

TEENS AND E- CIGARETTES

LEGAL ISSUES

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FEDERAL LAWS

- ▶ Family Smoking Prevention and Tobacco Control Act (FSPTCA) gives the Food and Drug Administration authority to regulate e cigarettes like they regulate tobacco.
- ▶ Age for the purchase and possession of e cigarettes raised to from eighteen to twenty one (21) in 2020.
- ▶ The CDC has a wonderful resource page with information for educators, parents, youth, and health care providers.
- ▶ https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html

Federal actions continued...

The US Surgeon General issued a report titled “E Cigarette use among youth and young adults: A report of the Surgeon General”. The report found, amongst other findings, that e cigarette youth among youth and young adults has become a public health concern”.

FDA issued a warning letter to Juul telling the company to cease all advertising that promoted the product as safer than tobacco products. (more on this later)

Juuls grace period for FDA approval ended in May 2020.

August 2020 study from Stanford

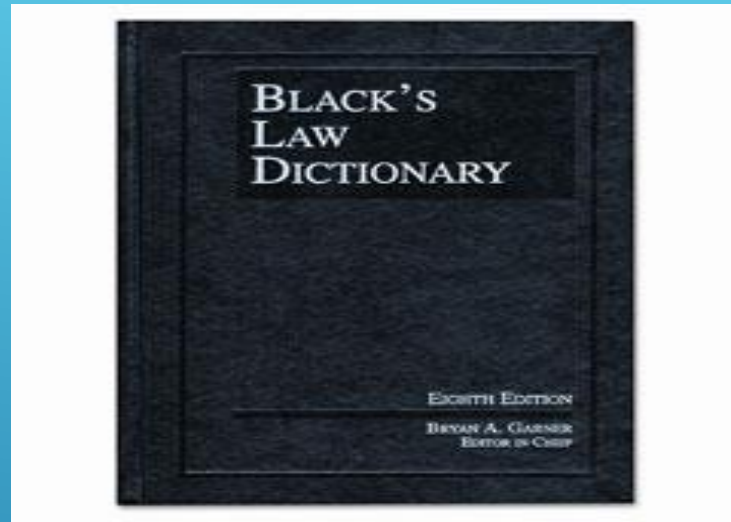
Vaping is linked to a substantially increased risk of COVID-19 among teenagers and young adults, according to a new study led by researchers at the Stanford University School of Medicine.

The study, which was published online Aug. 11 in the *Journal of Adolescent Health*, is the first to examine connections between youth vaping and COVID-19 using U.S. population-based data collected during the pandemic.

Among young people who were tested for the virus that causes COVID-19, the research found that those who vaped were five to seven times more likely to be infected than those who did not use e-cigarettes.

This evidence is leading to even more pressure on the Food and Drug Administration to increase regulations on sale of vape products to young people.

INDIANA LEGAL DEFINITIONS



Indiana includes e cigarettes in its definition of “tobacco product” at IC §7.1-1-3-47.5 *(more on why this matters in slide 6)*

Indiana defines an electronic cigarette as “ a device that is capable of providing an inhalable dose of nicotine by delivering a vaporized solution...and includes the components and cartridges (IC §35-46-1-1.5 and IC §24-3-7-4)

Indiana Legal Definitions Cont....

Indiana defines electronic delivery as any product that contains or delivers nicotine, Lobelia, or any other substance intended for human consumption, and can be used by a person to simulate smoking in the delivery of nicotine, etc through inhalation of vapor from the product. (IC §24-3-7-5)

Indiana defines e-liquid as “a substance that may or may not contain nicotine and is intended to be vaporized and inhaled using a vapor product (IC §7.1-7-2-10)

Indiana defines vapor product as a powered vaporizer that converts e liquid to a vapor intended for inhalation. (IC §7.1-7-2-23)

INDIANA'S TOBACCO 21 LAW

- ▶ Indiana's Tobacco 21 law went into effect on Wednesday, July 1, 2020. This new law encompasses all tobacco products including non-combustible tobacco products, and e-cigarette devices and e-liquid.

▶



INDIANA LAWS AND REGULATIONS REGARDING YOUTH ACCESS

- ▶ Ind. Code 24-3-7-7 Nicotine liquid/gels must be sold in child resistant packaging.
- ▶ Ind. Code 7.1-704-6(b) Manufacturers must use e-liquid containers with tamper evident packaging, a child resistant cap, etc.
- ▶ Ind. Code 7.1-7-5-1 (a) manufacture (including mixing, bottling, packaging) and sale of e liquids is restricted to those with proper permits.
- ▶ Ind. Code 35-46-1-1.9 (2020) – sale of e liquid or e cigarettes containing Vitamin E acetate is prohibited.

Indiana laws continued...

Ind. Code 7.1-7-5-1.1 (e) retailers are prohibited from selling e liquids with more than 75 mg of nicotine.

Sellers must not sell to persons under 21 (*Ind. Code 35-46-1-10(a); IC 35-46-1-10.2(a) (2020)*)

Persons under 21 must not possess or purchase e cigarettes. (2020)

Self service displays and vending machines are restricted to tobacco/vape shops and places inaccessible to persons under 21. (IC 35-46-1-11.8 and 11.5(c) (2020))

IC 7.1-7-5-1.1 – manufacturers, distributors and retailers may not market e liquid as a “modified risk” product

E LIQUID WITH AND WITHOUT NICOTINE – LEGALLY DOES IT MATTER FOR YOUTH?

- ▶ In terms of health: E Liquid without nicotine can still have a significant health impact due to the general toxicity of the flavoring chemicals.
- ▶ It is prohibited for any person under the age of 21 to possess even nicotine free E Liquid, by virtue of its inclusion in the E-Cigarette regulations. It is an infraction for a store to sell *any* E Liquid to minors.
- ▶ IC 7.1-7-5-1.1 – retailers may not sell e liquids with more than 75 mg/ml of nicotine.

HOW ABOUT VAPING WITH PRODUCTS CONTAINING THC?

- ▶ Vaping products containing >0.3% THC (the main psychoactive compound in marijuana) are illegal to sell or possess to any age. Selling such vape product to a minor can lead to a greater criminal penalty.
 - ▶ A youth in possession of or under the influence of THC vape product faces the same legal repercussions as traditional forms of marijuana possession
- ▶ Vaping products designed as a CBD based product (a non-psychoactive compound in marijuana) is, treated legally very much like Nicotine.
 - ▶ Surprisingly, Indiana does not have a codified age limitation for the purchase of CBD *in other forms*. However, the restriction against selling CBD based vape/E Liquid products to minors still applies.

WHAT CAN HAPPEN TO AN ESTABLISHMENT THAT SELLS THE PRODUCTS (TOBACCO OR AN E CIGARETTE) TO A PERSON UNDER 21

- ▶ IC 35-46-1-10.2: A retail establishment that sells or distributes tobacco or an electronic cigarette to a person less than 21 years of age can be subject to civil penalty enforcement.
- ▶ Such establishments are subject to a class C infraction (adjusted to a class B infraction if found selling to minors 6 times in a 180 day period) can be fined up to \$1,000 per instance.
 - ▶ Penalties collected fund the "Richard D. Doyle youth tobacco education and enforcement fund", per statute.



WHAT CAN HAPPEN TO SOMEONE UNDER THE AGE OF 21 IF THEY DO PURCHASE OR POSSESS AN E CIGARETTE?

- ▶ IC 35-46-1-10.5 – a person under 21 who purchases, accepts for personal use, or possesses on their person any tobacco or electronic cigarette product, commits a class C infraction
- ▶ An infraction is a non criminal fine, similar to an isolated traffic ticket. It does not become part of a criminal record, but still has legal implications and mandatory penalties.
- ▶ It is a defense if the person is acting in the ordinary course of employment (a gas station employee can stock shelves, etc).

HAS ANYTHING ACTUALLY BEEN FILED AGAINST KIDS SO FAR?

- ▶ For youth the health concerns are greater than the legal ones, but the potential long term legal consequences cannot be ignored.
- ▶ Schools have a wide variety of consequences they can hand down including suspension, expulsion, in school corrective action. They may also request involvement of law enforcement.
- ▶ Police finding youth with E-Liquid in public or at parties will usually hand out an infraction ticket, rather than any sort of arrest.
- ▶ The legal & medical issues are higher if E Liquid includes >.3% THC.
 - ▶ In IN Marijuana and THC oil are both are a schedule 1 (the highest regulated drug class in the Indiana Code). No legal difference.
 - ▶ A youth charged with possession of THC based E-Liquid will be charged with a Class A Misdemeanor. The code increases the penalty for over 30 grams of traditional marijuana, to a class D felony. At this time there is no equivalent law for increased amounts of THC liquid.

LAWSUITS - LOTS AND LOTS FILED ON BEHALF OF YOUTH AND UNDERAGE CHILDREN AGAINST MANUFACTURERS

- ▶ INJURIES CLAIMED IN LAWSUITS:
 - ▶ Deceptive marketing to minors
 - ▶ Hemorrhagic strokes, or bleeding in the brain
 - ▶ Lung diseases, including bronchiolitis obliterans organizing pneumonia, or BOOP
 - ▶ Lung injuries
 - ▶ Nicotine addiction
 - ▶ Seizures

JUUL IN PARTICULAR HAS BEEN THE SUBJECT OF MUCH SCRUTINY AND LITIGATION - WHY JUUL?

The U.S. Food and Drug Administration (FDA) reviewed testimony from the July 24-25, 2019 hearing on “Examining JUUL’s Role in the Youth Nicotine Epidemic. As a result of findings from that hearing in front of a House Subcommittee, the Center for Tobacco Products division of the FDA issued a warning letter to Kevin Burns, the CEO of Juul.

Full contents of the letter can be found here: <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/juul-labs-inc-590950-09092019>

Some high points from the letter on the next slide.....

*Juul “has engaged in labeling, advertising, and/or other activities directed to consumers, in which JUUL explicitly and/or implicitly has represented that JUUL products are free of a substance, have a reduced level of or exposure to a substance, and/or that JUUL products present a lower risk of tobacco-related disease or are less harmful than one or more other commercially marketed tobacco products.”

A JUUL representative speaking with students at his presentation stated that JUUL “was much safer than cigarettes” and that “FDA would approve it any day.

The JUUL representative speaking with students at his presentation stated that a student “...should mention JUUL to his [nicotine-addicted] friend...because that’s a safer alternative than smoking cigarettes, and it would be better for the kid to use.”

Failure to ensure compliance with the FD&C Act may result in FDA initiating further action, including, but not limited to, civil money penalties, seizure, and/or injunction. Please note that any adulterated and misbranded tobacco products offered for import into the United States are subject to detention and refusal of admission.

MORE ISSUES FOR JUUL



- ▶ In October 2019 the first wrongful death case was filed against Juul
- ▶ The mother of 18 year old David Wakefield claimed he was first exposed to Juul marketing when he was 15, took up vaping sometimes afterward and continued vaping for years.
- ▶ He was hospitalized for breathing and lung complications. He continued vaping after he was released from the hospital. Wakefield died in his sleep early on the morning of August 31, 2019 according to the complaint.
- ▶ The lawsuit claimed Juul marketed its products to minors and the company's "conduct and the defects in Juul products were a substantial factor in causing Wakefield's death."

CASES PENDING AGAINST JUUL

- ▶ As of Feb. 19, 2020, there were 331 JUUL lawsuits from around the U.S. combined into a mass litigation in a San Francisco federal court.
- ▶ The cases represented both class action lawsuits and individual personal injury cases filed in four states. The litigation is expected to continue growing.
- ▶ Claims in Juul E-Cigarette Lawsuits include: Juul marketed its products in a manner to attract minors; The company promoted nicotine use; Its marketing failed to warn that its nicotine products are more potent and addictive than tobacco cigarettes; The company's products are defective and unreasonably dangerous
- ▶ No trials in the mass litigation have been scheduled yet.
- ▶ Most of the initial lawsuits in the mass litigation were filed before reports of widespread vaping-related lung injuries and deaths began cropping up in mid-2019.

THE SCHOOLS GET INVOLVED - JUNE 2020

- ▶ 27 California school districts have filed suit against JUUL for what they call an "e-cigarette epidemic" amongst students. The lawsuits claim in part:
- ▶ "Vaping on school grounds has negatively impacted student education with some students' GPAs dropping, some getting suspended, and some unable to graduate. JUUL targeted youth customers with their marketing schemes and they should be held accountable for the negative consequences that come with that. JUUL shamelessly solicited and exposed an entire generation of youth to nicotine addiction."

LOOKING AHEAD

- ▶ Lawsuits are expected to be filed as a result of the vaping related lung injuries from 2019. The law suits against manufacturers are showing no signs of slowing down
- ▶ By early 2020, the CDC had determined that vitamin E acetate was “strongly linked to the EVALI outbreak.” The chemical is used as a thickening agent in vape fluids, particularly those fluids containing THC, the principal psychoactive substance in marijuana.
- ▶ San Francisco has already passed a ban prohibiting the sale of vaping products in the city. Other cities and states are following suit
- ▶ There are also a bounty of other lawsuits filed by individuals against the manufacturers claiming the product caused a variety of serious lung conditions, stroke, hemoraging, etc.

BAN ON FLAVORED E-LIQUID PODS



- ▶ On January 2, 2020, the FDA announced a ban on almost all flavored vaping cartridges and pods, such as those used with Juul devices.
 - ▶ Despite being heavily discussed and debated, this was a very small and ban. This did not effect the sale of flavored liquids, only the sale of *flavored* pod devices. Hundreds if not thousands of flavored E Liquids are still available for sale at every tobacco shop.
 - ▶ This did not limit the sale of traditional flavored or menthol flavored pods

- ▶ Public Health Law Center at Mitchell Hamline School of Law
- ▶ https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html
- ▶ <https://www.in.gov/atc/2476.htm>
- ▶ <https://www.drugwatch.com/e-cigarettes/lawsuits/>
- ▶ <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>
- ▶ <http://iga.in.gov/legislative/laws/2020/ic/titles/001>

REFERENCES