SB

340

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/13/92 FURTHER:

Date of 5-Day Notice: March 5, 92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: March ~~4~~ 17, 92

Judiciary Committee considered SENATE BILL NO. 340

"An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

and recommends:

[✓] replace with ✓ CS SB 340 (JUD)

[✓] same title
[ ] **new title**
[ ] technical title change (HB only)

[ ] attaches amendment(s)

[ ] adopts ______ Letter of Intent

[ ] further referral to the ______

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES: **Dept/Date**

[ ] **zero** fiscal notes ______

[ ] fiscal notes ______

[ ] **appropriation**--no fiscal note

PREVIOUS FISCAL NOTES: **Dept/Date**

[ ] **Governor's bill** with fiscal notes:

zero fiscal notes Labor/Labor Stand/1-17-92
Admin/Personnel/EEO/1/21/92

fiscal notes ______

DO PASS: [signature]

OTHER RECOMMENDATIONS: [signature] NO Rec
[signature] Al Adams - NO Rec

[signature] Rick Halford NO Rec
Chair: Signature and Recommendation

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

Bill Number: SB 340
Abbreviated Title:

Sponsor: Duncan Original Received: 1/13/92
Written Request to Schedule Rcv'd: _____ From: _____
Sponser's Statement Rcv'd: 1/16/92 From: Duncan (Wake)
Sectional Analysis Rqst'd: 1/14/92 From: _____
Sectional Analysis Received: _____
Fiscal Note (Original)
Rqst'd Of: _____ Rcv'd From: Labor Date: 1/17/92
Rqst'd Of: _____ Rcv'd From: Admin Date: 1/21/92
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Fiscal Note (C.S.)
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Five Day Notice Given: 1/30/92 Notice of Hearings Given: 1/30/92
Committees of Referral: First: JUD Second: / Third: /
LAA Contact: _____ To Senate Secretary: _____

COMMITTEE ACTION

DATE:

_____ _____
_____ _____
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PERSONS TO BE NOTIFIED OF HEARING

1. Sponsor
2. Agency
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : SB 340

Revision Date:
Title: "An Act prohibiting employers from discriminating against individuals..."
Sponsor: Senators Duncan, Eliason, et.al.
Requestor: Senate Judiciary

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour
COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Randy Carr, Acting Director — Phone : 264-2452
Division: Labor Standards & Safety — Date : 1/17/92

Approved by Commissioner: John Abshire, Acting Commissioner
Agency: Department of Labor — Date: 1/17/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/7/91

Fiscal Notes

FISCAL NOTE

STATE OF ALASKA **BILL NO. SB 340**

1992 LEGISLATIVE SESSION

Revision Date: _____

Title: Prohibiting discrimination for use of legal products outside of work

Sponsor: Duncan

Requestor: S. Judiciary

Department Affected: Administration

BRU: Personnel/OEEO

Component: Personnel/OEEO

COMPONENT SERIAL NO. 5 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)
SB 340 will not require an additional appropriation for this division.

Prepared by: R. H. King, Director Phone: 465-4430

Division: Personnel/OEEO Date: 1/21/92

Approved by Commissioner: Nancy Bear Usera

Agency: Administration Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
2/4FN2111.kp

Alaska State Legislature

SENATOR JIM DUNCAN

P.O. BOX V JUNEAU, ALASKA 99811-3300

(907) 465-4766

COMMITTEES:
VICE CHAIR – FINANCE
VICE CHAIR – STATE AFFAIRS
RULES
BUDGET & AUDIT
ETHICS REFORM

MEMORANDUM

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: Senator Jim Duncan

DATE: January 16, 1992

SUBJECT: Hearing for Senate Bill 340, Prohibiting Discrimination.

I request that the Judiciary Committee schedule, at your earliest convienence, a hearing for Senate Bill 340, "An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

This measure will protect employees from discrimination by an employer because of the employee's use of a lawful product in a lawful manner during nonworking hours and in places other than the premises or vehicles of the employer. In addition the terms employee and employer are defined.

Attachments:

Patrick M. Rodey
Senator

Alaska State Legislature

311 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

Senate

MEMORANDUM

DATE: February 24, 1992

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: Senator Pat Rodey Pat

SUBJ: SB 340

Attached, please find a copy of proposed federal language which I offer for inclusion in the bill file for Senator Duncan's SB 340.

PMR/tb/memo013

Alaska State Legislature

SENATOR JIM DUNCAN

P.O. BOX V JUNEAU, ALASKA 99811-3100

(907) 465-4766

COMMITTEES:
VICE CHAIR – FINANCE
VICE CHAIR – STATE AFFAIRS
RULES
BUDGET & AUDIT
ETHICS REFORM

SENATE BILL NO. 340

Section Analysis

"An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

This bill amends Title 23 the Labor and Workers Compensation statutes Chapter 10, Employment Practices and Working Conditions by adding a new subsection to Article 7. Employee Rights which will be 23.10.440. NONDISCRIMINATION FOR LAWFUL USE OF PRODUCTS.

AS 23.10.440 (a) explicitly provides that an employer may not discriminate against an applicant or employee with respect to compensation, privileges, terms, or conditions of employment a a result of the individuals use of a lawful produce in a lawful manner during nonworking hours in places other than the premises or vehicles of the employer.

AS.23.10.440.(b) provides definitions of; employee, a person employed by an employer and employer; and employer, a person, the state, or a political subdivision, who employs one or more persons in Alaska.

Alaska State Legislature

Senate Judiciary Committee

M E M O R A N D U M

TO: Legislative Legal

FROM: Senator Rick Halford

RE: SB 340

DATE: 2/25/92

I request Legal to draft a Senate Judiciary CS for SB 340 to include the following:

Line 9, after consumption, insert "when not identified as an employee of the employer and when"

Line 13, after employs, omit "one" and replace with "five"

Insert Section 3. It is not unlawful or an unfair employment practice under this section for an employer to discharge an individual or otherwise disadvantage an individual with respect to compensation, terms, conditions, or privileges of employment if that decision is based on the individual's failure to meet job performance standards or cost constraints as set by the employer.

Post Office Box V • Juneau, Alaska 99811

Alaska State Legislature

Senate Judiciary Committee

M E M O R A N D U M

TO: Legislative Legal

FROM: Senator Rick Halford

RE: SB 340

DATE: 2/18/92

Please draft as discussed before. Include copy of notes

I request Leg Legal to draft a Senate Judiciary CS for SB 340 to include the following:

Line 9, after consumption, insert "when not identified as an employee of the employer and when"

Line 13, after employs, omit "one" and replace with "five"

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Post Office Box V • Juneau, Alaska 99811

7-LS1588\D.1
Cramer
02/03/92

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR DUNCAN

TO: SB 340

Page 1, line 9, after "employer":

Insert "and as long as the employee is not wearing a uniform that identifies the employer"

7-LS1588\D.2
Cramer
02/13/92

AMENDMENT

OFFERED IN THE SENATE BY SENATOR DUNCAN

TO: SB 340

Page 1, line 10, after "(b)":

Insert "Nothing in (a) of this section prohibits an employer from discharging an employee or discriminating against an individual, whether or not the employee is a member of a collective bargaining unit, with respect to compensation, privileges, terms, or conditions of employment if the decision is based on the individual's failure to meet job performance standards set by the employer. or cost

(c)" constraints

This is Duncan's language BASICALLY the same as ours except last sentence to address cost constraints.

7-LS1588\G.1
Cramer
02/27/92

AMENDMENT

OFFERED IN THE SENATE BY SENATOR DUNCAN

TO: CSSB 340 (JUDICIARY)

Page 1, line 9:

Delete "identified"

Insert "wearing or carrying clothing or other items that identify the individual"

2274 AMH CL KELLI

Proposed for SB 340

By Representative Vance

HB 2274 - H COMM AMD
By Committee on Commerce & Labor

On page 2, after line 9, insert:

"(3) It is not unlawful or an unfair employment practice under this section for an employer to discharge an individual or otherwise disadvantage an individual with respect to compensation, terms, conditions, or privileges of employment if that decision is based on the individual's failure to meet job performance standards set by the employer."

Renumber the remaining subsections consecutively and correct internal references accordingly.

EFFECT: Clarifies that an employee may be terminated or disciplined for failure to meet the employer's job performance standards.

does not effect job performance or employment ctr.

SENATE BILL NO. 340

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY SENATORS DUNCAN, Eliason, Jones, Uehling

Introduced: 1/13/92
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 23.10 is amended by adding a new section to read:

Sec. 23.10.440. NONDISCRIMINATION FOR LAWFUL USE OF PRODUCTS. (a) An employer may not refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, privileges, terms, or conditions of employment because the individual uses a lawful product in a lawful manner during nonworking hours and for the individual's personal consumption in places other than the premises or vehicles of the employer.

(b) In this section,

(1) "employee" means a person employed by an employer;

(2) "employer" means a person, including the state and political subdivisions in the state, who employs one or more persons in the state.

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

WALTER J. HICKEL, GOVERNOR

REPLY TO:

P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE (907) 465-3376

January 17, 1992

The Honorable James Duncan, Senator
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

RE: SB 340 (Prohibiting discrimination against individuals using legal products in a legal manner outside of work)

Dear Senator Duncan:

Pursuant to my phone conversation with your aide, Dale Staley, the Department of Corrections respectfully requests an amendment to the abovementioned bill.

Current Department policy prohibits employees from drinking alcoholic beverages in public while in uniform, even though off duty. Drinking, even in an legal manner, by a uniformed professional may be perceived as drinking on duty by members of the public and therefor reflect negatively on the Department.

The proposed change would be on line 9 to read: "... in places other than the premises, [or] vehicles, or uniform of the employer.

Thank you for your consideration of this request.

Sincerely,

Diane Schenker
Special Assistant

20-01LH

Bill No: Senate Bill 340 **Date:** January 27, 1992

Title: "An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

Contact: Arbe Williams
465-2700

Senate Bill 340 establishes a prohibition against discriminating against employees for legal activity outside the work place. The bill does not provide that the Department of Labor, or any other agency, enforce the prohibition. Consequently, there is no program effect or fiscal impact on the Department.

APPROVED:

John A. Abshire

John A. Abshire, Acting Commissioner
Department of Labor

POSITION PAPER/Department of Labor

ALASKA STATE AFL-CIO

2501 Commercial Dr.
Anchorage, Alaska 99501
(907) 258-6284

819 1st Ave.
Fairbanks, Alaska 99701
(907) 456-2030

MANO FREY
Executive President

GARY BROOKS
Secretary / Treasurer

FEBRUARY 11, 1992

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: PAT SMUTZ, BUSINESS REPRESENTATIVE

RE: SENATE BILL 340

The Alaska State AFL-CIO has always supported the right of privacy for individuals. We have always believed that what an individual does on their own time is their own business as long as it doesn't interfere with the rights of others or doesn't present a danger to anyone.

With this in mind the Alaska State AFL-CIO would like to go on record as being in support of Senate Bill 340. Thank you for your consideration.

THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS

NBCSL GENERAL ASSEMBLY MEETING
DECEMBER 6, 1991
LAS VEGAS, NEVADA

RESOLUTION ON EMPLOYEE PRIVACY

WHEREAS: It has come to the attention of the National Black Caucus of State Legislators that individuals have been fired from their jobs or disadvantaged in other employment and compensation decisions for smoking tobacco products in the privacy of their homes; and

WHEREAS: There is a growing trend in job classification notices published in daily newspapers to stipulate "smokers need not apply" and "nonsmokers only"; and

WHEREAS: Twenty-one state legislatures have enacted legislation protecting employee privacy; and

WHEREAS: The National Black Caucus of State Legislators believes in individual privacy; and

WHEREAS: The National Black Caucus of State Legislators believes that employment decisions should be based solely on an individual's job skills, training and performance

THEREFORE BE IT RESOLVED: The National Black Caucus of State Legislators supports legislation that would make it unlawful for employers to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or non-smoker; and

The National Black Caucus of State Legislators supports legislation that would make it unlawful for an employer to require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours.

Resolution Of Support For SB 340
Nat'l Black Caucus Of State Legislators

206 Hall of the States Buildi[illegible] (202) 624-5457 • FAX (202) 508-3826

National Consumers League
Founded 1899

815 15th Street NW • Suite 928-N • Washington, DC 20005 • (202) 639-8140 Linda F. Golodner, Executive Director

January 15, 1992

Dear Editor:

Attached are a news release and report on a special survey commissioned by The National Consumers League on vital issues of workplace privacy in Alaska. The survey is being released in Alaska by the Older Persons Action Group.

The vast majority of those polled in Alaska believe that employers and prospective employers have no business asking applicants and employees about religion, smoking habits, lifestyle, outside hobbies and activities, and other personal, off-the-job factors which have nothing to do with their ability to perform a job. They also believe an employer has no right to force an employee to change diet, stop smoking, or quit a second job. Those polled in Alaska were also opposed to credit checks on job applicants and monitoring of personal telephone calls.

In spite of their opposition to such intrusions on their personal lives, many respondents reported that they or someone they knew had had such an experience.

Because of the importance of this issue and the overwhelming reaction of people in Alaska to the questions we have put to them, we have taken the unusual step of expressing the survey results to you.

Sincerely,

LINDA F. GOLODNER
President

LFG:jb
Attachments

Workplace Privacy Survey

815 15th Street NW • Suite 616 • Washington, DC 20005 • (202) 639-8140 Linda F. Golodner, Executive Director

FOR IMMEDIATE RELEASE
January 16, 1992

CONTACT: Linda Golodner
202-639-8140
Vera Gazaway
907-276-1059

WORKPLACE PRIVACY SURVEY

ALASKA FEATURED IN MAJOR PUBLIC OPINION POLL
ON WHAT THE BOSS NEEDS TO KNOW ABOUT EMPLOYEES

WASHINGTON, D.C. ---- People in Alaska value their privacy, on the job and outside the workplace. The vast majority says that the boss has no business asking questions about the private lives, lifestyles, and off-work activities of job applicants and employees. Although most Alaskans believe employers should not ask these questions, many of those polled reported that an employer has done such things either to them or to someone they know.

Alaska was one of four states participating in the survey released today by the National Consumers League and the Older Persons Action Group in Anchorage.

The other states were Arizona, Utah, and Washington.

According to the Penn and Schoen Associates poll for the National Consumers League, Americans clearly believe:

o Employers have no right to ask intrusive questions during job interviews.

o It is inappropriate for employers to hire and fire an employee for personal matters unrelated to the job.

o Employers have no right to try to change personal habits and lifestyles of employees.

Linda F. Golodner, executive director of the National Consumers League, said: "This poll confirms what we have found in many other states - that Americans believe they have a right to privacy on the job and off the job. It also shows that a significant number of employers are not respecting those rights."

In releasing the report, Vera Gazaway, executive director of the Older Persons Action Group, said: "The poll also reveals the vast majority of workers in Alaska are adamantly opposed to attempts by employers to force upon them a company-blessed lifestyle. Those 65 and over who were polled are in agreement with the rest of the state's population. As far as they are concerned, it's none of the boss's business who employees date, how much they eat, whether they smoke, take part in a political demonstration, hold a second job, drive a motorcycle, or have pending workers' compensation claims.

"As far as Alaska senior citizens and the general public are concerned, the ability to perform the job should be the sole criterion for winning and holding a job," she said.

I. NO RIGHT TO ASK

Overwhelmingly, those interviewed in Alaska said a prospective employer has no right to ask the following questions:

- o 88 percent, about an applicant's religion;
- o 87 percent, whether applicant lived with member of opposite sex;
- o 84 percent, if applicant had elderly parents;
- o 82 percent, whether applicant planned to have children;
- o 77 percent, if applicant smoked after work hours;
- o 59 percent, about hobbies and outside activities; and
- o 53 percent, about applicant's marital status.

II. NO JUSTIFICATION FOR HIRING OR FIRING

Those surveyed in Alaska were presented with nine examples of activities that employees may pursue on their own time away from work, their physical condition, and controversial opinions they may hold. Respondents were asked if they thought it was appropriate for the employer to base a decision to hire or fire on these criteria:

- o 98 percent said it was inappropriate for an employer to base hiring or firing on whether an individual dated a person of a different race.
- o 98 percent said whether an individual drives a motorcycle should not be a criterion.
- o 91 percent said participating in political demonstrations should not be a basis for hiring or firing.

- 91 percent said it was inappropriate for employers to consider whether an employee participates in gambling at a racetrack.
- 74 percent said holding an unusual second job should not be a consideration for employers.
- 84 percent said being overweight should not be a consideration in hiring or firing an individual.
- 95 percent said it was inappropriate to base hiring or firing on an individual's support for abortion.
- 97 percent said it was inappropriate to base hiring or firing on an individual's opposition to abortion.
- 94 percent said it was inappropriate to base hiring or firing on whether an individual smoked after work hours.

III. NO RIGHT TO FORCE A CHANGE IN LIFESTYLE

The vast majority of Americans believe that employers have no right to force employees to change their lifestyles.

Here's the level at which survey respondents in Alaska opposed employer rights in the following categories:

- 77 percent opposed employers monitoring personal telephone conversations.
- 86 percent opposed a prohibition of employees dating rival firm employees.
- 81 percent opposed an employer's refusal to hire an overweight person.
- 78 percent opposed an employer's refusal to hire a smoker.
- 92 percent opposed an employer's requirement that an employee or job applicant change his or her diet.
- 85 percent opposed requiring an employee to quit smoking.
- 68 percent opposed an employer requiring an employee to quit a second job.
- 67 percent opposed employers performing a credit check on a prospective employee.

IV. PERSONAL EXPERIENCE

The poll also asked Alaskans if they or anyone they knew had ever been asked any of the types of questions they objected to from employers. Sixty percent said they had been asked about their marital status;

- 45 percent, about outside hobbies and activities;
- 21 percent, about their religion;
- 15 percent about whether or not they planned to have children;

- o 15 percent, about whether or not they ... workplace;
- o 7 percent, whether they had elderly parents; and
- o 6 percent, whether they lived with a non-family member of the opposite sex.

Seventeen percent reported personal experience with monitored personal telephone conversations;

- o 17 percent, credit checks on prospective employees;
- o 15 percent, required to quit a second job;
- o 13 percent, refused to hire an overweight person;
- o 10 percent, refused to hire a smoker;
- o 7 percent, required an employee or applicant to quit smoking;
- o 6 percent, forbid an employee or applicant from dating an employee from a rival firm; and
- o 4 percent, required an employee or applicant to change diet.

Nine percent of those polled indicated they or someone they knew had been denied a job or fired because of a weight problem;

- o 7 percent because of an unusual second job;
- o 7 percent because of participation in a political demonstration;
- o 3 percent for smoking away from the workplace;
- o 4 percent for dating a person of a different race;
- o 2 percent for driving a motorcycle;
- o 2 percent for gambling at a racetrack; and
- o 1 percent for supporting or opposing abortion.

The Penn and Schoen poll, conducted in December 1991 on behalf of the National Consumers League, was based on a random sample of 609 respondents in Alaska. The margin of error in the survey is +/- four percent.

The National Consumers League, founded in 1899, is a private, non-profit consumer advocacy organization concerned with workplace and marketplace issues.

-30-

FOR IMMEDIATE RELEASE
January xx, 1992

CONTACT: Linda Golodner
202-639-8140
Vera Gallaway
907-276-1059

WORKPLACE PRIVACY SURVEY

ALASKA FEATURED IN MAJOR PUBLIC OPINION POLL ON WHAT THE BOSS NEEDS TO KNOW ABOUT EMPLOYEES

WASHINGTON ----- People in Alaska value their privacy, on the job and outside the workplace. The vast majority say that the boss has no business asking questions about the private lives, lifestyles, and off-work activities of job applicants and employees. Although most Alaskans believe employers should not ask these questions, many of those polled reported that an employer has done such things either to them or to someone they know.

Alaska was one of five states participating in the survey released today by The National Consumers League and the Older Persons Action Group in Anchorage.

The other states were Idaho, Arizona, Utah and Washington.

According to the Penn and Schoen Associates poll for the National Consumers League, Americans clearly believe:

o Employers have no right to ask intrusive questions during job interviews

o It is inappropriate for employers to hire and fire an employee for personal matters unrelated to the job

o Employers have no right to try to change personal habits and lifestyles of employees

Linda F. Golodner, executive director of the National Consumers League, said, "this poll confirms what we have found in many other states - that Americans believe they have a right to privacy on the job and off the job. It also shows that a significant number of employers are not respecting those rights."

In releasing the report, Vera Gazaway, Executive Director of the Older Persons Action Group, said: "As far as Alaska senior citizens and the general public are concerned, the ability to perform the job should be the sole criterion for winning and holding a job".

I. NO RIGHT TO ASK

Overwhelmingly, those interviewed in Alaska said a prospective employer has no right to ask the following questions:

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- o 87 percent, whether applicant lived with member of opposite sex
- o 84 percent, if applicant had elderly parents
- o 82 percent, whether applicant planned to have children
- o 77 percent, if applicant smoked after work hours
- o 59 percent, about hobbies and outside activities
- o 53 percent, about applicant's marital status

II. NO JUSTIFICATION FOR HIRING OR FIRING

Those surveyed in Alaska were presented with nine examples of activities that employees may pursue on their own time away from work; their physical condition; and controversial opinions they may hold. Respondents were asked if they thought it was appropriate for the employer to base a decision to hire or fire on these criteria.

- o 98 percent said it was inappropriate for an employer to base hiring or firing on whether an individual dated a person of a different race
- o 98 percent said whether an individual drives a motorcycle should not be a criterion
- o 91 percent said participating in political demonstrations should not be a basis for hiring or firing.
- o 91 percent said it was inappropriate for employers to consider whether an employee participates in gambling at a racetrack.
- o 74 percent said holding an unusual second job should not be a consideration for employers
- o 84 percent said being overweight should not be a consideration in hiring or firing an individual.
- o 95 percent said it was inappropriate to base hiring or firing on an individual's support for abortion.
- o 97 percent said it was inappropriate to base hiring or firing on an individual's opposition to abortion.
- o 94 percent said it was inappropriate to base hiring or firing on whether an individual smoked after work hours.

III. NO RIGHT TO FORCE A CHANGE IN LIFESTYLE

The vast majority of Americans believe that employers have no right to force employees to change their lifestyles.

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employee or job applicant change his or her diet

- o 85 percent opposed requiring an employee to quit smoking
- o 68 percent opposed an employer requiring an employee to quit a second job
- o 67 percent opposed employers performing a credit check on a prospective employee

IV. PERSONAL EXPERIENCE

The poll also asked Alaskans if they or anyone they knew had ever been asked any of the types of questions they objected to from employers. Sixty percent said they had been asked about their marital status;

- o 45 percent, about outside hobbies and activities
- o 21 percent, about their religion
- o 15 percent about whether or not they had children
- o 15 percent, about whether or not they smoked away from the workplace
- o 7 percent, whether they had elderly parents
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Seventeen percent reported personal experience with monitored personal telephone conversations

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- o 15 percent, required to quit a second job
- o 13 percent, refused to hire an overweight person
- o 10 percent, refused to hire a smoker
- o 7 percent, required an employee or applicant to quit smoking
- o 6 percent, forbid an employee or applicant from dating an employee from a rival firm

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 6, 1992

MEMORANDUM

TO: Senator Rick Halford

FROM: Ceceile Kay Richter
Legislative Analyst

RE: **Corrections to Employment Discrimination Based on Off-the-Job Use of Lawful Products**
Research Request 92.171 (February 26, 1992)

In submitting our memorandum of February 26, 1992, on the above topic to you, we overlooked verifying information in footnote 9 on page 5, taken from a 1985 article by Penny Lozon Crook in the *Alaska Law Review*, that, under the Alaska Statutes, employees who assert their rights to receive workers' compensation or who take time off for jury service are not protected from being discharged or from otherwise being discriminated against by their employers.

We have now determined that, subsequent to Crook's article, the Alaska legislature has protected employees who file claims for or who have received workers' compensation benefits from being discriminated against in hiring, promotion, or retention (AS 23.30.244). The legislature has also provided that an employee may not be deprived of employment or penalized by the employer for any time spent on jury service or prospective jury service (AS 09.20.037).

We did mention in the footnote that "whistleblowers" are protected by statute. That comment also requires some clarification. Public employees who are "whistleblowers" are protected from being discharged or otherwise discriminated against by their employers (AS 39.30.100). "Whistleblowers" in the private sector receive no such protection.

In revising footnote 9, the page break on page 5 was affected, and consequently all remaining page breaks were affected. To simplify matters, we are reissuing your memorandum in full under today's date. We are not reissuing the attachments, however. We ask that you combine the attachments you received earler with today's memorandum and destroy all existing copies of the previous text.

We hope this information is useful to you. If you do have any questions or would like additional information, please call.

Alaska State Legislature

Legislative Research Agency

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March 6, 1992

MEMORANDUM

TO: Senator Rick Halford

FROM: Ceceile Kay Richter
Legislative Analyst

RE: **Employment Discrimination Based on Off-the-Job Use of Lawful Products**
Research Request 92.171 (Revised)

Alaska Senate Bill 340 prohibits employers from discriminating against individuals on the basis of their off-the-job use of lawful products in hiring, firing, and terms and conditions of employment. Several other states already extend similar protections to job applicants and employees. You asked for any case law based on these existing statutes or which would otherwise address the contents of SB 340 or similar employment discrimination legislation.

Summary

As of January 1992, twenty-two states prohibited employment discrimination based on smoking, use of lawful products, or engaging in lawful activities during nonworking hours. Because of the recency of these laws, they have not been tested in court. The cases that are relevant have been decided outside these laws and concern employer *termination* practices, not employer *hiring* practices. In the matter of hiring, aside from obeying the civil rights laws, employers have been free to discriminate all they wish, so long as they do so in an equitable manner. While it used to be that "employees at will"--that is employees without a contract for a definite term--could be discharged at will, the courts of several states, including Alaska, now recognize general causes of action for discharged employees at will. Even so, Alaska and other states have upheld employer rules which limit off-the-job activities of the employee where public policies supporting the protection of worker health and safety or the justifiable business interests of the employer were found to override employee privacy interests. However, given that the courts will not uphold employer rules prohibiting off-the-job activities when such rules do not reflect overriding public policy or business interests of the employer, it appears that employees who smoke, drink alcohol, or engage in other legal activities off-duty are well protected from wrongful discharge without any new legislation. Their protections increase under SB 340 by denying exceptions to the employer.

State Legislation Prohibiting Employment Discrimination Based on Off-the-Job Lawful Activities

As of January 1992, twenty-two states prohibited employment discrimination based on smoking, use of lawful products, or engaging in lawful activities during nonworking hours.[1] The laws of seventeen states specifically mention use of tobacco products (Arizona, public employees only; Connecticut; Indiana; Kentucky; Louisiana; Maine; Mississippi; New Hampshire; New Jersey; New Mexico; Oklahoma; Oregon; Rhode Island; South Dakota, firing only; South Carolina; and Virginia, public employees only with firefighters and police excepted) or the use of a nonalcoholic agricultural product (Tennessee, firing only). In addition, Delaware prohibits employment discrimination as a result of an individual's smoking habits by executive order.[2] The laws of two states prohibit employment discrimination based on the individual's use of lawful products after hours (Illinois and Nevada) while two other states prohibit employment discrimination based on off-the-job lawful activities (Colorado, firing only, and North Dakota). The employee's right to engage in lawful activities after hours also appears encompassed by inference in a Montana statute which prohibits the discharge of nonprobationary employees for less than good cause.[3]

Montana's law was passed in 1987. The Oregon and Virginia laws and Delaware's executive order were issued in 1989. Otherwise, all the laws mentioned above were passed either in 1990 or 1991. (See Attachment A for citations to the state laws, excluding Montana and Delaware, as prepared by the Tobacco Institute, January 1992. Also at Attachment A is a summary of each law prepared in October 1991 by the Tobacco Institute.) Additionally, as of

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[1]According to Jonathan Anderson, staff assistant to the Workplace Rights Project, American Civil Liberties Union, New York City, in a telephone conversation February 20, 1992, protecting the use of lawful products off the job appears to cover the use of tobacco products and alcoholic beverages as well as food indulgences. Thus, he suggests that Alaska Senate Bill 340 would protect people who are smokers, drinkers, or are overweight. Concerning legislation which protects the right to engage in lawful activities off the job, Anderson pointed out that this would include protection to employees who engage in risky hobbies such as motorcycle riding, skiing, or scuba diving. Cathey Yoe, director of state legislative information, the Tobacco Institute, Washington, D.C., in a telephone conversation February 19, 1992, said right-to-work states are wary of offering protection for an employee's legal activities outside of work for it may sound like approving union organizing.

[2]Executive Order 71 of August 3, 1989.

[3]Section 39-2-904 (1987), *Montana Code Annotated 1991*.

February 1992, the Tobacco Institute reported similar legislation pending in twenty-two states including Alaska.[4]

In two of the states where such antidiscrimination legislation is pending, Massachusetts and Florida, discriminatory hiring laws exist for certain public safety employees. Since January 1, 1988, no person who smokes any tobacco product has been eligible for appointment as a uniformed member of the Massachusetts state police. In Florida, pursuant to legislation passed in 1989, an applicant for employment as a firefighter may not have used any tobacco product for at least one year immediately preceding the application. Several municipalities also have similar discriminatory hiring laws or policies for public safety employees or firefighters only.

In several of the states which do prohibit employment discrimination based on off-the-job smoking or other legal off-the-job activities, the statutes are written to allow exceptions such as an employer's restriction which represents a "bona fide" occupational requirement or which is reasonable in relationship to the employment position. Other exceptions are made for an off-duty activity prohibited by a collective bargaining agreement or if engaging in the protected activity would cause a conflict of interest with the mission of the organization.

According to *Business Week* writer Walecia Konrad (*Business Week*, August 26, 1991, p. 70), these so-called "smokers-rights" laws and bills represent "a campaign by the deep-pocketed tobacco companies to counter the antismoking movement." Konrad also quoted Tobacco Institute spokesman Thomas Lauria who stated: "These bills are put through by the ACLU and the AFL-CIO. The tobacco companies simply help smokers'-rights groups that have already formed."

It is true that the focus of the American Civil Liberties Union is broader than that of the Tobacco Institute. The North Dakota law, which the ACLU considers a model law, prohibits employment discrimination based on participation in a lawful activity off the employer's premises during nonworking hours.[5] In North Dakota, this freedom is elevated to the level of a civil right, with protections against discrimination in hiring, discharge, and on the job treatment comparable to that afforded on the basis of race, color, religion,

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[4]The twenty-two states witn similar pending employment discrimination legislation are Alaska, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New York, Pennsylvania, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, according to our telephone conversation with Cathey Yoe, February 19, 1992.

[5]Telephone conversation February 20, 1990, with Jonathan Anderson, staff assistant, ACLU Workplace Rights Project, New York, New York.

sex, national original, age, the presence of any mental or physical disability, or status with regard to marriage or public assistance.[6]

Case Law Related to Employment Discrimination Based on Off-the-Job Lawful Activities

Because of the newness of this new crop of employment discrimination laws, they have not been tested in court. The cases that are relevant have been decided outside these laws and concern employer termination practices, not employer hiring practices.[7] According to the *Individual Employment Rights Manual* (a looseleaf manual published by The Bureau of National Affairs, Inc.), court decisions and administrative opinions indicate that an employer has the right to establish a hiring policy that disqualifies smokers from eligibility for employment, provided the policy is applied equitably to all candidates (IREM 511:202). However, no cases were listed with this statement. According to Washington, D.C., attorney Matthew L. Myers, whose clients include the national Coalition on Smoking or Health (a nonsmoking advocacy group whose membership includes the American Cancer Society), this is "black letter law."[8] In other

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[6]In North Dakota, exception is made for employment discrimination on the basis of religion, sex, national origin, physical or mental handicap, or marital status for bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise. In the case of participation in a lawful activity off the employer's premises during nonworking hours, exception is made for employment discrimination if that participation is contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer. (See *North Dakota Century Code 1991*, Chapter 14-02.4, Discrimination.) ACLU staff assistant Jonathan Anderson also identified Colorado's law as a model law although the Colorado statute relates to termination only. Colorado makes exception when prohibition of the activity relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest with any responsibilities to the employer.

[7]That may change if the courts hear a Florida case (*Arlene Kurtz v. City of North Miami, Florida*) involving the refusal of North Miami to consider the employment application of Ms. Kurtz after she declined to sign a document stating that she had not smoked in the twelve months prior to her application. Before the document was offered to her, Kurtz had passed a written examination for a clerical job with the city. However, even if decided, the case still may not have any bearing on legislation like that posed for Alaska. A distinguishing factor in *Kurtz* is that the North Miami policy applies only to new hires and not to workers already on the job. Kurtz is suing for violation of her rights of due process and equal protection under the federal constitution; thus, the off-the-job smoking issue may never be addressed.

[8]Personal telephone conversations February 19 and 20, 1992.

words, he explained, it is clear that, beyond those discriminations prohibited by law, an employer is free to make hiring and firing decisions on subjective judgments.

The American Employment At-Will Doctrine

The traditional American common-law rule of "employment at will," developed by courts during the late nineteenth century, is that an employee without a contract for a definite term can be discharged by the employer for "good cause," "no cause," or even "bad cause," as for example a refusal to contravene public laws or morality. The reverse of this is also true so that the general principle is that employment is terminable at will by either party in the absence of an employment contract for a definite period or a law to the contrary.[9]

Collective bargaining brought the benefit of "just cause" discharge to unionized employees and various courts and legislatures have responded with similar protection against arbitrary discharge for unorganized workers. Three general exceptions to the at-will rule have developed for discharged employees,

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[9]The first major statutory exception applicable to private employers was the National Labor Relations Act of 1935 which protected from discharge employees who joined labor organizations. The other major federal statutory exception arises from federal civil rights laws. In addition, a number of federal statutes offer protection against discharge for specific classes of employees, such as those whose wages have been garnished or those who report violations of the federal Occupational Safety and Health Act. A number of state statutes also protect private sector employees who are discharged for certain specific reasons. Generally these parallel the federal laws. In addition, there are several other exceptions in state statutes, not including the smokers' rights exceptions, which range from the unique, such as Louisiana's prohibition against the discharge of employees who take time off to participate in Olympic or Pan American athletic contests, to the widely accepted, such as those forbidding the discharge of employees for serving on juries, filing claims for workers' compensation, or reporting violations of certain statutes. (See Penny Lozon Crook, "Employment at Will: The "American Rule" and Its Application in Alaska," *Alaska Law Review*, Vol. 2, 1985, pp. 23-39, which is included as Attachment B to this memorandum.)

Subsequent to Crook's article, the Alaska legislature has protected employees who attend court for jury service or prospective jury service from being deprived of employment or penalized by their employer (AS 09.20.037). The legislature has also subsequently protected employees who file claims for or who have received workers' compensation benefits from being discriminated against in hiring, promotion, or retention (AS 23.30.244) and public employees who are "whistleblowers" from being discharged or otherwise discriminated against by their employers (AS 39.30.100).

according to the Supreme Court of Arizona in *Wagenseller v. Scottsdale Memorial Hospital* [710 P.2d 1025 (Arizona 1985)]. As explained by the court:

> The most widely accepted approach is the "public policy" exception, which permits recovery upon a finding that the employer's conduct undermined some important public policy. The second exception, based on contract, requires proof of an implied-in-fact promise of employment for a specific duration, as found in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda. Under the third approach, courts have found in the [at-will] employment contract an implied-in-law covenant of "good faith and fair dealing" and have held employers liable in both contract and tort for breach of that covenant.[10]

(The *Wagenseller* opinion traces the origins of the employment-at-will doctrine and discusses each of the three exceptions in detail. A copy of the case is provided at Attachment C. For additional background on employment-at-will and a discussion of the implied covenant of good faith and fair dealing in three earlier Alaska cases, see Attachment B, "Employment at Will: The "American Rule" and Its Application in Alaska," by Penny Lozon Crook, *Alaska Law Review*, Vol. 2, 1985, pp. 23-39.)

Not all states have identified the three causes of action for discharged employees at will, although Alaska is identified by the *Individual Employee Rights Manual* as a state which has. According to the manual, the public policy cause of action exists either definitively or qualifiedly in 39 states and the District of Columbia, the contract theory cause exists either definitively or qualifiedly in 33 states and the District of Columbia, and the good-faith covenant exists definitively in only twelve states. (See Attachment D, Employment at Will State Rulings Chart, for the applicability of these causes of action in the fifty states and the District of Columbia.)

Oklahoma: Public Purpose of an Anti-Smoker Rule Upheld

In an Oklahoma case decided in 1987, the federal Tenth Circuit Court of Appeals upheld a firing under a municipal rule which forbade first-year firefighter trainees from smoking cigarettes either on- or off-duty in spite of the discharged employee's contentions that individual rights of liberty, privacy, property, and due process under the U.S. Constitution had been violated by the

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[10]According to the *Individual Employment Rights Manual*, the covenant of good faith and fair dealing when applied to at-will employment contracts does not create a duty in an employer to terminate its employees only for just cause. What it does is to consider that both parties have an obligation not to do anything that would injure the right of the other to receive the benefits of their implied contractual obligation.

employer. The court found there was a rational connection between the nonsmoking regulation and the state's policy of promoting the health and safety of firefighters. In that case, *Grusendorf v. City of Oklahoma City* (816 F.2d 539), the court stated that it needed only to look at the Surgeon General's warning on every box of cigarettes declaring that cigarette smoking is hazardous to health to find a rational connection between the nonsmoking regulation and the promotion of the health and safety of firefighter trainees. The court then took notice that good health and physical condition are essential requirements for firefighters, and that firefighters are frequently exposed to smoke inhalation which might reasonably be feared to present an increased risk for smokers. These considerations, the court decided, were enough to establish that the public purpose of the nonsmoking rule outweighed the liberty interest of the firefighter trainees under the Fourteenth Amendment to the U.S. Constitution to smoke cigarettes when off duty. (See Attachment E for a copy of *Grusendorf*.)

Indiana: No Business Interest in An Employer Rule Against Employees' Off-Duty Consumption of Legal Products but Criteria are Available for an Acceptable Rule

In the case of *Best Lock Corporation v. Review Board of the Indiana Department of Employment and Training Services* [572 N.E.2d 520 (Indiana, 1991)], the Indiana Court of Appeals found that an employer rule prohibiting off-duty consumption of tobacco, alcohol, and illegal drugs by its employees was not supported by evidence that the rule was reasonable or necessary for proper conduct or production at work. Had this evidence been supplied, the court seemed to leave no doubt that it would have ruled otherwise. The court took specific notice that the employer's claims that medical insurance costs were extremely low as a result of its policy against the use of alcohol, tobacco, and drugs by it employees, and of a direct relationship between high medical costs, on the job injuries, increased, absenteeism and tardiness, and an employee's use of alcohol, tobacco and/or drugs, were not supported by the record.

Distinguishing between the employer's regulation of an employee's on-the-job conduct and an employee's off-the-job conduct, the court said:

> The employer may want to closely regulate the employee's actions while at work to obtain the maximum efficiency on the job and to assure safety of the personnel. Accidents occur at work and the employer has an interest in minimizing those accidents for the sake of his employees as well as for the sake of his own liability insurance. However, the same interest does not always exist in regulating the employee's off-duty conduct. Therefore, we agree that in order for an employer rule which regulates an employee's off-duty activity to be considered reasonable, the activity sought to be regulated must bear some reasonable relationship to the employer's business interest.

The court said that a rule laid down by the employer governing off-duty conduct must have a reasonable relationship to the business interests of the employer at the time of the making of the rule, rather than at the time of the employee's violation. Discussing what would be an acceptable rule, the court said:

> A rule of this type may be regarded as reasonable where a violation is reasonably likely to harm the employer's business interest, even though the actual violation does not result in actual harm to the business interests of the employer.

However, where an employee was discharged for consuming alcoholic beverages off-duty in violation of an agreement made with his or her employer, and it could not be shown that such conduct posed a threat to the employer's business interest, unemployment compensation could not be denied the discharged worker, the court said. (See Attachment F for a copy of *Best Lock*.)

Distinguishing *Best Lock* from *Grusendorf*, the Indiana court said that the *Grusendorf* court was faced with a constitutional challenge; therefore, it started with the presumption that the employer rule was valid. Accordingly, the burden of proof was shifted away from the city to *Grusendorf*. In *Best Lock*, which was an appeal of a decision of the review board of the Indiana Department of Employment and Training Services that an employee was not fired for just cause and therefore entitled to employment compensation, the court said there was no presumption of validity of the employer rule and the burden was on the employer, not the employee, to establish the reasonableness of the rule. Thus, the *Grusendorf* decision was not controlling in *Best Lock*.

In June 1992, the trial court in Indiana is scheduled to hear the case of *Janice Bone v. Ford Meter Box Co.*, a case involving off-duty tobacco consumption. At the time of her hire in 1989, Bone admitted she smoked but agreed to quit smoking. Six weeks later, medical testing routinely given to all new hires revealed traces of nicotine in Bone's blood and she was discharged. Ms. Bone has sued, claiming invasion of privacy, intentional infliction of emotional distress, and wrongful termination. This case has generated national attention.

In the meantime, in 1991, the Indiana legislature prohibited employers from requiring workers to refrain from using tobacco products off the job. The law appears to have been passed in response to *Bone*.

Alaska: The Implied Covent of Good Faith is Not Breached When Public Policy Supporting the Employer's Protection of Worker Health and Safety Overrides an Employee's Privacy Interests

Alaska courts have held that employees hired on an at-will basis can be fired for any reason that does not violate the implied covenant of good faith and fair dealing. They have also held that a discharge of an at-will employee in violation of public policy is properly adjudicated as a breach of the implied

covenant of good faith and fair dealing. In Alaska, "the covenant of good faith is implied by law into every employment relationship and prohibits discharges in violation of public policy even in at-will employment contracts," observed the U.S. Circuit Court of Appeals for the Ninth Circuit in late 1990 in the matter of *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (CA-9 Alaska, 1990). While *Eldridge* does not warrant discussion in this memorandum beyond that observation, one of the cases on which this observation is based, that of *Luedtke v. Nabors Alaska Drilling, Inc.* [768 P.2d 1123 (Alaska 1989)], is central to this memorandum.[11]

Luedtke involved the firing of two at-will oil rig workers who refused to submit to urinalysis screening for drug use. The Alaska Supreme court's review began from the point of view that employees hired on an at-will basis can be fired for any reason that does not violate the implied covenant of good faith and fair dealing. Concerning the question of whether a public policy exists protecting an employee's right to withhold certain "private" information from his or her employer, the court said it believed that such a policy does exist and is evidenced in the common law, statutes, and constitution of Alaska.[12] However, in construing the public policy exception to the at-will employment doctrine, the court said the following analysis should be applied:

> That is, there is a sphere of activity in every person's life that is closed to scrutiny by others. The boundaries of that sphere are determined by balancing a person's right to privacy against other public policies, such as "the health, safety, rights, and privileges of others."

After noting that the law of Alaska recognized the citizens right to be protected against unwarranted intrusions into their private lives, the court reasoned that:

> The constitution protects against governmental intrusion, statutes protect against employer intrusion, and the common law protects against intrusions by other private persons. As

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[11] *Eldridge* cited three Alaska cases supporting this conclusion. We did not review *Reed v. Municipality of Anchorage* [782 P.2d 1155 (Alaska 1989) which dealt with the public policy prohibiting retaliatory discharge of whistleblowers, or *Knight V. American Guard and Alert, Inc.* [714 p.2d 788 (Alaska, 1986)], which, like *Luedtke*, dealt with the public policy of protecting employee privacy, as it predated *Luedtke*.

[12] The Alaska Constitution was amended in 1972 to add the following section:

> *Right of Privacy.* The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section. (Alaska Constitution, Article I, Section 22)

> a result, there is sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude.

The court then asked the question of whether employer monitoring of employee drug use outside the work place is such a prohibited intrusion. After observing the short-term physiological effects of marijuana, including the impairment of motor control, and that work on an oil rig can be very dangerous, the court answered its own question. It said that

> Where the public policy supporting the Luedtkes' privacy in off-duty activities conflicts with the public policy supporting the protection of the health and safety of other workers, and even the Luedtkes themselves, the health and safety concerns are paramount. As a result, Nabors is justified in determining whether the Luedtkes are possibly impaired on the job by drug usage off the job.

The court never considered whether the Luedtkes used a legal or illegal substance. This leaves open the consideration that the court would have ruled the same with respect to any legal substance provided that comparable health and safety considerations were involved. A concurring opinion of Chief Justice Matthews leaves a suggestion that considerations of lost productivity, absenteeism, and medical insurance rates could justify a total abstinence employment criteria, whether having to do with the use of marijuana or the consumption of alcohol, providing the private employer gave sufficient

notice.[13] (A copy of *Luedtke v. Nabors Alaska Drilling, Inc.* is at Attachment G.)

Conclusion

These cases seem to suggest that the courts will uphold employer rules prohibiting certain off-the-job activities if the rules protect worker health or safety or promote justifiable employer interests. Alaska Senate Bill 340 fails to address any legitimate employer considerations. That is, the proposed law provides for no exceptions to the nondiscrimination provisions.

As noted above, in several of the states which do prohibit employment discrimination based on off-the-job smoking or other legal off-the-job activities, there are exceptions for "bona fide" occupational requirements of the employer or for other reasons which are reasonable in relationship to the employment position or which are related to the mission of the organization. Additionally, several state statutes make exceptions for off-duty activities prohibited by a collective bargaining agreement. Thus, does the lack of exceptions to the employer in SB 340 mean that the transportation industry or governments who employ transportation workers cannot enforce rules against alcohol consumption within so many hours of the transportation worker reporting to the job or that a nonprofit antismoking organization cannot screen out job applicants who smoke?

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[13]The idea that containment of insurance and health care costs would be found to represent a legitimate business reason for excluding at least those who smoked off-the-job from the work force was countered by Jonathan Segal, a management attorney in Philadelphia. According to Mr. Segal, whose comments were included in an article, "Off-Duty Conduct: None of Employer's Business," by Christine Woolsey, in *Business Insurance*, February 17, 1992, if the employer's motive is to contain the cost of health insurance, there are less restrictive ways to achieve this policy. For example, the employer could require smokers to pay more for health insurance rather than refuse to hire them. However, if state law requires equal treatment of smokers and nonsmokers with respect to the compensation, terms, conditions, or privileges of employment, the employer could not charge a smoker more for additional health insurance.

According to this same article, the Equal Employment Opportunity Commission has stated that any increase in workers' compensation health insurance costs is no defense for the failure to hire because someone is a smoker. In addition, the article raises the possibility that in the future smoking will be labeled a disability under the *Americans for Disabilities Act* which takes effect for most major companies in July 1992. Even without such labeling, according to the article, under the ADA, companies can no longer refuse to hire workers predisposed to work-related or nonwork-related injuries and illnesses.

Given that the courts will not uphold employer rules prohibiting off-the-job activities when such rules do not protect worker health or safety or represent a justifiable business interest of the employer, it appears that employees who smoke, drink alcohol, or engage in other legal activities off duty are currently protected from wrongful discharge. Their protections will increase under SB 340 by denying exceptions to the employer.

We hope this information is useful to you. If you have any questions or would like additional information, please call.

Attachments

Anchorage Daily News

Gerald E. Grilly
Publisher

Howard Weaver
Editor

Michael Carey, Editorial Page Editor
Patrick Dougherty, Managing Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971
Founded in 1946 by Norman C. Brown

Nose out

For once, the tobacco lobby is right

American tobacco firms routinely bombard the public with transparently bogus or self-serving rhetoric.

Listening to the industry line, you'd think that there's still some doubt smoking causes cancer, that tobacco firms are disinterested guardians of the First Amendment and that smokers have made rational, fully informed decisions to take up their addictive and life-shortening habit.

But there is one instance where the tobacco industry has a legitimate point. The move by some firms to ban all smoking by all employees — not just at work, but off the job, too — is an illegitimate intrusion on workers' privacy.

Some 6,000 firms refuse to hire smokers, according to The New York Times. A case from Indiana drew national attention earlier this year when a woman was fired because a random drug test showed she'd been smoking cigarettes at home.

Smoking isn't the only unhealthy habit that gets workers in trouble with nosy employers. Best Lock Corporation of Indianapolis bars its workers from drinking alcohol — any time, anywhere. The city of Athens, Ga., even went so far as to reject job applicants with high cholesterol levels.

How do employers rationalize trying to run their workers' private lives? The best answer they can give is that bad habits like smoking or drinking can drive up their health insurance bills.

When that's the case, firms have good reason to charge those workers higher insurance premiums. But they don't have any grounds to tell employees how to live their lives outside of working hours.

In the workplace, only one question should matter: How well do workers do their jobs? As long as what employees do on their own time doesn't affect their job performance, it's none of their employers' business.

SMOKERS HAVE RIGHTS—JUST ASK THE TOBACCO COMPANIES

Last spring, a Georgia State Senator introduced into committee a "smokers'-rights" bill outlawing discrimination against people who smoke off the job. In the ensuing week, the lieutenant governor's office got a flood of phone calls supporting the law. So many, in fact, that the phone system broke down.

A strong grass-roots response from the good folk of Georgia? Yes, to some extent. But these complaining constituents got a little help from Philip Morris Cos. When Georgia residents called a toll-free hotline, they heard a recorded message lambasting the lieutenant governor—who was against the bill—for interfering with smokers' rights.

PRAIRIE FIRE? The recording then encouraged callers to "stay on the line—we can connect you to his office right now, toll-free." Hence, the flood of calls. A Philip Morris spokesperson says: "We want to make it easier for consumers to voice their concerns."

The Georgia bill was ultimately withdrawn. But 20 other states have passed similar legislation. Antismoking and health groups warn, however, that these laws are not some "prairie wildfire among state legislators," as Walker P. Merryman, vice-president of the Tobacco Institute, describes them. Rather, they represent a campaign by the deep-pocketed tobacco companies to counter the antismoking movement. Replies Tobacco Institute spokesman Thomas Lauria: "These bills are put through by the ACLU and the AFL-CIO. The tobacco companies simply help smokers'-rights groups that have already formed."

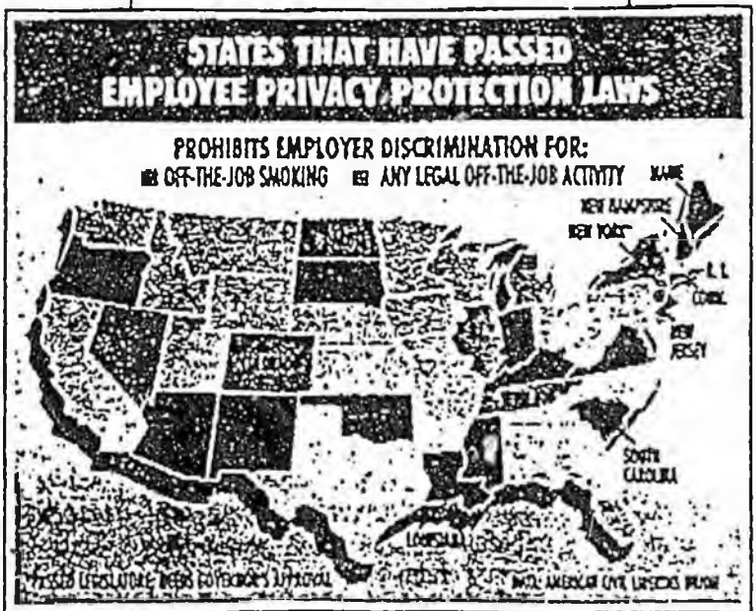
Early this year, a bill that would prohibit companies from refusing to hire smokers or firing people who smoke was introduced in the state legislature of New Jersey. The tobacco industry hired lobbyists to get lawmakers to vote for the bill. Philip Morris also blanketed the state with support-the-bill letters. R. J. Reynolds Tobacco Co. joined in, using videotapes, sample petitions, and slide shows to help smokers start activist groups. Ultimately, the measure passed the legislature, and the governor allowed it to become law without his signature in July.

The tobacco companies also target big businesses opposed to smokers'-rights bills. Last year, the New York State Legislature passed a broadly worded law that would have prohibited companies from forbidding any legal activity off the job. IBM, Eastman Kodak Co., and other businesses wrote strong letters against the bill, arguing that it would let employees ignore corporate conflict-of-interest policies. Governor Mario M. Cuomo vetoed it.

Now, another version is about to be presented to Cuomo. This time, however, there is no outcry from IBM and Kodak. The reason: Tobacco companies are big buyers of IBM computers and materials for cigarette filters made by Kodak. Rather than risk their accounts, the companies have withdrawn from the debate, say state government officials and sources close to the companies. Neither Kodak nor IBM will comment on their change of heart, saying only they take no position on the bill.

Surveys show that employees are concerned about employers' legislating their lifestyles. Aware of this, says Joseph Marx of the American Cancer Society: "The tobacco companies are trying to elevate smoking to a civil right"—and taking care of business at the same time.

By Valerie Konrad in Atlanta



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[tell us what you think]

Does a company have the right to control your life-style?

BONNIE COOK WAS A hospital attendant in Rhode Island with an excellent job record. When she tried to get a job at a hospital where she had previously worked, however, she found the door closed. Because Cook weighed 315 pounds, her former employers believed that their worker's compensation costs might rise if they rehired her. "If you lose weight, you'll be considered," she was told. After trying and failing to drop below 300 pounds, Cook filed suit, now pending in federal court.

Cook's supporters see her as the target of a dangerous trend—the desire of companies to control employees' behavior both on and off the job, through hiring and employment practices. "This is an example of Big Brother at work," says Steven Brown, the executive director of the Rhode Island American Civil Liberties Union (ACLU), which is handling Cook's suit. "They are essentially telling Bonnie Cook that they can control her life simply because twenty or thirty years from now she *might* cost the state a little money."

With the aim of lowering skyrocketing health costs or promoting a "healthier workplace," a number of companies have instituted policies to penalize certain workers. Turner Broadcasting System, for instance, simply won't hire smokers. The Best Lock Corporation in Indianapolis prohibits employees from drinking alcoholic beverages even during their off-hours. At U-Haul International, Inc., workers who smoke or are underweight or overweight pay about $120 for annual health insurance. Some companies, according to the ACLU, even bar employees from high-risk activities such as riding motorcycles.

Such policies are increasingly under challenge: Twenty states have passed laws limiting the rights of companies to impose life-style requirements on workers. But Fred H[illegible], president of the Society of Professional Benefit Administrators, maintains that companies' policies are instituted for legitimate reasons. "An employee benefit plan should be viewed as a contract between employer and employee," he says. "If the employee is paying her own medical costs, then she can behave any way she wants. If not, then she is taking something of value, and should be expected to behave responsibly and help minimize costs."

At U-Haul, corporate executives feared they wouldn't be able to provide health care for any employees unless they took action to control health costs. The company's decision to make selected employees pay was a logical extension of standard policy in homeowners or auto insurance, says Public Information Manager Melora Foley. "If you have a smoke detector or fire extinguisher, you get a rebate. In our company, if you don't smoke or you're not overweight or underweight, you don't have to pay."

Opponents of such policies feel they set a dangerous precedent. "The premise of insurance is a pooled risk. Once you start pulling out groups, it undermines the purpose," says Sally E. Smith, executive director, National Association to Advance Fat Acceptance. "If today it's fat people and smokers, who will it be tomorrow?"

Adds John Rosenthal, an ACLU spokesperson: "Almost any personal choice can have health insurance implications. If employers balance their books by invading our lives, virtually *every* aspect of our personal lives will be subjected to their control."

Tell us what you think.

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1. Do employers have the right to make life-style demands (such as forbidding smoking) when workers are on the job?
❑ *Yes* ❑ *No* ❑ *I don't know*

2. Do employers have the right to make life-style demands of workers during their *off*-hours?
❑ *Yes* ❑ *No* ❑ *I don't know*

3. If you answered yes to number two, which demands do you think employers have the right to make?
❑ *Staying within weight guidelines*
❑ *No smoking at any time*
❑ *No drinking at any time*
❑ *No hazardous sports*

4. Do employers have the right to use economic incentives to encourage healthy practices, such as charging overweight workers more for health insurance?
❑ *Yes* ❑ *No* ❑ *I don't know*

5. Which of the following would *you* be willing to do in order to keep your current job? (Check as many as you want, even if you're not, say, a smoker.)
❑ *Quit smoking*
❑ *Lose or gain weight*
❑ *Refrain from drinking any alcohol*
❑ *Not participate in risky sports*
❑ *None of the above*

6. If your company wanted you to make one of those changes and you weren't willing, what would you do?
❑ *Quit*
❑ *Ignore the ruling and hope I wouldn't get caught*
❑ *Lodge a formal protest*
❑ *I don't know*

Please feel free to comment on any of these questions in the space provided. Make yourself heard. To ensure that your answers reach us in time, please mail them within the next two weeks to: "Tell Us What You Think," Glamour, 350 Madison Ave., New York NY 10017. OR FAX IT! (212) 880-6922.

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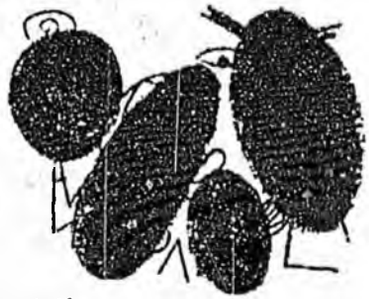
[this is what you thought]



Do companies have the right to dictate off-hours behavior?

93 percent say no

OVER 90 PERcent of the respondents to our November survey think that company should not be allowed to prohibit its employees from engaging in certain types of behavior, such as drinking, smoking and playing risky sports, during their off-hours. Almost half of the respondents said that they would not change their behavior to keep their jobs, and 72 percent feel that employers don't have the right to charge "unhealthy" workers more for health insurance. For more results of the survey, read on.

1. DO EMPLOYERS HAVE THE RIGHT TO MAKE LIFE-STYLE DEMANDS (SUCH AS FORBIDDING SMOKING) WHEN WORKERS ARE ON THE JOB?

65% say yes

"I'm a sales rep for a computer company, and part of what we sell is an image. It's my company's right to make sure I project that image when I go out in the field."

33% say no

"Not allowing smoking in the office is one thing, but there should be designated areas for those of us who still wish to exercise our right to free choice!"

2% say they don't know

2. DO EMPLOYERS HAVE THE RIGHT TO MAKE LIFE-STYLE DEMANDS OF WORKERS DURING THEIR *OFF*-HOURS?

93% say no

"Unless my life-style *negatively* affects my ability to perform on the job, it's none of my company's business what I do."

"I work to support my life. I don't live to support work."

4% say yes

"A company has the right to demand legal and noncontroversial behavior from its employees."

3% say they don't know

3. IF YOU ANSWERED YES TO NUMBER TWO, WHICH DEMANDS DO YOU THINK EMPLOYERS HAVE THE RIGHT TO MAKE?

50% say staying within weight guidelines

"I've struggled with my weight and know I have more energy when I'm eating properly and exercising regularly. A healthier person makes a better worker."

34% say no drinking at any time

"What people do during off-hours *can* affect the quality of their work. My co-worker's drinking problem has an impact on everyone in the office."

18% say no smoking at any time

"If you smoke, you're going to get sick. With odds like that, all employers should demand their employees quit."

3% say no hazardous sports

4. DO EMPLOYERS HAVE THE RIGHT TO USE ECONOMIC INCENTIVES TO ENCOURAGE HEALTHY PRACTICES, SUCH AS CHARGING OVERWEIGHT WORKERS MORE FOR HEALTH INSURANCE?

72% say no

"I suffer from an inactive thyroid gland and can't help that I'm a few pounds overweight. I watch my cholesterol and fat intake. Why should I have to pay extra for health insurance?"

18% say yes

"I'd rather my employer offer incentives to encourage healthy practices than not offer insurance benefits at all."

10% say they don't know

5. WHICH OF THE FOLLOWING WOULD *YOU* BE WILLING TO DO IN ORDER TO KEEP YOUR CURRENT JOB?

18% say none of the choices listed below

"I don't need my company telling me what's wrong with my personal habits."

"At my former company, the smoking and weight policy applied to employees *and* spouses. Who are they to tell us what we can and can't do in our own home?"

18% say refrain from drinking any alcohol

"I don't drink because of company policy. I haven't felt this good in years!"

15% say quit smoking

"I've been trying to stop smoking for months. If my employer gave me an ultimatum, it would be just the thing I need."

11% say not participate in risky sports

"I don't see why people feel the need to Bungee jump off bridges. Especially if it means higher insurance rates."

10% say lose or gain weight

"If my company wanted me to maintain a certain weight for better health, I'd do it. But if it was because of my looks, that would be discrimination."

6. IF YOUR COMPANY WANTED YOU TO MAKE ONE OF THOSE CHANGES AND YOU WEREN'T WILLING, WHAT WOULD YOU DO?

55% say lodge a formal protest

"It's a short hop from 'Don't smoke at home' to 'Who are you sleeping with?' to 'Don't have more than three kids.' "

16% say ignore the ruling and hope they don't get caught

"I'd like to think that I'd protest, but I really fear losing my job."

12% say quit

"I'd quit and move to Europe where, as far as I know, they're not as stuck on moralizing and controlling."

17% say they don't know

Please turn the page for this month's survey—How much do you want to know about politicians' private lives?

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