



Ohio Smoking Ban Clouds Issue of Employee Rights

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Last November, Ohio voters overwhelmingly approved a law banning cigarette smoke from all public places and “places of employment.” In neighboring Kentucky, smokers can sue when their employers treat them differently than non-smokers. This stark dichotomy reflects more than the cultural differences between the two states: it represents a potential maelstrom of smoking-related litigation for area employers.

After enactment of the ban, “The Smoke Free Workplace Act,” the Ohio Department of Health agreed not to enforce its provisions until a system of rules for enforcement was implemented. During the time before enforcement, the Department of Health issued informational letters in response to the receipt of more than 17,000 reports of violations. On May 3, 2007, official enforcement by the Department of Health began as it promulgated Administrative Code Chapter 3701-52, detailing smoking ban compliance requirements and violation penalties. Information letters will now be replaced with fines if violations continue.

The Ohio law states that “No person or employer shall discharge, refuse to hire, or in any manner retaliate against an individual for exercising any right, including reporting a violation, or performing any obligation under this chapter.” Because this language gives employees enforceable legal rights, it effectively creates a new employee cause of action for discrimination. Accordingly, an employee or applicant who is treated differently because he insists on a smoke-free workplace environment is entitled to his day in court.

Although the regulation addresses the fines for discrimination against employees (1st violation: warning letter; 2nd: \$1,000; 3rd or more: \$2,500), the statute does not mention damages available in a civil action by an aggrieved employee. Employers would be well-advised to respect these regulations, lest they become the first unwilling defendant to discover exactly how much weight courts might afford them.

A different world exists in Kentucky, where smokers are statutorily protected from employment discrimination. Although Kentucky provides identical protections to nonsmoking employees, the Commonwealth is one of the country’s few jurisdictions which provide smokers with enforceable workplace rights. In fact, the applicable statute places smoking in a category with race, color, religion, national origin, and sex as protected classes. Clearly, smokers’ rights are no trivial matter in Kentucky. These rights aren’t unlimited, however, as the statute bars an employee from bringing a discrimination action if he or she hasn’t complied with the employer’s workplace smoking policy. Nothing in the statute prohibits an employer from implementing a smoking policy of its choice. Once the employer does so, however, it must not treat smokers and non-smokers differently. Failure to do so permits an aggrieved employee to bring a claim.

While protecting smokers' workplace rights might seem slightly anachronistic — or outrageous, depending on one's personal views — this particular statutory provision has become increasingly irrelevant as many municipalities, including Lexington and Louisville, have banned smoking in all public places. In Ohio, however, the controversy and confusion have only just begun. Until employees, employers and business patrons learn to harmoniously coexist under the new ban, the road to smoke-free workplaces will surely be a rocky one.