



MarketWatch Retirement Weekly

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Keep smoking or keep my job?

Michigan employer's total ban on smoking hits nerve

By [Kristen Gerencher](#), MarketWatch
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SAN FRANCISCO (MarketWatch) -- It was the shot heard around U.S. company watercoolers, especially for those who smoke during off hours.

An employer in the business of administering other companies' benefits decided to eliminate smokers from its work force by randomly testing them for nicotine in their blood or urine. The zero-tolerance tobacco policy applies to smokers in general, not just those who light up on company time.

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Weyco Inc., an employee-benefits administrator in Okemos, Mich., had been building up to the ultimatum for several years before four employees who opted not to take the smoking test left the company in January, founder and chief executive Howard Weyers said.

In early 2003, Weyco quit hiring tobacco users and by fall had forbidden the staff from smoking on the premises. Starting in 2004, the firm added a tobacco "assessment" of \$50 a month per worker who smoked and didn't go to a cessation class. Weyco had given its employees a 15-month advance notice that those who still smoked on or off the company's watch by January 2005 would be terminated, Weyers said.

About 20 of Weyco's 200 workers kicked the habit and four quit before the company's mandatory testing last month, he said.

The justification: The desire to contain rising health-care costs and prepare people for the higher burden they face in the emerging consumer-driven health plans, Weyers said.

"We want to help our employees to handle the risk of a high-deductible plan," he said. "They can do that by managing their health care."

What's at stake

Weyco's controversial move pits employers' rights against those of employees and may pave the way for other private companies to invoke their own potentially discriminatory tactics in the bid to lower rapidly ballooning health-care costs, legal experts say.

What's more, Weyco's policy may open the door for employers to make employment more difficult to obtain for obese people or those with genetic predispositions for diseases, some warn.

"When an employer tries to deal with health-care costs by selecting or promoting employees based on their non-

work-related qualifications or qualities, you're really entering a slippery slope," said Kary Moss, director of the American Civil Liberties Union of Michigan, which supports smoking regulations at the workplace but not those that extend beyond it.

In Michigan, workers don't have legal recourse if they're fired for lifestyle-behavior issues; 29 states have laws protecting workers in those circumstances, she said.

"This isn't an issue about smoking," Moss said. "This is an issue about private employers being able to punish employees for their legal, non-work-related activities."

Consumer-driven health as incentive

Weyco is phasing out its last traditional PPO plan at the end of this year and offering only high-deductible plans known as health reimbursement accounts (HRAs) and health savings accounts (HSAs,) which are only a year old. Both have savings accounts attached.

With an HSA, a worker with a health plan that has an individual deductible of at least \$1,000 a year or a family deductible of \$2,000 could set aside that amount in his or her account. The limit rises to \$2,600 or \$5,150 a year respectively if deductibles are higher, though it rises each year to adjust for inflation. Regular coinsurance kicks in after the deductible is met.

The two vehicles differ in that the employer funds the HRA while the worker or anyone else can fund the HSA. Unused funds typically carry over year to year, but HSAs are portable from job to job whereas HRAs are not.

Some Weyco workers grumbled about the policy change designed to create a healthier staff but ultimately complied, Weyers said.

"I've had a number of employees come to me who were totally against the policy but quit the habit," he said. "They're still here. They didn't agree with it, but they made a decision what was going to be more important to them: Their job or the use of tobacco. I don't think it's a hard decision."

Weyers believes he's doing what's right for workers and advises other companies to demand similar changes, though he's not extending the policy to include obesity, he said.

"I tell employers, 'You need to set expectations for people in the lifestyle decisions they make because they unilaterally affect the bottom line and the paychecks of other employees.' We need to try to correct that. We're not going to correct health-care costs unless we start dealing with the problems creating it."

Protecting workers' rights

Nancy Richard-Stower, a member of the National Employment Lawyers Association and a civil-rights and employment-law attorney in Merrimack, N.H., said she doesn't believe Weyers is acting in his workers' best interests.

"If that employer really cared about his employees, he wouldn't be taking away the mortgage payment of those people unable to break their addiction," she said. "They may be responsible for smoking, but they're not responsible for their addiction."

Tobacco is an easy target since it's a serious health concern, but Weyco's action threatens to roll back workers' rights, Richard-Stower said.

"If we let employers make health-care costs the determining factor of whether or not you'll be a successful applicant, we'll be going back to the days where parents of children with cancer were not hired for fear of the costs," she said.

"Next week it will be 'What's your bad cholesterol? What's your family health history? Genetic code?' All these invasions of privacy are just over the horizon if people don't speak out against this kind of employer snooping."

Moss questioned the trajectory of such a policy as well. "Childbirth carries health-care risks. Sitting in the sun carries health-care risks. Lots of employees have inherited gene traits that give them a higher propensity for certain diseases. Where does this stop?"

Banning smokers from certain employers presents another dilemma, said Norman E. Kjono, a member of the board of directors and spokesman for FORCES International, a consumer-advocacy group that monitors anti-obesity and antismoking activities.

"The problem is it extends beyond current employment. It not only takes a job away from someone at Weyco, it makes them less desirable as an employee or less employable somewhere else simply because they lawfully consumed legal tobacco products," he said.

"It is entirely possible for Weyco to come back next year and say 'If you eat cheeseburgers – they are known to plug your arteries – you cannot work here.'"

About 5 percent of employers charge higher health-care premiums for smokers, just over 4 percent prefer not to hire smokers and less than 1 percent have a formal policy against hiring smokers, according to a recent survey of 270 human-resources professionals from the Society for Human Resource Management.

Bill Phelps, spokesman for Philip Morris USA, a unit of Altria Group ([MO: news, chart, profile](#)), the world's largest tobacco seller, said the company isn't lobbying for more worker protections to prevent other employers from cracking down on those who light up on or off site. "We believe this a matter between an employer and its employees."

Kristen Gerencher is a reporter for MarketWatch in San Francisco.

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