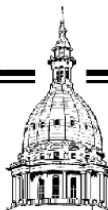




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BILL



ANALYSIS

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Senate Bill 730 (Substitute S-2 as reported)  
Sponsor: Senator Dale L. Shugars  
Committee: Health Policy and Senior Citizens

Date Completed: 11-15-95

### RATIONALE

The Youth Tobacco Act, originally enacted in 1915, makes it a misdemeanor for a retailer to sell tobacco to a minor (someone under 18) or for a minor to use tobacco in public. In either case, the offense is punishable by a maximum fine of \$50. Although the law is designed to prevent youths from obtaining tobacco products, the Act is said to be highly ineffective and rarely enforced. It has been suggested that this Act be replaced with a Statewide, uniform standard that would and could be enforced. In particular, some people believe that enforcement would be strengthened if the penalty against retailers were increased, while the penalty against minors were decriminalized, and that retailers should have a statutory obligation to inform their employees about the law.

### CONTENT

**The bill would create "Youth Tobacco Prevention Act" and repeal the Youth Tobacco Act (MCL 722.641-722.645). The bill would reinstate a number of existing provisions, including those that set a criminal penalty for persons who distribute tobacco products to minors (although the bill would establish a range of increased penalties); provide that it is a defense if the defendant has in force a written policy to prevent the distribution of tobacco products to minors; require tobacco retailers to post a sign stating that the provision of tobacco products to minors is illegal; require the Department of Public Health (DPH) to distribute the signs; set penalties for minors who use tobacco products in public (although the penalties under the bill would be civil, rather than criminal); and prohibit retailers from selling a cigarette separately from its package. The bill also would add new provisions to do the following:**

- **Require tobacco retailers to notify their sales clerks of the provisions of the law.**
- **Provide that someone under 18 could be engaged by the State or local police or the DPH as part of an enforcement action under the Act.**
- **Make exceptions to the Act for giving a tobacco product to a family member.**

#### Distributing to Minors

The current Act prohibits a person from selling, giving, or furnishing any cigarette, cigar, chewing tobacco, tobacco snuff, or tobacco in any other form to a person under 18, and provides that a violation is a misdemeanor punishable by a maximum fine of \$50. The bill would prohibit a person from distributing a tobacco product to a person under 18. A violator would be guilty of a misdemeanor punishable by a fine of \$100 for a first offense, \$150 for a second offense in a two-year period, and \$500 for a third or subsequent offense within a two-year period. Evidence that a defendant "carefully checked and reasonably relied on proof of age that appeared on its face to be valid" would be a defense to a charge brought for a violation of the prohibition.

("Distribute" would mean to sell, give, or furnish a tobacco product. "Distribute" would not include sale or distribution through the use of the U.S. mail services, express mail, parcel post, or common carrier services, or distribution to a person who had not previously paid or agreed to pay for the tobacco product, as regulated under the Michigan Penal Code. "Tobacco product" would mean a product that contained tobacco and was intended for human consumption, including cigarettes, noncigarette smoking tobacco, or smokeless tobacco, as those terms are defined in the Tobacco Products Tax Act, and cigars.

“Proof of age” would mean a driver’s license, official State personal identification card, or other pictured identification issued by a governmental agency, not including a school or university student identification card, that described the individual identified as 18 years of age or older.)

A person who sold tobacco products at retail or from a vending machine would be prohibited from selling a cigarette separately from its package, or from selling a package of cigarettes that contained fewer than 20 cigarettes. (Currently, the law only prohibits the sale at retail of a cigarette separately from its package.) Similar to current law, the bill would exempt from these prohibitions tobacco specialty and other retail stores that deal exclusively in tobacco products. Further, the bill would not apply to the giving or furnishing of a tobacco product to a family member for noncommercial purposes.

The bill would reinstate provisions that make it an affirmative defense that the defendant had in force at the time of arrest and continues to have in force a written policy to prevent the distribution of a tobacco product to persons under 18, and that the defendant enforced and continues to enforce the policy. A defendant must give notice of the defense to the prosecutor at least 14 days before trial, and the prosecutor must give notice of a rebuttal at least seven days before trial.

#### Notice to Employees

The bill would require a tobacco products retailer to notify each individual employed by that person as a retail sales clerk of all of the following:

- That State law prohibited the distribution of a tobacco product to a person under 18 and the purchase, receipt, possession, smoking, or other use or consumption of a tobacco product by a person under 18.
- That State law prohibited the sale of a cigarette separately from its package.
- That State law permitted a defense based on evidence that the defendant carefully checked and reasonably relied on proof of age that appeared on its face to be valid.

The notice would have to be given before the individual commenced work as a retail sales clerk or within 30 days of the bill’s effective date if the individual were employed as a retail sales clerk on that date. The individual would have to signify that he or she had received the notice by signing a form as prescribed in the bill. Each form would have to indicate the date of signature. The

employer would have to retain the form during the individual’s term of employment and for at least 120 days after the individual left that employ.

In addition, a tobacco products retailer would have to give each individual employed as a retail sales clerk a true copy of the proposed Act before the individual commenced work as a retail sales clerk or within 30 days of the bill’s effective date if the individual were employed as a retail sales clerk on that date. Beginning 30 days after the bill’s effective date, the DPH would have to provide copies of the proposed Act free, upon request, to persons subject to the above requirements.

An employer who failed to comply with these requirements would be guilty of a misdemeanor punishable by a fine of \$100 for a first offense and \$200 for each succeeding violation within a two-year period.

#### Signs

The bill would reenact requirements that a tobacco retailer post, in a place close to the point of sale and conspicuous to employees and customers, a sign stating that the purchase of tobacco products by minors and the provision of tobacco products to minors are prohibited by law. The bill specifies that the required sign would be the only notice regarding the distribution of tobacco products that was required to be posted or maintained in a store where tobacco products were sold at retail. The bill also states that the sign provisions would not conflict with Federal law regarding the signage or labeling of tobacco products.

In addition, the bill would reinstate provisions requiring the DPH to produce the sign (but would require DPH to do so within 30 days of the bill’s effective date); requiring licensed wholesalers, secondary wholesalers, and unclassified acquirers of tobacco products to distribute copies of the sign free of charge to retailers, upon request; and requiring the DPH to distribute copies of the sign free of charge to retailers who do not purchase tobacco products from wholesalers or unclassified acquirers.

#### Minor’s Public Use of Tobacco

Under the current Act, a person under 18 is prohibited from purchasing, receiving, possessing, smoking, or otherwise using or consuming a tobacco product in a public place. A violation is a misdemeanor punishable by a maximum fine of \$50, and, pursuant to a probation order, the court may require a violator to participate in a health

promotion and risk reduction assessment program. A violator also may be ordered to perform community service in a hospice, nursing home, or long-term care facility and/or participate in a health promotion and risk reduction program.

The bill provides instead that a person under 18 could not purchase, receive, possess, smoke, or otherwise use or consume a tobacco product in a public place; and provides that a person who violated this prohibition would be guilty of a State civil infraction and liable for a civil fine of up to \$100 for each violation. Fines and costs collected for these civil infractions would have to be disbursed as provided by law.

A law enforcement agency, upon determining that a person under 18 years of age allegedly purchased, received, possessed, smoked, or otherwise used, or attempted to purchase, receive, possess, smoke, or otherwise use, a tobacco product in violation of the prohibition would have to notify the person's parent or parents, custodian, or guardian as to the nature of the violation if the name of a parent, guardian, or custodian were reasonably ascertainable. The notice would have to be made within 48 hours after the alleged violator was cited for the State civil infraction. The notice could be made by any means reasonably calculated to give prompt actual notice including, but not limited to, notice in person, by telephone, or by first-class mail. The notification requirements would not apply if the law enforcement agency had reasonable grounds to believe the person was an emancipated minor.

This bill would not prohibit a person under 18 from possessing a tobacco product during regular working hours and in the course of his or her employment, if the tobacco product were not possessed for his or her personal consumption.

The prohibition applicable to persons under 18 would not limit the liability of a person who distributed a tobacco product to a person under 18 in violation of the bill.

The DPH would have to work with State and local law enforcement agencies, the Department of Attorney General, and local prosecutors to enforce the Act in a manner that could reasonably be expected to reduce the extent to which tobacco products were sold or otherwise distributed to persons under 18. Annually, the DPH would have to conduct random, unannounced inspections at locations where tobacco products were sold at retail or otherwise distributed to ensure compliance with the Act.

In addition, beginning one year after the bill's effective date, the DPH would have to prepare for submission annually to the standing committee of each house of the Legislature that had responsibility for public health matters, and to the Appropriations Committees, a written report that separately identified the number of prosecutions and convictions under the Act for the immediately preceding year; the number of retail tobacco sellers who were charged with and convicted of selling a tobacco product to a person under 18 for the immediately preceding year; the change in the number and percentage of sales to persons under 18; and the methodology used to obtain and determine the information required for the report.

### Enforcement Actions

A person under 18 could be engaged by the State Police or a local law enforcement agency as part of an enforcement action under the Act if the initial or contemporaneous receipt or purchase of a tobacco product by the minor occurred under the direction of the State Police or local law enforcement agency and were part of the enforcement action. The State Police or local agency could not recruit or attempt to recruit a person under 18 to participate in an enforcement action at the scene of a violation involving distribution to a minor; or allow a person under 18 to purchase or receive a tobacco product as part of an enforcement action without the permission of the minor's parents or legal guardians.

### ARGUMENTS

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### Supporting Argument

According to the Ingham County Health Department, tobacco use is the single greatest contributor to deaths and disabilities that can be prevented, and the vast majority of smokers pick up the habit before they are 18. Preventing youths from smoking in the first place could save numerous lives and avert countless diseases. The existing Youth Tobacco Act, however, is lamentably ineffective in doing so. Because a violation of the Act is a criminal offense punishable only by maximum fine of \$50, it provides little if any incentive for law enforcement to prosecute violators or for retailers and youths to obey the law. By increasing the criminal fine for retailers, and setting stiffer fines for repeat violations, the bill would increase the likelihood of both prosecution and deterrence. Changing violations by minors

from misdemeanors to State civil infractions would make the law easier to enforce as well as more likely to be enforced and obeyed. Youths who failed to respond to a civil infraction citation or to comply with a civil infraction judgment would be subject to driver's license sanctions under Public Act 54 of 1995 (which will take effect on January 1, 1996). Furthermore, the bill would establish important new educational requirements for tobacco retailers, who would have to give specific information to their employees and would be subject to criminal fines for failure to comply. At the same time, the bill would encourage retailers to ask purchasers for identification, by creating a defense for someone who carefully checked and reasonably relied on proof of age.

**Response:** The Department of Public Health has suggested various amendments to the bill. In particular, the DPH has recommended increasing the size of the required sign, including information about penalties in the sign, and establishing criminal penalties for failure to display the required sign; increasing the fine for employers who failed to comply with the proposed teaching requirements; requiring the Department to work with State and local law enforcement agencies and other groups to promote compliance with the Act; and stating that the DPH, local health departments, or educational or research organizations would not be precluded from engaging in nonenforcement activities designed to show the level of compliance.

#### **Opposing Argument**

The licensure of tobacco retailers is essential to any serious attempt to limit youths' access to cigarettes and other tobacco products. Licensure would create both a method for funding enforcement and a means of providing accountability. Further, the threatened loss of licensure would be a far greater deterrent than a \$500 fine to a vendor who may make \$10,000 monthly in tobacco sales. Retailers must take tobacco products as seriously as they take alcohol products.

#### **Opposing Argument**

The bill fails to remove the State's preemption of local tobacco regulations. As part of the 1993 school finance reform legislation, the Tobacco Products Tax Act was enacted to increase the tax on cigarettes and impose a tax on other tobacco products. In addition, the Act provides that no local unit of government may impose any new requirement or prohibition pertaining to the sale or licensure of tobacco products. As a result, only those municipalities that had an ordinance in place may continue to regulate tobacco sales. Local

ordinances, however, carry great potential to limit minors' access to tobacco. Reportedly, after ordinances were adopted, minors' success in purchasing tobacco dropped from 80% to 32% in Marquette County, and from 78% to 30% in Ingham County. Since the State must be able to demonstrate reduced tobacco sales to minors in order to maintain Federal block grant funding, local regulation may be essential to preserving millions of dollars for local drug prevention and treatment programs.

**Response:** Removing the preemption could open the door to a plethora of conflicting and overlapping ordinances and accompanying license fees, thus increasing costs and creating unnecessary confusion for retailers, especially those with stores in more than one jurisdiction. Although the current State law is neither enforced nor effective, the bill would create a statute that could be easily enforced throughout the State.

#### **Opposing Argument**

By providing for misdemeanor penalties for various violations of the proposed Act, the bill would move local health departments out of the enforcement arena. Although violations by minors would be civil infractions, the bill would retain criminal penalties for retailers. Successful enforcement means staying out of the courts to the extent possible.

**Response:** While the bill would neither expand local health departments' power nor impose new mandates on them, local health departments could continue to engage in their present activities regarding tobacco education, inspections, and surveys.

Legislative Analyst: S. Margules

#### **FISCAL IMPACT**

The bill would result in an indeterminate increase in fine revenues that are dedicated to public libraries. (The level of fine collections under the current Act is unknown.) The bill also would result in an indeterminate increase in costs incurred by the Department of Public Health associated with the new printing and mailing (probably \$10,000 annually) and data gathering and reporting provisions of the bill.

Fiscal Analyst: P. Graham

#### **A9596\S730A**

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.