990, 995 (2002) (observing in Table 5 that men who quit smoking at age thirty-five gained eight-and-a-half years of life expectancy relative to a continuing smoker, whereas men who quit smoking at age sixty-five gained only two years of life expectancy).

77. *Countdown* (MSNBC television broadcast Jan. 12, 2006) (Scotts CEO James Hagedorn said, “[W]e’ll give them pharmaceuticals, we’ll give them counseling—whatever they need, we’ll give them. And there’s no expense on what we’ll do to get people to quit.”).

actively trying to quit smoking, even if it takes years of effort.⁷⁸ Rather than being forced out of a job because of their nicotine addiction, smokers are being asked to attempt smoking cessation. Provided that employers have an appropriate understanding of the difficulty of breaking nicotine addiction (and the multiple attempts that may be involved), it is hard to see how a requirement to attempt smoking cessation infringes on personal privacy more than a myriad of other decisions that people must make in order to keep their jobs. In order to accept or maintain a job, people are often required to make significant life changes such as moving, relinquishing other outside employment, refraining from using or endorsing competitors' products, cutting their hair, and rearranging their schedules. There is no reason that smoking should be prioritized above other activities in which employees may wish to engage outside of work. In fact, given the costs smoking imposes on others, there is considerably less justification for making it a protected activity.

B. Slippery Slope Concerns are Weak

Besides privacy-related arguments, the “slippery slope” argument seems to be the most common objection to tobacco-free workforce policies. In response to the World Health Organization's decision to stop hiring smokers, one commentator wrote that “WHO's next logical step in amending its application is to ask for the height and weight of applicants so it can discard the applications of obese people.”⁷⁹ Tobacco use, however, remains in a class by itself. Tobacco use is known to cause the deaths of five million people worldwide⁸⁰ (and approximately 438,000 in the United States)⁸¹ each year—an entirely preventable public health crisis. Tobacco is the only legal consumable product that kills approximately one-half of the people who consume it, it is highly

78. Interview with Scotts CEO James Hagedorn (CNBC television broadcast Jan. 10, 2006) (“[W]hat we've told people is everybody who's making an effort to quit will not be impacted . . . [A]nybody who's making a good faith effort to quit smoking, with all the tools we're going to give them, will not be impacted, even if it takes a year, two years, three years, for them to quit.”).

79. Leonard Glantz, *Smoke Got In Their Eyes*, WASH. POST, Dec. 18, 2005, at B07.

80. World Health Org., *Tobacco Free Initiative: Why is Tobacco a Public Health Priority?*, http://www.who.int/tobacco/health_priority/en/index.html (last visited Jan. 8, 2007).

81. *Annual Smoking*, *supra* note 19.

addictive, and it cannot be used safely in moderation.⁸² All of these factors are clear bases on which tobacco use can be distinguished from other potentially hazardous activities.⁸³

Discussing the argument that prohibitions on “egg eating and beer drinking” could come next, Professor Karen Chadwick at Michigan’s Thomas M. Cooley Law School recently outlined the weaknesses of the slippery slope argument:

When closely examined, the slippery-slope argument as applied to employment policies on smoking is problematic. No one seriously disputes that obesity and other conditions that impact health, like smoking, impose significant health and productivity costs on employers. However, although there is considerable evidence that smoking is directly related to significant lost productivity and increased employer health care costs, there is little data supporting the contention that off-duty egg eating and beer drinking result in similar directly correlative costs.

Unlike smoking, consuming eggs and beer is not addictive. Smoking directly correlates with deleterious health consequences. But unlike smoking, the causes of obesity, heart disease, diabetes, alcoholism, and other conditions are the result of a complex number of factors, not just egg or beer consumption. Thus, discrimination against lifestyles which include beer drinking, egg eating, or other similar behaviors would impose employer monitoring costs without obvious directly correlative benefits.⁸⁴

82. See Valleau, *supra* note 43, at 491; Joseph R. DiFranza et al., *Initial Symptoms of Nicotine Dependence in Adolescents*, 9 TOBACCO CONTROL 313, 313 (2000) (finding that “[t]he first symptoms of nicotine dependence can appear within days to weeks of the onset of occasional use, often before the onset of daily smoking.”).

83. See Michele L. Tyler, *Blowing Smoke: Do Smokers Have Rights? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 794–803. As Tyler has written, the slippery slope argument is “emotionally powerful” but “practically weak.” *Id.* at 794. She writes:

Tobacco is unlike any other legal product; it is the only available consumer product that is hazardous to health when used as intended. As a result, the use of tobacco can be set apart analytically from other legal activities. . . . [T]obacco use differs from consumption of other products in both the magnitude of its abuse and the magnitude of the resultant risk of disease.

Id.

84. Chadwick, *supra* note 66, at 139–140.

Furthermore, the slippery slope concerns are entirely speculative. No employer has extended a tobacco-free workforce policy to exclude other types of employees who might increase healthcare costs. To the contrary, nearly all of the employers of whom we are aware who have instituted tobacco-free workforce policies have done so as part of a larger workforce-wellness agenda. These companies have built state-of-the-art gyms, provided healthier food in workplace cafeterias, provided coaches to help employees develop personal fitness plans, and more.⁸⁵ Far from discriminating against employees who may face higher health costs, these employers have actively sought to help them reduce their health risks. These employers should be applauded for their efforts, not vilified.

Some argue that employers might move beyond tobacco to prevent other high-risk behaviors like riding a motorcycle or hang-gliding.⁸⁶ This is speculative as well, and again, tobacco use (in the aggregate) imposes much more serious costs on employers than other risky activities.⁸⁷ Our legal system recognizes that employers have the right to set the conditions of employment, so long as they are not engaging in invidious discrimination.⁸⁸ An employer could choose to hire only people who did not hang-glide, provided that the employer was not in a state with a very broad “smokers’ rights”

85. See, e.g., Michelle Conlin, *Get Healthy—Or Else; Inside One Company’s All-Out Attack on Medical Costs*, BUS. WEEK, Feb. 26, 2007 (discussing wellness programs at Scotts and other companies).

86. See, e.g., Dick Dahl, *Employers Take Action to Control ‘Unhealthy’ Employee Lifestyles*, LAW. USA, Feb. 12, 2007 (quoting a corporate attorney suggesting that “[t]here’s a lot of speculation about where you should draw the line. Should you try to restrict other ‘risky activities’ like hang gliding or overeating?”); Interview by Carol Lin with Lewis Maltby, President, National Work Rights Institute (CNN television broadcast Dec. 10, 2005), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0512/10/pitn.01.html>:

[Y]ou can’t fire people—at least, you shouldn’t, for doing something that might make them sick someday. We all do things in our private life that could adversely affect our health. It could be smoking, it could be drinking, it could be junk food, it could be riding a motorcycle, could be practicing unsafe sex, could be having too many children. If we let our employers start telling us what to do in our private lives, because it effects our health care costs, we can all kiss our private lives good-bye.

87. Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 J. AM. MED. ASS’N 1238, 1240 Table 2 (2004) (finding that in 2000, tobacco use accounted for 18.1% of deaths in the United States, whereas illicit drug use, sexual behavior, firearms, and motor vehicle accidents combined accounted for 4.5% of all U.S. deaths).

88. See *supra* notes 44–46 and accompanying text.

law that applies generally to off-duty lawful activities.⁸⁹ However, a reasonable employer would consider the potential benefits of the policy in relation to the policy's costs—most notably, a reduction in the pool of qualified employees. For this reason, an employer is highly unlikely to propose such a policy unless the activity in question is imposing substantial costs on the business. It is no coincidence that we are seeing more and more tobacco-free workforce policies, but no “hang-glider-free workforce” policies.

Any concern about a “slippery slope” can be monitored, and future policy developments can be debated and, if necessary, reined in through the political process.⁹⁰ For the moment however, the “slippery slope” argument does not provide a compelling basis for preventing employers from implementing tobacco-free workplace policies. In addition to the positive impact on business productivity, these policies are likely to reduce tobacco use and save lives.⁹¹ They should not be prohibited or delayed in deference to hypothetical “slippery slope” concerns.

V. A SHAKY MIDDLE GROUND: INSURANCE SURCHARGES

Karen Chadwick has argued that, given the tension between employer costs and privacy concerns, we should settle on a “middle ground” that would prohibit employers from making hiring decisions based on smoking but allow them to “pass on health care costs attributable to smoking to those employers that smoke.”⁹² We agree that employers should have the option to impose health insurance surcharges on employees who smoke. But we see practical, legal, and logical problems with a regime that allows employers to charge health-care surcharges but proscribes tobacco-free workforce policies.

89. See *supra* Part III.

90. Lewis Maltby's reference to Henry Ford's own private police force proves too much. Perhaps employers *could* adopt similar policies today, but they don't. Any company that attempted to monitor its employees' off-duty morality would likely see a dramatic reduction in job applicants without any corresponding cost savings. To put it more directly, any company that announced such a policy would be relentlessly ridiculed. This alone should suggest that the “slippery slope” argument is overstated.

91. In the case of Weyco, for example, of the twenty-eight smokers employed by the company at the time the tobacco-free workforce policy was implemented, twenty-four quit smoking. Robinson, *supra* note 4, at 3.

92. Chadwick, *supra* note 66, at 137.

First, Chadwick's proposal does not take into account the fact that employees who smoke impose substantial costs on employers that go beyond healthcare costs.⁹³ These costs, such as lost productivity and excess workers' compensation claims, are outlined above.⁹⁴ Secondly, even if looking only at health-related costs, companies may be legally barred from imposing a health insurance surcharge high enough to fully recoup smoking-related expenses. Pursuant to administrative rules implementing the Health Insurance Portability and Accountability Act (HIPAA), employers can only add a premium surcharge of up to 20% of the total cost of employee-only coverage for employees who use tobacco.⁹⁵ Moreover, employers are prohibited from imposing the surcharge on current tobacco users for whom it is "unreasonably difficult... to stop smoking."⁹⁶

Given these legal limitations, it is unlikely that surcharges would truly be able to recover the excess costs imposed by tobacco users, and it is equally unlikely that the surcharges would be effective at motivating employees to quit (particularly when they can just claim that quitting is "unreasonably difficult").⁹⁷ Indeed, the HIPAA limitations were reportedly one factor that led Scotts to adopt a smoke-free workforce policy.⁹⁸ Third, as Lewis Maltby noted at the Tobacco Control Legal Consortium symposium, enforcing a surcharge policy implicates all of the same privacy concerns as a smoke-free workforce policy.⁹⁹ Thus, it does nothing

93. See *supra* Part II.

94. See *supra* Table I.

95. See 45 C.F.R. § 146.121(f)(2)(i) (2007).

96. 45 C.F.R. § 146.121(f)(2)(iv), (3)(Ex. 5) (2007). Those for whom quitting is "unreasonably difficult" can be required to participate in a cessation program. However, the surcharge cannot be applied so long as they participate in the cessation program, even if they continue to use tobacco afterwards. *Id.*

97. See Conlin, *supra* note 85 ("Some theorized that higher co-payments and pricier premiums would get people to take better care of themselves. It's not happening.").

98. John Jarvis, *Marysville Company Forcing a Healthy Choice: If You're a Smoker, You Can't Work Here*, MARION STAR (Ohio), Jan. 22, 2006 ("In making their decision, company officials also took into account that the law doesn't allow a company to deny health coverage to employees who are smokers or add fees to their premium that 'accurately reflect the true cost of smoking,' [Scotts spokesman Jim] King said.").

99. Cf. Tyler, *supra* note 83, at 795 ("Nor does this [surcharge] solution address the slippery slope problem. Instead, it encourages employers to further invade informational privacy rights by making other 'unhealthy' behaviors, such as poor diet, and risky hobbies such as sky-diving, cause to terminate or reduce an employee's health insurance.").

to address the tension between employer interests and privacy concerns.

In addition, hiring tobacco users but then implementing and enforcing a surcharge system creates a strong incentive for employees to mislead their employers. It is likely that at least some new employees who are current smokers will claim that they are non-smokers (or former smokers who have recently quit) in order to avoid paying the healthcare surcharge. Companies that are committed to enforcing the surcharge policy may conduct random tests to verify smoking status. If, however, tests later reveal that an employee has been untruthful, the company is left in a no-win situation. The company could dismiss the employee for lying on the health insurance application, but by that point, the company may have spent thousands of dollars in training expenses. Firing the employee may also lead to a wrongful termination suit, costing the company even more in legal bills. Companies would be far better off if they were able to do pre-employment testing and avoid these potential problems. Relative to a smoke-free workforce policy, the surcharge option may create far more practical and legal headaches.

In sum, we think this area is one where employers should have the ability to choose the option that works best for them—whether it is the status quo, tobacco use surcharges, or a tobacco-free workforce policy.¹⁰⁰ Tobacco use surcharges may work for some employers, but surcharges are certainly not a one-size-fits-all panacea that will work for all businesses.

VI. CONCLUSION

Though there are likely to be substantial public health implications to the widespread adoption of tobacco-free workforce policies, it is businesses owners and managers who must decide whether such policies make sense for their businesses. Tobacco-control advocates and business groups do not always see eye-to-eye, but this appears to be a case where business and public health interests converge. In addition to improving employee health and

100. Lewis Maltby stated at the TCLC symposium that before initiating a surcharge program backed up by testing, “employers need to consider how employees will react.” We completely agree. Employers are the ones who know their workforce and their workplace best. It should be left to the employer to balance the competing considerations and determine what policy works for a given company.

workforce productivity, tobacco-free workforce policies will send a strong signal to college students and young adults to stay away from tobacco (just as current drug-testing programs by employers discourage the use of illegal drugs).¹⁰¹

Facing the preventable, premature deaths of over 400,000 Americans each year and annual excess costs of more than \$160 billion,¹⁰² the U.S. Department of Health and Human Services goals delineated in *Healthy People 2010* a target U.S. adult smoking prevalence of only 12%.¹⁰³ Though the target date is less than two years away, we are still a long way from achieving that goal. The current adult smoking rate is over 20%,¹⁰⁴ and we have seen only minimal declines in smoking rates over the last decade.¹⁰⁵ Current tobacco control efforts are simply not reducing smoking rates quickly enough to derail the continuing public health catastrophe caused by cigarette smoking. If we are to make further progress in reducing the horrendous toll imposed by cigarettes, tobacco control advocates must be willing to work with the private sector and to support novel private-sector initiatives such as tobacco-free workforce policies.

101. Indeed, college students are already beginning to take notice. College newspapers across the country have covered companies' decisions to implement tobacco-free workforce policies. For example, a recent article in the University of Maryland's student newspaper warned students that "[a] cigarette drag is no longer just a health risk; it's a career liability." Ben Block, *Employers Less Likely to Hire Smokers*, THE DIAMONDBACK, Dec. 15, 2005, available at <http://media.www.diamondbackonline.com> (search "Employers Smokers").

102. *Annual Smoking*, *supra* note 19.

103. U.S. DEPT. OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010—TOBACCO USE (Nov. 2000), http://www.healthypeople.gov/document/html/volume2/27tobacco.htm#_Toc489766214.

104. CTRS. FOR DISEASE CONTROL & PREVENTION, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM, PREVALENCE DATA—NATIONWIDE (STATES AND DC)—TOBACCO USE 2006, <http://apps.nccd.cdc.gov/brfss/display.asp?yr=2006&cat=TU&qkey=4396&state=UB>.

105. See Ctrs. for Disease Control & Prevention, *Cigarette Smoking Among Adults—United States, 2006*, *supra* note 75 (noting that the adult smoking rate has declined from 24.7% in 1997 to 20.6% in 2006, but has remained virtually unchanged since 2004).