



Office of
**INDIAN RIVER COUNTY
ATTORNEY**

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MEMORANDUM

TO: Board of County Commissioners
FROM: Dylan Reingold, County Attorney
DATE: August 5, 2019
SUBJECT: Vaping Update

BACKGROUND

On June 18, 2019, the Indian River County Board of County Commissioners (the "Board") voted to direct the County Attorney's Office to research ways to regulate vaping.

Nicotine Products Regulation in Florida

Laws related to nicotine products are substantially the same as tobacco laws in the following ways:

- 1) The sale, delivery, 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.
- 2) Persons under 18 years of age are prohibited from knowingly possessing, purchasing, or misrepresenting their age or military service to obtain nicotine products or nicotine dispensing devices commit a noncriminal violation. A person who violates this commits a noncriminal penalty.
- 3) Retail dealers of nicotine products and nicotine dispensing devices are required to post signs that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited.
- 4) Nicotine products or nicotine dispensing devices may not be sold or delivered by self-service merchandising, except when such products are under the direct control, or line of sight where effective control may be reasonably maintained by the retailer or their agent or employee.

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

- 1) Retailers are not required to obtain a tobacco products dealer permit from the Division of Alcoholic Beverage and Tobacco (the "Division").

- 2) Retailers are not subject to inspection without a search warrant.
- 3) Manufacturers and distributors of nicotine products and nicotine dispensing devices are not required to obtain a permit from the Division.
- 4) The requirements for remote sales of tobacco products do not apply to nicotine products or nicotine dispensing devices.

Pursuant to section 569.003, Florida Statutes, the annual fee for a retail tobacco products dealer permits may not exceed \$50. Permits may be issued only to persons who are 18 years of age or older or to corporations the officers of which are 18 years of age or older. The Division may refuse to issue a permit to any person, firm, association, or corporation the permit of which has been revoked, to any corporation an officer of which has had his or her permit revoked, or to any person who is or has been an officer of a corporation the permit of which has been revoked. The Division may revoke the permit of the dealer upon sufficient cause appearing of a violation of any of the requirements of Chapter 569, (Tobacco Products).

Indian River County Regulations

In 2013, the Board enacted Ordinance 2013-16, which modified the definition of tobacco products to include electronic nicotine delivery devices. The ordinance defined an electronic nicotine delivery device as a device or product that produces a vapor that delivers nicotine or other substances to a person inhaling from the device to simulate smoking and that is offered to or purchased by consumers as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

Thus, due to the ordinance, the existing prohibition on the sale, or display for sale of tobacco products by means of self-service merchandising now applies to electronic nicotine delivery devices. Additionally, only vendor assisted sales are allowed, unless access to the premises by persons under the age of eighteen is prohibited by the person, business, tobacco retailer, or other establishment or prohibited by law.

Proposed Legislation

Earlier this year, the Florida Legislature considered House Bill 7119, which would have:

- 1) Increased the minimum age to lawfully purchase and knowingly possess tobacco products, nicotine products, and nicotine dispensing devices in Florida from 18 to 21.
- 2) Prohibited the sale, delivery, bartering, furnishing, shipping, or giving tobacco products, nicotine products, or electronic nicotine dispensing devices to persons under the age of 21.
- 3) Preempted the establishment of the minimum age to possess or purchase nicotine dispensing devices, nicotine products, and tobacco products, and the regulation of the marketing of such products to the State. However, such preemption would not have prohibited a local government from requiring licensure for the retail sale of tobacco products.

Recent Ordinances

On January 22, 2019, the Alachua County Board of County Commissioners approved Ordinance 2019-04. This ordinance established an annual County distribution license for those selling tobacco products, which includes e-cigarettes. The County would not grant a license for a new location that was 1,000 feet of any public high school, middle school, or elementary school. The ordinance also prohibited sales of tobacco products, including e-cigarettes to any person under the age of 21.

Regulatory Options

One option for the Board to consider would be to add a legislative priority that the Florida Legislature enact legislation that would require retailers, manufacturers and distributors, of nicotine dispensing devices to obtain similar licenses and have similar regulations as those that exist for tobacco products dealers, manufacturers and distributors.

On a local level, the Board could consider adopting a local licensing program for tobacco products, including nicotine dispensing devices, in a similar manner as that implemented by Alachua County. Please note that the County Attorney's Office has not researched the costs needed to regulate such a regulatory system.

Finally, the Board may wish to consider a requirement that any retailer of nicotine dispensing devices must also obtain a tobacco products dealer permit from the Division. Please note that the County Attorney's Office has also not researched the costs needed to enforce such a requirement.

The County Attorney's Office seeks guidance from the Board as to how it wishes to proceed forward with respect to local or state regulation of vaping.