

SUBJECT: Regulating e-cigarettes and banning their sale to minors

COMMITTEE: Public Health — committee substitute recommended

VOTE: 9 ayes — Crossover, Blanco, Coleman, S. Davis, Guerra, R. Miller,  
Sheffield, Zedler, Zerwas

0 nays

2 absent — Naishtat, Collier

WITNESSES: For — Josiah Neeley, R Street Institute; Ryan Van Ramshorst, Texas Pediatric Society, Texas Medical Association; Larriann Curtis, Texas PTA; (*Registered, but did not testify*: Marshall Kenderdine, Texas Academy of Family Physicians; Nelson Salinas, Texas Association of Business; Rebekah Schroeder, Texas Children's Hospital; Lon Craft, TMPA; Melody Chatelle, United Ways of Texas; Shannon Kemp; Katharine Ligon)

Against — Andrew Westerkom, Texas E-Cigarette and Vaping Association

On — Gavin Massingill, Altria; Schell Hammel, SFATA; Ernest Hawk, UT MD Anderson Cancer Center; (*Registered, but did not testify*: Kaitlyn Murphy, American Heart Association; Winfred Kang, Comptroller of Public Accounts; Barry Sharp, Department of State Health Services)

BACKGROUND: Health and Safety Code, ch. 161, subch. H regulates the distribution of cigarettes or tobacco products. In addition to other provisions, this subchapter prohibits the sale of cigarettes or tobacco products to persons younger than 18 years old. Chapter 161, subch. H and subch. N prohibit minors from possessing, purchasing, consuming, or accepting cigarettes or tobacco products. The chapter provides penalties for these offenses.

Education Code, sec. 38.006 and Penal Code, sec. 48.01 regulate the use of tobacco products on school property.

State statute does not currently apply all the requirements that apply to cigarettes and tobacco products to e-cigarettes, including requirements concerning the sale or provision of these products to individuals under 18.

**DIGEST:**

CSHB 170 would apply to e-cigarettes the similar provisions that regulate cigarettes and tobacco products under Health and Safety Code, ch. 161, subch. H, related to distribution of cigarettes or tobacco products. The bill also would apply to e-cigarettes the same provisions that apply to the use of tobacco products on school property under Education Code, sec. 38.006 and Penal Code, sec. 48.01. In addition, the bill would:

- add a definition for “e-cigarette”;
- require the Department of State Health Services to create a report on the use of e-cigarettes in the state;
- regulate the sale of liquid containing nicotine; and
- add requirements for delivery sales of e-cigarettes.

**Definitions.** The bill would define an “e-cigarette” to mean an electronic cigarette or any other device that simulated smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device. The term would not include a prescription medical device unrelated to the cessation of smoking. The term would include a device of the aforementioned description regardless of whether the device had another name or description and would include a component, part, or accessory of the device.

**Sale of e-cigarettes to minors.** The bill would prohibit the sale of e-cigarettes to persons younger than 18 years old under the same statutory provisions that currently apply to cigarettes and tobacco products in Health and Safety Code, ch. 161, subch. H, related to the distribution of cigarettes or tobacco products. As with cigarettes or tobacco products, it would be a class C misdemeanor (maximum fine of \$500) for a person, with criminal negligence, to sell, give, or cause to be sold or given an e-cigarette to someone who was younger than 18 years old. The bill also

would prohibit a person from selling, giving, or causing to be sold or given an e-cigarette to someone who was younger than 27 years old unless the person to whom the e-cigarette was sold or given presented an apparently valid proof of identification.

If an offense occurred in connection with a sale by an employee of the owner of a store in which cigarettes or tobacco products were sold at retail, the employee would be criminally responsible for the offense and would be subject to prosecution. It would be a defense to prosecution under the bill that the person to whom the e-cigarette was sold or given presented to the defendant apparently valid proof of identification. It also would be an affirmative defense to prosecution if the defendant was the owner of a store in which e-cigarettes were sold at retail, the offense occurred in connection with a sale by an employee of the owner, and the owner had provided the employee with a working transaction scan device and adequate training in the use of the scan device.

The bill would make it an offense punishable by a fine of up to \$250 for an individual younger than 18 years old to:

- possess, purchase, consume, or accept an e-cigarette; or
- falsely represent himself or herself to be 18 years old by displaying false proof of age to obtain possession of, purchase, or receive an e-cigarette.

An individual convicted of this offense would be required to attend an e-cigarette and tobacco awareness program approved by the commissioner. The bill would make an exception to the offense for an individual younger than 18 years old who possessed an e-cigarette in certain circumstances.

**E-cigarettes on school property.** The bill would apply to e-cigarette provisions in statute that prohibit the use of tobacco products on school property.

**Signage.** The bill also would apply to e-cigarettes the signage requirements in Health and Safety Code, ch. 161 that apply to the retail or

vending machine sale of cigarettes or tobacco products. The comptroller would provide the sign without charge to any person who sold e-cigarettes and to distributors.

**Notification of employees.** The bill would require retailers of e-cigarettes, as with retailers of cigarettes or tobacco products, to notify their employees of signage requirements within 72 hours of the date they began retail sales. Retailers also would have to notify employees within 72 hours that state law prohibited the sale of e-cigarettes to persons under 18 years old and that a violation of this law would be a class C misdemeanor (maximum fine of \$500). Employees would have to sign a form stating that the law had been fully explained, that they fully understood the law, and that they agreed to comply with the law as a condition of employment.

**Direct access to e-cigarettes.** A retailer or other person could not permit a customer direct access to e-cigarettes or install or maintain a vending machine for e-cigarettes. Also, a retailer could not redeem or distribute to persons younger than 18 years old a coupon, a free sample, or a discounted e-cigarette.

**Block grants and inspections.** The comptroller could make block grants to counties and municipalities to be used by local law enforcement agencies to enforce the bill's provisions in a manner that could reasonably be expected to reduce the extent to which e-cigarettes were sold or distributed, including by delivery sale, to persons who were younger than 18 years old. The bill would require random, unannounced inspections to be conducted at various locations where e-cigarettes were sold or distributed, including by delivery sale, to ensure compliance with the provisions of the bill.

**Tobacco awareness campaign.** The bill would require the tobacco awareness campaign under Health and Safety Code, sec. 161.301(a) to include e-cigarettes in its activities.

**Delivery sales.** Regulations in Health and Safety Code, ch. 161 that apply

to the delivery and shipping of cigarettes also would apply to e-cigarettes. The bill would add new regulations for delivery sale orders of e-cigarettes and would specify that a person taking a delivery sale order of e-cigarettes would have to comply with age verification and other requirements under state law. A person could not mail or ship e-cigarettes in connection with a delivery sale order unless the person verified that the prospective purchaser was at least 18 years old through a commercially available database. The bill would specify additional acceptable means for a retailer to verify the age of the prospective purchaser. The bill also would require such a delivery to require an adult signature.

A delivery sale of an e-cigarette would have to include a prominent and clearly legible statement that e-cigarette sales to individuals younger than 18 were illegal under state law and are restricted to those who provide verifiable proof of age. The bill would require a delivery sale order of e-cigarettes to include an additional clear, conspicuous statement provided in the bill.

A person who had made a delivery sale or shipped or delivered e-cigarettes would be exempt from the requirement to file a memorandum or copy of an invoice with the comptroller if the person had not violated Health and Safety Code, ch. 161, subch. H for two years preceding the date of the report and if they had not been reported by the comptroller as having violated subch. H. The bill would require a person who had not yet submitted such a memorandum of invoice copy to submit this record to the comptroller for each delivery sale of a cigarette or e-cigarette in the previous two years. A person would have to maintain records of compliance for four years from the date the record was prepared.

**Report.** The bill would require the Department of State Health Services to report to the governor, lieutenant governor, and speaker of the House by January 5 of each odd-numbered year on the status of the use of e-cigarettes in the state. The report would include components specified in the bill.

**Regulating the sale of liquid containing nicotine.** The bill would

prohibit a person from selling or causing to be sold a container that contained liquid with nicotine and that was an accessory for an e-cigarette unless:

- the container satisfied federal child-resistant effectiveness standards; or
- the container was a prefilled cartridge sealed by the manufacturer and was not intended to be opened by a consumer.

The bill would apply to an offense committed on or after October 1, 2015. The comptroller would develop the sign for a retailer or distributor to display per the bill and make the sign available to the public by September 15, 2015. The other provisions of the bill would take effect October 1, 2015.