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# Wisconsin Legislative Council

## AMENDMENT MEMO

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**2019 Assembly Bill 422**

**Assembly Amendment 3 to  
Assembly  
Substitute Amendment 1 and  
Assembly Substitute  
Amendment 1**

### CURRENT LAW

#### Federal Law

The recently amended federal Food, Drug, and Cosmetic Act imposes a nationwide prohibition on retailers selling a tobacco product<sup>1</sup> to any person younger than 21 years of age, including imposing fines on retailers<sup>2</sup> for violations of the law. Federal law also requires states, within approximately three years, to annually conduct random, unannounced inspections to ensure that retailers do not sell tobacco products to individuals under the age of 21 and to report to the federal government the activities carried out by the state to ensure that retailers do not sell tobacco products to individuals under the age of 21.

#### Wisconsin Law

##### Key Definitions

Under state law, a **“retailer”** means any person licensed by a city, village, or town to sell, exchange, barter, dispose of or give away any cigarettes or tobacco products to any person not holding certain licenses or permits. As described below, state law more narrowly defines “tobacco products” than federal law, which in turn further narrows the application of the term “retailer” in state law compared to federal law. [ss. 134.65 (1) and 134.66 (1) (g), Stats.]

Under state law, the term **“tobacco products”** means cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready-rubbed and other smoking tobacco; snuff, including moist snuff; snuff flour; cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but

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<sup>1</sup> Under federal law, the term “tobacco product” means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product). [21 USC s. 321 (rr) (1).] According to the U.S. Food and Drug Administration (FDA), E-liquids that do not contain nicotine or other substances made or derived from tobacco may nevertheless be components or parts of tobacco products and, therefore, subject to the FDA’s tobacco control authorities. [See <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/commonly-asked-questions-about-center-tobacco-products#14>.]

<sup>2</sup> “Retailer” is defined in federal law as “any person, government, or entity who sells tobacco products to individuals for personal consumption, or who operates a facility where self-service displays of tobacco products are permitted.” [21 USC s. 387 (14).]

“tobacco products” does not include cigarettes, as defined under s. 139.30 (1m), Stats. [s. 139.75 (12), Stats.]

“**Nicotine product**” is defined as a product that contains nicotine and is not any of the following: a tobacco product; a cigarette; or a product that has been approved by the U.S. FDA for sale as a smoking cessation product or for another medical purpose and is being marketed and sold solely for such an approved purpose. [s. 134.66 (1) (f), Stats.]

Under state law, “**vapor product**” means a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element, regardless of whether the liquid or other substance contains nicotine. [s. 139.75 (14), Stats.]

### **Minimum Age Requirements**

State law generally applies a minimum age requirement of 18 years to certain actions relating to cigarettes, tobacco products, and nicotine products. [ss. 134.66, 139.345, and 254.92, Stats.] More specifically, state law prohibits the following:

- A person under the age of 18 from purchasing, attempting to purchase, possessing, or falsely representing his or her age for the purpose of receiving any cigarette, nicotine product, or tobacco product, with certain exceptions.
- A person from purchasing cigarettes, tobacco products, or nicotine products on behalf of a person who is under the age of 18.
- A person from delivering a package of cigarettes unless the person making the delivery verifies that the person receiving the package is at least 18 years of age.
- A retailer, manufacturer, distributor, jobber, subjobber, or independent contractor or an employee or agent of any of these persons from doing any of the following:
  - Selling or providing cigarettes or tobacco or nicotine products to an individual who is under the age of 18.
  - Providing cigarettes or tobacco or nicotine products to any person for free unless the cigarettes or products are provided in a place where persons under 18 years of age are generally not permitted to enter.
- A retailer or vending machine operator from selling cigarettes or tobacco or nicotine products from a vending machine unless the retailer or vending machine operator ensures that no person under 18 years of age is present on or permitted to enter the premises where the machine is located.

In addition, state law requires retailers and vending machine operators to post certain signage where cigarettes or tobacco products are sold, indicating that sales to a person under the age of 18 is unlawful.

### **Investigations**

Very generally, under current law, a governmental regulatory authority may conduct unannounced investigations at retail outlets to enforce compliance with the requirement that retailers do not sell cigarettes, tobacco products, or nicotine products to anyone under age 18.

## **2019 ASSEMBLY BILL 422**

The bill makes changes relating to the following: the definition of “retailer;” the minimum age requirements described above; and investigations relating to compliance with those minimum age requirements. The bill takes effect approximately six months after its enactment.

### **Definition of “Retailer”**

The bill expands the state definition of retailer to include any person that sells, exposes for sale, possesses with intent to sell, exchanges, barter, disposes of, or gives away any vapor products to any person. However, the bill does not require that persons who sell vapor products must receive a license from the local government. Rather, the bill’s expanded definition of “retailer” only applies with regard to the state level minimum age restrictions.

### **Minimum Age Requirements**

The bill changes the minimum age requirements in current law from 18 years to 21 years.

The bill also applies those minimum age-related requirements to vapor products. Note that the current minimum age-related requirements cover “nicotine products.” Therefore, one impact of this change is that vapor products that are not nicotine products would be covered by the minimum -age related requirements.

### **Investigations**

The bill changes references in current law relating to investigations concerning the minimum age requirements from 18 to 21 and explicitly includes vapor products in the list of products subject to investigation.

## **ASSEMBLY SUBSTITUTE AMENDMENT 1**

Similar to the bill, Assembly Substitute Amendment 1 changes the minimum age requirements relating to cigarettes, tobacco, and nicotine products from age 18 years to age 21 years. However, the substitute amendment differs from the bill in the following ways:

- The substitute amendment ties the changes in minimum age requirements to the federal Food, Drug, and Cosmetic Act.
- The substitute amendment does not impose a minimum age requirement for selling, providing, or purchasing vapor products that are not nicotine products.
- The substitute amendment does not include vapor products that are not nicotine products in the list of products subject to investigation concerning the minimum age requirement.
- The substitute amendment does not expand the definition of retailer to include any person who engages in certain activities regarding vapor products and is not already a retailer.
- The substitute amendment does not include a delayed effective date.

## **ASSEMBLY AMENDMENT 3 TO ASSEMBLY SUBSTITUTE AMENDMENT 1**

Assembly Amendment 3 to the substitute amendment does the following:

- Applies the minimum age requirement to selling, providing, or purchasing vapor products that are not nicotine products.
- Includes vapor products that are not nicotine products in the list of products subject to investigation concerning the minimum age requirement.
- Expands the definition of retailer, as it applies to laws governing the minimum age requirements, to include any person who engages in certain activities regarding vapor products and is not already a retailer.

- Provides that under certain circumstances, a vending machine operator is not liable for the purchase of vapor products from his or her vending machine by a person under 21 years of age. Current law, as amended by the substitute amendment, provides similar immunity to a vending machine operator for the purchase of cigarettes, nicotine products, or tobacco products by a person under 21 years of age.

## **BILL HISTORY**

Representative Spiros introduced Assembly Substitute Amendment 1 on February 10, 2020, and Assembly Amendment 3 to the substitute amendment on February 19, 2020.

The Assembly Committee on Substance Abuse and Prevention voted on February 12, 2020, to recommend adoption of the substitute amendment and passage of the bill, as amended, on votes of Ayes, 6; Noes, 3.

The Assembly voted on February 20, 2020, to adopt Assembly Amendment 3 to the substitute amendment, to adopt the substitute amendment, as amended, and to pass the bill, as amended, on voice votes.

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