Lighten Up: Should Massachusetts Implement a Smoking Surcharge for State Employees?

“To take further steps in preserving and improving the health of all of our employees, Anna Jaques has recently implemented a non-smoking hiring policy requiring all individuals who have been offered a job at Anna Jaques Hospital . . . to take a nicotine test during their pre-hire screening process. This non-smoking hiring policy is an addition to existing pre-hiring screening measures. Administered by the hospital’s Occupational Health Services, the urine-based nicotine test detects the presence of all forms of nicotine.

Offers of positions to prospective employees who test positive for nicotine or drugs will be rescinded. Those individuals testing positive for drugs or nicotine will be eligible to re-apply for positions at the hospital [six] months after the date of the positive report.”

I. INTRODUCTION

On November 18, 2010, Anna Jaques Hospital in Newburyport, Massachusetts revealed its new hiring policy. Under the policy, the hospital will not hire any prospective employees who test positive for nicotine. Anna Jaques Hospital’s policy is part of a national trend among private employers that have instituted tobacco-free employment policies and tobacco surcharges on health insurance. Many employers have gone even further, instituting policies that target not only potential employees, but also current employees, who must attempt to quit using tobacco or face termination.

Simply stated, the reasoning behind these tobacco-free policies is the

3. See id.; see also supra note 1 and accompanying text (providing Anna Jacques Hospital’s new hiring policy).
5. See Buote, supra note 2 (noting ultimatum given by some employers to employees who smoke).
employer’s bottom line. With healthcare costs spiraling in Massachusetts and throughout the United States, many employers are looking for ways to reduce healthcare-related expenses. This trend is not limited to private employers either. Although no state has yet implemented a tobacco-free employment policy, a growing number of states have established smoking surcharges for public employees covered under state healthcare benefit plans. This Note will explore whether Massachusetts should join this trend and implement a tobacco-free employment policy or a smoking surcharge in order save taxpayer money.

This Note will begin with an in-depth discussion of the at-will employment doctrine by tracing the history of its development. It will then examine the current status of the doctrine throughout the United States by detailing both the common-law and statutory limitations to at-will employment. Additionally, it will explore the emergence of so called “lifestyle discrimination” statutes and the status of lifestyle-discrimination law in Massachusetts.

Next, this Note will discuss rising healthcare costs throughout the United States and Massachusetts. It will examine the cost of healthcare for Massachusetts as the commonwealth’s largest employer. It will also discuss the healthcare-related costs attributed to smoking and will look at the recent trend among states of integrating smoking surcharges into state healthcare benefit plans.
Finally, this Note will analyze two potential options for Massachusetts to reduce its employee healthcare costs within the context of Massachusetts employment law, while also addressing slippery-slope concerns raised by opponents of these options. First, it will consider whether Massachusetts should implement a smoke-free employment policy. Second, it will explore the potential benefits of imposing a smoking surcharge on Massachusetts state employees.

II. HISTORY

A. At-Will Employment

Massachusetts common law governing employment contracts defines an at-will employee as an employee who is not employed for a specified period of time or for the purpose of rendering any particular service. At-will employment in Massachusetts can be terminated by the employee at any time for any reason, or for no reason at all. Similarly, absent a contractual (reviewing smoking-surcharge trend among state employers).


18. See infra Part III.A (weighing potential smoke-free employment policy for Massachusetts).

19. See infra Part III.B (discussing benefits of imposing smoking surcharge on Massachusetts state employees).

20. See Askinas v. Westinghouse Elec. Corp., 111 N.E.2d 740, 741 (Mass. 1953) (holding employee not employed for particular term or service could be discharged at any time); Richard L. Alfred & Ben T. Clements, The Public Policy Exception to the At-Will Employment Rule, 78 MASS. L. REV. 88, 89 (1993) (describing Massachusetts’s common-law rule of at-will employment); John Allen Doran & David L. Abney, An Overview of Massachusetts Law on Wrongful Termination of At-Will Employment, 77 MASS. L. REV. 83, 83 (1992) (describing general rule allowing termination of at-will employment in Massachusetts); see also Mark Berger, Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee, 16 YALE L. & POL’Y REV. 1, 19 (1997) (tracing development of at-will employment doctrine in United States). The concept of at-will employment has its early roots in Horace Gray Wood’s 1877 treatise on the master-servant relationship. See Berger, supra, at 19 & n.83 (noting role of H.G. Wood’s A Treatise on the Law of Master and Servant). Although there is some debate surrounding whether the case law Wood cited completely supported his assertions about employment law at the time, soon after Wood published his treatise, various courts began citing his at-will employment rule. See id. at 19-20. By the turn of the twentieth century, the United States Supreme Court endorsed Wood’s presumption of at-will employment when it overturned legislation that limited the power of employers to terminate employees. See id. at 20; see also Adair v. United States, 208 U.S. 161, 174-75 (1908) (“[T]he right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.”).

21. See Alfred & Clements, supra note 20, at 88 (outlining Massachusetts common law governing employment contracts).
provision to the contrary, an employer can terminate at-will employment without notice for virtually any reason, or for no reason. Therefore in Massachusetts, “[t]he discharge of an at-will employee without cause is not alone a sufficient basis for imposing liability against an employer.”

Today, employment in all states, except Montana, is presumed to be at-will. The United States is one of the few countries in the world that adheres to the at-will presumption; most other countries require employers to justify terminations by showing cause. American courts and legislatures have chosen to retain the at-will presumption for a variety of reasons, including the preservation of freedom of contract, deference to employer judgment, and the belief that both employers and employees prefer at-will employment to job security.

1. Common-Law Limitations on At-Will Employment

Over time, three major exceptions to the at-will employment doctrine have developed at common law: the public-policy exception, the implied-contract exception, and the covenant-of-good-faith exception. Generally, these exceptions address terminations that conform to the at-will employment doctrine, but have been deemed unjust by a state’s courts.

The public-policy exception prohibits an employer from terminating an employee when such termination violates the explicit and well-established public policy of the state. Under the Massachusetts public-policy exception,
an employee is wrongfully discharged when the termination “violate[s] a ‘well-defined, clearly established public policy.’” Massachusetts courts have construed this exception to forbid the termination of an employee for complying with the law, refusing to violate the law, and asserting a legal right. Compared to many other states, Massachusetts courts have interpreted the public policy exception to the at-will presumption narrowly. The Massachusetts Supreme Judicial Court (SJC) explained the need for such a narrow interpretation of the public policy exception, stating, “[t]his court consistently has interpreted the public policy exception narrowly, reasoning that to do otherwise would ‘convert the general rule . . . into a rule that requires just cause to terminate an at-will employee.’”

The implied-contract exception to the at-will employment doctrine recognizes the existence of an implied contract between employer and employee where no express employment contract exists. When an employer makes written or oral representations to an employee concerning job security or termination procedures, courts may determine that those representations impliedly create an employment contract. The implied-contract exception often arises when courts decide whether representations made in employee handbooks create an implied employment contract, absent a valid waiver of the exception on public policy extrapolated from their respective state constitutions and statutes, in addition to broader notions of public good. See id. at 5 (providing map showing basis of states’ public policy exceptions). The remaining twenty-six states base their exceptions exclusively on public policy from their respective state constitutions and statutes. See id.


32. See Paget, supra note 30, at 42 (discussing cases in which SJC has refused to apply public-policy exception).

33. King, 638 N.E.2d at 492 (quoting Smith-Pfeffer, 533 N.E.2d at 1371) (noting internal administration, policy, and organizational matters not basis for invoking public policy exception).

34. See Muhl, supra note 27, at 7-10 (discussing implied-contract exception to at-will employment). Employment is not typically governed by a contract. See id. at 7.

35. See id. at 7-8 (describing creation of implied employment contract).
stating that the content of the handbook does not create a contract.\textsuperscript{36} While the implied-contract exception is recognized in thirty-eight of the fifty U.S. states, Massachusetts courts do not recognize the exception.\textsuperscript{37}

The covenant-of-good-faith exception to the at-will employment doctrine reads a covenant of good faith and fair dealing into every employment relationship.\textsuperscript{38} Generally, this exception has been construed to apply the “just cause” standard to employee termination, or to ban terminations made in bad faith or motivated by malice.\textsuperscript{39} Massachusetts is one of just eleven states to recognize this exception.\textsuperscript{40} The SJC has held that the exception applies only if an employee’s termination is in bad faith or without “good cause.”\textsuperscript{41} Further, the court has held that the exception applies only if the employer is unjustly enriched by withholding employee compensation for past services.\textsuperscript{42}

2. Statutory Limitations on At-Will Employment

a. Federal Statutory Limitations

Various federal statutes limit the doctrine of at-will employment for employers.\textsuperscript{43} Most of these laws outlaw discrimination in both hiring and firing

\textsuperscript{36} See id. (recognizing employee handbook could create implied employment contract). Employee handbooks found to create implied employment contracts typically state that employees will only be discharged for “just cause” or that specified procedures will be followed prior to employee termination. See id at 8.

\textsuperscript{37} See id. at 7 (showing map in which Massachusetts not among thirty-eight states recognizing implied-contract exception). Of the thirty-eight states that recognize the implied-contract exception, fifteen include oral and written assurances by employers within the exception. See id. The remaining twenty-three states limit application of the exception to written assurances of employment. See id.

\textsuperscript{38} See Muhl, supra note 27, at 10-11 (explaining covenant-of-good-faith exception to at-will employment).

\textsuperscript{39} See id. at 10 (noting standard for covenant-of-good-faith exception to at-will employment).

\textsuperscript{40} See id. at 9 (providing map indicating states adopting covenant-of-good-faith exception to at-will employment). Of the eleven states that follow this exception, six apply it broadly, permitting it to be applied in both contract and tort claims. See id. The remaining five states apply the exception narrowly, limiting it to contract claims. See id.


\textsuperscript{42} See Gram v. Liberty Mut. Ins. Co. (Gram II), 461 N.E.2d 796, 799 (Mass. 1984) (denying employer financial windfall from refusal to compensate employee for services rendered); see also Siles v. Travenol Labs., Inc., 433 N.E.2d 103, 106 (Mass. App. Ct. 1982) (holding sales employee’s termination not bad faith because no evidence employer would retain post-termination commissions). Under the covenant-of-good-faith line of cases, courts have limited the remedy available to an employee. See Paget, supra note 30, at 41-42. Courts have ordered employers to pay funds deemed earned by an employee, but have refused to reinstate employment. See id.

based on an employee’s specific characteristics. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from terminating an employee or refusing to hire a prospective employee on the basis of his or her race, color, religion, sex, or national origin. Title VII also forbids employers from discriminating against an employee or prospective employee because of his or her association with another individual of a particular race, color, religion, sex, or national origin.

Congress provided whole and partial exceptions to Title VII for religious organizations, Native American tribes, and bona fide nonprofit private-membership organizations. Additionally, Congress created a statutory defense that allows employers to discriminate on the basis of a protected characteristic, if the particular characteristic is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

Title VII does not identify age as a characteristic protected from employment discrimination. However, Title VII contains a provision that required the Secretary of Labor to conduct a detailed study of age discrimination. The resulting study found that discrimination on the basis of age was prevalent among employers throughout the country. In response to
the Secretary’s findings, Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits an employer from terminating or refusing to hire an employee over forty years old based on his or her age.52

In 1990, Congress adopted another major exception to the at-will employment doctrine: the Americans with Disabilities Act (ADA).53 According to Congress, the ADA was a nationwide mandate for the eradication of discrimination against individuals with disabilities.54 Title I of the ADA prohibits employers from terminating or refusing to hire a qualified individual because of his or her disability.55 The ADA defines a “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position.”56 Therefore, an employer discriminates not only if it fires or refuses to hire a qualified individual on the basis of disability, but also if the employer fails to reasonably accommodate the individual’s impairment.57

b. Massachusetts Statutory Limits

Exceptions to at-will employment that outlaw discrimination based on specified characteristics of an employee or a prospective employee are not

for legislation to address discrimination based on the misperception that older persons cannot adequately perform certain jobs. See id.

52. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (2006) (prohibiting employment discrimination on basis of age); see also id. § 631(a) (specifying ADEA applies to individuals over age forty). The ADEA applies only to employers with twenty or more employees. See id. § 630(b) (defining “employer” for purposes of ADEA).


54. See id. § 12101(b) (summarizing congressional purpose behind ADA).

55. See id. § 12112(a) (stating general rule of ADA Title I). Like Title VII of the Civil Rights Act, the ADA applies to employers with fifteen or more employees. See id. § 12111(5)(A).

56. See id. § 12111(8) (defining “qualified individual” for purpose of ADA); see also id. § 12111(5)(A) (defining “employer” for purpose of ADA Title I).

57. See id. § 12112(b)(5)(A) (outlining reasonable accommodation requirement of ADA Title I). There is considerable debate surrounding what constitutes reasonable accommodation within the context of the ADA. See Randal I. Goldstein, Note, Mental Illness in the Workplace After Sutton v. United Air Lines, 86 CORNELL L. REV. 927, 931 n.20 (2001) (noting debate surrounding application of ADA’s reasonable-accommodation standard). Much of this debate stems from difficulties in applying the reasonable-accommodation standard. See Stephen F. Befort, The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence, 37 WAKE FOREST L. REV. 439, 441-42 (2002) (discussing issues surrounding application of reasonable-accommodation standard since ratification of ADA). Determining the scope of the reasonable-accommodation requirement is difficult for two main reasons: First, because the statute does not define reasonableness, the notion of what is reasonable remains uncertain. See id. Second, the reasonable-accommodation inquiry is fact-specific as applied to each employer. See id. Additionally, some legal scholars believe that the reasonable-accommodation requirement is a form of affirmative action designed to integrate disabled individuals into the labor market despite inflicting economic losses on employers. See Carrie Griffin Basas, Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA, 29 BERKELEY J. EMP. & LAB. L. 59, 74 (2006) (discussing affirmative action debate surrounding ADA reasonable-accommodation requirement).
limited to federal law. Many states have enacted laws that largely mirror federal laws prohibiting such discrimination. Some states, such as Massachusetts, go beyond federal standards and proscribe discrimination based on additional characteristics of the employee.

The Massachusetts Fair Employment Practices Act (MFEPA), like the federal laws discussed previously, prohibits an employer from discriminating on the basis of race, color, religion, national origin, sex, age, and handicap. Unlike federal law, however, the MFEPA also prohibits discrimination based on ancestry, sexual orientation, and gender identity. In construing the MFEPA, Massachusetts courts often look to interpretations of analogous federal statutes, such as Title VII, although they are not bound by these


61. See id. In Massachusetts, all public employers and all private employers with more than six employees are subject to the antidiscrimination provisions of the statute. See id. § 1(5) (defining “employer” for purpose of MFEPA). Although federal legislation uses the term “disability” and Massachusetts legislation uses the term “handicap,” the SJC has interpreted these two terms to have the same meaning. See Dahill v. Police Dep’t of Bos., 748 N.E.2d 956, 959 n.7 (Mass. 2001).


“Gender identity” shall mean a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with of the person’s physiology or assigned sex at birth.

Section 3 of chapter 151B of the General Laws, as so appearing, is hereby amended by inserting in each instance after the word “sex”, in lines 17 and 61, in each instance, the following words: “, gender identity.”

B. Lifestyle Discrimination

There is no federal statute explicitly prohibiting employers from discriminating against an employee or prospective employee on the basis of his or her off-duty behavior. Some federal statutes—including, Title VII, the Immigration Reform and Control Act, the Fair Credit Reporting Act, and the Employee Polygraph Protection Act—indirectly limit the use of off-duty activity as a basis for adverse employment decisions; however, these statutes are fairly narrow in scope. Unlike the federal government, states limit the ability of employers to use off-duty conduct as a basis for hiring and firing employees.

1. The Emergence of Lifestyle Discrimination

In the early 1990s, states began enacting legislation to prevent employers from basing adverse employment actions on an employee’s off-duty tobacco use. The impetus for this legislation was the combined lobbying efforts of the U.S. tobacco industry and the American Civil Liberties Union (ACLU). These two powerful groups teamed up following the publication of a 1988 survey by the Administrative Management Society reporting that approximately 6% of employers in the United States refused to hire smokers.

---


66. See Pagnattaro, supra note 64, at 640 (highlighting state statutes limiting employment discrimination based on off-duty conduct).

67. See id. at 641 (noting arrival of “first wave” of off-duty protection for employees began in early 1990s).

68. See Christopher Valleau, Comment, If You’re Smoking You’re Fired: How Tobacco Could Be Dangerous to More than Just Your Health, 10 DRPAUL J. HEALTH CARE L. 457, 484 (2007) (discussing “unlikely pairing” of tobacco lobby and ACLU). The ACLU faced media criticism when it was revealed that it had accepted $500,000 from the tobacco lobby in the late 1980s and early 1990s. See id. at 484 n.138.

69. See id. (outlining origin of tobacco lobby and ACLU alliance). At the time, 6% of American employers equated to approximately 6,000 companies. See id.
The ACLU framed the issue as lifestyle discrimination and argued that discrimination against employees on the basis of private lifestyle choices was an unfair and dangerous violation of employees’ rights.\(^{70}\)

As a result of the lobbying efforts of the tobacco industry and the ACLU, more than half of the states and the District of Columbia enacted statutes proscribing discrimination based on employees’ off-duty conduct.\(^{71}\) The majority of these statutes contain language prohibiting discrimination against current or prospective employees because of off-duty tobacco use.\(^{72}\) Some of these statutes explicitly reference smoking, while others employ broader language to encompass general use of tobacco products.\(^{73}\) Rather than enacting legislation specifically aimed at protecting tobacco users from employment discrimination, some states have ratified laws that shield current and prospective employees from adverse employment action based on the use of any legal product.\(^{74}\) Similarly, a few states outlaw discrimination against an

\(^{70}\) See id. at 484 (discussing ACLU’s objections to “lifestyle discrimination”).

see also infra notes 72-76 and accompanying text (detailing lifestyle-discrimination statutes).

\(^{72}\) See Valleau, supra note 68, at 478 (noting twenty of thirty-one then-current statutes containing prohibitory language);
see also, e.g., D.C. CODE § 7-1703.03 (2013); IND. CODE ANN. § 22-5-4-1 (West 2013); KY. REV. STAT. ANN. § 344.040 (West 2013); LA. REV. STAT. ANN. § 23:966 (2012); ME. REV. STAT. ANN. tit. 26, § 597 (2013); MISS. CODE ANN. § 71-7-33 (2013); N.J. STAT. ANN. § 34:6B-1 (West 2013); N.M. STAT. ANN. § 50-11-3 (2013); OKLA. STAT. ANN. tit. 40, § 500 (West 2012), amended by 2013 Okla. Sess. Law Serv. 5-6 (West); OR. REV. STAT. ANN. § 659A.315 (West 2013); S.C. CODE ANN. § 41-1-85 (2012); S.D. CODE ANN. § 60-4-11 (2013); VA. CODE ANN. § 2.2-2902 (2013); W. VA. CODE ANN. § 21-3-19 (LexisNexis 2013); WYO. STAT. ANN. § 27-9-105(a)(iv) (2013). Of the remaining statutes, Virginia’s law applies only to public employers, allowing all private employers to discriminate based on tobacco use. See § 2.2-2902. (“No employee of or applicant for employment with the Commonwealth shall be required, as a condition of employment, to smoke or use tobacco products on the job, or to abstain from smoking or using tobacco products outside the course of his employment.”). Furthermore, the Louisiana and South Dakota statutes only protect current employees from tobacco use discrimination, not prospective employees. See § 23:966; § 60-4-11. Note that Arizona repealed its lifestyle discrimination statute, effective May 1, 2007. See ARIZ. REV. STAT. ANN. § 36-601.02 (repealed 2007).

\(^{73}\) Compare § 275:37-a (“No [New Hampshire] employer shall require any employee or applicant for employment abstain from using tobacco products outside the course of employment, as long as the employee complies with any workplace policy . . . .”), and § 21-3-19(a)(“It shall be unlawful for any [West Virginia] employer . . . to refuse to hire any individual or to discharge any employee or otherwise to disadvantage or penalize any employee with respect to compensation, terms, conditions or privileges of employment solely because such individual uses tobacco products off the premises of the employer during nonworking hours.”), with § 344.040(a)(1) (“It is an unlawful practice for a[] [Kentucky] employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual . . . because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking[,]”); and tit. 40, § 500(1) (“It shall be unlawful for an [Oklahoma] employer to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a nonsmoker or smoker or uses tobacco products during nonworking hours.”).

\(^{74}\) See, e.g., 820 ILL. COMP. STAT. ANN. 55/5(a) (West 2013) (“It shall be unlawful for an employer to refuse to hire or to discharge any individual . . . because the individual uses lawful products off the premises of the employer during nonworking hours.”); MINN. STAT. ANN. § 181.938, subdiv. 2 (West 2013) (“An employer
employee for engaging in any lawful activity outside of work. 75 Many of these state statutes provide exemptions that allow certain nonprofit employers to discriminate against employees who use tobacco or other lawful products if the employer’s mission is seemingly at odds with the use of such products.76

2. Lifestyle Discrimination in Massachusetts

Massachusetts is among the minority of states that have not enacted a lifestyle-discrimination statute explicitly protecting the rights of employees, current or prospective, from discrimination based on off-duty conduct.77 As a result, many major Massachusetts employers have instituted policies that prohibit the hiring of prospective employees who smoke or that permit the termination of existing employees who refuse to quit smoking.78 In Rodrigues

may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours."); MONT. CODE ANN. § 39-2-313(2) (West 2013) ("An employer may not refuse to employ or license and may not discriminate against an individual . . . because the individual legally uses a lawful product off the employer’s premises during nonworking hours.").

75. See, e.g., CAL. LAB. CODE §§ 96(k), 98.6 (West 2013) (protecting against “demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises”); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2013) (“It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours . . . .”); N.D. CENT. CODE ANN. § 14-02-4-03 (West 2013) (“It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee . . . because of . . . participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”).

76. See, e.g., CONN. GEN. STAT. ANN. §31-40s(a) (West 2013) (“No employer . . . shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, . . . provided any nonprofit organization or corporation whose primary purpose is to discourage use of tobacco products by the general public shall be exempt from the provisions of this section.”); 55/5(b) (exempting “any [Illinois] employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public”); MO. ANN. STAT. § 290.145 (West 2013) (“Religious organizations and church-operated institutions, and not-for-profit organizations whose principal business is health care promotion shall be exempt from the provisions of this section.”); MONT. CODE ANN. § 39-2-313(3)(c) (exempting “an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.”). In addition to nonprofits that promote health or discourage tobacco use, firefighters may be exempt from statutes protecting against lifestyle-discrimination statutes. See, e.g., LAB. § 98.6(c)(2)(B) (exempting California firefighters); § 31-40(a)(b) (exempting Connecticut firefighters); § 60-4-11 (exempting full-time South Dakota firefighters).

77. See Pagnattaro, supra note 64, at 667 (noting Massachusetts lacks lifestyle-discrimination statute).

78. See Buote, supra note 2 (describing growing trend of employers hiring exclusively nonsmokers). Scotts, an Ohio-based lawn care company, instituted a policy banning all employees from smoking both at work and when off-duty. See id. Attempting to achieve the goal of a tobacco-free workplace, the Massachusetts Hospital Association (MHA) implemented an employment policy that prohibits the hiring of smokers. See id. While announcing this new policy, the president of the MHA stated, “MHA is proud to take this groundbreaking step to promote public health. We hope more hospitals, health systems and businesses throughout Massachusetts follow our course.” Id.
v. Scotts Co., Rodrigues sued his former employer, Scotts Co. (Scotts), after it terminated him for failing a nicotine test. Rodrigues challenged Scotts’s policy of banning off-duty smoking through four causes of action: violation of his rights under the Massachusetts Privacy Act (MPA), violation of his rights under the Massachusetts Civil Rights Act (MCRA), wrongful termination, and violation of the Employee Retirement Income Security Act (ERISA) section 510.

On January 30, 2008, the United States District Court for the District of Massachusetts dismissed Rodrigues’s claims for MCRA violations and wrongful termination. The court found that Rodrigues failed to state a claim under the MCRA because he did not adequately show that his employer used threats, intimidation, or coercion to interfere with his rights. Likewise, the court found that Rodrigues’s asserted right to smoke is not a predicate for a wrongful termination claim under the public-policy exception to at-will employment rooted in Massachusetts common law.

Although the court held that Rodrigues properly stated claims under the MPA and ERISA section 510, on July 23, 2009, the court granted summary judgment in favor of Scotts on both remaining claims. The MPA, which provides that each person “shall have a right against unreasonable, substantial or serious interference with his privacy,” has been applied to employees who attempt to safeguard their private lives from their employers. Massachusetts courts have held that such privacy cases require careful balancing of an employee’s interest in “keeping private information private” against an employer’s business interest in acquiring this information.

The federal district court held that Rodrigues did not have a protected privacy interest

---

80. See id.
81. See id.
82. See id. at *2.
83. See Rodrigues, 2008 WL 251971, at *2 (explaining count two’s failure to state a claim). Rodrigues alleged that Scotts threatened to fire him if he did not submit to a nicotine test, but the court ruled that a threat to terminate at-will employment, without more, does not constitute an actionable threat under the MCRA. See id.
84. See id. (noting public policy exception “more aligned with efforts to suppress or discourage smoking than with protection of the ‘right to smoke’”).
86. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 2013); see also Pagnattaro, supra note 64, at 667 (describing application of MPA to protect employees’ private lives).
87. See Rodrigues, 639 F. Supp. 2d at 134 (describing balancing required in MPA cases).
ERISA section 510 outlaws discrimination by an employer against a participant in a benefit plan “for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.”

The court determined that Rodrigues was not actually a “participant” as defined by ERISA because he was not a “regular, full-time associate” under Scotts’s benefits plan. At the time of his termination, Rodrigues had been employed by Scotts for only two weeks, and his regular employment was contingent on passing background and urinalysis tests. Because ERISA has not been construed to apply to hiring decisions, the court dismissed Rodrigues’s ERISA claim.

C. Healthcare Costs for Employers

1. Rising Healthcare Costs Nationwide and in Massachusetts

The primary reason employers have instituted tobacco-free policies is to reduce healthcare-related costs. Most nonelderly Americans with health insurance receive employer-sponsored health insurance. In 2012, the average

---

88. See id. (ruling Scott’s policy did not violate MPA). In his deposition, Rodrigues testified that he did not attempt to keep private the fact that he was a smoker by willingly making the fact available to the public. See id. Further, Rodrigues acknowledged that while he was employed at Scotts, a supervisor saw a pack of cigarettes in plain view in his vehicle. See id.


90. See Rodrigues, 639 F. Supp. 2d at 135 (noting omission of word “hiring” from statute). ERISA defines “participant” as “any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . .” 29 U.S.C. § 1002(7) (emphasis added). In order to establish a prima facie case under ERISA section 510, “a [claimant] must demonstrate that 1) she is a member of an ERISA plan, 2) she was qualified for the position, and 3) she was discharged under circumstances that provide some basis for believing that [the employer] intended to deprive her of benefits.” See Kampmier v. Emeritus Corp., 472 F.3d 930, 943 (7th Cir. 2007). The first threshold question is whether the plaintiff qualifies as a benefits plan participant so as to gain standing to sue under ERISA. See Rodrigues, 639 F. Supp. 2d at 135. Under Scott’s benefits plan, a “Lawn Service Associate”—Rodrigues’s position—qualified for the benefits plan “on the first day of the month on or following 60 days of continuous full-time employment.” Id. (internal quotation marks omitted); see also Gregory L. Ash, Employer’s Aggressive Anti-Smoking Policy Survives Court Challenge—For Now, SPENCER FANE BRITT & BROWNE LLP (Sept. 4, 2009), http://www.spencerfane.com/Employers-Aggressive-Anti-Smoking-Policy-Survives-Court-Challenge--For-Now-09-04-2009 (noting ERISA claim rejected because court held Rodrigues ineligible for Scotts healthcare plan when terminated).


92. See id.

93. See Micah Berman & Rob Crane, Mandating a Tobacco-Free Workforce: A Convergence of Business and Public Health Interests, 34 WM. MITCHELL L. REV. 1651, 1654 (2008) (describing tobacco use as “obvious target” for employers to reduce healthcare costs); see also Michele L. Tyler, Note, Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers, 86 GEO. L.J. 783, 795 (1998) (suggesting employers have incentive to discover their employees’ unhealthy habits to reduce health insurance costs).

94. See ST. HEALTH ACCESS DATA ASSISTANCE CTR., STATE-LEVEL TRENDS IN EMPLOYER-SUPPORTED
annual premiums in the United States were $5615 for individual coverage and $15,745 for family coverage.\footnote{See \textit{The Kaiser Family Found. & Health Research & Educ. Trust, Employer Health Benefits: 2012 Annual Survey} 21 (2012) [hereinafter \textit{Kaiser Employer Health Benefits Survey}], available at http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf (providing average monthly and annual health-insurance premiums for covered workers).} The $15,745 average annual family premium in 2012 represents an approximately 30% increase from the 2007 average family premium and an approximately 74% increase from the 2003 average family premium.\footnote{See \textit{id.} at 30 (comparing average annual health insurance premiums for single and family coverage from 1999-2012). In 2003, the average annual premium was $3383 for single coverage and $9068 for family coverage. \textit{Id.} In 2007, the average annual premium was $4479 for single coverage and $12,106 for family coverage. \textit{Id.} It should be noted that these insurance premium increases far out-paced inflation and wage increase rates. See Berman & Crane, supra note 93, at 1654 (stating between 2001 and 2008 family premiums increased at rate four times higher than inflation and wages).} Employer contributions cover the overwhelming majority of all premium payments, accounting for approximately 83% of the premium for individual coverage and 73% of the premium for family coverage.\footnote{See \textit{id.} at 26.} In terms of dollars, the average annual contribution by employees in 2012 was $951 for single coverage and $4316 for family coverage, while the average annual contribution by employers in 2012 was $4664 for single coverage and $11,429 for family coverage.\footnote{See \textit{id.} at 78 (comparing 2012 average annual employer and employee health insurance premium contributions to total premiums).}

The nationwide trend of escalating healthcare costs is even more pronounced in Massachusetts.\footnote{See Amy M. Lischko, \textit{Mass. Med. Soc’y, Health Care Premium Expenditures in Massachusetts: Where Does Your Health Care Dollar Go?} 31-32 (2008), available at http://www.massmed.org/News-and-Publications/Research-and-Studies/Health-Care-Premium-Expenditures-in-Massachusetts--Where-Does-Your-Health-Care-Dollar-Go--(analyzing factors driving rising healthcare costs and health-insurance premiums in Massachusetts). Amy Lischko, a professor at the Tufts University School of Medicine, identifies the rising cost of hospital care, physical and clinical services, drugs and other medical nondurables, and administrative costs as the major factors driving healthcare costs in Massachusetts. See \textit{id.} at}
totaled $62.7 billion, the tenth highest total of any state.\textsuperscript{100} This total represents an increase of approximately 36% from 2004 and 100% from 1999.\textsuperscript{101} Historically, Massachusetts has had the highest per capita healthcare expenditures in the nation.\textsuperscript{102} In 2009, per capita healthcare expenditures in Massachusetts totaled $9278, which was approximately 36% higher than the national average and among the costliest in the world.\textsuperscript{103} In addition, employer-based health insurance premiums in Massachusetts are well above the national average.\textsuperscript{104}

2. Employee Healthcare Costs for Massachusetts

In fiscal year 2012, Massachusetts designated more than $1.3 billion of its budget for state-employee health insurance.\textsuperscript{105} This figure was a $31.1 million increase from the total spent on state-employee healthcare in 2009.\textsuperscript{106}
Healthcare plans for Massachusetts state employees are provided and administered by the Group Health Insurance Commission (GIC). The GIC is a quasi-independent state agency, governed by a seventeen-member board appointed by the governor. The state legislature established the GIC in 1955, pursuant to Chapter 32A of the General Laws of Massachusetts and gave it the power to negotiate and purchase insurance contracts with health insurance providers, every five years, on behalf of state employees. Currently, the GIC purchases health insurance for more than 225,000 subscribers and covers more than 400,000 individuals. These numbers will likely rise in upcoming years due to the recent ratification of An Act Relative to Municipal Health Insurance, which allows municipalities to transfer their municipal employee subscribers to the GIC.

3. The Cost of Smoking

The Centers for Disease Control estimate that smoking costs the U.S. economy approximately $193 billion annually. Of that figure, $97 billion

$1.3 billion on health insurance for its state employees. See id.


108. See What is the GIC?, supra note 107 (explaining mechanics of GIC).

109. See MASS. GEN. LAWS ANN. ch. 32A, § 4 (West 2013). The law reads as follows:

The commission shall negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth, and group general or blanket insurance providing hospital, surgical, medical, dental and other health insurance benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth.


110. See What is the GIC?, supra note 107 (noting number of state employees covered under GIC insurance plans).

111. See An Act Relative to Municipal Health Insurance, ch. 69, § 23, 2011 Mass. Acts 475, 481-84; see also Calvin Hennick, Communities See Savings in Health Law, BOS. GLOBE, July 28, 2011, http://www.boston.com/news/local/articles/2011/07/28/communities_see_savings_in_health_law/?camp=pm (reporting on passage of An Act Relative to Municipal Health Insurance). A municipality can join the GIC system if it shows that it would realize at least a 5% gain in savings in the subsequent year by joining GIC as opposed to simply altering its existing health insurance plans. See id. (discussing requirements to join GIC system). It is estimated that the legislation will save Massachusetts’s municipalities $100 million collectively. See id.

112. See B. Adhikari & V. Tong, Smoking-Attributable Mortality, Years of Potential Life Lost, and
accounts for lost productivity and $96 billion accounts for healthcare-related expenses.113 At the individual level, these costs represent more than $1760 in lost productivity and $1623 in excess medical expenditures for each employee who smokes.114 Insurance companies estimate that for each pack of cigarettes smoked, a smoker costs the nation $7.18 in healthcare expenditures and lost productivity.115 Because of these costs, an employee who smokes costs his employer 18% more than an employee who does not smoke.116

As of 2010, 14.1% of Massachusetts adults were smokers.117 According to a Massachusetts Department of Public Health study of smoking-attributable economic costs, these smokers cost the state’s economy a total of $6 billion.118 Of that figure, $4.3 billion arose from healthcare expenditures and $1.7 billion resulted from lost productivity.119

Productivity Losses—United States, 2000–2004, 57 MORBIDITY & MORTALITY WKLY. REP. 1226, 1228 (2008), available at http://www.cdc.gov/mmwr/pdf/wk/mm5745.pdf (discussing health and financial costs on American society imposed by smoking). But see Frank Pellegrini, From Big Tobacco, a Smoking Gun That Saves Money, TIME, July 17, 2001, http://www.time.com/time/nation/article/0,8599,167978,00.html (discussing possibility smokers actually save government money due to shortened life spans); Smokers May Not Be Financial Burden on Society, NBC NEWS (Apr. 7, 2009, 3:33 PM), http://www.nbcnews.com/id/30092491#.uxszqkglym (highlighting study regarding cost benefits of smoking). On average, smokers die approximately ten years younger than nonsmokers. See Smokers May Not Be Financial Burden on Society, supra. Therefore, although smokers cost the economy billions of dollars annually in healthcare costs and productivity losses, these premature deaths provide savings for Medicaid, Social Security, and pension benefits. See id. Kip Viscusi, a Vanderbilt University economist who has studied the impact of smoking on the economy, estimates that the country actually saves thirty-two cents for every pack of cigarettes smoked in the United States. See id. Such findings are generally considered controversial because they equate premature death with economic benefit. See id. Government agencies avoid considering such calculations because, as Dr. Terry Pechacek of the Centers for Disease Control claims, “[t]he natural train of logic that follows from [considering cost savings from premature deaths] is that . . . anybody that’s admitted around age 65 or older that’s showing any signs of sickness should be denied treatment,” because “[t]hat’s the cheapest thing to do.” See id.

113. See Smokers May Not Be Financial Burden on Society, supra note 112 (estimating economic losses caused by smoking).


118. See HUANG ET AL., supra note 117, at 1 (quantifying costs imposed on Massachusetts by smokers).

119. See id. (apportioning smoking costs between healthcare spending and lost productivity). In addition
D. Smoking Surcharges

Rather than instituting smoke-free employment policies, many employers instead charge higher health insurance rates or apply a smoking surcharge to employees who smoke. The number of major American employers that impose such smoking surcharges rose to 19% in 2011, doubling between the years 2009 and 2011. For example, in 2011, Wal-Mart—the nation’s largest private employer—introduced a smoking surcharge that charges employees who smoke up to $2000 more for health insurance than employees who do not smoke. That same year, Macy’s implemented a policy under which employees who smoke will be subject to a surcharge of $35 per month. Similarly, at PepsiCo, smokers must pay a $600 insurance surcharge each year. The smoking surcharge trend is not limited to private employers. At least eleven states currently charge or authorize higher healthcare premiums for state employees who smoke. West Virginia led the way in 2000 by requiring state

to the economic costs of smoking, 8045 Massachusetts residents over the age of thirty-five died from smoking-related causes in 2006. See id.

120. See Valleau, supra note 68, at 458-62 (discussing trend of smoking surcharges in employer-sponsored healthcare packages). Some employers have implemented similar surcharges for employees who fail to meet certain obesity-related metrics. See Melba Newsome, Fat Fees and Smoker Surcharges: Tough-Love Health Incentives, TIME, Nov. 30, 2009, http://www.time.com/time/magazine/article/0,9171,1940693,00.html. For example, in 2005, Safeway, Inc. implemented an employee-wellness plan whereby employees who meet specified blood pressure and cholesterol levels can reduce their insurance premiums by almost $800 annually. See id.


122. See id.


124. See id.


126. See State Employee Health Benefits, supra note 125 (listing states authorizing higher health-care premiums); see also Texas State Workers Pay Surcharge for Tobacco Use, SOC’Y FOR HUM. RESOURCE MGMT. (Mar. 20, 2012), http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/TexasStateWorkersPay.aspx (discussing Texas’s tobacco use surcharge). The eleven states that have introduced surcharges for state employees are: Alabama, Georgia, Indiana, Kansas, Kentucky, Missouri, North Carolina, South Carolina, South Dakota, Texas, and West Virginia. See State Employee Health Benefits, supra note 125; Texas State Workers Pay Surcharge for Tobacco Use, supra.

Soon thereafter, Kentucky passed a bill that established a $15 per month surcharge for single coverage and a $30 per month surcharge for family coverage. See Act of Oct. 19 2004, ch.1, § 4, 2004 (1st Extra. Sess.) Ky. Acts 1, 10 (establishing smoking surcharge for Kentucky state employees). This particular surcharge applies to the “enhanced” coverage plan. See id. When initially instituted in 2005, the surcharge was $20 per month. See Parekh, supra note 127. This surcharge has been increased to $35 per month as of the 2011 fiscal year. See State Employees’ Health Insurance Plan, Approved Premium and Benefit Changes, ALA. ST. EMP. INS. BOARD, https://www.alseib.org/PDF/SEHIPFY2011RateChange.pdf (last visited Nov. 15, 2013).

In 2008, South Carolina budget officials instituted a $25 monthly health insurance surcharge for state employees who smoke. See Smoking Will Cost State Workers, AUGUSTA CHRON., Aug. 15, 2008, http://chronicle.augusta.com/stories/2008/08/15/met_469594.shtml (reporting on South Carolina smoker surcharge). It is estimated that 58,600 state employees or—24% of the state’s workforce—are subject to the surcharge. See id.


Additionally, the Texas legislature recently passed a bill authorizing a monthly surcharge of $30 per tobacco user (up to a monthly maximum of $90 per family) covered under the state’s group-benefits plan. See Texas State Workers Pay Surcharge for Tobacco Use, supra note 126 (reporting on Texas Senate Bill 1664).


total cost of employee-only coverage; the surcharge must be reasonably
designed to promote health and prevent disease; individuals eligible for the
surcharge must have the opportunity to qualify for the discount at least once per
year; the surcharge must accommodate individuals for whom it is
“unreasonably difficult” to stop smoking due to addiction; and materials
describing the terms of the surcharge must describe a reasonable alternative
standard to qualify for the lower premium. Accordingly, HIPAA limits all
smoking surcharges to 20% of the total cost of employee-only coverage. In
addition, employers cannot impose a surcharge on current smokers who find it
unreasonably difficult to quit and must provide these individuals with a
reasonable alternative, such as smoking cessation classes or the assistance of
nicotine patches.

III. ANALYSIS

A. Tobacco-Free Employment Policy for Massachusetts

For years, Massachusetts lawmakers have attempted to reduce the state’s
spiralng healthcare spending, which as of 2011 consisted of approximately
37% of the state’s total fiscal year budget. In order to reduce healthcare
spending, Massachusetts should consider following the trend among the state’s
private employers and implement a tobacco-free employment policy. Like
the recent policies adopted by many of the state’s private employers, such a
policy would prevent the hiring of prospective employees who smoke and
would terminate current employees who refuse to quit smoking.

As of 2010, approximately 14.1% of the total population of Massachusetts
smokes tobacco. Assuming the percentage of GIC-covered state employees
who smoke is proportional to the state’s total population, approximately 31,725
GIC subscribers are smokers. Applying the costs of the average smoker in
terms of increased healthcare costs and productivity losses to these 31,725

136. See id. (highlighting limit on smoking surcharges under HIPAA). The Affordable Care Act raises the
limit on smoking surcharges to 30% of the total cost of employee-only coverage in the year 2014. See Abelson,
supra note 121 (discussing impact of Affordable Care Act on smoking surcharges).
137. See The HIPAA Nondiscrimination Requirements, supra note 135 (outlining smoking cessation
assistance requirements).
138. See Levenson, supra note 105 (noting percentage of Massachusetts budget dedicated to healthcare);
see also Kowalczyk, supra note 10 (describing legislation intended to cut annual healthcare cost increases in
half); Bebinger, supra note 10 (stating lawmakers “working feverishly” to control state’s healthcare spending).
139. See Buote, supra note 2 (describing trend among Massachusetts employers of instituting tobacco-free
employment policies).
140. See id. (discussing Anna Jaques Hospital’s and Scott’s smoking-related employment policies).
141. See Kotz, supra note 117.
142. See id. (basing calculation on reported 14.1% of Massachusetts citizens being smokers); What is the
GIC?, supra note 107 (noting GIC currently provides health insurance for 225,000 state employees).
employees, each year Massachusetts could save approximately $51.4 million in healthcare costs and approximately $55.8 million in productivity losses associated with smoking.\textsuperscript{143}

Although, unlike in many other states, there is no law banning tobacco-free employment policies in Massachusetts, the implementation of such a policy is not without risk.\textsuperscript{144} A decision to overturn the Rodrigues holding could curtail the ability of employers to implement tobacco-free employment policies and may make existing tobacco-free policies unlawful.\textsuperscript{145}

The fact-specific nature of the Rodrigues decision makes it a potentially unstable legal foundation on which to develop a tobacco-free employment policy.\textsuperscript{146} The district court rejected Rodrigues’s MPA claim because Rodrigues did not make any attempts to keep the fact that he smoked private.\textsuperscript{147} Had Rodrigues attempted to hide his smoking habit from his employer, his MPA claim may have succeeded.\textsuperscript{148} The court denied Rodrigues’s ERISA section 510 claim because, at the time of his termination, Rodriguez was not considered a regular employee under Scotts’s benefits plan, and thus did not qualify for ERISA section 510 discrimination protection.\textsuperscript{149} Had Rodrigues passed the urinalysis test, but Scotts later discovered that he smoked, he may have survived the court’s initial threshold questioning for ERISA section 510 claims.\textsuperscript{150} Additionally, the court failed to address the argument that Scotts intended to reduce its healthcare costs through its tobacco-free employment policy, which it accomplished by terminating smokers after they began working, but before they qualified for benefits.\textsuperscript{151} Therefore, a case with slightly different facts could yield a more employee-friendly result.\textsuperscript{152}

\textsuperscript{143} See supra note 114 and accompanying text (noting individual smokers cost employer $1623 in excess healthcare costs and $1760 in lost productivity annually).

\textsuperscript{144} See Pagnattaro, supra note 64, at 667 (observing Massachusetts lacks lifestyle discrimination statute unlike majority of states).

\textsuperscript{145} See Pierotti, supra note 71, at 469 (critiquing court’s holding in Rodrigues).

\textsuperscript{146} See id. (analyzing court’s holding in Rodrigues); see also Ash, supra note 90 (speculating Rodrigues may have prevailed with slightly different facts).


\textsuperscript{148} See Keating et al., supra note 85 (analyzing impact of court’s holding in Rodrigues on Massachusetts employers). Because the court determined that Rodrigues did not have a legitimate privacy interest at stake, the court did not weigh the employee’s interests in keeping his smoking habit private against the employer’s business interest in obtaining this private information. See id. Furthermore, the court failed to address how such a balancing test would result if an employee had a legitimate privacy interest. See id.

\textsuperscript{149} See Rodrigues, 639 F. Supp. 2d at 136 (discussing employee eligibility under Scotts’s benefit plan).

\textsuperscript{150} See id.; see also Pierotti, supra note 71, at 469.

\textsuperscript{151} See Keating et al., supra note 85 (highlighting arguments district court ignored in its decision).

\textsuperscript{152} See Ash, supra note 90 (concluding Rodrigues may have prevailed under slightly different set of facts); see also Pierotti, supra note 71, at 469 (noting fact-specific nature of court’s holding).
B. Tobacco Surcharge for Massachusetts

Another option to reduce state healthcare spending is the implementation of a tobacco surcharge. If Massachusetts was to create such a surcharge, it would join the increasing trend among the state’s private employers and a growing contingent of states that utilize this mechanism to reduce healthcare costs. Even a moderate surcharge—that is, one below the average among states currently employing a surcharge and applied only to subscribers—would save the state a substantial amount of money. A monthly tobacco surcharge of $20 would save Massachusetts $7.6 million annually, not including potential savings the state would reap if the surcharge applied to all individuals covered by the GIC. Furthermore, this figure does not account for indirect savings the state would benefit from if the surcharge caused some covered individuals to quit using tobacco, and would only increase as more municipalities become GIC subscribers.

In order to implement a smoking surcharge, the GIC would need to negotiate the charge with the various healthcare insurance providers with which it contracts. The Massachusetts legislature could amend chapter 32A of the General Laws of Massachusetts mandating that the GIC negotiate a smoking surcharge into all of its health-insurance plans. In the alternative, the GIC could promulgate its own regulation mandating that it incorporates a surcharge into each health-insurance contract that it enters.

C. Opposition to Tobacco-Free Policies and Tobacco Surcharges

Opponents to both tobacco-free employment policies and smoking surcharges view these measures as a potential slippery slope for further lifestyle
These opponents believe that, if allowed to stand, such policies will inevitably lead to further restrictions on employees’ off-duty behavior by restricting the types of activities they can engage in and the products they can consume. Some argue that employers will use healthcare costs to justify limits on recreational activities conducive to injuries, such as playing basketball or rock climbing. Further, opponents fear that a regulatory slippery-slope will result, eventually leading employers to control their employees’ off-duty food and alcohol consumption. This argument is illustrated as follows: “[B]ecause drinking beer could lead to alcoholism and liver problems, and eating eggs could lead to high cholesterol and heart disease, these activities could be banned by employers concerned about health insurance costs.”

The slippery-slope concept has been criticized by many legal scholars as a logical fallacy, and is problematic when applied to employment policies prohibiting tobacco use. While many physically intensive recreational activities inevitably cause injuries, it is unlikely that an employer trying to reduce healthcare costs would attempt to prevent employees from engaging in these activities because of their undeniable health benefits. Additionally, innate differences that distinguish tobacco from other consumable products, like food and alcohol, provide analytical traction for this supposed slippery slope.

Tobacco is inherently different from other consumable products because it is harmful when used exactly as intended. In fact, it is the only legal,
consumable product that can claim this dubious distinction. Like all consumable products, both food and alcohol can be abused; however, these products are not inherently harmful and, when consumed in moderation, are beneficial to overall health. Unlike food and alcohol, tobacco cannot be used safely in moderation because any amount of tobacco consumed is harmful to one’s health.

Furthermore, a clear distinction can be made between the use of a specific product like tobacco and medical conditions like obesity and alcoholism. Although some employers have begun to implement healthcare surcharges for employees that do not meet certain obesity metrics and refuse to participate in employee wellness programs, these policies do not ban specific food products. It is undisputed that, like tobacco use, obesity and alcoholism each adversely impact employee health and result in both increased healthcare costs and productivity losses for employers. However, unlike tobacco use, there is no evidence that the off-duty consumption of specific foods or alcoholic beverages directly relate to healthcare cost increases or productivity losses. While tobacco use directly correlates with negative health consequences, alcoholism and obesity-related diseases are caused by a complex web of factors, which cannot be directly linked to the use of a single product so as to warrant a ban on its consumption by employers.

IV. CONCLUSION

Employment law in the United States is built on the concept of at-will employment. Federal and state laws have gradually modified this concept, restricting the bases on which employers can hire and fire employees through hazardous to health when used as intended.”); see also Valleau, supra note 68, at 491 (noting tobacco harms health regardless of type, brand, or means by which consumed).

170. See Berman & Crane, supra note 93, at 1669 & n.83 (distinguishing tobacco from other legal consumable products); see also supra note 169 and accompanying text (highlighting tobacco’s uniquely harmful properties). Tobacco is the only legally consumable product that cannot be used in moderation and kills 50% of people who use it. See Berman & Crane, supra note 93, at 1668-69.

171. See Valleau, supra note 68, at 491 (explaining difference between tobacco and other consumable products). There is evidence that moderate consumption of alcohol has positive health effects. See id. Although not all food is nutritional, moderate consumption of food is necessary to sustain life. See id.

172. See Berman & Crane, supra note 93, at 1669 (distinguishing tobacco from other potentially hazardous consumable products); Valleau, supra note 68, at 491 (“While any amount of tobacco that is consumed is harmful; the same simply cannot be said for alcohol and food.”).

173. See Berman & Crane, supra note 93, at 1668-70 (drawing distinction between tobacco use and obesity, alcoholism).

174. See Newsome, supra note 120 (discussing obesity-related health insurance surcharges).

175. See Berman & Crane, supra note 93, at 1669 (noting conditions adversely impacting health impose healthcare and productivity costs on employers).

176. See id. (observing little data supporting direct correlation between specific food or alcohol intake and increased healthcare costs).

177. See id. (highlighting direct correlation between adverse health and smoking).
equal-protection and lifestyle-discrimination legislation. Although Massachusetts has adopted extensive equal-protection laws, Beacon Hill has followed Washington’s lead in foregoing adoption of a lifestyle-discrimination statute, allowing Massachusetts employers, like Anna Jaques Hospital, to implement tobacco-free employment policies.

Rising healthcare costs have become increasingly burdensome for employers throughout the United States. This is particularly true for employers in Massachusetts, where annual healthcare costs have been among the highest in the world over the past two decades. The Commonwealth of Massachusetts, as an employer of over 225,000 employees, is not immune to this healthcare cost burden. As a result, Massachusetts should consider joining the recent trend among private employers throughout the state and public employers throughout the country by implementing either a tobacco-free employment policy or smoking surcharge for state employees. Such a change would save the state millions of dollars in both healthcare and loss of productivity costs, while simultaneously promoting and improving public health.

Brian Wall