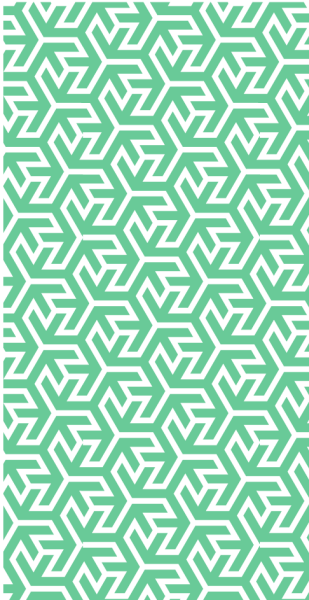




## **Risk control**

### Vaping in the Workplace



In partnership with



# Vaping in the Workplace

## Introduction

Under the Health Act 2006<sup>1</sup> (The 2006 Act) smoking is prohibited in any enclosed or substantially enclosed public place located in England, including workplaces, on public transport and in vehicles used for work. Similar prohibitions against smoking in public places apply in Northern Ireland, Wales and Scotland.

This means that it is against the law to smoke in designated smoke-free premises, an offence for which the smoker can receive a fixed penalty fine.

The law on conventional smoking in workplaces in the UK is clear.

However, electronic cigarettes do not fall within the scope of the prohibitions set out under the 2006 Act, as they do not create smoke or burn tobacco. Therefore, they fall outside the legal definition of 'smoking'. This means that they are not covered by the legal ban on smoking in enclosed places. There is no separate legislation that regulates or prohibits the use of electronic cigarettes at work.

Public Health England has concerns regarding the uptake of e-cigarette usage by young people, the potential for e-cigarettes to renormalise smoking, the safety for users and bystanders, and their effectiveness as quitting aids<sup>2</sup>.

## Controller of Premises

The 2006 Act places a legal obligation on anyone who controls or is concerned in the management of smoke-free premises to ensure that no-one smokes on those premises. Any failure to prevent someone from smoking, or failing to display 'no smoking' signs, could result in a penalty or fine.

As such, employers, managers and anyone else in control of smoke-free premises must not only display notices prohibiting tobacco smoking but must also take reasonable steps to ensure that their staff, service users and any other visitors do not smoke in buildings or other enclosed or substantially enclosed areas on their premises.

## Smoking Cessation

A natural consequence of prohibiting smoking in public places has been the active encouragement to quit. Some smokers choose to go cold turkey and just stop. Others use a range of products to help them become less dependent including Nicotine replacement therapy.

Nicotine replacement therapy involves "replacing" cigarettes with other nicotine substitutes, such as nicotine gum, patches, lozenges, inhalers, or nasal sprays. It relieves some of the withdrawal symptoms by delivering small and steady doses of nicotine into the body without the tars and

poisonous gases found in cigarettes. This type of treatment helps people focus on breaking the psychological addiction and makes it easier to concentrate on learning new behaviours and coping skills.

There are also non-nicotine prescription medications which reduce cravings and withdrawal symptoms without the use of nicotine.

Vaping is increasingly seen as a viable alternative to assist with smoking cessation and is promoted as such by the NHS.

## Health Concerns

There continues to be a debate about the level of safety of vaping<sup>3</sup>, as the long-term impact of their use on people's health remains inconclusive. Vaping is generally considered to be safer for users than smoked tobacco.

The British Heart Foundation suggests that vaping should never be taken up by people who do not already smoke but could be a useful tool to help people to stop smoking completely<sup>4</sup>.

In recent years concern has been raised that vaping could cause a condition called Popcorn Lung<sup>5</sup> (bronchiolitis obliterans) which is an uncommon type of lung disease, but it is not a cancer. It is caused by a build-up of scar tissue in the lungs, which blocks the flow of air. A possible link has been suggested between the disease and a chemical called diacetyl which is used in vaping. Some of the liquids used to contain diacetyl have led to the idea that vaping might cause Popcorn Lung. In the UK, diacetyl was banned in vaping liquids under the EU Tobacco Products Directive (TPD) in 2016 so e-liquids sold in the UK should not contain diacetyl. There have been no confirmed cases of popcorn lung linked to vaping.

There is also little evidence of harm to bystanders from exposure to the vapour, where any health risks from passive vaping are likely to be low. However, people with asthma and other respiratory conditions can be sensitive to a range of environmental irritants, which could include the vapour. A company policy on vaping should take this into account.

Vaping can, in certain circumstances, be a nuisance or distraction for people nearby. Where a decision is taken to allow vaping in an enclosed place, policies should contain some simple etiquette guidelines for vapers, such as minimising the production of visible vapour.

## Vaping at Work

There are widely varying approaches to the use of vaping in the workplace, where the question of whether vaping at work is permitted or prohibited is a matter of discretion for

the employer. Many organisations treat the practice of vaping in the same way as smoking, allowing the use of these devices in any designated areas outside their premises, such as a shelter or other outside space. Most employers will not provide formal breaks for vaping at work but, as with smoking tobacco cigarettes, will permit their staff to vape during their rest periods.

In some cases, an employer may decide not to permit any onsite use of vaping devices, asking staff not to vape until they are off site.

In environments where the organisation is keen to treat vaping in the same way as other age-restricted products, prohibiting their use is common. The need to reduce the risk of uptake by young people, for example, in a school or any other environment where the employee works with children or young people is seen as paramount.

A similar approach prohibiting the onsite use of both tobacco and vaping is typically found in the health and social care sector, where the promotion of the health and welfare of patients or service users is an important part of the organisations approach. However, the Care Quality Commission has stated “E-cigarettes should not routinely be treated in the same way as smoking. It is not appropriate to prohibit vaping use in health services as part of smoke-free policies.”<sup>6</sup>

When deciding whether to permit vaping at work, either inside or outside of premises, employers will need to balance a few competing factors, including how any decision will impact both their vaping and non-vaping staff. Even though the use of vaping at work is not against the law, this does not mean that employers cannot ban employees from vaping. As with any form of conduct, within reasonable limits, employers can set their own rules based on what they think is best for their business and the wider workforce.

## Permitting Vaping

Vaping is now the most popular stop smoking aid in England<sup>7</sup>. To support smokers to stop smoking and stay smoke-free, a more enabling approach may be appropriate in relation to vaping to make it an easier choice than smoking. In particular, vapers should not be required to use the same space as smokers, as this could undermine their ability to quit smoking and stay smoke-free, particularly among those most heavily addicted.

Many employers actively support the use of vaping as part of an employee's plan to stop smoking. A more enabling approach to vaping at work may be helpful to make it an easier choice than smoking. This can lead to significant health benefits for former tobacco smokers.

Within reason, an employer should support the right of their employees to use their rest breaks to relax and wind down in whatever way they see fit. This can lead to greater productivity, especially for former smokers who are using vaping to control or reduce their addiction to nicotine.

Increasing productivity and reducing break times by allowing workers to vape at their workstations is a viable option, but the views of neighbouring colleagues should be considered if the exhaled vapour is considered a nuisance.

## Prohibiting Vaping

Bystanders are exposed to potential health risks with the possibility that vaping produces exposure to toxic substances and the associated risk to others. This can be especially concerning for vulnerable members of staff such as pregnant women or those with respiratory disorders.

There can be a negative impact on air quality, with the risk of complaints from non-vaping members of staff, especially because the current generation of vaping devices create more vapour which might be uncomfortable or concerning for others. The use of vaping can also cause an odour, which non-vaping staff may find offensive.

Their use can create a negative image or first impression to clients, customers, service users or anyone else visiting a workplace, especially as the realistic appearance of the vapour can often be confused with conventional smoking.

## Policy Decision

There is no one-size-fits-all approach to addressing the issue of vaping at work, so organisations will need to develop their own policies to suit both the needs of the business and the workforce as a whole.

The policy adopted will depend on the nature of the business. For example, offices will have different considerations to schools or care homes. In many cases, the implementation of restrictions in the use of vaping at work, rather than a complete onsite ban, can often be used to find the right balance for both vaping and non-vaping staff.

By only allowing vaping at work in outside designated areas, organisations can respect the freedoms of those who wish to vape, whilst protecting the health and wellbeing of others.

It is up to organisations to decide whether vaping at work is permissible. It is also a matter of discretion as to when and where this is allowed. For any prohibition or restriction on the use of vaping at work to be deemed fair, an employee must be made aware of the stance taken by the organisation and the circumstances in which any use is considered unacceptable.

Therefore, organisations should implement a clear workplace policy, in writing, setting out the rules relating to both tobacco smoking and vaping onsite, including the potential disciplinary consequences of any breach of these rules.

When communicating the policy on vaping use, organisations should make clear the distinction between vaping and smoking, and the evidence on the relative risks for users and bystanders to avoid confusion, resisting the temptation to use smoking terminology when referring to vaping devices. E-cigarette use is often known as 'vaping' and e-cigarette users are often known as 'vapers'.

Some organisations have separate smoking and vaping policies, whilst others include an add-on about vaping to their existing smoking policy. Keeping the two issues of smoking and vaping separate is preferable to make sure that the issues of illegality with smoking in public places will not be associated with vaping.

It is essential that clear rules are in place and are communicated to staff. Consultation with any recognised trade union or elected employee representatives should be undertaken. To aid the communication of the policy it can be useful to display signs or notices within the workplace which make it clear where vaping is allowed and where it is banned.

## Restrictions

Rather than a complete ban on vaping at work, organisations may want to consider what restrictions, if any, they would like to put in place on the practice of vaping, recognising the effect on other members of staff and visitors. These restrictions could include ensuring that other staff and visitors are not exposed to the vapour. This is typically achieved by designating a specific area for vaping, ideally away from any conventional smoking area to support vaping staff in their attempts to quit. It is essential to ensure that employees who do not vape are not unfairly disadvantaged, for example, where vaping employees are allowed additional rest breaks in comparison to non-vaping colleagues.

## Disciplinary Action

Vaping at work is not illegal. However, if a policy prohibiting vaping or restrictions is in place to limit the use of electronic cigarettes at work, any breach of these rules will potentially amount to misconduct. In some cases, it could even amount to gross misconduct for which an employee could be summarily dismissed.

Any disciplinary action taken against an employee for vaping at work must be fair. This means that the employee must be made aware of any prohibition or restriction on vaping, either through clear warnings or a written policy.

Organisations may already have a smoking policy, but it may not reference electronic cigarettes, so employees may be confused about whether vaping at work is covered. The language within that policy will need to be revised. The workforce should also be informed of any changes to a workplace policy before they take effect, providing reasonable notice of these changes.

If a clear workplace policy that prohibits or restricts the use of vaping at work is in place, and the employee has breached the terms of that policy, there will be grounds for disciplinary action, just the same as any other form of misconduct.

## Review

Policies and practices on vaping use in workplaces are evolving and need to continue to do so in the light of the emerging scientific evidence. It is therefore important to keep any vaping policy under review, communicating any changes to the workforce.

If organisations are concerned that their policy may be contentious, they should consider acquiring advice from an employment law specialist before the introduction of the policy to ensure that it sets out a fair and reasonable basis upon which vaping is permitted or prohibited and the circumstances in which the use of vaping at work will be allowed.

## References

- 1 <https://www.legislation.gov.uk/ukpga/2006/28/contents>
- 2 <https://www.gov.uk/government/publications/use-of-e-cigarettes-in-public-places-and-workplaces>
- 3 <https://www.gov.uk/government/publications/vaping-in-england-evidence-update-february-2021>
- 4 <https://www.bhf.org.uk/informationsupport/heart-matters-magazine/news/e-cigarettes>
- 5 <https://www.cancerresearchuk.org/about-cancer/causes-of-cancer/does-vaping-cause-popcorn-lung>
- 6 <https://www.gov.uk/government/publications/e-cigarettes-use-by-patients-in-nhs-mental-health-organisations/using-electronic-cigarettes-in-nhs-mental-health-organisations>
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