



Extinguish and

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ing the Risks Costs of Vaping

by | **Olga M. Thall** and **Diana M. Bardes**

As the debate over the health risks of e-cigarettes continues, what are the options for employers and plan sponsors that want to discourage vaping both in and out of the workplace?

Vapes have ridden a rollercoaster of popularity since their introduction in the mid-2000s. Also known as *e-cigarettes*, *vapes* are battery-operated devices that people use to aerosolize and then inhale a liquid solution, which typically contains nicotine, flavorings and other chemicals. Vapes were initially heralded as a potentially safer and healthier alternative to cigarettes because the aerosol does not contain the same harmful contaminants as tobacco smoke. But now these products are facing a backlash as consumers and regulators question how safe they really are.

The U.S. Centers for Disease Control and Prevention (CDC) reports that traditional cigarette smoking is responsible for more than 480,000 deaths per year in the United States, including more than 41,000 deaths resulting from secondhand smoke exposure.¹ By comparison, as of February 2020, CDC reported only 68 vaping deaths ever. Although we understand how deadly smoking can be, it is possible that the full public health toll of vaping—and its related costs—is not yet known. What we do know is how employers can prohibit vaping and how employee benefit plans can seek to discourage such use if they so choose.

The Arguments for and Against Vaping

When it comes to setting policy around vaping, not everyone agrees that vaping and vaping technology are bad

for public health and health care costs. Industry advocates of vaping argue that vaping both helps regular tobacco users quit nicotine use altogether and that it is a less dangerous alternative to regular smoking for those who make the switch.² Proponents of vaping in public spaces—like workplaces—further argue that vaping does not create the noxious odors and secondhand smoke that cigarettes do, so there is no reason to ban it. Within the technology field, entrepreneurs are trying to develop new vaping technologies that will progressively wean users off nicotine by tracking their dependence and sending them cartridges with less and less nicotine at a declining rate until they are down to zero.³ Much like nicotine gum and patches, vaping technologies designed for this purpose will likely need approval from the U.S. Food and Drug Administration before they can be classified as smoking-cessation treatments.

Nevertheless, the data is starting to show that vaping is not without health risks. In 2019, CDC began an investigation into a national outbreak of lung injuries associated with the use of vaping products. As of February 18, 2020, 68 people had died of vaping-related lung injury, and 2,807 individuals had been hospitalized.⁴ The median age of deceased patients was 49.5 years but ranged from 15 to 75 years of age.⁵ Moreover, emerging data suggests a general link between vaping and higher rates of chronic lung disease and asthma.⁶ A recent study also pointed to an increased risk of contracting COVID-19 among teenagers and young adults who vape compared with those who don't.⁷

takeaways

- Also known as *e-cigarettes*, *vapes* are battery-operated devices that people use to aerosolize and then inhale a liquid solution, which typically contains nicotine, plant oils, flavorings and other chemicals.
- It is possible that the full public health toll of vaping—and its related costs—is not yet known, but employers and benefit plan sponsors can enact policies to discourage vaping.
- A growing number of states have passed legislation or instituted regulations that prohibit vaping in indoor workplaces. Employers in states without such laws can institute a no-vaping policy as they would a no-smoking policy.
- Employers and plan sponsors that want to discourage vaping with their health and welfare plans and wellness programs can do so through premium surcharges or smoking and tobacco-cessation programs, as well as by encouraging participants to use existing tobacco-cessation and substance abuse health benefits.

Employer Vaping Policies

A growing number of states have passed legislation or instituted regulations that prohibit vaping in indoor workplaces. For example, Florida, New Mexico, South Dakota and Minnesota joined 12 other states when they enacted legislation in 2019 that expanded their workplace smoking bans to include vaping. Other states, such as Maryland and the District of Columbia, have promulgated regulations that define vape products as tobacco products, meaning they would be subject to the same workplace restrictions as traditional cigarettes.⁸ In these states, the legal landscape is clear for employers: They must abide by their state laws and regulations and cannot permit vaping in the workplace.

In states without a law or regulation prohibiting vaping in the workplace, an at-will employer can still institute such a policy. There is no right to vape at work, just as there is no

right to smoke at work. As such, an employer can simply enforce a no-vaping policy just as it would a no-smoking policy. Employers with unionized workplaces may be required to bargain with a union over a no-vaping policy. The National Labor Relations Board has previously found a no-smoking policy to be a mandatory subject of bargaining, and employers should consult with their counsel before implementing a no-vaping policy in a unionized workplace in a state with no clear law or regulation.⁹

Despite the fact that the law permits the majority of employers to institute a no-vaping policy, according to the International Foundation of Employee Benefits Plans *Workplace Wellness Trends: 2019 Survey Report*, only 45% of respondents reported having such a policy. This is not necessarily surprising, as only in recent years has the health community sounded the alarm on potential health issues resulting from vaping. Moreover, employers are likely weighing the recent concerning health information regarding vaping versus the benefits that were previously espoused, including serving as an aid to quit smoking. For some employers, there is no decision to be made at all. Employers that are located in a state where there is a workplace vaping ban should research and understand the contours of that law and enforce it. Employers located in states that have not yet addressed these issues should examine these issues and, if they decide that vaping should be discouraged, they can likely pursue such a policy, similar to a no-smoking policy.

Vaping and Higher Health Care Costs for Health and Welfare Plans

Health and welfare plans have long been interested in participant behavior that increases the likelihood of illnesses and the necessity of costly hospitalization and medical treatment. Thus, employer-sponsored health care plans certainly have an interest in the health effects of vaping. This is more true than ever now, given the potential links between vaping and contracting COVID-19, which could further strain the resources of health and welfare plans during the current pandemic. Although the official position of the World Health Organization (WHO) as of July 2, 2020 is that “[t]here is no evidence about the relationship between e-cigarette use and COVID-19,” WHO emphasizes that “[s]moking any kind of tobacco reduces lung capacity and increases the risk of many respiratory infections and can increase the severity of respiratory diseases,” like COVID-19.¹⁰

Employers and plan sponsors seeking to discourage vaping with their health and welfare benefits and wellness programs can approach it in the following ways.

Premium Surcharges

Applicable health plans can add a premium surcharge for tobacco users, including those who consume tobacco by vaping.

Under the Patient Protection and Affordable Care Act (ACA) and where allowed by state law, health insurers in individual or small group markets are allowed to vary premiums for each plan category based on four factors: (1) individual versus family coverage, (2) location, (3) age and (4) tobacco use.¹¹ While insurers are not allowed to discriminate or price their policies according to current health or pre-existing conditions, they are allowed to charge tobacco users up to 50% more than nonusers, depending on the state.¹² This practice, which is known as *tobacco rating* or a *tobacco surcharge* is allowed by most states, though a few states have notably prohibited the practice: California, Massachusetts, New Jersey, New York, Rhode Island, Vermont and Washington, D.C.¹³

Adopting a premium surcharge for tobacco users, including those who consume tobacco by vaping, is a good, but not perfect, fit for discouraging all types of vaping and the health risks associated with them. Recently, the U.S. Food and Drug Administration published regulations broadening the traditional definition of *tobacco* to include many alternative forms of tobacco, such as e-cigarettes, dissolvable tobacco and smokeless tobacco.¹⁴ However, vaping is not limited to tobacco- and nicotine-containing e-cigarettes. It can alternatively involve various combinations of tetrahydrocannabinol (THC) and cannabinoids (CBD) from the marijuana plant, other plant oils, flavorings and other chemicals.¹⁵ In some uses, vaping involves no tobacco or marijuana products at all.

Nicotine, which comes from tobacco, is known to increase blood pressure and spike adrenaline, which increases heart rate and the likelihood of having a heart attack.¹⁶ Of those patients hospitalized due to vaping-related lung injury as of January 14, 2020, 57% reported using nicotine-containing products and 14% reported exclusive use of nicotine-containing products.¹⁷ In contrast, vitamin E acetate, which is commonly used as an additive in THC-containing vaping products, may lead to separate health problems.¹⁸ While vi-

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tamin E acetate is commonly found in many foods, dietary supplements and cosmetic products without concern, research indicates that inhaling it may interfere with normal lung functioning.¹⁹ Of those patients hospitalized due to vaping-related lung injury as of January 14, 2020, 82% reported using THC-containing products and 33% reported exclusive use of THC-containing products.²⁰

Toxins that may be attributable to the fruit and other flavorings in vaping products may also be separately problematic. A study by the Harvard T.H. Chan School of Public Health in April 2019 examined 75 popular e-cigarette products and found that 27% contained traces of endotoxin, a microbial agent found on gram-negative bacteria, and that 81% contained traces of glucan, which is found in the cell walls of most fungi.²¹ The study reports that exposure to these microbial toxins has been associated with myriad health problems in humans, including asthma, reduced lung function and inflammation.²²

Programs for Smoking and Tobacco Cessation

Employer-sponsored wellness programs come in two flavors: health-contingent and participatory. In a *health-contingent* wellness program, a reward or penalty is based on an insured person's satisfaction or lack thereof with a particular health-related target, such as successful smoking cessation or a measurable attempt at smoking cessation. In these programs, plans and insurers can offer incentives of up to 30% of the total cost (both the employer and employee share) of self-only health coverage in exchange for an employee's compliance.²³ The cap is increased to 30% of the cost of family coverage if spouses and dependents are eligible to participate in the program and to 50% of the total cost for programs

that are designed to prevent or reduce tobacco use.²⁴ Within this type of program, a group plan could also institute as a penalty a surcharge of up to 50% of premiums for tobacco use or offer a reward of waiving such a surcharge, if allowed by applicable state law in conjunction with ACA.²⁵

In a *participatory* wellness program, the reward is based on participation alone, and participation must be made available to all similarly situated individuals, regardless of health status. An example of this type of program is rewarding an employee for participation in an online class about vaping, even if the employee does not ultimately quit vaping.²⁶ In a participatory wellness program, there is no specific cap on incentives, but employers should make sure to understand the potential tax implications for the employee and employer.

Both types of wellness programs have the potential to educate participants about the health risks of vaping and encourage cessation. The benefit of using either type of program for this purpose is that it need not be restricted to only tobacco- and nicotine-related vaping, so there is an opportunity to address the full diversity of types of vaping and any unique health risks each may pose. Programs also can be designed for teen and adolescent dependents, who are vulnerable to developing new vaping habits and who are often marketed to by vaping vendors. Research reported by the U.S. Preventive Services Task Force shows that from 2011 to 2019, current e-cigarette use increased from 1.5% to 27.5% among high school students.²⁷

Encourage Use of Existing Tobacco-Cessation and Substance Abuse Health Benefits

Plans also can encourage employees and their dependents to use health benefits already in place for smoking cessation and substance abuse. ACA defines treatment of substance use disorders as an essential health benefit that plans and insurers must cover.²⁸ ACA also requires applicable health plans and insurers to cover preventive services that have an A or B rating in the current recommendations of the U.S. Preventive Services Task Force.²⁹ Currently, that includes a recommendation that clinicians ask all adults about tobacco use, advise them to stop using tobacco, and provide behavioral interventions and approved pharmacotherapy for cessation to adults who use tobacco.³⁰

Another recommendation is for primary care clinicians to provide interventions, such as education or brief counseling, to prevent the initiation of tobacco use among school-

aged children and adolescents.³¹ These recommendations were made, at least in part, based on the health risks associated with both e-cigarettes and nontobacco vaping, such as injuries from vitamin E acetate.³² The smoking cessation and substance abuse benefits that plans already cover can provide means to promote the cessation of both tobacco-based and THC-based vaping.

Conclusion

As more information about the potential health risks of vaping emerges, employers and health plan sponsors may want to consider implementing workplace policies and health plan provisions to discourage employees and plan participants from vaping. Such policies may help plans avoid increased costs associated with tobacco use. **■**

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