

E-Cigarettes in the Workplace: A Policy Toolkit to Manage This New Risk

Use this report to:

- Learn about the growing trend of e-cigarettes;
- Determine the pros and cons of allowing e-cigarettes in the workplace;
- Find out state and municipality laws regulating e-cigarettes in the workplace; and
- Create a policy regarding e-cigarettes.

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Electronic cigarettes (e-cigarettes or e-cigs) are a form of smokeless, vapor-filled cigarette that are more and more frequently being used as an alternative to the more traditional cigarettes. With the rise in popularity of these devices, an employer must ask itself what, if anything, should be done about e-cigarettes when they are brought into the workplace.

Before making a decision on this matter, it is important to consider all the pros and cons of these devices. For example, allowing e-cigarettes in the workplace might cut down the amount of smoking breaks that a worker is currently taking. On the other hand, the health effects of these devices are still unknown, and banning e-cigarettes might be a way to avoid future legal problems resulting from employees who get sick after coming into second-hand contact with the vapor.

No matter what an individual workplace decides to do about these devices, it is important to create a new written policy, or update an existing smoking policy, stating what is or is not allowed.

An employer can use the steps in [How to Formulate an Effective E-Cigarette Policy in the Workplace](#), see Appendix I, to aid in crafting this policy.

Questions to Consider When Crafting an E-Cigarette Policy

1. What exactly are e-cigarettes, and how are they regulated?

Electronic cigarettes are nicotine-containing devices that come in an assortment of flavors from the more traditional such as tobacco to foods like bacon to desserts such as chocolate. Depending on what kind is purchased, e-cigarettes can have as much nicotine as a traditional cigarette or considerably less.

While e-cigarettes do have nicotine, they do not contain tobacco. Despite this, a federal appeals court has ruled that the Food and Drug Administration (FDA) may regulate e-cigarettes as a tobacco product. This means that the FDA could place federal regulations on these devices that might affect how an employer should handle them, though it cannot create a blanket ban on the product. Many states and municipalities have added e-cigarettes to their public smoking bans or have otherwise addressed when and where these devices may be used.

Because there could be a ban on e-cigarettes in place, it is important for an employer to look at the state and municipal laws where it is operating before creating a policy that allows these devices in the workplace.

[State Electronic Cigarette Laws](#), see Appendix II, shows what states and municipalities have laws regarding e-cigarette use in the workplace.

2. What are the safety and health considerations surrounding e-cigarettes?

There has been little scientific consensus on the safety and health considerations surrounding electronic cigarettes. Some people claim that they can act as a smoking cessation tool. However, there is no solid evidence that this is true. Because it has not been proven, the FDA has not approved e-cigarettes as a device used to quit smoking and manufacturers usually refrain from claiming the devices as such.

Similarly, there has been no conclusive evidence regarding second-hand vapor. For the most part, it is agreed that there are probably less harmful effects caused by vaping than by smoking because there are less harmful chemicals in an e-cigarette than in a traditional cigarette. However, there have been reports of harmful side effects caused by e-cigarette exposure. These include, but are not limited to:

- Itchy nose and eyes;
- Nausea;
- Congestive heart failure; and
- Hypotension.

If an employee got sick from second-hand vapor exposure in the workplace, it is conceivable that he or she might be able to recover workers' compensation. However, in order to do so, the employee would be required to prove that the device actually caused the illness.

Another consideration an employer should have regards the matter of smell. While the e-cigarettes do not burn tobacco, thus do not create the same strong scent as a traditional cigarette, most do cause an aroma based on the flavor of the device. Some employees might enjoy the smell of e-cigarettes even if they do not actually use one, others may have smell sensitivities or allergies. E-cigarettes should be examined in the same manner as perfumes and other scent-creating products in the workplace.

3. Are there any legal concerns or liabilities an employer needs to consider?

There are legal considerations an employer should take surrounding electronic cigarettes. For example, as previously stated, it is important to consider all state and municipal laws, as there are many laws on these levels that ban e-cigarettes in public places such as workplaces.

Bans on e-cigarettes are almost always allowed. An employer will most likely not be liable for taking a stance against e-cigarettes in the workplace. However, many states have laws that ban discrimination against smokers or people participating in legal off-duty conduct. Because of this, while a ban on e-cigarettes in the workplace is likely acceptable, a ban on e-cigarettes outside of work or negative job consequences based on e-cigarette use outside of the workplace is likely to be ill-advised at best and illegal at worst.

Nicotine addiction is not a recognized disability under federal or most state law. For this reason, an employer is not obligated to allow e-cigarettes in the workplace as a means of reasonable accommodation to an employee who is trying to quit smoking.

4. How should an employer create and manage an e-cigarette policy?

The first thing an employer should do when creating an electronic cigarette policy is decide whether e-cigarettes will be completely banned, allowed in smoking areas, allowed in certain approved areas outside of the regular smoking areas or allowed everywhere inside the workplace.

Once it has been determined where e-cigarettes will or will not be allowed, it is important to write the new procedure or add it to a current smoking policy and make sure employees are aware of the policy in the same manner that they are informed of any new workplace guideline.

It is also imperative that the employer be ready to back their new policy. If e-cigarettes are allowed, some employees might want to ban them. Alternatively, if they are banned, some employees might want them to be allowed. Regardless of what decision the employer makes, it should have sound reasoning and should communicate that reasoning to employees.

In the [Acceptable Use of Electronic Cigarettes Policy](#), see Appendix III, an employer can see a sample policy for when e-cigarettes are allowed in the workplace.

Appendix I

How to Formulate an Effective E-Cigarette Policy in the Workplace

Author: [Stefan H. Black](#), FordHarrison, LLP

Electronic cigarettes (e-cigarettes) are a smokeless alternative to traditional cigarettes. E-cigarettes use a battery to heat a flavored liquid that usually contains nicotine. The heated liquid becomes a vapor that the user inhales. The use of e-cigarettes, which is called *vaping*, does not involve the burning of tobacco. Consequently, the vapor produced by e-cigarettes does not include the tars, carbon monoxide and other dangerous chemicals that are contained in tobacco smoke.

As e-cigarettes become more popular, employers must decide whether to allow employees to use e-cigarettes in the workplace. This decision is made all the more difficult by the lack of consensus within the scientific community regarding the health risks posed by e-cigarettes.

This How To discusses how an employer should go about formulating an effective e-cigarette policy.

Step 1: Determine Whether State or Local Law Prohibits the Use of E-Cigarettes in the Workplace

In 2011, a federal appeals court ruled that the Food and Drug Administration (FDA) may regulate e-cigarettes as "tobacco products," but not as a drug delivery device unless the product is marketed for therapeutic purposes (e.g., as a smoking cessation tool). In early 2014, the Food and Drug Administration is expected to issue rules restricting the use of e-cigarettes, but these rules will probably not address the use of e-cigarettes in the workplace.

However, some state and local governments have already implemented laws regulating the use of e-cigarettes. Most states restrict the sale of e-cigarettes to minors. At least three states (Colorado, New Jersey and Tennessee) and several local governments have implemented laws that prohibit e-cigarettes in the workplace.

The first step in developing an e-cigarette policy is to research the state and local laws where the employer operates. If state or local law prohibits the use of e-cigarettes in the workplace, the employer should adopt a written policy that affirms the state or local rule (See Step 7 of this How To). If the applicable state or local law is silent on the use of e-cigarettes, then the employer should move to Step 2 of this How To.

Step 2: Determine Whether the Workforce Includes Employees With Severe Allergies, Respiratory Conditions or Skin Sensitivities

E-cigarettes are generally considered to be safer than traditional cigarettes. However, the short-term and long-term health effects of e-cigarette vapor are still being studied. Some individuals have reported to the FDA that exposure to e-cigarette vapor has prompted respiratory problems, nausea, headaches, coughing and irritation to the eyes, nose and throat. Employees who suffer from severe allergies, respiratory conditions or skin sensitivities are particularly at risk.

Individuals who are able to prove that the exposure to e-cigarette vapor caused them to experience a medical condition that restricted their ability to carry out a major life activity will likely be protected by federal and state disability laws.

In contrast, nicotine addiction is not a recognized disability under federal disability law and most state disability laws. As such, employers are not required to reasonably accommodate employees who smoke traditional cigarettes by allowing them to vape while at work.

Accordingly, before deciding whether to allow vaping in the workplace, an employer should identify and evaluate potential reasonable accommodations that may be offered to employees who complain about the exposure to e-cigarette vapor.

The decision as to whether a proposed accommodation is reasonable must be made on a case-by-case basis. However, employers who have difficulty coming up with feasible accommodations should strongly consider implementing a policy that prohibits, or severely restricts, the use of e-cigarettes in the workplace.

Step 3: Weigh the Pros and Cons of Allowing E-Cigarettes in the Workplace

Assuming the employer does not operate in a state, county or city that prohibits vaping in the workplace, the employer should assess the pros and cons of allowing employees to vape while at work.

There are three primary considerations when making this decision:

1. The health effects of e-cigarette vapor;
2. The effect that allowing vaping in the workplace will have on employee productivity; and
3. The risk of liability created by vaping in the workplace.

Weigh the Health Effects of E-Cigarettes

Research regarding the short-term and long-term effects of vaping is still in the early stages. As such, there is no consensus among public health advocates regarding the safety of e-cigarettes.

E-cigarette advocates emphasize that e-cigarettes are widely considered to be safer than tobacco cigarettes. E-cigarette vapor does not contain the tars, carbon monoxide or other toxic materials known to be present in tobacco smoke. In addition, while some studies have identified trace amounts of nicotine, formaldehyde and other harmful substances in e-cigarette vapor, there is no conclusive scientific evidence that these substances pose a health risk when consumed in such small amounts.

As such, some public health advocates urge employers to allow vaping in the workplace in order to encourage employees to quit smoking tobacco cigarettes. These advocates point to the fact that more than half of e-cigarette users report using e-cigarettes because they wish to stop smoking. Additionally, there is some evidence that e-cigarettes are just as effective as "the patch" or "the gum" in helping people quit smoking. However, it is worth noting that the FDA has not approved e-cigarettes as therapeutic devices and most e-cigarette manufacturers do not market their products as such.

In contrast, those opposed to e-cigarettes argue that industry claims that e-cigarettes are "safe" are premature. The effects of inhaling substances commonly contained in e-cigarette cartridges have not been exhaustively studied, and studies have identified trace amounts of nicotine, formaldehyde and other toxic chemicals in e-cigarette vapor.

Employers should stay apprised of updates in research regarding the health impact of e-cigarettes and modify their e-cigarette policy as the risk/benefit analysis changes.

Analyze the Impact of E-Cigarettes on Employee Productivity

The second important factor an employer should consider when deciding whether to allow vaping at work is the effect the policy will have on employee productivity.

E-cigarette advocates contend that allowing employees to vape at their desks will substantially increase smokers' productivity in several respects. First, allowing employees to vape at their desk will eliminate the need for smoke breaks. Second, advocates claim that allowing e-cigarettes in the workplace will reduce employee absenteeism stemming from smoking-related health conditions. Finally, these advocates argue that allowing vaping in the workplace will reduce employers' group health care premiums because employees who smoke generally cost more to insure than employees who do not smoke.

Those opposed to e-cigarettes, however, stress that allowing vaping at work will negatively affect co-workers who do not smoke or vape. For instance, some individuals may find the smell or appearance of e-cigarettes to be offensive, annoying or distracting. The potential problems become even worse if the workplace involves regular in-person interaction with customers, who may be turned off by vaping.

An employer should conduct a predictive analysis to determine how many of its employees who smoke are likely to switch to e-cigarettes if vaping were to be allowed at work. If an employer finds that a substantial number of employees would switch from traditional cigarettes to e-cigarettes, then the potential increase in productivity favors adopting a policy that allows vaping at work. On the other hand, if the majority of the workforce either does not smoke or is unlikely to switch to e-cigarettes, the potential for distraction and annoyance outweighs the expected increase in productivity.

A blue line graphic that starts with a small triangle pointing up, then goes down to the left, then right, and then continues as a horizontal line across the page.

Assess Exposure for Liability

Prohibiting vaping at work will not subject an employer to liability. In contrast, allowing e-cigarettes in the workplace could potentially create exposure for employers.

Although the evidence regarding the health risks of secondhand vapor is inconclusive at this point, employers who allow vaping at work can expect to be sued by employees who will claim to have suffered an illness or injury because they were exposed to secondhand e-cigarette vapor. These lawsuits may take the form of a workers' compensation claim, a lawsuit under federal or state disability law or a claim for failure to provide a safe workplace, depending, in large part, on what type of suits are allowed in the individual state or locality.

Whether employees will be able to prevail on such claims depends on whether they can prove that the exposure to secondhand vapor in the workplace caused them to suffer an adverse reaction.

An employer should assess whether it possesses the resolve, resources and willingness to litigate the issue before implementing any policy allowing vaping in the workplace.

Step 4: Survey Employees to Determine Whether There Is a Demand for Vaping

If feasible, an employer should attempt to gauge its employees' desire to vape while at work. Depending on the size and nature of the form, the employer could formally or informally poll its employees (or a random sample thereof). An employer should also talk to first-line supervisors to gauge employee interest in or opposition to vaping and to determine practical operational problems that such a policy might create.

Step 5: Decide Whether to Allow Vaping at Work

Employers generally adopt some version of one of following types of e-cigarette policies:

- Allow vaping anywhere in the workplace;
- Allow vaping only in designated smoking/vaping areas; or
- Prohibit vaping anywhere in the workplace.

The factors employers should consider when deciding which of these policies to implement should include:

- *Size and make-up of the workforce.* The culture of each employer's workforce is different. Accordingly, employers should consider whether its workforce will be amenable to a policy that allows vaping. For instance, a smaller workplace that employs mostly younger adults might be more inclined to adopt a policy that allows vaping because vaping is more common among younger adults. In contrast, employers whose workforce includes a substantial number of minors may wish to prohibit vaping at work.
- *Layout of the work area.* The layout of the work area is a key factor to consider when assessing the feasibility of accommodating individuals who object to the use of e-cigarettes. For instance, outdoor worksites are less prohibitive to vaping than an enclosed office because any offensive odors are more likely to disperse in an open area.
- *Type of work being performed.* Employers should confirm that it is safe to operate an e-cigarette in the workplace. For example, a gas refinery may wish to prohibit e-cigarettes in the workplace because it may not be safe to have a battery-powered heating device in such an environment.

Employers should consider the pros and cons of allowing e-cigarettes in the workplace in light of the unique aspects of their workforce and workplace in order to identify the optimal policy.

Step 6: Develop the Written Policy

Once an employer decides whether to allow vaping in the workplace, the employer should draft a written policy. The policy should address the following issues:

- Whether vaping is allowed during work hours. (This should be expressed unambiguously);
- The circumstances and locations where vaping is permitted, if any;
- The legitimate business reason underlying the employer's policy;
- Any special requirements for e-cigarette users (e.g., a higher premium, etc.) imposed by the group health insurance carrier. (Employers should check with the carrier to find out if any special requirements exist); and
- The consequences of failing to comply with the policy.

An employer should distribute the e-cigarette policy in advance of implementation. Preferably, an employer should introduce the policy during a meeting that educates the employees regarding the employer's reasons for adopting the policy.

Appendix II

State Electronic Cigarette Laws

Authors: [Ashley Shaw](#), [Beth Zoller](#) and [Marta Moakley](#), XpertHR Legal Editors

Electronic cigarettes (e-cigarettes or e-cigs) are growing in popularity. As their use grows, the question of whether to allow employees to use them in the workplace arises. There are both [pros and cons to allowing e-cigarettes in the workplace](#), and an employer should consider both sides before making a decision. However, there are some states and municipalities that ban e-cigarettes in public places, usually as part of a smoking ban that already exists in the state.

State	Banned In...
Alabama	Certain municipalities
Alaska	Certain municipalities
Arkansas	School properties
California	Certain municipalities
Colorado	School properties
Florida	Certain municipalities
Georgia	Certain municipalities
Idaho	Certain municipalities
Illinois	Certain municipalities
Indiana	Certain municipalities
Kansas	Kansas Department of Corrections
Kentucky	Certain municipalities
Louisiana	Certain municipalities
Maryland	Mass transit and inside transit stations and waiting areas
Mississippi	Certain municipalities
New Hampshire	School properties
New Jersey	Enclosed indoor places of public access and workplaces
New York	Certain municipalities; within 100 feet of school and public building entrances
North Dakota	All places smoking is banned
Oklahoma	State buildings and certain municipalities
Oregon	State agency buildings and grounds
Pennsylvania	Certain municipalities starting on July 1, 2014
South Dakota	Certain municipalities; South Dakota Department of Corrections
Texas	Certain municipalities
Utah	All places smoking is banned (with a temporary exemption for retailers that sell e-cigarettes)
Washington	Certain municipalities
West Virginia	Certain municipalities

Appendix III

Acceptable Use of Electronic Cigarettes Policy

Author: [Stefan H. Black](#), FordHarrison, LLP

When to Use This Policy

Electronic cigarettes ("e-cigarettes") are a smokeless alternative to traditional cigarettes. Rather than burning tobacco, e-cigarettes use a battery to heat a flavored liquid, which becomes a vapor that the user inhales. As the use of e-cigarettes (known as *vaping*) has increased in recent years, so too have employees' demands to be allowed to vape while at work.

Some state and local governments prohibit the use of e-cigarettes in the workplace. Before implementing this policy, employers should consult an attorney to determine whether vaping at work is lawful in the city(ies) and state(s) in which they are operating.

Unless operating in a city or state that restricts the use of e-cigarettes, an employer generally has the right to choose whether to allow employees to vape at work. An employer should therefore determine whether it wishes to allow vaping at work and then develop, implement and enforce a policy that promotes the employer's decision. A written and published policy is the best means by which to manage employee expectations regarding the use of e-cigarettes in the workplace.

This policy is intended to serve as a guide for an employer wishing to allow the use of e-cigarettes in the workplace. An employer that wishes to ban e-cigarettes might consider incorporating this ban into its current [smoking policy](#).

Below is a model policy that should be further tailored to fit the employer's specific needs

Acceptable Use of E-Cigarettes Policy

Background Information. Electronic Cigarettes ("e-cigarettes") are a smokeless alternative to traditional cigarettes. Rather than burning tobacco, e-cigarettes use a battery to convert a flavored liquid into a vapor that the user inhales. Some initial studies have determined that e-cigarettes can be a useful smoking cessation device and can increase employees' productivity (e.g., by reducing the number of smoke breaks taken).

General Rule. The use of e-cigarettes (also known as *vaping*) is permitted on **[Enter Employer Name]** property, both during breaks and during working times, except as follows:

- **[Optional]** Employees may not use e-cigarettes in the presence of customers.
- **[Optional]** Employees may not use e-cigarettes that omit offensive odors. **[Enter Employer Name]** retains the right to determine which odors are offensive on a case-by-case basis.
- Employees may not use e-cigarettes in any way that negatively affects productivity or that disturbs or offends co-workers or customers. Because it is impossible to anticipate every circumstance in which this exception may apply,

employees must abide by supervisors' instructions regarding the use of e-cigarettes in a particular situation.

Reasonable Accommodation. **[Enter Employer Name]** will reasonably accommodate an employee who is unable to perform one or more of the essential functions of his or her job because he or she was exposed to e-cigarette vapor. Such reasonable accommodations may include restricting the work areas in which employees may use e-cigarettes, requesting that an employee either relocate his or her work area or discontinue using e-cigarettes, and prohibiting the use of e-cigarettes in the workplace altogether. [In California add the following language: "Nothing in this policy shall be interpreted as a request or demand for information regarding an employee's general health, medical condition or disability."]

[OPTIONAL] *Use of E-Cigarettes May Affect Health Insurance Premium.* Employees who elect to use e-cigarettes in the workplace may be required to pay a higher premium for **[Enter Employer's Name]**'s group health insurance coverage than employees who do not use e-cigarettes in the workplace.

Consequences for Violating E-Cigarette Policy. Employees who violate this policy shall be subject to disciplinary action, including termination of employment.

Tips

The first step for any employer is developing a policy that clearly sets forth the expectations regarding e-cigarette use in the workplace. Best practices call for the policy to be published as part of the employee handbook. Existing employees should be required to sign an acknowledgment that they have read and received the e-cigarette policy, and all new employees hired in the future should be required to do the same.

Warning

Just writing and distributing an e-cigarette policy is not enough. The policy must be communicated to each employee, and supervisors must consistently implement and uniformly enforce the policy. If the policy is not applied consistently, courts may be less willing to accept that the workplace policy, in fact, existed. Further, not applying the policy uniformly may expose an employer to a discrimination claim.

Employers often find it easiest and safest to have one individual or department responsible for reviewing and publishing this policy to make sure that the policy is continuously modified in accordance with new laws, court decisions and employer preference.

The research regarding the health effects of e-cigarette vapor is still in its infancy. However, some individuals have reported experiencing a number of negative health effects (e.g., headaches, respiratory problems, etc.) after being exposed to e-cigarette vapor. In particular, employees with severe allergies, respiratory conditions or skin sensitivities may claim to suffer a reaction to e-cigarette vapor. Accordingly, employers that allow vaping in the workplace must carefully monitor the implementation of the policy to mitigate the risks of any potential lawsuits.

Future Developments

The Food and Drug Administration and many state and local governments are considering new restrictions pertaining to the use of e-cigarettes in the workplace. Employers will need to monitor any changes in federal, state or local law regarding the use of e-cigarettes and revise their policies accordingly. Any changes to this policy should be sent to all employees and the employer may also require employees to acknowledge that they have received and understand the changes. Continue to check XpertHR regularly for the latest information on this and other topics.

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