

Assembly Bill No. 935

CHAPTER 351

An act to amend Section 22974.8 of the Business and Professions Code, and to amend Section 104559.5 of the Health and Safety Code, relating to tobacco sales.

[Approved by Governor October 7, 2023. Filed with Secretary of State October 7, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

AB 935, Connolly. Tobacco sales: flavored tobacco ban.

Existing law, the Stop Tobacco Access to Kids Enforcement (STAKE) Act, prohibits a person from selling or otherwise furnishing tobacco products, as defined, to a person under 21 years of age. Under existing law, violations of the act are punishable by civil penalties, as specified, and primary enforcement of the act is the responsibility of the State Department of Public Health.

Existing law prohibits a tobacco retailer, or any of the tobacco retailer's agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer, as those terms are defined, except as specified. Under existing law, a violation of this prohibition is punishable as an infraction.

This bill would provide for the enforcement of these provisions in a manner similar to the STAKE Act, and, instead of an infraction, make the provisions of the flavored tobacco ban punishable by civil penalties in the same manner as the STAKE Act, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 22974.8 of the Business and Professions Code is amended to read:

22974.8. (a) Except as provided in subdivision (b), the board shall suspend or revoke the license of a retailer upon notification by the State Department of Public Health pursuant to subdivision (b) of Section 22958, or pursuant to paragraph (2) of subdivision (f) of Section 104559.5 of the Health and Safety Code.

(b) Notwithstanding any other provision regarding the suspension or revocation of a license pursuant to this part, the board shall provide a licensee no fewer than 10 days' written notice of a pending suspension or revocation pursuant to this section and an opportunity to appeal the suspension or revocation and the civil penalty assessed pursuant to the provisions described in subdivision (a) only to correct a mistake or clerical error. The board shall

not accept or consider an appeal of suspension or revocation under this section if the appeal is founded upon the grounds of whether the retailer, or any employee or agent of the retailer, violated the STAKE Act (Division 8.5 (commencing with Section 22950)) or Section 104559.5 of the Health and Safety Code for which violation civil penalties are imposed by the State Department of Public Health pursuant to subdivision (a) of Section 22958, or pursuant to subdivision (f) of Section 104559.5 of the Health and Safety Code. This section shall not be construed to prevent the board from modifying its action on its own to correct a mistake or clerical error.

SEC. 2. Section 104559.5 of the Health and Safety Code is amended to read:

104559.5. (a) For purposes of this section, the following definitions apply:

(1) “Characterizing flavor” means a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. Characterizing flavors include, but are not limited to, tastes or aromas relating to any fruit, vanilla, chocolate, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition, that constitutes a characterizing flavor.

(2) “Constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(3) “Department” means the State Department of Public Health.

(4) “Enforcing agency” means the State Department of Public Health, another state agency, including, but not limited to, the office of the Attorney General, or a local law enforcement agency, including, but not limited to, a city attorney, district attorney, or county counsel.

(5) “Flavored shisha tobacco product” means any shisha tobacco product that contains a constituent that imparts a characterizing flavor.

(6) “Flavored tobacco product” means any tobacco product that contains a constituent that imparts a characterizing flavor.

(7) “Hookah” means a type of waterpipe, used to smoke shisha or other tobacco products, with a long flexible tube for drawing aerosol through water. Components of a hookah may include heads, stems, bowls, and hoses.

(8) “Hookah tobacco retailer” means a tobacco retailer that is engaged in the retail sale of shisha tobacco products, hookah, and hookah smoking accessories.

(9) “Labeling” means written, printed, pictorial, or graphic matter upon a tobacco product or any of its packaging.

(10) “Loose leaf tobacco” consists of cut or shredded pipe tobacco, usually sold in pouches, excluding any tobacco product which, because of its appearance, type, packaging, or labeling, is suitable for use and likely

to be offered to, or purchased by, consumers as tobacco for making cigarettes, including roll-your-own cigarettes.

(11) “Packaging” means a pack, box, carton, or container of any kind, or, if no other container, any wrapping, including cellophane, in which a tobacco product is sold or offered for sale to a consumer.

(12) “Premium cigar” means any cigar that is handmade, is not mass produced by use of mechanization, has a wrapper that is made entirely from whole tobacco leaf, and has a wholesale price of no less than twelve dollars (\$12). A premium cigar does not have a filter, tip, or nontobacco mouthpiece and is capped by hand.

(13) “Retail location” means both of the following:

(A) A building from which tobacco products are sold at retail.

(B) Any vending machine, vehicle, mobile unit, booth, stand, or concession that conducts in-person sales of tobacco products directly to the public.

(14) “Sale” or “sold” means a sale as that term is defined in Section 30006 of the Revenue and Taxation Code.

(15) “Shisha tobacco product” means a tobacco product smoked or intended to be smoked in a hookah. “Shisha tobacco product” includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh. “Shisha tobacco product” does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic tobacco product.

(16) “Tobacco product” means a tobacco product as defined in paragraph (8) of subdivision (a) of Section 104495, as that provision may be amended from time to time.

(17) “Tobacco product flavor enhancer” means a product designed, manufactured, produced, marketed, or sold to produce a characterizing flavor when added to a tobacco product.

(18) “Tobacco retailer” means a person who engages in this state in the sale of tobacco products directly to the public from a retail location. “Tobacco retailer” includes a person who operates vending machines from which tobacco products are sold in this state.

(b) (1) A tobacco retailer, or any of the tobacco retailer’s agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer.

(2) There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer’s agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

(c) Subdivision (b) does not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:

(1) The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with Section 22971.7) of Division 8.6 of the Business and Professions Code.

(2) The hookah tobacco retailer does not permit any person under 21 years of age to be present or enter the premises at any time.

(3) The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.

(4) If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, Section 6404.5 of the Labor Code.

(d) Subdivision (b) does not apply to sales of premium cigars sold in cigar lounges where products are purchased and consumed only on the premises.

(e) Subdivision (b) does not apply to loose leaf tobacco or premium cigars.

(f) (1) An enforcing agency may assess civil penalties against any person or entity that violates subdivision (b) according to the schedule of civil penalties prescribed in paragraph (1) of subdivision (a) of Section 22958 of the Business and Professions Code. In the case of a corporation or business with more than one retail location, the number of accumulated violations for purposes of the penalty schedule shall be determined in accordance with subdivision (h) of that section.

(2) In addition to the civil penalties described in paragraph (1), upon the assessment of a civil penalty for the third, fourth, or fifth violation, the department, within 60 days of the date of service of the final administrative adjudication on the parties or payment of the civil penalty for an uncontested violation, shall notify the California Department of Tax and Fee Administration of the violation who shall then assess a civil penalty of two hundred fifty dollars (\$250) and suspend or revoke a license issued pursuant to Chapter 2 (commencing with Section 22972) of Division 8.6 of the Business and Professions Code, in accordance with the schedule listed in paragraph (1) of subdivision (b) of Section 22958 of the Business and Professions Code.

(3) Notwithstanding paragraph (7), the civil penalty assessed pursuant to paragraph (2) shall be deposited into the Cigarette and Tobacco Products Compliance Fund and shall be made available to the California Department of Tax and Fee Administration, upon appropriation by the Legislature, for the purposes of meeting its duties prescribed in paragraph (2).

(4) The provisions of Chapter 4 (commencing with Section 55121) of Part 30 of Division 2 of the Revenue and Taxation Code apply with respect to the collection of the penalty imposed by the California Department of Tax and Fee Administration pursuant to paragraph (2).

(5) The department shall, upon request, provide information concerning any person or entity that has been assessed a civil penalty for violation of this section to the California Department of Tax and Fee Administration when the department has notified the California Department of Tax and Fee Administration of the violation.

(6) Proceedings under this section shall be conducted pursuant to Section 131071, except in cases where a civil penalty is assessed by an enforcing agency other than the department, in which case proceedings shall be conducted pursuant to the procedures of that agency that are consistent with Section 131071.

(7) Except as otherwise provided in paragraph (3), all moneys collected as civil penalties by the department or by any other state agency or department pursuant to this section shall be deposited in the State Treasury to the credit of the Sale of Tobacco to Minors Control Account.

(g) (1) Primary responsibility for enforcement of this section shall be with the department. In carrying out its enforcement responsibilities, the department may conduct onsite sting inspections at tobacco retailers randomly, in response to public complaints, or at retailers where violations have previously occurred. Agents of the department, while conducting enforcement activities pursuant to this section, are peace officers and are subject to all of the powers and immunities granted to Food and Drug Section inspectors pursuant to Section 106500 in the same manner as are any Food and Drug Section inspectors of the department.

(2) In addition to the primary enforcement responsibility assumed by the department, another enforcing agency may conduct inspections and assess penalties for violations of this section if that enforcing agency complies with the applicable provisions of this section and with all other applicable provisions of law.

(3) State and local enforcing agencies are encouraged, in order to avoid duplication, to share the results of inspections and coordinate with the department when enforcing this section.

(4) An enforcing agency may use audio or video recording equipment when conducting inspections, to record and document illegal sales or attempted sales.

(h) (1) The department may adopt any regulations that it determines are necessary for the enforcement of this section. The regulations shall be adopted by the department in the manner prescribed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) The department may adopt emergency regulations to implement this section. Any emergency regulation shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code and shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare. Emergency regulations adopted shall remain in effect until regulations have been adopted pursuant to paragraph (1).

(i) This section does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on the access to tobacco products than the restrictions imposed by this section. To the extent that there is an inconsistency between this section and a local standard that imposes greater restrictions on the access to tobacco products, the greater restriction on the access to tobacco products in the local standard shall prevail.