

E-Cigarette Legislative Options

*Prepared by the Kansas Department of Education Vaping Task Force
State Policy Subgroup*

While awaiting federal action, states and municipalities have enacted and implemented a number of electronic-cigarette (e-cigarette) policies, including smoke-free laws and ordinances, youth access laws, taxation, zoning and flavor bans. This memorandum provides a summary of options for four policy areas: (1) Minimum Legal Sale Age Restrictions; (2) Indoor Air and Smoke-Free Policies; (3) Taxation; and (4) Flavor Bans. The subgroup's review and presentation of these policies was built upon existing analysis by the Public Health Law Center and is limited to those policies that had been enacted as of September 15, 2019.

For the 2020 Kansas legislative session, the Kansas Board of Education might have the opportunity to work with legislators to introduce bills related to: (1) Tobacco 21, which raises the minimum legal sale age from 18 to 21; (2) adding vaping to the Kansas Indoor Clean Air Act (KSA 21-6109 through 21-6116); and (3) raising the tax on cigarettes and e-cigarettes (per milliliter of consumable materials, which is the liquid solution). At this time, there are no preliminary drafts of bills related to flavor bans.

Though the definitions of "tobacco products" and "e-cigarettes" differ from state to state, for the purposes of this memorandum, they are defined as follows:

Tobacco products are defined as products regulated by the Food and Drug Administration (FDA), which include cigarettes, all cigars (including cigarillos), dissolvables, roll-your-own tobacco, pipe tobacco, smokeless tobacco (including dip, snuff, snus and chewing tobacco), hookah tobacco, nicotine gels and e-cigarettes (including vaporizers, e-cigars, e-pipes, vape pipes, vaping pens, e-hookahs, hookah pens and other electronic nicotine delivery systems).ⁱ

E-cigarette or electronic smoking device means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic smoking device includes any component, part or accessory of the device, and also includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine.

E-Cigarette Policy Areas

1. Minimum Legal Sale Age Restrictions Policies
 - a. Sale of any tobacco product to individuals under age 21 is illegal
 - b. Exemptions – military; grandfathered-in policies
2. Indoor Air and Smoke-Free Policies
 - a. Prohibiting vaping in workplaces and public areas
 - b. Restricting use of e-cigarettes in certain areas (schools, day care facilities, etc.)
3. Taxation
 - a. Taxing e-cigarettes
4. Flavor Bans
 - a. Sale of fruit flavored e-liquids is illegal
 - b. Only menthol and tobacco flavored e-liquids permitted for sale

1. Minimum Legal Sale Age Restrictions

Tobacco 21 — or T21 — is a rapidly expanding, grassroots policy approach to youth tobacco use prevention that raises the minimum age of legal access (MLA) to purchase tobacco products from age 18 to 21 and also attempts to reduce access by adolescents to tobacco products by interrupting the supply available from peers age 18–20. Raising the MLA to age 21 complements other strategies to reduce tobacco use, including higher tobacco taxes, strong smoke-free laws that include all workplaces and public places, and well-funded, sustained, comprehensive tobacco prevention and cessation programs. In Kansas, 29 localities have adopted T21 ordinances.

States with T21 MLA Policy (18): AR, CA, CT, DE, DC, HI, IL, ME, MD, MA, NJ, NY, OH, OR, TX, VT, VA, WA

Example:

Washington - Sale/distribution of vapor products to persons under age 21 prohibited. WASH. REV. CODE ANN. § 26.28.080(1) (2019)

Variation: Utah has passed a bill which features stepped age restrictions starting at 19 in 2019, then increasing to 20 in 2020 and to 21 in 2021.

Exemptions to Age Restrictions:

Some states have passed age restriction legislation, often T21, but have included exemptions for individuals serving in the military who are at least age 18 (military exemption), for those who were of legal purchasing age prior to T21 (grandfathered-in exemption), or for those purchasing approved medical or cessation products. The implied rationale is that if an individual is old enough to serve in the military or was of legal age before the MLA was raised, they should be able to purchase e-cigarette devices and/or use e-cigarettes.

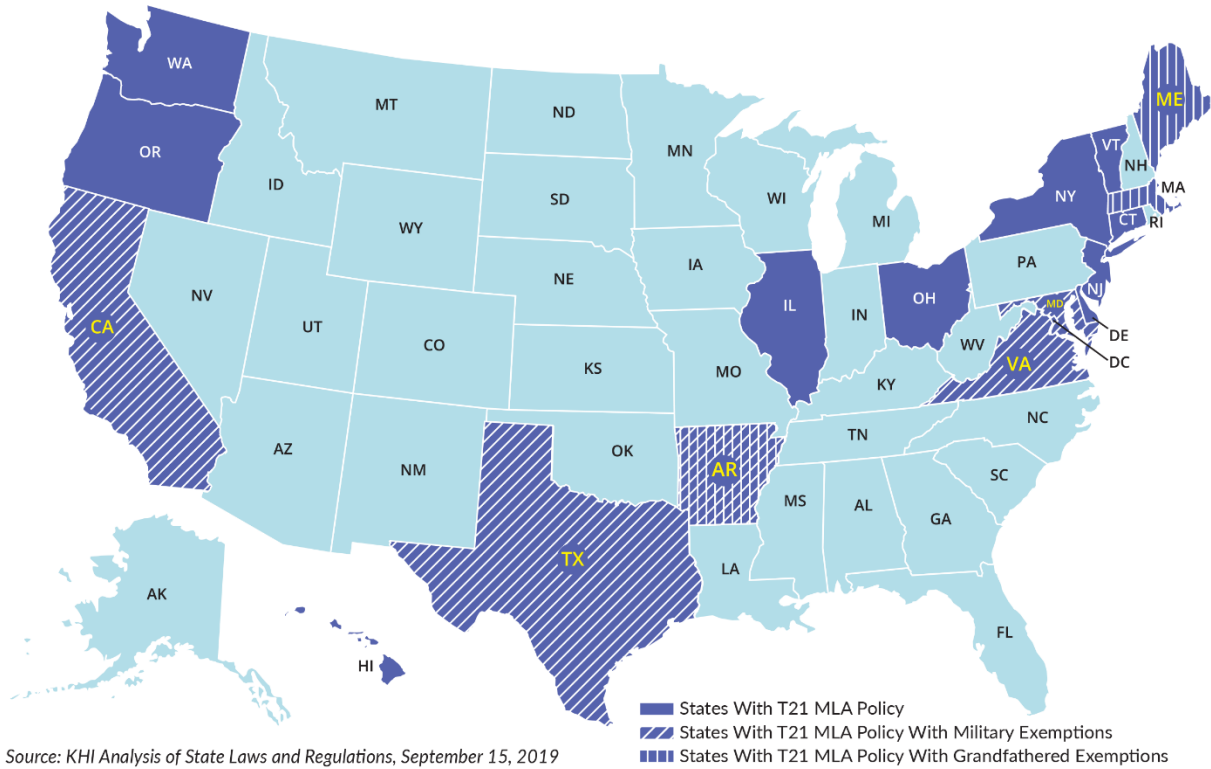
States with Military Exemptions (5): AR, CA, MD, TX, VA

States with Grandfathered Exemptions (3): AR, ME, MA

Examples: Arkansas – Sale of vapor products, e-liquids or any component thereof prohibited for persons under age 21, unless the person is active-duty military or has attained the age of 19 years as of December 31, 2019. ARK. CODE ANN. § 5-27-227(a)(1) (2019)

Massachusetts – Sale/distribution of electronic smoking devices to persons under age 21 prohibited (except those who have attained the age of 18 before December 31, 2018). MASS. GEN. LAW ch. 270 § 6 (b) (2019); 940 MASS. CODE REGS. 21.04(3) (2019)

States With Tobacco 21 Minimum Legal Age Policy, 2019



2. Indoor Air and Smoke-Free Restrictions

Building upon existing combustible cigarette smoking prohibitions or indoor clean air policies, many states have included e-cigarettes in “smoke-free” policies. States have aimed to accomplish e-cigarette smoke-free policies through two primary mechanisms: (1) modifying the definition of smoking to include e-cigarettes; or (2) adding “vaping” or e-cigarette use to existing smoking prohibitions; and often, these laws prohibit use of e-cigarettes in places of work, youth-serving locations, public spaces, health care spaces and on government property.

States with E-Cigarettes or Vaping Included in Smoking Definition or “Smoke-Free” Policies (20): AK, CA, CO, DE, DC, HI, ME, MA, MN, NV, NH, NJ, NM, NY, ND, OR, RI, SD, UT, VT

Examples: Colorado – Use of electronic smoking devices is restricted similar to smoking and prohibited in indoor areas, including places of employment, common areas of retirement and public housing, day care facilities, health care facilities, and hotel and motel rooms. Use of tobacco products are prohibited on school property and in vehicles, including those of day care, early learning and K-12 schools. COLO. REV. STAT. §§ 25-14-204(1) and §§ 25-14-103.5 (2019)

New York – E-cigarette use prohibited where smoking is prohibited, including, but not limited to, indoor areas such as workplaces, restaurants, mass transit, hospitals, schools and dorms, and outdoor areas, such as railroad stations, and hospital, library and school grounds. Smoking and vaping are not permitted within 100 feet of the entrances, exits or outdoor areas of any public or private elementary or secondary schools. N.Y. PUB. HEALTH LAW § 1399-n(9)

Variations: There is substantial variety in the locations and situations for which no-use (smoke-free) policies have been applied. Policies range in reach and scope from the broad (all schools, workplaces and public areas) to the narrowly tailored (court buildings). Additionally, some states, such as Virginia, have passed bills directing school boards to implement policies to prohibit use on school property. In effect, these directives accomplish the aims of broader e-cigarette smoke-free policies, but through the authority of individual school boards.

Other Related Policies:

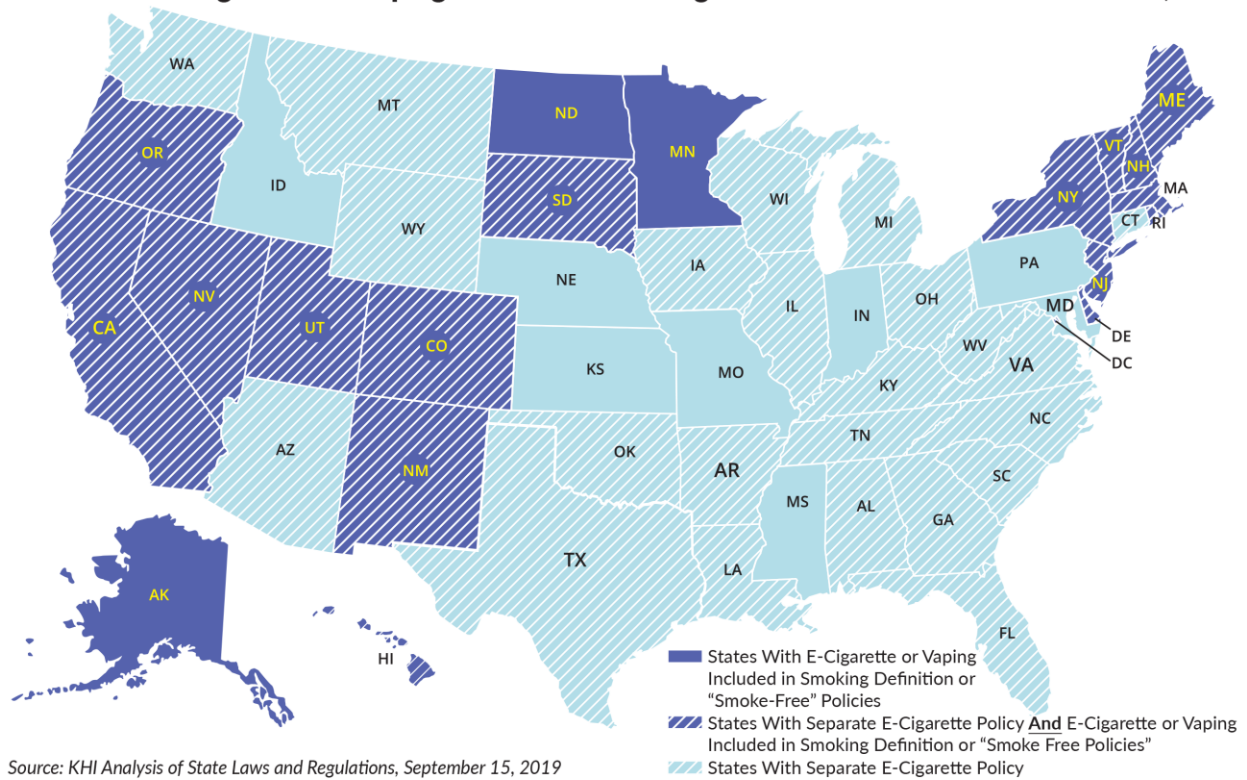
Some states have passed specific e-cigarette no-use policies that are separate or in addition to the broad smoke-free policies discussed above.

States with Separate E-Cigarette Policies (40): AL, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, IL, IA, KY, LA, ME, MA, MI, MT, NV, NJ, NH, NM, NY, NC, OH, OK, OR, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI, WV, WY

Examples: Arkansas – Use of vapor products or e-liquids on the grounds of any school or at off-campus school-sponsored events, in or on the grounds of any child care facility, school or child care vehicle, or health care facility is prohibited. ARK. CODE ANN. §§ 26-57-254(b); 6-21-609(b) (2019)

Virginia – School boards directed to develop and implement policy to prohibit use and distribution of nicotine vapor products on school buses, school property and at school-sponsored activities. VA. CODE ANN. §§ 22.1-79.5; 22.1-279.6(H) (2019)

States With E-Cigarettes or Vaping Included in Smoking Definition or “Smoke-Free” Policies, 2019



3. Taxation

There is currently no federal excise tax on vapor products; however, the Tobacco Tax Equity Act of 2019 was introduced in September 2019. This act would close tax code loopholes for tobacco products by doubling the federal tax rate on cigarettes and setting the federal tax rate for all other tobacco products, including e-cigarettes, at this same level.

States and localities have enacted their own taxes on e-cigarettes at varying rates and with varying methods: (1) percentage of the wholesale value; and (2) tax per unit or milliliter of e-liquid, meaning the delivery device is not taxed. Kansas imposes a privilege tax for sale or dealing of electronic cigarettes “at the rate of \$0.05 per milliliter of consumable material.” Kan. Stat. Ann. § 79-3399(a) (2019)

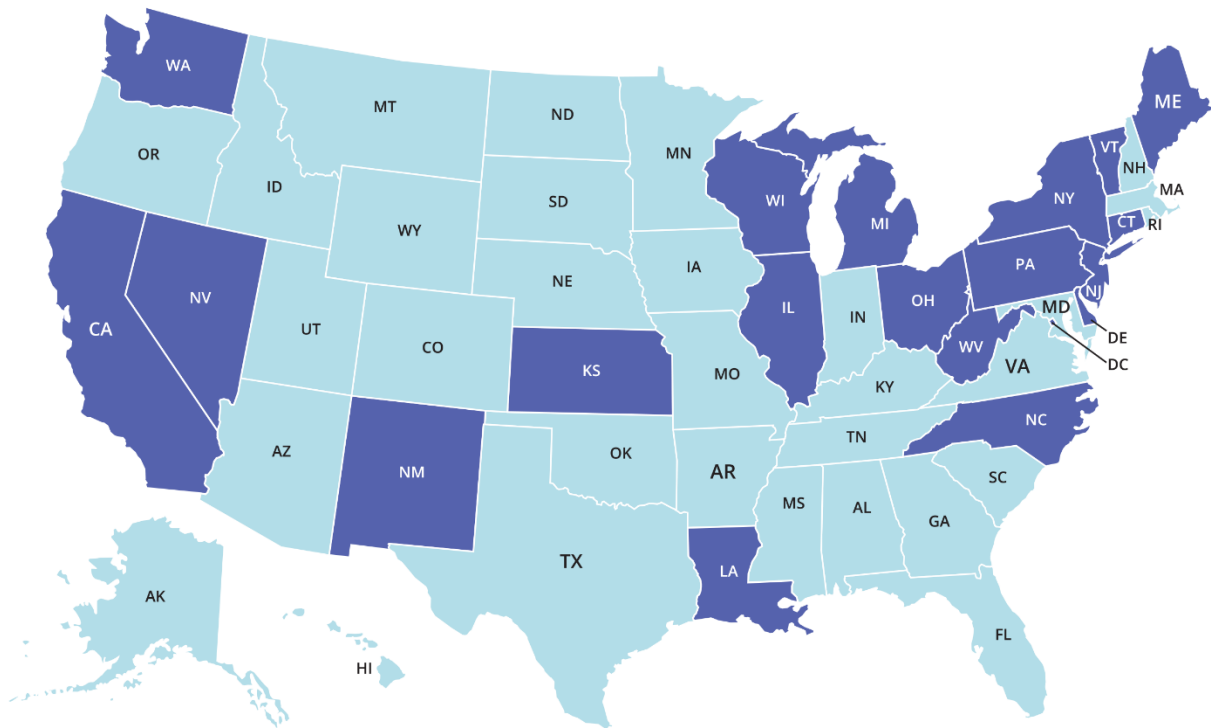
States with an Excise Tax or Special Tax (non-sales tax) on E-Cigarettes (20): CA, CT, DE, DC, IL, KS, LA, ME, MN, NV, NJ, NM, NY, NC, OH, PA, VT, WA, WV, WI

Examples: Minnesota – Tax of 95 percent of wholesale price imposed on tobacco products, including e-cigarettes. Minn. Stat. Ann. § 297F.05(3) (2019); Minn. Dep’t of Revenue Notice #12-10 (2012)

New Mexico – Instituted taxes on open system and closed system vapor liquid. E-liquid taxed at rate equal to 12.5 percent of product value. Closed-system cartridges or pods less than 5 ml are taxed at a rate of \$0.50 per cartridge. N.M. Stat. Ann. § 7-12A-3(D) (2019) and § 7-12A-3(E) (2019)

New York – Imposed a tax of 20 percent of the retail price on all vapor products. N.Y. Tax § 1181 (2019)

States With an Excise Tax or Special Tax on E-Cigarettes, 2019



Source: KHI Analysis of State Laws and Regulations, September 15, 2019

States With an Excise Tax or Special Tax on E-Cigarettes

4. Flavor Bans

State officials have described youth vaping as a public health emergency and note that young people are more likely to use sweet flavors, such as bubble gum and “fruit loops,” or mint. As of October 25, 2019, eight states and more than 220 municipalities have enacted flavor bans.

States that have enacted e-cigarette product flavor bans have done so through executive action, such as emergency declarations or actions based on a state’s existing public health authority, rather than by enacting a bill. Though supported by the governments within each state, these flavor bans have been met with legal challenges.ⁱⁱ

State(s) with Policy (8): MI, NY, RI, MA, WA, MT, OR, UT

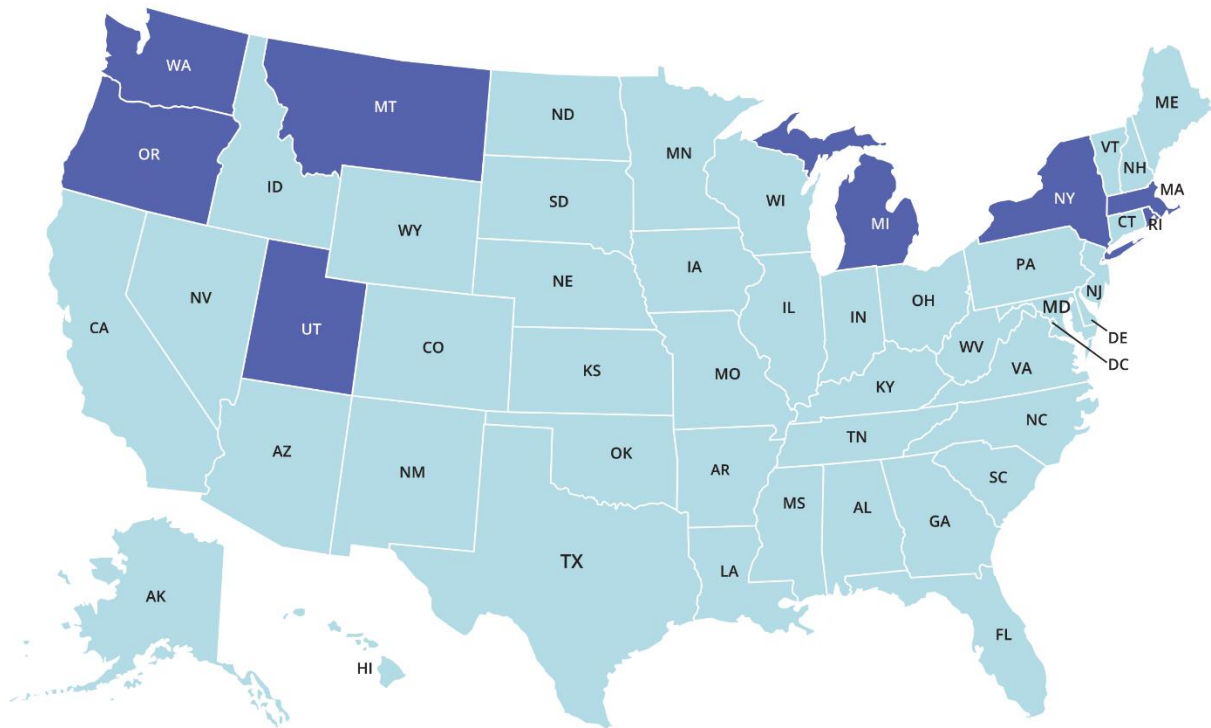
Municipalities: More than 220 localities in California, Colorado, Illinois, Massachusetts, Minnesota, New York and Rhode Island have prohibited the sale of flavored tobacco products, including flavored e-cigarettes.ⁱⁱⁱ

Examples: Michigan – Sales of flavored nicotine-containing vapor products are prohibited. Advertising for vapor products may not include imagery representing a characterizing flavor, must not be misleading (claiming to be “clean,” “safe” or “harmless,”) and are prohibited at point of sale, within 25 feet of candy, foodstuffs and soft drinks, and anywhere visible from 25 feet outside place of business. Rule 2-Rule 6, MICH. DEP’T. HEALTH & HUMAN SERVS., PROTECTION OF YOUTH FROM NICOTINE PRODUCT ADDICTION, EMERGENCY RULES (effective September 18, 2019, and continuing for 6 months)

New York – Possession, manufacture, distribution and sale of flavored (except menthol) electronic cigarettes and nicotine e-liquids prohibited. N.Y. COMP. CODES R.& REGS. tit. 10, § 9-3.2 (Effective September 17, 2019)

Variations: Flavor bans vary by the length of time that they are in effect, whether they can be renewed, and the type of products that they cover. While most of the bans have been limited to flavored e-cigarettes products, two states have enacted more general bans and prohibitions. In Massachusetts, the sale of all e-cigarette products are banned, the strictest e-cigarette action of any state. In Utah, the sale of e-cigarette devices has been restricted to only tobacco specialty shops.^{iv}

States With Bans on Flavored E-Cigarette Products, 2019



Source: KHI Analysis of State Laws and Regulations, October 25, 2019

States With Bans on Flavored E-Cigarette Products

Other Resources

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- ⁱ U.S. Food and Drug Administration. (2018, December 4). *Products, Ingredients and Components*. Retrieved from <https://www.fda.gov/TobaccoProducts/Labeling/ProductsIngredientsComponents/ucm20081732.htm>.
- ⁱⁱ Ducharme, J. (2019). As the number of vaping-related deaths climbs, these states have implemented e-cigarette bans. *Time*. Retrieved from <https://time.com/5685936/state-vaping-bans/>
- ⁱⁱⁱ Campaign for Tobacco-Free Kids. (2019). *States and localities that have restricted the sale of flavored tobacco products*. Retrieved from <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>
- ^{iv} Alberty, E. (2019). Utah puts emergency limits on flavored e-cigarettes, as vaping illnesses rise. *The Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2019/10/02/utah-puts-emergency/>
- Public Health Law Center. (2019, September 15). *U.S. E-cigarette Regulations – 50 State Review (2019)*. Retrieved from <https://www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review>