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**HOUSE BILL 1873**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Representatives Pollet, Harris, Cody, Robinson, Tarleton, Frame, Bergquist, Ryu, Kilduff, Macri, Stonier, Dolan, Orwall, Doglio, Senn, Stanford, Appleton, Callan, Wylie, Peterson, Valdez, Walen, Leavitt, Kloba, and Lovick

AN ACT Relating to the taxation of vapor products as tobacco products; amending RCW 70.345.090 and 82.26.020; reenacting and amending RCW 82.26.010; adding new sections to chapter 82.26 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  (1) The legislature finds that the nicotine in vapor products such as electronic cigarettes, electronic devices, and vape pens is almost exclusively processed or derived from tobacco and that the products are intended for human consumption in the oral or nasal cavity or absorption into the human body. Therefore, the legislature finds that these vapor products, including electronic cigarettes and other products are "tobacco products" as defined in RCW 82.26.010. Although these products have been documented as being interchangeably used by consumers with cigarettes or other tobacco products, and there is nicotine, which is usually produced or derived from tobacco in the products intended for human consumption and absorption into the human body, the manufacturers, wholesalers, and retailers have not been paying the tax levied on tobacco products pursuant to chapter 82.26 RCW on these products. The legislature intends to clarify that the tax on tobacco products applies to electronic cigarettes, electronic devices, vape pens, and other vaping products, despite the fact that no tobacco or cigarette tax has been previously paid on these products to date. Recognition of the application of this tax going forward will resolve claims of nonpayment of tobacco product taxes pursuant to chapter 82.26 RCW. The legislature believes that vapor products containing nicotine have always been subject to taxation pursuant to chapter 82.26 RCW, and passage of this act may not be interpreted as any indication otherwise.

(2) The legislature finds that electronic vapor product devices that heat liquids for inhalation are also frequently used for inhalation of THC and cannabis derivative products and other drugs. The legislature finds that there is extensive documentation and reporting of vapor products being used by minors in public schools, and that school officials have no readily available means to determine if the liquids being vaporized and inhaled are free of nicotine or illegal substances. The legislature finds that the centers for disease control has documented that as the price of electronic cigarettes and other vapor products has dropped, consumption has dramatically increased. The legislature finds that prices for electronic cigarette and vapor products are substantially lower than cigarettes, often as low as a fifth or a third of the comparable price. The legislature finds that there is strong evidence that low prices increase youth access to vapor products, as with cigarettes. Therefore, the legislature intends to tax these products to both decrease youth access and to provide funding for nicotine and other drug use prevention, education, enforcement, and research; foundational public health; and public health professional education and training purposes.

**Sec.**  RCW 70.345.090 and 2016 sp.s. c 38 s 17 are each amended to read as follows:

(1) No person may conduct a delivery sale or otherwise ship or transport, or cause to be shipped or transported, any vapor product ordered or purchased by mail or through the internet to any person unless such seller has a valid delivery sale license as required under this chapter.

(2) No person may conduct a delivery sale or otherwise ship or transport, or cause to be shipped or transported, any vapor product ordered or purchased by mail or through the internet to any person under the minimum age required for the legal sale of vapor products as provided under RCW 70.345.140.

(3) A delivery sale licensee must provide notice on its mail order or internet sales forms of the minimum age required for the legal sale of vapor products in Washington state as provided by RCW 70.345.140.

(4) A delivery sale licensee must not accept a purchase or order from any person without first obtaining the full name, birth date, and residential address of that person and verifying this information through an independently operated third-party database or aggregate of databases, which includes data from government sources, that are regularly used by government and businesses for the purpose of age and identity verification and authentication.

(5) A delivery sale licensee must accept payment only through a credit or debit card issued in the purchaser's own name. The licensee must verify that the card is issued to the same person identified through identity and age verification procedures in subsection (4) of this section.

(6) Before a delivery sale licensee delivers an initial purchase to any person, the licensee must verify the identity and delivery address of the purchaser by mailing or shipping to the purchaser a notice of sale and certification form confirming that the addressee is in fact the person placing the order. The purchaser must return the signed certification form to the licensee before the initial shipment of product. Certification forms are not required for repeat customers. In the alternative, before a seller delivers an initial purchase to any person, the seller must first obtain from the prospective customer an electronic certification, such as by email, that includes a declaration that, at a minimum, the prospective customer is over the minimum age required for the legal sale of a vapor product, and the credit or debit card used for payment has been issued in the purchaser's name.

(7) A delivery sale licensee must include on shipping documents a clear and conspicuous statement which includes, at a minimum, that the package contains vapor products, Washington law prohibits sales to those under the minimum age established by this chapter, and violations may result in sanctions to both the licensee and the purchaser.

(8) A delivery sale licensee must collect the tax imposed under RCW 82.26.020 on sales of vaporized tobacco products as defined in RCW 82.26.010(21)(b).

(9) A person who knowingly violates this section is guilty of a class C felony, except that the maximum fine that may be imposed is five thousand dollars.

((~~(9)~~)) (10) In addition to or in lieu of any other civil or criminal remedy provided by law, a person who has violated this section is subject to a civil penalty of up to five thousand dollars for each violation. The attorney general, acting in the name of the state, may seek recovery of the penalty in a civil action in superior court.

((~~(10)~~)) (11) The attorney general may seek an injunction in superior court to restrain a threatened or actual violation of this section and to compel compliance with this section.

((~~(11)~~)) (12) Any violation of this section is not reasonable in relation to the development and preservation of business and is an unfair and deceptive act or practice and an unfair method of competition in the conduct of trade or commerce in violation of RCW 19.86.020. Standing to bring an action to enforce RCW 19.86.020 for violation of this section lies solely with the attorney general. Remedies provided by chapter 19.86 RCW are cumulative and not exclusive.

((~~(12)~~)) (13)(a) In any action brought under this section, the state is entitled to recover, in addition to other relief, the costs of investigation, expert witness fees, costs of the action, and reasonable attorneys' fees.

(b) If a court determines that a person has violated this section, the court ((~~shall~~)) must order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the general fund.

((~~(13)~~)) (14) Unless otherwise expressly provided, the penalties or remedies, or both, under this section are in addition to any other penalties and remedies available under any other law of this state.

((~~(14)~~)) (15) A licensee who violates this section is subject to license suspension or revocation by the board.

((~~(15)~~)) (16) The board may adopt by rule additional requirements for mail or internet sales.

((~~(16)~~)) (17) The board must not adopt rules prohibiting internet sales.

NEW SECTION. **Sec.**  A new section is added to chapter 82.26 RCW to read as follows:

(1) The essential public health services account is created in the state treasury. In the 2019-2021 biennium, seventy-five percent of the moneys collected from the tax collected from RCW 82.26.010(21)(b) must be deposited into the account. Beginning in the 2021-2023 biennium and thereafter, sixty percent of the moneys collected from the tax collected from RCW 82.26.010(21)(b) must be deposited into the account. Moneys in the account may be spent only after appropriation to the department. The department of health must use the moneys in the account for each of the four following purposes:

(a) To fund foundational health services, with a minimum of twenty percent of the funds deposited into the account to be used for this purpose;

(b) To fund tobacco, vapor product, nicotine control and prevention, and other substance use prevention and education;

(c) At least ten percent of funds deposited must be used to support increased access and training of public health professionals at public health programs at accredited public institutions of higher education in Washington; and

(d) To fund enforcement by the state liquor and cannabis board of the provisions of this chapter to prevent sales of vapor products to minors and related provisions for control of marketing and product safety, provided that no more than 12.5 percent of the funds deposited into the account established by this section may be utilized and distributed by the department of health to the state liquor and cannabis board for these enforcement purposes.

(2) To determine the funding for foundational health services pursuant to subsection (1)(a) of this section, the department of health and representatives of local health jurisdictions must work together to:

(a) Arrive at a mutually acceptable allocation and distribution of funds from the account; and

(b) Determine the best accountability measures to ensure efficient and effective use of funds, emphasizing use of shared services when appropriate.

**Sec.**  RCW 82.26.010 and 2010 1st sp.s. c 22 s 4 are each reenacted and amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Actual price" means the total amount of consideration for which tobacco products are sold, valued in money, whether received in money or otherwise, including any charges by the seller necessary to complete the sale such as charges for delivery, freight, transportation, or handling.

(2) "Affiliated" means related in any way by virtue of any form or amount of common ownership, control, operation, or management.

(3) "Board" means the liquor ((~~control~~)) and cannabis board.

(4) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(5) "Cigar" means a roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient, if the roll has a wrapper made wholly or in greater part of tobacco. "Cigar" does not include a cigarette.

(6) "Cigarette" has the same meaning as in RCW 82.24.010.

(7) "Department" means the department of revenue.

(8) "Distributor" means (a) any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale, (b) any person who makes, manufactures, fabricates, or stores tobacco products in this state for sale in this state, (c) any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers or consumers in this state, to be sold by those retailers, (d) any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed.

(9) "Indian country" means the same as defined in chapter 82.24 RCW.

(10) "Little cigar" means a cigar that has a cellulose acetate integrated filter.

(11) "Manufacturer" means a person who manufactures and sells tobacco products.

(12) "Manufacturer's representative" means a person hired by a manufacturer to sell or distribute the manufacturer's tobacco products, and includes employees and independent contractors.

(13) "Moist snuff" means tobacco that is finely cut, ground, or powdered; is not for smoking; and is intended to be placed in the oral, but not the nasal, cavity.

(14) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(15) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale, including any vessel, vehicle, airplane, train, or vending machine.

(16) "Retail outlet" means each place of business from which tobacco products are sold to consumers.

(17) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(18)(a) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.

(b) The term "sale" includes a gift by a person engaged in the business of selling tobacco products, for advertising, promoting, or as a means of evading the provisions of this chapter.

(19)(a) "Taxable sales price" means:

(i) In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products;

(ii) In the case of a taxpayer that purchases tobacco products from an affiliated manufacturer, affiliated distributor, or other affiliated person, and that sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers, the actual price for which that taxpayer sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iii) In the case of a taxpayer that sells tobacco products only to affiliated distributors or affiliated retailers, the price, determined as nearly as possible according to the actual price, that other distributors sell similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iv) In the case of a taxpayer that is a manufacturer selling tobacco products directly to ultimate consumers, the actual price for which the taxpayer sells those tobacco products to ultimate consumers;

(v) In the case of a taxpayer that has acquired tobacco products under a sale as defined in subsection (18)(b) of this section, the price, determined as nearly as possible according to the actual price, that the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers; or

(vi) In any case where (a)(i) through (v) of this subsection do not apply, the price, determined as nearly as possible according to the actual price, that the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

(b) For purposes of (a)(i) and (ii) of this subsection only, "person" includes both persons as defined in subsection (14) of this section and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(c) The department may adopt rules regarding the determination of taxable sales price under this subsection.

(20) "Taxpayer" means a person liable for the tax imposed by this chapter.

(21)(a) "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, and any other product, regardless of form, that contains tobacco or contains nicotine and is intended for human consumption or placement in the oral or nasal cavity or absorption into the human body by any other means, but does not include cigarettes as defined in RCW 82.24.010.

(b) "Tobacco products" includes:

(i) Any product containing a solution or other consumable substance that contains tobacco or nicotine that employs a mechanical heating element, battery, or electronic circuit that can be used to produce vapor from the solution or other substance;

(ii) Any product that contains tobacco or nicotine that is in the form of a solid that is vaporized for inhalation. It also includes any flavored liquids intended for inhalation in vaporizing devices that the department determines the manufacturer or distributor intends to be inhaled in combination with either a tobacco, nicotine, or THC containing substance; and

(iii) Any hardware that comes preloaded with a vaporizable liquid intended for inhalation or can accept a preloaded liquid cartridge or cartridge with a solid substance intended to be vaporized for inhalation.

(c) "Tobacco products" does not include:

(i) Any product approved by the United States food and drug administration for sale as a tobacco cessation product, medical device, or for other therapeutic purposes when such product is marketed and sold solely for such an approved purpose;

(ii) Any product that will become an ingredient or component in a vapor product manufactured by a distributor. It also does not include any stand-alone hardware a consumer uses to vaporize a liquid or solid substance when the hardware is refilled from bulk liquid.

(22) "Unaffiliated distributor" means a distributor that is not affiliated with the manufacturer, distributor, or other person from whom the distributor has purchased tobacco products.

(23) "Unaffiliated retailer" means a retailer that is not affiliated with the manufacturer, distributor, or other person from whom the retailer has purchased tobacco products.

**Sec.**  RCW 82.26.020 and 2010 1st sp.s. c 22 s 5 are each amended to read as follows:

(1) There is levied and collected a tax upon the sale, handling, or distribution of all tobacco products in this state at the following rate:

(a) For cigars except little cigars, ninety-five percent of the taxable sales price of cigars, not to exceed sixty-five cents per cigar;

(b) For all tobacco products except those covered under separate provisions of this subsection, ninety-five percent of the taxable sales price;

(c) For moist snuff, as established in this subsection (1)(c) and computed on the net weight listed by the manufacturer:

(i) On each single unit consumer-sized can or package whose net weight is one and two-tenths ounces or less, a rate per single unit that is equal to the greater of 2.526 dollars or eighty-three and one-half percent of the cigarette tax under chapter 82.24 RCW multiplied by twenty; or

(ii) On each single unit consumer-sized can or package whose net weight is more than one and two-tenths ounces, a proportionate tax at the rate established in (c)(i) of this subsection (1) on each ounce or fractional part of an ounce; and

(d) For little cigars, an amount per cigar equal to the cigarette tax under chapter 82.24 RCW.

(2) Taxes under this section must be imposed at the time the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale, (b) makes, manufactures, fabricates, or stores tobacco products in this state for sale in this state, (c) ships or transports tobacco products to retailers in this state, to be sold by those retailers, or (d) handles for sale any tobacco products that are within this state but upon which tax has not been imposed.

(3) ((~~The~~)) (a) Except as provided in (b) of this subsection, moneys collected under this section must be deposited into the state general fund.

(b) Moneys collected under this section on products defined under RCW 82.26.010(21)(b) must be deposited into the essential public health services account created in section 3 of this act.

NEW SECTION. **Sec.**  A new section is added to chapter 82.26 RCW to read as follows:

The department may require testing of any products sold to determine if tobacco or nicotine is present in the product. If independent testing determines that a product has tobacco or nicotine when not advertised or sold as such, or if nicotine content was not disclosed, the tax due under RCW 82.26.020 may be applied retroactively on sales made of that product up to five years prior to the testing date.

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