Vaping burst into the national consciousness this summer when hundreds of people reported lung damage and at least 12 people died from what the U.S. Centers for Disease Control and Prevention calls “vaping-associated pulmonary injury.”

As of October, the CDC had reported at least 805 cases of vaping-related injuries from 46 states and the U.S. Virgin Islands, as well as 12 vaping-related deaths, including from Illinois (the first to be reported), Indiana, Kansas and Minnesota.

Vaping is the inhalation of nicotine- or THC-infused steam via an e-cigarette — a handheld, electronic vaporizer that produces an aerosol from heated liquid rather than smoke. (THC is the active ingredient in marijuana.) An e-cigarette can resemble a pen, cigarette or even a USB thumb drive. Proponents say vaping helps adults to quit smoking by providing a healthier alternative to the smoke and tar in regular cigarettes.

Public health officials, however, say the evidence for that is not solid, while evidence of nicotine’s highly addictive nature is. Moreover, they point to studies suggesting that more high-school-age children have taken up vaping in large numbers as e-cigarettes are easily concealed and marketed as safer than regular cigarettes.

Vaping devices have been on the market for about 10 years — and states typically have legislated and regulated them as part of the overall framework of keeping tobacco and tobacco-related products out of teenagers’ hands.

While local school and state health officials noticed and grew concerned about the rising use of vaping by teenagers, the devices hit a public health flashpoint this summer when the Illinois Department of Public Health announced in August that a man had died from vaping.

As more reports of illness and deaths followed from across the country, states swung into action.

In September, Michigan Gov. Gretchen Whitmer issued an executive order banning the sale of flavored nicotine. The Michigan Department of Health and Human Services issued emergency rules two weeks later, and retailers had to comply by early October. The first lawsuit to block these rules was filed in late September.

By the end of September, the governors of New York, Massachusetts and Rhode Island had followed Whitmer’s lead, and Ohio Gov. Mike DeWine said he was looking to see if he, too, has authority to issue such a ban.

At the federal level, the Trump administration announced in September it will ban sales of flavored e-cigarettes via rules expected soon from the U.S. Food and Drug Administration.

The FDA also announced it has opened a criminal investigation into vaping-related deaths, and new legislation has been filed in Congress to ban flavors and advertising of e-cigarettes, or to tax them as other tobacco products are taxed.

**Getting a grip on the science**

While states began addressing e-tobacco prior to 2016, when the FDA asserted jurisdiction over e-cigarettes, lately “the states have been struggling over how to proceed with e-cigarettes because they aren’t sure what’s in them, how they’re made, or what the health effects are in the long term,” says Joelle Lester, director of commercial tobacco-control programs at the Public Law Health Center, a part of the Mitchell Hamline School of Law in Minnesota.

“The challenge for public health is to respond to the current crisis with a comprehensive approach instead of the ‘whack-a-mole’ approach to this product and then the next product,” she says.
Lester suggests that along with raising the legal age to buy any tobacco-related product (so-called “Tobacco 21” laws) an effective state policy on vaping should include e-cigarettes in laws that already ban smoking in indoor public spaces or places of employment.

Other options include banning flavors in all tobacco products and increasing the taxes on e-cigarettes, she says.

A higher cost to buy any and all tobacco products is effective because “we know kids are very price-sensitive, that is a forever strategy in tobacco control,” Lester says. She recommends that states dedicate any new revenue from e-cigarette taxation to education and prevention programs.

According to Lester, flavored tobacco products “are getting kids addicted,” so restrictions on them “are incredibly effective.” The caveat: Banning them in e-cigarettes alone could end up just driving already-addicted kids to traditional tobacco products.

“There is good evidence about kids using e-cigarettes getting hooked on nicotine, but not so much on adults using them as an alternative to smoking [traditional tobacco],” Lester says.

In an August statement, however, the Vapor Technology Association defended e-cigarettes on that very point: “E-cigarettes and other nicotine-containing vapor products are designed for the consumption of nicotine to provide adult smokers an alternative to cigarettes.

“Importantly, major medical groups and governments have conclusively determined that vapor products are 95 percent safer than combustible cigarettes, and studies have shown that they are nearly twice as effective at helping adults quit smoking than traditional methods,” its statement said.

The industry group also called on public health officials to distinguish between nicotine vaping liquids, which are regulated by the FDA, and THC-laced vaping liquids, which aren’t; and said most vaping-related deaths seem to have been the result of people vaping THC rather than nicotine.

**States swing into action: Raising the age, taxing vaping products**

While Michigan Gov. Gretchen Whitmer’s order “prompted executive offices all around the country to examine their ability to act more quickly than legislatures can,” Lester acknowledges legislators haven’t been idle in 2019.

“Midwestern states are doing some interesting things,” she says.

In addition to her executive order, Whitmer signed SB 106, which makes it illegal to sell or provide a tobacco product to someone under 18 years of age; and SB 155, which bans the sale of liquid nicotine containers unless they meet child-resistant effectiveness standards set by the U.S. Consumer Product Safety Commission. That law also requires vapor products to be displayed in a locked case or behind store counters in areas accessible only to employees.

This year, too, Illinois and Ohio legislators raised their states’ legal tobacco-buying ages to 21 and began taxing vaping products.

Illinois’ Tobacco 21 bill (SB 345) was signed into law in March, and the state’s new tax on e-cigarettes (SB 690) — 15 percent of the product’s wholesale price — took effect in July.

This fall, Illinois legislators will consider at least two other measures: HB 3887, which would ban the sale of flavored tobacco and/or THC products, and HB 3883, which would ban all vaping flavors except for menthol.

In Ohio, the age hike and new vaping tax were folded into the state’s new budget (HB 166) as imperatives from Gov. Mike DeWine, according to state Sen. Matt Dolan. Both measures took effect in October.

According to Dolan, legislators agreed that since vaping is a part of smoking, it should be treated, and taxed, like any other tobacco product. While they looked briefly at taxing vaping equipment, Dolan says, legislators instead decided to tax vaping liquid — at a rate of 1 cent per 0.1 milliliter.

Taxing equipment “would be the next step to look at if we want to use the tax code to encourage behavior,” he adds. “If we make it more difficult to procure, the less likely people will be to use it.”

Raising the age to 21 did create some questions among Ohio legislators, considering that the age of 18 confers so many additional rights on people. But Dolan says “at the end of the day, people understood that with the dangers from
nicotine, it was a public health issue.”

As for Gov. DeWine exploring the possibility of an executive order to ban vaping flavors, Dolan says he could support it based on a clear public health link. At the same time, though, he doesn’t like the idea of setting a precedent with such a heavy intervention in the private sector.

“I don’t like the slippery slope of ‘we just don’t like your product,’ ” he says.

Wisconsin also implemented a tax of 5 cents per milliliter, effective this month, as part of its new biennial budget (AB 56 [19]). Kansas taxes vaping liquids at that same rate.

In Minnesota, e-cigarettes are taxed the same as other tobacco products, at 95 percent of the wholesale cost of any product containing or derived from tobacco. (Minnesota legislators in their 2019 session banned vaping indoors under the state’s Clean Indoor Air Act as part of SF 12 [20], an omnibus health and human services appropriation bill.)

**During legislative interim, states studying next moves on vaping**

The idea of taxing e-cigarettes or vaping liquid isn’t popular everywhere, however.

Nebraska Sen. Dan Quick says he wanted to tax vaping liquids as part of a bill to raise the legal tobacco product buying age from 18 to 21, but had to accept stripping that tax from an ultimately successful bill (LB 149 [21]) just to get the age raised to 19.

After intense news coverage of vaping-related deaths, however, Quick says he thinks those votes might have gone differently.

Nebraska legislators also approved LR 173 [22], establishing an interim study for the Health and Human Services Committee “to examine health concerns related to the public use of, and secondhand exposure to, electronic nicotine delivery systems and other products.” The committee held its first hearing on that subject in September.

Quick says he will probably bring new legislation in 2020 to address banning flavors, establishing a Clean Indoor Air Act, and curtailing online vaping sales — though he admits on that last point, “I don’t know how we get there.”

The potential taxation of vaping is also a subject for the North Dakota Legislative Assembly’s Interim Taxation Committee [23].

At a September hearing, committee members looked at possible taxation, but also wrestled with the more fundamental question of whether vaping cartridges are tobacco products or something else (perhaps more akin to nicotine patches), says Rep. Jim Grueneich, who serves as chairman of the panel.

The hearing also revealed that if legislators were to recommend a tax on vaping liquids, most committee members thought a tax between 5 and 10 cents per milliliter makes the most sense, he says.

But it’s difficult to say whether there should be any tax until there is some regulation of vaping products, Grueneich adds.

Legislators, he says, left the hearing with lots of questions: Should e-cigarettes be considered a taxable product? Is vaping really harmful, or are the cases of vaping-associated pulmonary injury due more to vaping THC? And if vaping liquids are taxed, would the state simply be pushing more people to the black market where products aren’t regulated and are less safe?

“We left with a lot of questions. It’s a challenging topic,” Grueneich says. “Are we looking for a revenue stream or because we think it’s bad for you?”

North Dakota legislators rejected bills in the 2019 regular session to raise the legal tobacco buying age to 19 (HB 1236 [24]) and/or to tax “liquid nicotine” (HB 1495 [25]). They did approve a resolution (SCR 4007 [26]) asking the FDA to prevent the marketing and advertising of e-cigarettes to youth.

By:
Monday, October 14, 2019 at 03:52 PM

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