

- SUBJECT:** Sale and distribution of tobacco products
- COMMITTEE:** State Affairs — committee substitute recommended
- VOTE:** 12 ayes — Seidlits, Alvarado, Black, Bosse, Carter, Danburg, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay
- 0 nays
- 1 present, not voting — S. Turner
- 2 absent — Craddick, Wolens
- WITNESSES:** For — Ronnie Volkening, The Southland Corporation; Chuck Courtney, Texas Retailers Association
- Against — Susan Rocha, City of San Antonio; Cindy Antolik, Smokeless Texas Coalition; Chet Brooks; Sharon Hausman-Cohen, M.D.
- On — Jim McDade, Texas Commission on Alcohol and Drug Abuse; David Smith, M.D., Texas Department of Health
- BACKGROUND:** The Health and Safety Code prohibits commercial enterprises from selling, giving or causing to be sold or given cigarettes or tobacco products to a person younger than 18 years of age. An offense is a Class C misdemeanor punishable by a maximum penalty of a \$500 fine. The Health and Safety Code also requires a specific sign outlining the prohibition to be posted near the location where tobacco products are being sold or near a tobacco product vending machine.
- DIGEST:** CSHB 2460 would amend the Health and Safety Code tobacco sale restrictions to add new provisions regarding distribution and sample distribution of tobacco products, placement of vending machines, signage requirements, enforcement measures and preemption local ordinances or rules. CSHB 2460 would also amend the Tax Code to require cigarette and other tobacco retailers to pay a permit fee of \$15 and to direct the use of fee revenue to be used for enforcement as well as administration and tax stamp activities.

The act would take effect September 1, 1995. Vending machine restrictions would take effect January 1, 1995. Tax Code changes would take effect May 1, 1996.

Sale and distribution. CSHB 2460 would restrict the distribution of tobacco products, in addition to their sale, and would amend the requirement that a person engaged in the sale or distribution of cigarettes or tobacco products would be required to demand proof of age from a prospective purchaser or recipient looked under age. "Distribute" would be defined as to sell, furnish, give or provide tobacco products, including tobacco product samples.

It would be a defense to prosecution if proof of age was presented and the defendant reasonably relied on that proof of age. Provisions requiring the use of specific identification would be removed from statute. Owners of retail stores in which tobacco products are sold would be required to notify employees of their legal responsibilities by October 1, 1995. An employer who failed to notify employees would be liable for a \$25-\$200 fine, and to a \$100-\$500 fine if convicted of the same offense within a two year period.

If the offense occurred in connection with a sale through a vending machine the proprietor of the establishment in which the vending machine was located would be criminally responsible and subject to prosecution, except if the proprietor made an employee responsible for the machine, the employee would be responsible.

Distribution of a tobacco product would not be prohibited to a family member or to an employee in the performance of the employee's duties.

A person would commit an offense if the person sold cigarettes and smokeless tobacco products other than in an unopened package that originated with the manufacturer.

Signs. CSHB 2460 would amend signage requirements to require a minimum size of 93-1/2 square inches. The sign would be required to state "State law strictly prohibits the sale of cigarettes or tobacco products to persons under the age of 18 years. Proof of age may be required."

Another notice could not be required to be posted or maintained in any store that sells tobacco products.

Samples. CSHB 2460 would enact new provisions making an offense for the distribution of tobacco product samples to a person younger than 18 years of age or in or on a public street, park within 500 feet of a school or other facility used primarily by children.

A person would be required to demand proof of age from a prospective sample recipient if the person had reason to believe the recipient was underage.

Vending machines. CSHB 2460 would add a provision prohibiting the placement of vending machines containing tobacco products in places accessible to persons younger than 18 years of age. Prohibitions would not apply to bars, private businesses not open to the public, places to which persons under age 18 are not permitted, places where the vending machine is under the supervision of the owner or an employee of the owner of the establishment, an industrial or manufacturing plant, a business office, a college, a university or a military installation.

Penalty. Sale, distribution, signage and vending machine offenses would be punishable as a Class C misdemeanor, with a maximum penalty of a \$500 fine.

Possession and purchase by a minor. CSHB 2460 would add a new provision making an offense for persons younger than age 18 to possess, purchase or accept tobacco products or to falsely represent to be age 18 or older for the purpose of purchasing tobacco products. Employees and family members would be exempt from this offense.

The offense would be punishable by a fine of \$25 to \$200 or 25 hours of community service. A person with a previous conviction within a two-year period would be subject to a \$100-500 fine or 50 hours of community service. The defendant could also be required to attend a smoking awareness course approved by the Texas Commission on Alcohol and Drug Abuse (TCADA).

Enforcement. TCADA would be required to enforce this chapter in partnership with county sheriffs and municipal police and could issue block grants for enforcement purposes. TCADA also would be required to ensure state compliance with federal law and regulations restricting the sale and distribution of tobacco products to minors.

Random inspections would be conducted at least annually and could enlist minors younger than 17 years of age to act as decoys to test compliance. Written parental consent would be required for a minor to act as a decoy. The minor would be required to have an appearance that would cause a reasonably prudent seller to request proof of age, and the minor would be required to answer truthfully any questions about age.

TCADA would be required to annually prepare a report for submission to the U.S. Department of Health and Human Services in compliance with federal requirements.

If required by federal law, TCADA could assess an administrative penalty against a person who holds a tobacco product permit under the Texas Tax Code for violations of sale and distribution restrictions and signage requirements. An administrative penalty could not exceed \$100 for the first violation and \$250 for the second violation within a 24-month period. For a third or subsequent violation within a 24-month period the penalty could include a seven-day suspension or, if previously suspended, a revocation of the retailer's permit. TCADA would be required to follow notice and hearing requirements as established under the Texas Administrative Procedure Act (Government Code Chapter 2001).

Uniformity. The Health and Safety Code requirements relating to tobacco products would have to be implemented and enforced in an uniform manner throughout the state. A county, municipality, political subdivision or state agency could not adopt or enforce any ordinances or regulations concerning the sale, distribution, advertising, display or promotion of cigarettes and tobacco products.

Tax Code changes. CSHB 2460 would require retailers who sell cigarettes, cigars and other tobacco products to obtain a \$15 permit. Revenue from the sale of retailer's permits would be deposited in the state

treasury to a special account to be appropriated to the state treasurer to cover permit and cigarette tax stamp administration duties and to TCADA to enforce tobacco product sale and distribution restrictions, including enforcement block grants and for the Texas DARE Institute (the Texas Drug Abuse Resistance Education Institute of Southwest Texas State University).

**SUPPORTERS
SAY:**

CSHB 2460 offers a reasonable and uniform approach to preventing children's access to tobacco products. It would also help Texas meet soon-to-be-established federal requirements to tighten enforcement of tobacco sale restrictions. Permit fee revenue would cover any additional enforcement costs.

Children are the more vulnerable to the hazards and addiction of smoking and tobacco use than adults because their bodies are still developing. They also do not have mature reasoning abilities and are more influenced by peer pressure. Limiting access to tobacco products would make for more healthy children and could reduce overall state health expenditures for smoking-related illnesses.

Current tobacco sale and distribution restrictions are not well enforced. A Texas Department of Health study in 1993 found that teenagers could buy cigarettes at about 61 percent of surveyed liquor, grocery or convenience stores. Vending machines are often unsupervised. A recent study by the Texas Commission on Alcohol and Abuse (TCADA) found that 98 percent of minors attempting to buy cigarettes in vending machines were successful. In cities where enforcement has been tightened, sales rates to minors have fallen and smoking rates of students have cut in half.

CSHB 2460 places the responsibility of conforming with the law on the retailer, the employee and the minor. These measures working together would create a significant reduction in minors' access to tobacco products. Retailers who make profits from illegal tobacco sales to children could be subject to penalties if required by pending federal rules, and retailers could lose their permit. Employees who choose to ignore the law and policies of the business owner would also be penalized. Owners who notify their employees of the law would not be liable for employees who break the law.

Minors would be less tempted to break the law because they could be fined or required to perform community service penalties.

A \$15 permit fee is reasonably low and can be handled by small retailers. It is sufficient to cover only the cost of enforcement and administration — it would not generate more revenue than is needed in order to support other state programs. The Legislative Budget Board estimates that the permits would generate \$751,755 per year in fee revenues, whereas the cost of CSHB 2460 provisions would be \$954,795 in 1996 dropping to \$613,977 in 2000.

Uniformity in state tobacco product vending laws is needed to assist retailer compliance. Businesses in urban and suburban areas lose customers to similar businesses in neighboring communities that attract customers because access to tobacco products is easier. Chain restaurants and other statewide businesses have to amend employee training practices and to modify store signs or other procedures to meet local standards for each establishment.

Excessive tobacco sale, sample distribution and vending machine restrictions can also unduly inconvenience smoking adults and could restrict trade.

OPPONENTS
SAY:

The statewide uniformity standard in CSHB 2460 should be removed or other provisions in the bill should be made more restrictive. CSHB 2460 at best represents a minimum state standard and should not preempt more restrictive local ordinances.

CSHB 2460 would roll back tough, effective restrictions recently enacted in local communities and prevent others from occurring. Tobacco sale and distribution standards should reflect community standards. The state government should respect local prohibitions or requirements to the same extent it respects local ordinances and regulations on the sale and consumption of alcohol. CSHB 2460 would create a fair minimum state standard, but it is not tough enough to satisfy many communities.

The CSHB 2460 uniform standard provisions would serve to diminish instead of improve enforcement against minors buying cigarettes. It would

prevent local communities from banishing tobacco sample distribution altogether, restricting vending machines to bars or lounges or prohibiting tobacco billboards targeted at minority neighborhoods. Similar uniform provisions on tobacco sales and smoking have been enacted in other states, and because the tobacco and retailer lobbies are strong at the state level restrictive tobacco laws have been watered down overtime.

Employees of chain retail businesses, as residents of the communities in which they work, would most likely already know about tobacco sale restrictions in their home town. Modifying a training program or company sign to accommodate a community's law is not a costly procedure and is part of a routine cost of doing statewide or nationwide business.

The vending machine provisions would not prevent kids from purchasing cigarettes because of the provision that allows vending machines to be placed anywhere the machine would be under the supervision of the owner or an employee. That would virtually nullify any restriction this bill would enact by allowing vending machines to be placed anywhere — just as they are allowed under current law. Since no one can watch a vending machine day and night, kids would continue to have easy access to many vending machines.

Retailers should be penalized for employee violations to ensure adequate compliance with the law. Increased penalties are an effective incentive for retailers to monitor employee behavior and could reduce some of the need for local law enforcement inspections. Tobacco retailers should be held responsible for their employees just like bar proprietors are responsible for their employees who sell alcoholic beverages to minors.

The permit fee in CSHB 2460 is too low. The state would depend on the assistance of local law enforcement authorities to enforce this act, and most of them are already swamped with other responsibilities. Adequate funding for enforcement is necessary to develop programs and attract and train personnel.

OTHER
OPPONENTS
SAY:

This bill is unnecessary and too costly. Devoting scarce law enforcement to offenses like tobacco sales and purchases of tobacco by minors would clog up the criminal justice system and will do little to deter smoking among the young. Kids will be kids and try to buy or smoke cigarettes regardless of the consequences. Businesses should not be forced to regulate social behavior.

NOTES:

Major additions in the committee substitute include:

- retail permit fee and other Tax Code provisions;
- manufacturing plants to the exemption from vending machine placement restrictions, and
- provisions circumscribing the use of a minor decoy in inspections.

The committee substitute also deleted specific written form requirements for use in employee notification of state laws and responsibilities. It modified state and local enforcement working arrangements and allowed TCADA to offer grants to local entities for enforcement. Administrative penalties were reduced from \$200 to \$100 for the first violation and from \$500 to \$250 for the second violation.

A related bill, SB 1237 by Armbrister (HB 2973 by Seidlits), which would establish uniform state smoking restrictions preempting local restrictions, passed the Senate on second reading on May 9.