



**House
Legislative
Analysis
Section**

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SMOKERS' EMPLOYMENT

**Senate Bill 484 (Substitute H-1)
First Analysis (6-10-92)**

**Sponsor: Sen. Frederick Dillingham
Senate Committee: Labor
House Committee: Labor**

THE APPARENT PROBLEM:

As health care costs rise, some companies have become more concerned about employees who smoke, drink or engage in other legal, but "high-risk," activities outside of work. It is feared by many companies that the unhealthy habits and lifestyles of their workers may have a substantial impact on what they pay for health insurance; in fact, some estimates show that smoking and other unhealthy habits of workers raise corporate health-care costs by up to 25 percent. Faced with ever-increasing expenses, some employers already have instituted policies of firing or refusing employment to certain workers. For instance, one U.S. maker of building materials reportedly has, since 1987, banned employees who smoke from working in eight of its plants, citing its concerns that smoking combined with the type of work involved at these plants (where mineral fiber is used to make tile) may lead to a higher incidence of cancer among these workers. Other companies reportedly will not hire smokers at all, or require job applicants to sign affidavits certifying that they do not smoke and have not within the last year. One company, reportedly, has even resorted to charging those who smoke outside of work \$10 a month extra to pay for increased health insurance costs after an in-house study showed that smokers' health costs were 50 percent higher than those of nonsmokers. Such policies have generated considerable concern among those who feel workers should be free to choose their own lifestyles outside of work without having to fear losing their means of livelihood, provided their activities are legal. In light of these concerns, legislation has been proposed that would prohibit employers from refusing to hire or retain someone for work based on whether or not he or she smoked outside of the workplace.

THE CONTENT OF THE BILL:

The bill would create a new act to prohibit an employer from requiring, as a condition of

employment, that an employee or prospective employee smoke or use tobacco products or refrain from smoking or using tobacco products outside his or her workplace, or otherwise discriminating against an employee with respect to his or her compensation or other terms or conditions of employment for smoking/using tobacco products or not smoking/using tobacco products outside of work. The bill, however, specifies that it would not prohibit an employer from offering, imposing or having in effect a health, disability, or life insurance policy or certificate, health maintenance organization contract, or health care corporation certificate that charged tobacco users more or otherwise made distinctions among employees regarding the type of coverage or the cost of coverage based on employees' use of tobacco products.

A person alleging a violation of the bill could bring a civil action for appropriate injunctive relief or damages, or both. Each violation would constitute a separate offense. The action could be brought in the circuit court for the county in which the alleged violation occurred or for the county in which the employer against whom the civil complaint was filed resided or had his or her principal place of business.

HOUSE COMMITTEE ACTION:

The House Labor Committee adopted Substitute H-1 for the bill that would prohibit discrimination in employment by employers against employees or prospective employees who smoke or use tobacco products or do not smoke or use tobacco products outside the workplace. The bill as passed by the Senate would prohibit discrimination within employment only relative to employees or prospective employees who smoke or use tobacco products outside of work.

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FISCAL IMPLICATIONS:

The House Fiscal Agency says the bill would not affect state or local budget expenditures, but could affect employment provisions in employment contracts or other negotiated prohibitions against employee smoking practices that a governmental unit may reach with its employees or bargaining units. In addition, the bill could encourage more legal action taken against employers relative to employment discrimination based on whether or not a person smokes, which could result in higher litigation costs for private employers. Any increased litigation costs that private employers might experience under the bill would depend on the number of lawsuits filed under the bill alleging discrimination in employment based on whether or not a person smoked, and how many of these were won by plaintiffs. (6-8-92)

ARGUMENTS:

For:

Employers should not have the legal authority to impede a person's progress in the work force or deny employment to someone based on whether or not he or she smokes outside the workplace if the person is otherwise qualified for the job or is performing it satisfactorily and complies with the rules of the workplace concerning smoking. With the enactment of the bill, Michigan would join some 20 other states that have passed laws banning discrimination on the basis of whether or not a person smokes.

Response:

Employers should be allowed to fire, or refuse employment to, smokers if being a nonsmoker is a bona fide occupational qualification. For example, it would be hypocritical to require such agencies and organizations as local health departments or the American Lung Association or American Cancer Society to hire or retain smokers, especially to promote anti-smoking programs. The bill, however, would deny such groups the right to select employees who subscribe to the group's philosophy and can credibly represent them.

Against:

The bill could generate more litigation to burden the courts, businesses, individuals and the tax-paying public since it could provide grounds on which disgruntled ex-employees could sue their former employers, alleging that their dismissal from work was due to their off-duty smoking. The burden of

proving that a dismissal was based on other grounds could then fall to the employer, thus adding to business costs that ultimately could be passed on to the employees and the consumer.

Response:

The bill would not necessarily generate more litigation; employees always have the right to sue their employer if they feel they are victims of discrimination. Moreover, it may well be that the burden of proof would fall to the employee, not the employer, which likely would deter smokers from filing numerous frivolous actions against an employer.

Against:

The bill would make it nearly impossible for employers, when budgeting for health care costs, to take into account their employees' smoking habits even though the impact of such habits on people's long-term health and on employer's health costs have been well-documented. According to Business Week, smokers who worked for the State of Kansas spent 69 percent more time in the hospital than nonsmokers did in 1990 and cost an average \$1,137, compared to \$854 for nonsmokers. Further, the American Cancer Society reports that the average employer loses \$5,000 per year on higher health care insurance, sick days, early retirement and other smoking-related problems with employees.

Response:

The extent to which employees' lifestyles affect the overall health care costs of their employers--when compared against the affects of an aging population, increasing costs of high technology, and greater use of the health care system--begs further scrutiny. It is unfair to assert, and would be difficult to prove, that smokers are primarily responsible for the skyrocketing costs of employers. Even so, the bill would permit employers to account for the smoking habits of their employees when budgeting for insurance coverage by giving them the option of requiring smokers to contribute more for coverage than nonsmokers.

Against:

Likening employment discrimination against smokers to inalienable civil rights such as protection from discrimination on the basis of race or gender is inappropriate. As smoking is an activity in which people choose to participate, they should be held responsible for any consequences of that choice.

Against:

If the bill truly were a civil rights bill it would prohibit employers from discriminating against people based on their choice of living arrangements, form of entertainment or recreation, and other activities conducted outside the work place. The bill now is merely a smokers' rights bill.

Response:

Safeguarding the rights of workers to pursue a broad range of activities and interests outside the workplace is certainly a worthwhile goal, but one that exceeds the scope of this legislation. Broader worker protections should be provided in statute later. The most compelling need now is to protect smokers against discrimination as it is this group of workers that many companies have targeted in their employment practices. The bill not only would help protect these employees, but also would set precedent for guarding the rights of other workers to engage in other legal activities in their private lives.

Against:

Allowing employers to provide less expensive health coverage to nonsmokers and charge more to smoking employees would be discriminatory.

Response:

Employers and nonsmoking employees should not have to subsidize health care costs incurred because of the unhealthy habits of smoking employees. Requiring employers and nonsmokers to do so would constitute discrimination against them.

SUGGESTED AMENDMENTS:

The American Lung Association suggests amending the bill to: 1) exempt from its provisions businesses with 10 or fewer employees, 2) remove public agencies and nonprofit organizations from its provisions, and 3) allow employers to refuse hiring or continuing to employ someone who smokes if the requirement to be a nonsmoker is a "bona fide occupational qualification."

POSITIONS:

The American Civil Liberties Union supports the bill. (6-8-92)

The Michigan State Chamber of Commerce is not opposed to the bill. (6-8-92)

The American Cancer Society is not opposed to the bill. (6-8-92)

The American Lung Association would not oppose the bill if its suggested amendments were adopted. (6-5-92)

The Michigan Coalition on Smoking or Health is not actively opposed to the bill, but still has serious concerns about some of its provisions. (6-8-92)