

TEXAS YOUNG LAWYERS ASSOCIATION

**CONSEQUENCES OF
VAPING**



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TEXAS YOUNG LAWYERS ASSOCIATION

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INTRODUCTION

The information in this pamphlet is designed to explain the consequences of vaping and electronic cigarette use. The brochure overviews public health concerns, the criminal- and education-related consequences of vaping, and civil lawsuits pending against e-cigarette manufacturers in state and federal courts. The Texas Young Lawyers Association intends this pamphlet will serve as a valuable resource to attorneys, lawmakers, educators, healthcare providers, parents, and youth, in the battle against today's vaping epidemic.

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PUBLIC HEALTH CONCERNS AND CONSEQUENCES

In December 2018, the U.S. Surgeon General issued an advisory “officially declaring e-cigarette use among youth an epidemic in the United States.”¹ This epidemic is no accident. Some e-cigarette companies utilize designs, specialized flavors, and social media platforms to attract youth and children. A 2016 Surgeon General’s report stated, “E-cigarettes are marketed by promoting flavors and using a wide variety of media channels and approaches that have been used in the past for marketing conventional tobacco products to youth and young adults.”²

E-cigarettes pose many potential health risks to the population. E-cigarettes have the potential to: increase the number of young adults exposed to nicotine; lead non-smokers to start smoking cigarettes and other tobacco products; sustain nicotine addiction to encourage continued use instead of quitting completely; and increase the likelihood that former smokers will become addicted to nicotine again while using e-cigarettes.³

Why Are E-Cigarettes So Addictive?

Nicotine levels in e-cigarettes are highly variable, with some reaching or exceeding levels found in combustible cigarettes.⁴ Some health professionals believe that e-cigarette use is on the rise due to aesthetics and lack of effort with the biggest difference being ease of use.⁵ Convenience of use and acceptance by societal norms make the draw to e-cigarettes stronger.⁶ Further, marketing and advertising are contributing factors to the rise in use of e-cigarettes, especially with ads targeted at youth.⁷

1 Office of the Surgeon General, *Surgeon General’s Advisory on E-cigarette Use Among Youth*, Washington, DC: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

2 Office of the Surgeon General, *E-cigarette Use Among Youth and Young Adults: A Report of the Surgeon General*, Washington, DC: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (2016), https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf

3 *Get the Facts on E-Cigarettes*, Office of the Surgeon General, <https://e-cigarettes.surgeongeneral.gov/getthefacts.html> (last visited January 12, 2021).

4 *E-cigarettes: Facts, stats, and regulations*, truthinitiative.org, (last updated December 2, 2020), <https://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations>

5 Amanda Capritto, *Why vaping is so addictive, according to doctors*, CNET: Health and Wellness (September 23, 2019 12:52 p.m. PT) <https://www.cnet.com/health/why-vaping-is-so-addictive-according-to-doctors/#:~:text=Nicotine%20is%20addictive,%20yes.%20But%20there%20are%20other,settings,%20mental%20health,%20coping%20mechanisms,%20and%20other%20factors>

6 *Id.*

7 *Id.*

Health Concerns

As the Surgeon General stated in a 2020 report, “The potential benefit of e-cigarettes for cessation among adult smokers cannot come at the expense of escalating rates of use of these products by youth.”⁸ While questions still exist, it is abundantly clear that it is unsafe for young people to use e-cigarettes or any other product containing nicotine. As stated by the Surgeon General, “E-cigarette use poses a significant—and avoidable—health risk to young people in the United States. Besides increasing the possibility of addiction and long-term harm to brain development and respiratory health, e-cigarette use is associated with the use of other tobacco products that can do even more damage to the body.”⁹

Physical Effects

a. Nicotine Poisoning can lead to death.

Delivered in high doses, nicotine can be lethal.¹⁰ Exposure to liquid nicotine found in e-cigarettes has resulted in thousands of calls to poison control centers in recent years, peaking in 2014, in which more than half of these calls were to report exposures among children under the age of six.¹¹

b. Aerosol is not harmless.

According to the Surgeon General, “E-cigarette aerosol is not harmless. It can contain harmful and potentially harmful constituents, including nicotine.”¹² The nicotine present in e-cigarette aerosol is absorbed by users and bystanders.¹³ Studies have found other chemicals and toxins present in some e-cigarettes, including formaldehyde, acrolein, volatile

8 Office of the Surgeon General, *Smoking Cessation: A Report of the Surgeon General*, Atlanta, GA: U.S. Department of Health and Human Services, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health (2020).

9 *Know the Risks: E-Cigarettes & Young People*, Office of the Surgeon General, <https://e-cigarettes.surgeongeneral.gov/knowtherisks.html> (last visited January 12, 2021).

10 See *supra* note 2; see also David L. Eaton, Leslie Y. Kwan, and Kathleen Stratton, eds., *Public Health Consequences of E-Cigarettes*, National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Population Health and Public Health Practice; Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems, Washington (DC): National Academies Press (2018).

11 Centers for Disease Control and Prevention, *Notes from the Field: Calls to Poison Centers for Exposures to Electronic Cigarettes—United States, September 2010–February 2014*, Morbidity and Mortality Weekly Report, 63(13):292-293 (April 4, 2014) <http://www.cdc.gov/mmwr/pdf/wk/mm6313.pdf>.

12 *Supra* note 2.

13 *Dual Use of Tobacco Products*, Centers for Disease Control and Prevention, <http://www.cdc.gov/tobacco/campaign/tips/diseases/dual-tobacco-use.html#ten> (last visited January 17, 2021).

organic compounds like toluene, tobacco-specific nitrosamines, and metals like nickel and lead.¹⁴

c. Flavor additives might not be safe.

Concerns about flavor additives have surfaced because they “have not been widely tested for sensitizing, toxic, or irritating potency.”¹⁵ In its 2016 report, the Surgeon General stated that, “while some of the flavorings used in e-cigarettes are generally recognized as safe for ingestion as food, the health effects of their inhalation are generally unknown” and noted that some of the flavorings found in e-cigarettes have been shown to cause serious lung disease when inhaled.¹⁶

d. Impact of Nicotine

E-cigarettes contain varying levels of nicotine, and the nicotine delivered through the aerosol varies depending on the device characteristics and user practices.¹⁷ Nicotine is highly addictive and can have lasting damaging effects on adolescent brain development.¹⁸ Nicotine also impacts the cardiovascular system.¹⁹ The Surgeon General concluded that, “The use of products containing nicotine poses dangers to youth, pregnant women, and fetuses. The use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.”²⁰

14 Cheng, T, *Chemical Evaluation of Electronic Cigarettes*, Tobacco Control 23:ii11-ii17 (May 2014), available at http://tobaccocontrol.bmj.com/content/23/suppl_2/ii11.full; see also Goniewicz, ML, et al., *Levels of selected carcinogens and toxicants in vapour from electronic cigarettes*, Tobacco Control 23(2):133-9 (March 6, 2013); see also Williams, M, et al., *Metal and Silicate Particles Including Nanoparticles Are Present in Electronic Cigarette Cartomizer Fluid and Aerosol*, PlosOne, 8(3) (March 2013).

15 Eaton, *supra* note 10 at 5-31.

16 *Supra* note 2.

17 Eaton, *supra* note 10.

18 Office of the Surgeon General, *The Health Consequences of Smoking: 50 Years of Progress: A Report of the Surgeon General*, Centers for Disease Control and Prevention, Office on Smoking and Health (2014) <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html>; See also Office of the Surgeon General, *Electronic Nicotine Delivery Systems: Key Facts*, Centers for Disease Control and Prevention, Office on Smoking and Health, (2015) <http://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts2015.pdf>.

19 Office of the Surgeon General, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General*, Centers for Disease Control and Prevention, Office on Smoking and Health, 2010 <http://www.ncbi.nlm.nih.gov/books/NBK53017/>.

20 *Supra* note 2.

Mental Effects

Youth are at heightened risk of nicotine addiction. Additionally, negative long-term impacts affecting our youth include impaired memory and reduced attention span.²¹ Decision-making, and impulse-control brain functions are not yet fully developed during adolescence causing young adults to take more risks with their health and safety, namely use of nicotine in addition to other drugs. Long-lasting effects to the adolescent brain include nicotine addiction, mood disorders, and permanent lowering of impulse control. Nicotine also changes the way synapses are formed, which can harm the parts of the brain that control attention and learning.²²

Potential Health Effects Still Being Studied

To date, no one knows the long-term effects of vaping and e-cigarette use, yet researchers continue to investigate emerging evidence of adverse effects on lung and cardiovascular health, which involves regular inhalation of nicotine, glycerin or some other solvent, and other additives.²³ In October 2019, the first published study linking e-cigarettes and cancer, found that mice exposed to e-cigarette aerosol for an extended period developed carcinomas of the lungs and abnormal bladder cell growth.²⁴

Researchers also have found that some flavors are potentially more toxic than others, specifically exposure to increased cinnamon flavoring caused significant cell death compared to other flavors. To further raise concerns about toxicity of e-cigarettes, carcinogens have been identified in popular flavors.²⁵

Research regarding the impact of e-cigarettes on cardiovascular health suggests negative effects on resting heart rate, blood pressure, and the cells that line the blood vessels.²⁶ The U.S. Food and Drug Administration (FDA) is investigating whether a direct relationship exists between the use of e-cigarettes and seizure risk or other neurological symptoms. Additionally, the Centers for Disease Control and Prevention, FDA, and state and local health departments continue to investigate a multistate outbreak of severe lung injury associated with e-cigarette or vaping product use.²⁷

21 Nicolas Chadhi et al., *Understanding the Implications of the “Vaping Epidemic” Among Adolescents and Young Adults: A Call for Action*, J. Subst. Abuse 40(1): 7-10 (2019).

22 *Supra* note 9.

23 *Supra* note 13.

24 *Supra* note 4.

25 *Supra* note 4.

26 *Id.*

27 *Id.*

Criminal Consequences Related to Vaping in Texas

In addition to public health concerns, certain individuals can face criminal consequences for mere possession of an e-cigarette also known as a vape pen. In 2019, the Texas Legislature passed a law titled the *Possession, Purchase, Consumption, or Receipt of Cigarettes, E-cigarettes, or Tobacco Products by Minors Prohibited*.²⁸ This law changed the minimum age from 18 to 21 for an individual to possess, purchase, consume, or accept a cigarette, e-cigarette, or tobacco product.

Important to note, law enforcement may articulate facts of either direct or “constructive” possession when the appropriate situations present themselves. Meaning, that an officer who believes that a minor had custody, management, or control over the e-cigarette device, but did not own it or have it directly on his or her person, could still face a citation for violating this offense. In practice, this issue often arises when groups of minors inside a car, are pulled over, and a vape pen is found. Examples of common locations where law enforcement officers find vape pens are on the floorboard or in the center console of the vehicle. If no one claims possession, an officer may choose to cite each individual in the car under a constructive possession theory, given the evidence available.

Misdemeanor Consequences

A citation for possession of an e-cigarette or vape pen is a Class C misdemeanor and can result in a fine of up to \$100.²⁹ For more information, review Section 161.252 of the Texas Health and Safety Code for both the applicable law and defenses available.³⁰ Upon conviction of this offense, a minor does have a right to have the offense expunged on or after his or her 21st birthday with payment of a \$30 fee.³¹

Felony Consequences

If an illegal substance is found in a vape pen, the criminal consequences can enhance rapidly. Unlike a single marijuana joint, which would traditionally fall under a Class B misdemeanor punishment range, vape pens utilize cartridges, which can contain THC oil. THC oil falls under a Penalty Group 2 controlled substance in Texas. The smallest usable quantity of less than one gram results in a state jail felony classification. A state jail felony is punishable by 180 days to two years in a state jail facility and a fine up to \$10,000. This

28 S.B. 21, 86th Legislature, Section 14.

29 Tex. Health & Safety Code §161.252(d).

30 Tex. Health & Safety Code §161.252(a).

31 Tex. Health & Safety Code §161.252(e).

means that if an individual is in possession of even one cartridge with some usable quantity of THC oil, he or she is likely to face a penalty in the felony range. If an individual is in possession of multiple cartridges, the penalties can increase dramatically based on the overall weight. The range is as follows:

- One gram or more but less than four grams: Third-degree felony, with a penalty range of 2 to 10 years confinement in the Institutional Division of the Texas Department of Corrections and up to a \$10,000 fine.
- Four grams or more but less than 400 grams: Second-degree felony, with a penalty range of 2 to 20 years confinement in the Institutional Division of the Texas Department of Corrections and up to a \$10,000 fine.
- 400 Grams or More: First-degree felony, with a penalty range between 5 years and up to life in the Institutional Division of the Texas Department of Corrections prison and a fine up to \$50,000.³²

A felony charge, arrest, or conviction can present considerable consequences such as difficulties with gaining admittance to college, eligibility for federal student loans, possessing a firearm, future job opportunities, or securing housing. If the individual involved is not a U.S. citizen, the experience can cause even greater harm and, depending on the status of the individual, may result in deportation.

³² Tex. Health & Safety Code §481.116.

Consequences of Vaping to Education in Texas

According to the Texas Education Agency, more than 330,000 middle and high school students reported vaping in 2018, representing 13% of all Texas students in grades 6-12.³³ Overall, youth use of vaping has more than quadrupled from 3% in 2012 to 13% in 2018.³⁴

Disciplinary Actions

As a result of increased usage by young people, incidents involving e-cigarettes in schools have continued to climb. During the 2015-2016 school year, the Texas Education Agency reports there were 5,770 discipline incidents where students were caught with tobacco in their e-cigarettes and 674 recorded incidents of students with a felony-controlled substance (illegal drugs) in their e-cigarettes.³⁵ By the 2018-2019 school year, the numbers had increased to almost 20,000 incidents of students with tobacco in their e-cigarettes and 1,600 incidents of students with some illegal substance in their e-cigarettes.³⁶

As the vaping trend grew, Texas school districts, empowered by recent legislation, aggressively responded in order to prevent the spread of e-cigarette use by students and discourage vaping in schools. By state law, public school boards must prohibit smoking, using, or possessing “e-cigarettes or tobacco products at a school-related or school-sanctioned activity on or off school property.”³⁷ This prohibition extends to anyone and everyone at school functions, not just the students.³⁸ The same statute requires that “school personnel enforce the policies on school property.”³⁹ Related regulations to these statutes prohibit the use of e-cigarettes or vapor products at school and before- or after-school programs, including on the premises or playground, in transportation vehicles, and during field trips.⁴⁰ Likewise, the use of e-cigarettes is prohibited at childcare homes and centers and residential childcare facilities, including on playgrounds, in vehicles, and during off-site field trips.⁴¹

33 Sarah Doolittle, *Anti-vaping campaign targets student health*, Four Points News, (January 3, 2021) <https://www.fourpointsnews.com/2020/08/11/anti-vaping-campaign-targets-student-health/>.

34 Miner P. Marchbanks III, Shannon Pearison, Colin Baker, Stacy Rhodes & Aaron Williams, *Texas Youth Tobacco Survey* The Public Policy Research Institute, (Texas A&M University 2018).

35 Doolittle, *Supra* note 33.

36 *Id.*

37 Tex. Educ. Code § 38.006(b)(1)-(2).

38 *Id.*

39 Tex. Educ. Code § 38.006(b)(3).

40 40 Tex. Admin. Code § 744.2603(d) (2020).

41 40 Tex. Admin. Code §§ 746.3703(d); 747.3503(d); 748.1661 (2020).

While simple in theory, school districts are still seeking the best approach in enforcement of these prohibitions. In general, a student can be subject to disciplinary consequences if he or she is caught using or possessing a vaping device as determined by the school district's policies. These consequences can include but are not limited to in-school suspensions, out-of-school suspensions, placement in an alternative education program, and in severe cases, expulsion.

Prevention

Schools are in a unique position to minimize e-cigarette and tobacco use by children. Most of a child's waking hours are spent at school and much of the peer pressure they feel to try tobacco products occurs at school. At a time when adolescents are more susceptible to peer pressure, research has shown students are more inclined to try cigarettes around sixth and seventh grades. According to research, most adult smokers begin smoking regularly before they graduate from high school.⁴²

School districts have an obligation to warn students and parents about vaping. To reach parents, each school district's local school health advisory council is required by law to publish notice in the student handbook and on the district's website that the district has adopted and enforces policies and procedures that prescribe penalties for tobacco and e-cigarette use.⁴³ In addition, local school health advisory councils are charged with recommending instruction to prevent substance abuse.⁴⁴ Because "substance abuse" means a pattern of use of a substance, in which the person consumes the substance in amounts or with methods that are harmful to the person or others, a local council could also recommend student instruction about the risks of vaping.⁴⁵

More recently, school districts are developing education campaigns and rehabilitation programs in attempt to shift the focus toward prevention rather than punishment. One such prevention program, *CATCH My Breath* is an evidence-based program focused on youth e-cigarette and vaping prevention specific to grades 5-12.⁴⁶ After participating in this program, students "showed a significant increase in knowledge of the dangers of vaping and an increase in positive perceptions about choosing a vape-free lifestyle."⁴⁷

42 *Smoke-free & Tobacco-free Places—Schools*, Public Health Law Center at Mitchell Hamline School of Law, <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/smoke-free-tobacco-free-places/schools> (last visited January 17, 2021).

43 Tex. Educ. Code § 28.004(k)(3)(C).

44 Tex. Educ. Code § 28.004(c)(2)(E).

45 Tex. Educ. Code § 5.001(9).

46 Available at: <https://catchinfo.org/modules/e-cigarettes/>

47 *Id.*

Hazardous Waste Disposal

A less recognizable consequence arising from the youth vaping epidemic is that institutions, primarily schools, must deal with increasing amounts of dangerous waste and its disposal. This waste is comprised of e-cigarette devices, e-liquid containers, cartridges or “pods” that contain liquid nicotine, and devices that contain lithium-ion batteries and other e-waste. The additional burden placed on public institutions, both logistically and financially, to dispose of the hazardous waste, is overwhelming. Given that federal law treats nicotine as hazardous waste, public officials must meet with experts to determine the best way to comply with federal, state, and local hazardous waste requirements.⁴⁸

⁴⁸ This provision is implemented by states that meet federal requirements. More information is available on the EPA website: <https://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra>.

CIVIL LAWSUITS AGAINST E-CIGARETTE MANUFACTURERS

E-cigarette manufacturers now face thousands of lawsuits, filed in both federal and state courts throughout the country. The federal actions are so numerous that they have been consolidated into a multi-district litigation (“MDL”) in the U.S. District Court for the Northern District of California.⁴⁹ Similarly, cases filed in California state courts have been consolidated in Los Angeles County Superior Court.

Pending Lawsuits Against E-Cigarette Manufacturers

The actions against e-cigarette manufacturers include class actions, individual personal injury cases, and actions on behalf of government entities and school districts.

Class Actions

Injured consumers have joined together and filed class action lawsuits against leading e-cigarette manufacturers over marketing tactics aimed at young adults and failure to warn consumers of the long-term health consequences of using their product.⁵⁰ They also allege manufacturers defectively designed their products by failing to limit the amount of nicotine delivered to the user, resulting in products that poses risks of abuse, addiction, and, in youth, long-term neurological damage.⁵¹

Personal Injury

Personal injury lawsuits have also been brought for serious injuries, including addiction, cardiovascular disease, seizures, strokes, birth defects, and respiratory illnesses.

Government Entities & School Districts

Governmental entities have filed a host of lawsuits against e-cigarette companies, alleging the industry is preying on young people in its advertising in order to get a new generation addicted to nicotine, causing state and local governments to incur significant costs to undo the damages caused by the vaping crisis.⁵² More than 100 school districts also filed lawsuits alleging the epidemic challenges the academic achievements of students, causes schools to divert resources to combat vaping, affects

49 See *In re Juul Labs, Inc., Mktg., Sales Practices, and Products Liab. Litig.*, 396 F. Supp. 3d 1366, 1367 (U.S. Jud. Pan. Mult. Lit. 2019) (granting consolidation).

50 *Colgate v. Juul Labs, Inc.*, 402 F. Supp. 3d 728, 735 (N.D. Cal. 2019).

51 *Id.*

52 See, e.g., *People of the State of Illinois v. Juul Labs Inc.*, No. 2019CH14302 (Circuit Court of Cook County).

individual learning, and leads to a rise in student absences, which results in reduced funding.⁵³

Can I Bring or Join a Lawsuit, If I Have Been Injured by E-Cigarettes?

If you or a loved one is addicted or suffered injuries related to e-cigarettes, you may be entitled to file or join an existing lawsuit, especially if you or the loved one began using e-cigarette devices before the age of 18.

Many law firms provide free, no-obligation consultations to discuss your legal options with an experienced attorney. If you are considering pursuing a lawsuit, remember to save all evidence in your possession, including documentation of purchase history (i.e. receipts, bank statements, emails, etc.), medical and therapy records, and e-cigarette devices.

⁵³ See, e.g., *Los Angeles Unified School District v. Juul Labs Inc. et al.*, No. CIVDS1932301 (Cal. Sup. Ct.).

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