
Commerce & Gaming Committee

HB 1345

Brief Description: Concerning the regulation of products sold to adults age 21 and over.

Sponsors: Representatives Pollet, Cody, Valdez, Orwall, Dolan, Ryu, Lovick, Callan and Frame.

Brief Summary of Bill

- Establishes a vapor product manufacturer's license, adds requirements for delivery sales of vapor products, modifies enforcement of vapor products laws, and grants agencies additional rulemaking authority.
- Modifies regulatory authority with respect to vapor products that may be injurious to human health or pose a significant risk to public health.
- Limits nicotine concentrations of vapor products, requires vapor product ingredient disclosures, and bans the sale of flavored vapor products.
- Authorizes local governments to limit the location of vapor product retailers near schools and youth-programs and activities, and repeals state preemption of local licensing and regulation of vapor products.
- Restructures the vapor product tax to be a 45 percent excise tax paid at retail by the customer, and imposes a 4.4 percent surcharge on manufacturers and distributors of vapor and tobacco products.
- Bans the sale of menthol-flavored cigarettes and tobacco products.

Hearing Date: 2/2/21

Staff: Peter Clodfelter (786-7127).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Vapor Products.

Vapor Products Generally. State law regulates the distribution, delivery, sale, and use of vapor products. "Vapor product" is defined to include any noncombustible product that may contain nicotine and that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor or aerosol from a solution or other substance. "Vapor product" does not include any product that is a marijuana product, a cigarette, or tobacco product. There is a vapor product retailer's license (\$175), a vapor product distributor's license (\$150), and a vapor product delivery sale license (\$250), issued by the Liquor and Cannabis Board (LCB).

Delivery Sales. Delivery sales of vapor products include orders and shipments made over the Internet or through mail to a consumer. A licensee may not accept a purchase or order without first obtaining the full name, birth date, and residential address of the person and verifying the information through an independently operated third-party database or aggregate of databases regularly used by government and business for age and identity verification and authentication. A delivery sale licensee must accept payment only through a credit or debit card issued in the purchaser's name.

Before a delivery sale licensee delivers an initial purchase to a 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. In the alternative, before a seller delivers an initial purchase to any person, the seller must obtain from the prospective customer an electronic certification that includes a declaration that, at a minimum, the prospective customer meets 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.

On shipping documents, a delivery sale licensee must include a clear and conspicuous statement including, at a minimum, that the package contains vapor products, Washington law prohibits sales to those under the minimum age, and violations may result in sanctions to both the licensee and the purchaser. A person who knowingly violates the delivery sale requirements is guilty of a class C felony, except the maximum fine that may be imposed is \$5,000. In addition to or in lieu of any other civil or criminal penalty provided by law, a person who violates delivery sale requirements is subject to a civil penalty of up to \$5,000 for each violation. The Attorney General may seek recover of the penalty in a civil action in superior court.

The Attorney General may also seek an injunction in superior court to restrain a threatened or actual violation of the delivery sale requirements and to compel compliance. A violation is also declared a violation of the Consumer Protection Act (CPA) and the Attorney General has standing to bring an enforcement action using the CPA. In any action brought to enforce delivery sale requirements, the state may recover, in addition to other relief, the costs of investigation, expert witness fees, costs of the action, and reasonable attorneys' fees. If a court determines there was a violation, the court 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. Licensees violating delivery sale requirements are also subject to license suspension or revocation by the LCB.

Penalties and Enforcement Related to Underage Purchases/Sales. A person who sells or gives vapor products to a person under age 21 is guilty of a gross misdemeanor. A retailer or delivery seller violating the prohibition, or other requirements in the vapor product law, is subject to a monetary penalty of \$200 for the first violation within a three-year window. A second violation within a three-year window is \$600. A third violation within a three-year window is \$2,000 and license suspension for six months. A fourth violation within a three-year window is \$3,000 and license suspension for 12 months. A fifth or subsequent violation within a three-year window results in license revocation with no possibility of reinstatement for a period of five years.

A peace officer or LCB enforcement officer who has reasonable grounds to believe a person observed by the officer purchasing, attempting to purchase, or in possession of vapor products is under age 18, may detain the person for a reasonable period of time and in a reasonable manner as necessary to determine the person's true identity and date of birth. Vapor products possessed by persons under age 18 are considered contraband and may be seized by a peace officer or LCB enforcement officer. A person under age 18 who purchases or attempts to purchase, possess, or obtain vapor products commits a class 3 civil infraction and must pay the fine (up to \$50 plus statutory assessments), participate in up to four hours of community service, or both. The court may also require participation in a smoking cessation program.

Injurious to Human Health/Risk to Public Health. Upon a determination by the Secretary of Health or a local health jurisdiction that a vapor product may be injurious to human health or poses a significant risk to public health, the LCB may consult with the Department of Health (DOH) and local county health jurisdictions to cause a vapor product substance or solution sample that was purchased or obtained from any vapor product licensee to be analyzed by an analyst appointed or designated by the LCB. If the analyzed vapor product contains an ingredient, substance, or solution present in quantities injurious to human health or posing a significant risk to public health, as determined by the Secretary of Health or a local health jurisdiction, the LCB may suspend the license of the retailer or delivery sale licensee unless the retailer or delivery sale licensee agrees to remove the product from sales. Additionally, if upon a finding from the Secretary of Health or local health jurisdiction that the vapor product poses an injurious risk to public health or significant public health risk, the retailer or delivery sale licensee does not remove the product from sale, the Secretary of Health or local health officer may file for an injunction in superior court prohibiting the sale or distribution of that specific vapor product substance or solution.

Preemption. Local governments may not adopt or enforce requirements for the licensure and regulation of vapor product promotions and sales at retail. No local government may impose fees or license requirements on retail outlets for possessing or selling vapor products, other than general business taxes or license fees not primarily levied on vapor products. Additionally, no local government may regulate the use of vapor products in outdoor public places, unless the

public place is an area where children congregate, such as schools, playgrounds, and parks. Local governments may regulate the use of vapor products in indoor public places.

Vapor Products Tax. A variable milliliter vapor products tax is levied and collected at the time a distributor brings vapor products into the state for sale, makes, fabricates, or stores vapor products in the state for sale in the state, ships or transports vapor products to retailers or consumers in the state, or handles for sale any vapor products that are within the state but upon which the tax has not been imposed. Accessible containers of solution greater than 5 milliliters are taxed at 9 cents per milliliter. All other vapor products are taxed at 27 cents per milliliter. The tax must be collected from the consumer where the tax was not paid by the distributor on the vapor products. Moneys from the tax are deposited 50 percent into the Andy Hill Cancer Research Endowment Fund Match Transfer Account and 50 percent into the Foundational Public Health Services Account.

Summary of Bill:

Vapor Product Manufacturers. A vapor product manufacturer's license is established, for a fee of \$250 per year. Vapor product retailers, distributors, and delivery sellers may only sell vapor products obtained from a licensed manufacturer or a licensed distributor. Existing references to a manufacturer's representative are removed from law.

Delivery Sales. The Liquor and Cannabis Board (LCB) is authorized to establish an additional fee of \$250 for vapor product delivery sale licensees. Any such funds are dedicated for use by the LCB to hire staff for enforcement of laws and rules applicable to Internet and other delivery sales of vapor products, including with respect to sales to persons under age 21 and collection of the vapor product tax.

For closed-system nicotine containers, delivery sale licensees are limited to selling and delivering no more than 16 individual cartridges of vapor product to a customer per month. Modifications are made to the age-verification process for delivery sellers. If the licensee is unable to verify a person's age, then the licensee must have the person submit an age-verification kit including a signed attestation that they are 21 years of age or older and a copy of a valid form of government identification. If the person submits an age-verification kit and the licensee is still unable to verify the person is age 21 years or older, the licensee may not proceed with the transaction and may not allow the person to submit more than one age-verification kit.

Delivery sale licensees must also verify the billing address on the credit or debit card offered for payment matches the address in the database used for verification. The licensee must submit information to the credit card company so the words "vapor product" are printed on the purchaser's credit card statement. A delivery seller licensee must make a telephone call to the purchaser, after 5 p.m., confirming the order prior to shipment.

When a delivery sale licensee ships vapor products to a customer the vapor products must be delivered in a container that is conspicuously labeled with the words: "CONTAINS VAPOR

PRODUCTS: SIGNATURE OF PERSON 21 YEARS OF AGE OR OLDER REQUIRED FOR DELIVERY." Delivery may be made only to the purchaser's verified billing address on the credit or debit card used for payment. No delivery may be made to a post office box.

Upon the delivery of the vapor product to the purchaser's address, the licensee must obtain the signature of a person 21 years of age or older before completing the delivery. For purposes of enforcement of the delivery sale requirements, the acts of United States Postal Service and other common carriers when engaged in the business of transporting and delivering packages for others are not unlawful and are not subject to civil or criminal penalties. Monetary penalties imposed on delivery sellers and profits from violations must be deposited in the Foundational Public Health Services Account. It is specified the state may recover costs of enforcement actions by the LCB.

Enforcement Related to Underage Purchases/Sales. The authority of peace officers is removed with respect to detaining persons for purposes of determining their true identity and date of birth, when the officer has reasonable grounds to believe a person observed by the officer purchasing, attempting to purchase, or in possession of vapor products is under 18 years of age. The LCB's enforcement authority in this area is also modified, authority is extended to local health officers, and a reference to vapor products possessed by persons under age 18 being contraband is removed.

For the purpose of investigating the illegal sale of vapor products, a local health officer or enforcement officer of the LCB who has reasonable grounds to believe an illegal sale to a person under 21 years of age has occurred, may seize the vapor products believed to be sold illegally to a person under 21 years of age. Additionally, a local health officer or enforcement officer of the LCB who has reasonable grounds to believe a person observed by the officer purchasing, attempting to purchase, or in possession of vapor products is under 18 years of age, may detain such person for a reasonable period of time and in such a reasonable manner as is necessary to determine the person's true identity and date of birth. It is provided that the LCB may seize any vapor products sold, offered for sale, or possessed in violation of the law.

It is specified that the Attorney General has primary jurisdiction over the LCB's actions with respect to imposing monetary and licensing penalties on licensed vapor products businesses in violation of the law, and may seek recovery of penalties in a civil or criminal action in superior court before a local prosecutor declines to file an action.

Injurious to Human Health/Risk to Public Health. Upon a determination by the Secretary of Health or a local health jurisdiction that a vapor product, vapor product constituent, emitted constituent, or vapor product component may be injurious to human health or poses a significant risk to public health, the LCB may restrict the sale of any such vapor product or any vapor product containing such a constituent or component, or the LCB may require vapor product retailers to make a written point-of-sale warning disclosure to consumers with respect to such a vapor product, a type of vapor product, or such a vapor constituent or component, in a format, style, and manner determined by the Secretary of Health. Existing provisions are removed

related to the LCB causing a vapor substance or solution sample to be analyzed and the LCB or other entity then taking administrative or legal action in certain circumstances.

Nicotine Concentration Limits. A vapor product may not be sold or offered for sale in the state if the product has nicotine salts or other ingredients that result in nicotine concentrations that exceed any of the following comparative levels of nicotine: (1) 20 milligrams of nicotine per milliliter of liquid; (2) nicotine that is equivalent to 2 percent of the total volume of the liquid; or (3) 20,000 parts per million of nicotine in the liquid.

Ingredient Disclosure. Vapor product distributors and manufacturers who sell vapor products in Washington must submit under oath to the Department of Health (DOH) a complete list of all constituent substances and their amounts and sources in each vapor product offered for sale, distributed, or manufactured in Washington, including all additives, thickening agents, preservatives, compounds, nicotine content, and any other substance used in the production and processing of each vapor product. Disclosures must be completed for every vapor product constituent substance, regardless of whether a constituent substance is an original constituent present in each vapor product, emitted during the use of the product, or it is reasonably foreseeable it will be present in the vapor product during the product's expected presale shelf life, or will develop in a vapor product after purchase without any action taken by the consumer.

Constituent substance disclosures must be accompanied by a signed declaration under penalty of perjury certifying the completeness and accuracy of the information. No vapor product may be sold, offered for sale, distributed, or manufactured in Washington unless a constituent disclosure has been submitted to the Department of Health. The LCB and DOH may use constituent disclosures for the purposes of enforcement, investigation, research, and public information, and for any other matter intended to protect the public health.

Flavored Vapor Product Ban. A retailer, manufacturer, delivery seller, or distributor may not sell, offer for sale, or possess with the intent to sell or offer for sale flavored vapor products, or any product that they know or reasonably should know will be used with or in a vapor product to create a flavored vapor product. "Flavored vapor product" is defined as any vapor product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of a vapor product including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, or honey, or any candy, dessert, alcoholic beverage, herb, or spice.

Retailer Location Restrictions. A city, town, county, or local health jurisdiction may limit the location of licensed vapor product retailers within a certain perimeter of schools and youth-orientated programs and activities if the city, town, county, or local health jurisdiction determines that such restriction may reduce underage access and addiction.

Vapor Products Surcharge. Beginning with business activities occurring on or after July 1, 2021, a surcharge of 4.4 percent is imposed on manufacturers and distributors of vapor products in Washington.

Vapor Product Tax Restructure. Effective January 1, 2022, the variable milliliter tax imposed on vapor products distributors is replaced with a vapor product excise tax equivalent to 45 percent of the selling price on each retail sale of vapor products, paid by the customer at retail. Conforming changes are made to the current vapor product tax framework. A tax credit is created and made available to vapor product distributors with respect to vapor products in their possession on the effective date of the act, or returned to the distributor by a retailer, other purchaser, or consignee, on or after the effective date of the act, if tax on the vapor products tax was previously paid by the distributor to the state.

It is provided that a tax credit is not authorized for vapor products that are expired, destroyed, unsellable, or that are not held for sale by the distributor and intended to ultimately be sold by a licensee at retail. Provisions are included with respect to taxation of bundled transactions of vapor products and non-vapor products, as well as with respect to retail sales of vapor products by tribal retailers in accordance with a vapor product tax contract or tax agreement.

Agency Rulemaking Authority. A general grant of rulemaking authority is provided to the LCB and DOH to adopt rules deemed necessary or advisable for the purpose of carrying into the effect the provisions of the vapor product law according to their true intent or supplying any deficiency.

Preemption. The provisions in the vapor product law addressing preemption and the regulation of vapor products by local governments are repealed from law.

Cigarettes and Tobacco Products.

Menthol Ban. A person may not sell, offer for sale, or possess with the intent to sell or offer for sale any menthol-flavored cigarette or tobacco product. The LCB must enforce the prohibition and may suspend or revoke a license for a violation. The LCB may conduct random and unannounced inspections of a cigarette or tobacco retailer, wholesaler, or distributor, and may conduct the inspections with local law enforcement. Menthol-flavored cigarettes and tobacco products sold, offered for sale, or possessed in violation of the prohibition are subject to seizure and forfeiture by the LCB.

Tobacco Products Surcharge. Beginning with business activities occurring on or after July 1, 2021, a surcharge of 4.4 percent is imposed on manufacturers and distributors of tobacco products in Washington.

Miscellaneous Changes.

A redundant reference to an existing vapor product tax credit is repealed from law. State and federal savings clauses are included.

Appropriation: None.

Fiscal Note: Available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 19, relating to the new vapor and tobacco products surcharges, which takes effect July 1, 2021, and sections 20 through 26, relating to vapor products tax changes, which take effect January 1, 2022.