

LEGISLATURE OF NEBRASKA
ONE HUNDRED EIGHTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1296

Introduced by Hughes, 24; Albrecht, 17; Ballard, 21; Bosn, 25; Brandt, 32; Brewer, 43; DeKay, 40; Hardin, 48; Holdcroft, 36; Ibach, 44; Kauth, 31; Lippincott, 34; Lowe, 37; Meyer, 41; Murman, 38; von Gillern, 4.

Read first time January 16, 2024

Committee:

1 A BILL FOR AN ACT relating to tobacco; to amend sections 28-1422,
2 28-1429, and 59-1523, Reissue Revised Statutes of Nebraska, sections
3 28-1418.01 and 28-1425, Revised Statutes Cumulative Supplement,
4 2022, and section 77-4001, Revised Statutes Supplement, 2023; to
5 define and redefine terms; to prohibit certain conduct relating to
6 controlled substances and counterfeit substances; to prohibit
7 delivery sales of electronic nicotine delivery systems; to change
8 provisions relating to licensure for sales of tobacco products; to
9 provide for revocation of licenses for certain violations; to
10 provide requirements for manufacturers and licensees under the
11 Tobacco Products Tax Act; to create a directory of electronic
12 nicotine delivery systems and manufacturers; to provide powers and
13 duties for the Tax Commissioner and Attorney General; to provide
14 penalties; to harmonize provisions; and to repeal the original
15 sections.
16 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 28-1418.01, Revised Statutes Cumulative
2 Supplement, 2022, is amended to read:

3 28-1418.01 For purposes of sections 28-1418 to 28-1429.03 and
4 sections 5 and 6 of this act:

5 (1) Alternative nicotine product means any noncombustible product
6 containing nicotine that is intended for human consumption, whether
7 chewed, absorbed, dissolved, or ingested by any other means. Alternative
8 nicotine product does not include any electronic nicotine delivery
9 system, cigarette, cigar, or other tobacco product, or any product
10 regulated as a drug or device by the United States Food and Drug
11 Administration under Chapter V of the Federal Food, Drug, and Cosmetic
12 Act;

13 (2) Cigarette means any product that contains nicotine, is intended
14 to be burned or heated under ordinary conditions of use, and consists of
15 or contains (a) any roll of tobacco wrapped in paper or in any substance
16 not containing tobacco, (b) tobacco, in any form, that is functional in
17 the product which, because of its appearance, the type of tobacco used in
18 the filler, or its packaging and labeling, is likely to be offered to, or
19 purchased by, consumers as a cigarette, or (c) any roll of tobacco
20 wrapped in any substance containing tobacco which, because of its
21 appearance, the type of tobacco used in the filler, or its packaging and
22 labeling, is likely to be offered to, or purchased by, consumers as a
23 cigarette described in subdivision (2)(a) of this section;

24 (3) Delivery sale means to sell, give, or furnish products (a) by
25 mail or delivery service; (b) through the Internet or a computer network;
26 (c) by telephone; or (d) through any other electronic method;

27 (4)(a) ~~(3)(a)~~ Electronic nicotine delivery system means any product
28 or device containing nicotine, tobacco, or tobacco derivatives that
29 employs a heating element, power source, electronic circuit, or other
30 electronic, chemical, or mechanical means, regardless of shape or size,
31 to simulate smoking by delivering the nicotine, tobacco, or tobacco

1 derivatives in vapor, fog, mist, gas, or aerosol form to a person
2 inhaling from the product or device.

3 (b) Electronic nicotine delivery system includes, but is not limited
4 to, the following:

5 (i) Any substance containing nicotine, tobacco, or tobacco
6 derivatives, whether sold separately or sold in combination with a
7 product or device that is intended to deliver to a person nicotine,
8 tobacco, or tobacco derivatives in vapor, fog, mist, gas, or aerosol
9 form;

10 (ii) Any product or device marketed, manufactured, distributed, or
11 sold as an electronic cigarette, electronic cigar, electronic cigarillo,
12 electronic pipe, electronic hookah, or similar products, names,
13 descriptors, or devices; and

14 (iii) Any component, part, or accessory of such a product or device
15 that is used during operation of the product or device when sold in
16 combination with any substance containing nicotine, tobacco, or tobacco
17 derivatives.

18 (c) Electronic nicotine delivery system does not include the
19 following:

20 (i) An alternative nicotine product, cigarette, cigar, or other
21 tobacco product, or any product regulated as a drug or device by the
22 United States Food and Drug Administration under Chapter V of the Federal
23 Food, Drug, and Cosmetic Act; or

24 (ii) Any component, part, or accessory of such a product or device
25 that is used during operation of the product or device when not sold in
26 combination with any substance containing nicotine, tobacco, or tobacco
27 derivatives;

28 (5) ~~(4)~~ Self-service display means a retail display that contains a
29 tobacco product, a tobacco-derived product, an electronic nicotine
30 delivery system, or an alternative nicotine product and is located in an
31 area openly accessible to a retailer's customers and from which such

1 customers can readily access the product without the assistance of a
2 salesperson. Self-service display does not include a display case that
3 holds tobacco products, tobacco-derived products, electronic nicotine
4 delivery systems, or alternative nicotine products behind locked doors;
5 and

6 (6) ~~(5)~~ Tobacco specialty store means a retail store that (a)
7 derives at least seventy-five percent of its revenue from tobacco
8 products, tobacco-derived products, electronic nicotine delivery systems,
9 or alternative nicotine products and (b) does not permit persons under
10 the age of twenty-one years to enter the premises unless accompanied by a
11 parent or legal guardian, ~~except that until January 1, 2022, a tobacco~~
12 ~~specialty store may allow an employee who is nineteen or twenty years of~~
13 ~~age to work in the store.~~

14 Sec. 2. Section 28-1422, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 28-1422 (1) Every person, partnership, limited liability company,
17 or corporation desiring a license under sections 28-1420 to 28-1429 shall
18 file with the clerk or finance department of the city, town, or village
19 where his, her, their, or its place of business is located, if within the
20 limits of a city, town, or village or with the clerk of the county where
21 such place of business is located if outside the limits of any city,
22 town, or village a written application stating:

23 (a) ~~The~~ the name of the person, partnership, limited liability
24 company, or corporation for whom such license is desired;

25 (b) ~~An email address for contacting such person, partnership,~~
26 limited liability company, or corporation; and

27 (c) ~~The~~ the exact location of the place of business and shall
28 deposit with such application the amount of the license fee provided in
29 section 28-1423.

30 (2) If the applicant is an individual, the application shall include
31 the applicant's social security number.

1 (3) Any clerk or finance department who grants such a license shall
2 notify the Tax Commissioner of such granting and transmit all applicable
3 application materials received to the Tax Commissioner.

4 Sec. 3. Section 28-1425, Revised Statutes Cumulative Supplement,
5 2022, is amended to read:

6 28-1425 Any licensee who shall sell, give, or furnish in any way to
7 any person under the age of twenty-one years, or who shall willingly
8 allow to be taken from his or her place of business by any person under
9 the age of twenty-one years, any cigars, tobacco, cigarettes, cigarette
10 material, electronic nicotine delivery systems, or alternative nicotine
11 products is guilty of a Class III misdemeanor. Any officer, director, or
12 manager having charge or control, either separately or jointly with
13 others, of the business of any corporation which violates sections
14 28-1419, 28-1420 to 28-1429, and 28-1429.03 and sections 5 and 6 of this
15 act, if he or she has knowledge of such violation, shall be subject to
16 the penalties provided in this section. In addition to the penalties
17 provided in this section, such licensee shall be subject to the
18 additional penalty of a revocation and forfeiture of his, her, their, or
19 its license, at the discretion of the court before whom the complaint for
20 violation of such sections may be heard. If such license is revoked and
21 forfeited, all rights under such license shall at once cease and
22 terminate and a new license shall not be issued until expiration of the
23 period provided for in section 28-1429.

24 Sec. 4. Section 28-1429, Reissue Revised Statutes of Nebraska, is
25 amended to read:

26 28-1429 If a ~~In the event that the license issued under sections~~
27 ~~28-1420 to 28-1429 is of a licensee hereunder shall be~~ revoked and
28 forfeited as provided in section 28-1425, no new license shall be issued
29 to such licensee;

30 (1) For a violation of section 5 or 6 of this act, until the
31 expiration of five years from the date of such revocation and forfeiture;

1 or

2 (2) For any other violation of sections 28-1418 to 28-1429.03,
3 except as otherwise provided in section 28-1423, until the expiration of
4 one year from the date of such revocation and forfeiture.

5 Sec. 5. A person holding a license under sections 28-1420 to
6 28-1429 who sells, gives, or furnishes in any way to any person, or who
7 willingly allows to be taken from such licensee's place of business by
8 any person, any controlled substance or counterfeit substance, as such
9 terms are defined in section 28-401, shall be, in addition to the
10 penalties provided for in the Uniform Controlled Substances Act, subject
11 to the additional penalty of a revocation and forfeiture of such license
12 as provided in sections 28-1425 and 28-1429, at the discretion of the
13 court.

14 Sec. 6. (1) A person holding a license under sections 28-1420 to
15 28-1429 shall not, by delivery sale: sell, give, or furnish to any person
16 any electronic nicotine delivery system. A violation of this subsection
17 is a Class I misdemeanor.

18 (2) Any common carrier that knowingly transports any electronic
19 nicotine delivery system in any form for a person who is in violation of
20 subsection (1) of this section is guilty of a Class I misdemeanor.

21 (3) In addition to any other penalty, a violation of this section
22 shall constitute a deceptive trade practice under the Uniform Deceptive
23 Trade Practices Act and shall be subject to any remedies or penalties
24 available for a violation of such act.

25 (4) All electronic nicotine delivery systems that are sold, given,
26 or furnished in violation of this section are subject to seizure,
27 forfeiture, and destruction and shall not be purchased or sold in the
28 state. The cost of such seizure, forfeiture, and destruction shall be
29 borne by the person from whom the products are seized.

30 (5) This section does not apply to the following:

31 (a) The shipment of electronic nicotine delivery systems to a

1 foreign trade zone that is established under 19 U.S.C. 81a et seq. and
2 that is located in this state if the products are from outside of this
3 country, were ordered by a distributor in another state, and are not
4 distributed in this state;

5 (b) A government employee who is acting in the course of the
6 employee's official duties; or

7 (c) The shipment of electronic nicotine delivery systems to a
8 university that is acquiring the systems to conduct basic and applied
9 research, if the systems are exempt from federal excise tax under 26
10 U.S.C. 5704(a).

11 Sec. 7. Section 59-1523, Reissue Revised Statutes of Nebraska, is
12 amended to read:

13 59-1523 (1) The cigarette tax division of the Tax Commissioner may,
14 after notice and hearing, revoke or suspend for any violation of section
15 59-1520 the license or licenses of any person licensed under sections
16 28-1418 to 28-1429.03 and sections 5 and 6 of this act or sections
17 77-2601 to 77-2622.

18 (2) Cigarettes that are acquired, held, owned, possessed,
19 transported, sold, or distributed in or imported into this state in
20 violation of section 59-1520 are declared to be contraband goods and are
21 subject to seizure and forfeiture. Any cigarettes so seized and forfeited
22 shall be destroyed. Such cigarettes shall be declared to be contraband
23 goods whether the violation of section 59-1520 is knowing or otherwise.

24 Sec. 8. Section 77-4001, Revised Statutes Supplement, 2023, is
25 amended to read:

26 77-4001 Sections 77-4001 to 77-4025 and sections 9 to 19 of this act
27 shall be known and may be cited as the Tobacco Products Tax Act.

28 Sec. 9. (1) By April 1, 2025, and annually thereafter, each
29 manufacturer of electronic nicotine delivery systems that are sold in
30 this state, whether directly or through a distributor, wholesaler,
31 retailer, or similar intermediary or intermediaries, shall execute and

1 deliver a certification, under penalty of perjury and in a form and
2 manner prescribed by the Tax Commissioner, that the manufacturer agrees
3 to comply with the Tobacco Products Tax Act and that:

4 (a) The manufacturer has received a marketing authorization or
5 similar order for the electronic nicotine delivery system from the United
6 States Food and Drug Administration pursuant to 21 U.S.C. 387j; or

7 (b) The electronic nicotine delivery system was marketed in the
8 United States as of August 8, 2016; the manufacturer submitted a
9 premarket tobacco product application for the electronic nicotine
10 delivery system to the United States Food and Drug Administration
11 pursuant to 21 U.S.C. 387j on or before September 9, 2020; and the
12 application either remains under review or a final decision on the
13 application has not otherwise taken effect.

14 (2) The annual certification form shall separately list each
15 electronic nicotine delivery system that a manufacturer sells in this
16 state.

17 (3) The annual certification form shall be accompanied by:

18 (a) Either:

19 (i) A copy of the marketing authorization or similar order described
20 in subdivision (1)(a) of this section; or

21 (ii) Evidence that a premarket tobacco product application was
22 submitted and either remains under review or a final decision on the
23 application has not otherwise taken effect as described in subdivision
24 (1)(b) of this section; and

25 (b) A nonrefundable payment of five hundred dollars for each
26 electronic nicotine delivery system the first time a manufacturer submits
27 a certification form for that electronic nicotine delivery system and a
28 nonrefundable payment of five hundred dollars annually thereafter for
29 each electronic nicotine delivery system.

30 (4) All revenue collected or received by the Tax Commissioner
31 pursuant to this section shall be remitted to the State Treasurer for

1 credit to the Department of Revenue Enforcement Fund for use by the
2 Department of Revenue to administer the Tobacco Products Tax Act.

3 Sec. 10. A manufacturer required to submit a certification form
4 pursuant to section 9 of this act shall notify the Tax Commissioner and
5 Attorney General within thirty days after any:

6 (1) Material change to the certification form, including the
7 issuance or denial of a marketing authorization or similar order by the
8 United States Food and Drug Administration pursuant to 21 U.S.C. 387j; or

9 (2) Any other order or action by the Food and Drug Administration or
10 any court that affects the ability of an electronic nicotine delivery
11 system to be introduced or delivered into interstate commerce for
12 commercial distribution in the United States.

13 Sec. 11. (1) Beginning October 1, 2025, the Tax Commissioner shall
14 maintain and make publicly available on the Department of Revenue's
15 website a directory that lists all electronic nicotine delivery system
16 manufacturers and electronic nicotine delivery systems for which up to
17 date and accurate certification forms conforming to the requirements of
18 sections 9 and 10 of this act have been submitted under section 9 of this
19 act. The commissioner shall update the directory as necessary to ensure
20 accuracy.

21 (2) Before any electronic nicotine delivery system manufacturer or
22 any such system may be removed from the directory, the Tax Commissioner
23 shall provide the manufacturer thirty days' notice of the intended action
24 and shall post the notice in the directory. The manufacturer shall have
25 thirty days to come into compliance with sections 9 and 10 of this act
26 or, in the alternative, secure a temporary injunction against removal in
27 the district court of Lancaster County. For purposes of such injunction,
28 loss of the ability to sell a type of electronic nicotine delivery system
29 as a result of removal from the directory shall constitute irreparable
30 harm. If after thirty days the manufacturer remains in noncompliance and
31 has not obtained such an injunction, the manufacturer or system shall be

1 removed from the directory.

2 (3) If the Tax Commissioner determines that an electronic nicotine
3 delivery system manufacturer or system of such manufacturer shall not be
4 included in the directory, such manufacturer may request a contested case
5 before the commissioner under the Administrative Procedure Act. The
6 commissioner shall notify the manufacturer in writing of the
7 determination not to include it in the directory. A request for hearing
8 shall be made within thirty calendar days after the date of such
9 determination and shall contain the evidence supporting the
10 manufacturer's compliance with sections 9 and 10 of this act. The hearing
11 shall be held within sixty days after the request. At the hearing, the
12 commissioner shall determine whether the manufacturer is in compliance
13 with such sections and whether the manufacturer or system should be
14 listed in the directory. A final decision shall be rendered within thirty
15 days after the hearing. Any decision of the commissioner may be appealed.
16 The appeal shall be in accordance with the Administrative Procedure Act.

17 (4) No later than twenty-one calendar days following removal of an
18 electronic nicotine delivery system manufacturer or system from the
19 directory, each retailer, distributor, and wholesaler shall remove all
20 affected systems from inventory and return the systems to the
21 manufacturer for disposal. After such twenty-one-day period has elapsed,
22 any such system is subject to seizure, forfeiture, and destruction and
23 shall not be purchased or sold in the state. The cost of such seizure,
24 forfeiture, and destruction shall be borne by the person from whom the
25 products are seized.

26 (5) Beginning October 1, 2025, or on the date that the Tax
27 Commissioner first makes the directory available for public inspection on
28 the website of the Department of Revenue, whichever is later:

29 (a) A person shall not sell or offer for sale an electronic nicotine
30 delivery system in this state that is not included in the directory; and

31 (b) An electronic nicotine delivery system manufacturer shall not

1 sell, either directly or through a distributor or wholesaler, retailer,
2 or similar intermediary or intermediaries, an electronic nicotine
3 delivery system in this state that is not included in the directory.

4 Sec. 12. (1) A retailer, distributor, or wholesaler who sells or
5 offers for sale an electronic nicotine delivery system in this state that
6 is not included in the directory created pursuant to section 11 of this
7 act shall be subject to a civil penalty of XXX dollars per day for each
8 system offered for sale in violation of section 11 of this act until the
9 offending system is removed from the market or until the offending system
10 is properly listed in the directory.

11 (2) For a second such violation of section 11 of this act within a
12 twelve-month period, the license of the licensee shall be suspended for
13 at least fourteen days.

14 (3) For a third such violation of section 11 of this act within a
15 twelve-month period, the license of the licensee shall be suspended for
16 at least sixty days.

17 (4) For a fourth or subsequent such violation of section 11 of this
18 act within a twelve-month period, the license of the licensee shall be
19 suspended for at least one year.

20 Sec. 13. (1) An electronic nicotine delivery system manufacturer
21 whose electronic nicotine delivery systems are not listed in the
22 directory created pursuant to section 11 of this act and are sold in this
23 state, whether directly or through a distributor or wholesaler, retailer,
24 or similar intermediary or intermediaries, is subject to a civil penalty
25 of XXX dollars per day for each system offered for sale in violation of
26 section 11 of this act until the offending system is removed from the
27 market or until the offending system is properly listed on the directory.

28 (2) In addition, any manufacturer that falsely represents any of the
29 information on the certification form required by sections 9 and 10 of
30 this act shall be guilty of a Class III misdemeanor for each false
31 representation.

1 Sec. 14. All fees and penalties collected by the Tax Commissioner
2 pursuant to sections 12 and 13 of this act shall be remitted to the State
3 Treasurer for credit to the Tobacco Products Administration Cash Fund and
4 used for administration and enforcement of sections 9 to 19 of this act.

5 Sec. 15. A violation of sections 9 to 19 of this act shall
6 constitute a deceptive trade practice under the Uniform Deceptive Trade
7 Practices Act and, in addition to any remedies or penalties set forth in
8 sections 12 and 13 of this act, shall be subject to any remedies or
9 penalties available for a violation under the Uniform Deceptive Trade
10 Practices Act.

11 Sec. 16. (1) In order to enforce sections 9 to 19 of this act, the
12 Tax Commissioner and Attorney General may examine the books, papers,
13 invoices, and other records of any person in possession, control, or
14 occupancy of any premises where electronic nicotine delivery systems are
15 placed, stored, sold, or offered for sale, as well as the stock of
16 electronic nicotine delivery systems on the premises.

17 (2) Every person in possession, control, or occupancy of any
18 premises where electronic nicotine delivery systems are placed, sold, or
19 offered for sale shall give the Tax Commissioner and Attorney General the
20 means, facilities, and opportunity for the examinations authorized by
21 this section.

22 (3) Each retailer and wholesaler that sells or distributes
23 electronic nicotine delivery systems in this state shall be subject to at
24 least two unannounced compliance checks annually for purposes of
25 enforcing sections 9 to 19 of this act. Unannounced followup compliance
26 checks of all noncompliant retailers and wholesalers shall be conducted
27 within thirty days after any violation of sections 9 to 19 of this act.

28 (4) The Tax Commissioner shall publish the results of all compliance
29 checks at least annually and shall make the results available to the
30 public on request.

31 Sec. 17. (1) Any nonresident manufacturer of electronic nicotine

1 delivery systems that has not registered to do business in the state as a
2 foreign corporation or business entity shall, as a condition precedent to
3 being included in the directory created pursuant to section 11 of this
4 act, appoint and continually engage without interruption the services of
5 an agent in Nebraska to act as agent for the service of process on whom
6 all process, and any action or proceeding against such manufacturer
7 concerning or arising out of the enforcement of sections 9 to 19 of this
8 act, may be served in any manner authorized by law. Such service shall
9 constitute legal and valid service of process on the manufacturer. The
10 manufacturer shall provide the name, address, telephone number, and proof
11 of the appointment and availability of such agent to the Tax
12 Commissioner.

13 (2) The manufacturer shall provide notice to the Tax Commissioner
14 thirty calendar days prior to termination of the authority of an agent
15 and shall further provide proof to the satisfaction of the commissioner
16 of the appointment of a new agent no less than five calendar days prior
17 to the termination of an existing agent appointment. In the event an
18 agent terminates an agency appointment, the manufacturer shall notify the
19 commissioner of the termination within five calendar days and shall
20 include proof to the satisfaction of the commissioner of the appointment
21 of a new agent.

22 (3) Any manufacturer whose electronic nicotine delivery systems are
23 sold in this state who has not appointed and engaged the services of an
24 agent as required by this section shall be deemed to have appointed the
25 Secretary of State as its agent for service of process. The appointment
26 of the Secretary of State as agent shall not satisfy the condition
27 precedent required in subsection (1) of this section to be included or
28 retained in the directory.

29 Sec. 18. The Tax Commissioner may adopt and promulgate rules and
30 regulations necessary to carry out sections 9 to 19 of this act.

31 Sec. 19. On or before August 31, 2025, and annually thereafter, the

1 Tax Commissioner shall electronically submit a report to the Legislature
2 regarding the status of the directory created pursuant to section 11 of
3 this act, manufacturers and electronic nicotine delivery systems included
4 in the directory, revenue and expenditures related to administration of
5 sections 9 to 19 of this act, and enforcement activities undertaken in
6 the prior fiscal year pursuant to such sections.

7 Sec. 20. Original sections 28-1422, 28-1429, and 59-1523, Reissue
8 Revised Statutes of Nebraska, sections 28-1418.01 and 28-1425, Revised
9 Statutes Cumulative Supplement, 2022, and section 77-4001, Revised
10 Statutes Supplement, 2023, are repealed.