

- SUBJECT:** Additional defenses for alcohol retailers that use scanning devices
- COMMITTEE:** Licensing and Administrative Procedures — favorable, without amendment
- VOTE:** 6 ayes — Geren, Goolsby, Hamilton, Jones, Quintanilla, Thompson
0 nays
3 absent — Flores, Isett, Miles
- SENATE VOTE:** On final passage, April 19 — 31-0, on Local and Uncontested Calendar
- WITNESSES:** No public hearing
- BACKGROUND:** Alcoholic Beverage Code, sec. 109.61 allows retailers of alcoholic beverages to use scanning devices to access electronically readable information from the magnetic strip and/or barcode on a driver's license to ensure that an individual is legally purchasing alcohol with a valid license.
- A person may retain information gathered in this manner only to the extent allowed by TABC rule, and such information may not be marketed in any manner. A violation of these requirements is a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).
- In the 2005 regular session, the 79th Legislature enacted SB 1465 by Whitmire, which added Alcoholic Beverage Code, sec. 109.61(e) to provide a retailer an affirmative defense to prosecution for a charge of selling alcohol to a minor if the retailer properly used a transaction scan device and relied in good faith on the results. An affirmative defense also is available to a retail store owner whose employee was accused of selling alcohol or tobacco to a minor if the owner had provided the employee with a properly working transaction scan device and adequate training in the use of that device.
- DIGEST:** SB 1828 would amend Alcoholic Beverage Code, 109.61(e) to provide an affirmative defense to prosecution for a charge of selling alcohol to a minor if the retailer had not directly or indirectly encouraged the employee to violate the law against selling alcohol to minors. It also would specify

that a retailer who sold alcohol to a minor after using a transaction scan device and relying in good faith on the results could offer an affirmative defense to prosecution if the scanner verified that the purchaser's driver's license was valid and that the person was at least 21 years old.

The affirmative defense to prosecution would not apply to administrative actions by the Texas Alcoholic Beverage Commission (TABC) to cancel, deny, or suspend the retailer's license or permit to sell alcoholic beverages.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

**SUPPORTERS
SAY:**

SB 1828 would provide needed clarification of the affirmative defense approved by the Legislature in 2005. A very loose interpretation of Alcoholic Beverage Code, 109.61(e) holds that a retailer need only furnish a working scanner and provide training to employees. The clerk, in turn, is required only to scan a driver's license, whether it belongs to the purchaser or not. SB 1828 would make it absolutely clear that the purchaser's driver's license must be scanned and that the purchaser must be at least 21 years old. The bill would close this loophole in current law.

Retailers should be held to a higher standard to maintain their TABC licenses and permits. Merely avoiding criminal sanctions is too low a threshold. License and permit holders should not be able to claim an affirmative defense to criminal prosecution in responding to TABC administrative actions because this statute was never intended to be used in administrative proceedings. Again, SB 1828 would make matters clear on this point.

The bill would not completely absolve retailers of the need to continue to exercise due diligence and to ensure that their employees comply with the prohibitions against sales of alcohol to minors. SB 1828 would hold retailers responsible if they directly or indirectly encouraged employees to ignore the law, but it would not penalize them unfairly should an employee deliberately ignore the rules and sell to underage friends or classmates. In addition, the bill would continue to require retailers to collect and retain information only for purposes allowed by TABC rule.

OPPONENTS
SAY:

SB 1828 would establish different standards for criminal and administrative investigations, possibly raising some equal protection and double jeopardy questions. If reliance on the retail scanning technology is sufficient as a defense to criminal prosecution, the same approach should apply to administrative decisions by the TABC.