

AMENDED IN ASSEMBLY MARCH 29, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1301

Introduced by Assembly Member Hill

February 18, 2011

~~An act relating to tobacco.~~ *An act to amend Sections 22952 and 22974.8 of the Business and Professions Code, and to amend Section 308 of the Penal Code, relating to tobacco.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1301, as amended, Hill. Retail tobacco sales: STAKE Act.

Existing law, *the California Cigarette and Tobacco Licensing Act of 2003*, requires a retailer to obtain a license from the State Board of Equalization to engage in the sale of cigarette and tobacco products in California. Existing law, the Stop Tobacco Access to Kids Enforcement Act, or STAKE Act, establishes various requirements for retailers relating to tobacco sales to minors. Existing law also makes it a misdemeanor for a retailer to knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sell, give, or in any way furnish a minor with tobacco products or paraphernalia.

Under existing law, violations of the STAKE Act or the above-described misdemeanor provision result in board action, on a set schedule, relating to the licensure of the retailer when the youth purchase survey finds that 13% or more of youth are able to purchase cigarettes, and makes the board's authority inoperative when a youth purchase survey shows less than 13% of youth were able to purchase cigarettes. Under existing law, for the first violation, the retailer receives a warning letter, as specified. For the 2nd conviction in 12 months, the

retailer is fined \$500. For the 3rd violation in 12 months, the retailer is fined \$1,000. For the 4th to 7th violations, inclusive, in 12 months, the retailer’s license to sell cigarettes and tobacco products is suspended for 90 days. For the 8th violation in 24 months, the retailer’s license is revoked. Existing law provides for a 30-day appeal of the board’s decision.

This bill would revise the schedule for board action in response to the occurrence of a violation, as defined, of the STAKE Act or the misdemeanor provision as follows: for a first violation, the retailer would get a warning letter; for the 2nd violation in 5 years, the retailer would be fined \$500 unless he or she can prove to the board that he or she has purchased an identification verification scanner since the date of the violation; for the 3rd violation in 5 years, the retailer’s license would be suspended for 90 days, for the 4th violation in 5 years, the retailer’s license would be suspended for 180 days; and for the 5th violation in 5 years, the retailer’s license would be revoked.

This bill would prohibit the board from considering violations that occurred prior to January 1, 2011. The bill would delete the provision conditioning the board’s authority to take action against retailers on the results of a youth purchase survey. The bill would remove the board appeal process and would, instead, allow suspension or revocation through a specified process. The bill would declare the intent of the Legislature regarding the enforcing agency reporting violations to the board within 30 days of determining that a violation has occurred.

~~This bill would declare the intent of the Legislature regarding the amendment of the STAKE Act to reduce the sale of tobacco to minors.~~

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

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

- 1 SECTION 1. The Legislature hereby finds and declares all of
- 2 the following:
- 3 (a) According to the American Cancer Society, almost 90
- 4 percent of adults who are regular smokers started at or before age
- 5 19.
- 6 (b) A 2009 survey from the United States Centers for Disease
- 7 Control and Prevention found that nearly one-half of high school
- 8 students had tried cigarette smoking and more than one out of four
- 9 high school students were current tobacco users.

1 (c) Smoking-related diseases remain the leading cause of
2 preventable death in the United States, claiming the lives of
3 438,000 Americans annually.

4 (d) According to the State Department of Public Health's
5 California Tobacco Control Program survey, 74 percent of youth
6 access enforcement agencies reported issuing warnings to
7 merchants selling tobacco products to minors in 2006.

8 (e) The California Tobacco Control Program survey also found
9 that law enforcement agencies continued to rank the suspension
10 or revocation of licenses and civil and criminal penalties for owners
11 and clerks; as effective strategies to reduce youth access to tobacco.

12 ~~(f) California's Stop Tobacco Access to Kids Enforcement Act~~
13 ~~which grants the state authority to suspend and revoke licenses~~
14 ~~from stores that illegally sell tobacco to minors has not been~~
15 ~~utilized because of a provision that prevents this grant from taking~~
16 ~~effect.~~

17 ~~(g) As a result, local cities and counties have taken it upon~~
18 ~~themselves to adopt local tobacco retailer licensing ordinances in~~
19 ~~order to reduce illegal sales of tobacco products to minors.~~

20 ~~(h) According to the American Lung Association's Center for~~
21 ~~Tobacco Organizing and Policy 2009 report, rates of illegal tobacco~~
22 ~~sales to minors have decreased, often significantly, in almost every~~
23 ~~California community that has passed strong tobacco retailer~~
24 ~~licensing ordinances.~~

25 ~~(i) Since only 60 communities in California have adopted retailer~~
26 ~~licensing ordinances, it's imperative for the state to fully implement~~
27 ~~the Stop Tobacco Access to Kids Enforcement Act to reduce the~~
28 ~~sale of tobacco products to minors in communities throughout~~
29 ~~California.~~

30 ~~SEC. 2. It is the intent of the Legislature to enact legislation~~
31 ~~that would amend the Stop Tobacco Access to Kids Enforcement~~
32 ~~Act (Division 8.5 (commencing with Section 229550) of the~~
33 ~~Business and Professions Code) to reduce the sale of tobacco to~~
34 ~~minors.~~

35 *SEC. 2. Section 22952 of the Business and Professions Code*
36 *is amended to read:*

37 22952. On or before July 1, 1995, the State Department of
38 Public Health shall do all of the following:

1 (a) Establish and develop a program to reduce the availability
2 of tobacco products to persons under 18 years of age through the
3 enforcement activities authorized by this division.

4 (b) Establish requirements that retailers of tobacco products
5 post conspicuously, at each point of purchase, a notice stating that
6 selling tobacco products to anyone under 18 years of age is illegal
7 and subject to penalties. The notice shall also state that the law
8 requires that all persons selling tobacco products check the
9 identification of a purchaser of tobacco products who reasonably
10 appears to be under 18 years of age. The warning signs shall
11 include a toll-free telephone number to the department for persons
12 to report unlawful sales of tobacco products to minors.

13 (c) Provide that primary responsibility for enforcement of this
14 division shall be with the department. In carrying out its
15 enforcement responsibilities, the department shall conduct random,
16 onsite sting inspections at retail sites and shall enlist the assistance
17 of persons that are 15 and 16 years of age in conducting these
18 enforcement activities. The department may conduct onsite sting
19 inspections in response to public complaints or at retail sites where
20 violations have previously occurred, and investigate illegal sales
21 of tobacco products to minors by telephone, mail, or the Internet.
22 ~~Participation in these enforcement activities by a person under 18~~
23 ~~years of age does not constitute a violation of subdivision (b) of~~
24 ~~Section 308 of the Penal Code for the person under 18 years of~~
25 ~~age, and the person under 18 years of age is immune from~~
26 ~~prosecution thereunder, or under any other provision of law~~
27 ~~prohibiting the purchase of these products by a person under 18~~
28 ~~years of age.~~

29 (d) In accordance with Chapter 3.5 (commencing with Section
30 11340) of Part 1 of Division 3 of Title 2 of the Government Code,
31 the department shall adopt and publish guidelines for the use of
32 persons under 18 years of age in inspections conducted pursuant
33 to subdivision (c) that shall include, but not be limited to, all of
34 the following:

35 (1) An enforcing agency may use persons under 18 years of age
36 who are 15 or 16 years of age in random inspections to determine
37 if sales of cigarettes or other tobacco products are being made to
38 persons under 18 years of age.

39 (2) A photograph or video recording of the person under 18
40 years of age shall be taken prior to each inspection or shift of

1 inspections and retained by the enforcing agency for purposes of
2 verifying appearances.

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

6 (4) The person under 18 years of age, if questioned about his
7 or her age, need not state his or her actual age but shall present a
8 true and correct identification if verbally asked to present it. Any
9 failure on the part of the person under 18 years of age to provide
10 true and correct identification, if verbally asked for it, shall be a
11 defense to an action pursuant to this section.

12 (5) The person under 18 years of age shall be under the
13 supervision of a regularly employed peace officer during the
14 inspection.

15 (6) All persons under 18 years of age used in this manner by an
16 enforcing agency shall display the appearance of a person under
17 18 years of age. It shall be a defense to an action under this division
18 that the person's appearance was not that which could be generally
19 expected of a person under 18 years of age, under the actual
20 circumstances presented to the seller of the cigarettes or other
21 tobacco products at the time of the alleged offense.

22 (7) Following the completion of the sale, the peace officer
23 accompanying the person under 18 years of age shall reenter the
24 retail establishment and shall inform the seller of the random
25 inspection. Following an attempted sale, the enforcing agency shall
26 notify the retail establishment of the inspection.

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

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

39 *SEC. 3. Section 22974.8 of the Business and Professions Code*
40 *is amended to read:*

1 22974.8. (a) (1) The board shall take action against a retailer;
 2 ~~convicted of a violation of~~ *who violates* either the ~~Stake~~ *STAKE*
 3 Act (Division 8.5 (commencing with Section ~~22950~~) 22950)) or
 4 Section 308 of the Penal Code, according to the schedule set forth
 5 in subdivision (b).
 6 (2) ~~Convictions of violations~~ *Violations* by a retailer at one retail
 7 location may not be accumulated against other locations of that
 8 same retailer.
 9 (3) ~~Convictions of violations~~ *Violations* accumulated against a
 10 prior retail owner at a licensed location may not be accumulated
 11 against a new retail owner at the same retail location.
 12 (4) Prior to suspending or revoking a retailer’s license to sell
 13 cigarette and tobacco products, the board shall notify the retailer.
 14 The notice shall include instructions for appealing the license
 15 suspension or revocation.
 16 (b) (1) Upon the first ~~conviction of a~~ violation of either the
 17 *STAKE* Act (Division 8.5 (commencing with Section ~~22950~~)
 18 22950)) or Section 308 of the Penal Code, the retailer shall receive
 19 a warning letter from the board that delineates the circumstances
 20 under which a retailer’s license may be suspended or revoked and
 21 the amount of time the license may be suspended or revoked. The
 22 retailer and its employees shall receive training on tobacco control
 23 laws from the *State* Department of *Public Health Services* upon a
 24 first conviction.
 25 (2) Upon the second ~~conviction of a~~ violation of either the
 26 *STAKE* Act (Division 8.5 (commencing with Section 22950)) or
 27 Section 308 of the Penal Code within ~~12 months~~ *five years*, the
 28 retailer shall be subject to a fine of five hundred dollars (\$500)
 29 *unless the retailer can show proof that he or she has purchased*
 30 *and installed an identification verification scanner since the date*
 31 *of the violation.*
 32 (3) Upon the third ~~conviction of a~~ violation of either the *STAKE*
 33 Act (Division 8.5 (commencing with Section 22950)) or Section
 34 308 of the Penal Code within ~~12 months~~ *five years*, the retailer
 35 ~~shall be subject to a fine of one thousand dollars (\$1,000)~~ *have his*
 36 *or her license to sell cigarette and tobacco products suspended*
 37 *for 90 days.*
 38 (4) Upon the fourth ~~to the seventh conviction of a~~ violation of
 39 either the *STAKE* Act (Division 8.5 (commencing with Section
 40 22950)) or Section 308 of the Penal Code within ~~12 months~~ *five*

1 years, the board shall suspend the retailer's license to sell cigarette
2 and tobacco products for ~~90~~ 180 days.

3 (5) Upon the ~~eighth conviction of a~~ *fifth* violation of the STAKE
4 Act (Division 8.5 (commencing with Section ~~22950~~) 22950)) or
5 Section 308 of the Penal Code within ~~24 months~~ *five years*, the
6 board shall revoke the retailer's license to sell cigarette and tobacco
7 products.

8 ~~(e) The decision of the board to suspend or revoke the retailer's~~
9 ~~license may be appealed to the board within 30 days after the notice~~
10 ~~of suspension or revocation. All appeals shall be submitted in~~
11 ~~writing.~~

12 ~~(d) The board's authority to take action against retailers, as set~~
13 ~~forth in this section, commences on the date of the release of the~~
14 ~~results from the survey undertaken by the Department of Health~~
15 ~~Services pursuant to Section 22952 of the Business and Professions~~
16 ~~Code Section 22952 to comply with Section 1926 of Title XIX of~~
17 ~~the federal Public Health Service Act (42 U.S.C. 300x-26), and~~
18 ~~any implementing regulations adopted in relation thereto by the~~
19 ~~United States Department of Health and Human Services, showing~~
20 ~~that the youth purchase survey finds that 13 percent or more of~~
21 ~~youth were able to purchase cigarettes. The board's authority to~~
22 ~~take action under this section is inoperative on or after the date of~~
23 ~~the subsequent release of the results from the survey showing that~~
24 ~~less than 13 percent of youth were able to purchase cigarettes.~~

25 *(c) When determining the penalty for violations pursuant to*
26 *subdivision (b), the board shall not include violations that occurred*
27 *prior to January 1, 2011.*

28 *(d) The board shall revoke or suspend the license pursuant to*
29 *the provisions applicable to the revocation of a license as set forth*
30 *in Section 30148 of the Revenue and Taxation Code.*

31 *(e) For the purposes of determining the accumulation of*
32 *violations pursuant to this section, it is the intent of the Legislature*
33 *that all of the following apply:*

34 *(1) A violation of the STAKE Act has occurred when either a*
35 *final administrative adjudication is reached or when the retailer*
36 *pays the fine of an uncontested violation.*

37 *(2) A violation of Section 308 of the Penal Code has occurred*
38 *when a final judgment of guilty, either by jury, appeal, or plea, is*
39 *entered against the retailer or any employee or agent of the retailer*
40 *pursuant to Section 308 of the Penal Code.*

1 (f) *It is the intent of the Legislature for the enforcing agency to*
2 *notify the board within 30 days of determining that a violation has*
3 *occurred, as set forth in subdivision (e).*

4 *SEC. 4. Section 308 of the Penal Code is amended to read:*

5 308. (a) (1) Every person, firm, or corporation that knowingly
6 or under circumstances in which it has knowledge, or should
7 otherwise have grounds for knowledge, sells, gives, or in any way
8 furnishes to another person who is under the age of 18 years any
9 tobacco, cigarette, or cigarette papers, or blunts wraps, or any other
10 preparation of tobacco, or any other instrument or paraphernalia
11 that is designed for the smoking or ingestion of tobacco, products
12 prepared from tobacco, or any controlled substance, is subject to
13 either a criminal action for a misdemeanor or to a civil action
14 brought by a city attorney, a county counsel, or a district attorney,
15 punishable by a fine of two hundred dollars (\$200) for the first
16 offense, five hundred dollars (\$500) for the second offense, and
17 one thousand dollars (\$1,000) for the third offense.

18 Notwithstanding Section 1464 or any other provision of law, 25
19 percent of each civil and criminal penalty collected pursuant to
20 this subdivision shall be paid to the office of the city attorney,
21 county counsel, or district attorney, whoever is responsible for
22 bringing the successful action, and 25 percent of each civil and
23 criminal penalty collected pursuant to this subdivision shall be
24 paid to the city or county for the administration and cost of the
25 community service work component provided in subdivision (b).

26 Proof that a defendant, or his or her employee or agent,
27 demanded, was shown, and reasonably relied upon evidence of
28 majority shall be defense to any action brought pursuant to this
29 subdivision. Evidence of majority of a person is a facsimile of or
30 a reasonable likeness of a document issued by a federal, state,
31 county, or municipal government, or subdivision or agency thereof,
32 including, but not limited to, a motor vehicle operator's license, a
33 registration certificate issued under the federal Selective Service
34 Act, or an identification card issued to a member of the Armed
35 Forces.

36 For purposes of this section, the person liable for selling or
37 furnishing tobacco products to minors by a tobacco vending
38 machine shall be the person authorizing the installation or
39 placement of the tobacco vending machine upon premises he or
40 she manages or otherwise controls and under circumstances in

1 which he or she has knowledge, or should otherwise have grounds
2 for knowledge, that the tobacco vending machine will be utilized
3 by minors.

4 (2) For purposes of this section, “blunt wraps” means cigar
5 papers or cigar wrappers of all types that are designed for smoking
6 or ingestion of tobacco products and contain less than 50 percent
7 tobacco.

8 (b) Every person under the age of 18 years who purchases,
9 receives, or possesses any tobacco, cigarette, or cigarette papers,
10 or any other preparation of tobacco, or any other instrument or
11 paraphernalia that is designed for the smoking of tobacco, products
12 prepared from tobacco, or any controlled substance shall, upon
13 conviction, be punished by a fine of seventy-five dollars (\$75) or
14 30 hours of community service work.

15 (c) Every person, firm, or corporation that sells, or deals in
16 tobacco or any preparation thereof, shall post conspicuously and
17 keep so posted in his, her, or their place of business at each point
18 of purchase the notice required pursuant to subdivision (b) of
19 Section 22952 of the Business and Professions Code, and any
20 person failing to do so shall, upon conviction, be punished by a
21 fine of fifty dollars (\$50) for the first offense, one hundred dollars
22 (\$100) for the second offense, two hundred fifty dollars (\$250) for
23 the third offense, and five hundred dollars (\$500) for the fourth
24 offense and each subsequent violation of this provision, or by
25 imprisonment in a county jail not exceeding 30 days.

26 (d) For purposes of determining the liability of persons, firms,
27 or corporations controlling franchises or business operations in
28 multiple locations for the second and subsequent violations of this
29 section, each individual franchise or business location shall be
30 deemed a separate entity.

31 *(e) Notwithstanding subdivision (b), any person under 18 years*
32 *of age who purchases, receives, or possesses any tobacco,*
33 *cigarette, or cigarette papers, or any other preparation of tobacco,*
34 *any other instrument of paraphernalia that is designed for the*
35 *smoking of tobacco, or products prepared from tobacco, while*
36 *participating in the enforcement activities that comply with the*
37 *guidelines adopted pursuant to subdivisions (c) and (d) of Section*
38 *22925 of the Business and Professions Code is immune from*
39 *prosecution for that purchase, receipt, or possession.*

40 (e)

- 1 *(f)* It is the Legislature’s intent to regulate the subject matter of
- 2 this section. As a result, no city, county, or city and county shall
- 3 adopt any ordinance or regulation inconsistent with this section.

O