



Texas Association of School Boards

Legal Services

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Serving Texas Schools Since 1949

Managing Employees Who Smoke During the School Day

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Within the school district's workforce may be employees who wish to smoke cigarettes or vape during their breaks. Questions often arise about how districts should regulate smoking or vaping by employees on campus. This article will help answer questions about issues related to employees who smoke.¹

1. Does our school district have to provide smoking breaks to employees?

The Fair Labor Standards Act (FLSA) does not require employers to give smoking or vaping breaks. However, a school district may give customary rest or coffee breaks to nonexempt employees. If a break lasts 20 minutes or less, the break is considered time worked and must be paid. 29 C.F.R. § 785.18. An employee may use this time to smoke if an appropriate location is available.

2. Where can employees smoke?

State law requires the district to prohibit smoking, the use of e-cigarettes, and the use of tobacco products at a school-related or school-sanctioned activity on or off school property. Tex. Educ. Code § 38.006(b)(1). The school board must ensure that school district personnel enforce the prohibition against tobacco on school property. Tex. Educ. Code § 38.006(3). The TASB Model Employee Handbook describes school property as buildings, playground areas, parking facilities, facilities used for athletics and other activities, and district-owned vehicles.

In addition, notices stating that smoking is prohibited by law and punishable by a fine must be displayed in prominent places in all school buildings. Tex. Penal Code § 48.01(b); TASB Model Employee Handbook. A district's Student Health Advisory Committee must ensure that the district has a statement on its website and in its student handbook that it has adopted and enforces policies and procedures that specify penalties for the use of e-cigarettes and tobacco products on school campuses or at school-sponsored or school-related activities. Tex. Educ. Code § 28.004(k)(3)(C).

¹ Note that Texas laws reference both smoking and using e-cigarettes while federal laws only reference smoking. While this document reflects the wording in law, districts can assume a prohibition on smoking includes a prohibition on the use of e-cigarettes or vaping. For more information on vaping, see TASB Legal Services' memo, [Vaping in Texas Public Schools](#).

Federal law also prohibits smoking in any indoor facility used for: kindergarten, elementary, or secondary education; library services for children; regular or routine healthcare or daycare or early childhood development services; or the use of employees who provide these services. 20 U.S.C. § 6083(a)-(b); 20 U.S.C. § 7183(a)-(b).

While state and federal laws set the minimum requirements for smoking prohibitions, districts may implement more stringent bans on smoking. For example, many districts prohibit smoking anywhere on school property, not just in buildings or at school events. Local ordinances may also regulate smoking in and around public buildings. As long as a district complies with state and federal law by prohibiting smoking in buildings and at school events, it may be possible to permit employee to smoke in restricted and designated areas away from buildings and school activities, and out of view of students on campus. A district considering such an option should weigh the convenience of employees against the risks to students and consult its school attorney.

3. Can our district prohibit an employee from leaving the campus in order to smoke?

Maybe. A district can prohibit a non-exempt employee from leaving district premises to smoke or vape during a rest period of 20 minutes or less or during a *bona fide meal period*. Under the FLSA, *bona fide meal periods*—breaks that are 30 minutes or more—are non-compensable time as long as the employee is completely relieved from duty (i.e., the employee must not be required to perform any duties). It is not necessary that the employee be permitted to leave the premises during a *bona fide meal period*. 29 C.F.R. § 785.19(b).

Classroom teachers are exempt from the FLSA's hourly wage requirements, so the above principles do not apply to them. However, teachers and full-time librarians are entitled to a duty-free lunch of at least 30 minutes. Tex. Educ. Code § 21.405(a). Under certain circumstances, a district may require a teacher to supervise students during lunch—but for no more than one day a week. Tex. Educ. Code § 21.405(c); 19 Tex. Admin. Code § 153.1001. The Texas attorney general has concluded that a district may not require a teacher to remain on campus during duty-free lunch unless the teacher is supervising students. Tex. Att'y Gen. Op. No. JM-0481 (1986).

4. Can we discipline employees for smoking on district property?

Yes, per district policy and the employee handbook. TASB Policy DH(LEGAL) and (LOCAL). Additionally, it is a criminal offense for an employee to possess a burning tobacco product, operate an e-cigarette, or to smoke tobacco in a public school facility or in an elevator. Tex. Penal Code § 48.01(a-1). It is a defense to prosecution that the district failed to prominently display a reasonably sized notice stating that smoking on school property is prohibited by state law and punishable by a fine of up to \$500. Tex. Penal Code § 48.01(b).

5. Can our district implement a smoking cessation program to combat rising healthcare costs associated with employees who smoke or vape?

Yes, as long as the program is not discriminatory under the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA is a federal law that prohibits an employer's wellness program from discriminating against an employee based on genetic information. 29 C.F.R. § 1635.1. Under Title II of GINA, an employer may not request or obtain an employee's or employee's family members' genetic information for a wellness program, such as a smoking cessation program, unless the information is voluntarily provided by the employee. 29 C.F.R. § 1635.8(b)(2)(i). Additionally, if the smoking cessation program provides financial incentives for participation, the program must be available to an employee regardless of the employee's current health condition or lifestyle choices. 29 C.F.R. § 1635.8(b)(2)(vi).

6. Are students subject to discipline for smoking at school or school events?

Yes. State law requires the school board to prohibit students from smoking, using e-cigarettes, or tobacco products at a school-related or school-sanctioned activity on or off school property. Tex. Educ. Code § 38.006(b)(1). The school board must ensure that school district personnel enforce this prohibition. Tex. Educ. Code § 38.006(b)(3). Student possession or use of tobacco products on school property is considered a general conduct violation and punishable under the Student Code of Conduct.

7. Can campus visitors smoke on school property or at school events?

No. Like employees, visitors are prohibited from smoking, using e-cigarettes, or tobacco products at school-related or school sanctioned activities, on or off school property. Tex. Educ. Code § 38.006(b)(1); TASB Policy GKA(LEGAL) and (LOCAL). Visitors are subject to the same criminal penalties described above.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/services/legal-services/tasb-school-law-esource/personnel/documents/managing-employees-who-smoke-during-school-day.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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