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A baseline understanding of state laws governing e-cigarettes

C K Gourdet,¹ J F Chriqui,¹ F J Chaloupka^{1,2}

¹Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago, Chicago, Illinois, USA
²Department of Economics, University of Illinois at Chicago, Chicago, Illinois, USA

Correspondence to
 C K Gourdet, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago, 1747 W. Roosevelt Road, M/C 275, Chicago, IL 60608, USA; cgourdet@uic.edu

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ABSTRACT

Background Electronic cigarettes (e-cigarettes) have been available for purchase in the USA since 2007, and have grown rapidly in popularity. Currently, there are no federal restrictions on e-cigarettes; therefore, any regulations are under the purview of state and/or local governments. This study examines state laws governing e-cigarettes through youth access restrictions, smoke-free air requirements and/or excise taxation.

Methods Codified statutory and administrative laws, attorney general opinions, executive orders, and revenue notices and rulings effective as of 15 November 2013 for all 50 states and the District of Columbia, were compiled using Boolean searches in Lexis-Nexis and Westlaw. All laws were analysed by two study authors to determine the presence and components of relevant provisions. Two categories of laws were identified; (1) explicit e-cigarette laws and (2) laws focused on tobacco-derived and/or nicotine-containing products.

Results Thirty-four states' laws address e-cigarettes either explicitly or as part of language applying to tobacco-derived or nicotine-containing products. Laws explicitly addressing e-cigarettes primarily focus on youth access (22 states) or smoke-free air (12 states); only Minnesota imposes an excise tax on e-cigarettes. Similarly, tobacco-derived or nicotine-containing products are primarily regulated through youth access restrictions (6 states), smoke-free air laws (5 states), or excise taxation (2 states).

Conclusions In the current absence of federal law governing e-cigarettes, more than one-half of the states have taken the initiative to regulate these products. The opportunity exists for the remaining states to incorporate e-cigarette-related restrictions into their pre-existing tobacco control laws.

INTRODUCTION

Electronic cigarettes (e-cigarettes) resemble tobacco cigarettes and are comprised of three components: a cartridge that resembles a cigarette filter, an 'atomising device' or 'heating element' which 'aerosolises the flavour solution' and turns the liquid solution into a substance that users inhale, and a battery that activates the heating element.¹⁻³ Though e-cigarettes commonly contain nicotine, a substance that is derived from tobacco, they do not actually contain tobacco itself.⁴ And, although some classes of e-cigarettes are marketed as nicotine-free products, recent research suggests that nicotine-free e-cigarettes actually do contain at least trace amounts of nicotine.³⁻⁸

E-cigarettes have been sold in the USA since 2007.⁹ One recent study concluded that 11.4% of 'current smokers' have consumed an e-cigarette at some point,¹⁰ and 'ever' use of e-cigarettes among

middle and high school students increased from 3.4% to 6.8% between 2011 and 2012.¹¹ Moreover, awareness about the existence of e-cigarettes has increased dramatically across all demographic groups over the past few years, particularly among young adults and current smokers.^{12 13}

Unlike regular tobacco cigarettes, e-cigarettes are not currently regulated by the Food and Drug Administration ('FDA'). However, the FDA has indicated its intent to regulate e-cigarettes as a 'tobacco product,' but not as a drug or delivery device (unless the product is specifically marketed for therapeutic purposes), in accordance with the federal courts' recent clarification of the FDA's authority under the 2009 Family Smoking Prevention and Tobacco Control Act ('Tobacco Control Act').^{14 15} Since the Tobacco Control Act does not pre-empt state or local-level policies,¹⁶ the FDA's forthcoming regulation should not supersede existing state or local e-cigarette laws. Thus, state (and local) laws will continue to play a vital role in e-cigarette regulation. To that end, this paper provides a baseline assessment of state e-cigarette youth access (YA), smoke-free air (SFA), and/or excise tax-related laws that: (1) explicitly reference e-cigarettes or other electronic smoking devices in their laws, or (2) alternatively regulate tobacco-derived or nicotine-containing products (hereafter 'tobacco-derived').

METHODS

Boolean terms and connectors searches were conducted in the codified statutory and administrative laws, attorney general opinions, executive orders, and department of revenue notices and rulings for all 50 states and Washington, DC, (hereafter referred to collectively as 'states'), in the subscription-based state legal research databases available in Lexis-Nexis and Westlaw. Results reflect codified laws and administrative documents (hereafter referred to collectively as 'laws') available in either data source as of 15 November 2013. Non-codified policies,¹⁷⁻²¹ not yet codified session laws, introduced measures, and proposed rules were excluded. Focus was on e-cigarette-related laws applying to YA, SFA, and/or excise taxation, but not sampling²² or licensure.²³

Two categories of laws were examined, those that: (1) explicitly address 'e-cigarettes,' 'electronic smoking device,' 'e-cigarette,' or a nicotine-containing 'vapor product;' and (2) restrict or regulate products that are 'derived from tobacco' or 'contain nicotine.' Inclusion of the second category of laws was based on recent federal activity whereby Congress amended the definition of 'tobacco product' to include 'any product made or



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derived from tobacco that is intended for human consumption...²⁴ after which the federal courts ruled that the FDA had the authority to regulate e-cigarettes under the scope of this newly amended ‘tobacco product’ definition.¹⁴

Two study authors analysed all laws to determine applicability and scope. All compiled law information was verified against publicly available secondary sources.²⁵ Laws addressing cigarettes or tobacco products without defining these terms or laws requiring the product to contain some form of tobacco or ‘tobacco substitute’ were excluded. Also excluded were states such as Arkansas and Virginia,^{26 27} whose attorneys general issued an opinion explicitly excluding e-cigarettes from their laws.

RESULTS

Thirty-four states’ laws regulate e-cigarettes or tobacco-derived products (see [table 1](#)). Twenty-eight of these states’ laws explicitly apply to e-cigarettes, all of which have been adopted since 2009; 22 states regulate YA to e-cigarettes, 12 states explicitly apply SFA provisions to e-cigarettes, and only 1 state, Minnesota, explicitly applies excise taxes to e-cigarettes. Seven of the 28 states explicitly regulate e-cigarettes relative to YA and SFA. Three of the 12 e-cigarette-related SFA laws (New Jersey, North Dakota, and Utah) are comprehensive in scope, applying to multiple places of public access or other indoor places; while the other nine states’ SFA-related laws apply to narrow lists of venues such as schools and child care facilities, universities, and state institutions (see [table 1](#) for complete listing and citations).

Eight states regulate tobacco-derived or nicotine-containing products without explicitly using ‘e-cigarette’ or other such terms in their laws—six states’ laws apply to YA, five focus on SFA, and two, Missouri and Vermont, focus on excise taxation. Three of the eight states’ laws apply to YA and SFA. The tobacco-derived product laws date back to 1986.²⁸

DISCUSSION

This is the first study to document the prevalence of states with YA, SFA, or excise tax laws that explicitly regulate e-cigarettes and/or tobacco-derived or nicotine-containing products. Most states’ laws are not comprehensive. This means that e-cigarette use has the potential to undermine the very same clean indoor air environment that SFA laws are designed to protect, and to enable minors to access and use e-cigarette products that may contain nicotine and other harmful ingredients. Opportunities exist for states to expand their existing laws to apply to e-cigarettes, which is important given recent reports that e-cigarette use and awareness are growing steadily.^{11–13}

Interestingly, the majority of the states’ laws focus on restricting YA to e-cigarettes, suggesting that the states that have taken action thus far deem e-cigarettes to be potentially harmful to minors. Yet, minors are also subject to potential exposure risks while in public places where state regulation lags behind. Thus, opportunities exist for states already restricting YA to e-cigarettes to expand their laws to include SFA restrictions, particularly in places frequented by minors, such as in recreational locations, entertainment venues, and school and college campuses.

Until states, administrative agencies, attorneys general, or the courts further interpret their state laws to apply to tobacco-derived or nicotine-containing products, states interested in applying their existing laws to e-cigarettes should consider using language that explicitly applies to e-cigarettes, because then the clear scope of the law is easier to implement. As noted earlier, both categories of laws are included in this study

to provide a more comprehensive view of the current landscape of laws that either explicitly apply to, or could be interpreted to apply to, e-cigarettes. Interestingly, Minnesota took a hybrid approach by including tobacco-derived products in its list of taxable tobacco products,²⁹ which the Minnesota department of revenue then stated in a revenue notice does include and apply to e-cigarettes.³⁰ In general, unambiguous and targeted definitional language is easier to comply with and enforce. However, a more thorough analysis of which kind of definition might be stronger and more comprehensive in enabling the taxation of e-cigarettes, restricting e-cigarettes to minors, or prohibiting their use within indoor spaces, represent areas for further study.

A possible impediment to e-cigarette regulation has occurred in states such as Arkansas and Virginia where each state’s attorney general issued an opinion that explicitly excluded e-cigarettes from its law. Arkansas’ attorney general concluded that ‘e-cigs’ do not fall under the state’s Clean Indoor Act laws because ‘no smoke is emitted when an e-cigarette is used, and an e-cig does not involve any lighted tobacco product...’²⁶ Moreover, e-cigarettes are not subject to Arkansas’ excise taxes imposed on other tobacco products, since ‘tobacco is not actually involved in the operation of e-cigs...[which] effectively removes them from the tax requirements applicable to tobacco products.’²⁶ Virginia’s attorney general concluded that its SFA law does not include e-cigarettes because they do not fall under the state’s definition of ‘smoke’ or ‘smoking’: ‘An e-cigarette does not function in manner of a traditional cigarette because it functions electrically... rather than via combustion of a material such as tobacco. Therefore, the vapor emitted by an e-cigarette...would not fall within the definition of “smoke” or “smoking” in § 15.2-2820.’²⁷

A state facing opposition or reluctance to e-cigarette regulation could alternatively consider initiating efforts in this area by working with their governor to issue an executive order which would apply to government buildings and/or worksites. Oklahoma and Oregon each have executive orders in place that restrict the use of e-cigarettes on state-owned or operated property.^{31 32}

Moreover, states and local communities that are considering adding e-cigarettes to their existing SFA laws should be careful to not also undermine stringent SFA requirements already in place by exempting certain venues, such as stand-alone bars, smoke shops, cigar shops, or other locations.^{33–45} While it is important for SFA policies to also restrict the indoor use of e-cigarettes, it is also critical to not lose ground on SFA laws that protect the health of various populations in many indoor settings. Additionally, state laws should allow local governments to enact their own e-cigarette YA, SFA and tax laws,^{46 47} because local governments have in the past, and continue to be, very active in these policy areas. For example, while only three states currently have comprehensive SFA laws that apply across multiple venues and include e-cigarettes, more than one-hundred municipalities across the country have enacted SFA ordinances that include e-cigarettes.²⁵

While we attempted to be as comprehensive as possible, this study is subject to the following limitations. First, all information presented herein is subject to availability in Lexis-Nexis and Westlaw, as of 15 November 2013. Second, non-codified policies not readily available in Lexis-Nexis or Westlaw, nor local policies that also play a critically important role in regulating e-cigarettes were beyond the study scope.^{25 48} Lastly, laws related to e-cigarette licensure or sampling were excluded, and remain an area for future study.²³

Table 1 States with e-cigarette-related codified laws (as of 15 November 2013)

State (abbr.)	Any law	Explicitly address e-cigarettes			Tobacco-derived or nicotine containing			Citation(s)
		YA	SFA	Tax	YA	SFA	Tax	
AL	X	X						Ala. Code § 28-11-1 et seq. (LexisNexis 2013)
AK	X				X			Alaska Stat. § 11.76.109 (2013)
AR	X	X	X* ²⁶					Ark. Code Ann. §§ 4-16-101, 5-27-233, 6-21-609 (2013)
AZ	X	X						Ariz. Rev. Stat. § 13-3622 (LexisNexis 2013)
CA	X	X				X*		Cal. Health & Safety Code § 119405 (Deering 2013); Cal. Educ. Code §§ 48900, 48901 (Deering 2013); Cal. Code Regs. tit. 19, § 3.32 (2013)
CO	X	X	X*					Colo. Rev. Stat. §§ 18-13-121, 24-35-501 et seq., 25-14-301, 25-14-103.5, 22-32-109, 25-14-204 (2013); 12 Colo. Code Regs. § 2509-8 (LexisNexis 2013)
DC	X		X*†‡					19-810 D.C. Code Mun. Regs § 810.5 (LexisNexis 2013); Act of Oct. 17, 2013, ch. 187, 2013 D.C. Legis. Serv. 187 (West 2013)
GA	X				X			Ga. Comp. R. & Regs. 560-8-1.01—1.11 (2013)
HI	X	X						Haw. Rev. Stat. Ann. § 709-908 (LexisNexis 2013)
ID	X	X						Idaho Code Ann. § 39-5701 et seq. (2013); Idaho Admin. Code r. 16.07.25.000 et seq. (2013)
IL	X	X						720 Ill. Comp. Stat. Ann. 675/1.5, /2 (LexisNexis 2013)
IN	X	X						Ind. Code Ann. §§ 7.1-1-3-15.5, 7.1-6-2-4, 35-46-1-1.5, 35-46-1-10—11, 7.1-2-3-33, 7.1-3-18.5-5 (LexisNexis 2013).
KS	X	X	X*					Kan. Stat. Ann. §§ 79-3301, 3303, 3321 (2013); Kan. Admin. Regs. § 123-2-111 (2013)
LA	X					X*		La. Rev. Stat. Ann. § 40:1300.263 (2013)
MD	X	X			X	X*		Md. Code Ann. Health-Gen. § 24-305 (LexisNexis 2013); Md. Code Regs. 13A.02.04.01—07 (2013)
MN	X			X	X	X*		Minn. Stat. Ann. §§ 297F.01, 243.555, 609.685, 609.6855, 461.18 (2013); Minn. Rev. Notice. 12–10 (Oct 22, 2012)
MS	X	X						Miss. Code Ann. § 97-32-51 (2013)
MO	X						X	Mo. Ann. Stat. §§ 149.011, 149.160 (West 2013)
NH	X	X	X*					N.H. Rev. Stat. Ann. § 126-K:1 et seq. (2013)
NJ	X	X	X†					N.J. Stat. Ann. §§ 26:3D-55 et seq., 2A:170-51.4, 2C:33-13.1, 26:3A2-20.1 (West 2013); N.J. Admin. Code §§ 10:128-4.6, 10:122C-7.2 (2013)
NY	X	X						N.Y. Pub. Health Law §§ 1399aa—mm (Consol. 2013)
NC	X	X						N.C. Gen. Stat. Ann. § 14-313 (West 2013)
ND	X		X†					N.D. Cent. Code § 23-12-09—11 (2013)
NV					‡			Act of June 1, 2013, ch. 326, 2013 Nev. Stat. 326 (YA law)
OK	X		X§					Exec. Order No. 2013-43, 31 Okla. Reg. 340 (Jan. 1, 2014)
OR	X		X*§					Or. Admin. R. 571-050-0005, 576-040-0010—0015, 576-015-0020 (2013); Exec. Order No. 12-13, 51 No. 9 Or. Bull. 4 (Aug. 2, 2012)
SC	X	X						S.C. Code Ann. §§ 16-17-500—504 (2013)
TN	X	X						Tenn. Code Ann. §§ 39-17-1501 et seq. (2013)
TX	X		X*					25 Tex. Admin. Code § 703.20 (2013)
UT	X	X	X†					Utah Code Ann. §§ 77-39-101, 76-8-311.3, 76-10-101 et seq., 53A-11-908, 26-38-1 et seq., 58-37-8, 10-8-41.6, 17-50-333, 41-6a-1717 (LexisNexis 2013) Utah Admin. Code r. 392-510-2—17 (2013)
VT	X	X					X	Vt. Stat. Ann. tit. 7, § 1001 et seq. (2013); Vt. Stat. Ann. tit. 32, §§ 7702, 7811 (2013)
WA	X	X	X*					Wash. Rev. Code Ann. § 26.28.080 (West 2013); Wash. Admin. Code §§ 132Q-30-231, 132L-136-010, 132E-120-410, 172-122-310 (2013)
WV	X				X	X*		W. Va. Code Ann. §§ 126-99-1 et seq. (LexisNexis 2013)
WI	X				X			Wis. Stat. Ann. §§ 134.66, 254.911, 254.916, 254.92 (West 2013)
WY	X	X						Wyo. Stat. Ann. §§ 14-3-301 et seq. (2013)
TOTALS	34	22	12	1	6	5	2	

*Et seq. indicates that both the cited law and the subsequent laws that follow in that same chapter, article, part or series are relevant.

†Only applies to limited venues: AR—school property; CA—school campus; CO—licensed child care facilities, school property; DC—public libraries (though session law is comprehensive); KS—juvenile correctional facilities; LA—public post-secondary educational property; MD—K-12 public school property; MN—state-operated agencies and correctional facilities; NH—public educational facilities; OR—university property; TX—workplace of cancer research grantees; WA—community colleges and universities; WV—school premises.

‡Indicates laws (or a session law, in the case of D.C.) that are comprehensive in scope by applying to multiple venues, including private and public workplaces, bars and restaurants.

§The state has enacted a bill and chaptered a session law (2013 D.C. Legis. Serv. 187; 2013 Nev. Stat. 326) but it has not yet codified the law into statute at the time of this writing.

§Executive orders.
SFA, smoke-free air; Tax, excise tax; YA, youth access.

CONCLUSION

Since e-cigarettes are not currently regulated by federal law, the sale, use and taxation of these products is only subject to state and local laws, which exist largely within the areas of YA and SFA. Opportunities exist for states to proactively restrict and regulate the purchase and indoor use of e-cigarettes, in order to

protect youth, in particular, from these potentially harmful products. In most cases, states could amend their existing cigarette or tobacco product laws to apply to e-cigarettes. States should also put e-cigarette policies into place that do not pre-empt local e-cigarette restrictions, which are often stronger and more comprehensive than their state's laws.

What this paper adds

- ▶ Opportunities exist for states to amend their existing laws to regulate e-cigarettes in the policy areas of youth access, smoke-free air and excise taxation.
- ▶ State laws that explicitly reference e-cigarettes are generally easier to implement, since e-cigarettes often do not fall under the common state law definitions of “cigarette” or “tobacco product.”
- ▶ States that regulate e-cigarettes should also allow their local governments to pass local-level laws.

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Contributors CKG conceptualised and designed the study, led the research, and drafted the manuscript. JFC contributed substantively to the manuscript's conceptualisation and reviewed all the legal research. She additionally provided critical feedback on the drafted manuscript. FJC contributed to the manuscript's conceptualisation and provided critical feedback on the manuscript. He is the principal Investigator for this funded study.

Competing interests None.

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Data sharing statement We will be posting the list of states with laws, to our project's website in the near future.

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