

**CRIMES CODE (18 PA.C.S.) AND GENERAL LOCAL GOVERNMENT CODE (52 PA.C.S.) -
AMEND SALE OF TOBACCO, TOBACCO VENDING MACHINE PLACEMENT AND
PREEMPTION**

Act of 2002, No. 112

Session of 2002

No. 2002-112

HB 1501

AN ACT

Amending Titles 18 (Crimes and Offenses) and 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes, further providing for sale of tobacco; and providing for placement of tobacco vending machines and for preemption.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6305 of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 6305. Sale of tobacco.

- (a) Offense defined.-- Except as set forth in subsection (f), a person is guilty of a summary offense if the person:
- (1) sells a tobacco product to any minor
 - (2) furnishes, by purchase, gift or other means, a tobacco product to a minor
 - (4) locates or places a tobacco vending machine containing a tobacco product in a location accessible to minors;
 - (5) displays or offers a cigarette for sale out of a pack of cigarettes; or
 - (6) displays or offers for sale tobacco products in any manner which enables an individual other than the retailer or an employee of the retailer to physically handle tobacco products prior to purchase unless the tobacco products are located within the line of sight or under the control of a

cashier or other employee during business hours, except that this paragraph shall not apply to retail stores which derive 75% or more of sales revenues from tobacco products.

(a.1) Purchase.--A minor is guilty of a summary offense if the minor:

(1) purchases or attempts to purchase a tobacco product;
or

(2) knowingly falsely represents himself to be at least 18 years of age to a person for the purpose of purchasing or receiving a tobacco product.

(b) Penalty

(1) Except as set forth in paragraph (2), a person that violates subsection (a) shall be sentenced as follows:

(i) for a first offense, to pay a fine of not less than \$100 nor more than \$250;

(ii) for a second offense, to pay a fine of not less than \$250 nor more than \$500; or

(iii) for a third or subsequent offense, to pay a fine of not less than \$500 nor more than \$1,000.

(2) A retailer that violates subsection (a) shall be sentenced as follows:

(i) for a first offense, to pay a fine of not less than \$100 nor more than \$500;

(ii) for a second offense, to pay a fine of not less than \$500 nor more than \$1,000;

(iii) for a third offense, to pay a fine of not less than \$1,000 nor more than \$3,000; or

(iv) for a fourth or subsequent offense, to pay a fine of not less than \$3,000 nor more than \$5,000.

(3) A minor who violates subsection (a.1) shall be sentenced to any or all of the following:

(i) not more than 75 hours of community service;

(ii) complete a tobacco use prevention and cessation program approved by the Department of Health;

(iii) a fine not to exceed \$200; or

(iv) a 30-day suspension of motor vehicle operating privileges.

(c) Notification.--

(1) Upon issuing or filing a citation charging a violation of subsection (a.1), the affiant shall notify the parent or guardian of the minor charged.

(2) Upon imposing a sentence under subsection (b)(1) or (2), a court shall notify the department of the violation committed by the person if the person is a retailer or an employee of a retailer and the person committed the violation in the course of the person's employment.

(d) Nature of offense.--

(1) An offense under subsection (a.1) shall not be a criminal offense of record, shall not be reportable as a criminal act and shall not be placed on the criminal record of the offender. The failure of a minor to comply with a sentence under subsection (b)(3) shall not constitute a delinquent act under 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

(2) A record of participation in an adjudication alternative program under subsection (e) shall be maintained for purposes of determining subsequent eligibility for such a program.

(3) Except as provided in subsection (f)(1), a retailer is liable for the acts of its agents as permitted by section 307 (relating to liability of organizations and certain related persons).

(e) Preadjudication disposition.--If a person is charged with violating this section, the court may admit the offender to the adjudication alternative program as authorized in 42 Pa.C.S. § 1520 (relating to adjudication alternative program) or any other preadjudication disposition if the offender has not previously received a preadjudication disposition for violating this section. Accelerated rehabilitative disposition or any other preadjudication alternative for a violation of subsection (a) shall be considered an offense for the purposes of imposing criminal penalties under subsection (b)(1) and (2).

(f) Exceptions.--

(1) The following affirmative defense is available:

(i) It is an affirmative defense for a retailer to an offense under subsection (a)(1) and (2) that, prior to the date of the alleged violation, the retailer has complied with all of the following:

(A) adopted and implemented a written policy against selling tobacco products to minors which includes:

(I) a requirement that an employee ask an individual who appears to be 25 years of age or younger for a valid photoidentification as proof of age prior to making a sale of tobacco products;

(II) a list of all types of acceptable photoidentification;

(III) a list of factors to be examined in the photoidentification, including photo likeness, birth date, expiration date, bumps, tears or other damage and signature;

(IV) a requirement that, if the photoidentification is missing any of the items listed in subclause (III), it is not valid and cannot be accepted as proof of age for the sale of tobacco products. A second photoidentification may be required to make the sale of tobacco products with questions referred to the manager; and

(V) a disciplinary policy which includes employee counseling and suspension for failure to require valid photoidentification and dismissal for repeat improper sales.

(B) informed all employees selling tobacco products through an established training program of the applicable Federal and State laws regarding the sale of tobacco products to minors;

(C) documented employee training indicating that all employees selling tobacco products have been informed of and understand the written policy

referred to in clause (A);

(D) trained all employees selling tobacco products to verify that the purchaser is at least 18 years of age before selling tobacco products;

(E) conspicuously posted a notice that selling tobacco products to a minor is illegal, that the purchase of tobacco products by a minor is illegal and that a violator is subject to penalties; and

(F) established and implemented disciplinary sanctions for noncompliance with the policy under clause (A).

(ii) An affirmative defense under this paragraph must be proved by a preponderance of the evidence.

(iii) An affirmative defense under this paragraph may be used by a retailer no more than three times at each retail location during any 24-month period.

(2) No more than one violation of subsection (a) per person arises out of separate incidents which take place in a 24-hour period.

(3) It is not a violation of subsection (a.1)(1) for a minor to purchase or attempt to purchase a tobacco product if all of the following apply:

(i) The minor is at least 14 years of age.

(ii) The minor is an employee, volunteer or an intern with:

(A) a State or local law enforcement agency;

(B) the Department of Health or a primary contractor pursuant to Chapter 7 of the act of June 26, 2001 (P.L.755, No.77), known as the Tobacco Settlement Act;

(C) a single county authority created pursuant to the act of April 14, 1972 (P.L.221, No.63), known as the Pennsylvania Drug and Alcohol Abuse Control Act;

(D) a county or municipal health department; or

(E) a retailer.

(iii) The minor is acting within the scope of

assigned duties as part of an authorized investigation, compliance check under subsection (g) or retailer-organized self-compliance check.

(iv) A minor shall not use or consume a tobacco product.

(g) Compliance checks.--This subsection shall apply to compliance checks conducted by the Department of Health, a primary contractor pursuant to Chapter 7 of the Tobacco Settlement Act, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act or a county or municipal health department for the purpose of conducting retailer education, assessing compliance with Federal or State law and enforcing the provisions of this section. Compliance checks shall be conducted, at a minimum, in accordance with all of the following:

(1) Compliance checks shall only be conducted in consultation with the Department of Health and the law enforcement agency providing primary police services to the municipality where the compliance check is being conducted.

(2) A minor participating in a compliance check must be at least 14 years of age, complete a course of training approved by the Department of Health and furnish the Department of Health with a signed, written parental consent agreement allowing the minor to participate in the compliance check.

(3) A retailer that is found to be in compliance with this section during a compliance check shall be notified in writing of the compliance check and the determination of compliance.

(4) Compliance checks conducted under this subsection shall be in a manner consistent with this subsection and the regulations as promulgated by the Department of Health.

(5) The Department of Health, a primary contractor pursuant to Chapter 7 of the Tobacco Settlement Act, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act or a county or municipal health department shall conduct a compliance check under this

subsection no more than once every 30 days at any one retail location. This paragraph shall not preclude the law enforcement agency providing primary police services to the municipality in which the retail store is located from otherwise enforcing this section.

(6) Individuals participating in compliance checks under this subsection shall not be deemed employees under the act of July 23, 1970 (P.L.563, No.195), known as the Public Employe Relations Act, nor shall participating individuals be considered policemen under the act of June 24, 1968 (P.L.237, No.111), referred to as the Policemen and Firemen Collective Bargaining Act.

(h) Administrative action.--

(1) Upon receiving notice, in accordance with subsection (c) or otherwise, of a third conviction of a retailer during any 24-month period, the department may, after an opportunity for a hearing, suspend the retailer's cigarette license for up to 30 days. The department, in a hearing held pursuant to this paragraph, has jurisdiction only to determine whether or not the retailer was convicted of a violation of subsection (a). The introduction of a certified copy of a conviction for a violation of subsection (a) shall be sufficient evidence for the suspension of the cigarette license.

(2) Upon receiving notice, in accordance with subsection (c) or otherwise, of a fourth conviction of a retailer during any 24-month period, the department may, after an opportunity for a hearing, revoke the retailer's cigarette license for up to 60 days. The department, in a hearing held under this paragraph, has jurisdiction only to determine whether or not the retailer was convicted of a violation of subsection (a). The introduction of a certified copy of a conviction for a violation of subsection (a) shall be sufficient evidence for the revocation of the cigarette license.

(i) Enforcement.--An employee of the Department of Health, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act, a county or municipal health department or a primary contractor pursuant to Chapter 7 of the

Tobacco Settlement Act may institute a proceeding to enforce the provisions of this section in accordance with any means authorized by the Rules of Criminal Procedure. The enforcement authority granted pursuant to this subsection may not be delegated.

(j) Other penalties.--Notwithstanding any other law to the contrary, prosecution or conviction under this section shall not constitute a bar to any prosecution, penalty or administrative action under any other applicable statutory provision.

(k) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Cigarette." A roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or other substance or material except tobacco. The term does not include a cigar.

"Cigarette license." A license issued under section 203-A or 213-A of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

"Department." The Department of Revenue of the Commonwealth.

"Minor." An individual under 18 years of age.

"Pack of cigarettes." As defined in section 1201 of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971.

"Pipe tobacco." Any product containing tobacco made primarily for individual consumption that is intended to be smoked using tobacco paraphernalia.

"Retailer." A person licensed under section 203-A or 213-A of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

"Smokeless tobacco." Any product containing finely cut, ground, powdered, blended or leaf tobacco made primarily for individual consumption that is intended to be placed in the oral or nasal cavity and not intended to be smoked. The term includes, but is not limited to, chewing tobacco, dipping

tobacco and snuff.

"Tobacco product." A cigarette, cigar, pipe tobacco or other smoking tobacco product or smokeless tobacco in any form, manufactured for the purpose of consumption by a purchaser, and any cigarette paper or product used for smoking tobacco.

"Tobacco vending machine." A mechanical or electrical device from which one or more tobacco products are dispensed for a consideration.

Section 2. Section 6306 of Title 18 is repealed.

Section 3. Title 53 is amended by adding a chapter to read:

CHAPTER 3
PREEMPTIONS

Sec.

301. Tobacco.

§ 301. Tobacco.

(a) General rule.--Except as set forth in subsection (b), the provisions of 18 Pa.C.S. § 6305 (relating to sale of tobacco) shall preempt and supersede any local ordinance or rule concerning the subject matter of 18 Pa.C.S. § 6305 and of section 206-A of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

(b) Exception.--This section does not prohibit:

(1) Local regulation authorized by the act of April 27, 1927 (P.L.465, No.299), referred to as the Fire and Panic Act.

(2) Local regulation enacted prior to January 1, 2002.

Section 4. This act shall apply to offenses committed on or after the effective date of this act.

Section 5. This act shall take effect in 30 days.

APPROVED--The 10th day of July, A. D. 2002.

MARK S. SCHWEIKER