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New Hiring Policy: "Quit Smoking"

Laurie Johnson

The State of Texas recently passed a law requiring state employees to give up smoking or face higher health insurance premiums. And some companies refuse to hire smokers altogether. But as Laurie Johnson reports, this strategy raises some interesting legal questions.

If you're one of the 3.25 million Texans who smoke, you might be interested to know it could get harder for you to change jobs in the future.

A new trend among employers is to ban hiring smokers or anyone who tests positive for nicotine.

Becky Hall is the Vice President of Health and Wellness of the Baylor Health Care System, a hospital system that primarily serves the Dallas-Fort Worth area and is not associated with Houston's Baylor College of Medicine. Hall says it was a natural progression for their company to implement such a policy.

"We went smoke-free on all of our campuses. And then just starting this past year in 2011, is when we began our employees that self-reported that they were tobacco users paid an additional surcharge on their paychecks if they're enrolled in our medical plan."

So now when potential hires give a urine sample for drug testing they're also screened for nicotine use.

Professor Jessica Roberts at the University of Houston Law Center specializes in health law and anti-discrimination. She says so many companies have tried this tactic that many states -- about two-thirds -- have enacted legislation to outlaw the practice. But Texas isn't one of them.

"If you're in a state like Texas, where there is not some kind of state legislation that specifically bans employers from engaging in that kind of conduct, really you're going to end up looking to federal statutes and probably the one that would be the most applicable in this context would be the Americans with Disabilities Act."

Roberts says Title 1 of the ADA prohibits employers from discriminating on the basis of disability, including during hiring. The question is whether or not a nicotine addiction could be classified as a disability.

"So if you're an employer and you're outright choosing not to hire a smoker, you could be effectively regarding that person as having a disability. And because you're regarding that person as disabled, you're actually violating Title 1 of the statute."

Complicating matters is the fact that many employees simply don't fess up to smoking. A survey by the public health foundation Legacy found that more than ten percent of smokers keep their habit secret from their doctors and employers. That worries many health care providers, who are concerned that punitive policies against smoking could cause more people to hide and not get adequate health treatment.

But Becky Hall with Baylor says permitting tobacco use among their employees would be hypocritical.

"We have our cancer center, we have our programs and we're telling patients about our programs and how important it is to try to kick the habit. And then if we just go down the hall and across the street and have a cigarette, how meaningful is that?"

A ban on hiring smokers is legal in Texas, although it could leave companies open to litigation from prospective employees. But as Prof. Roberts points out, filing a lawsuit is not the same as winning a lawsuit.