

Regulating e-cigarette usage in hotels

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Highlights

E-cigarettes likely will be at least somewhat regulated by late 2014 or 2015.

Many state and local laws have arguable loopholes that might not expressly address e-cigarettes.

Courts generally have not recognized smoking or nicotine addiction as a disability under the ADA.



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The usage of electronic cigarettes—battery-operated products that dispense nicotine in vapor form—seems to be steadily on the rise. With more venues advertising the sale of these “e-cigarettes” and specialty stores continually opening up to cater to this niche industry, it appears this is a trend that is here to stay. Invariably, just as with traditional cigarettes, hoteliers must address how to regulate their use on property, particularly in common areas and guestrooms.

Because e-cigarettes use liquid nicotine derived from natural tobacco plants, the Food and Drug Administration regulates them just as it does other tobacco products. To date, it is unclear whether there are any second-hand risks from inhaling the vapors of e-cigarettes, but detractors point to the concentrated nicotine and the vapor odor they produce to seek their banishment from public venues.

Obviously, hoteliers and other hospitality venues have wrestled for years with whether and how to regulate tobacco products in public areas and individual guestrooms. Whether due to state/local laws or guest preference, most hoteliers address the issue by banning tobacco smoking in public areas (other than a select group of bars and/or casinos) and allowing smoking in only limited, designated guestrooms. While a handful of states and municipalities have banned e-cigarettes, the technology has outpaced legislation. This has resulted in a present-day Wild, Wild, West scenario: a period of time where regulation lags behind popular use.

While there are still many unknowns regarding this increasingly popular product, hoteliers are asking: Can e-cigarettes be treated the same as tobacco cigarettes and banned or cordoned-off to limited areas? What if a guest contends he is disabled due to a dependence on nicotine and demands the “reasonable (public) accommodation” to use e-cigarettes? Do disability laws demand that hospitality venues capitulate?

Regulating e-cigarettes

First, some guidance is on the way: The FDA has proposed regulations that

would treat e-cigarettes as they do tobacco, banning vending machine sales and sales to minors, and requiring health warnings about the contents and risks of the products. However, because of the controversial nature of this matter, it is difficult to say when the regulations will be approved and go into effect. The product likely will be at least somewhat regulated by late 2014 or 2015.

Second, given that all indicators point to treating e-cigarettes as tobacco products, hoteliers can feel comfortable regulating their use on property to the same extent as they do tobacco smoke. That is not to say hotel proprietors are absolutely required to outlaw e-cigarettes where they have banned smoking. Many state and local laws have arguable loopholes that might not expressly address e-cigarettes, but there appears to be no basis for hoteliers to incur any liability risk if they choose to regulate e-cigarettes the same as tobacco smoke products.

Finally, courts generally have not recognized smoking or nicotine addiction as a disability under the Americans with Disabilities Act. Significantly, however, those reported cases pre-date the Americans with Disabilities Act Amendments Act, an expansive piece of legislation that liberally widens the definition of what constitutes a protected disability. It would not be surprising to see nicotine addiction recognized as a disability akin to other drug or alcohol addictions in the near future. Assuming a recognized disability, the next analysis would be whether e-cigarette use must be allowed as a reasonable accommodation.

The ADA (and most state-law versions) only require a reasonable accommodation and do not generally require the reasonable accommodation of choice. For instance, a hospitality venue banning e-cigarette use could presumably meet its accommodation obligations to a nicotine addict by allowing use of a nicotine patch or nicotine gum. Given the annoyance and confusion associated with second-hand vapors, it is unlikely a court or administrative agency would require their acceptance in public venues, at least until more is known about the health risks.

For the present and until the inevitable clarifying administrative regulations come along, hoteliers can feel comfortable regulating e-cigarettes in the same way as traditional tobacco products.

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