
ORDINANCE PROHIBITING THE PURCHASE OR POSSESSION OF TOBACCO PRODUCTS BY A MINOR, THE SALE OR GIFT OF CIGARETTES OR TOBACCO PRODUCTS TO MINORS, AND THE PURCHASE OR POSSESSION OF VAPOR PRODUCTS BY A MINOR

The Common Council of the City of Berlin do ordain as follows:

ARTICLE IV. - OFFENSES BY JUVENILES, of the Code of Ordinances of the City of Berlin shall be renamed to, "ARTICLE IV – OFFENSES INVOLVING JUVENILES."

Sec. 46-113 of the Code of Ordinances of the City of Berlin shall be created as follows:

Sec. 46-113 – Purchase or possession of tobacco products by a minor prohibited

(a) *Definitions.* The following words, terms and phrases when used in this section shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Cigarette means any roll of tobacco wrapped in paper or any other substance.

Nicotine product means a product that contains nicotine and is not any of the following:

- (1) A tobacco product.
- (2) A cigarette.
- (3) A product that has been approved by the U.S. Food and Drug Administration for sale as a smoking cessation product or for another medical purpose and is being marketed and sold solely for such approved purpose.

Tobacco products means cigars; cheroots; stogies, periques; granulated, plug cut, crimp cut, ready-rubbed and other smoking tobacco; snuff, including moist snuff; snuff flour; cavendish; plus and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but "tobacco products" does not include cigarettes.

State Law reference - Cigarette tax, definitions, Wis. Stat. § 139.30(1m); Definitions, Wis. Stat. § 139.75(12); Restrictions on sale or gift of cigarettes or nicotine or tobacco products, Wis. Stat. § 134.66(f).

(b) *Prohibition.* The provisions of Wis. Stat. § 254.92 relating to the purchase or possession of cigarettes or tobacco products by a person under age 18 are adopted as a portion of this section as far as may be applicable to the city. Except as provided in subsection (c), no person under 18 years of age may do any of the following:

- (1) Buy, attempt to buy, or possess any cigarette, nicotine product, or tobacco product; or
- (2) Falsely represent his or her age for the purpose of receiving any cigarette, nicotine product, or tobacco product.

State Law reference - Purchase or possession of cigarettes or tobacco products by person under 18 prohibited, Wis. Stat. § 254.92.

(c) *Exemption.*

- (1) A person under 18 years of age may purchase or possess cigarettes, nicotine products, or tobacco products for the sole purpose of resale in the course of employment during his or her working hours if employed by a retailer licensed under Wis. Stat. § 134.65(1).
- (2) A person under 18 years of age, but not under 15 years of age, may purchase, attempt to purchase or possess cigarettes, nicotine products, or tobacco products in the course of his or her participation in an investigation under Wis. Stat. § 254.916 that is conducted in accordance with Wis. Stat. § 254.916(3).

State Law reference - Purchase or possession of cigarettes or tobacco products by person under 18 prohibited, Wis. Stat. § 254.92.

- (d) *Penalty for violation.* Upon conviction in court, any person under age 18 found to be in violation of subsection (b) shall be subject to a forfeiture as set forth in section 1-16, except that such forfeiture shall not be less than \$50.00, as well as any other penalties that may be imposed by the court as set forth in section 1-16.
- (e) *Seizure by law enforcement officer.* A police officer shall seize any cigarette, nicotine product, or tobacco product that has been sold and is in the possession of a person under the age of 18.

State Law reference - Purchase or possession of cigarettes or tobacco products by person under 18 prohibited, Wis. Stat. § 254.92(3).

Sec. 46-114 of the Code of Ordinances of the City of Berlin shall be created as follows:

Sec. 46-114 – Sale or gift of cigarettes or tobacco products to minors prohibited

- (a) *Definitions.* The following words, terms and phrases when used in this section shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Cigarette, nicotine product, and tobacco products have the definitions set forth in subsection 46-113(a).

Distributor means any of the following:

- (1) A person specified under Wis. Stat. § 139.30(3).

- (2) A person specified under Wis. Stat. § 139.75(4).

Identification card means any of the following:

- (1) A license containing a photograph issued under Wis. Stats. ch. 343.
- (2) An identification card issued under Wis. Stat. § 343.50.
- (3) An identification card issued under 1987 Wis. Stat. § 125.08.
- (4) A tribal identification card, as defined in Wis. Stat. § 134.695(1)(cm).

Jobber has the meaning given in Wis. Stat. § 139.30(6).

Manufacturer means any of the following:

- (1) A person specified under Wis. Stat. § 139.30(7).
- (2) A person specified under Wis. Stat. § 139.75(5).

Retailer means any person licensed under Wis. Stat. § 134.65(1).

School has the meaning given in Wis. Stat. § 111.257(1)(d).

Subjobber has the meaning given in Wis. Stat. § 139.75(11).

Vending machine has the meaning given in Wis. Stat. § 139.30(14).

Vending machine operator has the meaning given in Wis. Stat. § 139.30(15).

State Law reference -Beverage and tobacco taxes, Wis. Stats. Ch. 139; Operators' licenses, Wis. Stats. Ch. 343; Proof of age, Wis. Stat. § 125.08 (1987); Liability for referral to police, Wis. Stat. § 118.257(1)(d).

(b) *Restrictions*

- (1) No retailer, direct marketer, manufacturer, distributor, jobber or subjobber, no agent, employee or independent contractor of a retailer, direct marketer, manufacturer, distributor, jobber or subjobber and no agent or employee of an independent contractor may sell or provide for nominal or no consideration cigarettes, nicotine products or tobacco products to any person under the age of 18, except as provided in Wis. Stat. § 254.92(2)(a). A vending machine operator is not liable under this paragraph for the purchase of cigarettes, nicotine products or tobacco products from his or her vending machine by a person under the age of 18 if the vending machine operator was unaware of the purchase.
- (2) No retailer, direct marketer, manufacturer, distributor, jobber, subjobber, no agent, employee or independent contractor of a retailer, direct marketer, manufacturer, distributor, jobber or subjobber and no agent or employee of an independent contractor may provide for nominal or no consideration cigarettes, nicotine products or tobacco products to any person except in

a place where no person younger than 18 years of age is present or permitted to enter unless the person who is younger than 18 years of age is accompanied by his or her parent or guardian or by his or her spouse who has attained the age of 18 years.

(3) *Notices.*

- a. A retailer shall post a sign in areas within his or her premises where cigarettes or tobacco products are sold to consumers stating that the sale of any cigarette or tobacco product to a person under the age of 18 is unlawful under this section and Wis. Stat. § 254.92(2)(a).
 - b. A vending machine operator shall attach a notice in a conspicuous place on the front of his or her vending machines stating that the purchase of any cigarette or tobacco product by a person under the age of 18 is unlawful under Wis. Stat. § 254.92(2)(a) and that the purchaser is subject to a forfeiture of not less than \$50.00.
- (4) A retailer or vending machine operator may not sell cigarettes or tobacco products from a vending machine unless the vending machine is located in a place where the retailer or vending machine operator ensures that no person younger than 18 years of age is present or permitted to enter unless he or she is accompanied by his or her parent or guardian or by his or her spouse who has attained the age of 18 years.
- (5) Notwithstanding subsection (4), no retailer may place a vending machine within 500 feet of a school.
- (6) No retailer or direct marketer may sell cigarettes in a form other than as a package or container on which a stamp is affixed under Wis. Stats. § 139.32(1).

State Law reference - Restrictions on sale or gift of cigarettes or nicotine or tobacco products, Wis. Stat. § 134.66.

(c) *Defense of retailer*

Proof of all the following facts by a retailer, manufacturer, jobber, subjobber or distributor, an agent, employee, or independent contractor of a retailer, manufacturer, distributor, jobber or subjobber, or an agent or employee of an independent contractor who sells cigarettes or tobacco products to a person under the age of 18 is a defense to any prosecution for a violation of subsection (b)(1).

- (1) That the purchaser falsely represented that he or she had attained the age of 18 and presented an identification card.
- (2) That the appearance of the purchaser was such that an ordinary and prudent person would believe that the purchaser had attained the age of 18.
- (3) That the sale was made in good faith, in reasonable reliance on the identification card and appearance of the purchaser and in the belief that the purchaser had attained the age of 18.

State Law reference - Restrictions on sale or gift of cigarettes or nicotine or tobacco products, Wis. Stat. § 134.66.

(d) *Penalties*

- (1) In this subsection, "violation" means a violation of subsection (b)(1), (2), (4), (5) or (6).
 - a. A person who commits a violation is subject to a forfeiture under section 1-16 except that such forfeiture shall:
 1. Not be less than \$150 nor more than \$300.00 if the person has not committed a previous violation within 12 months of the violation; or
 2. Not be less than \$300.00 if the person has committed a previous violation within 12 months of the violation.
 3. A court shall suspend any license or permit issued under Wis. Stats. § 134.65, 139.34 or 139.79 to a person for:
 - (i) Not more than three days, if the court finds the person committed a violation within 12 months after committing one previous violation;
 - (ii) Not less than three days nor more than ten days, if the court finds that the person committed a violation within 12 months after committing two other violations; or
 - (iii) Not less than 15 days nor more than 30 days, if the court finds that the person committed the violation within 12 months after committing three or more other violations.
 4. The court shall promptly mail notice of a suspension under subdivision 3 to the department of revenue and to the clerk of each municipality which has issued a license or permit to the person.
- (2) Whoever violates subsection (b)(3) is subject to a forfeiture under section 1-16 except that such forfeiture shall not more than \$50.00.

State Law reference - Restrictions on sale or gift of cigarettes or nicotine or tobacco products, Wis. Stat. § 134.66.

(e) *Procurement for persons under 18 years of age prohibited*

No person may purchase cigarettes, nicotine products, or tobacco products on behalf of, or to provide to, any person under the age of 18. Any person who violates this subsection is subject to a forfeiture under section 1-16 except that such forfeiture shall be not less than \$150.00 nor more than \$300.00 if the person has not committed a previous violation within 30 months of the violation, nor less than \$500.00 if the person has committed a previous violation within 30 months of the violation.

State Law reference - Purchase or possession of cigarettes or tobacco products by person under 18 prohibited, Wis. Stat. § 254.92(2m).

Sec. 46-115 of the Code of Ordinances of the City of Berlin shall be created as follows:

Sec. 46-115 – Purchase or possession of vapor products by a minor prohibited

(a) *Statement of purpose*

- (1) The purpose of this section is to protect the public health, safety and welfare of the property and persons in the City of Berlin by prohibiting persons under 18 years of age from possessing nicotine and vapor products, and prohibiting the sale of these products to persons under 18 years of age.
- (2) Over the last few years, the popularity of electronic cigarettes has increased substantially, particularly among the youth population. Electronic cigarettes are tobacco-less handheld devices that allow its user to simulate cigarette smoking, and are also commonly referred to as "electronic cigarettes," "e-cigarettes," "e-cigars," "e-cigarillos," "e-pipes," "e-hookahs," or "electronic nicotine delivery systems." For purposes of this section, all of these electronic smoking devices are referred to as an electronic nicotine delivery system (ENDS).
- (3) ENDS vary in their appearance and specific method of operation, although they do have a few basic elements in common. The devices work by heating up an "e-liquid" that generates an aerosol or vapor to be inhaled by its user. These e-liquid solutions typically contain nicotine, propylene glycol, glycerine and other flavorings. The concentration of nicotine contained in the solution can be customized by the retailer to the buyer's specifications, and many manufacturers make nicotine-free solutions.
- (4) ENDS often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products. These devices may be manufactured to look like conventional cigarettes, cigars or pipes. Some resemble pens or USB flash drives. Larger devices, such as tank systems or mods, bear little or no resemblance to cigarettes. Currently, these products come in many different flavors that appeal to young people.
- (5) The U.S. Food and Drug Administrative (FDA) currently regulates the manufacture, import, packaging, labeling, advertising, promotion, sale and distribution of all electronic nicotine delivery systems and prohibits the sale of such products to persons under 18 years of age. Under Wisconsin law, persons under 18 years of age are prohibited from purchasing or possessing cigarettes, tobacco products, or nicotine products, and retailers are prohibited from selling them to minors. Wisconsin law, however, does not currently regulate nicotine-free vapor products or prohibit the sale of such products to persons under 18 years of age.
- (6) Existing studies on vapor emissions and the cartridge contents of electronic smoking devices have found a number of dangerous substances including:
 - a. Chemicals known to cause cancer such as formaldehyde, acetaldehyde, lead, nickel and chromium;
 - b. PM 2.5, acrolein, tin, toluene, and aluminum, which are associated with a range of negative health effects such as skin, eye, and respiratory irritation, neurological effects, damage to reproductive systems, and even premature death from heart

attacks and stroke.

- (7) Some cartridges used by electronic smoking devices can be refilled with liquid nicotine solution, thereby creating the potential for exposure to dangerous concentrations of nicotine.
 - (8) Clinical studies regarding the safety and efficacy of such products have not been submitted to the FDA for the over 400 brands of electronic smoking devices that are on the market and for this reason, consumers have no way of knowing whether electronic smoking devices are safe, what types of potentially harmful chemicals the products contain, and what dose of nicotine the products deliver.
 - (9) Despite current FDA rules banning the sale of such products to persons under 18 years of age, the use of e-cigarettes and similar devices by middle and high school students have continued to increase significantly in recent years.
 - (10) The use of electronic smoking devices in smoke-free locations threatens to undermine compliance with smoking regulations and reverses the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment.
 - (11) It is the intent of the common council, in enacting the ordinance codified in this section, to provide for the public health, safety and welfare by facilitating uniform and consistent enforcement of smoke-free air laws; by reducing the potential for re-normalizing smoking in public places and places of employment; by reducing the potential for children to associate the use of electronic smoking devices with a normative or healthy lifestyle; and by prohibiting the sale or distribution of electronic smoking devices to minors.
 - (12) Therefore, the City of Berlin Common Council determines that prohibiting the sale, giving, or furnishing of electronic nicotine delivery systems and vapor products to minors and prohibiting the purchase, possession, or use of such products by minors is in the city's best interest and will promote public health, safety, and welfare.
- (b) *Definitions.* The following words, terms and phrases, when used in this subsection, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning.

Electronic nicotine delivery system means a portable device capable of producing a vapor or aerosol, containing ingredients such as nicotine, propylene glycol, vegetable glycerin, and other chemicals, to be inhaled by the user. Electronic nicotine delivery systems include but are not limited to vapes, vaporizers, vape pens, vaping devices, mod systems, pod systems, hookah pens, electronic cigarettes or e-cigarettes, e-pipes and other similar devices, but do not include any products that have been approved or otherwise certified by the United States Food and Drug Administration to be sold as part of a tobacco cessation treatment or other medical purposes, and is being marketed and sold for that approved purpose. Electronic nicotine delivery systems shall include any component part of such a product, whether or not sold separately.

Minor means an individual who is less than 18 years of age.

Possession of a vapor product shall mean either actual physical control of the product without

necessarily owning that product, or the right to control the product even though it is in a different room or place than where the person is physically located.

Vapor product means any part of an electronic nicotine delivery system, including the e-liquid solution that is intended to be used with or in an electronic smoking device, whether or not such component contains nicotine, or is sold separately. Vapor product does not include any products that have been approved or otherwise certified by the United States Food and Drug Administration to be sold as part of a tobacco cessation treatment or other medical purposes, and is being marketed and sold for that approved purpose.

(c) *Prohibited conduct*

- (1) No person under 18 years of age may falsely represent his or her age for the purpose of receiving any vapor product.
- (2) No person under 18 years of age may purchase, attempt to purchase, or possess any vapor product except as follows:
 - a. A person under 18 years of age may purchase or possess vapor products for the sole purpose of resale in the course of employment during his or her working hours if employed by a retailer.
 - b. A person under 18 years of age, but not under 15 years of age, may purchase, attempt to purchase or possess vapor products in the course of his or her participation in an investigation under Wis. Stat. § 254.91 that is conducted in accordance with Wis. Stat. § 254.916(3).
 - c. Any person who violates subsection (1) or (2) is subject to a forfeiture under section 1-16 except that such forfeiture may not be less than \$50.00, as well as any other penalties that may be imposed by the court as set forth in section 1-16.
- (3) No person may purchase vapor products on behalf of, provide to, or sell to any person who is under 18 years of age. Any person who violates this subsection is subject to a forfeiture under section 1-16 except that such forfeiture shall not be less than \$150.00 nor more than \$300.00 if the person has not committed a previous violation within 30 months of the violation, nor less than \$500.00 if the person has committed a previous violation within 30 months of the violation.
- (4) A law enforcement officer shall seize any vapor product that has been sold to or is in the possession of a person under 18 years of age.

(d) *Severability*

In the event any section, subsection, clause, phrase or portion of this section is for any reason held illegal, invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this article. It is the legislative intent of the common council that this section would have been adopted if such illegal provision had not been included or any illegal application had not been made.

This ordinance shall take effect the day after publication.

The numeric section numbers and headings of any portions of the Code of Ordinances affected by this Ordinance shall be subject to modification in the discretion of the codifier, and the approval of the City Attorney, during codification into the City's current Code of Ordinances.

Passed, approved and adopted this 11th day of April, 2023.

ROLL CALL VOTE:

CITY OF BERLIN

_____ AYES
_____ NAYS
_____ ABSENT

BY:

Joel E. Brussel,
Mayor

APPROVED AS TO FORM:

ATTEST:

Sara L. Rutkowski,
City Administrator/City Clerk

Matthew G. Chier,
City Attorney