

## HB0118S04 compared with HB0118S03

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inserted text shows text that was not in HB0118S03 but was inserted into HB0118S04.

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~~{Senator Kirk A. Cullimore}~~Representative Jennifer Dailey-Provost proposes the following substitute bill:

### RETAIL TOBACCO AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Jennifer Dailey-Provost**

Senate Sponsor: Evan J. Vickers

Cosponsors:	Marsha Judkins	Angela Romero
Patrice M. Arent	Brian S. King	Lawanna Shurtliff
Melissa G. Ballard	Karen Kwan	Andrew Stoddard
Joel K. Briscoe	Carol Spackman Moss	Norman K. Thurston
Susan Duckworth	Derrin R. Owens	Steve Waldrip
Steve Eliason	Lee B. Perry	Elizabeth Weight
Suzanne Harrison	Stephanie Pitcher	Mark A. Wheatley
Sandra Hollins	Marie H. Poulson	Logan Wilde
Eric K. Hutchings	Paul Ray	Mike Winder

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**LONG TITLE**

**General Description:**

## HB0118S04 compared with HB0118S03

This bill amends provisions relating to the sale of certain tobacco products.

### Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ amends the definition of a retail tobacco specialty business to include any retailer that sells a flavored electronic cigarette product;
- ▶ authorizes regulation and testing of manufacturer sealed electronic cigarette substances;
- ▶ requires a tobacco retailer to maintain certain records;
- ▶ prohibits a manufacturer, wholesaler, or retailer from providing certain discounts or giveaways for tobacco products; and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

This bill provides a coordination clause.

### Utah Code Sections Affected:

AMENDS:

**10-8-41.6**, as last amended by Laws of Utah 2018, Chapter 231

**17-50-333**, as last amended by Laws of Utah 2018, Chapter 231

**26-57-103**, as enacted by Laws of Utah 2015, Chapter 132

**76-10-111**, as last amended by Laws of Utah 2010, Chapter 114

**76-10-112**, as enacted by Laws of Utah 1989, Chapter 193

ENACTS:

**26-62-206**, Utah Code Annotated 1953

### Utah Code Sections Affected by Coordination Clause:

**10-8-41.6**, as last amended by Laws of Utah 2018, Chapter 231

**17-50-333**, as last amended by Laws of Utah 2018, Chapter 231

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **10-8-41.6** is amended to read:

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### 10-8-41.6. Regulation of retail tobacco specialty business.

(1) As used in this section:

(a) "Community location" means:

(i) a public or private kindergarten, elementary, middle, junior high, or high school;

(ii) a licensed child-care facility or preschool;

(iii) a trade or technical school;

(iv) a church;

(v) a public library;

(vi) a public playground;

(vii) a public park;

(viii) a youth center or other space used primarily for youth oriented activities;

(ix) a public recreational facility;

(x) a public arcade; or

(xi) for a new license issued on or after July 1, 2018, a homeless shelter.

(b) "Department" means the Department of Health, created in Section 26-1-4.

(c) "Electronic cigarette product" means the same as that term is defined in Section 59-14-802.

(d) (i) "Flavored electronic cigarette product" means an electronic cigarette product that has a taste or smell that is distinguishable by an ordinary consumer either before or during use or consumption of the electronic cigarette product.

(ii) "Flavored electronic cigarette product" includes an electronic cigarette product that has a taste or smell of any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, mint, or spice.

(iii) "Flavored electronic cigarette product" does not include an electronic cigarette product that:

(A) has a taste or smell of only tobacco ~~{, mint,}~~ or menthol; or

(B) has ~~{been issued an}~~ received a modified risk tobacco product order ~~{by}~~ from the United States Food and Drug Administration ~~{approving the premarket tobacco product application of the electronic cigarette product }~~ under 21 U.S.C. Sec. ~~{387}~~ 387k ~~{(c)(1)(A)(i)g}~~.

~~{(e)}~~ (e) "Local health department" means the same as that term is defined in Section

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26A-1-102.

~~[(d)]~~ (f) "Permittee" means a person licensed under this section to conduct business as a retail tobacco specialty business.

~~[(e)]~~ (g) "Retail tobacco specialty business" means a commercial establishment in which:

(i) the sale of tobacco products accounts for more than 35% of the total quarterly gross receipts for the establishment;

(ii) 20% or more of the public retail floor space is allocated to the offer, display, or storage of tobacco products;

(iii) 20% or more of the total shelf space is allocated to the offer, display, or storage of tobacco products; ~~[(or)]~~

(iv) the retail space features a self-service display for tobacco products~~[-];~~ or

(v) any flavored electronic cigarette product is sold.

~~[(f)]~~ (h) "Self-service display" means the same as that term is defined in Section 76-10-105.1.

~~[(g)]~~ (i) "Tobacco product" means:

(i) any cigar, cigarette, or electronic cigarette, as those terms are defined in Section 76-10-101;

(ii) a tobacco product, as that term is defined in Section 59-14-102, including:

(A) chewing tobacco; or

(B) any substitute for a tobacco product, including flavoring or additives to tobacco;

and

(iii) tobacco paraphernalia, as that term is defined in Section 76-10-104.1.

(2) The regulation of a retail tobacco specialty business is an exercise of the police powers of the state, and through delegation, to other governmental entities.

(3) (a) A person may not operate a retail tobacco specialty business in a municipality unless the person obtains a license from the municipality in which the retail tobacco specialty business is located.

(b) A municipality may only issue a retail tobacco specialty business license to a person if the person complies with the provisions of Subsections (4) and (5).

(4) (a) Except as provided in Subsection (7), a municipality may not issue a license for

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a person to conduct business as a retail tobacco specialty business if the retail tobacco specialty business is located within:

- (i) 1,000 feet of a community location;
- (ii) 600 feet of another retail tobacco specialty business; or
- (iii) 600 feet from property used or zoned for:
  - (A) agriculture use; or
  - (B) residential use.

(b) For purposes of Subsection (4)(a), the proximity requirements shall be measured in a straight line from the nearest entrance of the retail tobacco specialty business to the nearest property boundary of a location described in Subsections (4)(a)(i) through (iii), without regard to intervening structures or zoning districts.

(5) (a) Except as provided in Subsection (5)(b), beginning July 1, 2018, a municipality may not issue or renew a license for a person to conduct business as a retail tobacco specialty business until the person provides the municipality with proof that the retail tobacco specialty business has:

(i) a valid permit for a retail tobacco specialty business issued under Title 26, Chapter 62, Tobacco Retail Permit, by the local health department having jurisdiction over the area in which the retail tobacco specialty business is located; and

(ii) a valid license to sell tobacco products from the State Tax Commission.

(b) A person that was licensed to conduct business as a retail tobacco specialty business in a municipality before July 1, 2018, shall obtain a permit from a local health department under Title 26, Chapter 62, Tobacco Retail Permit, on or before January 1, 2019.

(6) (a) Nothing in this section:

(i) requires a municipality to issue a retail tobacco specialty business license; or

(ii) prohibits a municipality from adopting more restrictive requirements on a person seeking a license or renewal of a license to conduct business as a retail tobacco specialty business.

(b) A municipality may suspend or revoke a retail tobacco specialty business license issued under this section:

(i) if a licensee engages in a pattern of unlawful activity under Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

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(ii) if a licensee violates the regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents issued by the United States Food and Drug Administration, 21 C.F.R. Part 1140;

(iii) upon the recommendation of the department or a local health department under Title 26, Chapter 62, Tobacco Retail Permit; or

(iv) under any other provision of state law or local ordinance.

(7) (a) In accordance with Subsection (7)(b), a retail tobacco specialty business that has a business license and is operating in a municipality in accordance with all applicable laws except for the requirement in Subsection (4), on or before December 31, 2015, is exempt from Subsection (4).

(b) A retail tobacco specialty business may maintain an exemption under Subsection (7)(a) if:

(i) the retail tobacco specialty business license is renewed continuously without lapse or permanent revocation;

(ii) the retail tobacco specialty business does not close for business or otherwise suspend the sale of tobacco products for more than 60 consecutive days;

(iii) the retail tobacco specialty business does not substantially change the business premises or business operation; and

(iv) the retail tobacco specialty business maintains the right to operate under the terms of other applicable laws, including:

(A) Title 26, Chapter 38, Utah Indoor Clean Air Act;

(B) zoning ordinances;

(C) building codes; and

(D) the requirements of a retail tobacco specialty business license issued before December 31, 2015.

Section 2. Section **17-50-333** is amended to read:

### **17-50-333. Regulation of retail tobacco specialty business.**

(1) As used in this section:

(a) "Community location" means:

(i) a public or private kindergarten, elementary, middle, junior high, or high school;

(ii) a licensed child-care facility or preschool;

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- (iii) a trade or technical school;
- (iv) a church;
- (v) a public library;
- (vi) a public playground;
- (vii) a public park;
- (viii) a youth center or other space used primarily for youth oriented activities;
- (ix) a public recreational facility;
- (x) a public arcade; or
- (xi) for a new license issued on or after July 1, 2018, a homeless shelter.

(b) "Department" means the Department of Health, created in Section 26-1-4.

(c) "Electronic cigarette product" means the same as that term is defined in Section 59-14-802.

(d) (i) "Flavored electronic cigarette product" means an electronic cigarette product that has a taste or smell that is distinguishable by an ordinary consumer either before or during use or consumption of the electronic cigarette product.

(ii) "Flavored electronic cigarette product" includes an electronic cigarette product that has a taste or smell of any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, mint, or spice.

(iii) "Flavored electronic cigarette product" does not include an electronic cigarette product that:

(A) has a taste or smell of only tobacco ~~}, mint,~~ or menthol; or

(B) has ~~{been issued an}~~ received a modified risk tobacco product order ~~{by}~~ from the United States Food and Drug Administration ~~{approving the premarket tobacco product application of the electronic cigarette product}~~ under 21 U.S.C. Sec. ~~{387}~~387k(~~{c}~~(1)(A)(~~i~~g).

~~(e)~~ (e) "Licensee" means a person licensed under this section to conduct business as a retail tobacco specialty business.

~~(f)~~ (f) "Local health department" means the same as that term is defined in Section 26A-1-102.

~~(g)~~ (g) "Retail tobacco specialty business" means a commercial establishment in which:

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(i) the sale of tobacco products accounts for more than 35% of the total quarterly gross receipts for the establishment;

(ii) 20% or more of the public retail floor space is allocated to the offer, display, or storage of tobacco products;

(iii) 20% or more of the total shelf space is allocated to the offer, display, or storage of tobacco products; ~~[or]~~

(iv) the retail space features a self-service display for tobacco products~~[-];~~ or

(v) any flavored electronic cigarette product is sold.

~~[(f)]~~ (h) "Self-service display" means the same as that term is defined in Section 76-10-105.1.

~~[(g)]~~ (i) "Tobacco product" means:

(i) any cigar, cigarette, or electronic cigarette as those terms are defined in Section 76-10-101;

(ii) a tobacco product as that term is defined in Section 59-14-102, including:

(A) chewing tobacco; or

(B) any substitute for a tobacco product, including flavoring or additives to tobacco;

and

(iii) tobacco paraphernalia as that term is defined in Section 76-10-104.1.

(2) The regulation of a retail tobacco specialty business is an exercise of the police powers of the state, and through delegation, to other governmental entities.

(3) (a) A person may not operate a retail tobacco specialty business in a county unless the person obtains a license from the county in which the retail tobacco specialty business is located.

(b) A county may only issue a retail tobacco specialty business license to a person if the person complies with the provisions of Subsections (4) and (5).

(4) (a) Except as provided in Subsection (7), a county may not issue a license for a person to conduct business as a retail tobacco specialty business if the retail tobacco specialty business is located within:

(i) 1,000 feet of a community location;

(ii) 600 feet of another retail tobacco specialty business; or

(iii) 600 feet from property used or zoned for:



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(A) agriculture use; or

(B) residential use.

(b) For purposes of Subsection (4)(a), the proximity requirements shall be measured in a straight line from the nearest entrance of the retail tobacco specialty business to the nearest property boundary of a location described in Subsections (4)(a)(i) through (iii), without regard to intervening structures or zoning districts.

(5) (a) Except as provided in Subsection (5)(b), beginning July 1, 2018, a county may not issue or renew a license for a person to conduct business as a retail tobacco specialty business until the person provides the county with proof that the retail tobacco specialty business has:

(i) a valid permit for a retail tobacco specialty business issued under Title 26, Chapter 62, Tobacco Retail Permit, by the local health department having jurisdiction over the area in which the retail tobacco specialty business is located; and

(ii) a valid license to sell tobacco products from the State Tax Commission.

(b) A person that was licensed to conduct business as a retail tobacco specialty business in a county before July 1, 2018, shall obtain a permit from a local health department under Title 26, Chapter 62, Tobacco Retail Permit, on or before January 1, 2019.

(6) (a) Nothing in this section:

(i) requires a county to issue a retail tobacco specialty business license; or

(ii) prohibits a county from adopting more restrictive requirements on a person seeking a license or renewal of a license to conduct business as a retail tobacco specialty business.

(b) A county may suspend or revoke a retail tobacco specialty business license issued under this section:

(i) if a licensee engages in a pattern of unlawful activity under Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(ii) if a licensee violates the regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents issued by the United States Food and Drug Administration, 21 C.F.R. Part 1140;

(iii) upon the recommendation of the department or a local health department under Title 26, Chapter 62, Tobacco Retail Permit; or

(iv) under any other provision of state law or local ordinance.

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(7) (a) In accordance with Subsection (7)(b), a retail tobacco specialty business that has a business license and is operating in a county in accordance with all applicable laws except for the requirement in Subsection (4), on or before December 31, 2015, is exempt from Subsection (4).

(b) A retail tobacco specialty business may maintain an exemption under Subsection (7)(a) if:

(i) the retail tobacco specialty business license is renewed continuously without lapse or permanent revocation;

(ii) the retail tobacco specialty business does not close for business or otherwise suspend the sale of tobacco products for more than 60 consecutive days;

(iii) the retail tobacco specialty business does not substantially change the business premises or business operation; and

(iv) the retail tobacco specialty business maintains the right to operate under the terms of other applicable laws, including:

(A) Title 26, Chapter 38, Utah Indoor Clean Air Act;

(B) zoning ordinances;

(C) building codes; and

(D) the requirements of a retail tobacco specialty business license issued before December 31, 2015.

Section 3. Section **26-57-103** is amended to read:

**26-57-103. Electronic cigarette products -- Labeling -- Manufacturing and quality control standards -- Advertising.**

(1) The department shall, in consultation with a local health department, as defined in Section 26A-1-102, and with input from members of the public, establish, no later than January 1, 2016, by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, standards for electronic cigarette substance:

(a) labeling;

(b) nicotine content;

(c) packaging; and

(d) product quality.

~~[(2) The standards established by the department under Subsection (1) do not apply to a~~

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~~manufacturer sealed electronic cigarette substance:]~~

(2) On or before January 1, 2021, the department shall, in consultation with a local health department, as defined in Section 26A-1-102, and with input from members of the public, establish by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, standards for manufacturer sealed electronic cigarette substance:

- (a) labeling;
- (b) nicotine content;
- (c) packaging; and
- (d) product quality.

(3) (a) Beginning on July 1, 2016, a person may not sell an electronic cigarette substance unless the electronic cigarette substance complies with the standards established by the department under Subsection (1).

(b) Beginning July 1, 2021, a person may not sell a manufacturer sealed electronic cigarette substance unless the manufacturer sealed electronic cigarette substance complies with the standards established by the department under Subsection (2).

(4) (a) Beginning on July 1, 2016, a local health department may not enact a rule or regulation regarding electronic cigarette substance labeling, nicotine content, packaging, or product quality that is not identical to the standards established by the department under ~~[Subsection (1)]~~ Subsections (1) and (2).

(b) Except as provided in Subsection (4)(c), a local health department may enact a rule or regulation regarding electronic cigarette substance manufacturing.

(c) A local health department may not enact a rule or regulation regarding a manufacturer sealed electronic cigarette substance.

(5) Beginning on July 1, 2016, a person may not advertise an electronic cigarette product:

- (a) as a tobacco cessation device;
- (b) if the person is not licensed to sell an electronic cigarette product under Section 59-14-803; or
- (c) during a period of time when the person's license to sell an electronic cigarette product under Section 59-14-803 has been suspended or revoked.

Section 4. Section ~~26-62-206~~ is enacted to read:

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### **26-62-206. Permit requirements for the sale of tobacco products.**

(1) A tobacco retailer shall:

(a) for each sale of a tobacco product, provide the customer with an itemized receipt for each sale of a tobacco product that separately identifies:

(i) the name of the tobacco product;

(ii) the amount charged for each tobacco product; and

(iii) the time and date of the sale; and

(b) maintain an itemized transaction log for each sale of a tobacco product that separately identifies:

(i) the name of the tobacco product;

(ii) the amount charged for each tobacco product; and

(iii) the date and time of the sale.

(2) The itemized transaction log described in Subsection (1)(b) shall be:

(a) maintained for at least one year from the date of each transaction in the itemized transaction log; and

(b) made available to an enforcing agency or peace officer at the request of the enforcing agency or peace officer that is no less restrictive than the provisions in this part.

Section 5. Section **76-10-111** is amended to read:

### **76-10-111. Prohibition of gift or free distribution of smokeless tobacco or electronic cigarettes -- Exceptions.**

(1) The Legislature finds that:

(a) smokeless tobacco, or chewing tobacco, is harmful to the health of individuals who use those products because research indicates that they may cause mouth or oral cancers;

(b) the use of smokeless tobacco among juveniles in this state is increasing rapidly;

(c) the use of electronic cigarettes may lead to unhealthy behavior such as the use of tobacco products; and

(d) it is necessary to restrict the gift of the products described in this Subsection (1) in the interest of the health of the citizens of this state.

(2) (a) Except as provided in Subsection (3), it is unlawful for a manufacturer, wholesaler, and retailer to:

(i) give or distribute without charge any smokeless tobacco, chewing tobacco, or

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electronic cigarette in this state[-];

(ii) except as provided in Subsection (2)(b), sell, offer for sale, or furnish any smokeless tobacco, chewing tobacco, or electronic cigarette at less than 90% of the cost of the product to the manufacturer, wholesaler, or retailer; or

(iii) give, distribute, sell, offer for sale, or furnish any smokeless tobacco, chewing tobacco, or electronic cigarette for free or at a lower price because the recipient of the electronic cigarette product makes another purchase.

(b) The price that a manufacturer, wholesaler, or retailer may charge under Subsection (2)(a)(ii) does not include a discount for:

(i) a physical manufacturer coupon:

(A) that is surrendered to the wholesaler or retailer at the time of sale; and

(B) for which the manufacturer will reimburse the wholesaler or the retailer for the full amount of the discount described in the manufacturer coupon and provided to the purchaser;

(ii) a rebate that will be paid to the manufacturer, the wholesaler, or the retailer for the full amount of the rebate provided to the purchaser; or

(iii) a promotional fund that will be paid to the manufacturer, the wholesaler, or the retailer for the full amount of the promotional fund provided to the purchaser.

(c) Any person who violates this section is guilty of a class C misdemeanor for the first offense, and is guilty of a class B misdemeanor for any subsequent offense.

(3) [(~~a~~)] Smokeless tobacco, chewing tobacco, or an electronic cigarette may be distributed to adults without charge at professional conventions where the general public is excluded.

[(~~b~~) Subsection (2) does not apply to a retailer, manufacturer, or distributor who gives smokeless tobacco, chewing tobacco, or an electronic cigarette to a person of legal age upon the person's purchase of another tobacco product or electronic cigarette.]

Section 6. Section 76-10-112 is amended to read:

**76-10-112. Prohibition of distribution of cigarettes or other tobacco products --**

### **Exceptions.**

(1) (a) Except as provided in Subsection [(~~2~~)] (3), it is unlawful for a manufacturer, wholesaler, or retailer to:

(i) give or distribute cigarettes or other tobacco products in this state without charge[-];

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(ii) except as provided in Subsection (2)(b), sell, offer for sale, or furnish any cigarettes or other tobacco products at less than the cost of the product to the manufacturer, wholesaler, or retailer; or

(iii) give, distribute, sell, offer for sale, or furnish any cigarettes or other tobacco products for free or at a lower price because the purchaser makes another purchase.

(b) The price that a manufacturer, wholesaler, or retailer may charge under Subsection (2)(a)(ii) does not include a discount for:

(i) a manufacturer coupon:

(A) that is surrendered to the tobacco retailer at the time of sale; and

(B) for which the manufacturer will reimburse the wholesaler or retailer for the full amount of the discount described in the manufacturer coupon and provided to the purchaser;

(ii) a rebate that will be paid to the manufacturer, wholesaler, or retailer for the full amount of the rebate provided to the purchaser; or

(iii) a promotional fund that will be paid to the manufacturer, wholesaler, or retailer for the full amount of the promotional fund provided to the purchaser.

(2) Any person who violates this [subsection] section is guilty of a class C misdemeanor for the first offense and a class B misdemeanor for any subsequent offense.

~~[(2)] (3) Cigarettes and other tobacco products may be distributed to adults without charge at professional conventions where the general public is excluded.~~

~~[(3) The prohibition described in Subsection (1) does not apply to retailers, manufacturers, or distributors who give cigarettes or other tobacco products to persons of legal age upon their purchase of cigarettes or other tobacco products.]~~

### Section 7. **Coordinating H.B. 118 with S.B. 37 -- Technical amendments.**

If this H.B. 118 and S.B. 37, Electronic Cigarette and Other Nicotine Product Amendments, both pass and become law, it is the intent of the Legislature that the Office of Legislative Research and General Counsel shall prepare the Utah Code database for publication by amending:

(1) Subsection 10-8-41.6(1)(c) to read:

"(c) "Electronic cigarette product" means the same as that term is defined in Section 76-10-101."; and

(2) Subsection 17-50-333(1)(c) to read:

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"(c) "Electronic cigarette product" means the same as that term is defined in Section 76-10-101."