

E-Cigarettes: A Hazy Status In The Workplace



Electronic cigarettes with nicotine (“e-cigarettes”) and cartridges of nicotine solutions are widely available to consumers despite Health Canada’s warning that their importation, advertisement and sale are prohibited without authorization. There remains confusion over the legalities of their use, especially in public places and workplace settings.

What is the legal status of e-cigarettes?

This is what we know:

- According to both Health Canada and the Federal Court of Canada,¹ electronic smoking products containing nicotine are considered drugs under the *Food and Drugs Act*² (“Act”) and the *Food and Drugs Regulations*³ (“Regulations”);
- An advisory and notice have been issued by Health Canada warning Canadians not to purchase or use electronic smoking products, as well as asking all persons importing, advertising or selling electronic smoking products in Canada without the appropriate authorizations to stop doing so;
- The nicotine delivery system within e-cigarettes must meet the requirements of the Medical Devices Regulations;⁴
- Establishment licenses issued by Health Canada are needed prior to importing and manufacturing e-cigarettes;
- The Federal Court of Canada has found that electronic cigarettes are used mainly to deliver nicotine; and
- No electronic smoking products have been granted market authorization in Canada and their sale is currently not compliant with the Act.

This is what we don’t know:

- Whether electronic smoking devices that do not deliver nicotine fall within the scope of the Act;
- Whether electronic cigarettes with nicotine-free cartridges, or electronic cigarettes without cartridges, can be legally sold, imported or advertised in Canada;
- Whether a compliance or enforcement policy will be issued by Health Canada; and
- Whether e-cigarettes will be subject to the identical regulatory controls as tobacco products.

What are the takeaways for the workplace setting?

Employers are reacting to e-cigarettes. In the United States, Wal-Mart Stores, one of the largest employers, has combined e-cigarettes with traditional cigarettes and has banned them from all of its stores and offices. The same can be said for other large U.S. employers, such as General Electric, Target and Home Depot. A similar approach has been taken by employers in Canada. The basis of the ban is that e-cigarettes either contain a form of nicotine, a tobacco derivative, or are used mainly to deliver nicotine.

There is some debate surrounding electronic cigarettes that are not expressly intended to deliver nicotine, and whether such products should be treated in the same manner as traditional cigarettes. Some employers have responded to this issue by relying upon their "scent-sensitive" or "scent-free" workplace policies as justification for the ban on all forms of electronic cigarettes in the workplace.

A further debate relates to the potential effectiveness of e-cigarettes as a smoking-cessation aid. Although there is no conclusive evidence, this issue is being followed carefully by employers and human resources managers who have smoking-cessation plans for employees, particularly as this may give rise to a duty to accommodate. At this time, Health Canada has not approved e-cigarettes as a smoking cessation or nicotine replacement product.

Final Comment

Several non-smoking action groups have stated that after the successful ban on smoking in the workplace and public places, the proliferation of e-cigarettes has re-normalized smoking and undermined progress in tobacco reduction use.

Health Canada has yet to pronounce itself on the legal framework surrounding the use of e-cigarettes and whether or not they should be subject to the identical regulatory controls as tobacco products. However, for the time being, given the health and regulatory uncertainties, many employers have decided to treat e-cigarettes like traditional cigarettes, and have clearly identified them as being part of a tobacco-free workplace environment.

Employers should continue to monitor Health Canada's regulatory advisories regarding e-cigarettes. Employers with questions about establishing policies or how to adapt e-cigarettes to your current workplace policies should contact one of our members of McMillan's Employment and Labour Relations Group.

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