IS LEISURE-TIME SMOKING A VALID EMPLOYMENT CONSIDERATION?

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I. INTRODUCTION

It has been over forty years since the Surgeon General first released a report stating that cigarette smoking is a health hazard and a primary contributor to lung disease. Since that report, substantial research has established that smoking dramatically increases the risk of death from a plethora of conditions. Despite widespread awareness and acceptance of the risks of smoking, an estimated 44.5 million adults, or 20.9% of the United States population, continue to smoke. It has been estimated that cigarette smoking is now responsible for 440,000 deaths annually in the United States. Another estimated 8.6 million persons in the United States suffer from serious illnesses attributable to smoking.

In the years since the Surgeon General’s initial report, the evidence has mounted that the costs attributable to smoking are reflected not only in smokers’ decreased longevity and increased

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3 See, e.g., FRED C. PAMPEL, TOBACCO INDUSTRY AND SMOKING 43 (2004) (stating that a 1999 Gallup poll confirmed that there is virtually unanimous agreement among smokers and nonsmokers that smoking is harmful and causes lung cancer).

4 Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, Cigarette Smoking Among Adults—United States, 2004, 54 MORBIDITY & MORTALITY WKLY. REP. 1121, 1122 (2005) [hereinafter Cigarette Smoking Among Adults].


6 Id.
risk of disease, but also in the workplace. The highest prevalence of smoking in the United States occurs during peak employment years in the twenty-five to forty-four-year-old age groups. Health care costs for smokers are estimated to be as much as forty percent higher than those for nonsmokers. Employers of smokers suffer a substantial loss of productivity attributable to smoking. In the United States, productivity costs attributable to smoking total an estimated $92 billion annually. Many of the employment costs attributable to employee smokers, including increased health insurance costs and productivity losses due to absenteeism, are ultimately shared by nonsmoking employees.

Currently, twenty-seven states and the District of Columbia have adopted statutes which prohibit enforcement of employment policies that penalize employees and potential employees for engaging in legal activities such as smoking during non-employment periods. Notwithstanding the substantial support for legislation prohibiting

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8 See Cigarette Smoking Among Adults, supra note 4, at 1123.
10 ROBERT B. GRAUBARD & STEPHEN K. HEALY & FRANK A. SLOAN ET AL., supra note 7, at 212 (finding that between the ages of twenty-four and sixty-four, a man who smoked at age twenty-four would lose 280 work days attributable to smoking and a woman would lose forty-five days).

12 See SLOAN ET AL., supra note 7, at 193–94. At least one study has found that nonsmokers subsidize the life insurance policies of smokers. Id. at 193. The subsidy was $2,019 per female twenty-four-year-old smoker and $12,013 per male twenty-four-year-old smoker. Id. Presumably, because most employers make no distinction between smokers and nonsmokers as to employer provided health benefits, the benefits provided to smokers are subsidized by nonsmoking employees. Id.
13 ARIZ. REV. STAT. ANN. § 36-601.02 (West 2006); COLO. REV. STAT. ANN. § 24-34-402.5 (West 2006); CONN. GEN. STAT. ANN. § 31-40s (West 2006); D.C. CODE § 7-1703.03 (2006); ILL. COMP. STAT. ANN. 55/5 (West 2006); IND. CODE ANN. § 22-5-4-1 (West 2006); KY. REV. STAT. ANN. § 344.040 (West 2005); LA. REV. STAT. ANN. § 23:966 (2006); ME. REV. STAT. ANN. tit. 26, § 597 (2006); MINN. STAT. ANN. § 181.938 (West 2006); MO. ANN. STAT. § 290.145 (West 2006); MONT. CODE ANN. § 39-2-313 (2005); NEV. REV. STAT. ANN. § 613.333 (West 2005); N.H. REV. STAT. ANN. § 275:57-a (2006); N.J. STAT. ANN. § 34:6B-1 (West 2006); N.M. STAT. ANN. § 50-11-13 (West 2006); N.Y. LAB. LAW § 201-d (McKinney 2006); N.C. GEN. STAT. ANN. § 95-28.2 (West 2006); N.D. CENT. CODE § 14-02-4-03 (2005); OKLA. STAT. ANN. tit. 40, § 500 (West 2006); OR. REV. STAT. ANN. § 659A.315 (West 2005); R.I. GEN. LAWS § 23-20.7.1-1 (West 2004) (repealed 2005); S.C. CODE ANN. § 41-1-85 (2005); S.D. CODIFIED LAWS § 60-4-11 (2006); VA. CODE ANN. § 22-2902 (West 2006); W. VA. CODE ANN. § 21-3-19 (West 2006); WIS. STAT. ANN. § 111.31 (West 2005); WY. STAT. ANN. § 27-9-105 (2005).
lifestyle discrimination, a significant number of states continue to permit discrimination based on off-duty activities. In those states, an increasing number of employers have opted to enact policies precluding the employment of smokers. Currently, approximately six percent of companies refuse to hire smokers. In contrast to the draconian no-smoking-ever approach taken by some employers in states that tolerate lifestyle discrimination, other employers in those states have adopted a middle-of-the-road approach to leisure-time smoking by employees. Those employers, rather than proscribing employment of smokers, have attempted to pass on at least some of the additional costs attributable to smoking to employees that smoke.

This Article examines the current approaches to employment discrimination based on off-duty smoking. Part I examines the constitutional, statutory, and common law background giving rise to the differing views regarding employer consideration of off-duty behavior in making employment decisions. Both federal and state constitutional attacks on employment discrimination against smokers have failed. Similarly, no federal statute prohibits employers from refusing to hire smokers. Finally, a right to be free from employer scrutiny of employee off-duty smoking is not protected by tort law.

Part III of this Article examines the majority view that off-duty smoking...
smoking is not a legitimate employment consideration. An employee’s right to engage in leisure-time smoking without employment consequences is defended on both the basis of privacy and the connected notion that condoning discrimination against smokers constitutes a slippery-slope which will result in increased leisure-time scrutiny by employers.

Part IV of this Article reviews the arguments favoring allowance of discrimination against employees who smoke. From an economic perspective, a smoking employee simply costs more than one who does not.

Part V of this Article discusses the “middle” approach to employer scrutiny of off-duty smoking. This approach rejects the current all-or-nothing views on leisure-time discrimination against employee smoking and attempts to pass on at least some of the costs attributable to employee smoking to those employees who smoke.

Finally, in Part VI, this Article concludes that the current all-or-nothing approaches have unfair consequences to both employees and employers. A preferable approach would be state legislation with rational limitations on employment sanctions against employees and potential employees who smoke. Such a legislative scheme would allow the employer to shift some of the costs of smoking that are traditionally borne by the employer and employees (smoking and nonsmoking) to employees who smoke.

II. THE BACKGROUND AND BASIS FOR THE DIFFERING VIEWS ON EMPLOYMENT DISCRIMINATION BASED ON LEISURE-TIME SMOKING

Employees who have challenged employment policies considering off-duty behavior have based their claims on constitutional rights,21 statutory rights and prohibitions,22 and common law rights.23 Nonetheless, absent specific statutory or contractual prohibitions against an employer’s consideration of leisure-time activities, such as smoking, employers have been successful in protecting their right

21 See, e.g., Grusendorf v. City of Okla. City, 816 F.2d 539, 540 (10th Cir. 1987); City of N. Miami v. Kurtz, 653 So. 2d 1025, 1026 (Fla. 1995).
22 See, e.g., Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1462 (D. Colo. 1997). An airline employee discharged for writing a letter to a newspaper that was critical of his employer filed suit under a Colorado statute which was “created to protect employees in their ‘off-the-job-privacy.’” Id. (quoting Gwin v. Chesrown Chevrolet, Inc., 931 P.2d 466, 469 (Colo. Ct. App. 1996)).
to hire and fire employees at their will.\textsuperscript{24}

\textbf{A. Constitutional Claims Based on Privacy Interests}

In the public sector, it has been argued that employer discrimination against leisure-time smoking amounts to an impermissible constitutional violation of the state employee or applicant’s constitutional right to privacy and due process.\textsuperscript{25} However, federal constitutional attacks on state employment decisions based on leisure-time smoking have met with little success.\textsuperscript{26}

In \textit{Grusendorf v. City of Oklahoma City}, the constitutionality of the Oklahoma City Fire Department’s no-smoking-ever rule for fireman trainees was at issue.\textsuperscript{27} There, the plaintiff was fired from his position as a firefighter trainee when he was observed smoking during a lunch break.\textsuperscript{28} At the time he was hired, the plaintiff had signed a statement indicating that he understood and agreed to the Fire Department’s no-smoking policy.\textsuperscript{29} After being fired from his trainee position, the plaintiff brought suit claiming that the nonsmoking requirement constituted an unconstitutional infringement of his rights to liberty, property, due process, and privacy.\textsuperscript{30} The district court dismissed his claims.\textsuperscript{31}

On appeal, the Tenth Circuit Court of Appeals addressed whether the regulation violated a federal constitutional right to privacy and concluded that it did not.\textsuperscript{32} As a threshold matter, the court addressed whether the right to smoke cigarettes was a fundamental right subject to heightened constitutional protection.\textsuperscript{33} Relying on \textit{Carey v. Population Services International},\textsuperscript{34} the court concluded

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\item \textsuperscript{25} See, \textit{e.g.}, \textit{Grusendorf}, 816 F.2d at 540–41.
\item \textsuperscript{26} For a discussion on constitutional challenges to discrimination based on leisure-time activities, see Terry Morehead Dworkin, \textit{It's My Life-Leave Me Alone: Off-the-Job Employee Associational Privacy Rights}, 35 AM. BUS. L.J. 47, 78–81 (1997).
\item \textsuperscript{27} 816 F.2d at 540
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. (explaining that the district court “granted the defendants’ motion to dismiss Grusendorf’s suit and awarded the defendants $2,250 in attorney’s fees”).
\item \textsuperscript{32} Id. at 543 (“Since the non-smoking regulation appears rational on its face and since Grusendorf has not challenged this prima facie rationality by specifying any irrational aspects of the regulation, we hold that the rule is valid and enforceable.”).
\item \textsuperscript{33} Id. at 541.
\item \textsuperscript{34} 431 U.S. 678 (1977).
\end{itemize}
that smoking was distinguishable from rights such as marriage, procreation, contraception, family relationships, child rearing, and education, all of which were previously recognized as fundamental by the Supreme Court. Nonetheless, the court concluded that there was a Fourteenth Amendment liberty interest involved in the trainees’ right to smoke while off duty. Accordingly, to be constitutionally permissible, the no-smoking-ever regulation could not be arbitrary and must be rationally connected to public safety. The court found that there was a rational basis for the regulation because “good health and physical conditioning are essential requirements for firefighters.” In reaching its conclusion, however, the court chastised the plaintiff for failing to raise the argument that the regulation was irrational, noting that the regulation was seemingly arbitrarily limited to first-year trainees only. Thus, the court invited constitutional attack on off-duty smoking regulations that may be arbitrary or irrational as applied.

In City of North Miami v. Kurtz, the Florida Supreme Court considered whether a city job applicant’s state and federal constitutional rights to privacy were violated by the City of North Miami’s requirement that job applicants sign an affidavit stating that they had not used tobacco or tobacco products during the one-year period preceding the job application. The case arose when Arlene Kurtz attempted to apply for a clerk-typist position with the City of North Miami. At the time of her interview, she was informed that she was required to sign an affidavit stating that she had not used tobacco products for one year. Ms. Kurtz refused and brought suit seeking injunctive and declaratory relief.

Initially, the trial court held that neither the state nor the Federal Constitution afforded Ms. Kurtz a right to privacy with respect to off-duty smoking and granted the city’s motion for summary judgment. The Third District Court of Appeal reversed,
concluding that Ms. Kurtz did have a right to privacy with respect to smoking under Florida’s state constitution and that the City of North Miami’s interests were insufficient to outweigh the intrusion into her privacy. The Florida Supreme Court reversed and remanded with directions that the trial court’s judgment be reinstated. Two justices dissented.

Florida, together with ten other states, incorporates privacy protection into its state constitution. The Kurtz majority opinion, written by Justice Overton, first addressed whether the Florida Constitution—with its right to privacy—protected Ms. Kurtz from governmental intrusion into non-work-related activities. In concluding that it did not, the court relied on the pervasive public nature of smoking. The court reasoned that smokers must frequently disclose whether they smoke in obtaining seating in restaurants, renting cars, and reserving motel rooms. Accordingly, the court held that smokers did not have an expectation of privacy within the meaning of the Florida Constitution.

Turning to the Federal Constitution, the court again concluded that Ms. Kurtz did not have a cognizable right of privacy with respect to smoking. First, the court examined whether Ms. Kurtz’s “right to smoke” constituted a recognized fundamental interest entitled to protection absent a compelling state interest. In accord with Grusendorf, the court concluded that smoking did not violate any provision of either the Florida or the federal constitutions.

45 Id.
46 Id. at 1029.
47 Justice Kogan dissented in an opinion in which Justice Shaw concurred. Id. (Kogan, J. dissenting).
49 Kurtz, 653 So. 2d at 1026, 1028. Article I, section 23 of the Florida Constitution provides: “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein.” FLA. CONST. art. I, § 23.
50 Kurtz, 653 So. 2d at 1028.
51 Given that individuals must reveal whether they smoke in almost every aspect of life in today’s society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida’s right of privacy is not implicated under these unique circumstances.
Id.
52 Id.
53 Id. at 1028–29.
54 Id. at 1028.
55 See supra text accompanying notes 27–38.
not implicate fundamental rights such as “marriage, procreation, contraception, family relationships, and the rearing and educati[on] of children.”\textsuperscript{56} Notwithstanding the court’s determination that smoking did not constitute a fundamental right, the court concluded that even if the city’s policy infringed upon a liberty interest, there was a sufficient rational basis for the rule given the cost savings realized by the city in refusing to hire workers who smoked.\textsuperscript{57}

The majority’s conclusion, that the regulation did not violate any of the plaintiff’s constitutional rights, was not without criticism. Justice Kogan, in a dissent in which he was joined by Justice Shaw, questioned the rationality of a policy which precluded hiring applicants who had smoked during the year prior to applying for a job, but failed to proscribe smoking once employment was obtained.\textsuperscript{58}

Nonetheless, in light of the conclusions in \textit{Grusendorf} and \textit{Kurtz}, it is apparent that both state and federal constitutional attacks on policies precluding the employment of smokers are unlikely to succeed absent some showing that the policy is arbitrarily applied, is a pretext for another type of discrimination, or is unsupported by any relevant employment purpose.

\textbf{B. Federal Legislation and “Smoker” Discrimination}

The crux of employment in the United States is that it is at the will of the employer.\textsuperscript{59} In other words, absent some contractual, public policy, statutory, or constitutional prohibition, “either an employee or an employer may terminate an at-will employment contract at any time, for any reason, without liability.”\textsuperscript{60} In the employment arena, an employee’s right to privacy is frequently in

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\item \textsuperscript{56} \textit{Kurtz}, 653 So. 2d at 1027–28.
\item \textsuperscript{57} \textit{Id}. at 1028–29. The court stated that:
[U]nder the special circumstances supported by the record in this case, we would find that the City has established a compelling interest to support implementation of the regulation. As previously indicated, the record reflects that each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees; that, of smokers who have adhered to the one year cessation requirement, a high percentage are unlikely to resume smoking; and that the City is a self-insurer who pays 100\% of its employees’ medical expenses.
\item \textsuperscript{58} \textit{Id}. at 1029 (Kogan, J., dissenting). “As the majority itself notes, job applicants are free to return to tobacco use once hired. I believe this concession reveals the anti-smoking policy to be rather more of a speculative pretense than a rational governmental policy.” \textit{Id}.
\item \textsuperscript{60} Melnick v. State Farm Mut. Auto. Ins. Co., 749 P.2d 1105, 1109 (N.M. 1988).
\end{enumerate}
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direct conflict with the employer’s right to terminate the employee at his discretion. Where an employee’s privacy or other right is recognized by the government as one important enough to trump the at-will employment doctrine, statutes have been enacted to limit the doctrine of at-will employment and to offer the employee protection.

Although some federal statutes are specifically aimed at employment discrimination, none have been construed to reach so far as to regulate employer scrutiny of the smoking or nonsmoking status of employees. For example, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against disabled individuals on the basis of the disability “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” To be disabled within the meaning of the ADA, a claimant must establish that she has either “a physical or mental impairment that substantially limits one or more of [her] major life activities...; a record of such an impairment; or [evidence that she has] been regarded as having such an impairment.” In addition, the ADA prohibits employers from requiring medical examinations or making other disability-related inquiries to determine if an employee is disabled (or the extent of any such disability) unless the examination or inquiry is “job-related and consistent with business necessity.”

The ADA, with its focus on preventing discrimination against those with a significant physical or mental impairment, is inapplicable to claims brought by employees or applicants who are not restricted in life activities. Although smoking may lead to eventual disability, it is not, in and of itself, a disability because it does not limit major life activities as required under the ADA. Accordingly, employees faced with lifestyle discrimination based on

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61 See Kim, supra note 23, at 671, 675.
62 See supra note 13 and accompanying text.
64 Id. § 12112(a).
65 Id. § 12102(2).
66 Id. § 12112(d)(4)(A).
67 See Bartlett v. N.Y. State Bd. of Law Exam’rs, 226 F.3d 69, 79 (2d Cir. 1998) (explaining that whether an individual has a disability under the ADA requires a determination of “whether that individual suffers from a ‘physical or mental’ impairment;...whether the life activity on which the individual relies amounts to a ‘major’ life activity; and...whether the specified impairment ‘substantially limits’ that major life activity”).
smoking have no recourse under the ADA. Similarly, Title VII of the Civil Rights Act of 1964\textsuperscript{68} prohibits discrimination in employment based on race, national origin, sex, and religion.\textsuperscript{69} State counterparts to the Civil Rights Act may also prohibit discrimination as to height and weight.\textsuperscript{70} Because discrimination against smokers does not implicate, except tangentially,\textsuperscript{71} race, national origin, sex, or religion, employees and applicants subject to discrimination based on leisure-time smoking have no recourse under Title VII or similar state enactments.

In addition, as a result of the considerable body of evidence concerning the effect of second-hand smoke,\textsuperscript{72} there has been significant government regulation of smoking.\textsuperscript{73} For example, smoking is limited on airplanes,\textsuperscript{74} in the workplace,\textsuperscript{75} and in public buildings.\textsuperscript{76} However, government regulations aimed at protecting nonsmokers from second-hand smoke have not reached so far as to preclude smoking in private or to preclude employment consideration of private, off-duty smoking.

Although employers are prohibited from discriminating against employees and potential employees based on disability,\textsuperscript{77} race, national origin, sex, religion,\textsuperscript{78} age,\textsuperscript{79} whistle blowing,\textsuperscript{80} and union
activities, no current federal statute specifically precludes discrimination based on leisure-time smoking. Employer discrimination based on off-duty smoking would only be prohibited under federal law if it implicated other protected interests such as disability or race. However, because smoking rarely implicates a protected class or characteristic, absent state legislation or a common law privacy interest, employers are free to exercise their at-will right to arbitrarily or otherwise exclude employees who smoke from the workforce.

C. The Common Law Tort of Invasion of Privacy as the Basis for Claims in the Private Sector

The pervasive argument—that an employer’s consideration of leisure-time smoking violates a legally protected common law privacy interest—is without legal merit. Because there is no recognized state or federal constitutional right to be free from non-arbitrary employment consideration of off-duty smoking, absent leisure-time discrimination legislation, an employee or prospective employee whose employer implements a no-smoking-ever policy would have recourse against her employer only if a contractual or common law right encompasses smoking. At least facially, because individual privacy is implicated by employer consideration of leisure-time smoking, the tort of invasion of privacy would be the most likely source of common law protection for employees.

Recognition of an individual’s right to privacy is a relative newcomer to tort law. Over the last century, the majority of states that have considered an individual’s right to privacy have

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82 See, e.g., Gely, supra note 24, at 711–13 (discussing the doctrine of employment at-will and its limitations).
83 See Victor Schachter, Privacy in the Workplace, in 6TH ANNUAL INSTITUTE ON PRIVACY LAW: DATA PROTECTION—THE CONVERGENCE OF PRIVACY AND SECURITY 153, 231 (2005) (“Such onerous policies [restrictions forbidding off-duty smoking] strikes [sic] at the heart of traditional notions of liberty, and employer’s [sic] face an uphill battle in attempting to successfully defend restrictions against off-duty smoking or other legal activities against a common law privacy action.”).
84 See WILLISTON & LORD, supra note 59, § 54:39.
85 See Restatement (Second) of Torts § 652A (1977) (describing the scope of the right of privacy).
86 The genesis of a common law right to privacy has been attributed to a law review article which urged recognition of an individual’s right to enjoy life and “to be let alone.” Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890).
The right to privacy is protected by four separate torts, each of which protects individuals from interference with their interest in leading a "private life, free from the prying eyes, ears and publications of others." The right of privacy arguably implicated by a private employer's consideration of leisure-time smoking is an unreasonable intrusion upon the seclusion of another.

However, the privacy tort of unreasonable intrusion upon the seclusion of another affords little protection for an employee whose employer discriminates against leisure-time smokers. The right to be free from intrusion upon seclusion requires any actionable intrusion to be not only unreasonable, but also intrusive upon the private affairs of the plaintiff. The mere fact that smoking may take place in the privacy of the home is insufficient to render it a private activity subject to tort protection. In the case of off-duty smoking, those courts which have considered whether leisure-time smoking is a private affair implicating a legitimate privacy interest have concluded that it is not. Smokers must disclose their status as smokers when being seated in restaurants, renting hotel and motel rooms, and renting cars. Today, smokers must reveal that they smoke in almost every aspect of life. Thus, a claim for intrusion upon seclusion cannot be maintained where the activity, like smoking, is one which is habitually disclosed or undertaken in public.

In addition, most employers who police off-duty smoking require

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87 See Restatement (Second) of Torts § 652A cmt. a (noting that the first judicial recognition of the right to privacy was in 1905).
88 The four tort actions under the rubric of invasion of privacy are: (1) "unreasonable intrusion upon the seclusion of another," (2) "appropriation of the other's name or likeness," (3) "unreasonable publicity given to the other's private life," and (4) "publicity that unreasonably places the other in a false light before the public." Id. § 652A(2).
89 Id. § 652A cmt. b.
90 See id. § 652B. The Restatement provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Id.
91 Id.
92 See, e.g., Swerdlick v. Koch, 721 A.2d 849, 858 (R.I. 1998) ("Activities occurring in plain view of the public are not entitled to the protection of [a] privacy statute merely because they occur on private property in the vicinity of the actor's home.").
93 See, e.g., City of N. Miami v. Kurtz, 653 So. 2d 1025, 1029 (Fla. 1995).
94 Id. at 1028.
95 Id.
96 See, e.g., Gill v. Hearst Publ'g Co., 253 P.2d 441, 445 (Cal. 1953) (finding that plaintiffs had waived their right to privacy when they were photographed in an affectionate pose in a public place).
as a condition of employment, or continued employment, that employees agree to disclose their smoking status.97 No intrusion into privacy occurs where the employer has permission to commit the intrusive act98 or when the employee is on notice of the employment policy.99 Thus, where an employer has given notice of a no-smoking-ever policy, the smoker employee is caught between disclosing the smoking and being fired and refusing disclosure and being fired.100

Even if an employee or prospective employee could establish that she had a reasonable expectation of privacy in connection with her smoking habit, she would likely fail to surmount the obstacle of establishing that the employer’s scrutiny into the employee’s smoking was unreasonable.101 A balancing test is generally utilized in determining whether an employer’s intrusion into an area the employee deems private is unreasonable.102 Thus, the significance of the employee’s privacy interest is balanced against the employer’s business interest.103 Assuming that employers have a legitimate

97 See Kim, supra note 23, at 675–76 (discussing advance notice and consent of intrusion of privacy).

[Thus], when the employer gives notice in advance that it intends to engage in the same intrusive practices, the protection offered by the common law tort is problematic. If the employee accedes to the employer’s intrusive practices (or merely continues to work after receiving notice), her employer will likely assert that she consented to the intrusion as a defense to her claim that her privacy was wrongfully invaded. If, on the other hand, she objects to the intrusion and is fired as a result, the common law privacy tort provides no relief, because no invasion of her privacy has occurred. She has suffered the loss of her job, but no loss of privacy. Id. (internal citations omitted).

98 See O’Donnell v. United States, 891 F.2d 1079, 1083 (3d Cir. 1989) (concluding that an intrusion occurs when an actor “believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act”); see also Baggs v. Eagle-Picher Indus. Inc., 750 F. Supp. 264, 272 (W.D. Mich. 1990), aff’d, 957 F.2d 268 (6th Cir. 1992) (holding that employees who refused to submit to drug testing had no cause of action for invasion of privacy because there had been no intrusion).

99 See, e.g., TBG Ins. Servs. Corp. v. Zieminski, 96 Cal. App. 4th 443, 452 (Ct. App. 2002). In Zieminski, plaintiff agreed that a computer provided by his employer would only be used for business purposes. Id. at 446. The company fired plaintiff for accessing pornographic web sites and demanded the home computer be produced. Id. Plaintiff claimed that the computer contained personal information. Id. at 447. The court held that no privacy interest was implicated because plaintiff had notice of the company’s policy and, in addition, had signed the policy statement. Id. at 452.

100 See Kim, supra note 23, at 675–76 (discussing advance notice, consent, and employment generally).

101 City of N. Miami v. Kurtz, 653 So. 2d 1025, 1028–29 (Fla. 1995) (requiring that such intrusions serve a compelling government interest and be the least intrusive means of addressing that interest); see supra text accompanying note 57.


103 Id.
business interest in reducing employment costs, such as the increased health care costs incurred due to employees who smoke, a policy requiring employee self-disclosure of smoking habits may not be unreasonable.104

III. LEGISLATION AND EMPLOYER CONSIDERATION OF OFF-DUTY SMOKING

Weyco, Inc. (Weyco)105 became famous—or infamous—as a result of its well-publicized tobacco-free policy.106 As adopted, the Weyco policy required current employees to quit smoking or be fired, and employees who were identified as smokers on the target date were terminated.107 The Weyco policy provided that employees were to be subjected to random breath tests for carbon monoxide. A positive test result would be followed by a confirmatory urine test.108 On January 1, 2005, Weyco fully implemented its no-smoking-ever policy, and employees were required to maintain a tobacco-free status at all times.109

The Weyco tobacco-free policy has been the darling of the popular media. In anticipation of, or in response to, the Weyco approach to employee smoking, the majority of states have enacted statutes prohibiting employers from basing employment decisions on off-duty smoking.110 Although many are broader, most of the statutes are aimed, at least in part, at preventing employers from firing, refusing to hire, or otherwise discriminating against employees or prospective employees who smoke cigarettes.111 At least one

104 See discussion supra Part I.A.
106 See WEYCO News Release, Background on WEYCO Inc.’s Tobacco-Free Policy (Jan. 25, 2005), http://www.weyco.com/web/company/news/012520050001.jsp (last visited Sept. 19, 2006) [hereinafter WEYCO News Release]. According to Weyco, the tobacco-free policy has been an ongoing company program since the fall of 2003. Id. The policy was implemented in gradual stages to encourage staff members who use tobacco products to become healthier and remain Weyco, Inc. employees. Id.
107 Sharon Linstedt, A Smoker on Payroll Can Cost Firms up to $3,800, BUFFALO NEWS, Feb. 20, 2006, at B7. Weyco reported that only three employees opted out of the program and sought employment elsewhere. See WEYCO News Release, supra note 106.
108 Linstedt, supra note 107, at B7.
109 Id.
110 See supra note 13 and accompanying text.
additional state is poised to join the majority of states which prohibit employers from discriminating against current and prospective employees on the basis of engaging in legal activities such as smoking outside of the employment premises.  

There is considerable support for current and proposed legislation prohibiting employers from implementing discriminatory policies associated with employee leisure-time smoking. Those supporting legislative prohibitions against lifestyle discrimination urge that employment consideration of legal, leisure-time activities constitutes an invasion of privacy.  In addition, most supporters of legislative intervention argue that allowing employer lifestyle discrimination is a slippery-slope which will lead to discrimination based on other unhealthy habits such as leisure-time alcohol consumption and unhealthy eating.

Advocates of prohibitions against “smoker discrimination” invariably argue that consideration of leisure-time activities in making employment decisions improperly intrudes into personal freedoms. This view is based, in part, on a visceral belief that

The word ‘privacy’ means many different things to different people. One widely accepted meaning, however, is the right to be left alone. This cherished right is now under attack, but the government is not the primary culprit. Private employers are using the power of the paycheck to tell their employees what they can and cannot do in the privacy of their own homes. The American Civil Liberties Union believes that what a person does during non-working hours away from the workplace should not be the basis for discrimination.

ACLU, supra.
those things done outside the workplace are private and, unless illegal, should be off-limits to employer scrutiny. Proponents of anti-discrimination legislation similarly argue that when employers discriminate based on leisure-time activities, the personal autonomy of employees is unfairly controlled by the economic superiority of the employer. In this regard, any inherent right of privacy in the workplace “collide[s] headlong with the doctrine of employment at will.”

The right to privacy continues to be lauded as the foremost justification for statutory proscriptions against employment discrimination based on leisure-time activities. Not surprisingly, one of the biggest proponents of the right to privacy with respect to smoking is the tobacco industry. Thus, the Tobacco Institute has urged, in connection with employer discrimination against smokers, that “[r]easonable people agree that no one should be able to dictate what legal activities we can or can’t do in our own homes.” Similarly, the American Civil Liberties Union has denounced employment discrimination based on off-duty smoking on the basis that such discrimination infringes on one’s civil liberties or inherent right to privacy.

The belief that employee privacy is infringed by consideration of off-duty smoking has, no doubt, been the prime justification for legislation prohibiting employment discrimination based on off-duty smoking. Advocates of such legislation continue to urge that legislation is necessary to protect workers’ right to privacy when engaged in off-duty activities.

In addition, the privacy argument has been buttressed by the ubiquitous slippery-slope argument that if we do not protect the “right” to smoke in private, workers will be subjected to more offensive intrusions into their private lives. The slippery-slope argument in support of prohibiting employment consideration of off-duty smoking is pervasive. A slippery-slope has been defined as “one that covers all situations where decision A, which you might

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117 See Kim, supra note 23, at 729 (stating that “[a]ny employer intrusion on core aspects of personal privacy thus requires justification”).
118 Bosch, supra note 111, at 659.
119 Kim, supra note 23, at 671.
121 See supra note 116 and accompanying text.
122 Id.
123 See infra notes 125–26 and accompanying text.
find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose.”\textsuperscript{124} In the context of employment discrimination on the basis of smoking, this argument is generally stated: “[I]f employees are not free to smoke outside the workplace, are we next going to restrict what they are allowed to eat?”\textsuperscript{125} This concern has been taken to its extreme. For instance, one commentator has stated, “because drinking beer could lead to alcoholism and liver problems, and eating eggs could lead to high cholesterol and heart disease, these activities could be banned by employers concerned about health insurance costs.”\textsuperscript{126}

One of the greatest problems with the slippery-slope argument is that it is “a convenient way of warning of the dire effects of some course of action without actually having to criticize the action itself, which is what makes it a favorite ploy of hypocrites.”\textsuperscript{127} Thus, although many may agree that it is fair for employers to consider the increased costs incumbent in hiring or retaining employees who smoke, those same people might oppose employment consideration of smoking because they oppose employer scrutiny of how many eggs employees eat or how many beers employees drink in one week. Using the slippery-slope argument, proponents of employment consideration of off-duty smoking nonetheless oppose it because they oppose employer consideration of employee egg eating and beer drinking.

Proponents of leisure-time privacy legislation also argue that enforcement of discriminatory policies constitutes a slippery-slope. Thus, although self-identification at the outset of an employer’s no-smoking-ever policy may suffice, eventually “employers will have to hire spies to follow people away from work and/or require frequent universal medical testing . . . in order to enforce the policy.”\textsuperscript{128} Although, admittedly, most employers who discriminate based on smoking rely on employee disclosure of smoking status, it is true that employers such as Weyco have resorted to more intrusive measures, such as urine testing, to enforce their no-smoking-ever

\textsuperscript{125} Zgrodnik, supra note 75, at 1254.
\textsuperscript{127} Fresh Air: Slippery Slopes (NPR radio broadcast July 1, 2003), http://www-csli.stanford.edu/~nunberg/slipslop.html.
\textsuperscript{128} Nat’l WorkRights Inst., supra note 15.
However, when more intrusive means of policing off-duty behaviors are employed, an employer risks a claim for an actionable invasion of privacy.\textsuperscript{130}

The slippery-slope argument neatly meshes with the privacy argument. Nobody contends that personal leisure-time privacy should be abandoned altogether. Although there may be considerable tolerance for employer consideration of activities, such as smoking, which are already highly regulated\textsuperscript{131} and public in nature,\textsuperscript{132} an extension to other activities which are not regulated, but public in nature, such as eating, would be undesirable to many. Although smoking itself is not necessarily a private activity, even nonsmokers care about employer intrusion into their private lives.\textsuperscript{133} The slippery-slope logic is appealing; the belief that employers will initially ask about your smoking habits, but will ultimately ask about your diet and your sex life.

\textbf{IV. WHY EMPLOYMENT DISCRIMINATION AGAINST SMOKERS IS GOOD BUSINESS}

It is undisputed that employers incur costs as a result of hiring and retaining employees who smoke.\textsuperscript{134} If employers do not impose a surcharge on smoker employees, then those additional costs are passed onto, or shared with, nonsmoking employees.\textsuperscript{135}

Interestingly, while employers who hire smokers incur decreased productivity and increased health care costs when employees smoke, thus bearing much of the cost of smoking, because of the decreased life expectancy of smokers, the government ultimately realizes a cost savings as a result of smoking.\textsuperscript{136}

There is no doubt that the greatest harms caused by employee

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\textsuperscript{129} Linstedt, supra note 107, at B7.


\textsuperscript{132} See generally Grusendorf v. City of Okla. City, 816 F.2d 539 (10th Cir. 1987).

\textsuperscript{133} See, e.g., NAT’L WORKRIGHTS INST., supra note 15 (“[T]he issue is not smoking . . . but privacy . . . .”).

\textsuperscript{134} See Barendregt et al., supra note 9, at 1053.

\textsuperscript{135} SLOAN ET AL., supra note 7, at 108 (reasoning that “[b]ecause employers do not impose an extra contribution on employees who smoke, a plausible assumption is that any effect of smoking on [health] plan outlays is borne equally by employees enrolled in the plan”).

\textsuperscript{136} Id. at 125 (noting that “smoking actually save[s] the Medicare program money”). Both male and female smokers collect less social security benefits than nonsmokers as a result of decreased life expectancy. Id. at 155–56.
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smokers are inflicted upon the smokers themselves. Nonetheless, the health consequences to employee smokers have a ripple effect with employer consequences. It has been estimated that employees who smoke cost employers approximately $5,000 per smoker annually. In *Kurtz*, the court took note of evidence presented by the City of North Miami that, in 1981, the city incurred in excess of $4,000 in costs attributable to each employee who smoked. Employees who smoke have higher absenteeism from employment than do nonsmokers and use more health-care services than do nonsmokers who are younger than age sixty-five.

From the employer’s perspective, given a choice between a nonsmoking employee and a smoking employee, with all other things being equal, it would be an irrational business decision to choose the smoker. In dollars and cents, the employer who chooses to hire the smoker has opted to pay more for services which can be purchased for less. In other words, it is good business to hire nonsmokers.

Nonetheless, the employer who opts for the no-smoking-ever rule has made a business decision to forego hiring from a significant segment of the available labor market. In certain industries, a comprehensive ban on employment of smokers may be impracticable. For instance, because the highest incidence of smoking is in the twenty-five to forty-four-year-old age groups and because by education level, the highest incidence of smoking is within the segment of the population who has earned a General Educational Development diploma and those with a ninth to eleventh education, those businesses seeking a significant pool of unskilled laborers could ultimately limit the applicant pool to a point that any savings from proscribed smoking would be offset by the increased wages necessary to broaden the applicant pool.

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137 See *supra* text accompanying notes 2–6.
138 See Carol H. Ott et al., *Smoking-Related Health Behaviors of Employees and Readiness to Quit: Basis for Health Promotion Interventions*, 53 J. AM. ASSOC. OF OCCUPATIONAL HEALTH NURSES 249, 249 (2005).
139 City of N. Miami v. *Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995); see *supra* note 57 and accompanying text.
140 See *Sloan et al.*, *supra* note 7, at 211–12 (noting that “[n]umerous studies have documented a positive association between smoking and absenteeism”).
141 *Id.* at 115–21.
142 Cigarette Smoking Among Adults, *supra* note 4, at 1123.
143 *Id.*
144 *Id.* at 1122–23.
145 Kim, *supra* note 23, at 710 (providing a discussion on the pitfalls of the market argument as a basis of protection for employee privacy interests).
Predominantly white collar service industries have the most to gain and least to lose by imposing a leisure-time smoking proscription. Those in favor of employment discrimination against nonsmokers claim that such policies in effect provide incentives to employees to adopt healthy lifestyles. In fact, there is some, at least anecdotal, evidence which supports the proposition that no-smoking-ever policies do provide incentives for at least some employees to quit smoking. Perhaps most importantly, employees who are precluded from desired employment due to smoking policies are given the choice to quit smoking and to optimize not only their health, but also their job opportunities.

The benefits of employment policies precluding off-duty smoking are numerous. Health care costs are reduced, absenteeism is reduced, and nonsmoking employees are not bearing the burden of costs associated with smoking. When employers choose to hire only nonsmokers, it is generally, at least from the employer’s perspective, an economically rational decision.

V. THE “MIDDLE” APPROACH—EMPLOYEES WHO SMOKE PAYING THEIR OWN WAY

It is obvious that both sides of the leisure-time smoking debate have valid arguments. On one hand, there is a pervasive reluctance to allow employers to intrude into the private lives of employees and prospective employees with respect to leisure-time activities. In reality, permitting employment discrimination against smokers is a slippery-slope; there is no doubt that other conditions such as obesity, high cholesterol, and high risk behaviors also impose costs
on employers and could also come under employer scrutiny.\textsuperscript{153} On the other hand, employers have traditionally had a right to make hiring decisions based on the predicted efficiency of applicants.\textsuperscript{154} It is a safe and inevitable prediction that employees who smoke will cost employers more in health care benefits and be less reliable.\textsuperscript{155}

Assuming arguendo that both sides have valid arguments, is there an alternative to the current all-or-nothing approaches that the states have taken on employer discrimination against leisure-time smoking? Apparently, at least some employers, given the option to choose between the all-or-nothing approaches,\textsuperscript{156} have chosen something in between. A significant and growing number of employers have opted to pass on health care costs attributable to smoking to those employees who smoke.\textsuperscript{157} Of course, this middle position is available only in those jurisdictions which have not enacted statutes prohibiting leisure-time discrimination and adhere to the premise that employment is at-will.\textsuperscript{158}

The middle approach of passing on the employment costs attributable to smoking to the smoker has two benefits. First, supplemental amounts paid by employees who smoke are intended to, and by all accounts do, offset at least some of the employment costs inherent in hiring smokers.\textsuperscript{159} Accordingly, to the extent that increased health care costs and productivity costs attributable to smoking are passed on to employees who smoke, the increased smoking-related costs are borne by those who create the risk of the increased costs, rather than by nonsmokers, who do not pose the same economic risk to the employer.\textsuperscript{160} Second, because it operates as a tax on the smoker, it provides an incentive to the smoker to quit smoking and to adopt a healthy and productive lifestyle.\textsuperscript{161}

\textsuperscript{153} Stewart, supra note 126, at 1401–03.
\textsuperscript{154} See discussion supra Part II.B.
\textsuperscript{155} See Annual Smoking-Attributable Mortality, supra note 11, at 625; see also SLOAN ET AL., supra note 7, at 138.
\textsuperscript{156} See supra notes 14–17 and accompanying text. The employer has an option to impose health care or other costs on employees who smoke only in those states which have not opted for leisure-time discrimination legislation. See supra note 14 and accompanying text.
\textsuperscript{157} See, e.g., Forster, supra note 17 (reporting that Northwest Airlines and General Mills have adopted policies whereby employees who smoke are charged a surcharge for health benefits).
\textsuperscript{158} See supra notes 14–17 and accompanying text.
\textsuperscript{159} Forster, supra note 17 (noting that Northwest Airlines’ redesigned health plan was intended to charge more to those employees who utilize more health care).
\textsuperscript{160} See SLOAN ET AL., supra note 7, at 108–09, 138.
This benefit, however, may be viewed by proponents of smoker privacy as further evidence of unwelcome economic control by employers and/or unwarranted paternalism.\textsuperscript{162}

Another advantage of the middle approach is that it does not totally eliminate an available “smoking” labor pool. No doubt, with all else being equal, employees who smoke and who have the option to choose between an employer that imposes a surcharge and one that does not, would normally choose the tax-free employer. Nonetheless, although imposing the costs of smoking on employees who smoke will result in limiting the available labor pool to some extent, from the employer’s perspective, it may not be significant enough to offset the benefits of the surcharge.\textsuperscript{163}

Studies confirm that employers believe that employees should be held accountable for their own health.\textsuperscript{164} At the same time, employers believe that employees are not held accountable.\textsuperscript{165} One of the advantages of the surcharge is that it forces employees to be responsible for the additional costs incumbent in smoking, while at the same time relieving nonsmoking employees from bearing costs not attributable to their own behavior.\textsuperscript{166} In short, it makes employees accountable for off-duty behavior with employment consequences.

VI. WHAT IS THE BEST APPROACH TO CONSIDERATION OF SMOKING BY EMPLOYERS?

States are polarized on the issue of whether off-duty smoking constitutes a legitimate employment consideration. Although the majority of states proscribe employment consideration of off-duty

\textsuperscript{162} See, e.g., Tyler, supra note 16, at 795 (stating that the pay-your-own-way approach “does not remove the invasion of the individual’s informational privacy right”).

\textsuperscript{163} See id. (reasoning that “the employer would have an incentive to discover her employees’ unhealthy habits in order to derive the advantage of reduced health insurance costs without creating a corresponding loss of the employee’s work output”).

\textsuperscript{164} Watson Wyatt Worldwide, Staying@Work 2005/2006, http://www.watsonwyatt.com/research/resrender.asp?id=w-875&page=1 (last visited Sept. 19, 2006). Research conducted by Watson Wyatt indicated that “[a]lthough nearly three-fourths (74 percent) of organizations [surveyed] believe their employees should be held accountable to a great extent for improving, managing and maintaining their health, only 4 percent think their employees are held accountable.” Id.

\textsuperscript{165} Id.

\textsuperscript{166} See Forster, supra note 17.
smoking, a significant minority of states continue the at-will tradition of employment allowing employers to fire or refuse to hire employees who smoke at their option. In the middle are those employers who opt to hire smokers, but only on the condition that those who smoke pay at least some of the employment costs attributable to smoking. There is no doubt that proponents of each approach have valid and compelling support for their positions.

Nonetheless, legislation which protects smoker privacy at the expense of employers and nonsmoking employees does not seem fair. The clamor for privacy protection rings somewhat hollow when the biggest beneficiaries of such protection continue to be the tobacco industry and the smokers themselves. The privacy argument has many pitfalls. Cigarette consumption is already highly regulated. Smokers disclose their status as smokers when they purchase cigarettes, rent cars and hotel rooms, and eat in restaurants. In fact, whether a person smokes or not may frequently be discerned from the cigarette smell emanating from her clothes.

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.

167 See supra note 13 and accompanying text.
168 See supra note 14 and accompanying text; see also supra text accompanying notes 59–61.
169 See supra note 17 and accompanying text; see also supra text accompanying notes 157–60.
170 SLOAN ET AL., supra note 7, at 7 (“The equity principle relates to the just distribution of the burden of smoking based on smoking status or some other basis . . . .”).
171 See, e.g., Brooke Courtney, Comment, Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation, 15 ANNALS HEALTH L. 61, 82 (2006) (noting that high smoking rates are attributable to intense tobacco industry marketing and advertising).
172 See supra text accompanying notes 74–76.
173 See City of N. Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995).
174 See, e.g., Courtney, supra note 171, at 68 (finding that enormous costs including medical costs and lost productivity are associated with obesity).
175 See SLOAN ET AL., supra note 7, at 209, 212; Annual Smoking-Attributable Mortality, supra note 11, at 625; see also supra text accompanying notes 10–12.
176 See supra text accompanying note 9.
177 Carl Sherman, Quitting Smoking: An Overview, in SMOKING 79 (Bruno Leone et al. eds.,
Unlike smoking, consuming eggs and beer is not addictive.\textsuperscript{178} Smoking directly correlates with deleterious health consequences.\textsuperscript{179} 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.\textsuperscript{180} Thus, discrimination against lifestyles which include beer drinking, egg eating, or other similar behaviors would impose employer monitoring costs without obvious directly correlative benefits. Nonetheless, those in favor of prohibiting consideration of leisure-time smoking continue to persuasively argue that prohibitions are necessary, otherwise the floodgates would be opened to employment scrutiny of other less offensive and more private leisure-time activities.\textsuperscript{181}

An equitable approach to employer discrimination should balance the concerns of smokers with those of their employers.\textsuperscript{182} None of the states which have adopted lifestyle discrimination statutes have attempted to balance individual employee privacy concerns with the cost burdens imposed on employers who are forced to hire smokers.\textsuperscript{183} Under a balanced approach, state statutes could proscribe making hiring and firing decisions based on smoking. At the same time, these statutes could also provide that costs reasonably associated with the hiring and retention of smoking employees may be passed on by the employer to employees who

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\item See, e.g., Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003) (distinguishing a claim based on unhealthy food products from a claim based on tobacco use); see also Courtney, supra note 171, at 94 (noting that the most significant difference between tobacco and obesity is that using tobacco is intended to be, and generally is, addictive); Herbert Fingarette, The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism," 83 HARV. L. REV. 793, 803–04 (1970) (noting that there are a number of theories as to the cause of alcoholism including genetic, neurological, metabolic, or allergic abnormalities which create a vulnerability to alcohol).
\item See, e.g., U.S. DEPT OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 1 (2001) ("For each individual, body weight is determined by a combination of genetic metabolic, behavioral, environmental, cultural, and socioeconomic influences."); Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, Awareness of Family Health History as a Risk Factor for Disease—United States 2004, 53 MORBIDITY & MORTALITY WKLY. REP. 1044, 1046 (2004) ("Most diseases are the result of complex interactions between genetic and environmental factors.").
\item See supra text accompanying notes 125–29.
\item See SLOAN ET AL., supra note 7, at 12 (stating that “[a]lthough employers generally may be reluctant to interfere with private activities of workers,” employers are nonetheless financially affected by employee smoking).
\item See supra note 13.
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smoke. Under this statutory scheme, it would be legitimate to charge employees who smoke a surcharge for health insurance, life insurance, or short-term disability so long as the employer can establish that, statistically, smokers drive up those premiums or costs.184

Smokers acknowledge that smoking has adverse consequences.185 They are also generally willing to assume substantial costs and risks inherent in smoking.186 If in fact, as some employers claim, a no-smoking-ever policy is intended to induce workers to adopt a healthy lifestyle, then imposing a surcharge on those employees who smoke should also provide incentives for healthy lifestyles.187

184 For example, in City of North Miami v. Kurtz, the City of North Miami estimated that “each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incur[red] for nonsmoking employees.” 653 So. 2d 1025, 1028–29 (Fla. 1995).

185 See PAMPEL, supra note 3, at 43.

186 See Peter Brimelow, Smoking Has Health Benefits, in SMOKING, supra note 177, at 24 (noting that it has been reported that “smokers, if anything, exaggerate the health danger” of smoking).

187 See, e.g., Henry Waxman, Increased Government Regulations Are Necessary to Reduce Teen Smoking, in SMOKING, supra note 177, at 123 (“According to some estimates, increasing the tax on a pack of cigarettes by $2 could reduce tobacco use by 23% . . . .”); Forster, supra note 17 (“Research is clear: Financial incentives motivate smokers to try to quit, whether it is a tax on cigarettes or a surcharge on their health-care premiums . . . .”). But see SLOAN ET AL., supra note 7, at 9 (concluding that “[e]vidence is mixed on whether prices influence the probability of . . . quitting [smoking]”).