



# The Uncertain Future Of E-Cigarettes In The Workplace

Publication

2.24.14

What was once just a trendy European fad has now made it big in the American workplace. The popularity of electronic smoking (e-cigarettes or "vaping") is exploding, and may soon shake up many employers who will start deciding whether or not to allow e-cigarettes in the workplace.

First marketed internationally in 2002, battery-powered e-cigarettes were later introduced to the United States in late 2006. The industry has grown from a few thousand to several million users worldwide — with each week bringing tens of thousands of new e-cigarette users. Annual sales in the United States of the more than 200 types of e-cigarettes currently available are estimated at more than \$200 million. In a study released last February, The Center for Disease Control and Prevention noted that one out of every five adult smokers in the United States have tried e-cigarettes, up from one-in-10 in 2012.

Part of the problem for employers is that e-cigarettes suffer from a crisis of identity. They have not yet been officially classified by regulatory bodies as traditional cigarettes, nor is their use considered "smoking" in the colloquially understood sense. Unlike traditional cigarettes, which contain long-identified and 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. The U.S. Food and Drug Administration is expected to issue rules in early 2014 and propose regulations that would extend the agency's tobacco-product regulatory authority to cover e-cigarettes. This in turn would likely mean greater restrictions on how e-cigarettes are produced and marketed.

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. While for now, New Jersey is the only state that has passed legislation banning the use of vapor-type cigarettes, many states are considering similar measures. In December, New York City extended its ban on traditional cigarette smoking in public places, restaurants, bars and private office buildings to include e-cigarettes. New Jersey, Utah and North Dakota already ban the use of e-cigarettes where smoking is otherwise prohibited, and Los Angeles and Chicago are considering similar bans. California, Colorado, Minnesota, New Hampshire, New Jersey and Utah have already passed bills controlling e-cigarette

sales and advertising to minors. Where cities, states and their business communities fall on the issue will soon be decided.

## **Pros and Cons of E-Cigarettes in the Workplace**

Proponents of e-cigarettes point out that there is no proof of associated health risks and 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 have been no long-term studies confirming or disproving these conclusions.

Those who oppose vaping argue that e-cigarettes 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 a U.S. Food and Drug Administration approved tobacco cessation device, and their manufacture lacks 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. For that employer, all applicants must test nicotine-free. Health Care Service Corp., and its Blue Cross and Blue Shield health plans in Texas, Illinois, New Mexico and Oklahoma, have also 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 employers decide on whether to prohibit e-cigarettes in the workplace, it is important to research the state and local laws regarding smoke-free workplaces and determine if e-cigarettes are already covered by existing bans. Employers 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**

Employers should read their employee handbooks and determine the exact wording and extent of their existing smoking policies. How does the policy define smoking? Company policies may not be clear. 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 resource perspectives to help consider the implications of any stance on e-smoking. After an informed discussion the employer could then make a recommendation.

Employers can find information about e-cigarettes from many informed organizations including the National Business Group on Health, FDA, America's Health Insurance Plans and Center for Health Research Kaiser Permanente and the American Lung Association. It is also important for employers to stay informed on any new laws and emerging scientific evidence regarding e-cigarettes.

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 "nontobacco user" status in health plans that offer reduced premiums for nontobacco users. To be considered a nontobacco 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**

Employers need to clarify their objective when creating or modifying workplace smoking policies that include e-cigarettes. Do they want to prohibit the use of tobacco, ban nicotine or forbid smoke in the workplace? Or do they want to ban anything that creates the illusion of traditional cigarette smoking? By answering these questions before crafting a policy, employers may avoid substantial future challenges — including those that play out in court.

### **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. However, there are potential legal issues to be sure. While nonsmoking 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 and 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 the employer ban e-cigarettes if they allow use of nicotine infused gum or other prescription medicines at work as tools for cessation of smoking?

By thoroughly analyzing all facets of the issue, employers can ensure they are prepared to articulate legitimate business interests before deciding whether or not to ban the use of e-cigarettes in the workplace. With the expanding use of this new product, court decisions about e-cigarettes in the workplace are sure to abound.

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This article appeared on [Law360.com](http://Law360.com) on February 24, 2014.