

Department of Legislative Services  
 Maryland General Assembly  
 2015 Session

FISCAL AND POLICY NOTE

House Bill 478 (Delegate McDonough)  
 Economic Matters and Appropriations

**Labor and Employment - Discrimination Based on the Use of Tobacco Products - Prohibition**

This bill prohibits an employer, including the State and local governments, from discriminating or taking adverse action against an employee or applicant for using tobacco products off the employer’s premises during nonworking hours.

**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$39,768 for the Office of the Attorney General (OAG) to carry out the bill’s enforcement requirements. Out-year costs reflect elimination of one-time costs, annualization, and inflation. Additionally, all expenditures increase – potentially significantly – due to no longer discriminating against smokers in terms of health care and workers’ compensation claims.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	39,800	48,300	50,500	52,800	55,300
GF/SF/FF Exp.	-	-	-	-	-
Net Effect	(\$39,800)	(\$48,300)	(\$50,500)	(\$52,800)	(\$55,300)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** Many local jurisdictions do not discriminate against an employee or applicant for using tobacco products off the employer’s premises during nonworking hours in terms of employment decisions. However, expenditures could increase for local jurisdictions due to no longer discriminating against smokers in terms of health care and workers’ compensation claims.

**Small Business Effect:** Potential meaningful. Employers who discriminate in any manner or take adverse action against smokers are affected.

## Analysis

**Bill Summary:** The prohibition does not apply to a restriction regarding the use of tobacco products that relates to a bona fide occupational requirement or action that is taken in accordance with a collective bargaining agreement. An employee or applicant may submit a written complaint to the Commissioner of Labor and Industry or bring an action against an employer for a violation. The commissioner may investigate a written complaint; if the commissioner determines that these provisions have been violated, the commissioner must try to resolve the issue informally by mediation or ask the Attorney General to bring an action on behalf of the applicant or employee. An action brought by the Attorney General may be for injunctive relief, damages, or other relief.

### Current Law:

#### *Clean Indoor Air Act*

Pursuant to the Clean Indoor Air Act of 2007 (CIAA), except as otherwise specified, a person may not smoke in (1) an indoor area open to the public; (2) an indoor place in which meetings are open to the public; (3) a government-owned or government-operated means of mass transportation; (4) an indoor place of employment; (5) a private home used by a licensed child care provider; or (6) a private vehicle used for public transportation of children or as part of health care or day care transportation. The prohibition includes bars, clubs, restaurants, pubs, taverns, retail establishments, theaters, concert halls, athletic facilities, financial service institutions, government buildings, educational institutions, museums, and libraries. However, the prohibition does not apply to (1) private homes or residences; (2) private vehicles; (3) a hotel or motel room as long as the total percent of rooms so used does not exceed 25%; (4) specified tobacco facilities and retail businesses; or (5) a laboratory for the purpose of conducting scientific research into the health effects of tobacco smoke. CIAA defines “smoking” as the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco.

CIAA required the Department of Health and Mental Hygiene (DHMH) to adopt regulations that prohibit environmental tobacco smoke in indoor areas open to the public. A person who violates the DHMH regulations is subject to a written reprimand for a first violation, a civil penalty of \$100 for a second violation, \$500 for a third violation, and \$1,000 for each subsequent violation, unless otherwise waived by DHMH after the department considers the seriousness of the violation and good faith measures. (Statute requires that the civil penalty for third and subsequent violations be at least \$250.) However, an employer who takes certain retaliatory actions against an employee (who has complained or taken other actions related to violations) is subject to a civil penalty of at least \$2,000 but no more than \$10,000 for each violation. All civil penalty revenue is paid to the Cigarette Restitution Fund.

## *Discrimination*

Discrimination in public accommodations, labor and employment, and housing on the basis of race, sex, age, creed, color, religion, national origin, marital status, disability, gender identity, and sexual orientation is prohibited.

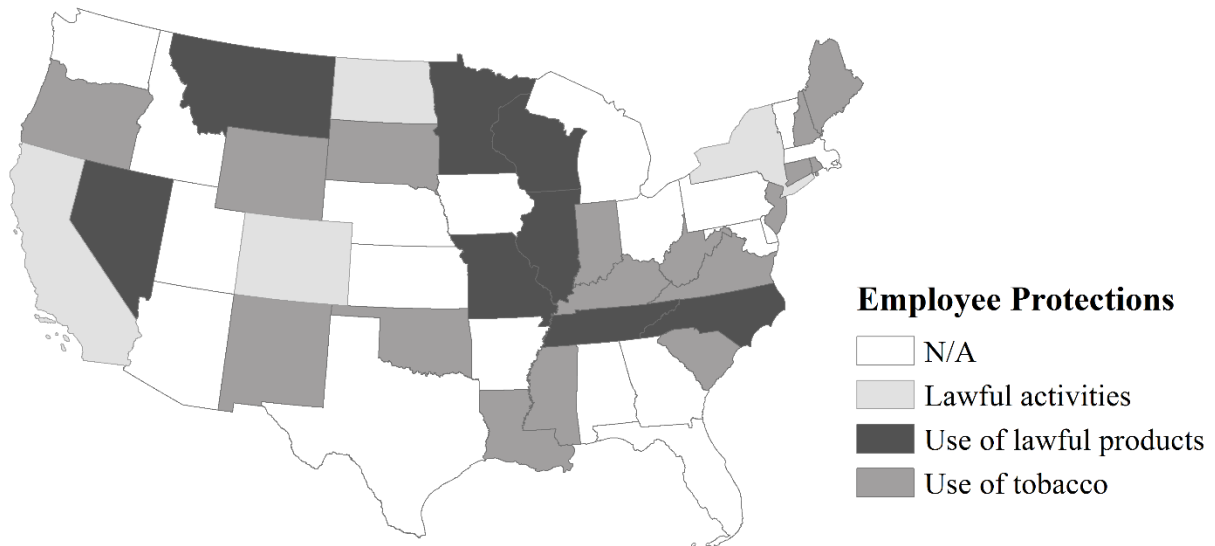
The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If EEOC finds that discrimination has occurred, it will try to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination. There is no federal or State protection against employment discrimination based on smoking during nonworking hours.

**Background:** **Exhibit 1** shows that 29 states and the District of Columbia have laws protecting smokers from employment discrimination. Eighteen of these states specifically protect tobacco users, 8 states protect employees from discrimination if they use lawful consumable products, and 4 states bar discrimination against employees who engage in lawful activities outside of work.

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**Exhibit 1**  
**Discrimination Laws Regarding Off-duty Conduct**



Source: National Conference of State Legislatures

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*Tobacco Use and Health Outcomes*

According to the 32<sup>nd</sup> Surgeon General’s report, *The Health Consequences of Smoking – 50 Years of Progress*, smoking rates among teens and adults are less than half what they were in 1964. However, 42 million American adults and 3 million middle and high school students continue to smoke. Further, even though smokers consume fewer cigarettes than 50 years ago, changes in the design and composition of cigarettes put smokers at a higher risk of developing lung cancer. The Surgeon General estimates that the economic costs attributable to smoking and exposure to tobacco smoke from both direct medical costs and lost productivity approach \$300 billion annually.

According to the U.S. Centers for Disease Control and Prevention, in Maryland the percentage of individuals 18 or older who smoked cigarettes was 19.1% in 2011. The rate across all states and DC ranged from 11.8% to 29.0%. The percentage of adults who used smokeless tobacco in Maryland was 2.1% during that same time, with a range of 1.4% to 9.8% across all states and DC. Maryland had the eleventh lowest and eighth lowest percentages across the states in cigarette and smokeless tobacco use, respectively.

**State Expenditures:** The Department of Labor, Licensing, and Regulation (DLLR) anticipates receiving nominal inquiries regarding this bill. Thus, DLLR reports it can address any complaints or inquiries with existing resources.

General fund expenditures increase for OAG by \$39,768 in fiscal 2016, which accounts for the bill's October 1, 2015 effective date. This estimate reflects the cost of hiring a part-time assistant Attorney General to carry out the bill's enforcement requirements and to investigate complaints. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	0.5
Salaries and Fringe Benefits	\$35,263
Operating Expenses	<u>4,505</u>
<b>Total FY 2016 State Expenditures</b>	<b>\$39,768</b>

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

The State implemented a new wellness program in 2015 under the State Employee and Retiree Health and Welfare Benefits Program. The wellness program offers benefits to employees, retirees, and enrolled spouses who complete healthy activities throughout the calendar year and imposes penalties for those who do not meet the healthy activities requirements. Participants with specified chronic conditions, like chronic obstructive pulmonary disease, may be required to participate in the disease management program, in which the participant must engage with the plan's nurse and follow the recommended treatment plan or else be penalized with a surcharge of \$250 in 2017. Since smokers may face the disease management surcharge in 2017, the Department of Budget and Management (DBM) may have to stop administering the wellness program or remove provisions in the plan that could be construed as adverse actions for tobacco users. DBM advises that the wellness program is estimated to save the State \$4 billion over 10 years, so the bill could jeopardize all or a portion of these savings.

The bill could affect workers' compensation claims. For instance, if an employee who smokes files a claim for heart disease or lung cancer and evidence of smoking is disallowed, expenditures for workers' compensation claims could increase.

**Local Fiscal Effect:** Many local jurisdictions do not discriminate against an employee or applicant for using tobacco products off the employer's premises during nonworking hours. However, the City of Hagerstown reports that new employees within the police department sign a "no tobacco agreement." Harford County advises that it is considering a health insurance program that would charge higher premium rates for tobacco users, so if it were to implement that program, the county might be affected.

Local jurisdiction expenditures could increase due to increased workers' compensation benefits paid as a result of an employee's smoking status not being used in disease presumption cases.

**Small Business Effect:** Small businesses that discriminate in any manner or take adverse action against smokers are affected by the bill. For instance, an employer may no longer charge higher insurance premiums to employees who smoke.

A recent study from Ohio State University found that a smoker, on average, costs an employer \$5,816 per year through absenteeism, reduced productivity, smoke breaks, and health care costs. Thus, a small business that would otherwise not hire smokers may incur additional costs for employing smokers. Additionally, smokers, on average, make 15.6% less than nonsmokers.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Allegany, Harford, Montgomery, Talbot, and Wicomico counties; Baltimore City; cities of Hagerstown and Laurel; Office of the Attorney General; Department of Budget and Management; Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Maryland Department of Transportation; University System of Maryland; Chesapeake Employers Insurance Company; National Conference of State Legislatures; Forbes; American Lung Association; U.S. Centers for Disease Control and Prevention; U.S. Surgeon General; Department of Legislative Services

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