

Can an Employer Prohibit Workers from Smoking on Breaks?



SITUATION

A manufacturer of wire and cable products operates a 250,000 square foot facility on 23-acre property. The collective agreement stipulates that workers get two paid, 30-minute breaks for each 12-hour shift. Initially, the manufacturer's smoking policy allows workers to smoke during breaks on company property in a designated area. But workers were smoking even when not on their breaks and they weren't returning to work from breaks on time. So the manufacturer adopts a new smoking policy, stating workers can't smoke *anywhere* on the manufacturer's property, including outside the plant. And a pre-existing policy prohibits workers from leaving the property during breaks. Workers argue that the smoking and break policies, when considered together, effectively ban smoking any time during their shifts. So the union files a grievance, arguing that these policies are too restrictive and workers should be able to smoke on their breaks off-site. It claims workers can be off the manufacturer's property within a minute or two and thus have ample opportunity to take a break, smoke and return to work on time.

QUESTION

Is the manufacturer's smoking ban justified'

- A. Yes, because smoking is a health hazard to all workers.
- B. Yes, because the manufacturer pays workers during their breaks, it can control what they do on those breaks.
- C. No, because smoking isn't illegal.
- D. No, because the policy goes too far in essentially prohibiting all smoking by workers during their shifts.

ANSWER

D. The smoking ban isn't justified because workers could leave the manufacturer's property, smoke off-site and still return from breaks on time.

EXPLANATION

This hypothetical is based on an Ontario labour arbitration decision in which the arbitrator ruled that an employer's prohibiting all smoking on its premises went too far when combined with another policy barring workers from leaving the premises on their breaks. The arbitrator acknowledged the harmfulness of smoking and an employer's right to prohibit smoking on its property. Additionally, an employer has an obligation to protect workers from health hazards'even those resulting from their own behaviour. However, the arbitrator explained that the employer doesn't have the right to control whether the worker smokes off of its property. In this case, the arbitrator noted, the workers had enough time on a 30-minute break to leave the employer's property to smoke off-site and return from their breaks on time. If the workers failed to return to work in a timely manner, they could be subject to discipline. And smoking off-premises wouldn't jeopardize the health of any co-workers with exposure to second-hand smoke, removing the OHS issue. Therefore, the arbitrator found the policy unreasonable.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because although smoking is a hazard and can affect the health of even those who don't engage in smoking through second-hand smoke, that health hazard could be addressed without this restrictive policy. The manufacturer does have a duty to protect workers from the health hazards posed by second-hand smoke in the workplace. But it could fulfill that duty simply by prohibiting any smoking on its property, which it did. The problem is that the manufacturer also has a policy barring workers from leaving the property at all during their shifts. And taken together, these two policies effectively bar workers from smoking *outside* of the workplace, where co-workers aren't endangered by second-hand smoke.

B is wrong because although the collective agreement did call for the manufacturer to provide paid 30-minute breaks, paying the workers for breaks doesn't give the manufacturer control over what workers do on those breaks. Workers are entitled to do what they want on their breaks'it's their personal time away from their work duties. So as long as their activity is legal and doesn't create a hazard or endanger other workers, they can use that break time as they wish, such as by reading, taking a nap, using their cell phones, eating or even smoking.

C is wrong because smoking in the workplace may, in fact, be illegal. Nearly all Canadian jurisdictions bar smoking in workplaces or limit it to designated rooms or areas only. And if an employer lets workers smoke in the workplace, it could face OHS violations. For example, during an inspection, a WSCC Safety Officer observed evidence of smoking in a Nunavut workplace. The employer pleaded guilty to violating the *Environmental Tobacco Smoke Work Site Regulations* by failing to control the exposure of workers to environmental tobacco smoke at an enclosed work site and was fined \$2,000 [J&N Moving Ltd., Govt. News Release, May 27, 2015].

Insider Says: Note that an employer can adopt a policy barring even legal activity if it affects worker safety. For example, drinking alcohol is legal for individuals over a certain age but an employer could still bar workers from drinking alcohol on their breaks because it could impair their ability to perform their work responsibilities safely.

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United Steelworkers Local 7175 v. Veyance Technologies Canada Inc., [2015]
CanLII 30713 (ONLA), June 3, 2015