

Labor & Employment Law

Electronic Cigarettes: It's Time to Include Them in Your Tobacco Use Policy

By Abby Dillsaver

Oklahoma Bar Journal

Volume 82, No 26, 10-08-2011, p. 2275

Electronic Cigarettes (e-cigs) are a smokeless tobacco product that has taken the nation's smoking population by storm. It's only a matter of time before you see an employee "lighting" up an e-cig in the office. Employers need to address these new smoking devices so employees know when and where they can use them.

ELECTRONIC CIGARETTES: AN INTRODUCTION

E-cigs mimic the effects of smoking, from holding the cigarette to the smoke-like vapor they emit. These cigarette look-alikes contain a battery-powered cylinder that holds nicotine-filled cartridges. The cylinder is designed to resemble a real cigarette. When operated, the cylinder vaporizes a liquid nicotine mixture, which the user inhales and exhales through the mouth. The resulting vapor looks like the smoke from a traditional cigarette, which has led to e-cig use being referred to as "vaping." E-cigs come in different flavors and different concentrations of nicotine.

Marketed as a healthier alternative to smoking because nicotine is delivered without any accompanying tar or smoke, e-cigs proclaim they can be used anytime and anywhere. Employee smokers have taken this marketing at its word and are supplementing or replacing their traditional cigarettes with e-cigs, believing them not only safer, but also not covered by

traditional employer tobacco policies. Given this popularity, it's time to revise your tobacco use policy to include e-cigs.

EMPLOYER RISKS IF E-CIGS ARE USED INDOORS

If you haven't seen e-cigs at your work, you will. Their use has been on the rise since they first appeared on U.S. shelves several years ago. And given many user testimonials that e-cigs help to quit smoking, more and more smokers are swapping their traditional cigarettes for e-cigs.

While you may gain some productivity by allowing "vaping" inside, that productivity may be counterbalanced by negative effects on health, professionalism and employee satisfaction. Given their novelty, e-cigs have not been thoroughly studied to determine what, if any, harmful effects they may pose to those using them much less what effect the second-hand vapors may cause, making an employer's potential liability as unknown as the effects of

Labor & Employment Law

e-cigs. Allowing “vaping” indoors may subject you to lawsuits based on alleged health problems caused by the vapors and fumes, from mere irritation to more serious issues such as breathing problems and possibly cancer. But there are reasons to include “vaping” in your tobacco use policy in addition to the unknown health effects.

Second to health risks are the appearances of professionalism and a healthy business environment. Even though e-cigs are not traditional cigarettes, employees still look like they are smoking when they use them. That’s the point of e-cigs. Customers and clients may not realize employees are not actually smoking and even if they do, the client may be irritated or offended by employees who “vap” in front of them.

“Vaping” inside the office may also lead to complaints from co-workers who notice an odor despite e-cig’s claim to be odorless or who are otherwise bothered by the vapor. Including e-cigs in your tobacco policy preserves the status quo and enforces your no smoking policy.

A NEW TOBACCO PRODUCT

Under *Sottera Inc. v. U.S. Food and Drug Administration*,¹ electronic cigarettes are regulated by the Food and Drug Administration (FDA) as a tobacco product, not a drug-device.² The impact of this distinction is in the regulatory steps a distributor or manufacturer must go through to market their products in the United States.³

In *Sottera*, two e-cig distributors petitioned the court for a preliminary injunction against the FDA.⁴ The FDA had denied entry of the

distributors’ e-cigs on the grounds they were “adulterated, misbranded, or unapproved drug-device combinations under the [Federal Food, Drug, and Cosmetic Act,] FDCA.”⁵ The court held that e-cigs were not a drug-device but rather a tobacco product and that the FDA had no authority to regulate them under the FDCA but could regulate them under the Family Smoking Prevention and Tobacco Control Act of 2009 (the Tobacco Act).⁶ The FDA has indicated that it will not appeal the decision and will regulate e-cigs as tobacco products in conformity with the decision.⁷ E-cigs classification as a tobacco product places them firmly within the sphere of employers’ tobacco policies.

Tobacco use in the workplace has been restricted for several decades. In 1987, Oklahoma passed the Smoking in Public Places and Indoor Workplaces Act⁸ (the act) which banned smoking in indoor workplaces.⁹ Indoor workplaces are excluded from this prohibition only if the owner, the immediate family, or smokers are the exclusive workers and the public has only “incidental public access” to the workplace.¹⁰ Given these limitations, most employers are prohibited from allowing employees to smoke inside any indoor workplace.

REVISING YOUR TOBACCO USE POLICY

As an employer, you may restrict employees’ tobacco use more stringently than required by law so long as you do not offend any legal rights an employee may have to use tobacco. Employees do have the right to use tobacco when they are off-duty. Oklahoma employers may not discriminate against their employees

Labor & Employment Law

who smoke or otherwise use tobacco products.¹¹ However, employers are certainly free to limit smoking in the workplace.¹² Indeed, most employers are legally required to only allow smoking outdoors under the act. Regulating “vaping” to work breaks outside conforms to the legal requirements for smoking and meets expectations for the use of tobacco products.

As a tobacco product, employers should also consider whether they are legally required to ban indoor “vaping” under the act. The act defines “smoking” as “the carrying by a person of a lighted cigar, cigarettes, pipe, or other lighted smoking device.”¹³ As e-cigs are derived from tobacco, marketed as an alternative to cigarettes, and the liquid nicotine mixture is heated, or lit, by the battery within the cylinder, they are arguably a “lighted smoking device.”¹⁴ Even if e-cigs are not a “lighted smoking device,” it is foreseeable that the Oklahoma Legislature may amend the act to specifically include e-cig use. Some U.S. agencies, state and municipalities have banned or are considering banning e-cig use. The U.S. Department of Transportation has proposed regulations to ban the use of e-cigs during flights.¹⁵ After public comment and debate over the regulation of e-cig use, Washington State’s Tacoma-Pierce County only permits vaping where minors are lawfully prohibited, non-public workplaces and retail outlets that exclusively sell e-cigs.¹⁶ Boston’s Board of Health has preliminarily approved regulations to treat the sale and consumption of e-cigs like tobacco products, including banning their use in the workplace.¹⁷ The San Francisco Health Commission has also endorsed similar proposed regulations.¹⁸ And the New York and New Jersey Assemblies have

introduced bills that would similarly prohibit e-cig use.¹⁹

All these issues should be considered when revising your tobacco use policy to cover e-cigs. Specifically listing electronic cigarettes in your policy leaves no doubt they are covered. You should also evaluate revising the policy to include a broader definition of tobacco use, if one is not already used. A broad definition will ensure that future tobacco products are covered. Whether you explicitly name electronic cigarettes in your policy or simply decide the policy already covers their use, employees should be informed that e-cigs are covered and may only be used outdoors or in designated areas.

As an employer, it’s important to be proactive when protecting your employees’ health, the welfare of the company, and yourself against legal liabilities. Don’t wait until “vaping” inside becomes a problem. Act now and revise your tobacco policy to address e-cig use.

1. 627 F.3d 891 (D.C. Cir 2010).
2. *Id.* At 898.
3. *See generally*, 21 U.S.C.A. §§321 et seq. and 21 U.S.C.A. §§387 et seq.
4. 627 F.3d at 893. The two petitioners were Smoking Everywhere and Sottera Inc. (doing business as NJOY). However, “[w]hile this appeal was pending, Smoking Everywhere voluntarily dismissed its complaint against the FDA, leaving NJOY as the sole appellee.” *Id.*
5. *Id.*
6. *Id.* at 898. Congress passed the Tobacco Act in 2009. Pub. L. 111-31, 123 Stat. 1776, codified at 21 U.S.C.A. §§387 et seq.
7. U.S. Food and Drug Admin., letter to stakeholders: *Regulation of E-Cigarettes and Other Tobacco Products* (Apr. 25, 2011), available at

Labor & Employment Law

- www.fda.gov/NewsEvents/PublicHealthFocus/ucm252360.htm.
8. 63 O.S. §§1-1521 et seq.
 9. *Id.* at §1-1523.
 10. *Id.* at §§1-1523 (G)(5)-(8).
 11. *See*, 40 O.S. §500.
 12. Historically, the nicotine addiction associated with tobacco use has not been covered as a disability under the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§12101 et seq. 138 F.Supp.2d 639,695 (D.Md. 2001) (finding that nicotine addiction is not a disability under the ADA because it is remediable). The expansion of the definition of “disability” under the Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. 110-325, 122 Stat. 3553, codified at 42 U.S.C.A. 12101 et seq., has sparked debate over whether smoking will now qualify as a disability. The potential ramifications of changes under the ADAAA are beyond the scope of this article.
 13. 63 O.S. §1-1522(8).
 14. However, the act’s definition of “smoking” is not as broad as that found in the Oklahoma Tobacco Use Prevention and Cessation Act, 63 O.S. §§1-229.1 et seq., which covers “tobacco use,” defined as “the consumption of tobacco products by burning, chewing, inhalation, or other forms of ingestion.” 63 O.S. §1-229.2(7).
 15. Dept. of Transp., Press Release DOT 119-11: “U.S. Department of Transportation Proposes to Ban the Use of Electronic Cigarettes on Aircraft” (Sept. 14, 2011), available at www.dot.gov/affairs/2011/dot11911.html.
 16. *Tacoma-Pierce County Board of Health Passes Tobacco Regulations* (June 1, 2011), available at www.tpchd.org/news.php?nid=647; *Tacoma-Pierce County Health Regulations, Ch.9, Restrictions on Sale, Use and Availability of Electronic Smoking Devices and Unregulated Nicotine Delivery Products*, available at www.tpchd.org/files/library/22094f84d3b140cb.pdf.
 17. Boston Public Health Comm’n, Press Release: *Boston Board of Health gives preliminary approval to regulating e-cigarettes* (Sept. 9, 2011), available at www.bphc.org/Newsroom/Pages/TopStoriesView.aspx?ID=233.
 18. Health Commission, City of San Francisco, Resolution No. 7-11 (June 21, 2011), available at www.sfdph.org/dph/files/hc/HCRes/Resolutions/2011Res/ecig%20reso.pdf.
 19. A. 01468, 2011 – 2012 State Assem., Reg. Sess. (N.Y. 2011); A. 4228, 213th Leg., Reg.Sess., 2009 N.J. Laws 182.