

Lights Out: Employers Can Ban Smoking Anywhere

By Michael A. Spero, Esq. and Christina J. Vassiliou, Esq.

With the dangers of smoking and second-hand smoke well recognized, more employers are now asking whether they have the ability to ban smoking anywhere on their property. In New Jersey, nicotine addiction is not seen as a disability under either the Law Against Discrimination (LAD), or the Americans with Disabilities Act (ADA). Thus, an employer may institute a premises-wide indoor and outdoor smoking ban.

Effective April 15, 2006, the New Jersey Legislature approved a state-wide smoking ban entitled the New Jersey Smoke-Free Air Act (Smoke-Free Air Act).¹ The act defines "workplace" as "a structurally enclosed location or portion thereof at which a person performs any type of service or labor."²

New Jersey law also prohibits employers from discriminating against smokers in the workplace in hiring, treatment, or firing decisions (Smoker Anti-Discrimination Act).³ However, the New Jersey Legislature in crafting the Smoker Anti-Discrimination Act, limited the act's effect: "Nothing contained in this act, shall be construed to affect any applicable laws, rules or workplace policies concerning smoking or the use of other tobacco products during the course of employment."⁴ With this limitation, as well as the Smoke-Free Air Act, an employer may freely implement a premises-wide smoking ban, if that ban is a part of a wellness campaign or to protect against workplace accidents due to the use of any volatiles at the employer's premises.

There have been no published cases in New Jersey under either the ADA or LAD finding smokers to be a protected class. In fact, under New Jersey law, an employer has an affirmative duty to provide a work area free from unsafe conditions, including the inhalation of second-hand smoke. One New Jersey court, in 1976, enjoined an employer from permitting employees from smoking in the workplace due to the

negative health effects on one employee. The court found that although the employer had to restrain employees from smoking in the workplace, the employer was entitled to set up a smoking area for those employees who smoked. The case preceded the Smoke-Free Air Act, however, and it is likely that a workplace-wide smoking ban, including outdoors, would be found permissible today.

Only one published decision to date has considered the question of whether smoking is a disability, a 2001 federal case filed in Maryland.⁵ The court held that smoking does not qualify as a disability under the ADA because it is a remediable condition; meaning that the employee may quit smoking by choice or through medical alternatives. The case involved an inmate of a federal prison who challenged Maryland's indoor and outdoor prison-wide smoking ban. The court dismissed the lawsuit, because "Congress could not possibly have intended the absurd result of including smoking within the definition of 'disability,' which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke." From this case, it follows that smoking is distinguishable from a condition such as alcoholism because it does not impair the employee from performing his or her job.

Under the Smoke-Free Air Act and the Smoker Anti-Discrimination Act, an employer may institute a workplace-wide smoking ban, even including the outdoors. This conclusion is supported by the lack of federal law to the contrary and the fact that the Equal Employment Opportunity Commission has never found smoking to be a disability. Employer-employee relations may best be served, however, by allowing a reasonable notice period before implementing any such policy.

For more information, please contact Michael A. Spero at 609.989.5009, or mspero@sternslaw.com, or Christina J. Vassiliou at 609.989.5022, or cvasiliou@sternslaw.com.

¹N.J.S.A. 26:3D-55.

²N.J.S.A. 26:3D-57.

³N.J.S.A. 34:6B-1.

⁴N.J.S.A. 34:6B-2.

⁵*Brashear v. Simms*, 138 F. Supp. 22 693 (D. Md. 2001).