

# Forbes

## Goodbye Illegal Indiana Vaping Law

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Some much-needed sanity was just injected into the debate over Indiana's nonsensical, anti-competitive vaping law . This is a major win for vapers everywhere and a blow to state-enforced monopolies.

In a preliminary injunction ruling issued on August 19 by the U.S. District Court for the Southern District of Indiana, Judge Richard Young decided that Indiana must allow the sale of e-liquid that is not approved by the state's Alcohol Tobacco Commission. This is the latest major development in a long line of changes that have brought turmoil to Indiana's e-liquid market.

Controversy first arose in May 2015, when Indiana Republican governor Mike Pence signed House Bill 1432. The bill was intended to "protect public health and safety" in the absence of federal regulations concerning e-liquid products. As it turned out, federal regulations of all kinds of e-liquid products were finalized in May 2016.

The Indiana law was set to go into effect on July 1, though full implementation was delayed at the last minute for another three months. In addition to regulations on manufacturers, the law stipulated that in order to secure the five-year permit required to sell their products in Indiana, e-liquid manufacturers must work with an independent security firm that inspects their products.

The requirement to work with a security company is the first of its kind, and the standards placed on approved security companies have nothing to do with producing safe e-liquid. Instead, the law was meant to create a local monopoly.

The only security company that met all of the law's requirements was Mulhaupt's, based (unsurprisingly!) in Lafayette, Indiana. As an investigation by the *Indianapolis Business Journal* revealed, there is reason to believe that the law was specifically written so that only one Indiana-based firm could comply.

The requirements include the security company having:

- An employee who has been a certified locksmith by the Associated Locksmiths of America for at least one year.

- An employee who has worked at the firm for at least one year and holds an Architectural Hardware Consultant certification from the Door and Hardware Institute.
- An employee who has worked at the firm for at least a year and holds a Rolling Steel Fire Door Technician certification from the International Door Association or the Institute of Door Dealer Education and Accreditation.
- One year of experience operating a security monitoring station with ownership control and use of a redundant offsite backup security monitoring station.
- One year of experience operating a facility with authority to modify commercial hollow metal doors, frames, and borrowed lights.

If you are asking yourself what any of these requirements have to do with properly inspecting and securing e-liquid, you are not alone. According to the court's ruling, even the state of Indiana has "no position on how a rolling steel fire door protects against tampering or adulteration of e-liquid during the manufacturing process."

The Architectural Hardware Consultant requirement is equally indefensible. Though one justification is that, as the court stated, "Mulhaupt's vice president, Michael Gibson, serves as the president-elect of the Door and Hardware Institute, which is the certifying organization identified in the statute for the Architectural Hardware Consultant certification." This is a clear example of the power of special interests .

The stipulation that workers with the proper certifications must be at the same company for the previous year stops security companies besides Mulhaupt's from hiring new employees or training existing employees to meet Indiana's requirements and approve e-liquid manufacturers. Again, the Indiana law's security company requirements had nothing to do with safety and everything to do with propping up a local company.

The e-liquid industry is decentralized and is primarily comprised of small, local producers. Many mix their own e-liquid, meaning they are counted as manufacturers under Indiana's law. Out of the thousands of e-liquid companies nationwide, Maulhaupt's decided to contract with only six—even though some of these companies never produced e-liquid in the past. The companies are Cloudtown of Cleves, Ohio; DB Vapes of Indianapolis, Indiana; DNM Ventures of Largo, Florida; Licenses E-Liquid Manufacturer of Fort Wayne, Indiana; VapeING of Lafayette, Indiana; and Vapor Bank of Evansville, Indiana.

Last month, I called 90 Indiana vape shops to see how the law was affecting their business. Every vape shop owner who I was able to talk to knew about the law that will stop them from making e-liquid and carrying the products that their customers want. Common responses to the law included moving their shops over the state border to Michigan or Ohio, laying off workers, and fully closing down.

This is why GoodCat, an e-liquid manufacturer located in Naples, Florida that was rejected when it tried to secure a permit from Indiana, challenged the law for favoring local firms and violating interstate commerce protections.

The six firms approved to work with Maulhaupt's are trying to keep out other qualified e-liquid manufacturers. All of them joined the case on Indiana's side as intervenors, as their economic interests will be harmed if Indiana's law is overturned. This shows how anti-competitive laws create special interests that will use any available tools to protect their profits and keep out competition .

Judge Young ruled against the approved manufacturers and the state of Indiana because the Commerce Clause in the U.S. Constitution prohibits states from placing unfair burdens on interstate commerce. In Commerce Clause cases, courts evaluate the overall effect of laws on intrastate and local economic activity in order to determine the constitutionality of a law. As the court found in this case, Indiana's unreasonably burdensome security regulation had a considerable effect on Indiana's vaping market.

As the ruling stated, "Prior to the Act taking effect, 164 of the 177 businesses (more than 90 percent) selling e-liquids in Indiana were out-of-state businesses... Fast-forward to present, and two-thirds of the permittees producing e-liquids for sale in Indiana have Indiana addresses." This is a major change in the market that the court rightly took notice of.

The injunction only applies to GoodCat, but other e-liquid manufacturers will probably be able to successfully petition to continue selling their products in Indiana. As Randal Meyer (no relation), a legal associate at the Cato Institute, told me, "Other out-of-state e-liquid manufacturers who were excluded by the market because of the same security regulations likely would be able to succeed in challenging enforcement of that rule against them."

Additionally, Meyer thinks that there is a strong chance the law will be permanently overturned, as he said, "GoodCat had to demonstrate a likelihood of success on the final merits in the case, so the ruling granting the injunction is a good sign for them in the pending litigation."

Indiana's unique e-liquid law goes far beyond promoting public safety. Giving one company the government-granted power to determine which products can come to market is clearly an anti-competitive decision that will limit customer choice and the growth of small businesses.

While Judge Young's ruling is a positive sign that the law might be permanently overturned, irreparable damage has already been done to Indiana vape shops and e-liquid producers. The public should not stand for illegal "laws" that limit consumer choice and violate interstate commerce protections