

Company's efforts to curtail smoking within law

The new owners of the company I work for are very health conscious. They've eliminated smoke breaks and told us the time we take to smoke must be taken from our lunch breaks. We are forbidden to smoke on property, even on the sidewalk at the front, back and side entrances and the parking lot. We must walk across the street to smoke. Now, there are rumors going around that they will refuse to hire anyone who smokes and find a way to terminate current employees, like myself, who smoke. Legally, can they do any of this?

Shayna Balch

Fisher & Phillips

Your question contains two separate but related inquiries: Can an employer regulate smoking at work? And, can an employer refuse to hire or terminate employees for smoking away from work?

As for the first question, there are no federal or Arizona state laws that entitle workers to smoke breaks or the ability to smoke on company property, so the owners of your company are acting within their legal rights.

The second part of your question is trickier. Arizona is an employment-at-will state, meaning that a company can terminate its employees at any time and for any reason so long as it is not unlawful. Therefore, the question becomes whether "smokers" are protected under the law.

Although 29 states and the District of Columbia offer legal protections to tobacco smokers, Arizona is not one of them. Similarly, tobacco smokers are not expressly protected under any federal laws. That said, a smoker suffering from "nicotine addiction" could conceivably make an argument that he or she is disabled within the mean-



Shayna Balch



Don Johnsen

ing of the ADA.

While this argument is not very compelling, it complicates my analysis because an employer cannot terminate an employee based on a disability. Assuming that you and your colleagues are not disabled, it is probably legal for your employer to refuse to hire smokers and terminate existing employees who smoke. In fact, dozens of health-care organizations in the U.S. have already implemented these types of policies.

Don Johnsen

Gallagher & Kennedy

Arizona law prohibits smoking in most public areas, so the company cannot permit smoking in areas covered by the law. And, like any property holder, the company may restrict smoking to a greater extent if it chooses to do so. So it is legal for an employer to prohibit smoking anywhere on the property, including sidewalks and parking lots.

The company can indeed deduct the duration of any smoking breaks from the time that workers may take for lunch. But under the federal Fair Labor Standards Act, any lunch break of less than 30 minutes is considered "working time," meaning that the employee is still on the clock during the break. So while the company can reduce lunch breaks to recapture time spent on smoke breaks, any lunch break that

ends up lasting less than 30 minutes is "working time," and the company must pay for that time.

Some states prohibit hiring or firing workers on the basis of nicotine use. Arizona does not. The federal Americans with Disabilities Act prohibits discrimination against disabled persons, and it would be illegal to fire or refuse to hire someone on the basis of a medical condition caused by smoking, such as emphysema, lung cancer, etc.

But the courts have not ruled on whether nicotine use alone, without any medical condition, is a disability. Until the courts rule, many employers will continue to take the position that it is legal to hire and fire on the basis of one's status as a smoker.

—Compiled by Georgann Yara

Send your questions to asktheexperts1@gmail.com.

NEWS AND NOTES

Seasoned commercial attorneys join to form firm

John McLean

Arizona Business Gazette • azcentral.com

Commercial attorneys **Renee B. Gerstman** and **Susan E. Wells** have formed their own law firm, **Wells & Gerstman PLLC**. They counsel medium and small business clients in business and commercial real estate transactions and as outside concierge general counsel. Gerstman has represented business owners and individuals in commercial transactions and litigation, from the inception of businesses to their sale. She has focused on matters involving real estate, construction, general business contracts, partnerships, LLCs and shareholder issues. Gerstman received her law degree from **Northeastern University School of Law** in 1985. Wells' practice encompasses all aspects of general business matters and commercial relationships, including contracts, mergers and acquisitions, joint



Renee Gerstman



Susan Wells

ventures, financings, leases, regulatory compliance, choice of business entity, corporate governance and day-to-day operations. She also acts as "general counsel" for a number of her clients that either do not have attorneys on staff or may need to supplement their in-house capabilities. Wells received her law degree from **Brooklyn Law School** in New York.

Promotions and hires

Raymond S. Heyman joined **Snell & Wilmer** in Phoenix as a partner in the natural resources practice. He is an experienced

regulatory attorney, previously representing electric, gas, water, sewer, solar and telecommunication companies. He began his career as a regulatory attorney at **Arizona Public Service Co.** and then moved to private practice where he eventually became a founding member of **Roshka Heyman & DeWulf**. He joined **UniSource Energy/Tucson Electric Power Co.** in 2005 as senior vice president and general counsel. Heyman received his law degree cum laude from **California Western School of Law** in 1983.

Victoria Stazio joined **Fennemore Craig** in Phoenix as an associate practicing in health care litigation, professional liability, long-term care and catastrophic injury defense. Previously, she was an associate at **Quintairos, Prieto, Wood & Borer** in Phoenix. She served as deputy county attorney with the **Mohave County Attorney's Office**. Stazio got her law degree from **St. John's University**

School of Law in 2006.

Cortland Silver, a shareholder at **Fennemore Craig** in Phoenix, has been appointed to the board of directors for **Habitat for Humanity** of Central Arizona. He practices in real estate acquisition, development, leasing and sale, focusing on convenience store and motor fuel facility issues. Silver got his law degree from **William Mitchell College of Law** in 1980.

Doreen Sutton, a freelance reporter from Scottsdale, was installed as secretary-treasurer of the **National Court Reporters Association**. A certified Registered Professional Reporter, she has been a freelance court reporter for 21 years, specializing in depositions, arbitrations and mediations. She is also experienced in per-diem reporting for Maricopa County Superior Court and in grand jury reporting, and has provided some communication access realtime translation services. Sutton is the author of *Erhardt's Edition*

of *Briefs & Phase*, a brief form compilation. She has served as a member of the NCRRA's board of directors, served as president of the Arizona Court Reporters Association in 2007, and was honored with ACRA's Distinguished Service Award in 2013.

Awards and honors

Pamela L. Judd, a partner at **Roshka DeWulf & Patten** in Phoenix, has been selected for membership to *Arizona's Finest Lawyers*, an organization honoring excellence and integrity.

Fennemore Craig has been honored with rankings in *The Legal 500* for 2014 for the firm's real estate and construction - land use/zoning, and real estate and construction - real estate. Four of their attorneys were also listed: **Joseph Chandler**, **Stephen A. Good** and **Jay S. Kramer** for real estate and construction - real estate; and **Michael J. Phalen**, real estate and construction - land use/zoning.

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