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Time for an update

As vaping becomes more common, lawyers and employers must take a hard look at policies



By **Tatiana Walk-Morris**
Chicago Lawyer correspondent

As of October 2018, the Centers for Disease Control and Prevention have confirmed 37 deaths from e-cigarettes, more commonly known as vaping.

A pair of these deaths occurred in Illinois.

Additionally, there have been 1,888 confirmed or

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probable lung injuries from vaping, the agency announced in a statement.

Though regulators and researchers are examining a possible link between vitamin E acetate, THC and vaping products, authorities remain unsure of the exact culprit. As the CDC points out on its website, various substances found within e-cigarette products could be causing what the health organization calls EVALI, an acronym for e-cigarette or vaping-associated lung illnesses.

As state and federal authorities rush to understand the cause of vaping lung injuries, multiple states, including Michigan, Montana and New York, have banned e-cigarettes. Here, in Illinois, the Senate passed a bill in late October that would ban e-cigarette use in public areas.

As regulators look harder at the vaping lung injury epidemic, personal injury, medical and labor lawyers are watching how state and, possibly, federal regulation would impact vapers, medical organizations and workplaces.

The fallout

As the epidemic grows nationally, health-care facilities and their counsel will have to pay close attention to regulatory agencies such as the CDC, the Food and Drug Administration and Department of Homeland Security who release guidance that overlaps with clinical decision-making, said Wendy Rubas, general counsel and chief compliance officer of VillageMD, a primary care practice in the Loop. Reflecting on how regulatory agencies worked together to address the opioid crisis, she added that some medical organizations will perform similarly.

But unlike doctors who prescribed opioids to their patients, physicians are not as likely to directly prescribe vaping products to their patients, she said. Until recently, the CDC promoted vaping as a safe alternative to smoking, she said.

While regulators and health-care professionals are still investigating the cause of vaping-related illnesses and deaths, early reports suggest that products containing vitamin E acetate could be a culprit, said Neville Bilimoria, a partner at Duane Morris' health law practice group and the cannabis law group.

As of Dec. 5, the CDC indicated on its website that e-cigarettes have "the potential to benefit adult smokers who are not pregnant if used as a complete substitute for regular cigarettes and other smoked tobacco products," but also said that vaping products weren't safe for youths, young adults, pregnant women or adults who already consume tobacco.

Rubas added she's unaware of how many doctors perceived vaping as a safe alternative to traditional smoking and thus prescribed vaping to their patients, but they'll need to stop now if they are, she said.

She advised fellow health-care lawyers to keep abreast of vaping illnesses and distribute developments to physicians. Attorneys should make sure their medical facility is compliant with local and state reporting requirements, so that these illnesses can be tracked, she added.

"These things, just like so many things in the law, they unfold," Rubas said. "When there's interagency cooperation like that, one thing you can be sure of is not everything is known

and ... there's another shoe that will drop."

Jacob Plattenberger, an attorney with TorHoerman Law, had previously represented flavoring manufacturing workers who had become sick from flavoring chemicals. He first heard about the chemicals associated with vaping products in 2013 as they entered the market and "found it almost unbelievable that ... somebody would put these in a product intended to be inhaled by a human being."

Last August, TorHoerman Law filed a lawsuit on behalf of a 22-year-old victim who, according to court documents filed in the U.S. District Court for the Southern District of Illinois, allegedly suffered multiple seizures and had to undergo three spinal taps as well as other medical testing to determine the cause of the seizures after becoming addicted to the popular e-cigarette brand Juul. Following court filings, he remains "severely addicted to nicotine, and this addiction and sequelae from the seizures will burden him the remainder of his life."

When Plattenberger spoke with *Chicago Lawyer* in November, he said his firm hadn't yet faced the Juul defense team in court, nor had the discovery process begun. Plattenberger said he received inquiries from parents of children under the age of 18, but most of the inquiries are regarding victims ages 18 to 30.

For personal-injury attorneys looking to represent victims in this practice area, Plattenberger recommends lawyers do their homework, adding that defendants will likely hire the best lawyers they can considering that there's a great deal of money at stake.

"If they banned all e-cigarettes tomorrow, that doesn't mean that no one is going to get sick after tomorrow," Plattenberger said. "There's a latency period ... Sometimes it can take months, sometimes it can take years. There are people who are sick right now and don't even know it yet."

Will vaping affect the workplace?

Labor and employment attorneys told *Chicago Lawyer* that employers are looking to update their workplace vaping policies, partially in response to Illinois cannabis legalization on Jan. 1.

Employers aren't treating vaping any differently than tobacco or other substances, said Margo Wolf O'Donnell, partner and co-chair of the labor and employment practice group at Benesch Law. Vaping, like traditional smoking, is coming under scrutiny in the media for potentially adverse health effects and employers don't want to appear as though they are promoting the use of vaping, she said. O'Donnell added that allowing vaping could run contradictory to employers' existing workplace wellness programs.

"If employers haven't looked into it by the new year, they need to look into it immediately after January 1," O'Donnell said. "If they're not updated, there could be issues with liability and also they want to make sure their [rules] are up-to-date with the realities of the workplace now."

Industries such as transportation, health care, manufacturing and other sectors that are "safety-sensitive" are particularly prone to vaping policy changes, because those employers seek to reduce harm, said Stephanie Dodge Gournis, partner at Drinker Biddle & Reath. She added that the National Safety Council in west suburban Itasca released its own guidelines regarding cannabis in the workplace. The council acknowledges that employers who ban cannabis use have been hit with lawsuits.

“I think that’s going to be the next frontier in the work environment that employers and employees have to address once our new law goes into effect January 1,” Gournis said. “If you are having a drug test come back positive, that is not necessarily going to indicate that there was use at work or impairment at work, but there was use at some point in time.”

Given that Illinois has legalized cannabis but has not introduced a statewide vaping ban, determining whether employees are impaired due to on-the-job cannabis use, vaping or other types of substances which can be inhaled would allow employers to precisely enforce vaping policies, Gournis said.

Illinois employers need to be mindful of the Illinois Right to Privacy in the Workplace Act, which prevents employers from firing workers for vaping during nonworking hours, O’Donnell said. This means employers can only craft policies prohibiting workers from using cannabis on the job but not restrict what they do outside of work, she said.

“Employers are going to be questioning ... what kind of policies are you going to enforce?” Gournis said. “Does it at some point impact your ability to recruit either — because you’re drug testing new hires and there’s going to be an increase in people not passing a drug test? You’re not going to get highly coveted applicants because you’re viewed as being an antiquated employer that doesn’t have policies that comport with modern times?”

As employers introduce new vaping policies, they will need to ensure their rules do not discriminate against employees or applicants who are lawfully using cannabis or other products and make accommodations for circumstances such as using medical cannabis products, Gournis said. She added that she rarely sees such claims.

Failure to explicitly spell out workplace vaping policies could expose employers to litigation if they, for example, take action against an employee of a protected class, because the worker could allege the company only took action against an individual because of their race, religion or some other diverse group, Gournis said.

If the workplace is unionized, employees also need to make sure that their union contract doesn’t prevent an employer from making changes to the workplace policies without worker approval, Gournis added. She recalled that, prior to the passage of the Clean Air Act and similar regulations, employers who wanted to prohibit smoking at work were met with fierce opposition.

Illinois hasn’t introduced a statewide vaping ban, but Chicago already has vaping as part of its clean air ordinance, and therefore, companies are largely not treating it differently than smoking, Gournis said.

E-cigarette bans could likely take of two approaches: Either prevent those producing vaping products from marketing to children or penalize companies found to have manufactured products associated with vaping-related illnesses and deaths, said Bryna Dahlin, a partner at Benesch Law. Dahlin added such laws could address both issues if the language is broad enough.

Coverage and care

As regulators and researchers work to understand the causes behind the vaping-related lung injuries, personal-injury and health-care attorneys are waiting to see how insurance companies will handle the vaping crisis.

On the epidemic's health-care side, Bilimoria said he is unaware of health insurance providers that have denied coverage of vaping-related illness claims, but it's not possible for a health insurer to deny coverage on the basis of patients participating in an illegal act.

Meanwhile, Rubas said physicians could face a malpractice claim for misdiagnosing patients suffering from a vaping-related illness. It's possible to mistake a vaping illness for another ailment, because doctors may not associate symptoms, such as nausea, with vaping, she said. Given that misdiagnosis is among the most common cause to file a malpractice claim, litigating such a claim is not only expensive but devastating to a doctor's career, she said.

"If we go see a physician, we expect them to figure out what it is; it's not always realistic," Rubas said. "We want to avoid patient injury. I think a patient that goes to an emergency room or goes to visit their doctor and has these symptoms and gets sent home and ends up expiring, I think we will see claims [like this]."

There have been some lawsuits filed in state courts against manufacturers that produced THC-infused vaping products, but consumers who got sick from black market THC-infused vaping products may not have legal recourse, said Seth Goldberg, Duane Morris' Philadelphia-based partner and group leader for its cannabis industry practice.

So far, state-compliant THC vaping manufacturers do not appear to be using substances that are contributing to the injuries making headlines, he said.

"Regulating the product is better than having it be relegated to the black market where there are no controls," Goldberg said. "The people who are buying it from state-controlled cultivators, processors and dispensaries are not having the problem."

If any legally operating cannabis companies are found liable for lung illnesses and deaths, covering the costs could be even more expensive if they're uninsured, attorneys told *Chicago Lawyer*.

Both Dahlin and Goldberg said insurance companies have charged high premiums for coverage or been reluctant to cover cannabis companies at all, because the substance remains illegal from federal law enforcement. In fact, Goldberg said insurance providers may rely on any available exceptions that would allow them to reject a claim on the basis of cannabis being illegal on the federal level.

Given the challenge of finding liability insurance, cannabis companies that work with third-party ingredients, hardware or other supplies should incorporate an indemnification clause into their contracts to safeguard against legal fees stemming from product malfunctions or consumer harm, Dahlin said. As a matter of best practice, they also should pay close attention to their product ingredients and hardware, she said.

"Another argument for why these products should be legal and highly, highly regulated [is that] we do have a highly regulated system here in Illinois and manufacturers in general pay close attention to the ingredients that they're using," Dahlin said. "It's important for everybody involved in the industry to know and understand what exactly is it in all of your products, so that you can make sure they're [as] safe as possible."

