

2019 Tobacco Control Network Policy Scans

This series of three policy scans was developed as a collaborative effort by the Tobacco Control Network Executive Committee and the Association of State and Territorial Health Officials (ASTHO) State Health Policy Team. These policy scans aim to provide state and territorial tobacco control programs and their partners with more information on emerging policy priorities relating to tobacco control and cessation. Any questions about these policy scans can be directed to tcn@astho.org.

Flavored Tobacco Products

The regulation of flavored tobacco products has emerged as a major public health priority in recent years. In September 2019, HHS issued a [press release](#) announcing that the agency intends to remove all flavored e-cigarette products from the market until manufacturers of those products file premarket tobacco product [applications](#) with FDA. Meanwhile, the use of menthol cigarettes continues to remain a major health equity issue in tobacco control, as [African American communities](#) and [young people](#) are more likely to use those products than the general population. While combustible cigarettes can only be flavored with menthol since the passage of the 2009 Family Smoking Prevention and Tobacco Control Act, other tobacco products can be sold with any flavoring. Restricting where and how flavored tobacco products of all kinds can be sold thus has the potential to make tobacco products [less appealing](#) to young people who have never used them before, saving millions from the health impacts of tobacco use and nicotine addiction.

At the state level, governors and state health officials have also taken executive and regulatory action to address and regulate flavored e-cigarettes. In New Jersey, Gov. Murphy issued an [executive order](#) creating the Electronic Smoking Device Task Force, which was directed to provide recommendations for a strategy to address vaping in the state. The task force's [report](#) sets out a variety of policy options to address the vaping issue, including prohibiting flavored vaping products.

In California, Gov. Newsom issued an [executive order](#) directing the California Department of Health to recommend ways to reduce youth vaping, including enforcing unlawful sales of vaping products to youth. The state health agency was also tasked with creating warning signs about vaping's health risks for display at retailers, recommending standards for nicotine content and product packaging requirements, and developing a vaping awareness campaign. Other California agencies were directed to recommend ways to remove illegal or counterfeit vaping products from stores, to include nicotine content in e-cigarette tax calculations, and to require retailers to report all distributions of vaping products to the state.

In early September, [Michigan](#) became the first state to announce a ban on the sale of all flavored e-cigarettes: based on an [emergency finding](#) from the Michigan Department of Health and human services, Gov. Whitmer directed the agency to issue [emergency rules](#) banning the sale of vaping products. [New York](#)'s Gov. Cuomo followed suit by instructing the state health agency to convene an emergency session of the state's Public Health and Health Planning Council to consider banning flavored e-cigarettes. On Sept. 17, the council met and [adopted rules](#) banning sales of most flavored e-cigarettes. Although the rules exclude menthol flavoring from the ban, Commissioner of Health Howard Zucker subsequently [recommended](#) that menthol be included in the ban, as well.

In [Massachusetts](#), Gov. Baker declared a public health emergency, and Department of Public Health Commissioner Monica Bharel issued an [order](#) prohibiting the sale or display of all vaping products (including all non-flavored and flavored vaping products) to consumers by any means. Commissioner Bharel subsequently issued an [implementation order](#) to clarify the order's geographical scope and display prohibitions for businesses.

Other states adopting emergency rules prohibiting flavored vaping products include [Montana](#), [Oregon](#), [Rhode Island](#), and [Washington](#). In Utah, the state health agency issued [emergency rules](#) restricting the sale of flavored e-cigarette products and e-cigarette substances to retail tobacco specialty businesses and requiring the posting of mandatory warning signs alerting consumers not to use e-cigarette products or to consume unregulated THC substances.

Vaping businesses have filed lawsuits in both state and federal courts challenging the state executive actions in Massachusetts, Michigan, Montana, New York, and. Courts in Michigan, New York, and Oregon temporarily stayed the emergency rules pending the final resolution of the lawsuits.

As the Trump administration, states, and localities consider executive actions that would temporarily remove some or all flavored e-cigarette products from the shelves, states have been considering legislative action to restrict the sale of flavored e-cigarettes and other flavored tobacco products. Many of the bills outlined below regulate flavored tobacco products based on key terms, which are defined below:

- A **constituent** is anything that's added by the manufacturer to a tobacco product—other than tobacco leaf, reconstituted tobacco, or water—at any stage of the tobacco product's manufacture.
- A **characterizing flavor** is a distinguishable taste or aroma (apart from that of tobacco) that's produced by a tobacco product or any byproduct of the tobacco product during its use. Characterizing flavors can include mint/menthol, fruit flavors, candy flavors, dessert flavors, and alcohol flavors.

Figure 1: Overview of States Regulating the Sale of Flavored Tobacco Products Through Legislative Action

STATE	BILL	BILL DESCRIPTION	BILL STATUS
CA	AB 739	<p>A tobacco retailer shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product. A “flavored tobacco product” is defined as any tobacco product that contains a constituent that imparts a characterizing flavor.</p> <p>There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or its agents has made a statement or claim directed to consumers or the public that the tobacco product has or produces a characterizing flavor on the product's labeling or packaging.</p>	In Assembly
CA	AB 1625	<p>The attorney general shall establish and maintain on its website a list of tobacco product brand styles that lack a characterizing flavor. Every manufacturer and importer of tobacco products may submit to the attorney general a list of all brand styles of tobacco products they manufacture or import that lack a characterizing flavor.</p>	In Assembly
DC	B23-0453	<p>No person shall sell or distribute a flavored electronic smoking device in the District.</p> <p>There is a rebuttable presumption that an electronic smoking device is a flavored electronic smoking device if a manufacture or its agents has made a statement or claim directed to consumers or the public that the electronic smoking device has or produces a characterizing flavor, including by text, color or images on the product's labeling or packaging that are used to explicitly or implicitly communicate that the electronic smoking device has a characterizing flavor.</p>	Under Council Review
FL	HB 151	<p>The sale of flavored liquid nicotine products intended for use in vapor-generating electronic devices is prohibited. The sale of tobacco-flavored liquid nicotine products intended for such use is not prohibited.</p>	In House

IL	HB 3883	<p>Creates the “Flavored Tobacco Ban Act” and prohibits the sale or distribution by an establishment of any flavored tobacco product.</p> <p>There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer, or any of the manufacturer’s employees or agents, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.</p>	In House
MA	H 1902 , S 1279 , H 4089 , and S 2357	<p>No retailer, retail establishment, or other person or entity shall sell or distribute or cause to be sold or distributed or offer for sale any flavored cigarette to any consumer.</p> <p>No person or entity shall sell or distribute or cause to be sold or distributed or offer for sale any flavored tobacco product to any consumer, except in a smoking bar. A public statement, claim or indicia made or disseminated by the manufacturer or any person authorized by the manufacturer that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.</p>	In House or Senate
MA	H 3778	No person, except a retail tobacco store, a licensee with an alcoholic beverages license on such premises, or smoking bar shall sell a flavored tobacco product in a location where minors are able to enter at any time.	In House
ME	LD1190	A person may not sell or distribute or offer to sell or distribute any flavored tobacco product.	Enacted
ND	HB 1477	A person may not sell, offer for sale, or distribute any flavored e-liquid or electronic smoking device containing flavored e-liquid to a minor.	Enacted

NJ	A 5134	Prohibits the sale or distribution of cigars which contain a natural or artificial constituent or additive that causes them or any smoke emanating from them to have a characterizing flavor other than tobacco, clove, or menthol. Current law already prohibits the sale or distribution of cigarettes meeting this definition. In no event shall the cigarette or cigar or any component part thereof be construed to have a characterizing flavor based solely on the use of additives or flavorings, or the provision of an ingredient list.	In Assembly
OH	HB 346	No manufacturer, producer, distributor, wholesaler, or retailer of cigarettes, other tobacco products, alternative nicotine products, or papers used to roll cigarettes, or other persons shall give away, sell, or otherwise distribute flavored electronic smoking devices or flavored vapor products that have not received approval from the United States Food and Drug Administration.	In House
WA	HB 1932	A retailer or distributor may not sell, offer for sale, or possess with the intent to sell or offer for sale flavored vapor products. A marijuana retailer may not sell, offer for sale, or possess with the intent to sell any flavored marijuana product intended for consumption through vaporization or aerosolization.	In House

Display of Tobacco Products at the Point of Sale

To date, no state has passed a law that prohibits the retail display of tobacco products. However, states have been successful in passing legislation restricting the display of tobacco products at points of sale. [Policies](#) restricting the placement and display of tobacco and vapor products may reduce consumer exposure to the products and may increase the burden of purchasing these products enough to reduce their consumption. Prohibiting vapor product [vending machines](#) in adult-only venues is associated with reduced recent smoking and lifetime smoking likelihood among adults. Policy strategies include regulating the availability of vending machines and self-service displays to sell tobacco or vapor products, as these items allow consumers to access these products more easily and without oversight or assistance from retail owners or their employees.

Vending Machines

The Family Smoking Prevention and Tobacco Control Act of 2009 prohibits certain tobacco products from being sold in vending machines, except when those vending machines are in adult-only establishments. Although currently only [Vermont](#) has a state-level total restriction on vending machines, in the recent legislative session several states sought to further restrict the display of tobacco and vapor products by regulating vending machines. Virginia enacted companion bills ([SB 1727](#) and [HB 2748](#)) that added nicotine vapor products and alternative nicotine products to those sold in vending machines only if certain requirements are met, including signage requirements and age restrictions.

Although Michigan law already currently prohibits selling tobacco products in vending machines, the [Michigan](#) legislature is also considering a bill that would restrict tobacco paraphernalia sales in vending machines. In addition, [Michigan](#) proposed a bill that would prohibit persons from possessing a machine for vending tobacco products. (The bill defines “person” as an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity.) Wisconsin introduced multiple bills ([AB 65](#), [SB 73](#), and [AB 422](#)) that would include vapor products in the list of those prohibited from sale through vending machines in locations accessible to minors.

New York considered a bill ([A 2939](#)) that would have prohibited the sale of tobacco products at vending stand leasing spaces and in vending machines in a state building. The state also considered a bill ([S 4710](#)) that would have restricted the sale of tobacco products, herbal cigarettes, or electronic cigarettes in vending machines located within three hundred fifty feet of a building occupied exclusively as a school, church, synagogue, or other place of worship.

Self Service Displays

In the recent legislative session, several states sought to restrict access tobacco and vapor products by regulating self-service displays (categorized as displays to which the public has access without the assistance of a retailer or retailer’s employee). While some of the proposed bills failed, it is an emerging trend in tobacco control that is worth analyzing, especially since tobacco companies pay cigarette retailers [hundreds of millions of dollars](#) annually to carry particular brands and display products in particular places within the store.

The [Ohio](#) legislature is considering a bill that would not allow retail establishments that primarily sell vapor products from “recklessly sell[ing] a vapor product in open display and accessible to the public without the intervention of a store employee.” Companion bills in Florida ([HB1125](#) and [SB1046](#)) would have prohibited retailers that sell electronic nicotine delivery systems or e-liquid from placing the products in an open display unit unless it was located in an area inaccessible to customers or unless the establishment prohibits persons under 18 on the premises. In [Indiana](#), the legislature considered a bill requiring that all vapor products be sold from behind the counter or displayed in an age-restricted area or sealed display case. [Maryland](#) also introduced a bill that would have specifically limited the sale of electronic nicotine delivery systems and

vaping liquids to displays that are not physically accessible to customers without the assistance of an employee.

An [Iowa](#) bill would have prevented the sale of tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes through a vending machine or through a self-service display. A similar bill in [Montana](#) would have prohibited the sale of tobacco products, alternative nicotine products, and vapor products via self-service displays. Companion bills in New Mexico ([HB552](#) and [SB450](#)) would have restricted the sale of e-cigarettes or nicotine liquids through self-service displays, but would allow the sale of these products in vending machines in locations where minors are not permitted.

In [Wisconsin](#), the legislature considered a bill that would require retailers to only place cigarettes, nicotine products, or tobacco products in locations that are inaccessible to customers without the assistance of the retailer, including behind the counter or in a locked case. The requirement does not apply to products sold in vending machines or at retail locations that receive 75 percent or more of their revenue from sales of cigarettes, nicotine products, or tobacco products, or if no person younger than 18 is permitted to enter.

State Medicaid Coverage of Tobacco Cessation Treatments

State Medicaid programs provide a [key opportunity](#) for offering evidence-based tobacco cessation treatments to adult smokers who might not otherwise have access to them. Cigarette smoking is more than [twice as prevalent](#) among Medicaid enrollees (24.5%) as it is among privately insured Americans (10.5%), and 69.2 percent of Medicaid and dual-eligible adult smokers are [interested in quitting](#).

Currently, there are nine Medicaid-approved tobacco cessation treatment options—including seven FDA-approved prescription and over the counter pharmacotherapies—as well as group and individual cessation counseling options. According to a [Morbidity and Mortality Weekly Report](#) study, as of June 2017, 10 states covered all of these evidence-based treatments and 32 states covered all FDA-approved cessation medications. Further, 33 states covered individual counseling, and 10 of those states also covered group counseling. Increasing state Medicaid coverage of these therapies is a Healthy People 2020 [objective](#) and a strong way to promote evidence-based cessation methods among adult smokers who want to quit.

Arkansas and Maine recently enacted legislation increasing Medicaid coverage for tobacco cessation products and treatment. In April 2019, the governor of Arkansas signed [House Bill 1555](#), requiring the Department of Human Services to ensure that the Arkansas Medicaid Program covers all seven medications approved by FDA for tobacco cessation. The bill was passed based on legislative findings that Arkansas has the third-highest rate of adult smokers and new lung cancer diagnoses in the U.S. The legislature stated that the bill is intended to lower the rate of adult smokers and reduce treatment costs for tobacco use-related illnesses by increasing coverage.

In March, Maine's governor signed [Legislative Document 1](#), which amends a carrier's ability to vary premium rates due to age and tobacco use. Carriers may no longer apply a rate differential when the covered individual is participating in an FDA-approved evidence-based tobacco cessation strategy. Implementing rate differentials may discourage individuals from using tobacco cessation services by making Medicaid unaffordable to lower-income clients who smoke.

Several states introduced bills that would provide Medicaid coverage for tobacco cessation products and services. In Massachusetts, companion bills ([H 1129](#) and [S 704](#)) would direct the state's executive office of health and human services to include within its MassHealth-covered services a program for smoking and tobacco use cessation treatment and information. These benefits would include FDA-approved nicotine replacement therapy, other FDA-approved smoking cessation pharmacologic aids, and accompanying individual, group, and phone counseling by a physician, dentist, behavioral health counselor, mental health counselor, certified tobacco use cessation counselor, or another qualified clinician. Under this bill, the executive office would also be required to report annually on the number of enrollees who participate in smoking and tobacco cessation services, the number of enrollees who quit smoking or using tobacco, and Medicaid expenditures tied to tobacco use by Medicaid enrollees.

A California bill ([AB 990](#)) would require Medi-Cal managed care plan contracts entered into or amended on or after Jan. 1, 2021 to offer financial incentives to existing enrollees to promote participation in preventive health or wellness activities. Plans may link the financial incentives to participation in a health promotion program, including a tobacco cessation program. This bill may encourage smoking enrollees to seek evidence-based tobacco cessation services and products that they might not otherwise use in order to reduce their insurance payments.

