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E-Cigarettes in the Workplace

27 January 2013 – Issues relating to E-Cigarettes in the workplace are dealt with in an article by solicitor Bond Dickenson of an English law firm. Dickenson writes, “We look at the issue of e-cigarettes and how employers should tackle the rise in their use. Specifically we ask whether they should be allowed in the workplace and what employers should consider when drawing up a policy.

Background

Latest figures suggest that around 1.3 million Britons now smoke e-cigarettes, a 100% increase from 2012. E-cigarettes, which generally look like real cigarettes, contain a rechargeable battery and a liquid solution containing propylene glycol or glycerine (which contains a nicotine dose of varying levels). When heated by the battery, they produce a vapour that can be inhaled. The fact that it is a vapour that is inhaled rather than smoked has led to the verb 'vaping' being adopted to describe their use, instead of 'smoking'.

Arguments for and against

Opinion on their use, both generally and in the workplace, is split. Supporters argue that e-cigarettes should be actively promoted as a healthy alternative to smoking and that employers should play their part in encouraging employees to give up smoking by using this method. On the other side of the debate, people are concerned that the use of e-cigarettes glamorises smoking and could in fact encourage non-smokers (including minors) to take it up. Many people are unconvinced that they have no health ramifications. Although e-cigarettes do not contain any tar, they do contain nicotine, which is addictive (although it is possible to buy "zero nicotine" e-cigarettes) and there is no clear evidence as to whether they contain any other toxic elements.

Concerns – at home and abroad

As a result of these concerns a number of countries have banned the importation and sale of e-cigarettes, including Brazil, Singapore and Mexico. In the United States there are a variety of different approaches: Arizona has banned the sale of products to minors, as has New York State, which has also banned vaping within 100 metres of school entrances. In Washington State, all vaping in public is banned.

Here in the UK, there are also concerns. At the last annual meeting of the British Medical Association, their members agreed that e-cigarettes should be included in the smoking ban currently in force. As yet, there has been no indication from the Government that it intends to make this change. A January 2013 briefing published by the BMA summarised the main concerns:

"While e-cigarettes have the potential to reduce tobacco-related harm (by helping smokers to cut down and quit), a strong regulatory framework is required for the sale and use of e-cigarettes to:

- *ensure they are safe, quality assured and effective at helping smokers to cut down or quit*
- *restrict their marketing, sale and promotion so that it is only targeted at smokers as a way of cutting down and quitting, and does not appeal to non-smokers, in particular children and young people*
- *prohibit their use in workplaces and public places to limit second hand exposure to the vapour exhaled by the user, and to ensure their use does not undermine smoking prevention and cessation by reinforcing the normalcy of cigarette use."*

Regulation

It was announced last summer that the Government wants to ensure that e-cigarettes are regulated and it has welcomed draft EU legislation that will mean by 2016:

- the sale of e-cigarettes will be restricted
- they will also be subject to medical regulation and manufacturers will need to be licensed and will be required to state clearly the precise nicotine content
- there will be a ban on marketing or selling them to people under 16.

Issues for employers to consider

Acas has published a very brief guidance note, which addresses the issues that should be considered by employers when deciding on their policy. According to Acas, those issues include many of those set out above. The Acas guidance acknowledges that *"It's in the interests of employers to do their bit to promote health and well-being in the workplace"* and that *"Supportive employers may be able to provide help and advice for employees who want to quit smoking"*. Whether that extends to promoting the use of e-cigarettes, Acas do not make clear. However, they recommend that employers consider whether the devices are likely to upset other workers *"particularly if they are pregnant or trying to give up smoking themselves"*.

The Acas guidance also raises the question of whether employees vaping in the workplace would fit in with the employer's desired corporate image.

Another issue raised by many is the smell. Whilst the smell is undoubtedly preferable to cigarette smoke (many e-cigarette vapours are scented), it still has the potential to cause friction in an enclosed work place.

Another running debate is whether, by encouraging the use of e-cigarettes in the workplace, employers could reduce the amount of time that smokers spend away from their desks taking smoking breaks. Similarly, where vapers are asked to do so away from their desks, employers need to ensure they monitor the time they spend vaping, as they do with smokers.

Whilst many argue that e-cigarettes should be encouraged as a healthy alternative to an unhealthy habit, some employers who have looked into the issue have reported that smokers and ex-smokers have fed back that watching others use e-cigarettes has enhanced their cravings and therefore it was unhelpful to have them in the workplace.

What should employers do?

Common consensus therefore seems to suggest that vaping should be banned in workplaces, at least until the Government's approach (eg including e-cigarettes expressly in the smoking ban) and the health implications of them become clearer. Put simply, there seems to be too much scope for the use of e-cigarettes to cause unnecessary tensions. There is also a whole host of industries and workplaces where vaping at work would not be safe or in line with corporate image; it is hard to imagine a customer not feeling uncomfortable at the sight of a bus driver or a supermarket cashier vaping whilst working. Where employees work with children, an outright ban would also seem sensible.

Where should those who wish to vape be sent?

Some employers have considered asking those smoking e-cigarettes to join their smoking colleagues in designated smoking areas. However, that could invite problems. Vapers do not classify themselves as smokers and many, particularly those who use e-cigarettes as a way of giving up smoking, are likely to complain about being exposed to second hand smoke. To avoid this issue, if vapers are going to be asked to vape in specified areas, this should be away from the designated smoking area.

What about social events?

Employers will also have to consider what approach they take to social events. A number of movie stars were pictured at the recent Golden Globe awards vaping inside the venue. Smoking does not need to be expressly banned at social events because where those events take place in an indoor venue, smoking will be banned anyway and smokers will have to go outside. So should employers ban vaping at social events? Our view is that doing so would be hard to justify, particularly if the venue allows vaping. Of course where it is not permitted by the venue, there will be no issue.

Summary

We are in a period of uncertainty at the moment so employers will have to decide their own policy on this issue and it is unlikely that there will be a 'one size fits all' solution. In some workplaces, particularly where employees are not customer facing and have a level of privacy whilst working, it may be hard to justify an outright ban at work. In others, for example where there are open plan offices and particularly where workers are identifiable by a uniform or are customer-facing, it would

be wise to ban the use of e-cigarettes, for corporate image reasons. In any event, employers should consider consulting with staff before introducing new rules.

The main points employers will need to consider are:

- If vaping in the workplace is to be banned, where should vapers be told to 'light up'?
- If employees are made to leave their desks to vape, the time spent away from their desks needs to be monitored.
- Where some employees are in customer facing roles and others are not – or where certain roles are split between customer facing time and desk work – should a consistent approach (eg an outright ban) be taken or should there be some flexibility allowed? Policies tend to work best when they are simple and easy to understand; if there is going to be a degree of flexibility, any restrictions placed on the use of e-cigarettes must be set out clearly.
- What approach should be taken to vaping at social events?

Whatever approach is decided on, it needs to be clearly communicated to all employees, with the consequences of breach made clear.”

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