

HOUSE BILL REPORT

HB 1645

As Reported by House Committee On:
Commerce & Gaming

Title: An act relating to youth substance use prevention associated with tobacco and drug delivery e-cigarettes and vapor products.

Brief Description: Concerning youth substance use prevention associated with tobacco and drug delivery e-cigarettes and vapor products.

Sponsors: Representatives Pollet, Harris, Carlyle, Cody, Johnson, Tharinger, Robinson, Lytton, Kagi, Ryu, S. Hunt, Farrell, Moscoso, Riccelli, McBride and Jinkins; by request of Governor Inslee and Attorney General.

Brief History:

Committee Activity:

Commerce & Gaming: 3/16/15, 3/30/15 [DPS].

Brief Summary of Substitute Bill

- Creates a statutory framework for the regulation of commerce in vapor products, including provisions related to: (a) licensing; (b) product safety warnings and disclosures; (c) packaging requirements; (d) Internet sales; (e) and other provisions intended to prevent minors from having access to vapor products.
- Creates licensing requirements for vapor products distributors and retailers.
- Grants broad rule-making authority to the Liquor Control Board and the Department of Health regarding the regulation of commerce in vapor products.

HOUSE COMMITTEE ON COMMERCE & GAMING

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Hurst, Chair; Wylie, Vice Chair; Blake, Kirby and Van De Wege.

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

Minority Report: Do not pass. Signed by 4 members: Representatives Condotta, Ranking Minority Member; Holy, Assistant Ranking Minority Member; Scott and Vick.

Staff: Thamas Osborn (786-7129).

Background:

Overview: Vapor Products.

Under state law, the term "vapor product" is defined to mean a noncombustible, tobacco-derived product containing nicotine that employs a mechanical heating element, battery, or circuit, regardless of shape or size, that can be used to heat a liquid nicotine solution contained in cartridges. "Electronic cigarettes" (e-cigarettes) are a form of vapor product, and the terms are often used interchangeably. Vapor product cartridges generally include nicotine extracted from tobacco, glycerol, propylene glycol, and flavorings.

In 2014, the Legislature directed the Washington State Institute for Public Policy (WSIPP) to review research on the prevention of tobacco and vapor product use. Noting that vapor products were a relatively new phenomenon, the WSIPP concluded that there were no studies that met its research standards and observed that there was a general lack of scientific information regarding the health effects of vapor products. The WSIPP study also cites surveys indicating that the use of vapor products among adults increased from 1 percent in 2009 to over 6 percent in 2011 and among adolescents use rates increased from 3 percent to 7 percent between 2011 and 2012.

A study conducted by the Centers for Disease Control and Prevention (CDC) reported that in 2013 more than a quarter of a million youth who had never smoked a cigarette had used vapor products. The CDC noted that in 2011 this number was 79,000, which increased to more than 263,000 in 2013, thus reflecting a threefold increase in the number of minors using vapor products during this three-year period.

Federal Regulation of Vapor Products.

Vapor products are not currently subject to federal regulation or taxation. However, in April of 2014, the Food and Drug Administration (FDA) issued proposed regulations that would include coverage of vapor products under their authority to regulate tobacco products. The proposed rules include the following:

- prohibiting sales to persons under age 18;
- banning vending machine sales;
- mandating warning labels;
- prohibiting free samples; and
- requiring vapor product companies to register with the FDA to monitor compliance and quality.

The proposed rules have not yet been adopted.

State Regulation and Taxation of Vapor Products.

Washington state neither taxes nor regulates vapor products, except for the imposition of criminal penalties for the sale of vapor or tobacco products to a minor. Pursuant to statute, a person who sells cigars, cigarettes, tobacco, or vapor products to a person under the age of 18

is guilty of a gross misdemeanor. State law does not prohibit the use or possession of vapor products by minors, nor does it require that a retailer be licensed to sell vapor products.

State Regulation of Tobacco Products.

Cigarette and tobacco product distributors and retailers must obtain a license from the Liquor Control Board (LCB). The distributor license fee is \$650 and the retailer license fee is \$93, annually. The LCB has the authority to revoke or suspend the license of, or impose monetary sanctions upon, a retailer or distributor for noncompliance with regulatory and taxation requirements.

State Regulation of Access to Cigarettes and Tobacco Products by Minors.

The federal government requires states to enact and enforce laws prohibiting the sale and distribution of tobacco to minors. Under state law, a person who sells cigars, cigarettes, tobacco, or vapor products to a minor is guilty of a gross misdemeanor. A minor who purchases or possesses cigarettes or tobacco products commits a class 3 civil infraction, which may be penalized with a \$50 fine, up to four hours of community service, and participation in a smoking cessation program. "Minor" is defined as a person under the age of 18.

The LCB is authorized to enforce the laws governing minors' access to tobacco. The LCB has authority to suspend or revoke a retailer's license, impose a monetary penalty, or issue a cease and desist order if it finds that a license holder has violated laws governing minors' access to tobacco products. The sanctions available to the LCB vary, depending upon which statute has been violated and the number of prior violations.

A person holding a cigarette wholesaler or retailer license is required to prominently display a sign stating the prohibition of tobacco sales to minors. Tobacco products may not be sold through a device that mechanically dispenses the products unless: (1) the device is located in a place where minors are prohibited, or in a worksite where minors are not employed; and (2) the device is located not less than 10 feet from entrances and exits.

The offering of tobacco product samples to the public is prohibited. Coupons for tobacco products may only be used during an in-person transaction in a retail store. Generally, state law preempts local ordinances or regulations regarding commerce in tobacco products. Local governments are prohibited from enacting regulations pertaining to licensure and regulation of tobacco product promotions and retail sales. Local governments are also prohibited from regulating signage, vending machines, packaging, sampling, coupons, and the acquisition of tobacco products by minors.

School Policies Regarding Tobacco Products.

All public school districts are required to have a written policy prohibiting the use of all tobacco products on school property. Such policies must ensure that notice of the policy is provided to students and school personnel, require that signs be posted, establish sanctions for violators, and require that school district personnel enforce the prohibition.

Youth Tobacco Prevention Account.

There is a Youth Tobacco Prevention Account (Account) in the State Treasury that consists of funds derived from tobacco-related commercial licensing fees and monetary penalties. The

Department of Health (DOH) may use monies appropriated from the Account for implementation of the laws governing minors' access to tobacco. The DOH is required to enter into an agreement with the LCB to pay for costs incurred for enforcement, and the agreement must set standards of enforcement to reduce the extent to which tobacco products are available to persons under the age of 18.

Federal Poison Prevention Packaging Act.

Enacted in 1970, the federal Poison Prevention Packaging Act requires specified household substances to be packaged in child-resistant packaging. The packaging required by the federal act must be designed or constructed to be significantly difficult for children under 5 years of age to open within a reasonable time and not difficult for normal adults to use properly.

Summary of Substitute Bill:

Introduction.

The act creates a comprehensive regulatory scheme governing commerce in vapor products that is enforced by the LCB in consultation with the DOH. Although it focuses on the prevention of the acquisition and use of vapor products by minors, the act also: (a) creates licensing requirements for vapor products distributors and retailers; and (b) authorizes the LCB to adopt rules regulating labeling and advertising, as well as the chemical composition of the liquid contents of vapor products. The regulatory and licensing provisions in the act closely mirror existing statutory requirements applicable to commerce in cigarettes and other tobacco products.

Redefinition of Vapor Product.

"Vapor product" is redefined to mean any: (a) device that employs a battery or other mechanism to heat a solution or substance to produce a vapor or aerosol intended for inhalation; (b) cartridge or container of a solution or substance intended to be used with or in such a device or to refill such a device; or (c) solution or substance intended for use in such a device, including, but not limited to, concentrated nicotine. "Vapor product" includes any electronic cigarettes, electronic nicotine delivery systems, electronic cigars, electronic cigarillos, electronic pipes, vape pens, or similar products or devices, as well as any parts that can be used to build such products or devices.

Purchase and Possession of Vapor Products by Minors.

Persons under age 18 are prohibited from purchasing or possessing, or attempting to purchase or possess, vapor products. Violation of this prohibition is a class 3 civil infraction and may result in a fine, community service, and/or participation in a smoking cessation program.

School Policies Regarding Vapor Products.

All public school districts are required to have a written policy prohibiting the use of all vapor products on school property. Such policies must ensure that notice of the policy is provided to students and school personnel, require that signs stating the prohibition be posted, establish sanctions for violators, and require that school district personnel enforce the prohibition.

Liquor Control Board Licensing and Enforcement Authority.

Vapor products distributors and retailers must be licensed by the LCB. Applications for such licenses must be submitted to the state Business Licensing Service administered by the Department of Revenue (DOR). For distributors, the initial licensing application fee is \$650, as is the annual licensing renewal fee. For retailers, the initial licensing application fee is \$93, as is the annual licensing renewal fee.

The LCB's enforcement authority with respect to cigarette wholesalers and retailers is extended to cover the activities of vapor product distributors and retailers.

Vapor Product Packaging Requirements.

The retail packaging of nicotine cartridges and other substances intended for use in vapor products must conform with the child-resistant packaging standards established under the federal Poison Prevention Packaging Act. However, a substance contained in a cartridge that is prefilled and sealed by the manufacturer, and not intended to be opened by the consumer, is exempt from such packaging requirements.

Labeling and Advertisement of Vapor Products.

The LCB, in consultation with the DOH, must adopt rules addressing requirements regarding health and safety warnings and the disclosure of ingredients contained in vapor products that are advertised or offered for sale in this state. Such rule-making authority is subject to federal preemption if the federal government enacts laws or regulations pertaining to such labeling and advertising disclosures.

Regulation of Substances Contained in Vapor Products.

The LCB, in consultation with the DOH, is authorized to adopt rules:

- regulating the chemical composition of the liquids contained in vapor products; and
- prohibiting the sale of vapor products that contain or emit substances, other than nicotine, that pose a substantial threat to public health and safety.

Sale and Shipment of Vapor Products Ordered by Mail or Through the Internet.

Qualified domestic and out-of-state manufacturers, distributors, and retailers of vapor products may directly ship vapor products to retail customers who are at least 18 years of age, provided specified age verification and other procedures are followed.

General Regulations for Licensed Vapor Products Distributors and Retailers.

Licensed vapor products retailers and cigarette retailers are required to post signs stating that the sale of vapor and other tobacco products to minors is prohibited and that photo identification is required.

Vapor products may not be sold through a device that mechanically dispenses the products unless: (a) the device is located in a place where minors are prohibited, or in a worksite where minors are not employed; and (b) the device is located not less than 10 feet from entrances and exits.

The offering of vapor products samples to the public is prohibited. Coupons for vapor products may only be used during an in-person transaction in a retail store.

A retail licensee may allow customers to taste vapor products within the licensed premises, but only if the entry into the premises is restricted to persons 18 years of age or older.

Both vapor products and tobacco products retailers are required to display and store such products behind the counter, so that the products are not accessible to the public without the assistance of a store employee.

The sale of vapor products containing any substance that increases the absorption of nicotine is prohibited.

Sanctions for Violating Statutory Provisions Regarding Minors' Access to Vapor and Tobacco Products.

Vapor products retailers are made subject to the same sanctions and penalties applicable to noncompliant cigarette and tobacco product retailers. Accordingly, a retailer that violates specified statutory provisions pertaining to minors' access to vapor products may be subject to license suspension or revocation, or specified monetary penalties. The monetary penalties that can be imposed on tobacco products retailers are doubled, and such penalties are made applicable to noncompliant vapor product retailers. The time period established for monitoring the compliance of retailers for the purpose of determining the severity of available sanctions is increased from two to three years.

State Preemption and Vapor Products Regulation.

Political subdivisions are subject to state preemption with respect to vapor products regulations and may not impose additional regulations or restrictions on the sale, use, or promotion of vapor products.

Rule-Making Authority of the LCB and the DOH.

The LCB, in conjunction with the DOH, is granted broad authority to adopt the rules necessary to implement and enforce the provisions of the act.

Tobacco and Vapor Products Enforcement Account.

The act creates the Dedicated Tobacco and Vapor Products Enforcement Account in the State Treasury. Receipts from the monetary penalties imposed under chapter 70.155 RCW must be deposited into the account. Expenditures from the account must be used only for defraying the costs of activities and expenditures related to the regulation of vapor products, cigarettes, and other tobacco products.

Youth Tobacco and Vapor Products Prevention Account.

The Youth Tobacco Prevention Account is renamed the "Youth Tobacco and Vapor Products Prevention Account" and is revised to include funds derived from monetary penalties imposed under chapters 82.24 and 82.26 RCW.

Effective Date of the Act.

The act takes effect on October 1, 2015.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the original bill:

- eliminates the excise tax on vapor products and strikes all tax-related provisions;
- strikes all provisions related to tribal-state vapor products compacts;
- strikes all provisions related to the regulation of flavorings in vapor products;
- establishes that counties, cities, and towns are preempted from imposing additional regulations or restrictions pertaining to the sale, purchase, use, and promotion of vapor products;
- revises the rule-making authority of the LCB and the DOH regarding vapor products labeling and advertising. The LCB, in consultation with the DOH, must adopt rules addressing requirements regarding health and safety warnings and the disclosure of ingredients contained in vapor products that are advertised or offered for sale in this state. Such rule-making authority is subject to federal preemption if the federal government enacts laws or regulations pertaining to such labeling and advertising disclosures;
- strikes provisions creating the Essential Public Health Services Account;
- authorizes licensed retailers to offer vapor products tasting to customers, subject to specified conditions;
- eliminates the licensing fee increase applicable to retailers of cigarettes and other tobacco products;
- exempts from child-proof packaging requirements those vapor products containing liquid nicotine cartridges that are prefilled and sealed within the product by the manufacturer, and which are not intended to be accessed or opened by the customer;
- eliminates the prohibition against the sale and purchase of vapor products through the Internet or by mail order;
- authorizes qualified domestic and out-of-state manufacturers, distributors, and retailers to ship vapor products to retail customers who are at least 18 years of age, provided specified age verification and other procedures are followed;
- authorizes the LCB, in consultation with the DOH, to adopt rules prohibiting the sale of vapor products that contain or emit substances, other than nicotine, that pose a substantial threat to public health and safety; and
- creates the Dedicated Tobacco and Vapor Products Enforcement Account in the State Treasury. Receipts from the monetary penalties imposed under chapter 70.155 RCW must be deposited into the account. Expenditures from the account must be used only for defraying the costs of activities and expenditures related to the regulation of vapor products, cigarettes, and other tobacco products.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 31, 2015.

Effective Date of Substitute Bill: The bill takes effect on October 1, 2015, except for section 11, relating to granting rule-making authority to the Liquor Control Board regarding vapor product labeling and advertising, which takes effect July 1, 2016.

Staff Summary of Public Testimony:

(In support) This bill is being offered by the Governor in response to the dramatic increase in the number of young people using vapor products and the total lack of regulation of the vapor products industry. It is intended to prevent youth access to nicotine-based products and to create a comprehensive regulatory system. This is a dangerous product that presents a significant risk of nicotine poisoning in children and, increasingly, is the gateway for nicotine addiction on the part of teenagers. Minors have no problem purchasing vapor products, and they are more susceptible to nicotine addiction than are adults. In 2014, 25 percent of high school seniors used vapor products. Among adolescents, vapor products use is more prevalent than cigarette smoking. Vapor products are becoming the gateway to nicotine addiction, and studies have shown that a significant percentage of teen vapor products users will move on to cigarettes. Flavored vapor products are particularly objectionable, insofar as they are very appealing to young people. Vapor product use has become a significant problem in many high schools. The reason young people are so attracted to vapor products is that they are cheap, convenient, and readily available. Nicotine has long-term, adverse effects on the brain development of teenagers. The use of vapor products has become a public health emergency that must be addressed by state lawmakers. Although the federal government is developing vapor products regulations, to date such regulations have not been issued and the state needs to fill this regulatory vacuum. Regulatory standards must be established with respect to labeling, advertising, and packaging. Because of the lack of regulation, the exact contents of liquid nicotine cartridges is largely unknown and some have been found to contain toxic substances. There is little evidence that vapor products are useful for smoking cessation purposes, and the overall health effects of the products are largely unknown. Taxing vapor products will have the beneficial effect of keeping prices high enough to discourage use by young people. Ninety-four percent of vapor products websites sell to minors. Vapor products present health risks beyond nicotine addiction, including the inhalation of toxic chemicals such as formaldehyde. If passed, this bill would help prevent vapor products from becoming a major public health problem in this state.

(With concerns) The provisions in the bill relating to shipping, transportation, and Internet sales are of great concern to the shipping industry and need revision. Many sections have documentation requirements that are unworkable and penalty provisions for noncompliance that are far too harsh. The bill should be amended to remedy these problems and to allow Internet sales of vapor products.

(Opposed) Vapor products are very beneficial as a means of quitting cigarette smoking and are categorically different than tobacco products with respect to health consequences. Thousands of people have quit smoking, and many lives have been saved, as the result of these products. The bill is a classic example of regulatory overkill, and it will prevent many adults from obtaining vapor products for smoking cessation purposes. Imposing additional taxes on vapor products is unfair and will make them too expensive for many users. Tobacco products have hundreds of added chemicals, but vapor products have very few added substances, none of which are toxic. Tobacco products are far more dangerous than vapor products, and it makes no sense, therefore, to restrict adult access to vapor products when doing so will likely result in higher rates of cigarette smoking. Vapor products are a healthy alternative to tobacco products, and they need to be flavored in order to make the vapor palatable, even for adults. An Internet sales prohibition would be unwise, because it will lead to a black market. Vapor products need to be regulated at the federal level, so as to have uniform, national standards regarding labeling, advertising, and product content. The

industry will not be able to function if each state adopts its own regulatory standards. The industry has been very successful at self-regulation with respect to labeling and child-proof packaging. Product sampling must be allowed so as to enable consumers to make informed product choices. The tax provisions in the bill will make vapor products too expensive for many consumers and would be an economic disaster for many independent retailers. Furthermore, the high tax rate will guarantee the emergence of an uncontrollable black market and will also cause many consumers to use the tribal stores. The claims that vapor products generate formaldehyde and other toxic substances are false and are based on bad science. The formation of formaldehyde requires heating to temperatures far above those reached during normal use. The 95 percent tax rate will mean the end of much of the vapor product industry. If passed, the bill will have extremely adverse consequences for the industry, put thousands of jobs at risk, and make it difficult for many adults to access vapor products for smoking cessation purposes.

Persons Testifying: (In support) Representative Pollet, prime sponsor; Representative Harris, secondary sponsor; Jason McGill, Governor's Office; John Wiesman, Office of the Secretary; Tim McAfee, CDC, Office on Smoking and Health; Ian Corbridge, Washington State Hospital Association; Alexander Garrard, Washington Poison Center; Lindsay Hovind, American Heart Association; Meta Lee, Washington Academy of Pediatrics/Valley Children's Clinic; Jeff Ketchel, Washington State Association of Local Public Health Officials; Fel Pajimula, Public Health - Seattle & King County; Meg Carlson, Seattle Public Schools; Bryce Hackett, Clark County Schools; Lori Stolee, Marysville School; Susan Turner, Kitsap Public Health; and Patricia Atwater, University of Washington Tobacco Studies Program.

(With concerns) Al Ralston, FedEx; and Larry Pursley, Washington Trucking Association.

(Opposed) Stuart Halsan and Joe Baba, Washington Vape Association; Holly Chisa, NJOY; Emily Murphy, Kim Thompson, Mark Jarrett, and Chris Hendricks, Anti-Smoking Alliance; Matt Zukowski; Jacqueline E. LaVerne; Zach McLain, Future Vapor; Kristopher Brady; Joannie Deutsch, Washington Retail Association; Amy Rhodes, Roger St. George, and Ajinder Handa, 7-11; Joshua Baba, Vaporland; Levi Brennan, Clouds The Limit; Tim Klerekoper, Provape, Inc.; Dave Buckley, Volcano Vapor; Stephanie Allen; and Josh Linvog.

Persons Signed In To Testify But Not Testifying: None.