

Firings light up privacy debate

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By JACK KATZANEK / The Press-Enterprise

People are free to smoke cigarettes in the privacy of their own home, and there's nothing employers who trumpet a smoke-free workplace can do about it.

Or can they?

In Michigan, Weyco Inc. told its employees that smokers could no longer work for the insurance processing company, even if they did their smoking away from the workplace. Since instituting its no-smoker policy Jan .1, it has fired four employees for refusing to take a test for nicotine.

The action has sparked a nationwide debate on how much sway employers hold over workers' private lives, especially when the issue is juxtaposed with the high cost of health care.

In California, the right to privacy is outlined by the first paragraph of the state constitution. Also, California's labor codes prohibit employers from dictating what employees can and can't do outside of work.

Despite these rights, some employers, including the Riverside County Sheriff's Department, will no longer hire people who smoke, and could fire current ones who do.

At least two private employers with significant operations in Inland Southern California -- Union Pacific Corp. and Alaska Airlines Inc. -- have similar programs.

Newly hired sheriff's deputies must sign declarations that they don't smoke and won't start, county spokesman Ray Smith said. Applicants will not be tested, however, before or after being hired, meaning this is essentially enforced by the honor system.

The county supervisors were able to pass the rule late in 2003 because public safety employees already have a higher risk for heart disease, cancer and other ailments that are caused by both stress and smoking.

"There's a tremendous escalation of medical costs and disability," Smith said by phone.

Howard Weyers, the 70-year-old founder of Wyeco, told The Associated Press he initiated the nonsmoking rule to control the company's health-care costs.

"I don't want to pay for the results of smoking," Weyers said.

The Okemos, Mich.-based company, which has about 200 employees, will conduct random tests for nicotine. Michigan companies can do that because it is one of about 20 states with no privacy law.

The protections California workers enjoy have led to some murky legal waters, some attorneys say. For example, the Labor Code section that protects off-duty behavior was really written to protect a worker's right to engage in political activity, said William Floyd, an employment law attorney from the Riverside firm Best Best & Krieger.

"The scope of the Labor Code statutes really hasn't been defined by the courts," Floyd said by phone.

California offers a constitutional right to privacy because the federal government, in effect, does not. The Bill of Rights does not expressly guarantee privacy, which is left to the states.

"It's one of the reasons why employees in California can challenge random drug tests," said Richard Roth, an attorney with Carney & Delany in Riverside.

Chicago-based employment lawyer David Morrison said California and Michigan are both at-will states, meaning an employee can be fired for any reason as long as it isn't discriminatory.

But the Weyco situation, which Morrison said is legal in Michigan, will inflame civil-liberties groups, Morrison said by phone.

"They'll want to know where this stops," said Morrison. "Does it include the guy who rides motorcycles on the weekend, or bungee jumps or scuba dives?"

The Associated Press contributed to this report.