

AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 221

Introduced by Assembly Member ~~Koretz~~ Members *Koretz and Maldonado*

(Principal coauthors: Assembly Members Lieber and Nation)

(Principal coauthor: Senator Dunn)

~~(Coauthors: Assembly Members Chu, Hancock, Lieber, Maldonado, Nation, and Vargas)~~

(Coauthors: Assembly Members Chan, Chu, Cohn, Hancock, Levine, and Vargas)

(Coauthor: Senator Kuehl)

January 29, 2003

An act to amend Sections 17537.3, 22952, 22956, 22958, and 22963 of, and to add Section 22964 to, the Business and Professions Code, and to amend Section 308 of the Penal Code, relating to tobacco.

LEGISLATIVE COUNSEL'S DIGEST

AB 221, as amended, Koretz. Tobacco products: minimum legal age: advertising, display, and distribution limitations.

Existing law prohibits persons from making various promotional or advertising offers of smokeless tobacco products without taking specified actions to ensure that the product is not available to persons under 18 years of age.

This bill would extend the applicability of those provisions to persons under 21 years of age, except those born before January 1, 1986.

The Stop Tobacco Access to Kids Enforcement (STAKE) Act is designed to reduce the availability of tobacco products to minors

through specified sales restrictions and enforcement activities. The act, among other things, prohibits the furnishing of tobacco products to, and the purchase of tobacco products by, any person under the age of 18 years, authorizes the assessment of civil penalties of a violation of the act, and makes the violation of the act a criminal offense.

This bill would extend the applicability of the act to persons under the age of 21 years, except for those who were born before January 1, 1986. Because this bill would change the definition of a crime, it would create a state-mandated local program.

The act requires the State Department of Health Services to conduct random, onsite sting inspections at retail sites, and requires the department to enlist the assistance of persons who are 15 and 16 years of age for this purpose.

This bill would, instead, authorize the department, until January 1, 2007, to enlist the assistance of persons who are 15 and 16 years of age, and, on and after January 1, 2007, to enlist the assistance of persons under 21 years of age, for these inspections.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

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

1 SECTION 1. The Legislature finds and declares the
2 following:

3 (a) Tobacco kills 480,000 Americans every year, causing more
4 deaths than AIDS, alcohol abuse, illegal drug use, auto accidents,
5 firearms accidents, fires, homicides, and suicides combined.

6 (b) Youth smoking has been identified as one of the most
7 important health care problems, and beginning to smoke as an
8 adolescent is the most important cause of a lifetime smoking
9 addiction.

10 (c) Three states, Alabama, Alaska, and Utah, have raised the
11 minimum legal age for smoking above that required by California.



1 (d) Increasing the legal minimum sale age for tobacco will
2 reduce the number of older youth who smoke and will help reduce
3 sales of tobacco to younger children.

4 (e) Studies and surveys have shown that when states increased
5 the legal minimum sale age for alcohol, drinking by high school
6 seniors fell by over a third and daily drinking in the same group fell
7 more than 50 percent.

8 (f) According to a United States Surgeon General report,
9 smokers have sampled cigarettes at the median age of 14 years but
10 did not begin to smoke daily until the age of 18 years, and a small
11 percentage began smoking after the age of 21 years.

12 (g) According to the American Lung Association,
13 approximately 90 percent of smokers begin smoking before the
14 age of 21 years, and those who begin smoking at an early age are
15 more likely to develop a severe level of addiction to nicotine than
16 those who start at a later age.

17 (h) The legal minimum sale age for alcohol in California is 21
18 years of age, and persons under 21 years of age have visibly
19 different drivers' licenses. Raising the legal minimum age
20 required to purchase tobacco would ease the ability of merchants
21 and vendors to check identification and would establish a uniform
22 age for the purchase of both of these legal drugs.

23 (i) The state should continue its commitment to vigorous
24 antitobacco education efforts and strict enforcement of existing
25 laws limiting access by youth to tobacco products.

26 (j) It is in the interest of the public health to prevent adolescents
27 from taking up the deadly habit of smoking in order to prevent their
28 addiction to nicotine later in life.

29 SEC. 2. Section 17537.3 of the Business and Professions
30 Code is amended to read:

31 17537.3. The following acts are prohibited:

32 (a) For any person to make, as part of an advertising plan or
33 program, any promotional offer of any smokeless tobacco product
34 that requires proof of purchase of a smokeless tobacco product
35 unless that product carries a designation that the offer is not
36 available to any person under the age of 21 years. Each
37 promotional offer shall include in any mail-in coupon a statement
38 requesting purchasers to verify that the purchaser is 21 years of age
39 or older.



1 (b) For any person to honor any mail-in or telephone request for
2 any promotional offer of any smokeless tobacco product unless
3 appropriate efforts are made to ascertain that a purchaser is over
4 21 years of age. For purposes of this subdivision, appropriate
5 efforts to ascertain the age of a purchaser include, but are not
6 limited to, requests for a purchaser's birth date.

7 (c) For any person, by any means, as part of an advertising plan
8 or program, to distribute any free sample of any smokeless tobacco
9 product within a two-block radius of any premises or ~~facilities~~
10 ~~whose primary purpose~~ *facilities, when the primary purpose of the*
11 *facility* is directed toward persons under the age of 21 years
12 including, but not limited to, schools, clubhouses, and youth
13 centers, when those premises are being used for their primary
14 purposes.

15 (d) For any person to distribute, as part of any advertising plan
16 or program, any unsolicited sample of any smokeless tobacco
17 product through a mail campaign.

18 (e) This section shall not be construed to prohibit any
19 promotional offer of any smokeless tobacco product, the honoring
20 of that promotional offer, or the distribution of samples, to any
21 person who was born before January 1, 1986.

22 SEC. 3. Section 22952 of the Business and Professions Code
23 is amended to read:

24 22952. The State Department of Health Services shall do all
25 of the following:

26 (a) Establish and develop a program to reduce the availability
27 of tobacco products to persons under 21 years of age through the
28 enforcement activities authorized by this division.

29 (b) Establish requirements that retailers of tobacco products
30 post conspicuously, at each point of purchase, a notice stating that
31 selling tobacco products to anyone under 21 years of age is illegal
32 and subject to penalties unless otherwise specified by law. The
33 notice shall also state that the law requires that all persons selling
34 tobacco products check the identification of any purchaser of
35 tobacco products who reasonably appears to be under 21 years of
36 age. The notice shall include a toll-free telephone number to the
37 state department for persons to report unlawful sales of tobacco
38 products to any person under 21 years of age who was not born
39 before January 1, 1986.



1 (c) Provide that the primary responsibility for enforcement of
2 this division shall be with the state department. In carrying out its
3 enforcement responsibilities, the state department shall conduct
4 random, onsite sting inspections at retail sites. Until January 1,
5 2007, the state department may enlist the assistance of persons who
6 are 15 and 16 years of age in conducting these enforcement
7 activities. On and after January 1, 2007, the state department may
8 enlist the assistance of persons who are under 21 years of age in
9 conducting these enforcement activities. The state department
10 may conduct onsite sting inspections in response to public
11 complaints or at retail sites where violations have previously
12 occurred, and may investigate illegal sales of tobacco products to
13 any person under 21 years of age by telephone, mail, or the
14 Internet. Participation in these enforcement activities by any
15 person under 21 years of age shall not constitute a violation of
16 subdivision (b) of Section 308 of the Penal Code for the person
17 under 21 years of age, and the person under 21 years of age is
18 immune from prosecution under that section, or under any other
19 provision of law prohibiting the purchase of these products by a
20 person under 21 years of age.

21 (d) In accordance with Chapter 3.5 (commencing with Section
22 11340) of Part 1 of Division 3 of Title 2 of the Government Code,
23 the state department shall adopt and publish guidelines for the use
24 of persons under 21 years of age in inspections conducted pursuant
25 to subdivision (c) that shall include, but not be limited to, all of the
26 following:

27 (1) The state department and any local law enforcement agency
28 under an enforcement delegation contract with the department
29 may use persons under 21 years of age in random inspections to
30 determine if sales of cigarettes or other tobacco products are being
31 made to persons under 21 years of age.

32 (2) A photograph or video recording, pursuant to this section,
33 of the person under 21 years of age shall be taken prior to each
34 inspection or shift of inspections and retained by the department
35 or the local law enforcement agency under an enforcement
36 delegation contract with the department for purposes of verifying
37 appearances.

38 (3) The state department or a local law enforcement agency
39 under an enforcement delegation contract with the department
40 may use video recording equipment when conducting the



1 inspections to record and document illegal sales or attempted
2 illegal sales.

3 (4) The person under 21 years of age, if questioned about his
4 or her age, need not state his or her actual age but shall present a
5 true and correct identification if verbally asked to present it. Any
6 failure on the part of the person under 21 years of age to provide
7 true and correct identification, if verbally asked for it, shall be a
8 defense to any action pursuant to this section.

9 (5) The person under 21 years of age shall be under the
10 supervision of a regularly employed peace officer during the
11 inspection.

12 (6) All persons under 21 years of age used in this manner by the
13 department or a local law enforcement agency under an
14 enforcement delegation contract with the department shall display
15 the appearance of a person under 21 years of age. It shall be a
16 defense to any action under this division that the person's
17 appearance was not that which could be generally expected of a
18 person under 21 years of age, under the actual circumstances
19 presented to the seller of any cigarette or other tobacco product at
20 the time of the alleged offense.

21 (7) Following the completion of the sale, the peace officer
22 accompanying the person under 21 years of age shall reenter the
23 retail establishment and inform the seller of the random inspection.
24 Following an attempted sale, the department shall notify the retail
25 establishment of the inspection.

26 (8) Failure to comply with the procedures set forth in this
27 subdivision shall be a defense to any action brought pursuant to
28 this section.

29 (e) Be responsible for ensuring and reporting the state's
30 compliance with Section 1926 of Title XIX of the federal Public
31 Health Service Act (42 U.S.C. 300x-26) and any implementing
32 regulations adopted in relation thereto by the United States
33 Department of Health and Human Services. A copy of any report
34 pursuant to this subdivision shall be made available to the
35 Governor and the Legislature.

36 (f) Provide that any civil penalties imposed pursuant to Section
37 22958 shall be enforced against the owner or owners of the retail
38 business and not against the employees of the business.

39 SEC. 4. Section 22956 of the Business and Professions Code
40 is amended to read:



1 22956. Any person engaging in the retail sale of any tobacco
2 product shall check the identification of any tobacco purchaser in
3 order to ascertain the age of the purchaser, if the purchaser
4 reasonably appears to be under 21 years of age.

5 SEC. 5. Section 22958 of the Business and Professions Code
6 is amended to read:

7 22958. (a) The state department may assess civil penalties
8 against any person, firm, or corporation that sells, gives, or in any
9 way furnishes to another person who is under the age of 21 years,
10 except any person born before January 1, 1986, any tobacco,
11 cigarette, or cigarette papers, or any other instrument or
12 paraphernalia that is designed for the smoking or ingestion of
13 tobacco, any product prepared from tobacco, or any controlled
14 substance, according to the following schedule: (1) a civil penalty
15 of from two hundred dollars (\$200) to three hundred dollars (\$300)
16 for the first violation, (2) a civil penalty of from six hundred dollars
17 (\$600) to nine hundred dollars (\$900) for the second violation
18 within a five-year period, (3) a civil penalty of from one thousand
19 two hundred dollars (\$1,200) to one thousand eight hundred
20 dollars (\$1,800) for a third violation within a five-year period, (4)
21 a civil penalty of from three thousand dollars (\$3,000) to four
22 thousand dollars (\$4,000) for a fourth violation within a five-year
23 period, or (5) a civil penalty of from five thousand dollars (\$5,000)
24 to six thousand dollars (\$6,000) for a fifth or subsequent violation
25 within a five-year period.

26 (b) The state department shall assess penalties in accordance
27 with the schedule set forth in subdivision (a) against any person,
28 firm, or corporation that sells, offers for sale, or distributes any
29 tobacco product from a cigarette or tobacco products vending
30 machine, or against any person, firm, or corporation that leases,
31 furnishes, or services these machines in violation of Section
32 22960.

33 (c) The state department shall assess penalties in accordance
34 with the schedule set forth in subdivision (a) against any person,
35 firm, or corporation that advertises or causes to be advertised any
36 tobacco product on any outdoor billboard in violation of Section
37 22961.

38 (d) If a civil penalty has been assessed pursuant to this section
39 against any person, firm, or corporation for a single, specific
40 violation of this division, the person, firm, or corporation shall not



1 be prosecuted under Section 308 of the Penal Code for a violation
2 based on the same facts or specific incident for which the civil
3 penalty was assessed. If any person, firm, or corporation has been
4 prosecuted for a single, specific violation of Section 308 of the
5 Penal Code, the person, firm, or corporation shall not be assessed
6 a civil penalty under this section based on the same facts or specific
7 incident upon which the prosecution under Section 308 of the
8 Penal Code was based.

9 (e) (1) In the case of a corporation or business with more than
10 one retail location, to determine the number of accumulated
11 violations for purposes of the penalty schedule set forth in
12 subdivision (a), violations of this division by one retail location
13 shall not be accumulated against any other retail location of that
14 same corporation or business.

15 (2) In the case of a retail location that operates pursuant to a
16 franchise, as defined in Section 20001, violations of this division
17 accumulated and assessed against a prior owner of a single
18 franchise location shall not be accumulated against a new owner
19 of the same single franchise location for purposes of the penalty
20 schedule set forth in subdivision (a).

21 (f) Proceedings under this section shall be conducted in
22 accordance with Section 100171 of the Health and Safety Code.

23 SEC. 6. Section 22963 of the Business and Professions Code
24 is amended to read:

25 22963. (a) The distribution or sale of tobacco products
26 directly or indirectly to any person under the age of 21 years
27 through the United States Postal Service or through any other
28 public or private postal or package delivery service at locations,
29 including, but not limited to, public mailboxes and mailbox stores,
30 is prohibited.

31 (b) Any person selling or distributing tobacco products directly
32 to a consumer in the state through the United States Postal Service
33 or by any other public or private postal or package delivery
34 service, including orders placed by mail, telephone, facsimile
35 transmission, or the Internet, shall comply with the following
36 provisions:

37 (1) (A) Before enrolling a person as a customer or distributing
38 or selling the tobacco product through any of these means, the
39 distributor or seller shall verify that the purchaser is 21 years of age
40 or older. The distributor or seller shall attempt to match the name,



1 address, and date of birth provided by the customer to information
2 contained in records in a database of individuals whose age has
3 been verified to be 21 years or older by reference to an appropriate
4 database of government records kept by the distributor, a direct
5 marketing firm, or any other entity. The distributor or seller shall
6 also verify that the billing address on the check or credit card
7 offered for payment by the purchaser matches the address listed in
8 the database.

9 (B) If the distributor or seller is unable to verify that the
10 purchaser is 21 years of age or older pursuant to subparagraph (A),
11 he or she shall require the customer to submit an age-verification
12 kit consisting of an attestation signed by the customer that he or she
13 is 21 years of age or older and a copy of a valid form of government
14 identification. For the purposes of this section, a valid form of
15 government identification includes a driver's license, state
16 identification card, passport, an official naturalization or
17 immigration document, such as an alien registration receipt card
18 (commonly known as a "green card") or an immigrant visa, or
19 military identification. The distributor or seller shall also verify
20 that the billing address on the check or credit card provided by the
21 consumer matches the address listed in the form of government
22 identification.

23 (2) The distributor or seller shall impose a two-carton
24 minimum on each order of cigarettes, and shall require payment
25 for the purchase of any tobacco product to be made by personal
26 check of the purchaser or the purchaser's credit card. No money
27 order or cash payment shall be received or permitted. The
28 distributor or seller shall submit to each credit card acquiring
29 company with which it has credit card sales identification
30 information in an appropriate form and format so that the words
31 "tobacco product" may be printed in the purchaser's credit card
32 statement when a purchase of a tobacco product is made by credit
33 card payment.

34 (3) The distributor or seller shall make a telephone call after 5
35 p.m. to the purchaser confirming the order prior to shipping the
36 tobacco products. The telephone call may be a person-to-person
37 call or a recorded message. The distributor or seller is not required
38 to speak directly with a person and may leave a message on an
39 answering machine or by voice mail.



1 (4) The distributor or seller shall deliver the tobacco product to
2 the purchaser's verified billing address on the check or credit card
3 used for payment. No delivery described under this section shall
4 be permitted to any post office box.

5 (c) Notwithstanding subdivisions (a) and (b), if a distributor or
6 seller complies with all of the requirements of this section and a
7 person under the age of 21 years, except any person born before
8 January 1, 1986, obtains a tobacco product by any of the means
9 described in subdivision (b), the seller or distributor is not in
10 violation of this section.

11 (d) For the purposes of the enforcement of this section pursuant
12 to Section 22958, the acts of the United States Postal Service or
13 other common carrier when engaged in the business of
14 transporting and delivering packages for others, and the acts of a
15 person, whether compensated or not, who transports or delivers a
16 package for another person without any reason to know of the
17 package's contents, are not unlawful and are not subject to civil
18 penalties.

19 (e) (1) For the purposes of this section, a "distributor" is any
20 person or entity, within or outside the state, who agrees to
21 distribute tobacco products to a customer within the state. The
22 United States Postal Service or any other public or private postal
23 or package delivery service is not a distributor within the meaning
24 of this section.

25 (2) For the purpose of this section, a "seller" is any person or
26 entity, within or outside the state, who agrees to sell tobacco
27 products to a customer within the state. The United States Postal
28 Service or any other public or private postal or package delivery
29 service is not a seller within the meaning of this section.

30 (3) For the purpose of this section, a "carton" is a package or
31 container that contains 200 cigarettes.

32 (f) A district attorney, city attorney, or the Attorney General
33 may assess civil penalties against any person, firm, corporation, or
34 other entity that violates this section, according to the following
35 schedule:

36 (1) A civil penalty of not less than one thousand dollars
37 (\$1,000) and not more than two thousand dollars (\$2,000) for the
38 first violation.



1 (2) A civil penalty of not less than two thousand five hundred
2 dollars (\$2,500) and not more than three thousand five hundred
3 dollars (\$3,500) for the second violation.

4 (3) A civil penalty of not less than four thousand dollars
5 (\$4,000) and not more than five thousand dollars (\$5,000) for the
6 third violation within a five-year period.

7 (4) A civil penalty of not less than five thousand five hundred
8 dollars (\$5,500) and not more than six thousand five hundred
9 dollars (\$6,500) for the fourth violation within a five-year period.

10 (5) A civil penalty of ten thousand dollars (\$10,000) for a fifth
11 or subsequent violation within a five-year period.

12 SEC. 7. Section 22964 is added to the Business and
13 Professions Code, to read:

14 22964. The provisions of this division shall not be construed
15 to prohibit a city or county from enacting laws with respect to the
16 legal age to purchase or possess any tobacco product as long as
17 they are at least as stringent as state law.

18 SEC. 8. Section 308 of the Penal Code is amended to read:

19 308. (a) (1) Every person, firm, or corporation that
20 knowingly, or under circumstances in which it has knowledge, or
21 should otherwise have grounds for knowledge, sells, gives, or in
22 any way furnishes to another person who is under the age of 21
23 years, except for any person born before January 1, 1986, any
24 tobacco, cigarette, or cigarette papers, or any other preparation of
25 tobacco, or any other instrument or paraphernalia that is designed
26 for the smoking or ingestion of tobacco, any product prepared from
27 tobacco, or any controlled substance, is subject to either a criminal
28 action for a misdemeanor or to a civil action brought by a city
29 attorney, a county counsel, or a district attorney, punishable by a
30 fine of two hundred dollars (\$200) for the first offense, five
31 hundred dollars (\$500) for the second offense, and one thousand
32 dollars (\$1,000) for the third offense.

33 (2) Notwithstanding Section 1464 or any other provision of
34 law, 25 percent of each civil and criminal penalty collected
35 pursuant to this subdivision shall be paid to the office of the city
36 attorney, county counsel, or district attorney who is responsible for
37 bringing the successful action, and 25 percent of each civil and
38 criminal penalty collected pursuant to this subdivision shall be
39 paid to the city or county for the administration and cost of the
40 community service work component provided in subdivision (b).



1 (3) Proof that a defendant, or his or her employee or agent,
2 demanded, was shown, and reasonably relied upon, evidence of
3 majority shall be a defense to any action brought pursuant to this
4 subdivision. Evidence that a person is 21 years of age or older or
5 was born before January 1, 1986, may be a facsimile of or a
6 reasonable likeness of a document issued by a federal, state,
7 county, or municipal government, or subdivision or agency
8 thereof, including, but not limited to, a motor vehicle operator's
9 license, a registration certificate issued under the Federal Selective
10 Service Act, or an identification card issued to a member of the
11 Armed Forces indicating the person is 21 years of age or older or
12 was born before January 1, 1986.

13 (4) For purposes of this section, the person liable for selling or
14 furnishing tobacco products to any person under the age of 21
15 years or a person born on or after January 1, 1986, by a tobacco
16 vending machine shall be the person authorizing the installation or
17 placement of the tobacco vending machine upon premises he or
18 she manages or otherwise controls and under circumstances in
19 which he or she has knowledge, or should otherwise have grounds
20 for knowledge, that the tobacco vending machine will be utilized
21 by any person under the age of 21 years or a person born on or after
22 January 1, 1986.

23 (b) Every person under the age of 21 years, except for any
24 person born before January 1, 1986, who purchases, receives, or
25 possesses any tobacco, cigarette, or cigarette papers, or any other
26 preparation of tobacco, or any other instrument or paraphernalia
27 that is designed for the smoking of tobacco, any product prepared
28 from tobacco, or any controlled substance shall, upon conviction,
29 be punished by a fine of seventy-five dollars (\$75) or 30 hours of
30 community service work.

31 (c) Every person, firm, or corporation that sells or deals in
32 tobacco or any preparation thereof, shall post conspicuously, and
33 keep so posted in his, her, or their place of business, at each point
34 of purchase, the notice required pursuant to subdivision (b) of
35 Section 22952 of the Business and Professions Code, and any
36 person failing to do so shall, upon conviction, be punished by a fine
37 of ten dollars (\$10) for the first offense and fifty dollars (\$50) for
38 each succeeding offense, or by imprisonment for not more than 30
39 days.



1 (d) For purposes of determining the liability of any person,
2 firm, or corporation controlling franchises or business operations
3 in multiple locations, for the second and subsequent violations of
4 this section each individual franchise or business location shall be
5 deemed a separate entity.

6 (e) It is the Legislature's intent to regulate the subject matter of
7 this section. As a result, no city, county, or city and county shall
8 adopt any ordinance or regulation inconsistent with this section.

9 (f) Notwithstanding any other provision of this section, the
10 Director of Corrections may sell or supply tobacco and tobacco
11 products, including cigarettes and cigarette papers, to any person
12 confined in any institution or facility under his or her jurisdiction
13 who has attained the age of 16 years, if the parent or guardian of
14 the person consents thereto, and may permit smoking by the person
15 in any institution or facility. No officer or employee of the
16 Department of Corrections shall be considered to have violated
17 this section by any act authorized by this subdivision.

18 SEC. 9. No reimbursement is required by this act pursuant to
19 Section 6 of Article XIII B of the California Constitution because
20 the only costs that may be incurred by a local agency or school
21 district will be incurred because this act creates a new crime or
22 infraction, eliminates a crime or infraction, or changes the penalty
23 for a crime or infraction, within the meaning of Section 17556 of
24 the Government Code, or changes the definition of a crime within
25 the meaning of Section 6 of Article XIII B of the California
26 Constitution.

