

**(Without Reference to File)**

## ASSEMBLY THIRD READING

AB 1639 (Gray, et al.)

As Amended August 21, 2019

2/3 vote. Urgency

**SUMMARY:**

This bill would, among other things, would create various advertising, promotion, packaging, and selling prohibitions on electronic cigarettes in California. Requires a retailer to check the identification of any tobacco purchaser using age verification software or an age verification device. Increases the civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes tobacco products to persons under 21 years of age. Increases retail penalties for selling tobacco products to underage individuals. Prohibits a person under the age of 21 from entering a tobacco store, as defined. Requires the California Department of Public Health (CDPH) to conduct random, onsite sting operations of at least 20% of the total number of licensed tobacco retailers and, as defined. Contains an urgency clause to ensure that the provisions of this bill go into immediate effect upon enactment.

**Major Provisions**

- 1) Revises existing DPH enforcement against tobacco retailers that sell tobacco to any person under 21 years of age by requiring Department of Public Health (DPH) to conduct random, onsite sting inspections of at least 20% of the total number of licensed tobacco retailers; and, in the event of a violation, requires DPH to conduct a second sting inspection at that site within six months of the first violation, and a third sting inspection within 12 months of the first violation. Requires DPH to enlist the assistance of persons under 21 years of age in conducting these enforcement activities.
- 2) Requires a person engaging in the retail sale of tobacco products to check the identification of a tobacco purchaser using age verification software or an age verification device.
- 3) Increases the amount of civil penalties an enforcing agency may assess against any person, firm, or corporation that sells, gives or in any way furnishes tobacco, cigarettes, or paraphernalia that is designed for smoking or ingesting tobacco, tobacco products, or controlled substances, and shortens the timelines between penalties as follows:
  - a) For a first violation a penalty range of \$1,200 to \$1,800 (was \$400 to \$600);
  - b) For a second violation within a 36-month period, a range of \$3,000 to \$4,000 (was \$900 to \$1,000 within a five-year period); and,
  - c) For a third or subsequent violation within a 36-month period, a range of \$5,000 to \$6,000 (was \$3,000 to \$4,000 for a fourth violation, or \$5,000 to \$6,000 for a fifth violation, within a five-year period.)
- 4) Increases the length of license suspensions required to be implemented by the California Department of Tax and Fee Administration (CDTFA), upon notice of a civil penalty by DPH, in accordance with the following schedule:

- a) A 60-day suspension for the first violation (was 45 days for a third violation at the same location within a five-year period); and,
  - b) A 90-day suspension for a second violation at the same location within a 36-month period (was 90 days for a fourth violation at the same location within a five-year period).
- 5) Prohibits a person under 21 years of age from entering a tobacco store, as defined.
- 6) Prohibits an electronic cigarette manufacturer from advertising, promoting, or packaging electronic cigarettes in a manner that does either of the following:
- a) Is intended to encourage persons under 21 years of age to use an electronic cigarette; or,
  - b) Is attractive to persons under 21 years of age, including, but not limited to, by showing any of the following:
    - i) Cartoons; an image, character, or phrase that is similar to one popularly used to advertise to children; a video game, movie, video, or animated television show known to appeal primarily to persons under 21 years of age; an imitation of candy packaging or labeling or, the terms "candy" or "candies," or other variants in spelling, such as "kandy" or "kandeez," and the terms of common dessert foods, including, but not limited to, "milkshake," "cupcake," and "thin mint."
- 7) Prohibits a person from displaying on an electronic cigarette, or its packaging, an indication or illustration, including a brand element that could cause a person to believe that the product is flavored, if there is reasonable belief that the indication or illustration could be appealing to persons under 21 years of age, and prohibits the sale of such an electronic cigarette.
- 8) Places various restrictions on the advertising and promotion of electronic cigarettes, including, but not limited to:
- a) a) by means of packaging in a manner that could cause a person to believe that health benefits may be derived from the use of the electronic cigarette, unless approved by the federal Food and Drug Administration (FDA);
  - b) b) by comparing the health effects arising from the use of the electronic cigarette or from its emissions with those arising from the use of other tobacco products; or,
  - c) c) through a testimonial or endorsement.
- 9) Prohibits paid or unpaid sponsorships of concerts, sport events, and any event with an intended audience having a significant percentage of persons who are under 21 years of age.

**COMMENTS:**

Electronic smoking devices, often called e-cigarettes or vape pens, heat and aerosolize a liquid that sometimes contain a cocktail of ingredients, including flavorings and varying levels of nicotine. Some e-cigarettes are made to look like regular cigarettes, cigars, or pipes. Some resemble pens, USB sticks, and other everyday items. Using these devices is called vaping. The metal or plastic devices contain a cartridge filled with a liquid that is vaporized by a battery-powered heating element. The aerosol is inhaled by the user when they draw on the device, as

they would a regular cigarette. The user then exhales secondhand aerosol, which includes chemicals and other pollutants.

Most electronic smoking devices contain nicotine, and some companies claim to sell nicotine-free cartridges. They come in a wide variety of shapes, sizes, flavors, and nicotine levels. These are not one uniform product but hundreds of different products. It should be noted that youth and adults are also using these devices to vape marijuana, hash oil, and other substances. To date, no e-cigarettes have been approved by the FDA and are not currently approved as a quit smoking aid. Preliminary tests by the federal FDA found that e-cigarettes contain many impurities and some contain dangerous chemicals. E-cigarettes are the most commonly used tobacco product among United States (U.S.) middle and high school students. Some e-cigarettes don't look like tobacco products, so some kids use them unnoticed in schools, including in classrooms and bathrooms.

The five largest electronic smoking brands collectively represent more than 97% of the current market for electronic smoking devices (ESDs)—JUUL, Vuse, MarkTen, blu eCigs, and Logic.

According to the FDA, the use of e-cigarettes (vaping) by high school students nearly doubled over the past year. One in five high school students and one in 20 middle school students, currently use e-cigarettes. Most of these kids are using flavored e-cigarettes, inhaling chemical aerosols created by heating solutions containing nicotine and flavoring agents seemingly developed for young people. With flavors such as Gummy Bear, Cotton Candy, Berry Cobbler, Cherry Crush, Vivid Vanilla and host of others, e-cigarette liquids are enticing to many youths.

Public health officials are concerned about the rising number of teens using e-cigarettes, because nicotine can harm a young person's developing brain. The Centers for Disease Control (CDC) and Prevention warns that young people who vape may be more likely to start smoking traditional cigarettes. The CDC further states, "While e-cigarettes have the potential to benefit some people and harm other, scientists still have a lot to learn about whether e-cigarettes are effective for quitting smoking." The CDC further states, "to date, the few studies on the issue are mixed. Evidence from two randomized controlled trials found that e-cigarettes with nicotine can help smokers stop smoking in the long term compared with placebo (non-nicotine) e-cigarettes."

California state law prohibits the sale of tobacco products (including electronic smoking devices and e-liquids whether or not they contain nicotine or tobacco) to individuals younger than 21 years of age. Active duty military personnel who are at least 18 years old are exempt, but they must show a valid, unexpired Identification card issued by the U.S. Armed Forces.

The California Stop Tobacco Access to Kids Enforcement (STAKE or Act) program aims to curb illegal sales of tobacco products to individuals under the age of 21. Generally, the provisions of the Act may be enforced by CDPH, the Attorney General or a local enforcement agency. The Act requires retailers to check the identification of purchasers of tobacco products who reasonably appear to be too young and prohibits the non-sale distribution of tobacco products via public or private postal services. According to the CDPH report, tobacco and vape shops have the lowest compliance with this law, with one out of three tobacco and vape shops selling to underage minors.

According to CDPH, they conducted 4,675 compliance inspections and collected \$265,100 in civil penalties in fiscal year (FY) 2018-19. Currently, CDPH is required to notify the CDTPA within 60 days of the final adjudication of a firm's third, fourth, or fifth violation within a five-

year time frame, however, CDPH did not have any retailers that fit these criteria in FY 2018-19. CDPH received an additional \$1.9 million in local assistance funding in FY 2019-20 to allocate grants to local entities for enforcement activities. According to CDTFA as of August 1, 2019, there are 30,685 registered cigarette and tobacco retail locations.

According to CDPH, fewer adults are smoking cigarettes than ever before. California has the second lowest adult smoking rate among the 50 states plus the District of Columbia, second only to Utah. California monitors smoking rates among high school students using the California Student Tobacco Survey, administered by CDPH on a biennial basis. One in eight California high school students currently use tobacco products, with the most used product among all students being ESDs {10.9%}. Of those that currently use tobacco, an overwhelming majority use ESDs (84.3%). In addition, 86.4% of youth tobacco users reported using flavored tobacco products.

It should be noted that the Master Settlement Agreement (MSA) prohibits the participating manufacturers from certain types of marketing, including targeting youth, using cartoons to advertise tobacco products, using brand-name merchandise, sponsoring youth-oriented events, and paying for product placement in media. *E-cigarettes are not part of this agreement.*

The FDA has issued several statements over the past couple of years focusing on youth access to tobacco products. Specifically, the FDA is concerned about youth access to ESDs, as the youth use rate has reached epidemic status. In the September 2018 statement, the FDA announced issuing 12 warning letters to companies that continued to advertise and sell products to youth. Earlier the same year the FDA had also issued 56 warning letters and six civil monetary penalties to retailers as part of its enforcement action to limit access of tobacco products to youth. The FDA also sent letters to five ESD manufacturers (JUUL, Vuse, MarkTen, blu eCigs, and Logic) whose products were sold to kids during the FDA's ramped up enforcement period. The FDA requested that these companies provide robust plans on how they address the widespread use of their products by minors or face increased enforcement.

When the FDA started regulating e-cigarettes in 2016, the agency prevented new products from entering the market and said those already being sold would need to send in applications for FDA review starting in 2018. In 2017, the FDA extended the deadline to 2022. In March 2019, the former FDA commissioner issued a statement announcing that manufacturers and retailers were being put on notice that they could be subject to FDA enforcement for selling certain flavored ESD products without authorization.

In June 2019, the FDA issued final guidance for e-cigarette makers to submit pre-market tobacco product applications, giving e-cigarette manufacturers a path to seek official authorization to market their products. The announcement came about a month after a federal judge ordered the agency to speed up its review of thousands of vaping products now on the market. That decision, said that the agency has acted illegally by allowing e-cigarettes to remain on the market until 2022 before requiring companies to apply for that authorization. The ten-month deadline is applicable to new tobacco products on the market as of the August 8, 2016 deeming rule that extended FDA's regulatory jurisdiction to include all tobacco products. Accordingly, manufacturers of e-cigarettes now have until May 2020 to submit applications for market approval in order to continue selling their products. Once e-cigarette companies submit their applications to the FDA, they'll have to show that their products are appropriate for the "protection of public health," including that they do not encourage teens to start vaping. Public

health advocates say it would be difficult for many of the e-cigarettes on the market to meet that standard. The sales restrictions and new deadline would apply to a vast array of e-cigarette products, including those offered in flavors such as cherry, bubble gum and cotton candy. The guidance would not apply to the sale of tobacco-flavored products, menthol and mint— flavors the FDA said it wants to preserve because they're available in cigarettes and help switch adult smokers.

Over 30 California cities have ordinances that ban the sale of flavored tobacco products, including cigars, little cigars, pipe tobacco and electronic cigarettes. The ordinances vary from city to city, for example, the City of Sacramento ordinance bans flavored tobacco products, including menthol cigarettes and e-cigarettes. San Francisco recently banned the sale and distribution of e-cigarettes in the city entirely.

#### **According to the Author:**

According to the author, with more than 3.5 million middle school and high school students reporting e-cigarette use in 2018, vaping has become the new smoking among American youth. There are now 2.5 times more children using JUUL and other e-cigarette brands compared to traditional cigarettes. With a 78% increase in use amongst high schools students between 2017 and 2018 alone, there is significant momentum behind what has to be called an epidemic. The author states that this bill represents a comprehensive plan that would get e-cigarettes out of the hands of children, penalize those who sell to kids, regulate marketing that appeals to minors, and restrict sales in locations where children are present. The author contends that this is unquestionably the toughest reform aimed at combating youth vaping in any of the 50 states.

The author points out this bill is about the health and well-being of kids and utilizes proven tools to help ensure these addictive products don't end up in the hands of young people, and concludes that is the start, not the conclusion of our efforts as a Legislature to tackle this important issue.

#### **Arguments in Support:**

The American Cancer Society Cancer Action Network, the American Heart Association, the American Lung Association in California and the Campaign for Tobacco-Free Kids, write in support, "tobacco use remains the leading cause of preventable death in our country, and sadly, 95% of adult smokers begin before the age of 21. Of the 9 million youth currently living in our state, nearly 1.4 million of them will become smokers, and approximately 440,000 of those kids will die prematurely as a result of tobacco use. It is clear we need a multi-pronged approach to address this problem. We believe the substantial increased penalties for selling to minors as well as increased random on-site sting operations under AB 1639 are positive steps towards driving down these statistics and keeping tobacco products out of the hands of our youth. Holding retailers accountable for illegally selling tobacco products to underage consumers is an important component of a comprehensive tobacco control strategy to reduce tobacco use."

The Association of California Healthcare Districts (ACHD) supports this bill, stating that it goes further to regulate e-cigarette manufacturers consistent with regulations for cigarettes and cannabis product including by prohibiting any advertisement intended to encourage youth to use an electronic cigarette; prohibiting the imitation of candy packaging or labeling and prohibiting the use of those terms; as well as preventing claims of "health" benefits that may be derived from the product's use. ACHD notes that 80% of young people who have ever used tobacco started with a flavored product, and for these reasons, ACHD is pleased to support this bill.

**Arguments in Opposition:**

In opposition, The Vapor Technology Association writes, "the vague and subjective marketing standards contained within the bill go far beyond any standards imposed on other age-restricted products which arguably pose a much greater public health threat to youth than vapor products. Moreover, the overly broad and subjective standards likely will result in years of litigation and regulatory debates in order to fully define the parameters put into statute. The proposed penalties on businesses are, without justification, significantly higher than those for similar industries. Although our industry generally supports increasing penalties, it should be done in a way that does not shut down small businesses and is also commensurate with other areas of law."

**FISCAL COMMENTS:**

According to the Assembly Appropriations Committee analysis, annual General Fund costs of approximately \$1.4 million beginning in 2020-21. This bill requires DPH to conduct approximately 2,100 more inspections each than the Food and Drug Branch has resources to conduct. The above cost estimate reflects the costs of six investigators, one supervising investigator, and an analyst to complete the additional workload.

**VOTES:****ASM GOVERNMENTAL ORGANIZATION: 16-0-5**

**YES:** Gray, Bigelow, Aguiar-Curry, Brough, Cooley, Cooper, Daly, Eduardo Garcia, Gipson, Jones-Sawyer, Lackey, Low, Quirk-Silva, Robert Rivas, Blanca Rubio, Salas

**ABS, ABST OR NV:** Berman, Bonta, Gallagher, Mathis, Melendez

**ASM HEALTH: 15-0-0**

**YES:** Wood, Mayes, Aguiar-Curry, Bigelow, Bonta, Burke, Carrillo, Flora, Limón, McCarty, Nazarian, Ramos, Rodriguez, Santiago, Waldron

**ASM APPROPRIATIONS: 18-0-0**

**YES:** Gonzalez, Bigelow, Bloom, Bonta, Brough, Calderon, Carrillo, Chau, Diep, Eggman, Fong, Gabriel, Eduardo Garcia, Maienschein, Obernolte, Petrie-Norris, Quirk, Robert Rivas

**UPDATED:**

VERSION: August 21, 2019

CONSULTANT: Eric Johnson / G.O. / (916) 319-2531

FN: 0001703