

HOUSE BILL REPORT

HB 2614

As Reported by House Committee On:
Commerce & Labor

Title: An act relating to employment decisions based on consumption of lawful products.

Brief Description: Regulating employment decisions based on consumption of lawful products.

Sponsors: Representatives Morrell, Conway, Williams, Blake, Kirby, Eickmeyer, Grant, Wallace, Hankins, Linville, McCoy, Flannigan, Anderson, McIntire, Kenney, Walsh, Hudgins, Holmquist, Condotta, Ormsby, Upthegrove and Simpson.

Brief History:

Committee Activity:

Commerce & Labor: 2/1/06, 2/2/06 [DPS].

Brief Summary of Substitute Bill

- Prohibits an employer from refusing to hire, discharging an individual, or otherwise disadvantaging an individual based on the individual's consumption of lawful tobacco products off the premises of the employer during nonworking hours.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Hudgins, Kenney and McCoy.

Minority Report: Do not pass. Signed by 4 members: Representatives Condotta, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Crouse and Holmquist.

Staff: Sarah Dylag (786-7109).

Background:

State law does not explicitly prohibit an employer from requiring as a condition of employment or continued employment that an applicant or employee refrain from consuming lawful tobacco products away from the workplace during nonworking hours.

State law also does not explicitly prohibit an employer from putting an employee at a disadvantage in other ways because the employee consumes lawful tobacco products away from the workplace during nonworking hours.

Summary of Substitute Bill:

Employment Practices

An employer cannot refuse to hire, discharge an individual, or otherwise disadvantage an individual with respect to compensation, terms, conditions, or privileges of employment because the individual engages in the consumption of lawful tobacco products off the premises of the employer during nonworking hours. The individual must comply with applicable laws or policies regulating consumption of lawful tobacco products on the premises of the employer during working hours.

An employer may refuse to hire, discharge, or otherwise disadvantage an individual with respect to compensation, terms, conditions, or privileges of employment if the employer's decision is based on:

- the individual's failure to meet job-related standards set by the employer;
- an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information, or other proprietary interests;
- a bona fide occupational qualification or requirement, including qualifications or requirements implemented by the employer to screen for respiratory diseases in occupations where the individual will be exposed to smoke and noxious fumes; and
- the employer's drug and alcohol free workplace program, including those adopted in response to federal requirements.

Exemptions

These requirements do not apply to any matter that is also subject to collective bargaining between the employer and the affected employee.

A religious or health organization, whose tenets prohibit the use of an otherwise lawful tobacco product or a company or nonprofit organization whose primary business purpose is the prevention of heart and lung disease, may refuse to employ an individual who uses an otherwise lawful tobacco product.

Remedies

An individual who believes that an employer has violated these requirements may bring a civil action for damages for all wages and benefits deprived the individual by reason of the violation. The civil action must be filed within six months after the alleged unlawful or unfair employment practice or the discovery of that practice. In a civil action alleging a violation, the court may award the prevailing party court costs and reasonable attorneys' fees.

Substitute Bill Compared to Original Bill:

The original bill referred to consumption of lawful products. The substitute narrows the scope of the bill to consumption of lawful tobacco products.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support) The issue in this bill is workers consuming legal products during non-work hours. Workers should not lose their livelihood for doing so. Although this bill was vetoed in 1992, it was only vetoed because this type of discrimination was not happening in this state at the time. It is happening now. There are tests that are being given to employees and employees are being terminated for smoking. It is not right to penalize employees for what they do in their private time. For example, a workplace cigarette plan is okay, but when employees smoke on their own time in their own homes, they should not be penalized for that at work. There must be a barrier that separates employer rights at the workplace and what an employee does on his or her own time.

(With concerns) Allowing employers to take action with respect to consumption of lawful products that endangers or impacts the workplace does not expand employer authority. It is existing employer authority under at-will employment doctrine. This narrows the at-will employment doctrine in a concerning way by making a drinker or smoker a protected class within the law. The bill also opens up the law regarding employment discrimination and sets a concerning precedent.

Testimony Against: This is a violation of employment-at-will and expands reasons for small businesses, and other businesses, to be brought into court. The bill will create more litigation in an area of law where things are already highly litigated and confusing. The bill will create more reasons for individuals to threaten employers with litigation. For example, employers are already putting emphasis on wellness programs, including quitting smoking. This bill could cause confusion about these programs. Another example of confusion would be an employee who is being discharged for other reasons, but the employee claims it is because the employee came into work smelling like smoke.

Costs for an employer sued under this bill will be at least thirty to fifty thousand dollars, even when the employer has done nothing wrong. If enacted, the bill also could be used for unintended purposes to pressure an employer for some other reason.

There are safety and health issues related to this bill. In certain jobs, heat stress is an issue and one of the factors that makes an individual more likely to suffer heat stress is dehydration. Alcohol use, even when not on the premises of the employer during nonworking hours, can make someone more likely to suffer dehydration. An employer needs to have the ability to decide that hungover employees jeopardize the safety and health of the work environment and other workers.

Persons Testifying: (In support) Representative Morrell, prime sponsor.

(With concerns) Kris Tefft, Association of Washington Business.

(Opposed) Gary Smith, Independent Business Association; and Carolyn Logue, National Federation of Independent Business.

Persons Signed In To Testify But Not Testifying: None.