
Commerce & Gaming Committee

HB 1645

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 Summary of Bill

- Creates a regulatory scheme intended to prevent minors from possessing and using vapor products.
- Prohibits minors from purchasing, possessing, or using vapor products.
- Creates licensing requirements for vapor products distributors and retailers.
- Imposes an excise tax on vapor products distributors and retailers.
- Authorizes the Governor to enter into vapor products compacts with federally recognized Indian tribes and establishes requirements for such compacts.
- Enhances the sanctions that may be imposed on noncompliant cigarette and tobacco products licensees.

Hearing Date: 3/16/15

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

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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, 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 and Taxation of Tobacco Products.

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.

The Other Tobacco Products (OTP) tax is due from a distributor for the sale, use, consumption, handling, and distribution of cigars, pipe tobacco, chewing tobacco, and other forms of tobacco, except cigarettes. The OTP tax rate is imposed on the taxable sales price of most tobacco

products at a rate of 95 percent. For cigars, the tax is capped at 65 cents per cigar. The OTP tax is due when the product is imported to, or manufactured in, Washington for sale in the state.

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, possesses or obtains, or who attempts to purchase or obtain, 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 Liquor Control Board (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.

Tribal-State Compacts Regarding Cigarette Taxation.

Where authorized by statute, the Governor may enter into compacts and agreements with the Indian tribes of this state regarding matters of mutual interest or concern. Many such compacts have been implemented regarding gambling and various taxation issues, most notably those regarding cigarette taxes and gasoline taxes. In 2001, legislation was passed allowing the Governor to enter into contracts with the tribes concerning the sale of cigarettes. Such contracts must be for renewable terms of eight years or less. Cigarettes sold on Indian lands during the contract term are subject to a tribal cigarette tax and are exempt from state cigarette, sales, and use taxes.

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 Bill:

INTRODUCTION

The act creates a comprehensive regulatory and taxation scheme governing commerce in vapor products. 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; (b) imposes an excise tax on distributors or retailers; and (c) authorizes the Governor to enter in vapor products compacts with federally recognized Indian tribes. The regulatory, licensing, and taxation provisions closely mirror existing statutory requirements applicable to commerce in cigarettes and other tobacco products.

PART I: YOUTH ACCESS TO VAPOR 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.

General Requirements for Licensed Vapor Products Manufacturers, 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: (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 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. Vapor products may not be ordered by mail or through the Internet by anyone in the state other than a licensed distributor or retailer. A retailer must require a customer to provide photo identification to purchase vapor products if there is a question regarding the customer's age.

Both vapor product and tobacco product 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 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.

The sale of flavored vapor products is prohibited.

The sale of vapor products containing any substance that either increases the absorption of nicotine or contains psychoactive chemicals is prohibited.

Labeling and Advertisement of Vapor Products.

The DOH is granted rule-making authority regarding the labeling and advertisement of vapor products. Vapor products must have a manufacturer's label stating the nicotine content of the product and a warning regarding the harmful effects of nicotine. Advertisements for vapor products must have the same disclosures and warnings as the product labels. Nicotine content must be verified by a laboratory certified by the DOH for nicotine testing of vapor products.

The DOH and the LCB are required to study whether these labeling and disclosure requirements should include information regarding harmful vapor product constituents and/or emissions other than nicotine. By December 16, 2016, these agencies are required to submit a report to the Governor and the Legislature that includes findings and recommendations regarding this disclosure issue.

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 product 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.

Enforcement Authority of the LCB Regarding Vapor Products.

The LCB's enforcement authority with respect to cigarette wholesalers and retailers is extended to cover the activities of vapor product distributors and retailers. This enforcement authority includes the power to do the following:

- suspend or revoke licenses;
- enter the premises of licensees; and
- detain a person for identification purposes where there are reasonable grounds to believe that he/she is minor involved in the illegal acquisition or possession of vapor 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 vapor products licensing fees and monetary penalties.

Vapor Products Regulations and State Preemption.

Vapor products regulations enacted by local governments are exempted from state preemption provisions applicable to the licensure and regulation of cigarettes and tobacco products. Accordingly, local governments may impose additional restrictions on the sale, purchase, use, or promotion of vapor products.

Shipments of Vapor Products Ordered by Mail or Through the Internet.

Vapor products are subject to the same prohibition as are cigarettes and tobacco products with respect to the in-state receipt of product shipments stemming from mail or internet transactions. Specifically, the shipment or transportation in this state of vapor products ordered by mail or through the Internet is prohibited unless the person receiving the products is a licensed wholesaler, distributor, or retailer. Shipments of nicotine concentrate for industrial purposes unrelated to vapor products are exempted from this prohibition.

Rule-making Authority of the LCB and the DOH.

The LCB and the DOH are granted broad authority to adopt the rules necessary to implement and enforce chapter 70.155 RCW, which pertains to the prevention of youth access to tobacco and vapor products.

PART II: TAXATION, LICENSING, AND ENFORCEMENT PROVISIONS

New Taxation Chapter Created.

A new chapter is created in Title 82 RCW pertaining to the imposition of an excise tax on the distribution or sale of vapor products by licensed distributors or retailers. The chapter also contains licensing and general regulatory provisions applicable to such licensees. The taxation,

licensing, and regulatory provisions in this chapter are parallel to, and largely the same as, those applied to commerce in tobacco products, other than cigarettes, under chapter 82.26 RCW. The LCB is responsible for issuing licenses and for the enforcement of the chapter. In addition, the LCB is granted the authority to promulgate the rules necessary for enforcement.

Vapor Products Tax.

The sale, use, consumption, handling, possession, or distribution of vapor products is subject to a tax of 95 percent of the taxable sales price. The distributor is responsible for the payment of the tax, but such tax may be imposed on the consumer if it was not previously collected. However, the tax may be collected only once during the commercial distribution and retail sales process. Ninety percent of the proceeds from the vapor products' tax must be deposited into the state general fund and 10 percent deposited into the Essential Public Health Services Account.

Essential Public Health Services Account.

The Essential Public Health Services Account is created in the State Treasury, consisting of 10 percent of the revenues derived from the vapor products tax. The DOH must use the funds in the account for three purposes: (a) to fund essential governmental public health services; (b) to fund tobacco control and prevention and other substance use prevention and education programs; and (c) to strengthen and support public health system capabilities, including accredited higher education public health programs.

LCB Licensing 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 \$250, as is the annual licensing renewal fee. A manufacturer that distributes or sells vapor products in this state must have a distributor's license.

Licensing Fees for Cigarette and Tobacco Products Retailers.

For cigarette and other tobacco products retailers, the initial licensing fee and annual renewal fee are each increased from \$93 to \$250, respectively.

PART III: TRIBAL COMPACTING

The Governor is granted the authority to enter into vapor products tax contracts with federally recognized Indian tribes located within the geographic boundaries of the state of Washington. With the exception of contracts with the Puyallup Tribe, each such contract must require that the tribal vapor products tax rate be 100 percent of the combined sum of the state vapor products tax, state sales and use taxes, and local sales and use taxes. Contracts with the Puyallup Tribe must set the tribal tax rate at 90 percent of the state vapor products tax. However, any vapor products tax agreement with the Puyallup Tribe must also require the tribe to remit to the state 30 percent of all vapor products tax revenue it collects. The tribal vapor products tax is in lieu of all state and local taxes that would otherwise be applicable to sales of vapor products.

Vapor products tax contracts must pertain only to retail sales in which Indian retailers transfer possession of the vapor products from the seller to the buyer within Indian country. Such contracts do not apply to transactions by non-Indian retailers.

Tribal-state vapor products contracts must contain specified provisions, including provisions that:

- prohibit the sale of vapor products to persons under 18 years of age;
- limit the duration of the contracts to renewable periods of no more than eight years;
- require compliance with legal standards, inspection procedures, record-keeping requirements, and audit requirements;
- require that the tax revenue retained by the tribe be used for essential government services; and
- require that Indian retailers purchase vapor products only from state-licensed manufacturers or distributors, or from other specified sources.

The Governor may delegate the power to negotiate vapor product tax contracts to the DOR. The DOR must consult with the LCB during any such negotiations.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on October 1, 2015.