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Aaron J. Graf, Esq.

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Don't Let Your Company's Smoke-Free Policy Go Up In Vapor

By Aaron J. Graf

Many companies have smoke-free workplace policies that prohibit smoking within the company's buildings or ban smoking on company property altogether. These policies are usually relatively straightforward: Employees can only smoke in designated areas or cannot smoke at all, no questions asked, no exceptions. Failure to abide by the policy usually results in progressive discipline being followed. The policies typically include language that makes them broad enough to apply to cigarettes, pipes, and other tobacco smoking accessories. Surely, these policies are simple and straightforward enough to not be the cause of any consternation.

Then, along came the increased popularity of the electronic cigarette. Electronic cigarettes, or e-cigs, are typically made of plastic or metal and look like an actual cigarette. The difference of course being that they contain no tobacco and do not require a flame to light. Rather, they are battery powered and accomplish the delivery of nicotine to the body through production of a mist or vapor, which the user inhales. Some view e-cigs as safer and cleaner methods of ingesting nicotine as opposed to cigarette smoking or chewing tobacco. It should be noted that this perception could soon change. E-cigs are currently unregulated by the federal Food and Drug Administration ("FDA"). However, the FDA proposed a new rule in April 2014 that would extend that agency's authority to cover e-cigs and other currently unregulated tobacco products. It is presently

open for public comment with a rule anticipated in later 2014.

The question becomes does a typical smoke-free workplace policy likely apply to e-cigs, and should such policies be amended to cover e-cigs if they do not already do so. Finally, if such changes are warranted, what special considerations, if any, should be taken into account regarding this new form of "vaping"?

The standard smoke-free workplace policy applies to various tobacco-based products such as cigarettes, pipe smoking, or chewing tobacco. It typically does not speak in terms of, or define prohibited items, based on the presence of nicotine but, rather, the presence of tobacco. After all, most companies are usually not concerned whether its employees are ingesting nicotine through, for example, a nicotine patch or nicotine gum. Rather, they are concerned about the ingestion of tobacco and the presence of second-hand smoke on other employees and the general office environment. But as indicated above, e-cigs use no tobacco and thus are likely not covered by most current smoke-free workplace policies. However, for the time being, companies may want to consider including e-cigs in any workplace ban on smoking until the precise health effects are more fully analyzed and studied.

There are little to no anticipated issues with modifying smoke-free workplace policies to explicitly include e-cigs. Companies wishing to prohibit e-cigs should simply make it explicitly clear in their policies that e-cigs are included in a smoking ban so that all employees are aware of the rules. There is nothing prohibiting companies from banning e-cigs while still permitting nicotine gum or nicotine patches. Further, companies with such prohibitions should be cognizant to evenly apply the policy and associated discipline to cigarette smokers and e-cig users. Additionally, as events unfold regarding regulation and studies concerning any potential health effects, companies should remember to revisit their policies based on these developments and adjust the policies as needed and as desired in accordance with company goals and wishes.

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