

MASSACHUSETTS' FLAVORED TOBACCO PRODUCTS POLICY

A Case Study



In 2019, Massachusetts became the first state in the nation to pass a statewide restriction on the sale of menthol and other flavored commercial tobacco¹ and e-cigarette products.²

The sweeping legislation, which took effect in 2020, prohibits the sale (and not the possession of) flavored tobacco products by every establishment other than certain licensed smoking bars for consumption on site only within the state.³ The Massachusetts ban came on the heels of a cluster of vaping-related lung injuries both in the state and throughout the nation. While the landmark policy has served as a guide for other states pursuing flavored tobacco product control initiatives, it has also been widely criticized for its perceived economic impact.



Background and Laying the Groundwork for Action

In 2017, before the flavor ban was implemented, 13.7 percent of adult Massachusetts residents smoked.⁴ This rate, however, was even higher for Massachusetts residents of color, with 15.7 percent of Black adults and 18.3 percent of Hispanic adults smoking regularly.⁵ In the same year, 3.3 percent of adults reported using e-cigarettes, though it was found that e-cigarette usage was highly skewed toward young people who smoke with 7.8 percent of adults aged 18-24 reporting regular e-cigarette use within the state.⁶ A similar trend was observed in Massachusetts high school youth. Over 20 percent of youth reported using e-cigarette products and 6.4 percent reported smoking cigarettes.⁷

Months before the flavor ban passed, Massachusetts Governor Charlie Baker declared a public health emergency in response to the outbreak of severe lung disease resulting from vaping product use both within the state and beyond.⁸ At the time the public health emergency was declared, the Centers for Disease Control and Prevention had confirmed 530 cases of lung injury within 38 states and the Massachusetts Department of Public Health reported being notified of 61 potential cases within state borders.⁹ Highlighting that flavored vaping products are particularly enticing to youth and that use of e-cigarettes among Massachusetts high schoolers was six times higher than use among adult residents, Governor Baker called for a four-month statewide ban on the sale of flavored and non-flavored vaping products in both retail stores and online.¹⁰ The emergency ban, which took effect at the end of September 2019, applied to all vaping products, including tobacco and marijuana, and was to continue through January 25, 2020.¹¹

While the developing vaping health crisis certainly set the stage for major tobacco policy change in the state, tobacco control advocates also played a role in urging Massachusetts to restrict menthol and flavored products. A number of organizational stakeholders, including the Campaign for Tobacco Free Kids, Health Resources in Action, Tobacco Free Mass., the African American Tobacco Control Leadership Council, and many other organizations (both national, state and local) banded together to create the Fight All Flavors campaign.¹² The campaign emphasized that for generations, tobacco companies have targeted menthol tobacco products towards youth, Black communities, and other communities of color.¹³ As a result of this marketing strategy, menthol cigarettes, which are easier to smoke and harder to quit, are often what hook the next wave of tobacco users.¹⁴ Using its social justice-oriented strategy, the Fight All Flavors campaign helped educate and mobilize partners around the state, and particularly Black, Latinx, and LGBTQ+ communities, to support the statewide menthol and flavor ban.¹⁵ Campaign-trained youth and adult community members spoke at press conferences, reached out to media outlets, and encouraged legislators and the governor to take action on the flavored tobacco problem.¹⁶



Massachusetts' Flavor Ban

The Massachusetts flavor ban, also known as An Act Modernizing Tobacco Control, was signed into law in November of 2019.¹⁷ In December of that year, the state's Public Health Council approved the new regulations imposed by the law, an action that marked the official end to the governor's previous emergency ban on the sale of tobacco and vape products that was due to lapse in January.¹⁸

Effective immediately, the law restricted the sale of flavored nicotine vaping products and non-flavored nicotine products with a nicotine concentration of 35 milligrams per milliliter or higher to only licensed, adult-only retail tobacco stores and smoking bars and only allowed consumption on-site in smoking bars.¹⁹ Beginning June 1, 2020, the law restricted the sale of flavored combustible cigarettes and other tobacco products, including menthol, to licensed smoking bars for on-site consumption only.²⁰ Also in June 2020, a 75 percent excise tax on the wholesale cost of nicotine vaping products was enforced on top of Massachusetts' 6.25 percent sales tax.²¹

Celebrating a Victory

Massachusetts' menthol and flavor ban made history as the first statewide restriction of flavored tobacco products and was a huge victory for tobacco control advocates.²² To celebrate this critical achievement, forty public health and social justice groups collaborated to place

a full-page advertisement in the Boston Globe newspaper to thank the state for passing the landmark legislation.²³ The ad highlighted many of the organizational partners that contributed to this historic win against Big Tobacco and it emphasized that this measure would serve to protect the state's youth and populations of color.²⁴

Implementation

Because Massachusetts tobacco retailers were already subject to restrictions on the sale of vaping products following the governor's emergency order, the vaping-related provisions of the flavor ban law went into effect immediately. Before the portion of the law impacting combustible cigarettes and other tobacco products took effect, however, a public comment period was held.²⁵ Responding to comments made during this period, the Public Health Council voted to incorporate several changes to the new tobacco regulations, effective March 6, 2020.²⁶ Some of these changes included adding the phrase "regardless of nicotine content" to the definition of "tobacco product," specifying that locations that are permitted to sell flavored e-cigarette products may *only* do so for on-site consumption, and including a specific acknowledgement that the legislation does not preempt, or prevent, local authorities from adopting non-conflicting rules.²⁷

The final regulation laid out specific implementation requirements regarding signage (including health warnings, age restrictions, and cessation resources), advertising limitations, penalties for non-compliance, and enforcement authority.²⁸ Tobacco retailers who are found to be in violation of Massachusetts' tobacco laws may be subject to fines up to \$5,000, the temporary prohibition of the sale of tobacco products on their premises, or both.²⁹

Epilogue

In 2020, the year in which the Massachusetts flavor ban took effect, a study found that 11.1 percent of Massachusetts adults smoked.³⁰ This number is both 4 percent fewer than the 2020 national average and is 2 percent fewer than the number of Massachusetts adults who reported smoking prior to the implementation of the ban.³¹ Because Massachusetts' tobacco legislation is so recent, other updated statistics are not currently available. Several studies, however, have looked to evaluate the impact of the flavor ban within the state. One such study, published by the *Journal of the American Medical Association (JAMA)*, found that Massachusetts' comprehensive flavor ban was associated with a statistically significant decrease in state-level menthol and all cigarette sales.³² The study, however, did find that nonflavored cigarette sales increased after the ban, suggesting that some may be replacing menthol products with flavorless options.³³

A Renewal of Opposition

In 2022, two years after the passage of Massachusetts flavor ban, the law is facing renewed opposition. Opponents of the ban argue that although cigarette sales are down within the state, tobacco-product use remains consistent and that people who use tobacco products are simply sourcing their products from neighboring states as a means of skirting the ban and the associated excise taxes.³⁴ However, most neighboring states did not see increases in overall tobacco sales. New Hampshire saw an initial increase in menthol sales, but this increase was not sustained.³⁵ Some argue that this outsourcing deprives Massachusetts of tax revenue from tobacco sales while leaving the state to continue covering tobacco-related healthcare expenses.³⁶ It was estimated that Massachusetts would see between \$93-\$120 million in revenue loss in 2021 because of the ban, while the number of cigarette tax stamps sold throughout the Northeastern region of the U.S. held steady.³⁷

These arguments against the menthol and flavored tobacco ban have resulted in a legislative attempt to repeal the portion of the Act Modernizing Tobacco Control that prohibits the sale of menthol cigarettes while leaving the ban on flavored e-cigarette products in place.³⁸ The attempted partial repeal, “An Act to Repeal the State Menthol Ban,” has been proposed in the current (192nd) General Court (see [H.2406](#) and [S.1433](#)).³⁹ These bills were sent to “study” in February 2022, which means they were dismissed without further discussion.

Others Following Suit

Despite criticism of the law, including from within the Massachusetts legislature, the state’s comprehensive flavor ban remains in place and has inspired other states to pursue similar action. In 2020, New Jersey, New York, and Rhode Island enacted statewide bans on flavored e-cigarettes, including menthol, but did not extend the regulation to menthol cigarettes or other combustible products.⁴⁰ Also in 2020, California became the second state in the nation to pass a comprehensive menthol and flavored tobacco restriction; however, the law was promptly put on hold following a proposed referendum.⁴¹ The referendum qualified for the ballot in early 2021 and will be voted on during the state’s General Elections in November 2022.⁴²

Massachusetts remains a leader within tobacco control and its landmark passage and implementation of a comprehensive, statewide menthol and flavored tobacco product restriction serves as a helpful guide for states seeking to follow in its footsteps.

Lessons Learned

As the first U.S. state to pass a statewide menthol and flavor ban, Massachusetts' process represents a useful learning opportunity. Below are a few lessons learned from Massachusetts' experience:

- **Capitalize on opportunities that present themselves.** Governor Baker's emergency order that temporarily prohibited the sale of vaping products served as a steppingstone for the larger, statewide flavor ban. Build on engagement and efforts that already exist in the community. Make the most out of instances when the public's attention is drawn to tobacco control efforts.
- **Take time to celebrate victories.** It is important to celebrate victories, even small ones, when they occur. Acknowledge the contributions of partner organizations, large and small. Maintain the focus of work on social justice outcomes.
- **Acknowledge unintended impacts.** Consider how a flavor restriction may impact retailers, state tax revenue sums, or other interested parties. Be prepared to justify the restriction in the face of such criticism and question the criticism when justified. Where appropriate, engage and educate oppositional stakeholders.
- **Empower your neighbor.** Make an active effort to call for similar tobacco control efforts from neighboring cities, counties, or states. Share resources and offer guidance or assistance when possible. Make clear that any given locality is benefited when those surrounding it are engaging in similar tobacco control efforts.

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcml.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
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- 3 MASS. GEN. LAWS ch. 270, § 28, <https://www.mass.gov/info-details/mass-general-laws-c270-ss-28>.
- 4 *Tobacco Statistics in Massachusetts and How Tobacco Use Impacts Your Health*, [Mass.gov](https://www.mass.gov/info-details/tobacco-statistics-in-massachusetts-and-how-tobacco-use-impacts-your-health), <https://www.mass.gov/info-details/tobacco-statistics-in-massachusetts-and-how-tobacco-use-impacts-your-health> (last visited Jun. 22, 2022).
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- 7 *Id.*
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- 10 *Id.*
- 11 *Id.*
- 12 FIGHT ALL FLAVORS, <https://fightallflavors.org/> (last visited Jun. 23, 2022).
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- 14 Laura Bach, *Impact of Menthol Cigarettes on Youth Smoking Initiation and Health Disparities*, CAMPAIGN FOR TOBACCO-FREE KIDS (May 16, 2022), <https://www.tobaccofreekids.org/assets/factsheets/0390.pdf>.
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- 16 McCabe, *supra* note 15.
- 17 2019 *Tobacco Control Law*, [Mass.gov](https://www.mass.gov/guides/2019-tobacco-control-law#-new-tobacco-control-law-), <https://www.mass.gov/guides/2019-tobacco-control-law#-new-tobacco-control-law-> (last visited Jun. 27, 2022).
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- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 Matthew L. Myers, *Today Massachusetts Makes History as the First State to End the Sale of All Flavored Tobacco Products, Including Menthol Cigarettes*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jun. 1, 2020), https://www.tobaccofreekids.org/press-releases/2020_06_01_massachusetts-flavor-ban.
- 23 *Id.*

24 *Id.*

25 *Public Health Council Approves Regulations Restricting Access to Vaping and Tobacco Products*, [Mass.gov](https://www.mass.gov/news/public-health-council-approves-regulations-restricting-access-to-vaping-and-tobacco-products) (Dec. 11, 2019), <https://www.mass.gov/news/public-health-council-approves-regulations-restricting-access-to-vaping-and-tobacco-products>.

26 *Id.*

27 Letter from Mass. Dep't of Public Health on 105 CMR 655 to Local Public Health Colleagues (Feb. 19, 2020), <https://www.mass.gov/doc/boh-informational-letter-105-cmr-665>.

28 105 CMR 665.00 (Jun. 12, 2020), <https://www.mass.gov/regulations/105-CMR-66500-minimum-standards-for-retail-sale-of-tobacco-and-electronic-nicotine-delivery-systems>.

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31 See *Tobacco Use in Massachusetts 2020*, TRUTH INITIATIVE, <https://truthinitiative.org/research-resources/smoking-region/tobacco-use-massachusetts-2020> (last visited Jun. 29, 2022).

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37 *Massachusetts Flavored Tobacco Ban Has Severe Impact on Tax Revenue*, *supra* note 34.

38 S.B. 1433, 192nd Gen. Ct. (Mass. 2021); H.B. 2406, 192nd Gen. Ct. (Mass. 2021).

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