

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2020-008

TO: Mayor John Engen, City Council, Ellen Leahy, Mike Colyer, Scott Hoffman, Richard Stepper, Laurie Clark, Marty Rehbein, Kirsten Hands, Kelly Elam, Jeff Brandt, Gordy Hughes, Brad Davis, Charmell Owens

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 7, 2020

RE: Pursuant to section 45-5-637 MCA, a person under 18 years of age who knowingly possesses or consumes a tobacco product, alternative nicotine product, or vapor product commits the criminal offense of possession or consumption of a tobacco product, alternative nicotine product, or vapor product.

FACTS:

Recent discussions pertaining to the City of Missoula adopting city ordinance regulations applicable to vaping or sale displays of flavored tobacco products has included some inquiries about the legality of a youth under age 18 possessing or consuming tobacco products, alternative nicotine products or vapor products.

ISSUE(S):

Does existing Montana state law regulate possession or consumption of tobacco products, alternative nicotine products or vapor products by a youth under the age of 18 years of age?

CONCLUSION(S):

Pursuant to section 45-5-637 MCA possession or consumption of tobacco products, alternative nicotine products or vapor products by persons under 18 years of age is prohibited and is unlawful.

LEGAL DISCUSSION:

Title 45 MCA is entitled “CRIMES”. Title 45, chapter 5 MCA is entitled “OFFENSES AGAINST THE PERSON” and part 6 is entitled “OFFENSES AGAINST THE FAMILY”. Section 45-5-637 MCA is entitled “POSSESSION OR CONSUMPTION OF TOBACCO PRODUCTS, ALTERNATIVE NICOTINE PRODUCTS OR VAPOR PRODUCTS BY

PERSONS UNDER 18 YEARS OF AGE PROHIBITED---UNLAWFUL ATTEMPT TO PURCHASE---PENALTIES.”

Section 45-5-637 MCA states:

45-5-637. Possession or consumption of tobacco products, alternative nicotine products, or vapor products by persons under 18 years of age prohibited -- unlawful attempt to purchase -- penalties. (1) A person under 18 years of age who knowingly possesses or consumes a tobacco product, alternative nicotine product, or vapor product, as defined in **16-11-302**, commits the offense of possession or consumption of a tobacco product, alternative nicotine product, or vapor product.

(2) A person convicted of possession or consumption of a tobacco product, alternative nicotine product, or vapor product:

- (a) shall be fined \$50 for a first offense, no less than \$75 or more than \$100 for a second offense, and no less than \$100 or more than \$250 for a third or subsequent offense; or
- (b) may be adjudicated on a petition alleging the person to be a youth in need of intervention under the provisions of the Montana Youth Court Act provided for in Title 41, chapter 5.

(3) A person convicted of possession or consumption of a tobacco product, alternative nicotine product, or vapor product may also be required to perform community service or to attend a tobacco cessation program.

(4) A person under 18 years of age commits the offense of attempt to purchase a tobacco product, alternative nicotine product, or vapor product if the person knowingly attempts to purchase a tobacco product, alternative nicotine product, or vapor product, as defined in **16-11-302**. A person convicted of attempt to purchase a tobacco product, alternative nicotine product, or vapor product:

- (a) for a first offense, shall be fined \$50 and may be ordered to perform community service;
- (b) for a second or subsequent offense, shall be fined an amount not to exceed \$100 and may be ordered to perform community service.

(5) The fines collected under subsections (2) and (4) must be deposited to the credit of the general fund of the local government that employs the arresting officer, or if the arresting officer is an officer of the highway patrol, the fines must be credited to the county general fund in the county in which the arrest was made.

The 2015 Montana State Legislature inserted the “alternative nicotine product, or vapor product” language in three places in section 45-5-637 MCA.

CONCLUSION(S):

Pursuant to section 45-5-637 MCA possession or consumption of tobacco products, alternative nicotine products or vapor products by persons under 18 years of age is prohibited and is unlawful.

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/s/

Jim Nugent, City Attorney

JN:jb