

The E-cigarette: Navigating Uncharted Territory

Employers in hospitality have the difficult task of balancing public perception and guest expectations with their many legal obligations. Developments in technology often complicate those responsibilities. Online bookings can create new ADA obligations. Social networking has blurred the lines between an employee's workplace conduct and private conduct. Now, the e-cigarette has become a focal point of the public discussion raising important questions for hospitality employers.

What's The Big Deal?

The electronic cigarette, or e-cigarette, is similar to a traditional tobacco cigarette, except that the e-cigarette employs electricity to vaporize a packaged cocktail of water, nicotine, and assorted chemicals. Unlike a traditional cigarette, the e-cigarette does not emit the signature odor of tobacco smoke. In fact, unless infused with an additional flavor, the vapor can be virtually odorless.

Critics view the device with skepticism. Given the novel nature of the device, very little is known about any long-term effects of vaping and whether there are any negative side-effects from second-hand vaping. An e-cigarette emits vapor that strongly resembles cigarette smoke from afar and the similarities can be confusing to bystanders. Another potential drawback is whether e-cigarettes may lead young people to try other tobacco products, including conventional cigarettes, which are known to cause disease and lead to premature death.

Proponents laud the device for its liberating qualities. When introduced a decade ago, the e-cigarette was championed as the ultimate compromise between smokers' and non-smokers' rights. They point to the health benefits of e-cigarette use, including helping people quit smoking. Although the replaceable cartridges have varying dosages of nicotine, e-cigarettes do not have the chemicals that traditional cigarettes contain, including tar. It also has enabled smokers to consume nicotine discretely in places they cannot smoke. As a benefit to employers, proponents point out that employees are able to "vape" at their desk, which means fewer breaks and ostensibly a greater degree of productivity and efficiency on the job.

E-cigarettes are polarizing in part because very little is known about the long-term effects of vaping and because current laws do not clearly address the issue. Regardless of which side an employer is on, employers should have an up-to-date policy that addresses vaping for guests and employees alike.

The Law Is Currently in Transition

The U.S. Food and Drug Administration (FDA) does not currently regulate e-cigarette use or sales. Similarly, e-cigarettes are not regulated in many states and

municipalities. But (and with cigarettes there's always a butt) lawmakers are beginning to regulate the e-cigarette as just another bad habit.

The FDA has issued a proposed rule that would extend the agency's tobacco authority to cover e-cigarettes. Moreover, several municipalities have been proactive in recent months, amending local laws to govern e-cigarette use. Many cities, even entire counties in Northern California, passed laws on the issue last year. Cities in Los Angeles County, the most notable being the cities of Los Angeles and Long Beach, passed laws in early March 2014 that essentially treat e-cigarettes just like traditional cigarettes. Proponents of e-cigarette regulation typically cite the fact that very little scientific research exists to support any impressions about e-cigarette use—a foundation that no doubt will be supplemented as research begins to shed light on the issue. Hoteliers are encouraged to review both state and local ordinances to determine regulatory treatment of e-cigarettes. Various regulations, at all levels of government, are being passed on a regular basis and may dramatically impact operations.

Despite the FDA regulation's slow transition, employers in the hospitality space should consider implementing an e-cigarette policy that is consistent with company identity to handle shifting attitudes and varying expectations of guests and its employees.

Forming an E-Cigarette Policy

When it comes to implementing a new policy or procedure, there is no one size fits all approach. Hospitality employers will need to evaluate a host of factors that are unique to their business and their clientele when dealing with e-cigarettes.

1) Understand your goals

Not all establishments are the same. Not all establishments invite the same type of clientele. Does the employer wish to ban the use of tobacco? Does the employer wish to maintain a visage of professional service? Obviously, hospitality employers must always be mindful of guest expectations. Having a clearly articulated goal and policy will help enforce any written policy, including dealing with guests who violate the policy. To the extent an employer wishes to accommodate its guests' vaping activities, the employer should educate its employees about vaping and its e-cigarette policy so that they can alleviate any guest concerns regarding e-cigarette use. While smoker guests may appreciate the ability to "vape" inside, some non-smokers could be offended or turned off.

2) Consider flexibility

As noted above, several municipalities have shaped their laws governing e-cigarette sale and use to mirror laws governing traditional cigarettes. Given the uncertainty, employers should consider flexibility in their policies. Even if an employer does business in a municipality that has already revised its laws to address e-cigarettes, it is likely that state and/or federal requirements will change how an e-cigarette policy interacts with the law. Some elements of forthcoming legislation may be predictable; for example, there are

laws that clearly recognize a person's right to be free from sustained second-hand smoke. Similar rights could be recognized with regard to vapor. At the same time, depending on what future research reveals, e-cigarettes could be the norm inside restaurants, bars, and hotels. As municipalities have changed the legal definition of "smoking," employers can create a similar effect by making the same type of revision to the employee handbook or the employer's smoking policy. If an employer wishes to communicate to employees that e-cigarettes will be treated differently from smoking, it may be useful to define them separately.

3) Train and educate your employees

Providing employees with scenarios that revolve around e-cigarette can be invaluable for employees to recognize and respond to concerns of guests. For example, guests might feel unfairly victimized for being asked to stop vaping without a satisfactory reason. Guests who use e-cigarettes may not be willing to follow a policy that imposes greater restrictions than the law imposes. If an employee must request that a guest observe a restrictive policy, an educated employee who understands the reasons underlying the policy will be able to better explain the policy and hopefully diffuse any potential confrontation.

4) Implement a clear workplace policy

In addition, proactively implementing a clear employee policy can help eliminate potential problems from the start. While a guest policy might be fairly straightforward, a policy for employees will need to be more nuanced. An employer, for example, could be specific about whether e-cigarette use is tolerated during work hours or on the premises. An employer could have different expectations of employees depending on their position—a front desk clerk may be treated differently from a back-office worker, and kitchen staff will likewise operate under different constraints. Regardless, employers should define when and where employees are allowed to use e-cigarettes.

5) Reaffirm drug-free workplace

It can be difficult to tell the difference between vaping tobacco and vaping marijuana. If your establishment decides to allow e-cigarette's keep in mind that some e-cigarette users will be inhaling tobacco and some will not. And you may not be able to tell until you see the effects of the vapor on the behavior of the employee or guest. It is important that employers who choose to permit vaping to clearly communicate what plants are okay and which aren't.

If an employer decides to treat e-cigarettes like traditional cigarettes, that policy will be simple to define, regardless of whether an employee agrees. With this position, an employer also errs on the side of caution, limiting employee and guest exposure to the unknown. On the other hand, an employer that allows vaping in common areas may encounter pushback. As described above, such a policy might expose employees and guests unnecessarily to unknown health risks or could lead to guests feeling unnerved upon

seeing “smoke” where cigarettes are not allowed. Finding some middle ground, such as having ‘vaping areas’ similar to ‘smoking areas,’ might be a considerate compromise.

Conclusion

If and when the U.S. Food and Drug Administration exercises the authority to regulate e-cigarettes, employers may have to make appropriate adjustments in employee handbooks and other HR documents. But regardless of how the law changes, employers are encouraged to think proactively about e-cigarettes with clear goals in mind.