

The Questionable Policy of Not Hiring Smokers

Leonard J. Weber, Ph.D.
Ethics Consultant
weberlj@udmercy.edu

There have been periodic reports in recent years of hospitals and health systems instituting policies of not employing smokers. The best known case is probably the Cleveland Clinic, which stopped hiring smokers in 2007. Now the practice is becoming more widespread.¹ And recently there has been one report of a hospital introducing a similar policy on not hiring individuals who exceed a stated obesity standard.¹ About half of the 50 states have laws that prohibit the practice of refusing to hire smokers; most states have no legislation on hiring those who are obese.

The “tobacco-free” hiring policies treat nicotine as many employers have been treating illegal drugs during the last two decades. Job applicants otherwise approved for hire are tested for nicotine (urine tests), and individuals testing positive are not employed. The tests are described as able to distinguish between personal nicotine use and second-hand smoke. Most such policies do not apply to current employees and they sometimes allow applicants to reapply after a stated period of time if they stop using tobacco.

In the states in which the law permits employers to reject tobacco users in hiring, the decision about whether to

implement a no-smokers hiring policy is all about the organization’s ethics. The decision made both expresses and shapes the organization’s understanding of fairness to job applicants and its sense of responsibility to the larger community. Deliberations about such policies should be highly informed by – indeed, should be driven by – an analysis of and a focus on the meaning of justice and fairness in employment.

When serious ethics scrutiny is part of a discussion about policy on not hiring smokers, a variety of different questions and perspectives are identified. For example:

- If the justification for excluding smokers from employment is compelling, why do most such policies not apply to current employees, not even in a phased-in manner?
- Smoking has become largely a class-related activity in this country, more common among non-professionals and the less affluent. Does a policy of not hiring smokers have the consequence of affecting most those with fewer economic advantages? Does the real possibility of disparate impact affect the justification for the policy?
- Is this kind of policy, in effect, penalizing smokers for their

- unhealthy behavior? How does penalizing individuals for health-related behavior fit with the mission of health care organizations?
- If a key reason for such a policy is to try to save on employee health care costs, is a no-smokers policy ethically different from refusing to hire other persons who can be predicted to have higher than average health care costs – because of chronic conditions or genetic disposition or something else? Is the only difference a legal constraint?
 - If smoking is seen as health-related personal behavior that disqualifies someone for employment, what other aspects of an individual's life might be seen as disqualifying (where legally permissible)?
 - If the goal is to get smokers to stop smoking, would working with them be more effective than turning them away? For example, prospective employees could be tested for nicotine and, if positive, be required to take part in a smoking cessation program as they begin employment.
 - When doing stakeholder analysis before deciding on such a policy, who can adequately represent those not yet employed? Who in the larger community should be involved in the review of a proposed policy? Should individuals or organizations working on economic and employment justice be consulted?

These are the kind of questions and observations that are likely to be part of any discussion of the ethical merits of a no-smokers hiring policy. The most important contribution that can be made by a systematic review of the ethics of not hiring smokers is, however, to ensure that the fundamental and big-picture question of fairness in hiring is addressed. Good objectives and identifiable gains for the organization are not sufficient to make a policy good if it involves a basic unfairness in hiring.

There is a long-standing recognition that hiring criteria, practices, and decisions need to be scrutinized very carefully in order to avoid unfairness. An equal opportunity for employment is of such fundamental importance that any practice or proposal that disqualifies certain job applicants needs to be scrutinized carefully. An important focus of the consideration of the policy of excluding smokers should be the ethical standards for making employment decisions that have been developed over the years. There is, however, little evidence of the hard ethics work of determining the implications of fairness in this case. And there is little evidence that health care ethicists are demanding to be heard on the issue. It is time to give the development of "tobacco-free" hiring policies the critical ethical attention they need.

A policy that excludes smokers meets the descriptive meaning of the term "discrimination." The policy excludes members of one group from opportunities that are available to others. The ethical

question is whether discrimination in the case of smokers is based on factors sufficiently relevant and important to overcome the presumption against discrimination in hiring.

Fairness in Hiring

Sometimes a policy of not hiring smokers is described as the next step in an effort to discourage smoking and to protect others from second-hand smoke. Banning smoking in the building and on the hospital property has not been successful in getting all employees to quit smoking, so why not simply refuse to hire smokers? And when such a policy is announced to the public, spokespersons for the organization often describe it as a “natural progression” from the campus ban on smoking. The policy is seen as part of the effort to promote healthy behavior.

Refusing to hire smokers may be related to a prohibition of smoking on campus in the sense that they both send a message about the harm of smoking, but it is an entirely different step in terms of the employer-employee relationship and raises very different ethical questions. If such a policy of not hiring smokers is justifiable, it needs to address these different concerns. A ban of workplace smoking does not deprive a smoker of employment and relates to the employee’s personal behavior only at the workplace. Refusing to hire someone who tests positive for nicotine use, on the other hand, 1) deprives someone of employment opportunity, and 2) does so on the basis of information about the person’s

behavior on her/his own time outside the workplace.

It is reasonable and often necessary for employers to restrict certain employee personal behaviors on the job and at the work site in order to provide for a safe and healthy environment. There has been widespread support for policies that ban tobacco use from health care campuses. These on-site smoking restrictions have generally been considered ethically acceptable, even ethically required, because they contribute to a healthier environment for patients, co-workers, and visitors (without extending controls further than the worksite).

On the other hand, when the employer prohibits a certain kind of employee behavior that applies to the employee off-site and outside of working time, the connection between personal behavior and potential negative jobsite impact is less clear and less direct, if it even exists. This importance of job-relatedness has been clearly identified and highlighted in both civil rights and in business ethics.

The decades-long civil-rights efforts to increase job opportunities for everyone regardless of ethnic, racial, or gender identity gradually led to the recognition that some criteria or reasons for not hiring individuals are irrelevant to the ability to do the job and are, therefore, fundamentally unfair. Some forms of job discrimination are now legally prohibited, but the law is not the final word on appropriate hiring criteria.

In the work done in the field of business ethics over the last 40 years, the relationship between employers and employees emerged as one major area of focus. Special attention has been paid to the nature and limits of employee rights to individual privacy and individual freedom. When is employer monitoring and mandating of employee behavior appropriate and when is it not? There is a necessary distinction between behavior on-the-job and behavior off-the-job. Employee off-the-job behavior should be respected as private (that is, something employers should not inquire into) unless it is something that affects "the employee's work performance in a direct and serious manner."¹

The anti-discrimination movement and the attention paid to the nature of employee privacy have led to a common perspective on ethical hiring criteria: **hiring decisions based on any factors not directly related to the ability to do the job put individuals at risk of being deprived of employment opportunities unfairly.** This is the meaning of wrongful discrimination in hiring. There is an ethical imperative to avoid making employment decisions on the basis of personal attributes or characteristics or behaviors unless they can be shown to be directly related to job performance.

The key question, of course, is whether the simple fact that one engages in the legal practice of tobacco use prevents one from being able to do the job adequately. (Remember, nicotine testing is done only

when the individual has been approved for hire pending the outcome of the physical.) It is not enough to prefer non-smokers. It is not enough to be legally permitted to refuse to hire smokers. The ethical standard is higher.

It would be difficult to make a convincing case that, unless they engage in healthy behavior at all times, employees are failing to live up to their essential job responsibilities. Smoking does have negative health consequences and can be expected to affect work performance at times. The same might be said, to a certain extent, of a number of other personal habits or behaviors – too much work, poor eating, heavy drinking, lack of exercise, too little rest, living in a stressful environment, a dangerous hobby. It is understandable that smoking is singled out. It is a behavior that has become less socially acceptable; it can be tested for in the lab and does not require personal assessments or self-reporting; some argue that there is no "moderate" level of indulgence that is acceptable or healthy. It is understandable that it is singled out, but it is not clear that the differences mean that off-site smoking is not compatible with acceptable job performance while other off-site health-related behaviors are more compatible.

It may well be true that a requirement that all employees be non-smokers will save on the organization's health care costs. There are, however, also some non-smokers whose healthcare cost can be expected to be higher than normal or whose health is

expected to result in higher than average absenteeism. Consistency – treating similar cases similarly – is one aspect of fairness. If a key reason for a policy of hiring only non-smokers is the smoker’s likely future health care needs, should job applicants be tested for other conditions that suggest higher future health care needs?

The ethical standard of direct relationship to job performance is designed to ensure that hiring decisions are not based on irrelevant – and therefore unfair – considerations. Expanding the concept of job performance to include potential future health care costs so that potential health care costs can be decisive in employment decisions appears to undermine the very notion of fair employment opportunity that the concept is intended to protect.

Smoking is unhealthy behavior, unhealthy to oneself and others, and is behavior that is voluntary in the sense that no one is forced to start and many are able to stop, given sufficient incentive, time, and effort. It is sometimes suggested that hiring “discrimination” against smokers is not real discrimination because smoking is voluntary behavior (very different from race or gender). A reference to clinical ethics standards might be useful here. We recognize and respect the right of patients to self-determination even when they act contrary to their best health interest. Similarly, when individuals engage in unhealthy behavior on their own time, they do not give up their right to be

considered for employment based on job qualifications and not on the basis of their personal choices away from work.

To provide a healthier environment, there is strong ethical support for banning smoking in the workplace. To promote health and/or to contain health care costs, it makes good sense for an employer to provide smoking cessation programs and incentives for employees to stop smoking. Making non-smoking a condition of employment, however, appears to be a very different kind of step.

It is not necessary to engage in an ethically questionable hiring practice in order to promote health and contain health care costs. Alternative approaches are possible and might well be considered more thoroughly if the “solution” of making non-smoking a condition of employment is taken off the table.

NOTES

¹ A. G. Sulzberger, “Hospitals Shift Smoking Bans to Smoker Bans.” *The New York Times*. February 11, 2011.

² Emily Ramshaw, “Vitoria Hospital Won’t Hire Very Obese Workers.” *The Texas Tribune*. March 26, 2012.

³ Manuel G. Velasquez. Business Ethics: Concepts and Cases. Fifth Edition. Upper Saddle, NJ: Prentice Hall. 2002. P. 469.