

Regulating tobacco use by public safety personnel

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Special Feature

The use of tobacco products became a serious public health issue 40 years ago when Surgeon General Luther Terry released his famous report on smoking and health.¹ In the intervening years a substantial amount of scientific evidence has linked cigarette smoking to lung cancer, emphysema, and a variety of other cardiopulmonary diseases. Likewise, users of smokeless tobacco products, such as chewing tobacco and snuff, experience a higher incidence of throat and mouth cancers. In more recent times, tobacco use has also engendered a level of social stigma in certain regions of the country. Increasingly non-smokers have objected to exposure to second-hand smoke. Additionally, the presence of stale cigarette butts and chewing tobacco spittle is deemed to be unsightly by many. The change in society's views about tobacco usage has increasingly led to no smoking sections in restaurants and buildings and to absolute bans on tobacco use in certain facilities.

No research is known on whether the incidence of tobacco use among public safety personnel is greater or less than its occurrence in the general population. However, a study of New York City fire fighters found that after the events of September 11, 2001, 23 percent of fire fighters who had stopped smoking cigarettes picked up the habit again within one year. Additionally, 29 percent of fire fighters who already smoked began to smoke more. Researchers attributed the increase in tobacco use to post-9/11 stress.² No comparable study of New York police officers has been reported. Relatively little statutory and case law exists outlining the degree to which a public employer can control the use of tobacco products by job applicants and employees. This article will summarize the current state of the law on the topic of tobacco use by public safety employees.

Smokers' rights laws

Despite the broad societal response against smoking, many jurisdictions have enacted so-called "smokers' rights" laws. These laws tend to take one of two forms: statutes that grant equal rights to smokers and nonsmokers, and statutes that broadly ban "lifestyle discrimination." In some jurisdictions these laws, like most anti-discrimination laws, provide that a restriction on smoking can be used as an employment criterion if it is shown to be a *bona fide* occupational qualification.

More than half of the states have enacted some form of law that prohibits employers from discriminating against employees based on their use of tobacco or other lawful products while off the job. Those states include: California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, Wyoming, and the District of Columbia. Except as noted on the next page, none of these state laws is known to

specifically grant an exemption for public safety personnel.

Heart-lung presumption statutes

While the specifics of each jurisdiction's statutes vary, over three-quarters of the states have enacted some form of law that creates a presumption that a public safety officer who files a disability retirement claim based on cardiovascular disease or cancer is presumed to have incurred the disease as a result of his occupation. To rebut the statutory presumption an employer normally must show, by a preponderance of the evidence, both that the claimant's disease was not caused by his employment, and there was a non-work-related cause of the disease. Thus, if the employer does not carry the burden of proof in both parts of the test, the employer has failed to overcome the statutory presumption and more generous line-of-duty benefits will be awarded. Establishment of a duty-related injury normally means higher benefits coupled with more favorable tax treatment.

Among the common defenses raised by employers is that the employee was a smoker. If the public employer establishes that the employee smoked, the presumption is often rebutted and the burden falls on the employee to establish the link between the cardiovascular disease or cancer and the job. Thus, while a fire fighter may ingest toxic fumes in the course of the job, if the fire fighter is also a smoker, difficulty arises in establishing whether his respiratory disease is job-related, thereby qualifying for duty-related benefits.

Ban on tobacco use in the workplace

Idaho, Florida, California, Delaware, New York, Massachusetts, Rhode Island, and Connecticut are among the states that have banned tobacco use in the workplace. In some jurisdictions similar bans have been enacted by local ordinance. Some laws are anti-smoking legislation while others cover all forms of tobacco use. Whether public employers are excluded from the law's coverage would depend on the wording of the particular statute.

Ban on tobacco use in public facilities

All 50 states and the District of Columbia have clean indoor air provisions restricting smoking in certain places. Increasingly popular are total bans on tobacco in public facilities, particularly government offices. Forty-seven states have restricted smoking in government buildings. These laws range from outright bans on tobacco usage to a requirement limiting tobacco use to designated areas.

None of the statutes barring tobacco use in public buildings is known to provide an exemption for employees who work in the location although some laws may apply only in areas open to the general public, not in private offices. Given that virtually all fire fighters and police officers work in public facilities, any law restricting tobacco use in such facilities will impact these public safety employees.

Ban on tobacco use while on duty

The authority to ban tobacco use by public safety personnel is generally assumed by public employers. While the Supreme Court has never broached the topic directly, lower courts have ruled that the right to smoke is not included in the fundamental rights that enjoy constitutional protection. Presumably, use of other tobacco products similarly lacks constitutional protection.

In the 1976 landmark case of *Kelley v. Johnson*,³ the Supreme Court counseled that the judiciary should generally defer to police department officials in the establishment of regulations for on-duty

conduct. While the Kelley case involved grooming standards, the principle has been relied upon by both police and fire departments to justify a wide range of behavioral rules for on-duty personnel. The *Kelley* decision served as the basis of the 1987 ruling in *Grusendorf v. City of Oklahoma City*,⁴ wherein a federal appeals court upheld the firing of a fire fighter trainee who smoked a cigarette during lunch break. He had signed an agreement not to smoke during his first year on the job. The appeals court found that although the trainee may have had a 14th Amendment liberty interest in smoking off duty, the fire department's rule was rationally related to the promotion of health and safety of fire fighters. In passing, the court noted that limiting the smoking prohibition to the first year of employment weakened the city's argument that the rule was rationally related to the government's interest in fire fighter wellness.

While no fundamental constitutional right to smoke has been ruled to exist, the use of tobacco on duty can still be the subject of collective bargaining. Indeed, many public safety labor agreements specifically speak to the issue of tobacco use on the job. Absent bargaining rights for employees, the public employer may lawfully restrict use of tobacco on the job, particularly by uniformed personnel who may be seen by the public. For example, New York and Los Angeles police departments strictly prohibit uniformed officers from smoking in public. On the other hand, Philadelphia dropped a smoking ban after the Fraternal Order of Police objected and requested the matter be negotiated.

Ban on tobacco use while off duty

Perhaps the most problematic area of tobacco use regulation lies in efforts to restrict off duty use. While the scant case law that does exist suggests there is no constitutional right to use tobacco, other cases have generally required that a public employer establish a demonstrable negative effect between the off duty conduct and the delivery of police or fire suppression services. Such a relationship is often difficult to show, particularly in a large community.

However, at least one state, Massachusetts, has a statute that mandates termination of any police officer or fire fighter who is found smoking tobacco "at any time" during employment. In 1997, a state court upheld the termination of a police officer who was caught smoking on duty (*Town of Plymouth v. Civil Service Commission*).⁵ A Springfield fire fighter was fired in 2002 for smoking while a seven-year veteran police officer, who smoked off duty at a party, was terminated by the Town of Fall River in 2003. No court challenge by these individuals has been reported.

Summary

The current state of the law would appear to permit banning of tobacco use by public safety employees while on duty. This authority might be limited, however, by specific state or local legislation. Likewise, in jurisdictions where police officers and fire fighters enjoy bargaining rights, such a ban might be viewed as a condition of employment subject to negotiation. Banning of tobacco use by off duty personnel is a more murky issue. While some case law supports the authority of a government employer to invoke such a rule, particularly when directly tied to disability pension rules, no definitive case law exists that proscribes the degree to which a public employer can regulate off-duty tobacco use.

¹ *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, GPO: 1964 (available at www.cdc.gov/tobacco/sgr/1960s).

² "More NYC firefighters smoke since 9/11," www.cnn.com, September 11, 2002.

³ 425 U.S. 238 (1976).

⁴ 816 F.2d 539 (10th Cir. 1987).

⁵ 686 N.E.2d 188 (Mass. 1997).