

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 7089 PCB HMR 20-04 Nicotine Products

**SPONSOR(S):** Judiciary Committee, Health Market Reform Subcommittee, Toledo and Duran

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health Market Reform Subcommittee	14 Y, 1 N	Morris	Calamas
1) Commerce Committee	18 Y, 5 N	Brackett	Hamon
2) Judiciary Committee	15 Y, 1 N, As CS	Jones	Luczynski

### SUMMARY ANALYSIS

The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) is responsible for the regulation of tobacco products. "Tobacco products" are loose tobacco leaves, products made from tobacco leaves, and cigarette wrappers, which can be used for smoking, sniffing, or chewing. Retailers that sell or deal, at retail, in tobacco products are required to have a permit issued by the Division and are required to comply with certain provisions related to the sale of such products. The Division enforces the tobacco regulations, may issue fines to permit holders for violations, or suspend or revoke such permits.

Nicotine products and nicotine dispensing devices are not included in the definition of tobacco products. Retailers that sell only nicotine products and nicotine dispensing devices are not required to obtain a tobacco retailer permit or a permit from any other state agency. As such, these retailers are not subject to state regulatory oversight.

Punitive damages are damages awarded in a civil case as an enhancement of actual damages when a defendant's wrongful conduct was intentional, malicious, or reckless. They are imposed to punish the defendant and deter others. In most cases the cap on punitive damages is the greater of three times the amount of compensatory damages or \$500,000.

The bill creates a retail nicotine products dealer permit which must be obtained from the Division to sell nicotine products in this state. This establishes state regulatory oversight for retailers of nicotine products and nicotine dispensing devices. The regulations for the sale of nicotine products and nicotine dispensing devices mirror the regulations for the sale of tobacco products; however, the bill does not impose a tax or licensing fee similar to tobacco products.

The bill authorizes a holder of a tobacco retail permit to sell nicotine products in addition to tobacco products.

The bill raises the cap for the amount of punitive damages that can be awarded in actions against manufacturers of vapor-generating electronic devices, nicotine products, or nicotine dispensing devices, to the greater of four times the amount of compensatory damages or \$2 million.

The bill has a significant, indeterminate, negative fiscal impact on DBPR.

The bill provides an effective date of October 1, 2020.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

#### **Federal Regulation of Tobacco Products**

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act) gives the Food and Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health. The Tobacco Control Act provides advertising and labeling guidelines, provides standards for tobacco products, and requires face-to-face transactions for tobacco sales with certain exceptions.<sup>1</sup>

On August 8, 2016, the FDA extended the definition of “tobacco product[s]” regulated under the Act to include electronic nicotine delivery systems (ENDS). ENDS include e-cigarettes, e-cigars, e-hookah, vape pens, personal vaporizers and electronic pipes. Additionally, the definition of tobacco products includes components and parts such as e-liquids, tanks, cartridges, pods, wicks, and atomizers.

Federal law requires that a retailer may sell cigarettes and smokeless tobacco only in “direct, face-to-face exchanges between the retailer and the customer.” This language explicitly prohibits vending machines and self-service displays.<sup>2</sup> This language is referred to in the industry as the “behind the counter” language; however, this does not specifically require that a retailer place cigarettes or smokeless tobacco behind the counter. A locked display case would likely meet the self-service display prohibition. Facilities that prohibit minors under the age of 18 are exempted from this federal requirement.

Federal law preempts states from providing additional or different requirements for tobacco products in regards to “standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.” However, federal law explicitly preserves the right of states, or any political subdivision of a state, to enact laws, rules, regulations or other measures related to prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of tobacco products which are more stringent than federal requirements.<sup>3</sup>

On December 20, 2019, the Federal Food, Drug, and Cosmetic Act was amended to raise the federal minimum age of sale of tobacco products, including ENDS, from 18 to 21 years.<sup>4</sup> The law became effective on January 15, 2020, with the FDA announcing that retailers may no longer sell tobacco products to anyone under the age of 21.<sup>5</sup> Prior to the enactment of this amendment the FDA used minors to ensure that retailers were complying with the law. Despite the change in the law, the FDA will continue to use minors under the age of 18 for compliance checks during a transition period.<sup>6</sup> The FDA did not provide any further guidance but stated that it would be “updating our website and other materials, including our regulations, in the near future to reflect the change in law.”<sup>7</sup>

The federal government does not require states to enforce the federal minimum age, but states that do not demonstrate that their retailers are complying with the federal minimum age are subject to a

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<sup>1</sup> Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq; 15 U.S.C. s. 1333, s. 1335 (2017); 21 U.S.C. s. 387g, s. 387f (2017).

<sup>2</sup> 21 C.F.R. § 1140.14.

<sup>3</sup> 21 U.S.C. § 387p (2017).

<sup>4</sup> *Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21*, United States Food and Drug Administration, January 15, 2019, available at <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21> (last visited February 11, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* The FDA states that it “recognizes that both the agency and some retailers will need to update current practices to implement this new law as FDA will need time to do outreach and education to retailers and update the Agency’s programmatic work to reflect this change in law.” The FDA does not provide a timeline for how long it anticipates this transition period will last.

<sup>7</sup> *Id.*

possible reduction in funding for Substance Abuse Prevention and Treatment Block Grants.<sup>8</sup> Substance Abuse and Prevention and Treatment Block Grants are administered by the U.S. Department of Health and Human Services, and are federal funds provided to the states to prevent substance abuse.<sup>9</sup> However, the federal government will not reduce a block grant for failing to enforce the federal minimum age for at least three years.<sup>10</sup>

### E-Cigarette, or Vaping, Product Use-Associated Lung Injury (EVALI)

As of January 14, 2020, there have been 2,668 cases of EVALI and 60 deaths in the United States. 113 of the cases and two of the deaths have been in Florida. According to the Centers for Disease Control (CDC), tetrahydrocannabinol (THC) and Vitamin E acetate are strongly linked to the outbreak of EVALI. The CDC and FDA recommend that people not use THC-containing vaping products, particularly from informal sources like friends, family, or in-person or online dealers.<sup>11</sup>

Symptoms of the lung injury include:<sup>12</sup>

- Cough, shortness of breath, or chest pain;
- Nausea, vomiting, or diarrhea; and
- Fatigue, fever, or abdominal pain.

The CDC has the following data on the age and sex of the 2,668 cases:<sup>13</sup>

- 66% of the patients are male;
- The median age of patients is 24 years old and ranges from 13-85 years. However, 76% of the patients are under 35 years old;
- By age group category:
  - 15% of patients are under 18 years old;
  - 37% of patients are 18 to 24 years old;
  - 24% of patients are 25 to 34 years old; and
  - 24% of patients are 35 years or older.

### **Regulation of Tobacco Products in Florida**

The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) is the state agency responsible for the regulation and enforcement of the tobacco products under ch. 569, F.S. “Tobacco products” include loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.<sup>14</sup>

Section 210.25(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term “tobacco products” differently as “loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts 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.”

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<sup>8</sup> H.R. 1865 Further Consolidated Appropriations Act, 2020, 116th Congress (2019-2020).; 42. U.S.C. § 300x-26.

<sup>9</sup> USDHHS, Substance Abuse Prevention and Treatment Block Grant, <https://www.samhsa.gov/grants/block-grants/sabg> (last visited Jan. 27, 2020)

<sup>10</sup> H.R. 1865 Further Consolidated Appropriations Act, 2020, 116th Congress (2019-2020).; 42. U.S.C. § 300x-26.

<sup>11</sup> CDC, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html#latest-outbreak-information](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#latest-outbreak-information) (last visited Feb. 7, 2020). Florida Department of Health, *Lung Injury Associated with E-Cigarette Use, or Vaping- Florida*, Florida Department of Health <http://www.flhealthcharts.com/ChartsReports/rdPage.aspx?rdReport=ChartsProfiles.LungInjuryE-CigaretteUse> (last visited Feb. 7, 2020).

<sup>12</sup> CDC, *For the Public*, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease/need-to-know/index.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease/need-to-know/index.html) (last visited Feb. 7, 2020).

<sup>13</sup> *Supra*, note 11.

<sup>14</sup> S. 569.002(6), F.S.

“Tobacco products” in either definition does not include nicotine products and nicotine dispensing devices.

An individual must obtain a retail tobacco products dealer permit from the Division for each place of business or the premises where tobacco products are sold to be eligible to sell retail tobacco products, or operate a tobacco products vending machine in Florida. The fee for such a permit is \$50.<sup>15</sup> The Division may only issue permits to persons who are 18 years or older or corporations with officers who are 18 years or older.<sup>16</sup> The place or premises covered by a permit is subject to inspection and search without a search warrant by the Division or its authorized assistants, and by sheriffs, deputy sheriffs, or police officers, to determine compliance with requirements for tobacco sales and dealing.<sup>17</sup>

DBPR is required to submit an annual report to the Governor and Legislature regarding the enforcement of tobacco products, including:<sup>18</sup>

- The number and results of compliance visits by the Division;
- The number of violations for failure of a retailer to hold a valid license;
- The number of violations for selling tobacco products to anyone under the age of 18 and the results of administrative hearings on such violations; and
- The number of people under the age of 18 cited, including sanctions imposed as a result of such citation, for misrepresenting their age, purchasing tobacco products underage, and misrepresenting military service for the purpose of obtaining tobacco products underage.

Florida also has an excise tax and surcharge on cigarettes and other tobacco products, not including cigars. The tax and surcharge for cigarettes is \$0.1695 to \$0.42375 per pack and a surcharge of \$0.50 to \$1.25 per pack depending on the number of cigarettes in the pack. The excise tax for tobacco products is 25% of the wholesale price and the surcharge is 60% of the wholesale price. There is no excise tax or surcharge for nicotine products or nicotine dispensing devices.<sup>19</sup>

## Requirements for Tobacco Products Retailers

### *Signage*

Retail tobacco products dealers (dealers) must post a clear and conspicuous sign that the sale of tobacco products is prohibited to persons under the age of 18 and that proof of age is required for purchase. The Division is required to make the signs available to retailers. Dealers must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a tobacco product.<sup>20</sup>

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<sup>15</sup> S. 569.003, F.S.

<sup>16</sup> S. 569.003, F.S.

<sup>17</sup> S. 569.004, F.S.

<sup>18</sup> S. 569.19, F.S.

<sup>19</sup> Ss. 210.011, 210.02, 210.276, & 210.30, F.S.; DBPR, Alcoholic Beverages & Tobacco – Tax & Reporting Information For Licensees, <http://www.myfloridalicense.com/DBPR/alcoholic-beverages-and-tobacco/tax-and-reporting-information-for-licensees/#1510753842753-25986d10-086f> (last visited Jan. 28, 2020).

<sup>20</sup> S. 569.14, F.S.

## Direct Sales

The sale or delivery of tobacco products is prohibited, except when those products are under the direct control or line of sight of the dealer or the dealer's agent or employee in order to prevent persons under 18 years of age from purchasing or receiving tobacco products. If a tobacco product is sold from a vending machine, the vending machine must have:

- An operational lockout device which is under the control of the dealer or the dealer's agent or employee who directly regulates the sale of items through the machine by triggering the lockout device to allow the dispensing of one tobacco product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled; and
- A mechanism to ensure that only one tobacco product is dispensed at a time.<sup>21</sup>

These requirements for the sale of tobacco products do not apply to an establishment that prohibits persons under 18 years of age on premises and do not apply to the sale or delivery of cigars and pipe tobacco.<sup>22</sup>

If the Division determines a tobacco product dealer or a tobacco product dealer's employee violated the regulations for tobacco product dealers, the Division can suspend or revoke the dealer's permit or assess a fine up to \$1,000 for each violation.<sup>23</sup>

If the Division discovers a tobacco product dealer's employee illegally sold tobacco products to a person under 18 years, the Division may mitigate penalties, if:

- The dealer is qualified as a responsible dealer by establishing and implementing specified practices designed to ensure that the dealer's employees comply with ch. 569, F.S., such as employee training.
- The dealer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation.
- The sale was made through a vending machine equipped with an operational lock-out device.<sup>24</sup>

## Mail Order, Internet, and Other Remote Sales of Tobacco Products in Florida

Section 210.095, F.S., provides requirements for the delivery of mail order, Internet, and other remote sales of tobacco products and cigarettes, referred to as "delivery sales." Each person who mails, ships, or otherwise delivers tobacco products or cigarettes in connection with an order for a delivery sale is required to:

- Include, as part of the shipping documents, in a clear and conspicuous manner, the following statement: "Tobacco Products: Florida law prohibits shipping to individuals under 18 years of age and requires the payment of all applicable taxes."
- Use a method of mailing, shipping, or delivery which obligates the delivery service to:
  - Require the signature of an adult who resides at the delivery address and obtain proof of the legal minimum purchase age of the individual accepting delivery, if the individual appears to be under 27 years of age.
  - Require proof that the individual accepting delivery is either the addressee or the adult designated by the addressee, in the form of a valid, government-issued identification card bearing a photograph of the individual who signs to accept delivery of the shipping container.

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<sup>21</sup> S. 569.007(1), F.S.

<sup>22</sup> S. 569.007(2)-(3), F.S.

<sup>23</sup> S. 569.006, F.S.

<sup>24</sup> See s. 569.008(3), F.S.

- Provide to the delivery service, if such service is used, evidence of full compliance with requirements for the collection and remittance of all taxes imposed on tobacco products or cigarettes by this state with respect to the delivery sale.

Before the first delivery to a consumer, the person mailing, shipping, or delivering the tobacco products or cigarettes must also:<sup>25</sup>

- Obtain a certification from the person accepting delivery that includes reliable confirmation that the person accepting delivery is an adult, and a written statement under penalty of perjury providing the person's date of birth, address, and confirmation that the person wants to accept the delivery;
- Make a good faith effort to verify the information in the certification by checking the information against a commercially available database or obtaining a photocopy of the person's ID;
- Provides the person accepting the delivery a notice stating tobacco products are illegal for underage youths and tobacco products are taxable;
- Impose a two-carton minimum on each order of cigarettes;
- Submit to the credit card company necessary information so that the words "tobacco product" appear on the person's credit card statement when a purchase is made using a credit card;
- Make a phone call to the individual who made the order to confirm the order before shipping the order; and
- Receive payment by a credit card or debit card in the name of the person accepting delivery or a personal or company check of the person, if the order is made in accordance with an advertisement on the Internet.

A person who accepts a purchase order for a delivery sale and delivers the tobacco products or cigarettes without using a delivery service must comply with all of the delivery service requirements.<sup>26</sup>

Section 210.095(8), F.S., currently provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree:<sup>27</sup>

- A delivery of tobacco products, on behalf of a delivery service, to an individual who is under 18 years of age.
- A person under the age of 18 who knowingly violates any of the provisions of the mail order or internet sales requirements.

These provisions do not apply to nicotine products and nicotine dispensing devices. However, it is illegal for a person to deliver nicotine products or nicotine dispensing devices to persons under 18 years of age.<sup>28</sup>

### Tobacco Products and Minors

The sale, delivery, bartering, furnishing or giving of tobacco products or giving sample to products to persons under the age of 18 is prohibited.<sup>29</sup> A violation of this prohibition is a second degree misdemeanor.<sup>30</sup> A second or subsequent violation within one year of the first violation is a first degree misdemeanor.<sup>31</sup>

<sup>25</sup> *Id.*

<sup>26</sup> S. 210.095, F.S.

<sup>27</sup> Section 775.082, F.S., does not provide a third degree misdemeanor. Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S., does not provide a third degree misdemeanor. Section 775.083, F.S., provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>28</sup> S. 877.112(2), F.S.

<sup>29</sup> Ss. 569.0075 and 569.101, F.S.

<sup>30</sup> S. 775.082, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a term of imprisonment not exceeding 60 days. Section 775.083, F.S. provides that the penalty for a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>31</sup> S. 775.082, F.S., provides that the penalty for a misdemeanor of the first degree is punishable by a term of imprisonment not exceeding one year. Section 775.083, F.S. provides that the penalty for a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

It is a complete defense to a person charged with such a violation if the buyer or recipient falsely evidenced that he or she was 18 years of age or older, a prudent person would believe the buyer or recipient to be 18 years of age or older, and the buyer or recipient presented false identification upon which the person relied upon in good faith.<sup>32</sup>

Persons under the age of 18 years are prohibited from knowingly possessing, directly or indirectly, any tobacco products. Persons who violate this noncriminal violation are punishable as follows:<sup>33</sup>

- A first violation of this prohibition is a non-criminal violation with a penalty of 16 hours of community service or a \$25 fine, and attendance at a school-approved anti-tobacco program, if locally available.
- A second violation within 12 weeks of the first violation is punishable with a \$25 fine.
- A court may suspend or withhold issuance of a driver license for persons under 18 years of age who fail to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase tobacco products.

However, this does not include any person under the age of 18 who:<sup>34</sup>

- Has had his or her disability of nonage removed under ch. 743, F.S.;
- Is in the military reserve or on active duty in the Armed Forces of the United States;
- Is otherwise emancipated by a court of competent jurisdiction and released from parental care and responsibility; or
- Is acting in his or her scope of lawful employment with an entity licensed under the provisions of ch. 210, F.S., relating to taxation of cigarettes and other tobacco products, or ch. 569, F.S., relating to tobacco products.

Eighty percent of all civil penalties received from violating prohibitions related to the possession or sale of tobacco products by a county court must be remitted to the Department of Revenue for transfer to the Department of Education for teacher training and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children.<sup>35</sup> The remaining 20 percent of civil penalties received by a county court must remain with the clerk of the county court to cover administrative costs.<sup>36</sup>

The Florida Clean Indoor Air Act prohibits any person under the age of 18 from smoking tobacco within 1,000 feet of a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight. A violation of this prohibition is punishable by a maximum noncriminal civil penalty not to exceed \$25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco “alternative to suspension” program.<sup>37</sup>

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<sup>32</sup> S. 569.101(3), F.S.

<sup>33</sup> S. 569.11, F.S.

<sup>34</sup> S. 569.002(7), F.S.

<sup>35</sup> S. 569.11(6), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> S. 386.212, F.S.

## Nicotine Products Regulation in Florida

Section 877.112, F.S., provides for the regulation of nicotine products and nicotine dispensing devices, such as electronic cigarettes (e-cigarettes). This statute extends the current prohibitions related to tobacco products to the sale, gifting, possession, or use of nicotine products and nicotine dispensing devices to and by persons under 18 years of age.

A “nicotine dispensing device” is:<sup>38</sup>

any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

A “nicotine product” is any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means.<sup>39</sup> The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.<sup>40</sup>

The sale or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor.<sup>41</sup> It is a complete defense to a violation if an underage person falsely misrepresented his or her age, the underage person had the appearance to a prudent person to be 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.<sup>42</sup>

Persons under 18 years of age who knowingly possess, purchase, or misrepresent their age or military service to obtain nicotine products or nicotine dispensing devices commit a noncriminal violation.<sup>43</sup> The penalty is 16 hours of community service or a \$25 fine for a first violation, and attendance at a school-approved anti-tobacco and nicotine program, if available. A second violation within 12 weeks of the first violation requires a \$25 fine. A court may suspend or withhold issuance of a driver’s license for persons under 18 years of age who fail to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase tobacco products.<sup>44</sup>

Eighty percent of civil penalties related to the unlawful possession or sale of nicotine products are remitted to the Department of Revenue for transfer to the Department of Education for teacher training and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children.<sup>45</sup> The remaining 20 percent of civil penalties received by a county court are retained by the clerk of the county court to cover administrative costs.<sup>46</sup>

Retail dealers of nicotine products and nicotine dispensing devices are required to post signs indicating that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited and that proof of age is required for purchase. Retailers must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a nicotine product or nicotine dispensing device.<sup>47</sup>

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<sup>38</sup> S. 877.112(1)(a), F.S.

<sup>39</sup> S. 877.112(1)(b), F.S.

<sup>40</sup> *Id.*

<sup>41</sup> Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S., provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>42</sup> S. 877.112(5), F.S.

<sup>43</sup> Ss. 877.112(6), (7), F.S.

<sup>44</sup> *Id.*

<sup>45</sup> S. 877.112(9), F.S.

<sup>46</sup> *Id.*

<sup>47</sup> S. 877.112(10), F.S.



Nicotine products or nicotine dispensing devices may not be sold or displayed by means of self-service merchandising.<sup>48</sup> Self-service merchandising means the open display of nicotine products or nicotine dispensing devices for direct customer access and handling before the purchase of such product without the assistance of the retailer or the retailer's employee. However, this does not apply to establishments that prohibit persons under the age of 18 on the premises.<sup>49</sup>

Laws related to nicotine products and nicotine dispensing devices are different from tobacco laws in the following ways:

- Nicotine retailers are not required to obtain a tobacco products dealer permit from the Division;
- Nicotine retailers are not subject to inspection without a search warrant.
- The Division does not have authority to discipline a nicotine retailer for violating any of the regulations relating to the retail sale of nicotine products and nicotine dispensing devices.
- The requirements for Internet and remote sales of tobacco products do not apply to nicotine products or nicotine dispensing devices.
- There are no exemptions for the prohibition of the purchase and possession of nicotine products and nicotine dispensing products by persons under 18 years old, such as military service.

## Youth Vaping

The FDA reports that between 2011 and 2014, the number of high school students who had used an e-cigarette in the last 30 days increased nearly 800 percent, with 13.4 percent of high school students reporting usage in 2014.<sup>50</sup> In 2018, over 4.9 million middle and high school students were current users of e-cigarettes.<sup>51</sup> As of 2018, more than one in four high school seniors and one in ten middle school students used e-cigarettes.<sup>52</sup> In 2019, among middle and high school students, over 5 million were current users of e-cigarettes, and almost 1 million were using e-cigarettes daily.<sup>53</sup>

In order to decrease youth usage of ENDS, the FDA has begun a Youth Tobacco Prevention Plan. The plan has three main components: preventing youth access to tobacco products, ending marketing aimed at youth, educating youth about the dangers of using tobacco and educating retailers about their role in preventing underage usage of tobacco.<sup>54</sup>

## Punitive Damages

Punitive damages are damages awarded in a civil case as an enhancement of actual damages when a defendant's wrongful conduct was intentional, malicious, or reckless. They are imposed to punish the defendant and deter others.<sup>55</sup>

Section 768.725, F.S., requires that the right to receive punitive damages must be demonstrated by clear and convincing evidence at trial.<sup>56</sup> The plaintiff must prove the defendant "had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage...would result" or "that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or

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<sup>48</sup> Ss. 877.112(11), (12), F.S.

<sup>49</sup> *Id.*; S. 877.112(1), F.S.

<sup>50</sup> Food and Drug Administration, 81 C.F.R. 28973, <https://www.federalregister.gov/d/2016-10685/p-635> (last visited Mar. 22, 2019).

<sup>51</sup> Food and Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on new data demonstrating rising youth use of tobacco products and the agency's ongoing actions to confront the epidemic of youth e-cigarette use*, <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-data-demonstrating-rising-youth-use-tobacco> (last visited Feb. 7, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> Food and Drug Administration, *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> (last visited Feb. 7, 2020).

<sup>54</sup> Food and Drug Administration, *FDA's Youth Tobacco Prevention Plan*, <https://www.fda.gov/TobaccoProducts/PublicHealthEducation/ProtectingKidsfromTobacco/ucm608433.htm> (last visited Feb. 7, 2020).

<sup>55</sup> 17 Fla. Jur 2d Damages §§ 122 and 123.

<sup>56</sup> The "clear and convincing evidence" standard is an intermediate burden of proof requiring that the evidence must be of "such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." See *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014) (internal citations omitted).

indifference to the life, safety, or rights” of others.<sup>57</sup> Thus, a plaintiff must make a stronger case for punitive damages than he or she must make for actual damages.

Section 768.73(1), F.S., currently provides a general cap on punitive damages of three times the amount of compensatory damages or \$500,000, whichever is greater.

This cap may be exceeded where the trier of fact finds that the defendant’s wrongful conduct was motivated solely by a desire for unreasonable financial gain and the defendant knew of the unreasonably dangerous nature of the conduct and the high likelihood of injury. In such cases, the cap on punitive damages increases to four times the amount of compensatory damages or \$2,000,000, whichever is greater. However, there is no cap on punitive damages in cases where the defendant had a specific intent to harm the plaintiff and the defendant’s conduct actually harmed the plaintiff.<sup>58</sup>

Section 768.73(2), F.S., also restricts multiple awards of punitive damages. A defendant in a civil action may avoid subsequent punitive damages if the defendant can establish that punitive damages have previously been awarded against the defendant in a state or federal court for harm from the same act or course of conduct for which the plaintiff seeks damages. However, subsequent punitive damages may be awarded if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish the defendant’s behavior. The wrongdoer’s cessation of the wrongful conduct may be considered in making this determination. If a subsequent award is permitted, the finder of fact will determine the total punitive damages appropriate to punish the conduct. The court will then enter judgment for that amount less any prior punitive damages awards.

### **Effect of Proposed Changes**

The bill establishes state regulatory oversight for retailers of nicotine products and nicotine dispensing devices. The regulations for the sale of nicotine products and nicotine dispensing devices mirror the regulations for the sale of tobacco products; however, the bill does not impose a tax or permit fee similar to tobacco products. The bill also includes regulations for the sale and delivery of nicotine products and nicotine dispensing devices through the mail and over the Internet, which are similar to the regulations for tobacco products, to ensure sales and deliveries are not to persons under age.

### **Nicotine Products Regulation in Florida**

The bill creates a retail nicotine products dealer permit which must be obtained from DBPR to be able to sell nicotine products, at retail, in this state. This permit however does not allow for the sale of tobacco products. The bill includes nicotine products, in addition to tobacco products, as those products that may be sold by an individual who holds a retail tobacco products dealer permit.

“Nicotine products” include any product that contains nicotine, including liquid nicotine, which is intended for human consumption, whether inhaled, chewed, absorbed, dissolved, or ingested by any means. **This also includes a nicotine dispensing device**, such as an electronic cigarette, that employs an electronic, chemical, or mechanical means to produce a vapor from a nicotine product. Products not considered to be nicotine products include:

- Tobacco products;
- Products regulated as a drug or device by the FDA; or
- Products that contain incidental nicotine.

The bill requires a person to obtain a retail nicotine products dealer permit for each place of business or the premises where nicotine products are to be sold face-to-face or through a vending machine, but there is no fee for the permit. The Division may only issue permits to persons who are 18 years or older or corporations with officers who are 18 years or older.<sup>59</sup> The bill provides for the place or premises

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<sup>57</sup> S. 768.72(2), F.S.

<sup>58</sup> See also s. 768.736, F.S. (removing the cap on punitive damages where the defendant was intoxicated); s. 768.735, F.S. (providing for different rules for punitive damages in special cases, such as those involving child abuse and elder abuse).

<sup>59</sup> S. 569.003, F.S.

covered by a permit be subject to inspection and search without a search warrant by the Division or its authorized assistants, and by sheriffs, deputy sheriffs, or police officers, to determine compliance with requirements for nicotine sales and dealing.

The bill repeals s. 877.112, F.S., which currently regulates nicotine products in this state.

### Requirements for Retail Nicotine Products Dealers

#### *Signage*

The bill requires nicotine product retailers to post a clear and conspicuous sign that the sale of nicotine products is prohibited to persons under the age of 18 and that proof of age is required for purchase. The Division is required to make the signs available to nicotine product retailers. Nicotine product retailers must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a nicotine product.

#### *Direct Sales*

The bill prohibits the sale or delivery of nicotine products except when those products are under the direct control or line of sight of the nicotine product retailer or the nicotine product retailer's agent or employee. The bill permits nicotine products to be sold from a vending machine if the vending machine has:

- An operational lockout device which is under the control of the nicotine product retailer or the nicotine product retailer's agent or employee who directly controls the sale of items through the machine by triggering the lockout device to allow the dispensing of one nicotine product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled; and
- A mechanism to ensure that only one nicotine product is dispensed at a time.

The bill also prohibits nicotine products from being sold or displayed by means of self-service merchandising. Self-service merchandising means the open display of nicotine products or nicotine dispensing devices for direct customer access and handling before the purchase of such product without the assistance of the retailer or the retailer's employee.<sup>60</sup>

The bill exempts establishments that prohibit people under the age of 18 on premises from such sales requirements.

#### *Mitigating Penalties for Underage Sales*

If the Division determines a nicotine product retailer or a nicotine product retailer's employee violated the regulations for nicotine product retailers, the Division can suspend or revoke the retailer's permit or assess a fine up to \$1,000 for each violation.

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<sup>60</sup> S. 877.112(1), F.S.  
**STORAGE NAME:** h7089c.JDC  
**DATE:** 2/28/2020

If the Division discovers a nicotine product retailer's employee illegally sold tobacco products to a person under 18, the bill allows the Division to mitigate penalties if:

- The nicotine product retailer is qualified as a responsible retailer by establishing and implementing specified practices designed to ensure that the nicotine product retailer's employees comply with Florida laws regulating the sale of nicotine products, such as employee training;
- The nicotine product retailer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation; and
- If the sale was made through a vending machine, the machine was equipped with an operational lock-out device.

### Nicotine Products and Minors

The bill prohibits the sale, delivery, bartering, furnishing or giving of nicotine products or giving sample to products to anyone under the age of 18. A violation of this prohibition is a second degree misdemeanor. A second or subsequent violation within one year of the first violation is a first degree misdemeanor.

A person charged with such a violation to have a complete defense if:

- The buyer falsely represented that he or she was 18 years of age or older;
- The appearance of the buyer would indicate, to a prudent person, that the buyer was 18 years of age or older; and
- The buyer presented false identification upon which the person relied upon in good faith.

The bill prohibits persons under the age of 18 from knowingly possessing, directly or indirectly, any nicotine products. Any person who violates such prohibition commits a non-criminal violation, punishable as follows:

- A first violation carries a penalty of 16 hours of community service or a \$25 fine, and attendance at a school-approved anti-tobacco and anti-nicotine program, if locally available.
- A second violation within 12 weeks of the first violation is punishable with a \$25 fine.
- A court may suspend or withhold issuance of a driver's license for persons under 18 years of age who fail to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase nicotine products.

However, this does not include any person under the age of 18 who:

- Has had his or her disability of nonage removed under ch. 743, F.S.;
- Is in the military reserve or on active duty in the Armed Forces of the United States;
- Is otherwise emancipated by a court of competent jurisdiction and released from parental care and responsibility; or
- Is acting in his or her scope of lawful employment.

The bill requires 80 percent of all civil penalties received from violating prohibitions related to the possession or sale of nicotine products by a county court to be remitted to the Department of Revenue for transfer to the Department of Education for teacher training and for research and evaluation to reduce and prevent the use of nicotine products and or nicotine products by children. The remaining 20 percent of civil penalties received by a county court is required to remain with the clerk of the county court to cover administrative costs.

## Mail Order, Internet, and Other Remote Sales of Nicotine Products in Florida

The bill creates requirements for the delivery of mail order, Internet, and other remote sales of nicotine products, referred to as “delivery sales.” Each person who mails, ships, or otherwise delivers nicotine products in connection with an order for a delivery sale must:

- Include, as part of the shipping documents, in a clear and conspicuous manner, the following statement: “Nicotine Products: Florida law prohibits shipping to individuals under 18 years of age.”
- Use a method of mailing, shipping, or delivery which obligates the delivery service to:
  - Require the signature of an adult who resides at the delivery address and obtain proof of the legal minimum purchase age of the individual accepting delivery, if the individual appears to be under 27 years of age.
  - Require proof that the individual accepting delivery is either the addressee or the adult designated by the addressee, in the form of a valid, government-issued identification card bearing a photograph of the individual who signs to accept delivery of the shipping container.

Before the first delivery to a consumer, the bill requires the person mailing, shipping, or delivering the nicotine products to:

- Obtain a certification from the person accepting delivery that includes reliable confirmation that the person accepting the delivery is an adult, and a written statement under penalty of perjury providing the person’s date of birth, address, and confirmation that the person wants to accept the delivery;
- Make a good faith effort to verify the information in the certification by checking the information against a commercially available database or obtaining a photocopy of the person’s ID;
- Provide the person accepting the delivery a notice stating nicotine products are illegal for underage youths and sales of such products are restricted to individuals who provide verifiable proof of legal age to purchase;
- Receive payment by a credit card or debit card in the name of the person accepting the delivery or a personal or company check of the person accepting the delivery, if the order is made in accordance with an advertisement on the Internet;
- Submit to the credit card company necessary information so that the words “nicotine product” appear on the person’s credit card statement when a purchase is made using a credit card; and
- Make a phone call to the person accepting the delivery to confirm the order before shipping the order.

The bill requires a person who accepts a purchase order for a delivery sale and delivers the nicotine products without using a delivery service to comply with all of the delivery service requirements.

The bill imposes a penalty for knowingly violating the delivery sale requirements as a misdemeanor of the second degree.

The bill requires the Division to submit an annual report, by December 31, to the Governor and Legislature on the progress of implementing and enforcing the above requirements, including:

- The number and results of compliance visits by the Division;
- The number of violations for failure of a retailer to hold a valid permit;
- The number of violations for selling nicotine products to anyone under the age of 18 and the results of administrative hearings on such violations; and
- The number of people under the age of 18 cited, including sanctions imposed as a result of such citation, for misrepresenting their age, purchasing nicotine products underage, and misrepresenting military service for the purpose of obtaining nicotine products underage.

The bill changes the title of ch. 569, F.S., from “Tobacco Products” to “Tobacco and Nicotine Products.” The bill directs the Division of Law Revision to create parts I and II of ch. 569, F.S., entitled “Tobacco Products” and “Nicotine Products,” respectively.

### Punitive Damages

The bill raises the cap for the amount of punitive damages that can be awarded in actions against manufacturers of vapor-generating electronic devices, nicotine products, or nicotine dispensing devices, to the greater of four times the amount of compensatory damages or \$2 million.

The bill does not affect current law related to the standard for proving punitive damages, which first requires that certain elements, including intentional misconduct or gross negligence, be proven by clear and convincing evidence prior to a determination of the amount of the award of damages.

The bill provides an effective date of October 1, 2020.

### B. SECTION DIRECTORY:

- Section 1:** Renames ch. 569, F.S., as "Tobacco and Nicotine Products."
- Section 2:** Directs the Division of Law Revision to create part I of ch. 569, F.S., entitled “Tobacco Products” and to create part II of ch. 569, F.S., entitled “Nicotine Products.”
- Section 3:** Amends s. 569.002, F.S., relating to definitions.
- Section 4:** Amends s. 569.004, F.S., relating to consent to inspection and search without warrant.
- Section 5:** Amends s. 569.006, F.S., relating to retail tobacco products dealers; administrative penalties.
- Section 6:** Amends s. 569.0073, F.S., relating to special provisions; smoking pipes and smoking devices.
- Section 7:** Amends s. 569.009, F.S., relating to rulemaking authority.
- Section 8:** Amends s. 569.12, F.S., relating to jurisdiction; tobacco product enforcement officers or agents; enforcement.
- Section 9:** Amends s. 569.14, F.S., relating to posting of a sign stating that the sale of tobacco products to persons under 18 years of age is unlawful; enforcement; penalty.
- Section 10:** Amends s. 569.19, F.S., relating to annual report.
- Section 11:** Creates s. 569.31, F.S., relating to definitions.
- Section 12:** Creates s. 569.32, F.S., relating to retail nicotine products dealer permits; application; qualifications; renewal; duplicates.
- Section 13:** Creates s. 569.33, F.S., relating to consent to inspection and search without warrant.
- Section 14:** Creates s. 569.34, F.S., relating to operating without a retail nicotine products dealer permit; penalty.
- Section 15:** Creates s. 569.35, F.S., relating to retail nicotine product dealers; administrative penalties.
- Section 16:** Creates s. 569.37, F.S., relating to sale or delivery of nicotine products; restrictions.
- Section 17:** Creates s. 569.38, F.S., relating to gift of sample nicotine products and nicotine dispensing devices.
- Section 18:** Creates s. 569.381, F.S., relating to responsible retail nicotine products dealers; qualifications; mitigation of disciplinary penalties; diligent management and supervision; presumption.
- Section 19:** Creates s. 569.39, F.S., relating to rulemaking authority.
- Section 20:** Creates s. 569.41, F.S., relating to selling, delivering, bartering, furnishing, or giving nicotine products to persons under 18 years of age; criminal penalties; defense.
- Section 21:** Creates s. 569.42, F.S., relating to possession, misrepresenting age or military service to purchase, and purchase of nicotine products by persons under 18 years of age prohibited; penalties; jurisdiction; disposition of fines.
- Section 22:** Creates s. 569.43, F.S., relating to posting a sign stating that the sale of nicotine products to persons under 18 years of age is unlawful; enforcement; penalty.
- Section 23:** Creates s. 569.44, F.S., relating to annual report.
- Section 24:** Creates s. 569.45, F.S., relating to mail order, Internet, and remote sales of nicotine products; age verification.

**Section 25:** Amends s. 768.73, F.S., relating to punitive damages; limitation.

**Section 26:** Repeals s. 877.112, F.S.

**Section 27:** Provides an effective date of October 1, 2020.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The Department of Revenue (DOR) may see an increase in revenue as the bill allows 80 percent of civil penalties received by a county court relating to enforcement of underage possession and purchasing of nicotine products to be remitted to DOR. The impact is indeterminate.

#### 2. Expenditures:

The bill has a significant, indeterminate, negative fiscal impact on DBPR. The bill creates new duties of the Division relating to the regulation and enforcement of nicotine products and sales which will increase current workload on Division employees. The impact is indeterminate because the number of current retailers who sell nicotine products is unknown as they are not currently regulated by any state agency. DBPR estimates that it will need an additional \$105,846 in non-recurring funds and \$269,432 in recurring funds, which will be used in part to pay for three additional full-time equivalent (FTE) positions.

The bill requires the Division to create a new application for a retail nicotine products dealer permit, and issue such permits, the cost of which may be able to be absorbed within current resources.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The clerk of the county court may see an increase in revenue as the bill allows 20 percent of civil penalties received by a county court relating to enforcement of underage possession and purchasing of nicotine products to remain with the clerk. The impact is indeterminate.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

The Florida Supreme Court has held that the existence of a claim for punitive damages is subject to the authority of the legislature, which "may place conditions upon such a recovery or even abolish it altogether."<sup>61</sup>

#### B. RULE-MAKING AUTHORITY:

The bill provides sufficient rule-making authority for DBPR to implement the provisions of this bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 26, 2020, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment corrected drafting errors, made clarifying changes, and deleted unnecessary language.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.

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<sup>61</sup> *Gordon v. State*, 585 So. 2d 1033, 1035-36 (3d DCA 1991), *approved*, 608 So. 2d 800 (Fla. 1992).