

E-Cigarettes Light Up Controversy Among Employers

By Michael V. Abcarian



First marketed internationally in 2002, battery-powered e-cigarettes are exploding stateside and may soon shake up many employers who need to decide whether or not to allow e-cigarettes in the workplace. Sales in the United States of the more than 200 types of e-cigarettes currently available are estimated at more than \$200 million annually. In a study released last year, The Center for Disease Control and Prevention noted that one out of every five adult smokers in the United States has tried e-cigarettes, up from one in 10 in 2012.

Part of the problem for employers is that e-cigarettes suffer from an identity crisis. They have not yet been officially classified by regulatory bodies as traditional cigarettes, nor is their use currently considered “smoking.” Unlike traditional cigarettes, which contain harmful levels of carcinogens that emit a lingering cloud of fumes, e-cigarettes are odorless. Most do not work by combusting tobacco, but instead, rely on a heating element to vaporize a liquid cocktail that includes a concentration of nicotine.

Congress is currently considering laws for the e-cigarette industry and will likely seek to regulate sales, impose taxes and control advertising, especially to minors. Many jurisdictions have either banned or restricted the use of vapor-type cigarettes in public places, restaurants, bars and private office buildings, with many more considering legislation on the matter. Many school districts have also jumped onboard and banned them from school campuses.

E-cigarettes in the workplace

The arguments for allowing e-cigarettes in the workplace are few in number, and all things considered, pale in comparison to the reasons for prohibiting them in that environment.

Proponents of e-cigarettes point out there is no proof of associated health risks, and that these devices might actually improve employee productivity by eliminating the need for smoking breaks during the workday. They also tout vaping as an effective smoking cessation tool. However, there are no long-term studies confirming or disproving these conclusions.

Those who oppose e-cigarettes argue that they contain nicotine and small levels of known carcinogens and toxic chemicals, and that banning their use eliminates the risk of complaints from nonsmokers who are annoyed by e-cigarette vapors. And, because most e-cigarettes are designed to look like their traditional tobacco-leaf counterparts, allowing their use seems counter to the intent of nontobacco use policies. Opponents also state that e-cigarettes are not an FDA approved tobacco cessation device, and their manufacturers lack sufficient quality-control processes and standards.

A few organizations have already banned hiring e-smokers. Texas-based Baylor Scott & White HealthCare System has a nicotine-free hiring policy that aggregates e-cigarette smokers with other nicotine users. Health Care Service Corp., and its Blue Cross and Blue Shield health plans in Texas,

Illinois, New Mexico, and Oklahoma, also have included a ban on e-cigarettes as part of their tobacco-free workplace policies.

Several federal employers have banned e-cigarettes, including the U.S. Air Force, based on the categorization by the Surgeon General's office that e-cigarettes are "tobacco products." The U.S. Department of Transportation also prohibits the use of e-cigarettes on airplanes, and plans to soon issue a formal official ban.

Tips for establishing an e-cigarette workplace policy

Research the laws

Before deciding whether to prohibit e-cigarettes in the workplace, research state and local laws regarding smoke-free workplaces to determine if e-cigarettes are already covered by existing bans. You should also understand whether unions, work councils, or other laws could raise barriers to implementing workplace policies that seek to regulate use of e-cigarettes.

Examine your company's existing smoking policy and insurance plans

Review your employee handbook and determine the exact wording and extent of your existing smoking policies. How does the policy define smoking? Company policies may not be clear-cut. For example, a policy might state that the company does not hire "nicotine users" – but some e-cigarettes don't contain nicotine.

Study the issue

One way for employers to gain more information about the e-cigarette phenomenon is to compile an ad hoc committee with scientific, medical, and human resources perspectives to help consider the implications of any stance on e-smoking. You can find information about e-cigarettes from many organizations including the National Business Group on Health, U.S. Food and Drug Administration, America's Health Insurance Plans and Center for Health Research Kaiser Permanente and the American Lung Association.

Since e-cigarettes are not FDA-approved smoking-cessation devices, employees who use e-cigarettes are often considered smokers. As such, they might not be eligible for "non-tobacco user" status in health plans that offer reduced premiums for non-tobacco users. To be considered a non-tobacco user, employees must be free of all tobacco products or enrolled in cessation programs with FDA-approved cessation methods and devices.

Clarify the objective of the policy

Clarify your objective when creating or modifying workplace smoking policies that include e-cigarettes. Do you want to prohibit the use of tobacco, ban nicotine, or forbid smoke in the workplace? Or do you want to ban anything that creates the illusion of traditional cigarette smoking?

Carefully weigh the pros and cons

Creating a policy that bans e-smoking can be as easy as adding e-cigarettes to an existing no-tobacco policy. But there are potential legal issues. While non-smoking employees might file a complaint about e-cigarette use in the workplace, employers who bar the hiring of e-smokers might possibly face some type of legal challenge for infringement on the e-smoker's rights.

Some states provide employment protection to conventional smokers. While the courts have generally not protected smokers as a whole, the Americans with Disabilities Amendments Act expanded definition of disability might be revisited in future cases.

If nicotine addiction were to be recognized as a disability, employers might one day be required to allow the use of e-cigarettes as a “reasonable accommodation.” In this scenario, how could an employer ban e-cigarettes if it allows use of nicotine-infused gum or other prescription medicines at work as tools for cessation of smoking?

The Bottom Line

Employers must ensure they are prepared to articulate legitimate business interests before deciding whether or not to ban the use of e- cigarettes in the workplace. Make sure to thoroughly analyze all the facets of this issue. With the expanding use of this new product, court decisions about e-cigarettes are sure to light up the workplace.

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Many of Mike's successful cases resulted in defense verdicts for employer clients following trial by jury. Mike also handles complex workplace safety matters, including fatality investigations, and has represented employers in high-visibility proceedings before the Occupational Safety and Health Administration.

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Throughout his career, Mike has been a sought-after speaker and a prolific author on labor and employment law issues.

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