No Smoking = No Vaping?

Employers must determine whether or not e-cigarettes fall under their smoking policies.

Susan K. Lessack | leSsack@pepperlaw.com

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The days of lighting up at the office are making a comeback in some workplaces, thanks to the growing popularity of electronic cigarettes. According to the Centers for Disease Control, in 2013, one in five adult smokers reported that they had tried e-cigarettes, up from one in 10 in 2012. While e-cigarettes differ from traditional cigarettes in some fundamental ways, many employers are now faced with a dilemma in terms of how to treat e-cigarettes in policy and in practice.

An e-cigarette looks somewhat like a traditional cigarette or a pipe, and contains a battery-powered heating element that vaporizes a liquid containing nicotine, flavorings and other chemicals. E-cigarettes emit an odorless vapor, and as a result, e-cigarette smoking is known as “vaping.” E-cigarettes do not contain tobacco or some of the other harmful ingredients in traditional cigarettes, and do not leave behind the tar residue that tobacco does, but the jury is still out on the long-term health effects of vaping for the vapers themselves and for those who may inhale the vapor secondhand. The U.S. Food and Drug Administration has proposed rules that would extend its authority to regulate tobacco products to e-cigarettes, but those rules are not yet final. Under the FDA’s proposal, the sale of e-cigarettes to minors would also be prohibited, and health warnings would be required on e-cigarette packaging.

In terms of whether e-cigarettes should be permitted or banned in the workplace, there are arguments on both sides of the issue. On the pro side, allowing workers to vape in their workplaces means they no longer have to take regular smoke breaks, which can improve workforce productivity. Some also believe vaping can be used as a smoking cessation tool, which can help reduce health care expenditures.

But, there are a number of cons to allowing vaping at work. Some employers wish to discourage any smoking-related behavior in the workplace, and believe that vaping runs counter to existing no-smoking policies. Concern about the lack of research on the long-term effects of e-cigarette vapor, which contains nicotine and other chemicals (which may also irritate those inhaling it secondhand), and the fact that e-cigarettes are not approved for smoking cessation by the FDA (approved smoking cessation products include prescription medications and over-the-counter products such as skin patches, lozenges and gum) are other reasons employers may lean toward a ban. Some employers have banned e-cigarette use in the workplace to avoid confusion, as someone who is vaping may appear to be smoking a regular cigarette. And, there is a perception among certain employers that while it may not cause the same adverse health effects, e-cigarettes are still feeding or encouraging a nicotine addiction.

In some cases, the decision is made for employers. Certain states, including New Jersey, have added e-cigarettes to existing laws banning smoking tobacco cigarettes in the workplace and other public places, as have more than 150 municipalities around the country, including Philadelphia, Boston, New York and Los Angeles. Employers in those areas must abide by state or local law, and should add e-cigarettes to existing tobacco policies in their employee handbooks. That’s the route some major
Employers have taken, including CVS and Walmart, which have explicitly banned e-cigarette use in their corporate offices, and Starbucks, which bans employees and customers from vaping in their stores.

Employers also must consider whether they can ban the hiring of vapers, if they do so for smokers. For example, Pennsylvania law does not protect an employee’s off-duty conduct, so it is well within the rights of Pennsylvania employers to enact a no-hire policy for smokers. Twenty-nine states, including New Jersey and the District of Columbia, do not permit employers to make hiring decisions based on off-duty conduct, and several of those specifically prohibit no-hire rules for smokers.

E-cigarettes also present interesting questions regarding health insurance premiums. For example, when the Hospital of the University of Pennsylvania put its no-hire policy in place for smokers, it allowed existing employees to continue using tobacco, but it added a surcharge to those workers’ insurance premiums. According to an article published in Forbes, UPS, which charges non-union tobacco users $150 extra in monthly health insurance premiums, also makes e-cigarette users pay that surcharge, despite the fact that there is not yet hard evidence that shows that vaping causes the same negative health effects as smoking tobacco cigarettes.

Under the Affordable Care Act, employers are permitted to impose surcharges as high as 50 percent on smokers. But, as part of an increased focus on wellness programs, the law prohibits the surcharge for employees who attempt to stop smoking (even if they are unsuccessful), such as by participating in a smoking cessation program. This may create a thorny issue for some employers, as employees may claim that e-cigarettes helped them to stop smoking regular cigarettes, though e-cigarettes are not approved by the FDA as a smoking cessation aid.

In any case, employers in states or municipalities where vaping is permitted in workplaces and other indoor areas must determine the right vaping policy for their organization based on the law, vaping’s impact on current smoking policies, its financial impact on health insurance premiums, and the organization’s culture.

Endnote
1. Note that recent litigation brought by the Equal Employment Opportunity Commission raises the issue of whether such surcharges comply with the Americans with Disabilities Act.