

# Tobacco Control Legal Consortium

William Mitchell College of Law

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Dear Kathi,

Thank you for inviting our comments on whether a state agency in West Virginia can prohibit smokeless (spit) tobacco use by employees and visitors in its buildings, and related issues. I apologize for not being able to respond to your questions sooner. I need to say at the outset that the Tobacco Control Legal Consortium is not authorized to provide legal representation or formal legal advice. For that, we encourage you to consult with local legal counsel familiar with West Virginia law and practice.

From what we understand, the West Virginia office of Workers Compensation is inquiring whether it can prohibit the use of smokeless tobacco (snuff, chewing tobacco, etc.) by its employees and visitors to its buildings. West Virginia has a smoker protection law that prohibits public or private employers from refusing to hire or from discharging or penalizing any individual or employee solely because that individual uses tobacco products off the premises of the employer during non-working hours. W.VA. CODE § 21-3-19 (1992). An employer, however, may offer a health, disability or life insurance policy that distinguishes between employees for the type or price of coverage based on the employee's use of tobacco products. Although the state's employee policy requires state government buildings to be smoke-free, and allows individual agencies to implement more restrictive policies, it doesn't prohibit smokeless tobacco use.

1. **Can a state agency prohibit the use of smokeless tobacco by employees and visitors in its buildings?** To begin with, employers can set certain policies regarding the behavior of individuals that enter their premises, much as landowners can set policies regarding the behavior of their guests (invitees) on the landowner's premises. These policies can have the force and effect of law, and a violator can be asked to leave the premises or (in the case of an employee) face disciplinary action for repeated offenses.

Is there a difference between private employers and state agencies that would make it possible for the former to prohibit the use of a tobacco product on its premises and impossible, or at most problematic, for the latter? Union

management wanting to enforce such a policy, for example, would have to address issues, such as the duty to bargain in good faith, in worksites subject to collective bargaining agreements. A state agency, unlike many private employers, typically has buildings open to the general public (courthouses, county libraries, etc.), which people need to access daily. Because of the public right to access, state agencies enacting a policy that would affect all visitors, as well as employees, in the agency, would appear to face a somewhat higher bar than private employers. At the same time, the reason so many public facilities tend to enact smoke-free policies and laws before private facilities is because secondhand smoke is considered a health risk that affects the general public. A state agency's smokeless tobacco policy would need to establish a similar legitimate governmental need for such a policy.

2. **On what rationale can this prohibition be based?** To assess whether a given law is based on an adequate justification, a court looks at the individual and governmental interests at stake. The criteria a court uses become more demanding as the individual interests at stake become more substantial. In all cases regarding public health regulations, courts require that a law be "rationally related" to accomplishing a "legitimate" government objective. This "rational basis" requirement sets a very low standard for the government. A law will be considered valid so long as the law is not completely irrational or arbitrary.

By eliminating exposure to secondhand smoke, clean indoor air acts in West Virginia and around the country are rationally related to the legitimate governmental goal of minimizing health and safety risks and maintaining public health. Unlike smoking, however, the use of smokeless tobacco does not pose a significant risk to nonusers. According to this month's MMWR (July 2005) published by the Centers for Disease Control and Prevention, smokeless tobacco use in the U.S. causes fewer than 1,000 deaths annually from cancers of the lip, oral cavity and pharynx, compared to more than 400,000 of the 50 million U.S. smokers (and about 50,000 U.S. nonsmokers) annually.

Nevertheless, under rational basis review, the state is not obliged to produce scientific evidence or empirical data. The legislature need not "actually articulate at any time the purpose or rationale for its public health policy." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Public health regulations may be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

A rational basis for prohibiting smokeless tobacco exists on a public health and welfare ground: The ingredients in smokeless tobacco (nicotine, carcinogens, polonium 210, radioactive elements, and formaldehyde) have been linked to heart problems, oral, palate and tongue cancers, and problems with teeth and gums related to the dangers of nicotine addiction. Moreover, the escalating use of smokeless tobacco products by underage persons, combined with the addictive nature of nicotine, presents an additional growing public health problem. With its

policy, the state would have the same goal in reducing harm to common interests in health, safety, and welfare caused by smokeless tobacco as it does in reducing harm caused by any other tobacco product.

Part of the rationale behind tobacco control laws and policies throughout the country is the strong message they send about the health risks of tobacco use. Prohibiting the use of smokeless tobacco on state agency premises is just another way the state can discourage use of this toxic product.

What's more, the state has an interest in preventing unreasonable interference with the community's use and enjoyment of a public place. In the past, public nuisances in America included garbage and offal, decaying animals, and improper sewage. Today, state legislatures, or state and local public health agencies, usually define public nuisances as anything injurious to health or indecent or offensive to the senses, or obstructing the free use of property, which interferes with the comfortable enjoyment of life or property. Some clean indoor air acts, such as those in Rhode Island and Colorado, have declared smoking a public nuisance and public health danger in indoor areas. Local ordinances and policies around the country have declared spitting or expectorating on public grounds a public nuisance.<sup>1</sup> Given the toxic ingredients in tobacco spit and the offensive sight and smell of users spitting tobacco juice on public grounds, a case could certainly be made for designating the public use of spit tobacco a "public nuisance."

### **3. What legal challenges are likely if a state agency implemented such a policy?**

Since a state agency is open to the public, its policies affect more than the employees of and visitors to a private employer: they affect individuals who are legally required to be on an agency's premises (for example, a courtroom) and have a legal right to be on the agency's premises (for example, a library). Because of the public need to access a state agency, opponents could argue that the policy discriminates against smokeless tobacco smokers by excluding them from public facilities at which they are required to appear (say, for example, they were subpoenaed to appear in court) or entitled to enter. They could challenge the policy on the grounds that it violates the Equal Protection Clause because it discriminates against smokeless tobacco users and in favor of nonusers without an adequate justification.

Similar Equal Protection challenges to smoke-free laws have been raised in courts around the country, and not one of them has succeeded. The Equal Protection Clause gives special protection to only a few categories of people, based on race, nation origin, ethnicity, gender, or illegitimacy – groups that share an "immutable characteristic" determined solely by the accident of birth. The use of smokeless

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<sup>1</sup> Concern about the spread of tuberculosis played a significant role in the movement to prohibit public spitting throughout the country.

tobacco is not an “immutable characteristic” because people are not born chewing and spitting brown tobacco juice, and even though the practice is addictive, people can stop it. Arguments that smokeless tobacco users are a specially protected group under either the federal Equal Protection Clause or West Virginia’s state equal protection clause are thus unlikely to succeed.

Opponents might also challenge the smokeless tobacco policy on substantive due process grounds, alleging that the use of tobacco is a constitutionally protected liberty or property interest. The U.S. Constitution, however, only affords due process protection to fundamental rights and liberties such as the right to marry, to procreate, to educate and raise children, to marital privacy, to travel and to vote. The use of tobacco is not a fundamental right or liberty. Thus, the Constitution does not bar the passage of local, state or federal tobacco control laws or policies.

Opponents could also claim that the policy infringes on the privacy rights of smokeless tobacco users, based on the Due Process Clause of the 14<sup>th</sup> Amendment. This constitutionally guaranteed right of privacy covers only fundamental personal interests, such as marriage, procreation, and contraception. A smokeless tobacco policy would not violate any constitutionally protected right of privacy. What’s more, even if there was a “right of privacy” to use smokeless tobacco, the policy would not prohibit the use of smokeless tobacco – it would simply prohibit its use in state agency buildings.

#### **4. Are there differences in legal standing between a policy passed by state agencies and one passed by a private company?**

Employers are generally free to establish policies in the workforce, such as restrictions or prohibitions of on-site employee smoking, as long as they are in compliance with federal and state laws. Because of the public’s need and right to access public facilities, state agencies may be subject to higher public scrutiny than a private employer, but as long as the policy can be rationally related to a legitimate government goal, such as minimizing the health risks of tobacco use, or reducing health insurance costs, or maintaining public health, it is likely to enjoy the same validity as any other legal employment policy. It’s worth observing that state governmental entities often enforce arbitrary policies that apply to visitors as well as employees, such as prohibitions against eating or chewing gum in courtrooms, with rare exceptions.<sup>2</sup> Unlike a government policy based on protocol or similar administrative reasons, a smokeless tobacco policy is grounded on grave public health concerns. It could arguably be viewed as an essential part of any regulatory approach designed to reduce the health risks of tobacco use and help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products.

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<sup>2</sup> For example, under the ADA, diabetics might be entitled to take snack breaks at certain times during the day.

I hope this information is helpful, Kathi. I'm sorry I wasn't able to get back to you sooner than this. Please let us know if we can be of any further help to you on this or any other tobacco law-related matter.

Best regards,

Kerry Cork  
Staff Attorney

<sup>2</sup> For example, under ADA, diabetics might be entitled to take snack breaks at certain times during the day.