

HOUSE BILL REPORT

HB 1249

As Reported by House Committee On:
Health Care & Wellness

Title: An act relating to internet and mail order sales of certain tobacco products.

Brief Description: Concerning internet and mail order sales of tobacco products.

Sponsors: Representatives Cody, Bailey, Dickerson, Roberts, Moeller, Kelley, Kenney and Morrell; by request of Attorney General.

Brief History:

Committee Activity:

Health Care & Wellness: 2/3/09, 2/13/09 [DPS].

Brief Summary of Substitute Bill

- Prohibits a person from shipping tobacco products, other than cigars, that are purchased by mail or through the Internet to anyone in Washington other than a licensed wholesaler or retailer.
- Subjects a violation of the tobacco shipping restriction to both criminal and civil penalties, and allows the Attorney General to bring an action under the Consumer Protection Act.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Cody, Chair; Driscoll, Vice Chair; Ericksen, Ranking Minority Member; Bailey, Green, Herrera, Hinkle, Kelley, Moeller, Morrell and Pedersen.

Staff: Chris Cordes (786-7103)

Background:

Both federal and state law regulate the sale and shipment of cigarettes and other tobacco products. Under the federal Jenkins Act, interstate shippers of cigarettes who ship to anyone other than a licensed distributor must report to the state the names and addresses of

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customers and the quantities of cigarettes shipped. The Department of Revenue (DOR) is the agency designated to receive this report for Washington.

Washington's tobacco regulatory programs are administered by the Washington State Liquor Control Board (Board). Among the programs is the Minors' Access to Tobacco Products Act (Act) which limits youth access to tobacco products. The Act includes requirements for posting warnings that tobacco sales to anyone under the age of 18 are illegal. It restricts the placement of tobacco vending machines. State law also makes selling or giving cigarettes to minors in Washington a misdemeanor. Additional civil penalties apply to persons who sell tobacco to minors. Minors who purchase tobacco products are subject to an infraction, with fines and community restitution.

A person making delivery sales of cigarettes to consumers in Washington, whether the cigarettes are ordered by telephone, mail, or the Internet, must ensure that no sales are made to persons under the age of 18. They must comply with notice, delivery, and tax requirements. They also must file a disclosure statement with the Board each month listing their customers. When a purchaser places an order for a delivery sale of cigarettes, the seller must verify the age of the purchaser either by photocopy of the purchaser's identification or through a commercial database. The seller must then mail or electronic mail the purchaser a disclosure notice that contains the federal tobacco warning, a warning that sales to minors are unlawful, and a statement that cigarettes are taxable. The statute requires sellers to use a private delivery service that will verify that cigarettes are not delivered to a minor.

Persons violating the cigarette delivery sale statute are subject to criminal penalties. A seller's first violation is punishable as a class C felony. A second or subsequent offense is punishable as a class B felony. Any delivery service that delivers cigarettes without first verifying the age and identity of the recipient of a delivery sale is guilty of a gross misdemeanor.

In 2008 the U.S. Supreme Court (Court) held that a cigarette delivery sale statute in Maine was pre-empted by the Federal Aviation Administration Authorization Act of 1994. The Court found that because the Maine statute required shippers to choose only carriers that would perform the age verification services required by state law, the state statute was within the scope of "price, route, or service" regulations that states were not allowed to impose.

Summary of Substitute Bill:

The cigarette delivery sale statute is repealed.

A person may not ship tobacco products, other than cigars, purchased by mail or through the Internet to anyone in Washington other than a licensed wholesaler or retailer. A person may not, with knowledge, provide substantial assistance to someone violating this tobacco shipping restriction.

The Internet is defined to mean computer, telephonic, or other electronic networks.

The Attorney General may seek an injunction to restrain a threatened or actual violation of the tobacco shipping restriction.

In addition to any civil or criminal remedy provided by law, a violation of the tobacco shipping restriction is:

- punishable as an unranked class C felony for a knowing violation, except that the maximum fine is \$5,000;
- subject to a civil penalty of up to \$5,000 for each violating shipment, to be imposed by the Attorney General in an action in superior court; and
- subject to a Consumer Protection Act action, if the action is brought by the Attorney General.

A court may order a violator to disgorge profits or other gains to be paid to the State Treasurer for deposit in the State General Fund. The state is entitled to recover costs of investigation, expert witness fees, costs of the action, and reasonable attorneys' fees in any action brought under the tobacco shipping restrictions.

Substitute Bill Compared to Original Bill:

The substitute bill: (1) applies the shipping restriction to all tobacco products except for cigars; (2) adds the shipping restriction to the chapter addressing access of minors to tobacco (instead of creating a new chapter in the code); (3) uses the term "Internet" to describe computer, telephonic, or other electronic networks; (4) changes the criminal penalty to an unranked class C felony; (5) adds a requirement for civil penalties to be recovered by the Attorney General in a civil action in superior court; and (6) deletes definitions that are used only in the repealed "delivery sales" law.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is the only feasible way to address the legal problems related to age verification of tobacco shipments. The current statute is not enforceable after the court ruling in Maine. With this bill, retail sales would only occur face-to-face. Orders can still be delivered to retailers and wholesalers. The approach in this bill has been upheld in federal court in Arkansas.

Six other states have enacted similar shipping prohibitions. The Institute of Medicine also recommends legislation like this.

To combat youth smoking, the state needs to act on several fronts. The Internet is one of the biggest concerns. Studies indicate that about 15 percent of kids get cigarettes through loopholes such as the Internet. Anecdotal evidence suggests that more than 70 percent of kids are successful at getting cigarettes on the Internet. Internet sellers generally do not employ age verification procedures or they are easy to pass. Some Internet sellers have stopped selling in states with laws like this bill.

The bill should cover all tobacco products.

Other benefits of the legislation include improving the integrity of the cigarette tax system (all Internet sales are illegally conducted because they avoid taxes to make them cheaper) and making the system more fair to in-state retailers who compete with the online retailers.

(Opposed) Retailers do have a problem with Internet sellers, but the bill will only hurt current Washington licensees who ship tobacco products. They are licensed and easily subject to sanction. The bill will not affect online retailers because of the difficulty of enforcement against them.

There are some small cigars that would not fit the cigar exemption in the bill, but which are not aimed at the young market. These are premium cigars that are too expensive for kids. If this bill passes, all those sales will go out-of-state.

Parents should deal with this problem. Experience with ordering on the Internet indicates that samples requested online never get sent out.

Persons Testifying: (In support) Rusty Fallis, Office of the Attorney General; Mary Selecky, Department of Health; Lucy Culp, American Heart Association and American Cancer Society; and Paul Zemann, King County Public Health.

(Opposed) Richard Frank; and Dale Taylor, Cigar Association of Washington.

Persons Signed In To Testify But Not Testifying: None.