

SESSION OF 2020

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2563

As Amended by House Committee on Federal
and State Affairs

Brief*

HB 2563 would amend the Kansas Cigarette and Tobacco Products Act, the Kansas Indoor Clean Air Act, law concerning student health, and criminal statutes related to the use and possession of cigarettes, electronic cigarettes, consumable material, alternative nicotine products, and tobacco products by persons under the age of 21.

Kansas Cigarette and Tobacco Products Act

Purpose

The bill would amend the statement of purpose for the Kansas Cigarette and Tobacco Products Act (Act) to include the regulation and taxation of the sale of electronic cigarettes, consumable material, and alternative nicotine products in addition to cigarettes and tobacco products; and it would also state the intent to impose a tax where applicable.

Licensing

Continuing law requires a license for each person engaged in the sale of regulated products, as defined in the bill. The bill would not increase the currently charged biennial fee of \$25 for each dealer establishment. [*Note*: The bill, as introduced, would have increased the \$25 biennial dealer fee

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

to \$100; however, the House Committee deleted the bill language that would have raised the fee.]

The bill would add the following to the list of reasons the Director of Taxation (Director) would be able to refuse to renew or issue a license or could suspend or revoke licenses for the sale of regulated products:

- Any person who is not of good character and reputation in the community in which such person resides;
- Any person who has been convicted of a felony or of any crime involving moral turpitude or the violation of any laws of any state or federal laws pertaining to cigarettes or tobacco products and has not completed the sentence, parole, probation, or assignment to a community correctional services program imposed for such conviction within two years immediately preceding the date of applying for a license; or
- Any person who is not 21 years of age.

The bill would also remove provisions related to retailer's licenses on railroad or sleeping cars; show, carnival, and catering licenses; and resident retail dealer temporary licenses.

Change in Age to Purchase or Possess Tobacco Products

The bill would specify it is illegal to:

- Sell, furnish, or distribute any regulated products to any person under 21 years of age;
 - The bill would also change other references to the legal age to use or possess such products throughout the Act from 18 years of age (or a minor) to 21 years of age;

- Distribute samples within 500 feet of a school when the facility is primarily used by persons under 21 years of age, unless it is in an area to which persons under 21 years of age are denied access;
- Sell regulated products through any self-service display in any establishment, except in an indoor enclosed area where the retailer ensures that no person under 21 years of age is present or permitted to enter at any time;
 - The bill would also strike language in current law related to the sale of such products through vending machines and would make such sales a violation of the Act; or
- Sell any electronic cigarette or consumable material that has not obtained a tobacco product clearance order from the United States Food and Drug Administration (USFDA) pursuant to 21 USC §387j. The bill would provide an exception for sales of electronic cigarettes that contain tobacco or menthol flavored consumable material, or separate sales of such tobacco or menthol flavored consumable material.

Posted Notice

The bill would require retail dealers to post and maintain notice that cigarettes, electronic cigarettes, consumable material, alternative nicotine products, and tobacco products could be sold only to persons over 21 years of age in a conspicuous place. The bill would specify such notices must be:

- Posted in a manner conspicuous to both employees and consumers;
- Unobstructed from view in their entirety;

- Within six feet of where such products are available for purchase;
- At least 8.5 inches by 11 inches in size; and
- Legibly printed.

Penalties

The bill would state it is a class B misdemeanor to sell, furnish, or distribute regulated products to persons under 21 years of age or to buy such products for persons under 21 years of age and would specify the following fines:

- A fine of at least \$500 for a first violation;
- A fine of at least \$750 for a second violation within a three-year period; or
- A fine of at least \$1,000 for a third or subsequent violation within a three-year period.

Current law provides it is a class B misdemeanor punishable by a minimum fine of \$200 for selling, furnishing, distributing, or buying cigarettes or tobacco products for persons under 18 years of age. Continuing law also provides specific defenses for such violations, which would be amended by the bill to specify regulated products and to raise the related age provisions to 21 years of age.

The bill would also remove a provision that makes it a cigarette or tobacco infraction for persons under 18 years of age to purchase, attempt to purchase, possess, or attempt to possess cigarettes, electronic cigarettes, or tobacco products, specifying such infraction is punishable by a fine of \$25 and a judge may require the juvenile to appear in court with a parent or legal guardian.

The bill would also specify it would not be a violation of the Act to permit an individual under 21 years of age to

possess regulated products if such possession is solely in the course of such person's employment by a retailer.

Additional Penalties

Continuing law allows the Secretary of Revenue, or designee, upon the finding that a person has violated the Act or any related rule and regulation, to impose a civil fine of up to \$1,000 per violation. The bill would specify in determining the fine imposed, completion of a training program approved by the Secretary of Health and Environment would be a mitigating factor for an employee of a licensed retailer who sold, furnished, or distributed prohibited products in violation of the Act.

The bill would specify a violation of the Act, or a violation of a city or county ordinance that prohibits the acts made illegal under the Act, would be considered a violation of the Act.

Nuisances and Contraband

The bill would also amend provisions in current law concerning nuisances and contraband to include all regulated products in the possession of a person under 21 years of age, as well as consumable material on which tax has not been paid. Under continuing law, nuisances and contraband may be seized by the Director, an authorized agent, or a duly constituted peace officer without process or warrant.

Compliance Checks

The bill would require the Director, or an authorized person, to perform compliance checks to engage persons under 21 years of age to perform not less than two controlled buys at each licensed retail dealer establishment each year. The bill would also require a subsequent unannounced controlled buy within 90 days of any non-compliant controlled buy.

The bill would specify compliance checks may be conducted by persons under 18 years of age without the consent of a parent or guardian.

Definitions

The bill would create the following definitions:

- “Alternative nicotine product,” meaning any non-combustible product containing nicotine without the presence of tobacco leaf that is intended to be placed in the oral or nasal cavity, whether chewed, absorbed, dissolved, or ingested by any other means. The term would specifically be defined to exclude cigarettes, electronic cigarettes, consumable material, tobacco products, or any product regulated as a drug or device by the USFDA under Chapter V of the Federal Food, Drug, and Cosmetic Act;
- “Consumable material,” meaning any liquid solution or other material that is depleted as it is consumed through the use of an electronic cigarette; and
- “Regulated products,” meaning cigarettes, electronic cigarettes, consumable material, alternative nicotine products, and tobacco products. The bill would also replace references to such products in continuing law with the term “regulated products.”

Changes to the Kansas Indoor Clean Air Act

Removal of Exceptions

The bill would remove the exception to the Kansas Indoor Clean Air Act (Clean Air Act) for gaming floors of lottery gaming facilities and racetrack gaming facilities and would

amend the exception of certain designated areas in a private club to specify the exception applies to areas where persons under 21 years of age are prohibited.

Definitions

The bill would create the following definitions:

- “E-liquid,” meaning a substance that may or may not contain nicotine and is intended to be aerosolized or vaporized and inhaled using an electronic cigarette;
- “Smoking,” meaning to include the use of an electronic cigarette. Continuing law defines smoking to mean possession of a lighted cigarette, cigar, pipe, or burning tobacco in any other form or device designed for the use of tobacco; and
- “Tobacco shop,” meaning any indoor area operated primarily for the retail sale of tobacco, tobacco products, smoking devices, electronic cigarettes, e-liquids, or accessories, and which derives not less than 65 percent of its gross receipts from any combination of the sale of tobacco, tobacco products, smoking devices, electronic cigarettes, or e-liquids.

Schools

The bill would amend the prohibition on the use of tobacco products in school buildings to specify the use of cigarettes, electronic cigarettes, consumable material, alternative nicotine products, and tobacco products are prohibited in school buildings.

Effective Date

The bill would be effective on July 1, 2021.

Technical Amendments

The bill would repeal a statute regarding a previously required tobacco inventory tax and would make technical amendments to ensure consistency in statutory phrasing.

Background

The bill was introduced by the House Committee on Federal and State Affairs, at the request of Representative Eplee on behalf of himself and Representatives Barker, Bishop, Croft, and Ellis.

In the House Committee hearing, Representatives Croft, Eplee, and Holscher, as well as representatives of the Kansas City Chamber of Commerce and the Kansas National Education Association provided proponent testimony on the bill. Written-only proponent testimony was provided by the Attorney General and representatives of the Kansas Academy of Family Physicians, Kansas Association of Local Health Departments, Kansas Health Foundation, Kansas Hospital Association, Kansas Public Health Association, and two Kansas school district superintendents.

Opponent testimony was provided by representatives of the American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, American Vaping Association, Big E Vapor Shops, Casey's General Stores, Equality Kansas, Kansas Smoke Free, Liberty Alliance, Petroleum Marketers and Convenience Store Association of Kansas, Tobacco Free Kansas Coalition, Top Shelf Vapors, and five private citizens. Written-only opponent testimony was provided by the Kansas Chapter of the American Academy of Pediatrics, Kansas City, Kansas Police

Department, National Alliance on Mental Health, Shawnee Mission School District, Stallions Against Tobacco, and 11 private citizens.

Written-only neutral testimony was provided by the Kansas Association of School Boards, Kansas Health Institute, and Oral Health Kansas.

The House Committee amended bill provisions, including the flavors of consumable material allowed under law, licensing fees for retail dealers, and definitions and removed the Clean Air Act exemption for lottery and racetrack gaming facility floors. The Committee also adopted a technical amendment.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Department of Revenue (Department) estimates the bill would decrease state revenues by \$6,870,337 in FY 2021. Of that total, the State General Fund (SGF) is estimated to decrease by \$6.8 million, the State Highway Fund (SHF) is estimated to decrease by \$265,337, and the Cigarette and Tobacco Enforcement Fund is estimated to increase by \$195,000. The bill also is estimated to decrease local sales tax revenues from lower cigarette sales; however, a specific estimate was not calculated. While some cities and counties in Kansas have already increased the age to purchase cigarettes, electronic cigarettes, and tobacco products from 18 to 21 years of age, the effect is unknown to the Department. To formulate these estimates, the Department reviewed data from the Centers for Disease Control and Prevention that show an estimated 17,662 smokers aged 18 to 20 in Kansas (14.1 percent of this particular population are smokers), which represents approximately 4.66 percent of all adult smokers in Kansas. The Department reported annual cigarette stamp revenue of \$116.7 million in 2019 and reducing consumption by 4.66 percent would result in a reduction of approximately \$5.4 million in cigarette stamp revenue that is deposited in the SGF. There would also be a loss of an additional \$1.6 million in sales tax revenue (\$1.4 million to the SGF and

\$265,337 to the SHF). The Department estimates the \$5.4 million cigarette stamp revenue represents approximately 4.2 million packs of cigarettes no longer being sold in Kansas. The bill would also increase the biennial retail dealer's license fee from \$25 to \$100. With that change, the Department would see an increase every other year of \$195,000 to the Cigarette and Tobacco Enforcement Fund. The Department indicates that 2,600 dealers would see a fee increase of \$75 every other year. This bill would also increase the fees for violations of the Cigarette and Tobacco Products Act; however, it is unknown what the effect on revenue collected from these increased fines will be. The Department has further indicated that the bill would require \$92,482 from the SGF in FY 2021 to update forms and publications and would require the Department to hire 1.0 new FTE position to perform the additional inspection requirements.

The Kansas Department of Health and Environment (KDHE) has indicated that the bill requires it to create or approve training materials for those caught selling tobacco products to people under 21 years of age. KDHE indicates the Department is currently performing these duties and requiring KDHE to perform these duties instead would require \$26,155 from the SGF to contract with a part-time inspector to conduct training sessions. KDHE indicates there were 188 compliance violations in 2019 and assumes that the number of compliance violations would not vary substantially as a result of this bill.

The Office of Judicial Administration has indicated the bill has the potential for increasing litigation in the courts because of the increased fine structure for violations of the Cigarette and Tobacco Products Act created by the bill. If it does, the Office of Judicial Administration indicates there would be a fiscal effect on the operations of the court system. However, it is not possible to estimate the number of additional court cases that would arise or how complex and time-consuming the cases would be. The fiscal effect would most likely be negligible and could be accommodated within the existing budget resources.

The Office of the Attorney General indicates the bill would have no fiscal effect on its operations; however, they indicate that there might be additional law enforcement actions on the local level to investigate and prosecute additional violations.

The Kansas Sentencing Commission indicates that the bill would not have an effect on prison admissions and beds.

Any fiscal effect associated with HB 2563 is not reflected in *The FY 2021 Governor's Budget Report*.