

## Headlines

### STRATEGIC PERSPECTIVES—Employers need a uniform policy on smoking—which includes use of e-cigarettes

By Adam D. Kemper, J.D.

The popularity of electronic cigarettes (e-cigarettes), including vapes, vaporizers, e-hookahs, shisha pens, or any other type of e-cigarette has risen dramatically over the last ten years. In fact, there are currently as many as 500 different brands of e-cigarettes and hundreds of flavor options, making it a billion-dollar industry, which is competing with and may eventually overtake the tobacco industry.

**What is an e-cigarette?** An e-cigarette is an electronic nicotine delivery system that is typically operated by battery, a heating element, and a nicotine-based liquid cartridge that delivers a vaporizer to provide the user with a similar sensation of smoking a traditional cigarette. E-cigarettes are advertised as not exposing the user to as many harmful levels of cancer-causing agents and other dangerous chemicals normally associated with traditional tobacco products. The premise is that the “vapor” associated with e-cigarettes is less harmful than tobacco smoke because tobacco smoke contains many dangerous chemicals, including tar and carbon monoxide.

**Health issues.** For a while, individuals were permitted to use e-cigarettes in traditionally tobacco smoke-free environments, such as airplane lounges, restaurants, and workplaces. However, recent studies have shown the harmful and addictive effects of e-cigarettes. Specifically, the vapor from e-cigarettes has been found by the U.S. Food and Drug Administration (FDA) to contain detectable levels of several known carcinogens and toxic chemicals to which users and others could potentially be exposed. Further, with flavors such as bubble gum, cotton candy, and chocolate cake, a new generation of e-smokers has emerged.

According to a [statement](#) by the American Lung Association, a 2014 study showed wide ranging nicotine levels in e-cigarettes and substantial variability between listed and actual nicotine levels. In 2009, the FDA conducted lab tests and found detectable levels of toxic cancer-causing chemicals, including an ingredient used in antifreeze, in two leading brands of e-cigarettes and 18 various cartridges. A 2014 study found that e-cigarettes with a higher voltage level have higher amounts of formaldehyde, a carcinogen. The potential harm for people exposed to secondhand emissions from e-cigarettes is not yet defined. However, the American Lung Association referenced two initial studies that reportedly found formaldehyde, benzene, and tobacco-specific nitrosamines (all carcinogens) as coming from those secondhand emissions.

The U.S. Department of Health and Human Services tells a similar story, [noting](#) that e-cigarettes may contain ingredients that are known to be toxic to humans. Because clinical studies about the safety of e-cigarettes have not been submitted to the FDA, users have no way of knowing which chemicals they contain, how much nicotine they are inhaling, and the health effects of long-term use. No e-cigarettes currently are approved by FDA for therapeutic uses so they cannot be recommended as a smoking cessation aid.

The Florida Department of Health’s Bureau of Tobacco Free Florida recommends that consumers wait for reliable scientific evidence to come out before using e-cigarettes. There is simply no long-term study on the effects of prolonged use of e-cigarettes.

**State law restrictions on the use of e-cigarettes in the workplace.** Although many states have laws prohibiting smoking in the workplace, most do not specifically include e-cigarettes. According to the American Nonsmokers' Rights Foundation, as of [April 2, 2015](#), only three states had laws that restrict e-cigarette use in 100 percent smoke-free venues (i.e., non-hospitality workplaces, restaurants, bars, and certain gambling facilities); 18 states have laws restricting e-cigarette use in other venues; and 354 cities and counties have local laws that restrict e-cigarette use in 100 percent smoke-free venues. Thus, there is a lack of uniformity regarding the restrictions of e-cigarette use in traditionally smoke-free environments, such as workplaces.

Florida law, for example, generally prohibits smoking in enclosed indoor areas such as workplaces. The Florida Legislature enacted the "Florida Clean Indoor Air Act" in 1985 with the specific intent to protect individuals from health hazards associated with secondhand tobacco smoke.

"Smoking" as defined by Florida law means "inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product." It is clear that the Florida legislature did not envision tobacco alternatives to "lighted tobacco products," such as e-cigarettes.

Although New Jersey has for several years prohibited the use of electronic smoking devices used to deliver nicotine or other substances to the person inhaling from the device, and Montana included "any smokable product" in its smoking prohibition a few years ago, states such as Hawaii and Oregon have recently amended their smoking laws, effective January 2016, to specifically encompass "electronic smoking devices," including, but not limited to, electronic cigarettes, cigars, cigarillos, pipes, hookah pipes, or hookah pens, and any cartridge or other component of the device. Rather than define the device itself, Oregon's law states that a person may not smoke, aerosolize or vaporize an inhalant or carry a lighted smoking instrument in smoke-free areas.

**Company policies on the use of e-cigarettes in the workplace.** Some companies prefer to permit the use of e-cigarettes in their workplace because they believe it will lead to fewer smoke breaks, which equates to more time on the clock and additional profit for the company. Naturally, there is a difference of opinion on this issue. Others believe that a healthy workforce will inevitably be a productive workforce. In this regard, there has been a greater emphasis of late by certain employers to offer workplace wellness programs to encourage healthier lifestyles. Many of the wellness programs encourage employees to stop smoking altogether.

The Society of Actuaries has determined that secondhand smoke costs the United States economy roughly \$10 billion dollars a year based on medical and other costs associated with being out of work because of health reasons from secondhand smoke.

Regardless of where your company stands on both the health and economic debate, a workplace smoking ban must be consistent and should include e-cigarettes both in the company's disciplinary policies and wellness programs. Inconsistent application of smoking rules can potentially lead to confusion, complaints of favoritism, discrimination, and unintended endorsements of one product over another.

A smoking policy should be included in an employee handbook or as a separate stand-alone document in order for employees to have adequate notice of the company's position with regard to smoking in the workplace.

#### **About Adam Kemper:**

*Mr. Kemper practices in the area of labor and employment law at Greenspoon Marder Law, where he counsels employees and employers on a variety of workplace issues including, but not limited to, day-to-day human resources counseling and compliance, wage and hour issues, and workplace discrimination.*

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