

HOUSE BILL NO. 177

INTRODUCED BY F. SMITH

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATING TO TOBACCO PRODUCTS; REVISING DEFINITIONS TO INCLUDE ALTERNATIVE NICOTINE AND VAPOR PRODUCTS UNDER THE DEFINITION OF "TOBACCO"; INCLUDING ALTERNATIVE NICOTINE AND VAPOR PRODUCTS IN THE LICENSE FEES FOR TOBACCO PRODUCTS; REPEALING THE PROHIBITION ON A LOCAL ORDINANCE PROHIBITING THE SALE OF TOBACCO PRODUCTS; AMENDING SECTIONS 7-1-111, 16-11-302, 16-11-303, 16-11-304, 16-11-305, 16-11-306, 16-11-308, 16-11-309, 16-11-310, AND 16-11-311, MCA; AND REPEALING SECTION 16-11-313, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 7-1-111, MCA, is amended to read:

"7-1-111. Powers denied. A local government unit with self-government powers is prohibited from exercising the following:

(1) any power that applies to or affects any private or civil relationship, except as an incident to the exercise of an independent self-government power;

(2) any power that applies to or affects the provisions of 7-33-4128 or Title 39, except that subject to those provisions, it may exercise any power of a public employer with regard to its employees;

(3) any power that applies to or affects the public school system, except that a local unit may impose an assessment reasonably related to the cost of any service or special benefit provided by the unit and shall exercise any power that it is required by law to exercise regarding the public school system;

(4) any power that prohibits the grant or denial of a certificate of compliance or a certificate of public convenience and necessity pursuant to Title 69, chapter 12;

(5) any power that establishes a rate or price otherwise determined by a state agency;

(6) any power that applies to or affects any determination of the department of environmental quality with regard to any mining plan, permit, or contract;

(7) any power that applies to or affects any determination by the department of environmental quality with regard to a certificate of compliance;

(8) any power that defines as an offense conduct made criminal by state statute, that defines an offense as a felony, or that fixes the penalty or sentence for a misdemeanor in excess of a fine of \$500, 6 months' imprisonment, or both, except as specifically authorized by statute;

(9) any power that applies to or affects the right to keep or bear arms;

(10) any power that applies to or affects a public employee's pension or retirement rights as established by state law, except that a local government may establish additional pension or retirement systems;

(11) any power that applies to or affects the standards of professional or occupational competence established pursuant to Title 37 as prerequisites to the carrying on of a profession or occupation;

(12) except as provided in 7-3-1105, 7-3-1222, 7-21-3214, or 7-31-4110, any power that applies to or affects Title 75, chapter 7, part 1, or Title 87;

(13) (a) any power that applies to or affects landlords, as defined in 70-24-103 and 70-33-103, when that power is intended to license landlords or to regulate their activities with regard to tenants beyond what is provided in Title 70, chapters 24, 25, and 33; or

(b) any power to deviate from or add to the exclusive application of the provisions of:

(i) the Montana Residential Landlord and Tenant Act of 1977, Title 70, chapter 24;

(ii) residential tenants' security deposit law in Title 70, chapter 25; or

(iii) the Montana Residential Mobile Home Lot Rental Act, Title 70, chapter 33.

(14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy;

(15) subject to 80-10-110, any power to regulate the registration, packaging, labeling, sale, storage, distribution, use, or application of commercial fertilizers or soil amendments, except that a local government may enter into a cooperative agreement with the department of agriculture concerning the use and application of commercial fertilizers or soil amendments. This subsection is not intended to prevent or restrict a local government from adopting or implementing zoning regulations or fire codes governing the physical location or siting of fertilizer manufacturing, storage, and sales facilities.

(16) subject to 80-5-136(10), any power to regulate the cultivation, harvesting, production,

1 processing, sale, storage, transportation, distribution, possession, use, and planting of agricultural seeds or
2 vegetable seeds as defined in 80-5-120. This subsection is not intended to prevent or restrict a local
3 government from adopting or implementing zoning regulations or building codes governing the physical location
4 or siting of agricultural or vegetable seed production, processing, storage, sales, marketing, transportation, or
5 distribution facilities.

6 (17) any power that prohibits the operation of a mobile amateur radio station from a motor vehicle,
7 including while the vehicle is in motion, that is operated by a person who holds an unrevoked and unexpired
8 official amateur radio station license and operator's license, "technician" or higher class, issued by the federal
9 communications commission of the United States;

10 (18) subject to 76-2-240 and 76-2-340, any power that prevents the erection of an amateur radio
11 antenna at heights and dimensions sufficient to accommodate amateur radio service communications by a
12 person who holds an unrevoked and unexpired official amateur radio station license and operator's license,
13 "technician" or higher class, issued by the federal communications commission of the United States;

14 (19) any power to require a fee and a permit for the movement of a vehicle, combination of vehicles,
15 load, object, or other thing of a size exceeding the maximum specified in 61-10-101 through 61-10-104 on a
16 highway that is under the jurisdiction of an entity other than the local government unit;

17 (20) any power to enact an ordinance governing the private use of an unmanned aerial vehicle in
18 relation to a wildfire;

19 (21) any power as prohibited in 7-1-121(2) affecting, applying to, or regulating the use, disposition,
20 sale, prohibitions, fees, charges, or taxes on auxiliary containers, as defined in 7-1-121(4);

21 (22) any power that provides for fees, taxation, or penalties based on carbon or carbon use in
22 accordance with 7-1-116;

23 (23) any power to require an employer, other than the local government unit itself, to provide an
24 employee or class of employees with a wage or employment benefit that is not required by state or federal law;

25 (24) any power to enact an ordinance prohibited in 7-5-103 or a resolution prohibited in 7-5-121 and
26 any power to bring a retributive action against a private business owner as prohibited in 7-5-103(2)(d)(iv) and 7-
27 5-121(2)(c)(iv);

28 ~~(25) any power to prohibit the sale of alternative nicotine products or vapor products as provided in~~

1 16-11-313(1);

2 (26)(25)any power to control the amount of rent charged for private residential or commercial property.

3 Private residential property does not include property in which the local government unit has a property interest

4 or in which the local government unit has an interest through a housing authority.

5 (27)(26)any power to require additional licensing when the state is the original issuer of the license;

6 (28)(27)any power to prohibit or impede the connection or reconnection of an electric, natural gas,

7 propane, or other energy or utility service provided by a public utility, municipal utility, cooperative utility, or

8 other energy or fuel provider;

9 (29)(28)any power to prohibit the purchase or use of any fuel derived from petroleum, including but not

10 limited to methane, propane, gasoline, and diesel fuel, or the installation or use of any vehicles, vessels, tools,

11 or commercial and residential appliances that burn or transport petroleum fuels; or

12 (30)(29)any power to require that buildings be constructed to have solar panels or wiring, batteries, or

13 other equipment for solar panels or electric vehicles."

14

15 **Section 2.** Section 16-11-302, MCA, is amended to read:

16 **"16-11-302. Definitions.** For the purposes of 16-11-301 through 16-11-308, the following definitions

17 apply:

18 (1) (a) "Alternative nicotine product" means any manufactured noncombustible product containing

19 nicotine derived from tobacco that is intended for human consumption, whether chewed, absorbed, dissolved,

20 or ingested by any other means. An alternative nicotine product is considered a tobacco product as defined in

21 this section.

22 (b) ~~—The term does not include a tobacco product, a vapor product, or a product regulated as a drug~~

23 ~~or device by the United States food and drug administration under Chapter V of the Federal Food, Drug, and~~

24 ~~Cosmetic Act.~~

25 (2) "Distribute" means:

26 (a) to give, deliver, sample, or sell;

27 (b) to offer to give, deliver, sample, or sell; or

28 (c) to cause or hire another person to give, deliver, sample, or sell or offer to give, deliver, sample,

1 or sell.

2 (3) "Health warning" means a tobacco product label required by federal law and intended to alert
3 users of the product to the health risks associated with tobacco use. The term includes warning labels required
4 under the Federal Cigarette Labeling and Advertising Act and the Comprehensive Smokeless Tobacco Health
5 Education Act of 1986.

6 (4) "License" means a retail tobacco product sales license.

7 (5) "Person" means a natural person, company, corporation, firm, partnership, organization, or
8 other legal entity.

9 (6) (a) "Tobacco product" means a substance intended for human consumption that contains
10 tobacco. The term includes cigarettes, cigars, snuff, smoking tobacco, and smokeless tobacco.

11 (b) ~~The term does not include an alternative nicotine product, a vapor product, products, and vapor~~
12 ~~products or a product regulated as a drug or device by the United States food and drug administration under~~
13 ~~Chapter V of the Federal Food, Drug, and Cosmetic Act.~~

14 (7) (a) "Vapor product" means a noncombustible product that may contain nicotine and that uses a
15 heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means,
16 regardless of shape or size, to produce vapor from a solution or other substance. The term includes an
17 electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and a vapor
18 cartridge or other container that may contain nicotine in a solution or other form that is intended to be used with
19 or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. A
20 vapor product is considered a tobacco product as defined in this section.

21 (b) ~~The term does not include a product regulated as a drug or device by the United States food~~
22 ~~and drug administration under Chapter V of the Federal Food, Drug, and Cosmetic Act."~~

23

24 **Section 3.** Section 16-11-303, MCA, is amended to read:

25 **"16-11-303. License for retail sale of tobacco products -- ~~alternative nicotine products -- vapor~~**
26 **~~products.~~** (1) A person may not sell tobacco products, ~~alternative nicotine products, or vapor products~~ at retail,
27 whether over the counter, by vending machine, or otherwise, without a license obtained from the department of
28 revenue.

(2) A license for the retail sale of tobacco products, ~~alternative nicotine products, or vapor products~~ may be obtained from the department of revenue.

(3) The fee collected by the department must be deposited in the general fund."

Section 4. Section 16-11-304, MCA, is amended to read:

"16-11-304. Signs. A retail seller of tobacco products, ~~alternative nicotine products, or vapor products~~ shall conspicuously display, at each place on the premises at which tobacco products, ~~alternative nicotine products, or vapor products~~ are displayed and sold, a sign that is ~~to be~~ provided without charge by the department of revenue that states: "Montana law prohibits the sale of tobacco products, including alternative nicotine products, and vapor products to persons under 18 years of age.""

Section 5. Section 16-11-305, MCA, is amended to read:

"16-11-305. Sale or distribution of tobacco products, ~~alternative nicotine products, or vapor products to persons under 18 years of age prohibited.~~ (1) A person may not sell or distribute a tobacco product, ~~alternative nicotine product, or vapor product~~ to an individual under 18 years of age, whether over the counter, by vending machine, or otherwise.

(2) If there is a reasonable doubt as to the individual's age, the seller shall require presentation of a driver's license or other generally accepted identification that includes a picture of the individual.

(3) If the seller scans a person's government or tribal-issued identification, the seller shall handle data and metadata from the scan in accordance with 16-3-313."

Section 6. Section 16-11-306, MCA, is amended to read:

"16-11-306. Sales of tobacco, ~~alternative nicotine products, or vapor products~~ through vending machines restricted. (1) Tobacco products, ~~alternative nicotine products, and vapor products~~ may be sold through a vending machine only in places where alcoholic beverages are sold and consumed on the premises and where the vending machine is under the direct line-of-sight supervision of the owner or an employee of the establishment. The tobacco products, ~~alternative nicotine products, or vapor products~~ must be in a vending machine that contains only tobacco products, ~~alternative nicotine products, or vapor products~~.

(2) Tobacco products, ~~alternative nicotine products, or vapor products~~ may not be sold through a vending machine that is located in a restaurant unless the restaurant has a bar, the restaurant area shares seating with the bar area, and the vending machine meets the requirements of subsection (1).

(3) The sale of tobacco products, ~~alternative nicotine products, or vapor products~~ from a vending machine under the direct line-of-sight supervision of an owner or employee is considered a sale of tobacco products, ~~alternative nicotine products, or vapor products~~ by the owner or employee for the purposes of 16-11-305."

Section 7. Section 16-11-308, MCA, is amended to read:

"16-11-308. Civil penalties -- license suspension -- tobacco education fee. (1) Failure to obtain a license, as required by 16-11-303, failure to post signs, as provided in 16-11-304, or the manufacture or sale of cigarettes or rolling tobacco in violation of the minimum package size requirements of 16-11-111 or 16-11-307 is punishable by a civil penalty of \$100. The department may collect the penalty in the manner provided for the collection of other debts.

(2) A person who violates 16-11-305(1) or 16-11-307(1) at any one location within a 3-year period shall be punished as follows:

(a) A first through third offense is punishable by a verbal notification of violation.

(b) A fourth offense is punishable by a written notice of violation to be sent by the department of public health and human services to the owner of the establishment.

(c) A fifth offense is punishable by assessment against the owner of the establishment of a tobacco education fee of \$500. The employee or other person who ~~sold~~ sells the tobacco product, ~~alternative nicotine product, or vapor product~~, the establishment manager, and the establishment owner, if the owner is a sole proprietor or partner, shall read and view the tobacco education material.

(d) A sixth offense under 16-11-305(1) or 16-11-307(1) or a third offense under 16-11-307(2) is punishable by suspension of the licenses required by 16-11-120 and 16-11-303 for 3 months.

(e) A seventh and subsequent offense under 16-11-305(1) or 16-11-307(1) or a fourth and subsequent offense under 16-11-307(2) is punishable by suspension of the licenses required by 16-11-120 and 16-11-303 for 1 year.

(3) After 2 years from the first violation, if a person has not received notice of any further violations, a second violation is considered a first violation for the purposes of subsection (2).

(4) A license may not be reissued after suspension under subsection (2)(d) or (2)(e) unless tobacco education fees or civil penalties are paid in full.

(5) Tobacco education fees must be assessed and collected by the department of public health and human services. Notice of an assessment pursuant to subsection (2) and this subsection must be made by the department of public health and human services within 30 days of the alleged violation by certified letter addressed to the establishment owner or manager. The notice of assessment against the owner of the establishment must provide an opportunity for a hearing. The hearing may be conducted using electronic equipment and must comply with the provisions of the Montana Administrative Procedure Act. Within 30 days from the date on which the notice of assessment was mailed, the owner or manager shall notify the department of public health and human services that the owner or manager objects to the assessment and request a hearing pursuant to this subsection.

(6) In addition to the penalty provided for in subsection (2), a first and subsequent violation of 16-11-305(1) or 16-11-307(1) is punishable by an assessment of a tobacco education fee of \$25 against the employee who ~~sold~~sells the tobacco product, ~~alternative nicotine product, or vapor product~~ if the employee is not the owner of the establishment. The tobacco education fee must be assessed and collected by the department of public health and human services. Within 30 days of the alleged violation, notice of assessment pursuant to this subsection must be made by the department of public health and human services by certified letter addressed to the employee. The notice of assessment must provide an opportunity for a hearing. The hearing may be conducted using electronic equipment and must comply with the provisions of the Montana Administrative Procedure Act. Within 30 days from the date on which the notice of assessment was mailed, the employee shall notify the department of public health and human services that the employee objects to the assessment and requests a hearing pursuant to this subsection.

(7) The tobacco education material referred to in this section must be provided by the department of public health and human services in the form of written and video self-teaching materials. The education materials may be used only for the purposes provided in this section. Upon completion of the self-teaching materials, the establishment owner or manager shall execute a written statement on a form provided by the

1 department of public health and human services verifying that the employee, owner, or manager, as
2 appropriate, has read and viewed the self-teaching material and shall return the statement and the self-teaching
3 video to the department of public health and human services.

4 (8) Upon the sixth and subsequent violation of this section, the department of public health and
5 human services shall notify the department of revenue in writing to initiate suspension of the licenses required
6 by 16-11-120 and 16-11-303 and shall notify the licensee in writing of the alleged violation and of the referral of
7 the licensee's record of violations to the department of revenue for suspension of the licenses pursuant to 16-
8 11-144 and this section. The department of revenue shall review the record of violations and may initiate
9 license suspension proceedings in accordance with 16-11-144. If, upon a review of the record of violations, the
10 department of revenue declines to initiate suspension proceedings, the violation may not be charged against
11 the licensee for the purposes of this section.

12 (9) Fees assessed pursuant to this section must be deposited in the state general fund."
13

14 **Section 8.** Section 16-11-309, MCA, is amended to read:

15 **"16-11-309. Inspection and notification of violation required.** (1) The department of public health
16 and human services shall conduct inspections of persons selling or distributing tobacco products, ~~alternative~~
17 ~~nicotine products, or vapor products~~ to determine compliance with 16-11-303, 16-11-304, 16-11-305(1), 16-11-
18 306, and 16-11-307. Inspections may be conducted directly by the department of public health and human
19 services or may be provided for by contract let by the department of public health and human services. Persons
20 found to be in violation of the requirements of this part or the rules of the department of public health and
21 human services a fourth and subsequent time must be notified in writing by the department of public health and
22 human services of the facts of the violation and the penalties provided by this part.

23 (2) The department of public health and human services shall provide documentation of alleged
24 violations of 16-11-303, 16-11-305, and 16-11-307 to the department of revenue."
25

26 **Section 9.** Section 16-11-310, MCA, is amended to read:

27 **"16-11-310. Minors not liable for possession or attempt to purchase.** An individual under 18
28 years of age assisting in the enforcement of this part is not liable under a civil or criminal law for the possession

1 of or the attempt to purchase a tobacco product, ~~alternative nicotine product, or vapor product~~ for the purposes
2 of enforcing this part."

3

4 **Section 10.** Section 16-11-311, MCA, is amended to read:

5 **"16-11-311. Local regulations.** A local government may by ordinance adopt regulations on the
6 subjects of ~~16-11-301 through 16-11-308, including alternative nicotine or vapor products as provided in 16-11-~~
7 ~~313, that are no more stringent than 16-11-301 through 16-11-308 and 16-11-313~~ this chapter."

8

9 NEW SECTION. **Section 11. Repealer.** The following section of the Montana Code Annotated is
10 repealed:

11 16-11-313. Alternative nicotine products and vapor products -- local ordinance or resolution -- prohibition.

12 - END -