Should your no-smoking policy ban e-cigarettes?

by Susan K. Lessack, Esq., Pepper Hamilton LLP

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.

What is an e-cigarette?

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 second-hand.

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.

Vaping and the workplace

Should e-cigarettes 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 work spaces 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 costs.

There are a number of cons. Some employers believe vaping runs counter to existing no-smoking policies. Concern about the lack of research on the long-term effects of e-cigarette vapor (which does contains nicotine and other chemicals that could irritate those who experience second-hand vapor) and the fact that e-cigarettes are not approved for smoking cessation by the FDA are other reasons some employers 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.

**Local laws cover vaping**

In some cases, the decision is made for employers. Some states, including New Jersey, have added e-cigarettes to existing laws banning smoking tobacco cigarettes in the workplace and other public places. So 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.

That’s the route some major employers have taken, including CVS and Walmart, which have explicitly banned e-cigarette use in their corporate offices. Starbucks bans employees and customers from vaping in their stores.

Employers must consider whether vapers should be considered as smokers under their hiring policies. Pennsylvania law does not protect an employee’s off-duty conduct, so it is well within an employer’s rights to enact a no-hire policy for smokers. That’s what Geisinger Health System and the Hospital of the University of Pennsylvania (HUP) have done.

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.

**Health insurance factors**

E-cigarettes present interesting questions regarding health insurance premiums.

When HUP implemented its no-hire policy for smokers, it allowed existing employees to continue using tobacco, but added a surcharge to their insurance premiums. UPS adds $150 to monthly insurance premiums for nonunion tobacco users—and makes e-cigarette users pay the surcharge, too, even though there is no hard evidence yet that vaping causes the negative health effects like tobacco smoking does.

The Affordable Care Act allows employers to impose such surcharges on smokers, up to 50% of the premium. 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.

Employers in locales where vaping is permitted in workplaces must determine the right vaping policy for their organization based on the law, vaping’s impact on existing policies, its financial impact on health insurance premiums and the organization’s culture.

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