

# SENATE BILL REPORT

## ESSB 6328

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As Passed Senate, March 28, 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:** Health Care: 1/26/16, 2/04/16 [DPS-WM, DNP, w/oRec].

Ways & Means: 3/09/16 [w/oRec].

**First Special Session:** Passed Senate: 3/28/16, 37-6.

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### SENATE COMMITTEE ON HEALTH CARE

**Majority Report:** That Substitute Senate Bill No. 6328 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Becker, Chair; Dammeier, Vice Chair; Angel, Bailey, Baumgartner, Brown, Conway, Parlette and Rivers.

**Minority Report:** Do not pass.

Signed by Senators Cleveland, Ranking Minority Member; Jayapal.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Frockt and Keiser.

**Staff:** Evan Klein (786-7483)

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That it be referred without recommendation.

Signed by Senators Hill, Chair; Braun, Vice Chair; Dammeier, Vice Chair; Honeyford, Vice Chair, Capital Budget Chair; Hargrove, Ranking Member; Keiser, Assistant Ranking Member on the Capital Budget; Ranker, Ranking Minority Member, Operating; Bailey,

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*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.*

Becker, Billig, Brown, Conway, Hewitt, O'Ban, Padden, Parlette, Pedersen, Rolfes, Schoesler and Warnick.

**Staff:** Dean Carlson (786-7305)

**Background:** Electronic cigarettes are battery-operated inhalers containing nicotine. The battery heats liquid in the cartridge, turning it into vapor that can be inhaled. The process of inhaling e-cigarette liquid is often called "vaping."

State Law. Washington currently defines a "vapor product" as: 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. "Vapor product" does not include any product that is regulated by the United States food and drug administration under chapter V of the federal food, drug, and cosmetic act.

Vapor products may not be sold or given to any person under the age of 18.

WSIPP Study. In 2014 the Legislature directed the Washington Institute for Public Policy (WSIPP) to research e-cigarette prevention programs. After an extensive search for rigorous outcome evaluations of e-cigarette prevention and cessation programs, WSIPP was unable to locate any studies that met WSIPP's research standards. WSIPP found that relatively little research has been conducted on e-cigarettes as a cessation tool. Surveys suggest that e-cigarette use grew from 1 percent in 2009 to over 6 percent in 2011 among adults. WSIPP found use rates grew from 3 percent to 7 percent between 2011 and 2012 among adolescents. According to the National Monitoring the Future Project, as of 2014, 16 percent of tenth graders used e-cigs.

FDA Regulations. The Food and Drug Administration (FDA) proposed regulations in April 2014, that would include coverage of e-cigarettes under their tobacco authority. The proposed rules include the following:

- setting the federal minimum age of 18 for sales;
- banning vending machine sales;
- mandating warning labels;
- prohibiting free samples; and
- requiring companies to register with the FDA to monitor compliance and quality.

The proposed rules were delivered to the White House Office of Management and Budget in October 2015, for final review.

**Summary of Engrossed Substitute Bill:** Vapor Products. "Vapor products" are defined as 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. "Vapor product" does not include any product that meets the definition of marijuana, useable marijuana, marijuana concentrates, marijuana-infused products, cigarette, or tobacco products.

Preemption. Political subdivisions are preempted from adopting or enforcing requirements for licensure and regulations of promotions and sales. Political subdivisions are also preempted from imposing fees on retail outlets other than general business taxes or license fees. Political subdivisions may regulate the use of vapor products only in outdoor public places where children congregate, such as schools, playgrounds and parks. Political subdivisions may regulate the use of VPs in all indoor public places, except that tasting in vapor products retail outlets is specifically permitted, and vapor products use in and around schools, child care centers, elevators and school buses is specifically prohibited.

Licensing and Fees. Vapor Product retailers, distributors and delivery sellers must obtain a license from the Washington State Liquor and Cannabis Board (Board) in order to conduct business in Washington. Applications for licensing must be made through the business licensing system, on a form prescribed by the Board. Fees are set for all vapor product licenses, raised for certain tobacco retailers, and set for retailers with both vapor product and Tobacco licenses.

- Vapor product Retailers - \$175
- Vapor product Distributors - \$150
- Vapor product Delivery Sellers - \$250
- Tobacco & Other Tobacco Product Retailers - \$175
- Vapor product Retailer & Tobacco Product or Other Tobacco Product Retailer Combo Fee - \$250

Licenses must be renewed annually. Licenses must be exhibited in the retailer's place of business. The Board is given authorities, enumerated in the language of the bill, to enforce vapor product retailer licenses.

Enforcement. The Board may impose penalties, sanctions and other actions against licensees, and is given other powers and authorities as necessary to enforce the provisions of this act. Monetary penalties for vapor product licensees are set, and monetary penalties for tobacco product retailers are changed to:

- \$200 for 1st offense w/in 3 years;
- \$600 for 2nd offense w/in 3 years;
- \$2000 for 3rd offense w/in 3 years, and if the violation is for selling to minors, suspension of the license for 6 months;
- \$3000 for 4th offense w/in 3 years and if the violation is for selling to minors, suspension of the license for 12 months; and,
- Revocation of license with no possibility of reinstatement for 5th offense w/in 3 years.

For persons holding dual vapor product and tobacco or other tobacco product licenses who are caught selling to minors, each subsequent offense counts as an additional violation during that 3 year period.

Signage. A person who holds a vapor product retailer license must display a sign concerning the prohibition of vapor product sales to minors, including specific language enumerated in the language of the bill. The signs must be provided, free of charge, by the Department of Health (DOH). DOH may issue a single tobacco and vapor product sign to cigarette retailers and wholesalers who are also vapor product retailers.

Sales Requirements. It is a class 3 civil infraction for any person under the age of 18 to purchase or attempt to purchase, possess, or obtain vapor products. Whenever there is a question as to whether someone is old enough to purchase vapor products, the retailer or their agent must require the purchaser to present an official form of photo identification. Vapor product retailers may not sell products containing cannabinoid, synthetic cannabinoid, cathinone, or methcathinone.

It is unlawful to sell or distribute vapor products at a retail store unless the customer has no direct access to the product except through assistance of the seller. It is also unlawful to sell vapor products from a self-service display. Retail establishments are exempt from both restrictions if they do not allow minors into the store.

No person may mail, ship or otherwise deliver any vapor products unless the purchase is made using a credit or debit card in the purchaser's name, and the name, birthdate and address of the purchaser is verified by a third party database.

Labeling Requirements. A manufacturer of an open system liquid nicotine container must label products with warnings about nicotine, keeping away from children, that vapor products are illegal for use by minors, and the milligrams per milliliter of nicotine and total volume of the e-liquid. Manufactures of closed system containers must provide DOH with disclosures of nicotine content in their products.

Child Resistant Packaging. Liquid nicotine containers that are sold in Washington must satisfy the child-resistant effectiveness standards, established by the poison prevention packaging act of 1970, and enforced by the federal Consumer Product Safety Commission.

Use Restrictions. The use of vapor products is prohibited, with certain exemptions enumerated in the bill, in the following areas:

- child care facilities;
- schools;
- within 500 feet of schools;
- school buses;
- elevators; and,
- playgrounds.

Vapor Product use is specifically permitted in the indoor areas of vapor product retail outlets, for purposes of tasting.

Tasting. Tastings may be offered in the indoor areas of licensed retail outlets. The vapor product liquids used for tasting must contain zero milligrams of nicotine unless the customer explicitly consents to tasting a product that contains nicotine. Disposable mouthpieces must be used, or the vapor device must be disposed of after each tasting.

Coupons. Coupons are allowed to be used for discounted vapor product sales. Coupons for free vapor products are only allowed as part of a contingency of a prior or the same purchase.

Youth Tobacco Prevention Account. The youth tobacco prevention account name is changed to the youth tobacco and vapor product prevention account. All licensing fees and fees collected by the Board for imposition of monetary penalties must be deposited into the youth tobacco prevention account.

Exemption. Motor carriers, freight forwarders and air carriers are exempted from the vapor product provisions in the bill.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony (Health Care):** PRO: Exposure and risk of poisoning to young children is serious. A bill preventing exposure and preventing youth access passed out of the Senate last year but didn't pass the House. Over the last year, more young children have been exposed, there has been rampant use of vaping on school grounds, and other state entities have started to take action. However, this patchwork action has created irregularities in law in different areas of the state. What we all know, is doing nothing at the state level is unacceptable. School districts are frustrated that they have no vehicle to enforce the use of vapor products. This bill also prohibits vending machine sales. For store owners and retailers with more than one location, it is important to have uniformity throughout the state. This bill balances adult access and youth prevention. The online sale requirements in the bill will ensure that youth prevention extends to online sales. The pink lung brigade manufacturers already use child resistant packaging.

CON: There are many concerning elements of this bill. It would permit the use of vapor products in many public spaces. Permitting the use of these devices where children can see it, sends a message that these devices are okay to use. The effects of vapor devices harm the developing brains of children. Given that most smokers become addicted in their teens, we must avoid exposing young people to use of vapor products in public spaces. Being that we don't know what is being vaped when someone is vaping, it is difficult to enforce consumption rules. Nicotine is as addictive as heroin, and young people are extremely vulnerable. This bill fails to implement an effective youth prevention strategy. State preemption also undermines the ability to implement local regulations.

OTHER: This bill is about our kids and saving the next generation from getting addicted to nicotine. The tobacco industry and nicotine patch companies use evidence based approaches to get people hooked on tobacco. Vapor product companies target marketing towards children. Vapor product companies are using the same type of marketing as tobacco companies use to get children addicted to nicotine. Tenth grade use of tobacco and e-

cigarette products went up 67 percent in two years. The fee revenue generated by this bill will not provide for robust enforcement. There is also concern that this bill would allow internet sales of vapor products since there is no consistent way to ensure that youth cannot access the products online. In 2015, 70 percent of calls into the poison control center regarding vapor products, pertained to pediatrics. There is no standardized labeling on any vapor product packaging. This makes it difficult to know how much nicotine is in a package, and how much nicotine is consumed when a child gets into the product. The low monetary penalties in the bill are concerning. Larger penalties lead to higher rates of compliance. Applications for liquor and tobacco licenses require a criminal background check, but this bill does not require that for vapor products. Vapor products are also used as a vehicle for synthetic drugs. These vapor products sometimes contain THC and other cannabis based products. This bill does not offer enough protection to teenagers.

**Persons Testifying (Health Care):** PRO: Senator Dammeier, Prime Sponsor; Kim Thompson, Pink Lung Brigade, President; Marc Jarrett, Pink Lung Brigade, Vice President; Joe Baba, WaVape (The Washington Vape Association); Joanie Deutsch, Washington Retail Association; Cliff Webster, 7-Eleven Corporation; Justin D. Lewis, Viper Vapor.

CON: Sarah Stewart, High School Student; Alexander Garrard, Washington Poison Center/ Clinical Managing Director; Dr. Gary Goldbaum, Snohomish Health Dist. Health Officer & Director, WSMA; Dr. Jeff Duchin, Public Health Seattle & King County / Health Officer; Derek Young, Pierce County Councilmember.

OTHER: Rusty Fallis, Office of the Attorney General; Josh Bolender, Liquor and Cannabis Board; John Wiesman, Department of Health; Sarah Stewart, High School student; Dr. Alex Garrard, Poison Center.

**Persons Signed In To Testify But Not Testifying (Health Care):** PRO: Mark LaBudde, DBA CC Vapour; Johnny Vigil, CC Vapour. OTHER: Al Ralston, FedEx.

**Staff Summary of Public Testimony (Ways & Means):** No public hearing was held.

**Persons Testifying (Ways & Means):** N/A.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** N/A.