

# Engaging Interested Parties to Advance Public Health Policy: Utah Department of Health's E-Cigarette Sales Restriction Regulation

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## Collaborating to Reduce Tobacco and Nicotine Use in Utah

To further its work to reduce tobacco and nicotine use among Utah residents, the Utah Department of Health has cultivated strong relationships with community organizations within the state. Leaders from the department's Tobacco Prevention and Control Program helped foster these connections by engaging the Department of Health's executive director in critical outreach and education activities related to youth electronic cigarette use. Additionally, the governor is supportive of policies to reduce e-cigarette use or vaping among Utah youth, which has been beneficial to this work.

The Utah Department of Health (DOH) is also part of [Utah Tobacco Free Alliance](#) (UTFA), which brings together public health departments, clinicians, nonprofits, and individuals committed to reducing tobacco and nicotine exposure and use in the state. UTFA partner organizations include the American Cancer Society Cancer Action Network, American Heart Association, Pediatricians Against Secondhand Smoke, and the Urban Indian Center, along with well-resourced residents, including one resident who used their personal wealth to advocate for strong tobacco and nicotine control legislation.

Each coalition member has different constraints on their efforts to create or influence policy. Some nonprofit organizations' policy priorities may be established by their national leadership, providing little latitude for a state affiliate to address state-specific policy needs. Other organizations may be limited by an organizational resolution establishing the contours of the policy positions the organization will support. DOH consults with the governor's office to establish its policy priorities during the state legislative session.

Addressing youth nicotine and e-cigarette use is a policy focus for UTFA. DOH has worked together with local public health agencies, UTFA, and others over several years to appropriately encourage legislators to take action to limit e-cigarette use in Utah by adopting e-cigarette sales restrictions. These include requiring tobacco retailers to only sell lower nicotine containing e-cigarettes and limiting the sale of most flavored e-cigarettes to age-restricted retail tobacco specialty businesses.

## Establishing the Department of Health's Legal Authority to Regulate E-Cigarette Products

### *Initial Efforts: 2015-2019*

Leveraging the expertise of its Tobacco Prevention and Control Program staff and legislative liaison, DOH began working with state legislators to authorize the department to have regulatory authority to restrict retail sales of e-cigarette products sold in Utah. In 2015, Utah enacted [HB 415](#), which authorized the DOH to draft an administrative rule to regulate labeling, nicotine content, packaging, and product quality for non-manufacturer e-cigarette substances (e-liquids or open systems).

In 2019, Utah legislators introduced a bipartisan bill ([HB 274](#)) that would have limited the sale of flavored e-cigarette products to age-restricted retail tobacco specialty stores. Although this bill was unsuccessful, an outbreak of e-cigarette or vaping product use-associated lung injury (EVALI) later that

year influenced DOH's decision to issue an [emergency rule](#) restricting the sale of flavored e-cigarette products to age-restricted retail tobacco specialty businesses under the department's broader rulemaking authority.

Retailers of flavored vape products opposed the emergency rule, and a Utah court granted a [temporary restraining order](#) preventing the flavor restriction part of the rule from taking effect. However, the emergency rule and court order continued to require tobacco retailers selling e-cigarettes to post mandatory warning signs for 120 days alerting customers that "vaping unregulated THC is dangerous to your health." The court found that the DOH was justified in issuing an emergency rule to prevent illegal THC vaping products but did not have emergency rulemaking authority to regulate flavored electronic cigarette products. The department declined to appeal the court order, allowing the emergency rule to lapse at the end of January 2020.

#### *Further Efforts: 2019-2021*

In summer 2019, in preparation for the upcoming Utah General Session, DOH was invited to participate in a bipartisan e-cigarette workgroup established by state House and Senate leadership to address the Utah vaping epidemic in different ways. During the 2020 General Session, a bi-partisan group introduced bill ([HB 118](#)) restricting the sale of flavored e-cigarette products to age-restricted retail tobacco specialty businesses. The bill also included authorizing DOH to draft an administrative rule to regulate manufacturer sealed e-cigarette substances (closed system cartridges/pods, excluding disposable vape products).

During the 2020 General Session, legislators determined to incorporate the language from HB 118 in another bill ([HB 23](#)) that expanded DOH's regulatory authority to include manufacturer sealed e-cigarette substances (closed system cartridges/pods, excluding disposable vape products). The bill also included elements that loosened tobacco control, such as measures to expand the existing law limiting local government's ability to regulate tobacco at the point of sale, invalidating certain local health department regulations aimed at further restricting tobacco product use.

In the final week of the 2020 legislative session, HB 23 underwent several revisions as legislators continued to engage with interested parties, from grassroots organizations to tobacco and e-cigarette industry representatives. Seeing the overall public health benefit of HB 23, the DOH appreciated the final version of the bill that passed both chambers and was signed into law in March 2020. HB 23's passing gave DOH specific authority to draft an administrative rule regulating manufacturer sealed e-cigarette substances (closed system cartridges/pods, excluding disposable vape products) beginning July 1, 2020.

Identifying this discrepancy that the administrative rule exempted disposable vape products, the department actively engaged lawmakers to extend rulemaking authority to include closed prefilled e-cigarettes or disposables. This authority was granted with the passage of [SB 1003](#) during the First Special Session in May 2021. This bill also gave DOH greater legal protection by enabling the department to draft the administrative rule as a sales restriction and not a product standard regulation. DOH anticipates that this policy shift will make it more likely for the administrative rule to withstand a legal challenge from e-cigarette manufacturers or retailers.

#### **Engaging Interested Parties in the Rulemaking Process**

Between developing the administrative rule regulating open system e-liquids in 2015 and participating in the passing of HB 23 in 2020, DOH engaged many interested parties in the rulemaking process—

including e-cigarette retailers, manufacturers, and public health coalitions and community partners—and developed a list of their names, affiliations, and contact information.

HB 23 directed DOH to engage with local health departments and gather public input on a proposed rule establishing labeling, nicotine content, packaging, and product quality standards for manufacturer sealed e-cigarette substances in accordance with the [Utah Administrative Rulemaking Act](#). Current tobacco prevention staff met with former tobacco prevention and control staff who still work for the department in other capacities to learn from their colleagues' institutional knowledge regarding the 2015 rulemaking process.

Following the pre-established blueprint and legal requirements, DOH established an advisory committee to help amend the existing administrative rule to include requirements on manufacturer sealed e-cigarette substances. In forming the advisory committee, DOH ensured equal representation of viewpoints to have a balance of public health and industry voices participating in the process. DOH held five advisory committee meetings over the summer and fall of 2020, with DOH staff serving as neutral facilitators. Advisory committee discussions culminated in the release of the first version of the proposed rule amendment in November 2020.

Subsequently, DOH held three virtual public hearings on four different proposed rule amendments. The final adopted rule, prohibits retailers from selling a manufacturer sealed electronic cigarette product (including disposable vape products) containing a nicotine concentration of either 3% by weight per container or equal to 36 mg/mL concentration of nicotine, went into effect on Sept. 9, 2021.

### **Considerations for States and Territories Considering Similar Policies**

Support from the state and territorial health official and governor's office can be very helpful when working with the state or territorial legislature to pass effective and comprehensive tobacco and nicotine control regulations. To gain this support, state health agency tobacco control staff should:

- Spend time educating state and territorial health officials about the issue and proposed policies available to reduce tobacco use.
- Build trust between tobacco control program staff and leadership.
- Facilitate or participate in community groups, especially those aimed at reducing tobacco and nicotine use among youth.

When provided the opportunity to testify on a bill, tobacco control staff should:

- Consider inviting subject matter experts from the tobacco control program to speak on the issue.
- Develop a process to equally engage interested parties of diverse views when drafting an initial policy or regulation.
- Actively listen to all parties involved and incorporate their feedback when feasible.