

PROHIBITING THE SALE OF E-CIGARETTES TO MINORS AND OTHER NEW NICOTINE REGULATIONS

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House Bill 4164 (H-4) as referred to second committee

Sponsor: Rep. Thomas A. Albert

1st Committee: Regulatory Reform

2nd Committee: Judiciary

Complete to 4-15-19

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 4164 would amend the Youth Tobacco Act to prohibit selling or providing vapor products and alternative nicotine products (such as e-cigarettes) to minors. It would also implement new regulations on the retail sale of vapor products, alternative nicotine products, and liquid nicotine containers that are in line with those currently in place for traditional tobacco products. The bill would take effect 90 days after its enactment.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on the state and on local units of government. (For a detailed fiscal statement, see *Fiscal Information*, below)

THE APPARENT PROBLEM:

Since their introduction into the U.S. market in 2007, e-cigarettes have been the most commonly used tobacco product among U.S. youth. In December of 2018, the U.S. Surgeon General issued an advisory declaring e-cigarettes an epidemic among youth.¹ A 2016 federal rule extended the Food and Drug Administration's Center for Tobacco Products' regulatory authority to cover all tobacco products, including e-liquids, cartridges, and atomizers. The bill would extend similar regulations on a statewide level, but would not classify e-cigarettes as tobacco.

THE CONTENT OF THE BILL:

Prohibition of the sale of nicotine products to minors

The bill would prohibit selling, giving, or furnishing *vapor products* or *alternative nicotine products* to anyone under the age of 18, including through vending machines. Violators would be guilty of a misdemeanor punishable by a fine of up to \$100 for a first offense, \$500 for a second offense, or \$2,500 for a third or subsequent offense.

Vapor product would mean a noncombustible product that employs a heating element or other means to produce vapor from nicotine or any other substance, and the use or inhalation of which stimulates smoking. A vapor product would include an e-cigarette, e-cigar, e-cigarillo, or e-pipe, and would include the cartridge or other container for the liquid or solution that is used in the product or device.

¹ <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

Alternative nicotine product would mean a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means. The term would exclude food and any product defined under the act as a tobacco product or vapor product.

Prohibition of the purchase of nicotine products by minors

The bill would prohibit minors from:

- Purchasing or attempting to purchase a vapor or alternative nicotine product.
- Possessing or attempting to possess a vapor or alternative nicotine product.
- Using a vapor or alternative nicotine product in a public space.
- Using a false ID to do any of the above.

An individual who violated the above prohibitions would be responsible for a state civil infraction or found guilty of a misdemeanor, with the following penalties:

- For a first offense, the individual would be responsible for a state civil infraction and would have to pay a fine of up to \$50, and the court could choose to impose up to 16 hours of community service.
- For a second offense, the individual would be responsible for a state civil infraction and would have to pay a fine of up to \$50, and the court could choose to impose up to 32 hours of community service.
- For any subsequent offense, the individual would be guilty of a misdemeanor and would have to pay a fine of not more than \$50 per offense, and the court could choose to assign not more than 48 hours of community service.

In addition to these penalties, the court could require the individual to participate in a health promotion and risk assessment program, if such a program is available, pursuant to a probation order. In such a case, the individual would be responsible for paying the costs of participating in the program.

The bill clarifies that the above prohibitions would not apply to a minor participating in the following:

- An undercover operation in which the minor purchases or receives vapor or alternative nicotine products under the direction of the minor's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.
- An undercover operation in which the minor purchases or receives vapor or alternative nicotine products as part of state or local police operations, unless the initial or contemporaneous purchase or receipt of the product was not under the direction of said police.
- The handling or transportation of vapor or alternative nicotine products by a minor under the terms of the minor's employment.

Regulation of the sale of nicotine products

Under the bill, before selling, offering for sale, giving, or furnishing a tobacco, vapor, or alternative nicotine product to an individual, a person would need to verify that the individual is at least 18 years of age by doing either of the following:

- If the individual appears to be under 27 years of age, by examining a government-issued photographic ID that establishes that the individual is at least 18 years old.
- If the sale is made electronically or remotely, by performing an age verification through an independent, third-party age verification service that compares information from a commercially available database or aggregate of databases that are regularly used by government agencies and businesses for age identification purposes.

Currently, retail sellers of tobacco products are required to post, in a conspicuous location near the point of sale, a sign designed and produced by the Department of Health and Human Services that warns minors of the criminal penalties incurred by unlawfully purchasing tobacco products. Under the bill, the language of these signs would be amended to include mention of vapor products and alternative nicotine products as well, and the signs would also have to be posted by retail sellers of vapor and alternative nicotine products.

In addition, the bill would prohibit the display for sale of vapor products or alternative nicotine products unless they are stored behind a counter in an area accessible only to employees or within a locked case so that customers must ask an employee for access. Those who violate this prohibition would be responsible for a state civil infraction and fined up to \$500.

Regulation of the sale of liquid nicotine containers

The bill would also prohibit the sale of liquid nicotine containers unless the containers met the child-resistant effectiveness standards required by the U.S. Consumer Product Safety Commission. Anyone who violated this prohibition would be guilty of a misdemeanor punishable by a fine of up to \$50 for each infraction.

Defense against charges of sale to minors

Under the bill, a defendant who is charged with selling vapor or alternative nicotine products to minors, but who had been enforcing a written policy to prevent the sale of such products to minors at his or her retail location, may use the policy and its enforcement as an affirmative defense against the charges by providing a written notice of the defense to the court and the prosecuting attorney no later than 14 days before the date set for the trial. If the prosecuting attorney wishes to rebut this affirmative defense, he or she may do so by serving a notice of rebuttal in writing to the court and to the defendant no later than 7 days before the date set for the trial. (These affirmative defense provisions currently apply to sellers of tobacco products under the act.)

The bill would take effect 90 days after its enactment.

MCL 722.641 et seq.

FISCAL INFORMATION:

The bill would have an indeterminate fiscal impact on the state and on local units of government. Revenues could be increased under the bill, as new misdemeanor fines and civil infractions would be established, and a number of current misdemeanor fines would be increased. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues. Revenue collected from payment of civil infraction penalties is deposited into the state Justice System Fund, which supports various justice-related endeavors in the judicial and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury.

Costs could be incurred by the judiciary and local court systems. Costs would depend on how provisions of the bill affect caseloads and related administrative costs. The bill would have modest cost implications for the Department of Health and Human Services (DHHS) to modify signs made available to wholesalers and retailers, to modify related training and instructional materials, and to support related outreach and training to those entities. Signs and training materials are currently made available through a DHHS publications clearinghouse as downloadable pdfs and PowerPoints.

ARGUMENTS:

For:

Proponents said that the bill is intended to address the e-cigarette epidemic and to prevent minors from purchasing vaping products. While classifying vaping products as a separate category may not be ideal, they argued, it presents the quickest and most efficient way to implement protections. Schools were looking for direction in combating the use of e-cigarettes, and the legislature had an obligation to act quickly to prevent the spread. Future legislation could deal with the intricacies of regulation, they argued, but the bill would present an important first step in addressing the problem.

Against:

Opponents argued that classifying vaping products as tobacco is key to stopping the spread of the practice. Now that tobacco use is acknowledged to have health consequences, they said, associating a product with tobacco signals to the user—even an unsophisticated user, such as those typically drawn to vaping—that use may be worthy of additional scrutiny. Any other classification allows vaping companies to distinguish themselves from tobacco usage by promoting vaping as a safe alternative and offering products in special colors, flavors, and scents, critics argued. In short, they posited that the legislation would separate e-cigarettes from the stigma associated with tobacco use.

Moreover, they argued that classifying e-cigarettes as a tobacco product, thereby bringing them under any regulations concerning tobacco without having to rewrite large portions of statute, would be the true quickest and most efficient move.

POSITIONS:

Representatives of the following organizations testified in support of the bill (2-26-19):

Ionia School District
Prosecuting Attorneys Association of Michigan
TL Labs, Inc.
A Clean Cigarette
Vapejoose, Inc.

The following organizations indicated support for the bill:

Grand Rapids Chamber of Commerce (2-26-19)
Juil Labs (3-19-19)
Oakland Schools (3-19-19)

Representatives of the following organizations testified in opposition to the bill (2-26-19):

American Lung Association
American Cancer Society Cancer Action Network
American Heart Association

The following organizations indicated opposition to the bill:

Michigan Department of Health and Human Services (3-19-19)
The American College of Cardiology (2-26-19)
Michigan Council for Maternal and Child Health (2-26-19)
Michigan State Medical Society (2-26-19)
Michigan Health and Hospital Association (3-19-19)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.