Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 144

130th General Assembly
(As Reported by H. Health and Aging)

Reps. Kunze, Gonzales, Duffey, Hood, Ruhl, Strahorn, Becker, Pillich, Grossman, Hackett, Stebelton, Wachtmann, Brown, Lynch, Sears, Smith

BILL SUMMARY

- Prohibits a child, unless accompanied by a parent, adult spouse, or legal guardian, from consuming, possessing, using, purchasing, attempting to purchase, ordering, paying for, sharing the cost of, accepting, or receiving alternative nicotine products.
- Prohibits a child from knowingly furnishing false identification to obtain alternative nicotine products.
- Expands the offense of permitting children to use cigarettes or other tobacco products to include alternative nicotine products.
- Expands the offense of illegal distribution of cigarettes or other tobacco products to include alternative nicotine products.
- Requires age verification before alternative nicotine products, papers used to roll cigarettes, or tobacco products other than cigarettes can be sold or otherwise distributed over the Internet.
- Authorizes sellers to perform transaction scans to check the validity of drivers' licenses and other identification cards presented as a condition for distributing alternative nicotine products.
- Permits sellers to raise as an affirmative defense against a charge of distributing alternative nicotine products to a child, that a transaction scan of the recipient's license or identification card was performed, the scan indicated validity, and the scan was reasonably relied upon.
- Declares an emergency.

CONTENT AND OPERATION

Prohibiting children from possessing, using, purchasing, or receiving alternative nicotine products

The prohibition

The bill extends to alternative nicotine products existing law that applies with respect to cigarettes, other tobacco products, and papers used to roll cigarettes. The bill defines an alternative nicotine product as an electronic cigarette or any other product or device that consists of or contains nicotine that can be ingested into the body by any means, including, but not limited to, chewing, smoking, absorbing, dissolving, or inhaling.[1] The bill exempts the following from the definition of an alternative nicotine product: (1) a cigarette or other tobacco product and (2) a drug, device, or combination product as defined under federal law.[2] Nicotine replacement therapies, such as nicotine gum and patches, do not fall under the definition of an alternative nicotine product.

The bill further defines an electronic cigarette as any electronic product or device that produces a vapor that delivers nicotine or any other substance to the person inhaling the device to simulate smoking and that is likely to be offered to or purchased by consumers as an electronic cigarette, electronic cigar, electronic cigarillo, or electronic pipe.[3] According to the U.S. Food and Drug Administration (FDA), an electronic cigarette is a battery-operated product designed to deliver nicotine, flavor, and other chemicals to the user. The device turns nicotine and other chemicals into a vapor that the user inhales. Most electronic cigarettes are manufactured to look like conventional cigarettes, cigars, or pipes, while others resemble everyday items like pens and USB memory sticks.[4] The FDA has stated its intention to regulate electronic cigarettes as tobacco products under the federal Family Smoking Prevention and Tobacco Control Act; however, it has not yet done so.[5]

Current law does not prohibit children from possessing, using, purchasing, or receiving alternative nicotine products. Under the bill, no child may do any of the following unless accompanied by a parent, adult spouse, or legal guardian of the child:

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[1] R.C. 2927.02(A)(4).

[2] R.C. 2927.02(A)(2), (4), and (7). *See also* 21 United States Code (U.S.C.) 321(g)(1) and (h) and 21 U.S.C. 353(g).

[3] R.C. 2927.02(A)(5).

[4] U.S. Food and Drug Administration. *News & Events, Electronic Cigarettes* (last visited November 12, 2013), available at <www.fda.gov/newsevents/publichealthfocus/ucm172906.htm>.

[5] *News & Events, Electronic Cigarettes*.

(1) use, consume, or possess alternative nicotine products, (2) purchase or attempt to purchase alternative nicotine products, (3) order, pay for, or share the cost of alternative nicotine products, or (4) except when acting exclusively within the scope and requirements of the child's employment, accept or receive alternative nicotine products.[6]

Under the bill, it is not a violation of any of the prohibitions described in the preceding paragraph if (1) the child possesses, purchases or attempts to purchase, orders, pays for, or shares the cost of, or accepts or receives, alternative nicotine products while participating in an inspection or compliance check conducted by a federal, state, local, or corporate entity at a location at which alternative nicotine products are sold or distributed or (2) the child is participating in a research protocol under the following conditions:

(a) The child's parent, guardian, or legal custodian has consented in writing to the child participating in the research protocol;

(b) An institutional human subjects protection review board, or equivalent entity, has approved the research protocol;

(c) The child is participating in the research protocol at the facility or location specified in the research protocol.[7]

The bill additionally prohibits a child from knowingly furnishing false information concerning that child's name, age, or other identification for the purpose of obtaining alternative nicotine products.[8]

The bill specifies that a child alleged or found to have violated either prohibition may not be detained under any provision of the Juvenile Law or any other provision of the Revised Code.[9]

Disposition of a child who violates any of the prohibitions

Under the bill, a child who is alleged to have violated any of the above prohibitions and that child's parent, guardian, or custodian, in lieu of appearing before the juvenile court, may sign a waiver of appearance before the clerk of the juvenile court

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[6] R.C. 2151.87(B) and (E)(1).

[7] R.C. 2151.87(E)(2) and (3).

[8] R.C. 2151.87(C).

[9] R.C. 2151.87(H).

and pay a fine of $100. If the child and the child's parent, guardian, or custodian do not waive the court appearance, the court must proceed with an adjudicatory hearing.[10]

If a juvenile court finds that a child violated any of the prohibitions described under "**The prohibition**," above, the court may do either or both of the following: (1) require the child to attend a youth smoking education program or other smoking treatment program approved by the court, if one is available, or (2) impose a fine of not more than $100.[11]

If a child disobeys a juvenile court order described in the preceding paragraph, the court may do any or all of the following: (1) increase the fine imposed upon the child, (2) require the child to perform not more than 20 hours of community service, or (3) suspend for a period of 30 days the child's temporary instruction permit, probationary driver's license, or driver's license.[12]

The bill prohibits a juvenile court from adjudicating a child a delinquent or unruly child for violating any of the prohibitions.[13]

Related changes

The bill also has the effect of making the following provisions of the Juvenile Code applicable to the prohibitions described in "**The prohibition**," above:

(1) It grants juvenile courts exclusive original jurisdiction concerning any child who is alleged to have violated any of the prohibitions.[14]

(2) It authorizes a person to file in juvenile court a complaint alleging a child to have violated any of the prohibitions.[15]

(3) It excepts a child who violates any of the prohibitions or who violates a court order relating to the prohibitions from the definition of "unruly child" and from the definition of "delinquent child."[16]

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[10] R.C. 2151.28(C)(2), (not in the bill).

[11] R.C. 2151.87(F).

[12] R.C. 2151.87(G).

[13] R.C. 2151.87(D).

[14] R.C. 2151.23(A)(1), (not in the bill).

[15] R.C. 2151.27(A)(1), (not in the bill).

[16] R.C. 2151.022 and 2152.02(F), (not in the bill).

(4) It provides that the adjudicatory hearing for a child alleged to have committed any of the prohibitions must be held and may be continued in accordance with the Juvenile Rules.[17]

Permitting children to use alternative nicotine products

As described above with respect to prohibitions that apply to children, the bill extends to alternative nicotine products existing law that applies with respect to cigarettes, other tobacco products, and papers used to roll cigarettes. It prohibits a manufacturer, producer, distributor, wholesaler, or retailer of alternative nicotine products, an agent, employee, or representative of any such entity, or any other person from knowingly furnishing any false information regarding the name, age, or other identification of any child with purpose to obtain alternative nicotine products for that child. Whoever violates that prohibition is guilty of permitting children to use alternative nicotine products, a misdemeanor of the fourth degree. If the offender previously has been convicted of a violation of that prohibition, permitting children to use alternative nicotine products is a misdemeanor of the third degree.[18]

Illegal distribution of alternative nicotine products

Under the bill, no manufacturer, producer, distributor, wholesaler, or retailer of alternative nicotine products, no agent, employee, or representative of a manufacturer, producer, distributor, wholesaler, or retailer of alternative nicotine products, and no other person can do any of the following: (1) give, sell, or otherwise distribute alternative nicotine products to any child, (2) give away, sell, or distribute alternative nicotine products in any place that does not have posted in a conspicuous place a sign stating that giving, selling, or otherwise distributing alternative nicotine products to a person under 18 years of age is prohibited by law, or (3) manufacture, sell, or distribute any one-time use alternative nicotine product.

The bill also prohibits a manufacturer, producer, distributor, wholesaler, or retailer, an agent, employee, or representative of a manufacturer, producer, distributor, wholesaler, or retailer of cigarettes, other tobacco products, alternative nicotine products, or papers used to roll cigarettes, and any other person from giving, selling, or otherwise distributing alternative nicotine products, papers used to roll cigarettes, or tobacco products other than cigarettes over the Internet or through another remote method without age verification.[19] The bill defines age verification as a service provided

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[17] R.C. 2151.28(A)(1), (not in the bill).

[18] R.C. 2927.02(B)(3) and (F)(2).

[19] R.C. 2927.02(B).

by an independent third party, other than a manufacturer, producer, distributor, wholesaler, or retailer of cigarettes, other tobacco products, alternative nicotine products, or papers used to roll cigarettes, that compares information available from public records to personal information provided during an Internet sale or other remote method of sale to establish that the purchaser is 18 years of age or older.[20]

Additionally, no person may sell or offer to sell alternative nicotine products by or from a vending machine except in the following locations: (1) an area either: (a) within a factory, business, office, or other place not open to the general public, or (b) to which children are not generally permitted access, (2) in any other place not identified in (1) above, upon all of the following conditions: (a) the vending machine is located within the immediate vicinity, plain view, and control of the person who owns or operates the place, or an employee of the person, so that all alternative nicotine products purchases from the vending machine will be readily observed by the person who owned or operated the place or an employee of that person, and (b) the vending machine is inaccessible to the public when the place is closed. A vending machine located in any unmonitored area, including an unmonitored coatroom, restroom, hallway, or outer waiting area, is not considered to be located within the immediate vicinity, plain view, and control of the person who owns or operates the place, or an employee of that person.[21]

A person who violates any of the above prohibitions is guilty of illegal distribution of alternative nicotine products, a misdemeanor of the fourth degree. If the offender previously has been convicted of a violation of any of the above prohibitions, then illegal distribution of alternative nicotine products is a misdemeanor of the third degree.[22]

Affirmative defenses

The bill creates affirmative defenses to the prohibitions described above. The affirmative defenses are that (1) the child was accompanied by the child's parent, adult spouse, or legal guardian, and (2) the person who gave, sold, or distributed alternative nicotine products to the child is the child's parent, adult spouse, or legal guardian, and (3) the child is participating in a research protocol as described in "**The prohibition**" above.[23]

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[20] R.C. 2927.02(A).

[21] R.C. 2927.02(B).

[22] R.C. 2927.02(D).

[23] R.C. 2927.02(D) and (E).

Under the bill, any alternative nicotine products that are given, sold, or otherwise distributed to a child in violation of any of the above prohibitions and that are used, possessed, purchased, or received by a child in violation of the prohibitions described under "**Prohibiting children from possessing, using, purchasing, or receiving alternative nicotine products**," above, are subject to seizure and forfeiture as contraband.[24]

Authority to perform transaction scans to verify identity

The bill authorizes a seller of alternative nicotine products (along with a seller's agent or employee) to perform a transaction scan by means of a transaction device to check the validity of a driver's license or identification card presented by a card holder as a condition for selling, giving away, or otherwise distributing alternative nicotine products to the card holder.[25] Current law permits the same persons to perform transaction scans when selling or distributing cigarettes or other tobacco products.

A transaction scan device is any commercial device or combination of devices used at a point of sale that is capable of deciphering in an electronically readable format the information encoded on the magnetic strip or bar code of a driver's or commercial driver's license or an identification card.[26] If information deciphered by a transaction scan fails to match information printed on the driver's or commercial driver's license or identification card presented by the card holder, or if the transaction scan indicates that information printed is false or fraudulent, the seller may not sell, give away, or otherwise distribute alternative nicotine products.[27]

Current law prohibits a seller from electronically or mechanically recording or maintaining any information derived from a transaction scan, except for the following:

(1) The name and date of birth of the person listed on the card presented by the card holder;

(2) The expiration date and identification number of the card presented by the card holder.

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[24] R.C. 2927.02(G).

[25] R.C. 2927.021(B).

[26] R.C. 2927.021(A).

[27] R.C. 2927.021(B).

Current law also forbids a seller from using, selling, or disseminating information derived from a transaction scan.[28]

Penalties

A person who violates any requirement governing alternative nicotine product transaction scans is guilty of an illegal alternative nicotine product transaction scan. The court may impose a civil penalty of up to $1,000 for each violation.[29]

Transaction scan a defense to illegal distribution

The bill provides that a seller (or agent or employee of a seller) may not be found guilty of illegal distribution of alternative nicotine products when the age of the purchaser or other recipient is an element of the offense if all of the following are the case:

(1) The person attempting to purchase or receive alternative nicotine products presented a driver's or commercial driver's license or an identification card;

(2) A transaction scan of the license or card presented indicated that it is valid;

(3) The alternative nicotine products were sold, given away, or otherwise distributed to the person in reasonable reliance upon the identification presented and the completed transaction scan.[30]

In determining whether a seller has met these requirements, the trier of fact must consider any written policy that the seller has adopted and implemented and that is intended to prevent the sale or distribution of alternative nicotine products to minors. The trier of fact must also consider that reasonable reliance on the identification presented and the completed transaction scan may require a seller to exercise reasonable diligence to determine the following:

(1) Whether a person to whom the seller sells, gives away, or otherwise distributes alternative nicotine products is age 18 years or older;

(2) Whether the description and picture appearing on the license or card presented by the card holder is that of the card holder.[31]

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[28] R.C. 2927.021(D).

[29] R.C. 2927.021(F).

[30] R.C. 2927.022(A).

[31] R.C. 2927.022(B).

HISTORY

ACTION	DATE
Introduced	04-30-13
Reported, H. Health & Aging	09-30-13

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