

CHAPTER 249
FORMERLY
HOUSE BILL NO. 241

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO TOBACCO SUBSTITUTES.

WHEREAS, mechanical tobacco substitutes commonly known as e-cigarettes have become increasingly popular, with sales for e-cigarettes having doubled each year since 2008; and

WHEREAS, only a few clinical studies have been conducted on e-cigarettes so far in which there is no definitive answer yet on the health effects of e-cigarettes, prompting the Food and Drug Administration (FDA) to state that consumers of e-cigarette products have no way of knowing “whether e-cigarettes are safe for their intended use, how much nicotine or other potentially harmful chemicals are being inhaled during use, or if there are any benefits associated with using these products”; and

WHEREAS, e-cigarette cartridges contain up to 20 mg. of nicotine and refill bottles can contain up to 7 grams of nicotine; and

WHEREAS, in 2009, the FDA analyzed two brands of e-cigarettes and found that they did contain trace elements of hazardous compounds including nitrosamines and diethylene glycol which is found in antifreeze; and

WHEREAS, 41 Attorneys General urged the (FDA) in September 2013 to test and regulate e-cigarettes; and

WHEREAS, 12 non-profit organizations sent a letter to President Obama in September 2013 urging government regulation of e-cigarettes; and

WHEREAS, the Centers for Disease Control and Prevention reported that the percentage of United States high school and middle school students using e-cigarettes doubled between 2011 and 2012; and

WHEREAS, the National Youth Tobacco Survey shows that the percentage of high school students reporting ever using e-cigarettes jumped from 4.7 percent in 2011 to 10 percent in 2012; and

WHEREAS, an estimated 1.8 million young people are reported as trying e-cigarettes in 2012; and

WHEREAS, sales of e-cigarettes are projected to reach \$1.7 billion in 2013; and

WHEREAS, a recent study of Delaware students has found that, among students first smoking cigarettes, e-cigarette users are far more likely to continue smoking cigarettes than non e-cigarette users; and

WHEREAS, 27 states prohibit the sale of e-cigarettes to minors.

NOW THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend Chapter 5, Title 11 of the Delaware Code as follows:

§ 1115. Definitions.

(1) "Coupon" means any card, paper, note, form, statement, ticket or other issue distributed for commercial or promotional purposes to be later surrendered by the bearer so as to receive any tobacco product without charge or at a discounted price.

(2) "Distribute" means give, deliver or sell, offer to give, deliver or sell, or cause or hire any person to give, deliver or sell, or offer to give, deliver or sell.

(3) "Health warning" means any tobacco product or tobacco substitute label mandated by federal law and intended to alert all users of such tobacco product or tobacco substitute to the health risks associated with tobacco use, including, but not limited to, warning labels imposed under the Federal Cigarette Labeling and Advertising Act [15 U.S.C. § 1331 et seq.] and the Comprehensive Smokeless Tobacco Health Education Act of 1986 [15 U.S.C. § 4401 et seq.].

(4) "Proof of age" means a driver's license or other identification with a photograph of the individual affixed thereon that indicates that the individual is 18 years old or older.

(5) "Public place" means any area to which the general public is invited or permitted, including, but not limited to, parks, streets, sidewalks or pedestrian concourses, sports arenas, pavilions, gymnasiums, public malls and property owned, occupied or operated by the State or by any agency thereof.

(6) "Sample" means a tobacco product or tobacco substitute distributed to members of the general public at no cost for the purpose of promoting the product.

(7) "Sampling" means the distribution of samples or coupons for redemption of tobacco products or tobacco substitutes to members of the general public in a public place.

(8) "Tax stamp" means any required State or federal stamp imposed for the purpose of collecting excise tax revenue.

(9) "Tobacco product" means any product that contains tobacco, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff or smokeless tobacco and is intended for human consumption or use.

(10) "Tobacco store" means any retail establishment where 60% of the retail establishment's gross revenue comes from the retail sale of tobacco products and smoking paraphernalia.

(11) "Tobacco substitute" means any device employing a mechanical heating element, battery, or circuit, regardless of shape or size, that can be used to deliver nicotine into the body through inhalation and that has not been approved by the United States Food and Drug Administration for tobacco cessation or other medical purposes, or any noncombustible product containing nicotine intended for use in such a device that has not been approved by the United States Food and Drug Administration for tobacco cessation or other medical purposes.

(12) "Vending machine" means any mechanical, electronic or other similar device which automatically dispenses tobacco products or tobacco substitutes, usually upon the insertion of a coin, token or slug.

§ 1116. Sale or distribution of tobacco products or tobacco substitutes to minors.

(a) It shall be unlawful for any person to sell or distribute any tobacco product or tobacco substitute to another person who has not attained the age of 18 years or to purchase any tobacco product or tobacco substitute on behalf of another such person, except that this section shall not apply to the parent or guardian of another such person.

(b) A person engaged in the sale or distribution of tobacco products or tobacco substitutes shall have the right to demand proof of age from a prospective purchaser or recipient of such products.

(c) A person engaged in the sale or distribution of tobacco products or tobacco substitutes shall demand proof of age from a prospective purchaser or recipient of such products who is under 27 years of age.

§ 1117. Notice.

A person engaged in the sale or distribution of tobacco products or tobacco substitutes shall post conspicuously at each point of purchase and each tobacco vending machine a notice stating that selling tobacco products or tobacco substitutes to anyone under 18 years of age is illegal, that the purchase of tobacco products or tobacco substitutes by anyone under 18 years of age is illegal and that a violator is subject to fines. The notice shall also state that all persons selling tobacco products or tobacco substitutes are required, under law, to check the proof of age of any purchaser of tobacco products or tobacco substitutes under the age of 27 years. The notice shall include a toll-free telephone number to the Department of Safety and Homeland Security for persons to report unlawful sales of tobacco products or tobacco substitutes. The owners of an establishment who fail to post a notice in compliance with this section shall be subject to a fine of \$100.

§ 1118. Distribution of samples to minors.

(a) It shall be unlawful for any person to distribute tobacco product or tobacco substitute samples or coupons for subsequent receipt of free or discounted tobacco products or tobacco substitutes to another person who has not attained the age of 18 years.

(b) A person engaged in sampling shall have the right to demand proof of age from a prospective recipient of samples or of coupons for the redemption of tobacco products or tobacco substitutes.

§ 1119. Distribution of cigarettes or tobacco substitutes through vending machines.

(a) It shall be unlawful for any person to distribute or permit the distribution of tobacco products or tobacco substitutes through the operation of a vending machine in a public place, except as provided in subsection (b) of this section.

(b) Pursuant to subsection (a) of this section, a person may distribute or permit the distribution of tobacco products or tobacco substitutes through the operation of a vending machine in a taproom, tavern, tobacco shop or in premises in which a person who has not attained the age of 18 years is prohibited by law from entering. A tobacco vending machine must be operated a minimum of 25 feet from any entrance to the premises and must be directly visible to the owner or supervisor of the premises.

(c) It shall be unlawful for any person who owns, operates or manages a business establishment where tobacco products or tobacco substitutes are offered for sale over the counter at retail to maintain such products in any display accessible to customers that is not under the control of a cashier or other employee. This prohibition shall not apply to business establishments to which persons under the age of 18 are not admitted unless accompanied by an adult, tobacco vending machines as permitted under subsection (b) of this section, or tobacco stores. As used in this subsection, "under the

control" means customers cannot readily access the tobacco products or tobacco substitutes without the assistance of a cashier or other employee. A display that holds tobacco products or tobacco substitutes behind locked doors shall be constructed as under the control of a cashier or other employee.

§ 1120. Distribution of tobacco products.

(a) No person shall distribute a tobacco product for commercial purposes unless the product is in a sealed package provided by the manufacturer with the required health warning and tax stamp.

(b) No person shall distribute any pack of cigarettes containing fewer than 20 cigarettes.

§ 1121. Penalties.

Notwithstanding any other provision of Delaware law, a person who violates § 1116, § 1118, § 1119 or § 1120 of this title shall be guilty of a violation and shall be fined \$250 for the 1st offense, \$500 for the 2nd offense and \$1,000 for the 3rd and all subsequent offenses. Additionally, and notwithstanding any other provision of Delaware law, in imposing a penalty for a 2nd, 3rd or other subsequent offense under this subpart, the court may order the Department of Finance to suspend the defendant's license for sale of tobacco products, issued pursuant to § 5307 of Title 30, for a period not to exceed 6 months. Upon the suspension of such license, the court shall advise the Department of Finance of the suspension in writing. The holder of the license shall surrender the license to the Department of Finance and no refund of fees shall be paid. For purposes of this subpart, a subsequent offense is one that occurs within 12 months of a prior like offense.

§ 1122. Affirmative defense.

In any prosecution for an offense under this subpart, it shall be an affirmative defense that the purchaser or recipient of tobacco products or tobacco substitutes who had not reached the age of 18 years presented to the accused proof of age which set forth information that would lead a reasonable person to believe that such individual was 18 years of age or older.

§1123. Liability of employer.

(a) If a sale or distribution of any tobacco product or tobacco substitute or coupon is made in violation of § 1116, § 1118, § 1119 or § 1120 of this title, the owner, proprietor, franchisee, store manager or other person in charge of the establishment where the violation occurred shall be guilty of the violation and shall be subject to the fine only if the retail licensee has received written notice of the provisions of §§ 1116 through 1121 of this title by the Department of Safety and Homeland Security. For purposes of determining the liability of a person who owns or controls franchises or business operations in multiple locations, for a 2nd or subsequent violation of this subpart, each individual franchise or business location shall be deemed a separate establishment.

(b) Notwithstanding any other provision of this subpart, in any prosecution for a violation of §§ 1116, 1118 and 1120, the owner, proprietor, franchisee, store manager or other person in charge of the establishment where the alleged violation occurred shall have an affirmative defense if such person or entity can establish that prior to the date of the violation:

(1) Had adopted and enforced a written policy against selling tobacco products or tobacco substitutes to persons under 18 years of age;

(2) Had informed its employees of the applicable laws regarding the sale of tobacco products or tobacco substitutes to persons under 18 years of age;

(3) Required employees to sign a form indicating that they have been informed of and understand the written policy required herein;

(4) Required employees to verify the age of tobacco product or tobacco substitute customers by means of photographic identification; and

(5) Had established and enforced disciplinary sanctions for noncompliance.

(c) The affirmative defense established in subsection (b) of this section may be used by an owner, proprietor, franchisee, store manager or other person in charge of the establishment no more than twice at each location within any 12-month period.

§ 1124. Purchase or receipt of tobacco products or tobacco substitutes by minors.

(a) It shall be unlawful for any person who has not attained the age of 18 years to purchase a tobacco product or tobacco substitute, to accept receipt of a sample, to exchange a coupon for a tobacco product or tobacco substitute, or to present or offer to another person a purported proof of age which is false, fraudulent or not actually that person's own proof

of age, for the purpose of purchasing or receiving any tobacco product or tobacco substitute or redeeming a coupon for a tobacco product or tobacco substitute.

(b) A person who violates subsection (a) of this section shall be adjudged delinquent and shall for a 1st adjudication be fined \$50 or ordered to perform 25 hours of community service work, and for a 2nd adjudication and for all subsequent adjudications be fined \$50 and ordered to perform 50 hours of community service work. A subsequent adjudication of delinquency is one that occurs within 12 months of a prior like offense.

§ 1125. Unannounced inspections; reporting; enforcement.

(a) The Department of Safety and Homeland Security or its delegates shall be responsible for conducting annual, random, unannounced inspections at locations where tobacco products or tobacco substitutes are sold or distributed to test and ensure compliance with and enforcement of §§ 1116-1120 and 1124 of this title.

(b) Persons under the age of 18 may be enlisted by the Department of Safety and Homeland Security or its delegates to test compliance with and enforcement of §§ 1116-1120 and 1124 of this title, provided however, that such persons may be used only under the direct supervision of the Department of Public Safety, its employees or delegates and only where written parental consent has been provided.

(c) Participation in the inspection and enforcement activities of this section by a person under 18 years of age shall not constitute a violation of this subpart for the person under 18 years of age, and the person under 18 years of age is immune from prosecution thereunder, or under any other provision of law prohibiting the purchase of these products by a person under 18 years of age.

(d) The Department of Safety and Homeland Security shall adopt and publish guidelines for the use of persons under 18 years of age in inspections conducted pursuant to this section.

(e) The Department of Safety and Homeland Security may enter into an agreement with any local law enforcement agency for delegation of the inspection and enforcement activities of this section within the local law enforcement agency's jurisdiction. The contract shall require the inspection and enforcement activities of the local law enforcement agency to comply with this subpart and with all applicable laws.

(f) In cases where inspection and enforcement activities have been delegated to a local law enforcement agency pursuant to this section, any inspection or enforcement by the Department of Safety and Homeland Security in the jurisdiction of the local law enforcement agency shall be coordinated with the local law enforcement agency.

(g) The Delaware Department of Health and Social Services shall annually submit to the Secretary of the United States Department of Health and Human Services the report required by § 1926 of the federal Public Health Service Act (42 U.S.C. § 300x-26). A copy of this report shall be available to the Governor and the General Assembly.

Approved June 12, 2014