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# Wisconsin Legislative Council

## ACT MEMO

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### 2023 Wisconsin Act 73 [2023 Senate Bill 268]

### Department of Revenue Enforcement and Changes to Alcohol Beverage Laws

2023 Wisconsin Act 73 includes a number of provisions related to the enforcement of laws by the Department of Revenue (DOR), including those related to the following: cigarettes, tobacco products, and electronic vaping devices; DOR special agents; lottery laws; automated sales suppression devices; and the disclosure of tax information.

Act 73 also makes numerous changes relating to the regulation of alcohol beverages under ch. 125, Stats. (Wisconsin's Alcohol Beverages Chapter). This act memo does not discuss these changes. Rather, for an in-depth discussion of the changes to Wisconsin's Alcohol Beverages Chapter, please see [https://docs.legis.wisconsin.gov/misc/lc/information\\_memos/2023/im\\_2023\\_08](https://docs.legis.wisconsin.gov/misc/lc/information_memos/2023/im_2023_08).

## CIGARETTES, TOBACCO PRODUCTS, AND ELECTRONIC VAPING DEVICES

### Retail Licensing

The act subjects electronic vaping devices to the same retail licensing requirements as cigarettes and tobacco products and creates several new requirements applicable to licenses for all three types of products. Under both prior and current law, a person must obtain a license to sell cigarettes or tobacco products from the clerk of the city, village, or town where the retailer seeks to operate. A clerk may not issue a license unless the applicant specifies in the application whether the applicant will sell, exchange, barter, dispose of, or give away the cigarette or tobacco products over the counter or in a vending machine, or both.

An electronic vaping device is defined as a device that may be used to deliver any aerosolized or vaporized liquid or other substance for inhalation, regardless of whether the liquid or other substance contains nicotine, including an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. The definition includes a component, part, or accessory of the device, including a liquid or other substance that may be aerosolized or vaporized by the device, regardless of whether the liquid or other substance contains nicotine. It does not include a battery or battery charger when sold separately or drugs, devices, or a combination of products authorized for sale by the U.S. Food and Drug Administration (FDA), as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

Under the act, a person must also obtain a license to sell electronic vaping devices. DOR must create an application form to be used for all three types of products across all cities, villages, and towns in the state. The application form must require an applicant to provide all of the following information to the clerk in the city, village, or town where the intended place of sale is located:

- The applicant's history relevant to the applicant's fitness to hold a license.
- The kind of license for which the applicant is applying.
- The premises where cigarettes, electronic vaping devices, or tobacco products will be sold or stored.

- If the applicant is a corporation, the identity of the corporate or company officers and agent; if the applicant is a limited liability company, the identity of the company members or managers and agent.
- The applicant's trade name, if any.
- Whether the applicant will sell, exchange, barter, dispose of, or give away the cigarettes, electronic vaping devices, or tobacco products over the counter or in a vending machine, or both.
- Any other information required by DOR.

An applicant must use the form application created by DOR, sign the application, and submit the application to the municipal clerk where the intended place of sale is located. If there is a change in any fact set forth in an application, the applicant or licensee must file a written description of the change with the municipal clerk within 30 days. The applications are open to inspection, and the municipal clerk must retain all applications for at least four years. A clerk may issue a license unless the applicant has habitually been a law offender or been convicted of a felony unless pardoned and has submitted proof of a seller's permit or use tax registration certificate.

A licensed retailer must frame and enclose the license so that it may be read clearly and must conspicuously display the license for public inspection at all times in the room or place where the activity subject to licensure is carried out.

Finally, the act requires the municipal clerk to annually submit to DOR a list of licenses issued by the municipality during the previous year. The list must include the name, address, seller's permit number, and trade name of the licensee and type of license held. DOR must publish this list annually on its website.

## **Penalties for Evasion of Taxes**

Cigarettes, tobacco products, and electronic vaping devices are subject to excise tax. Any person who makes or signs any false or fraudulent report, attempts to evade such a tax, or aids or abets the evasion or attempted evasion of a tax, may be fined up to \$10,000, imprisoned for up to nine months, or both.

The act retains the penalty for making or signing a false or fraudulent report, but establishes graduated penalties for tax evasion based on the amount of the tax. Specifically, a person who evades, attempts to evade, or aids or abets in the evasion or attempted evasion of a tax is subject to the following penalties:

- If the amount of the tax is less than \$2,500, a Class A misdemeanor.
- If the amount of the tax is between \$2,500 and \$5,000, a Class I felony.
- If the amount of the tax is between \$5,000 and \$10,000, a Class H felony.
- If the amount of the tax is between \$10,000 and \$100,000, a Class G felony.
- If the amount of the tax is greater than \$100,000, a Class F felony.

## **Penalties for Unlawful Possession of Cigarettes**

The act also revises the penalties for unlawful possession of cigarettes.

Under prior law, a person who unlawfully possesses cigarettes was subject to the following penalties:

- If the number of cigarettes was fewer than 6,000, a fine of up to \$200 or imprisonment for up to six months, or both.
- If the number of cigarettes was between 6,000 and 36,000, a fine of up to \$1,000 or imprisonment for up to one year, or both.

- If the number of cigarettes was greater than 36,000, a Class I felony.

Under the act, a person who unlawfully possesses cigarettes is subject to the following penalties:

- If the number of cigarettes is fewer than 200, a fine of up to \$200 or imprisonment for up to six months, or both.
- If the number of cigarettes is between 200 and 3,000, a fine of up to \$1,000 or imprisonment for up to one year, or both.
- If the number of cigarettes is between 3,000 and 5,000, a Class I felony.
- If the number of cigarettes is between 5,000 and 10,000, a Class H felony.
- If the number of cigarettes exceeds 10,000, a Class F felony.

The act also includes a violation of this offense in the list of offenses in the definition of “racketeering activity” for the purposes of the Wisconsin Organized Crime Control Act.

## **Electronic Vaping Device Registry**

The act establishes an electronic vaping device registry maintained by DOR and prohibits the sale of electronic vaping devices that are not included on the registry.

### **Creation of Registry**

Under the act, every manufacturer of an electronic vaping device sold in the state, either directly by the manufacturer or through a distributor, wholesaler, retailer or similar intermediary, must do the following no later than July 1, 2025:

- Certify to DOR that the manufacturer will comply with requirements contained in the act and either of the following:
  - The manufacturer has received marketing authorization or similar order from the U.S. FDA pursuant to federal law. The manufacturer must also include a copy of the marketing authorization or similar order issued by the U.S. FDA for the electronic vaping device, or evidence that the pre-market tobacco product application for the electronic vaping device was submitted to the U.S. FDA and a final decision on the application has not otherwise taken effect.
  - The electronic vaping device was marketed in the United States on or before August 8, 2016, the manufacturer submitted a pre-market tobacco product application for the electronic vaping device to the U.S. FDA pursuant to federal law on or before September 9, 2020, and the application either remains under review by the U.S. FDA or a final decision on the application has not otherwise taken effect.
- Submit to DOR, in the manner prescribed by the department, a form that separately lists each of the manufacturer’s electronic vaping devices that are available in this state. Together with this form, and in each year thereafter, the manufacturer must also submit a payment of \$500 for each device listed on the form.

### **Maintenance of Registry by DOR**

DOR must maintain a directory that lists all electronic vaping device manufacturers and electronic vaping devices for which certification forms have been submitted and to make the directory publicly available on its website. DOR must update the directory at least monthly to ensure accuracy and must allow manufacturers the opportunity to cure deficiencies in the directory before DOR may remove an electronic vaping device or manufacturer from the directory. A manufacturer has 15 business days to respond to the notice and provide sufficient information in order for the manufacturer or the

manufacturer's devices to remain in the directory. After that time, DOR may remove the manufacturer or the manufacturer's devices from the directory.

### **Prohibition on Sale of Devices Not Included in Registry**

Beginning on March 1, 2025, or the date that DOR first makes the directory available for public inspection, DOR must impose a \$1,000 forfeiture on the manufacturer and retailer for each day that an electronic vaping device is offered for sale, but not included in the directory. Any electronic vaping device that is sold, offered for sale, or possessed for sale in violation of the act is contraband and is subjected to seizure, similar to the seizure of unstamped cigarettes. DOR's authorized employees have all necessary police powers to prevent violations of the provisions related to the directory.

If an electronic vaping device is removed from the directory described above, each retailer, distributor, and wholesaler that has such a device in its inventory must: (1) remove the device from its inventory no later than 21 days after the date on which the device is removed from the directory; and (2) return the device to the manufacturer for disposal. After 21 days following removal from the directory, the electronic vaping devices of a manufacturer whose devices have been removed are subject to seizure, forfeiture, and destruction, and may not be purchased or sold in Wisconsin.

### **Miscellaneous Provisions**

The act provides that it is an unfair and deceptive trade practice for any retailer, distributor, wholesaler, or manufacturer to violate the provisions related to an electronic vaping directory. Additionally, the Attorney General may, upon DOR's request, represent the state or assist a district attorney in prosecuting any case arising from violations of the electronic vaping directory requirements. The provisions that apply to service of process under the tobacco settlement agreement also apply to an agent for service of process under the electronic vaping directory requirements.

Finally, the act requires DOR to provide a report to the chief clerks of both houses of the Legislature no later than July 1, 2026, regarding the following: (1) the status of the electronic vaping directory maintained by DOR; (2) manufacturers and electronic vaping devices included in the directory; (3) revenue and expenditures related to the administration of the electronic vaping directory requirements; and (4) enforcement activities undertaken pursuant to the requirements of the bill.

## **PROVISIONS RELATED TO DOR SPECIAL AGENTS**

### **Arrest Powers**

Under prior law, the arrest powers of DOR special agents were distinct from other law enforcement officers. An on-duty DOR special agent who is certified as a law enforcement officer by the Law Enforcement Standards Board (LESB) was allowed to arrest a person if a crime has been committed in the presence of the special agent or if the special agent believes, on reasonable grounds, that certain circumstances exist, such as a warrant for the person's arrest has been issued in Wisconsin or the person is violating or has violated certain laws related to gambling machines.

The act expands the arrest powers of DOR special agents. Under the act, a DOR special agent who is on-duty and certified as a law enforcement officer by LESB has the same arrest powers as other law enforcement officers and may arrest a person in any of the following circumstances:

- The law enforcement officer has a warrant for the person's arrest.
- The law enforcement officer reasonably believes that a warrant for the person's arrest has been issued in Wisconsin.

- The law enforcement officer reasonably believes that a felony warrant for the person's arrest has been issued in another state.
- There are reasonable grounds to believe the person is committing or has committed a crime.

## **Protective Occupation Participant**

Under the Wisconsin Retirement System, protective occupation participants are treated differently than other participating employees, such as having a younger retirement age. The occupations listed in the definition of "protective occupation participant" included excise tax investigators employed by DOR. The act changes the title of this occupation to special agents employed by DOR who are authorized to exercise arrest powers. The act makes a similar change to the list of occupations entitled to hazard pay.

## **LOTTERY LAWS**

### **Investigation and Enforcement of Lottery Laws**

DOR's Lottery Division administers Wisconsin's lottery laws, which are found in ch. 565, Stats. Among DOR's duties in administering the lottery laws are requirements to monitor the regulatory compliance of gaming operations, audit gaming operations, and investigate suspected violations of the chapter. Prior to Act 73, DOR was required to report any suspected gaming-related criminal activity to the Division of Criminal Investigation (DCI) of the Department of Justice. DCI then had the power to investigate the reported suspected criminal activity. DOR special agents were allowed to coordinate an investigation with local law enforcement officials and the district attorney only if DCI chose not to investigate.

Under the act, DOR is not required to report to DCI suspected gaming-related activity under the lottery laws, and DCI is not required to decline to investigate a report in order for DOR to have the ability to coordinate an investigation and refer charges to the district attorney. Instead, DOR may enforce violations of the chapter and has the power to coordinate an investigation with local law enforcement officials and the district attorney without first reporting the suspected criminal activity to DCI. In other words, DOR's ability to coordinate an investigation and refer charges to the district attorney is not dependent on first reporting suspected gaming-related activity under the lottery laws to DCI.

The act also allows an employee of the Lottery Division to purchase a lottery ticket or share, if the purchase is on behalf of the Lottery Division and is part of an official lottery investigation. No person may claim any prize or winnings from a lottery ticket or share purchased under this provision.

### **Crimes Related to Lottery Laws**

The act creates several new crimes related to lottery laws. The act prohibits the following:

- Counterfeiting or illegally obtaining a lottery ticket or share. Any person who commits this crime is guilty of a Class I felony.
- Possessing a counterfeit or illegally-obtained lottery ticket or share, or a winning lottery ticket or share for which the prize has already been claimed, with intent to defraud. Any person who commits this crime is subject to a fine of up to \$10,000 or imprisonment for up to nine months or both.
- Claiming a lottery prize from a winning lottery ticket or share and then transferring the same winning lottery ticket or share to another person. Any person who commits this crime is guilty of a Class I felony.
- Transferring or sharing of a lottery ticket or share, presenting a transferred lottery ticket or share for payment of a lottery prize, or claiming a lottery prize from a transferred ticket or share with

intent to avoid withholding outstanding federal income taxes, state taxes, child support, debts owed to the state, child support, spousal support, maintenance, family support, assessments, fines, restitutions, or surcharges. Any person who commits this crime is subject to a fine of up to \$10,000 or imprisonment for up to nine months or both.

## **AUTOMATED SALES SUPPRESSION DEVICE**

The act prohibits the creation, design, manufacture, sale, purchase, lease, installation, update, repair, service, transfer, use, or possession of phantomware or an automated sales suppression device, unless for a legitimate purpose. A person who violates this provision is guilty of a Class D felony and may have any permits, licenses, or certificates issued by DOR revoked for up to 10 years.

An automated sales suppression device means a software program, including a program accessed through the Internet or by any other means, that falsifies electronic records, including transaction data and transaction reports, of electronic cash registers and other point-of-sale systems. Phantomware means a programming option that is either embedded in the operating system of or hardwired into an electronic cash register and can be used to create a virtual second electronic cash register or eliminate or manipulate transaction records that may or may not be preserved in digital formats to represent the true or manipulated record of transactions.

## **DISCLOSURE OF TAX INFORMATION**

It is generally illegal to divulge or circulate any information derived from an income, franchise, withholding, fiduciary, partnership, or limited liability company tax return or tax credit claim. Exceptions allow certain specified officials, such as the Secretary of DOR and any DOR employee or the Attorney General and any state Department of Justice (DOJ) employee, to examine any returns or claims.

The act allows a DOR employee, in connection with the employee's official duties, to disclose information derived from a return or claim to the extent that the disclosure is necessary to obtain information for the enforcement of Wisconsin's tax laws. The information that may be disclosed is strictly limited to, and may be used solely for the purposes of, obtaining information that is necessary for an audit, collection, inspection, or investigation by the employee.

Similarly, the act specifies the limits on the use of information obtained by a DOJ employee. It specifies that an employee may, in connection with the employee's official duties, disclose information obtained to a law enforcement investigator who is participating in a DOJ investigation of suspected criminal conduct, but the information that may be disclosed is strictly limited to, and may be used solely for the purposes of, obtaining information necessary for a DOJ investigation.

The act also allows information to be divulged to or used by a federal grand jury or Wisconsin grand jury, upon receipt by DOR of a grand jury subpoena.

**Effective date:** December 8, 2023. The provisions related to the retail sale of electronic vaping devices take effect on the 90th day after the day of publication.

For a full history of the bill, visit the Legislature's [bill history page](#).

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