

S.B. NO. 3130

JAN 24 2024

A BILL FOR AN ACT

RELATING TO HEALTH.

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

1 SECTION 1. Tobacco use remains the leading cause of
2 preventable disease and death in the United States and in
3 Hawaii. Tobacco use is a serious public health problem in terms
4 of the human suffering and loss of life it causes, as well as
5 the financial burden it imposes on society and our healthcare
6 system. According to the Centers for Disease Control and
7 Prevention's 2014 "Best Practices for Comprehensive Tobacco
8 Control Programs" guide, \$526,000,000 in health care costs are
9 directly attributed to smoking in the State of Hawaii.

10 Furthermore, in a 2016 report titled "E-Cigarette Use Among
11 Youth and Young Adults" (2016 E-Cigarette Use report), the
12 United States Surgeon General explained that ninety-five per
13 cent of all smokers start smoking before the age of twenty-one.
14 A 2017 study published in the American Journal of Preventive
15 Medicine found that eighty-one per cent of youth who ever used a
16 tobacco product report that the first product they used was
17 flavored. Flavored tobacco products promote youth initiation to
18 tobacco use and push young occasional smokers to become daily

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1 smokers by reducing or masking the natural harshness and taste
2 of tobacco smoke, thereby increasing the appeal of tobacco
3 products.

4 Menthol is used by the tobacco industry because it has a
5 cooling and numbing effect and can reduce the throat irritation
6 caused by smoking, thus making menthol cigarettes an appealing
7 option for youth who are initiating tobacco use. Candy and
8 fruit flavors improve the taste and reduce the harshness of
9 tobacco products, making them more appealing and easier for
10 beginners to try tobacco products and ultimately become addicted
11 to nicotine. The popularity of electronic cigarettes among
12 youth is concerning. The combination of enticing flavors and
13 nicotine salts allows higher levels of nicotine to be inhaled
14 with less irritation. In the 2016 E-Cigarette Use report, the
15 United States Surgeon General stated that, "compared with older
16 adults, the brain of the youth and young adults is more
17 vulnerable to the negative consequences of nicotine exposure.
18 The effects include addiction, priming for use of other
19 addictive substances, reduced impulse control, deficits in
20 attention and cognition, and mood disorders."

21 While there has been a significant decline in the use of
22 combustible cigarettes over the last decade, there has been a

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1 dramatic increase in the use of electronic smoking devices by
2 Hawaii's youth. Vaping in Hawaii is at an epidemic level.
3 According to the 2011 and 2015 Hawaii Youth Tobacco Survey,
4 during these four years, the proportion of youth experimenting
5 with electronic smoking devices increased six-fold among middle
6 school youth and four-fold among high school youth. According
7 to the 2017-2021 Hawaii Youth Risk Behavior Survey, twenty-four
8 per cent of middle school and forty-one per cent of public high
9 school students had tried electronic smoking devices. The 2017-
10 2021 Hawaii Youth Risk Behavior Survey also indicates that
11 thirteen per cent of middle school and twenty-three per cent of
12 high school students currently vape. The 2017-2021 Hawaii Youth
13 Risk Behavior Survey also shows the prevalence is higher in the
14 neighbor island counties with high school vaping exceeding
15 twenty-seven per cent for Hawaii, Maui, and Kauai. These rates
16 rank among the highest in the country. The elevated use of
17 electronic smoking devices has led to a significant rise in
18 youth nicotine addiction.

19 Furthermore, while the 2009 Family Smoking Prevention and
20 Tobacco Control Act, P.L. 111-31 (Tobacco Control Act),
21 prohibited characterizing flavors, including fruit and candy
22 flavorings, in cigarettes, it did not ban menthol in cigarettes

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1 or the use of characterizing flavors in other tobacco products.
2 The Tobacco Control Act provided the United States Food and Drug
3 Administration with the authority to regulate cigarettes, roll-
4 your-own tobacco, and smokeless tobacco, but required the Food
5 and Drug Administration to undertake an extensive rulemaking
6 process to extend its regulatory authority to include e-
7 cigarettes. Delays in the regulatory process allowed the
8 tobacco industry and electronic smoking device industry to
9 significantly increase the introduction of and extensively
10 market flavored non-cigarette tobacco products, especially in
11 electronic smoking devices. It is no coincidence that the
12 number of electronic cigarette flavors have skyrocketed in
13 recent years. In a 2018 study published in The Journal of
14 Medical Internet Research, the count of flavor labels was
15 reported to have more than doubled from 7,776 in 2013-2014 to
16 15,586 in 2016-2017. Hawaii has experienced the heightened
17 promotion of vape products that offer candy and local flavors
18 designed to appeal to the State's youth, such as orange soda,
19 apple mui, Kona coffee, Maui mango, shaka strawberry, lychee
20 ice, and Molokai hot bread. Additionally, many of the packages
21 are designed to look like candies popular with children, such as
22 Jolly Ranchers and Sour Patch Kids.

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1 Furthermore, young people are disproportionately using
2 flavored tobacco products, including menthol. According to the
3 2019 Hawaii Youth Risk Behavior Survey, an average of fifty-nine
4 per cent of Hawaii's high school cigarette smokers and thirty-
5 eight per cent of middle school cigarette smokers used menthol.

6 Current surveillance data show that menthol cigarette
7 smoking is high among the general population in Hawaii with
8 further gender and racial disparities. According to the 2020
9 Behavioral Risk Factor Surveillance System, sixty-three per cent
10 of adult smokers in Hawaii usually smoke menthol cigarettes.
11 The 2020 Behavioral Risk Factor Surveillance System also shows
12 that prevalence is high among specific ethnic groups with
13 seventy-nine per cent of Filipinos, seventy-eight per cent of
14 Native Hawaiians, and sixty-nine per cent of Japanese usually
15 smoking menthol cigarettes. Furthermore, the 2020 Behavioral
16 Risk Factor Surveillance System shows that female smokers in
17 Hawaii smoke menthol cigarettes at significantly higher rates
18 than men - seventy-five per cent versus fifty-one per cent
19 comparatively.

20 Additionally, after California banned flavored e-cigarettes
21 and menthol cigarettes in 2022, the tobacco industry developed a
22 new way to replace the menthol flavor and market these new

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1 products as "non-menthol" products. These products contain a
2 new synthetic agent, which purports to create a cooling
3 sensation similar to menthol without using menthol and menthol's
4 characteristically minty odor. These products can facilitate
5 smoking initiation, similar to menthol, as they are marketed to
6 impart cooling sensations in users.

7 Given the significant threat to public health posed by
8 flavored tobacco products, including those with menthol and
9 those that produce cooling sensations, five states, including
10 Massachusetts, New Jersey, New York, Rhode Island, and
11 California, and three hundred ninety-five localities have
12 enacted laws prohibiting the sale of flavored tobacco products.
13 These laws now protect over twenty-five per cent of the United
14 States population. The legislature finds that Hawaii should
15 also take steps to regulate these products to reduce tobacco-
16 related health disparities and address the youth vaping
17 epidemic.

18 Accordingly, the purpose of this Act is to prohibit the
19 sale or distribution in Hawaii of all flavored tobacco products,
20 including products with menthol and products that produce
21 cooling sensations, and prohibit the mislabeling of products as
22 nicotine-free.

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1 SECTION 2. Chapter 321, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 "PART . SALE OF FLAVORED TOBACCO PRODUCTS

5 §321-A Definitions. As used in this part, unless the
6 context otherwise requires:

7 "Cigarette" has the same meaning as in section 245-1.

8 "Constituent" means any ingredient, substance, chemical, or
9 compound, other than tobacco, water, or reconstituted tobacco
10 sheet, that is added by the manufacturer to a tobacco product
11 during the processing, manufacture, or packing of the tobacco
12 product.

13 "Department" means the department of health.

14 "Director" means the director of health.

15 "Distinguishable" means perceivable to the sense of smell,
16 taste, or touch, or more than one or all of these.

17 "Electronic smoking device" means any device that may be
18 used to deliver any aerosolized or vaporized substance to a
19 person inhaling from the device, including but not limited to,
20 an electronic cigarette, electronic cigar, electronic pipe, vape
21 pen, or electronic hookah. "Electronic smoking device" does not
22 include drugs, devices, or combination products authorized for

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1 sale by the United States Food and Drug Administration, and
2 subject to the Federal Food, Drug and Cosmetic Act (21 U.S.C.
3 301 et seq.).

4 "E-liquid" means any liquid or like substance, which may or
5 may not contain nicotine, that is designed or intended to be
6 used in an electronic smoking device, whether or not packaged in
7 a cartridge or other container.

8 "E-liquid" does not include:

- 9 (1) Prescription drugs;
- 10 (2) Cannabis for medical use pursuant to chapter 329 or
11 manufactured cannabis products pursuant to chapter
12 329D; or
- 13 (3) Medical devices used to aerosolize, inhale, or ingest
14 prescription drugs, including manufactured cannabis
15 products described in section 329D-10.

16 "Entity" has the same meaning as in section 245-1.

17 "Flavored tobacco product" means any tobacco product that
18 imparts:

- 19 (1) A taste or odor distinguishable by an average
20 consumer, other than the taste or odor of tobacco,
21 either prior to, during, or after the consumption of a
22 tobacco product, or more than one or all of these,

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1 including but not limited to, any tastes or odors
2 relating to fruit, chocolate, vanilla, honey, candy,
3 cocoa, dessert, alcoholic beverage, mint, wintergreen,
4 menthol, herb, or spice; or

5 (2) A cooling or numbing sensation distinguishable by an
6 average consumer prior to, during, or after the
7 consumption of such tobacco product, or more than one
8 or all of these.

9 "Labeling" means written, printed, pictorial, or graphic
10 matter upon a tobacco product or any of its packaging.

11 "Packaging" means a pack, box, carton, or container of any
12 kind, or if no other container, any wrapping, including
13 cellophane, in which a tobacco product is sold or offered for
14 sale to a consumer.

15 "Retailer" means an entity who sells, offers for sale, or
16 exchanges or offers to exchange tobacco products to consumers
17 for any form of consideration. The term "retailer" includes an
18 owner, agent, or employee of a tobacco retail location.

19 "Tobacco product" means:

20 (1) Any product containing, made of, or derived from
21 tobacco or nicotine that is intended for human
22 consumption or is likely to be consumed, whether

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1 inhaled, absorbed, or ingested by any other means,
2 including but not limited to a cigarette, a cigar,
3 pipe tobacco, chewing tobacco, snuff, or snus;

4 (2) Any electronic smoking device and any substances that
5 may be aerosolized or vaporized by such device,
6 whether or not the substance contains nicotine; or

7 (3) Any component, part, or accessory of any item
8 described in paragraph (1) or (2), whether or not any
9 of these contains tobacco or nicotine, including but
10 not limited to filters, rolling papers, blunt or hemp
11 wraps, hookahs, mouthpieces, and pipes.

12 "Tobacco product" does not mean drugs, devices, or combination
13 products authorized for sale by the United States Food and Drug
14 Administration, as those terms are defined in the Federal Food,
15 Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

16 "Tobacco retail location" means any premises where tobacco
17 products are sold or distributed to a consumer, including but
18 not limited to any store, bar, lounge, cafe, stand, outlet,
19 vehicle, cart, location, vending machine, or structure.

20 **§321-B Sale of flavored tobacco products; mislabeling as**
21 **nicotine-free.** (a) Beginning January 1, 2025, it shall be
22 unlawful for any retailer to:

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1 (1) Sell, offer for sale, or possess with the intent to
2 sell, or offer for sale, a flavored tobacco product;
3 or

4 (2) Mislabeled as nicotine-free, or sell or market for sale
5 as nicotine-free, any e-liquid product that contains
6 nicotine.

7 (b) A statement or claim, including but not limited to
8 text, color, or images on the tobacco product's labeling or
9 packaging that is used to explicitly or implicitly communicate
10 that the tobacco product has a flavor other than tobacco, or
11 that the tobacco product imparts a cooling or numbing sensation,
12 made by a manufacturer or an agent or employee of the
13 manufacturer, and directed to consumers or the public shall be
14 prima facie evidence that the tobacco product is a flavored
15 tobacco product. This includes but is not limited to public
16 statements that a product has a minty or cooling effect, such as
17 describing the product as "chill," "ice," "fresh," "arctic," or
18 "frost."

19 (c) Any tobacco product found in a retailer's possession
20 that is in violation of this part shall be considered contraband
21 and may be seized by an inspector or be subject to immediate
22 destruction or disposal in accordance with rules adopted by the

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1 department. The cost of proper disposal of electronic smoking
2 devices and e-liquids as hazardous waste pursuant to rules
3 adopted pursuant to section 342J-4, shall be borne by the
4 retailer.

5 (d) Any retailer who violates this part shall be subject
6 to a fine not less than \$100 nor more than \$1,000 for each
7 separate offense. Each day of each violation constitutes a
8 separate offense. Any fines collected by the department shall
9 be deposited to the credit of the general fund.

10 (e) Notwithstanding any other law to the contrary, any
11 county may adopt a rule or ordinance that places greater
12 restrictions on the access to tobacco products than provided in
13 this part. In the case of a conflict between the restrictions
14 in this part and any county rule or ordinance regarding access
15 to tobacco products, the more stringent restrictions shall
16 prevail.

17 **§321-C Inspectors; authority and access to records.** (a)
18 The director may appoint, commission, or contract for services
19 of a third party one or more inspectors as the exigencies of the
20 enforcement of this part may require. Persons appointed,
21 commissioned, or contracted for services under this part shall

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1 have and may exercise all the powers and authority outlined in
2 the rules adopted pursuant to section 321-D.

3 (b) Information necessary to investigate violations of
4 this part shall be made available to the department and any
5 appointed, commissioned, or contracted inspectors of the
6 department.

7 **§321-D Administrative rules.** (a) The department shall
8 adopt rules pursuant to chapter 91 to effectuate the purposes of
9 this part.

10 (b) No later than June 30, 2025, the department shall
11 adopt interim rules, which shall be exempt from chapter 201M and
12 from the public notice and public hearing requirements of
13 chapter 91, to effectuate the purposes of this part; provided
14 that the interim rules shall remain in effect until January 1,
15 2031, or until rules are adopted pursuant to subsection (a),
16 whichever occurs sooner.

17 (c) The department may amend the interim rules adopted
18 pursuant to subsection (b), exempt from chapter 201M and the
19 public notice and public hearing requirements of chapter 91;
20 provided that any amended interim rules shall remain in effect
21 until January 1, 2031, or until rules are adopted pursuant to
22 subsection (a), whichever occurs sooner.

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1 **§321-E Contract for services.** Subject to section 26-36,
2 the department may contract the services of a third party in
3 accordance with chapter 103D for enforcement, inspections, or
4 any other services needed to administer this part."

5 SECTION 3. Section 328J-11.5, Hawaii Revised Statutes, is
6 repealed.

7 ~~["**§328J-11.5** **Statewide concern.** (a) Sales of~~
8 ~~cigarettes, tobacco products, and electronic smoking devices are~~
9 ~~a statewide concern. It is the intent of the legislature to~~
10 ~~regulate the sale of cigarettes, tobacco products, and~~
11 ~~electronic smoking devices in a uniform and exclusive manner.~~

12 ~~(b) All local ordinances or regulations that regulate the~~
13 ~~sale of cigarettes, tobacco products, and electronic smoking~~
14 ~~devices are preempted, and existing local laws and regulations~~
15 ~~conflicting with this chapter are null and void.~~

16 ~~(c) Nothing in this chapter shall be construed to limit a~~
17 ~~county's authority under section 328J-15."]~~

18 SECTION 4. The department of health shall establish two
19 full-time equivalent (2.0 FTE) program specialist positions to
20 carry out the purposes of this Act, including reviewing,
21 processing, and initiating inspections under the authority of
22 the department of health and one full-time equivalent (1.0 FTE)

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1 hearings officer position to preside over administrative
2 hearings and other related hearings duties to carry out the
3 purposes of this Act.

4 SECTION 5. There is appropriated out of the general
5 revenues of the State of Hawaii the sum of \$1,000,000 or so much
6 thereof as may be necessary for fiscal year 2024-2025 to carry
7 out the purposes of this Act, including the hiring of necessary
8 staff.

9 The sum appropriated shall be expended by the department of
10 health.

11 SECTION 6. This Act does not affect rights and duties that
12 matured, penalties that were incurred, and proceedings that were
13 begun before its effective date.

14 SECTION 7. If any provision of this Act or the application
15 thereof to any person or circumstance is held invalid, the
16 invalidity does not affect other provisions or applications of
17 the Act that can be given effect without the invalid provision
18 or application, and to this end the provisions of this Act are
19 severable.

20 SECTION 8. In codifying the new sections added by section
21 2 of this Act, the revisor of statutes shall substitute

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1 appropriate section numbers for the letters used in designating
2 the new sections in this Act.

3 SECTION 9. Statutory material to be repealed is bracketed
4 and stricken.

5 SECTION 10. This Act, upon its approval, shall take effect
6 on July 1, 2024.

7

8

INTRODUCED BY:

A handwritten signature in black ink, appearing to read "W. W. V. M.", is written over a horizontal line.

9

BY REQUEST

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Report Title:

Department of Health; Flavored Tobacco Products; Sale; Ban; Appropriation

Description:

Bans the sale of all flavored tobacco products and mislabeled e-liquid products. Establishes positions and appropriates funds to enforce the ban. Repeals section 328J-11.5, HRS.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO HEALTH.

PURPOSE: To prohibit the sale, offering for sale, or possession with the intent to sell, or offer for sale, of all flavored tobacco products, including products that contain menthol and products that produce a cooling sensation, and the mislabeling as nicotine-free any e-liquid product containing nicotine within the State.

MEANS: Add a new part to chapter 321, Hawaii Revised Statutes (HRS). Appropriate funds. Repeal section 328J-11.5, HRS.

JUSTIFICATION: This measure responds to the epidemic of youth vaping due to the appeal of electronic smoking devices (ESDs) that feature flavored tobacco products, including menthol, that are a gateway to cigarettes and other substances. Additionally, international studies have identified counterfeit electronic cigarette products with mislabeled nicotine concentrations, necessitating better control and monitoring of nicotine containing products and sales outlets.¹

Impact on the public: This measure addresses the youth vaping epidemic by prohibiting the sale or distribution of all flavored tobacco products. The fiscal impact of a ban on flavored tobacco products in Hawaii would result in modest reductions in Hawaii's tax revenues while at the same time leading to reductions in chronic

¹ Omaiye, E. E., Cordova, I., Davis, B., & Talbot, P. (2017). Counterfeit Electronic Cigarette Products with Mislabeled Nicotine Concentrations. *Tobacco Regulatory Science*, 3(3), 347-357. <https://doi.org/10.18001/TRS.3.3.10>

diseases and health care spending, including Medicaid spending in the State.²

Most ESDs contain nicotine, which is addictive, and youth who regularly use ESDs are more likely to use tetrahydrocannabinol (THC) and other substances. Youth ESD users are four times more likely to become regular cigarette users. Menthol and other flavors are popular with younger smokers. The flavorants used in ESDs have been product tested for ingestion but not for inhalation. Data on the long-term consequences of regular inhalation of oils like vegetable glycerin and propylene glycol (derived from petroleum) that are used in ESDs are being collected. The evidence is mounting on the risks for lung and cardiovascular damage from vaping. This measure will not prohibit smokers from legally obtaining non-flavored tobacco products.

Public Health Impact:³

- More than 3,000 smokers (5.6% of menthol smokers) would quit as a result.
- 700 premature smoking-caused deaths would be avoided.
- Fewer youth would initiate smoking with menthol cigarettes.

Fiscal Impact:⁴

- At least \$48 million in long-term health care cost savings for the State.⁵

² Chaloupka, F.J. *Potential Effects of a Ban on the Sale of Flavored Tobacco Products in Hawaii*, University of Illinois at Chicago, 2021

³ Ibid.

⁴ Ibid.

⁵ The projected health care savings and public health benefits are conservative because they do not include the impact on youth who will not start to smoke as a result of this policy. Preventing kids in Hawaii from becoming addicted smokers would secure millions of dollars in future health care cost savings.

- \$11.5 million decline in cigarette tax revenue (13.1% decline).
- \$1.3 million decline in other tobacco products tax revenue (14.9% decline).

Repeal of section 328J-11.5, HRS, is necessary to enable counties to enact ordinances in response to higher rates of flavored tobacco product use among neighbor island youth and adults.

Impact on the department and other agencies:

This measure would create parity between cigarettes and ESDs, because all flavored tobacco products would be restricted, not just flavored cigarettes. Mislabeled nicotine containing products can be monitored and controlled. Interim administrative rules will be developed to provide the Department of Health with expedited authority to enforce the law. The department will contract out retail store investigations. Three positions will be hired within the department, one hearings officer and two program specialists to provide retailer and public education, monitor contracts, and enforce administrative fines.

A reduction in tobacco use resulting from a comprehensive flavor ban would likely lead to significant reductions in health care spending.

GENERAL FUND: \$1,000,000.00.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: HTH 590.

OTHER AFFECTED AGENCIES: None.

EFFECTIVE DATE: July 1, 2024.