

HOUSE BILL REPORT

ESSB 6328

As Passed House:
March 29, 2016

Title: An act relating to youth vapor product substance use prevention, and vapor product regulation, without permitting a tax on the sale or production of vapor products.

Brief Description: Concerning youth vapor product substance use prevention, and vapor product regulation, without permitting a tax on the sale or production of vapor products.

Sponsors: Senate Committee on Health Care (originally sponsored by Senators Dammeier, Hasegawa, Conway, O'Ban, Becker and Carlyle).

Brief History:

Committee Activity:

None.

Floor Activity:

Passed House: 3/29/16, 74-20.

Brief Summary of Engrossed Substitute Bill

- Creates a comprehensive regulatory scheme governing commerce in vapor products that establishes statutory provisions pertaining to: (a) licensing and fee requirements for vapor products distributors, retailers, and Internet sellers; (b) prohibition against the purchase, possession, and use by minors; (c) product labeling with information regarding product safety and nicotine content; (d) sampling of products at retail establishments; (e) Internet sales; (f) use of coupons and other product promotions; (g) public use of vapor products in indoor and outdoor settings; and (h) state preemption of local governmental regulations.

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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

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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 225,000 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 federal 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 and Cannabis 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.

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

The shipment or transportation in this state of tobacco products ordered by mail or through the Internet is prohibited unless the person receiving the products is a licensed wholesaler or retailer. Violations of this prohibition are punishable as a class C felony and may be subject to civil penalties.

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 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 Youth Tobacco Prevention 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 Bill:

Introduction.

The act creates a regulatory scheme governing commerce in vapor products that is enforced by the LCB in conjunction with the DOH. It focuses on the prevention of the acquisition and use of vapor products by minors and creates regulations and requirements that include the following:

- licensing and fee requirements for vapor products distributors, retailers, and Internet sellers;
- prohibition against the purchase, possession, and use by minors;
- product labeling with information regarding product safety and nicotine content;
- sampling of products at retail establishments;
- Internet sales;
- use of coupons and other product promotions;
- public use of vapor products in indoor and outdoor settings; and
- state preemption of local governmental regulations.

Definition of Vapor Product, Liquid Nicotine Container, and Delivery Sale.

"Vapor product" is redefined to mean 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" includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container that may contain nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device.

"Liquid nicotine container" is defined to mean a package from which nicotine in a solution or other form is accessible through normal and foreseeable use by a consumer and that is used to hold soluble nicotine in any concentration. The definition of "liquid nicotine container" does not include a "closed system nicotine container," which is defined as a sealed, prefilled, and disposable container of nicotine in a solution or other form in which such container is inserted directly into an electronic cigarette, electronic nicotine delivery system, or other similar product, if the nicotine in the container is inaccessible through customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion or other contact by children.

"Delivery sale" is defined to mean any sale of a vapor product to a purchaser in this state where:

- the purchaser places the order through the use of the Internet (or other online service), telephone, mail, delivery service, or other electronic means; or
- the vapor product is delivered by mail or through a delivery service.

"Delivery sale" does not include purchases of vapor products by a retailer for resale.

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.

Vapor and Tobacco Product Commercial Licensing Requirements.

Vapor products retailers, distributors and delivery sellers (i.e., Internet/mail order sellers) must be licensed by the LCB. For distributors, the initial licensing application fee is \$150, as is the annual licensing renewal fee. For retailers, the initial licensing application fee is \$175, as is the annual licensing renewal fee. For delivery sellers, the initial licensing application fee is \$250, as is the annual licensing renewal fee. Vapor product retailers who opt to obtain a tobacco retailer license in addition to a vapor product license may pay a discounted combined fee of \$250 for both licenses.

The tobacco product retailer license application fee is increased from \$93 to \$175, as is the annual renewal fee. Tobacco product retailers who opt to obtain a vapor product retailer license in addition to a tobacco retailer license may pay a discounted combined fee of \$250 for both licenses.

Location Restrictions on Use of Vapor Products.

The use of vapor products is prohibited within the following indoor areas:

- child care facilities;
- schools;
- school buses; and
- elevators.

The use of vapor products is permitted for tasting and sampling purposes within the licensed premises of vapor products retailers.

Local governments are granted the authority to enact ordinances regulating indoor vapor product use in other public places provided such ordinances are otherwise consistent with the provisions of the act.

The use of vapor products is prohibited in the following outdoor areas:

- outdoor areas of property upon which a child care facility is located and which are under the control of the child care facility;
- real property upon which a school is located and which is under the control of the school; and
- playgrounds.

Local governments may regulate the outdoor use of vapor products in public places where children congregate, including, but not limited to, schools, playgrounds, and public parks.

State Preemption and Vapor Products Regulation by Local Governments.

Except as otherwise provided under the act, state law preempts vapor product regulatory measures adopted by local governments.

Local governments are granted the authority to regulate the outdoor use of vapor products in public places where children congregate, including, but not limited to, schools, playgrounds, and public parks.

Local governments are granted the authority to regulate the use of vapor products in indoor public places except as otherwise provided under the act.

Vapor Product Packaging Requirements.

The retail packaging of liquid nicotine containers must conform with the child-resistant packaging standards established under the federal Poison Prevention Packaging Act and other applicable federal regulations. However, this packaging requirement does not apply to a sealed, prefilled, and disposable container of nicotine which is inserted directly into an electronic cigarette, electronic nicotine delivery system, or other similar product, if the nicotine in the container is inaccessible through customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion or other contact by children (i.e., "closed system nicotine container").

Labeling of Vapor Products.

Both the manufacturer and the distributor of a vapor product are responsible for package labeling that discloses the nicotine content of liquids contained in vapor products. In addition, such labeling must include health-related warnings regarding nicotine and use by children.

An exception to nicotine labeling requirements is created for closed system nicotine containers as defined in statute. In lieu of including standard product labeling regarding nicotine content, manufacturers of closed system nicotine containers must annually disclose the nicotine content of its products to the DOH.

Regulation of Substances Contained in Vapor Products.

If the DOH or county health department tests a vapor product and determines that it contains a substance that poses a substantial risk to public health, then the LCB may demand that the licensee cease all sales of the product. The LCB may suspend the license if the product is not removed from circulation and a court injunction may be obtained to prohibit further sales.

Delivery Sales: Purchase of Vapor Products by Mail or Through the Internet.

The act authorizes the purchase of vapor products through a delivery sale (i.e., Internet or mail order sale) provided specified requirements are met regarding purchaser identification and age verification, including the following:

- the seller must have a delivery sale license;
- the purchaser must be at least 18 years of age;

- the seller verifies the name, date of birth, and residential address of the purchaser using reliable databases regularly used by the government and businesses for age and identity authentication;
- payment is made only through a credit card in the purchaser's name and the seller follows specified procedures for verification of the true identity of the card holder; and
- before shipment, the seller again verifies the identity and address of the purchaser through specified procedures requiring the purchaser to submit verification information to the seller.

The LCB is granted broad rule making authority with respect to the implementation of delivery sales regulations.

Retailer Signage Requirements.

Licensed vapor products 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. These signage requirements are the same as those imposed on retail tobacco product licensees.

Promotional Samples and Coupons.

The issuance of coupons for free vapor product samples is prohibited unless the issuance of the coupon is tied-to and contingent upon a prior or current sale. Coupons for a discount purchase are allowed only if issued as part of an in-person transaction or delivery sale. Violation of either provision is a misdemeanor.

Promotional Tastings of Vapor Products.

Licensed retailers may allow customers to taste vapor product samples provided: (1) the premises are restricted to persons 18 and over; (2) the tasting is conducted within the licensed premises and the product tasted is not removed from the premises; and (3) the product being tasted either contains no nicotine or the customer explicitly consents to the inclusion of nicotine.

Violation of any of these provisions is a misdemeanor.

Vendor Assisted Sales Requirements.

Vapor products retailers are required to display and store vapor products in a manner that ensures the products are not accessible to the public without the assistance of a store employee. Self-service displays are prohibited. However, these requirements do not apply to retailers that prohibit minors within the licensed premises.

Sanctions for Violating Vapor Product Regulatory Provisions.

The LCB is authorized to suspend and revoke vapor product licenses, and to impose monetary penalties, for violations of the act. Monetary penalties for vapor product licensees mirror those imposed on tobacco product licensees for violations statutory provisions related to preventing product access and use by minors. The monetary penalties currently imposed on tobacco product licensees for statutory violations are doubled.

Monetary penalties are subject to graduated increases for repeat violations of regulatory provisions within any three year period. The time period established for monitoring the compliance of vapor product licensees for the purpose of determining the severity of available sanctions is increased from two to three years.

For holders of both vapor product and tobacco product retailer licenses: (1) violations consisting of selling to a minor under one license counts as a violation against the other license for penalty purposes; and (2) suspension/revocation of one license automatically results in suspension/revocation of the other license if suspension or revocation is due to an unlawful sale to a minor.

Youth Tobacco and Vapor Products Prevention Account.

The Youth Tobacco Prevention Account is renamed the "Youth Tobacco and Vapor Products Prevention Account" and requires that monies from the account be used to fund law enforcement and intervention strategies designed to prevent access to, and use of, vapor products, cigarettes, and other tobacco products by youth.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.