

Can Employers Discriminate Against Smokers?

Question:

I've been unemployed for five months, despite the fact that I've interviewed for several positions. I'm starting to believe employers are refusing to hire me because I'm a smoker. Can they do this?

Answer:

The topic of employers excluding smokers from their lists of viable job candidates has become a hot topic since the New York Times last February published an article detailing how hospitals in several states have adopted anti-tobacco smoker bans. Over the past year, the article noted, hospitals in Florida, Georgia, Massachusetts, Missouri, Ohio, Pennsylvania, Tennessee and Texas have stopped hiring people who smoke.

Given the troves of research showing how smokers are more prone to absenteeism and carry far greater health care insurance costs, it is easy to see why employers under financial strain would view the elimination of smokers from their payrolls as an easy way to help make ends meet.

However, in New York and many other states, employers are prohibited from discriminating against employees and potential employees for using tobacco products during non-working hours.

Nevertheless, the temptation to screen against such high-risk activities remains especially strong in a tight economy.

Under Section 201-d of the New York State Labor Law, employers cannot refuse to hire, employ or license, or fire an individual because of his or her "legal use of consumable products," so long as such consumption occurs before or after his or her work shift and off the employer's premises. Employers, likewise, cannot discriminate against individuals in compensation, promotion or terms, or conditions or privileges of employment because of such legal use of consumable products.

The New York state attorney general can sue employers who discriminate against smokers and seek a court order enjoining or restraining them from continuing such unlawful employment practices. In such a lawsuit, the court could also impose a civil penalty of up to \$300 for first-time offenders and \$500 for repeat offenders. Aggrieved smokers can also sue the employer for equitable relief and damages.

Although this law prohibits employers from developing smoker-free workplace policies, they can develop smoke-free workplace policies. In addition to the state's ban on smoking in indoor places of employment, many employers, particularly those in medical fields, have developed more prohibitive anti-smoking policies. In 2007, for example, 13 Capital Region hospitals, including Saratoga Hospital and Albany Medical Center, turned into smoke-free campuses.

