What Should Employers Do About E-Cigarettes?

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Darin Mackender was quoted in the *BenefitsPro* article "What Should Employers Do About E-Cigarettes?" on November 12, 2014.

Darin was quoted on the importance of employers re-examining their tobacco policies to ensure that they cover the use of e-cigarettes.

"I don't think it's clear at all that existing tobacco policies also cover the use of e-cigarettes," said Darin. "Companies need to consider whether their policies cover e-cigarettes or whether they need to clarify those policies or implement new policies. And they shouldn't assume that an existing policy covers e-cigarettes."

"One of the problems with electronic smoking is that no one understands what it is," Darin noted. "Is it smoking, or can it be considered smoking cessation? Is it more like smoking, or is it more like a nicotine patch? And there's still research being done – what will that research say about how e-cigarettes affect people who are in close proximity to the user?"

Darin advised businesses to begin evaluating their tobacco-use policy by first examining the state and local laws that might govern the use of e-cigarettes.

"There are a number of states and municipalities that have either lumped e-cigarette use into their smoking bans or have implemented new laws that prohibit the use of e-cigarettes in the workplace or other indoor spaces," he explained. "So in some jurisdictions, allowing the use of e-cigarettes in the workplace would be unlawful."

"Employers might have potential issues with other employees having some kind of reaction to the e-cigarette byproduct," Darin said. "E-cigarettes are odorless, and they obviously don't generate smoke – it's a vapor – but there are still some byproducts, and other employees could have a reaction to that. And that could potentially rise to the level of a condition that could require a reasonable accommodation under the Americans with Disabilities Act."

"E-cigarette use still looks an awful lot like smoking," Darin noted. "Are there concerns about public-facing positions in the workplace?" Employers must ask themselves these questions and align their answers with their key business interests, whether that's a healthier workforce or a clean public image.

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public image.

Darin added that the completion of the tobacco-use policy isn't the final step in the process.

"Employers need to keep an eye on whether there are new laws that come into effect or new research that would affect their policies," he added, "or changes in their insurance plans that could affect their policies. And employers also need to think about the rights of the users of e-cigarettes. Some states have statutes that prohibit discrimination based on lawful off-duty activities. Using an e-cigarette in the workplace isn't an off-duty activity -- but are there other considerations and rights that could come into play, and that need to be taken into account?

"At this point, there are more questions than answers," he continued. "Unfortunately, this isn't one of those situations where it's easy to plug in a policy."

To read the full article, please visit *BenefitsPro*.

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