MISSISSIPPI LEGISLATURE REGULAR SESSION 2021

By: Representative Bain To: Judiciary B

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 874

AN ACT TO AMEND SECTION 97-32-51, MISSISSIPPI CODE OF 1972, TO REVISE THE DEFINITION OF ALTERNATIVE NICOTINE IN THE PROVISIONS OF LAW REGULATING TOBACCO, BY ADDING THE WORDS "AEROSOLIZING" AND "VAPORIZING"; TO CLARIFY THE REQUIREMENT FOR GOVERNMENT-ISSUED PHOTOGRAPHIC IDENTIFICATION AS PROOF BEFORE SALE OF TOBACCO PRODUCTS; TO AMEND SECTIONS 97-32-5, 97-32-7, 97-32-11, 97-32-15, 97-32-17 AND 97-32-19 TO INCREASE THE AGE OF SALE AND USE OF TOBACCO TO TWENTY-ONE YEARS OF AGE; TO REQUIRE GOVERNMENT ISSUED PHOTOGRAPHIC IDENTIFICATION AS PROOF OF AGE; TO BRING FORWARD SECTIONS 97-32-9 AND 97-32-13, MISSISSIPPI CODE OF 1972, WHICH REGULATE TOBACCO PRODUCTS, FOR PURPOSES OF AMENDMENT; TO REQUIRE THE OFFICE OF THE ATTORNEY GENERAL TO DEVELOP A VAPOR PRODUCT DIRECTORY ON OR BEFORE SEPTEMBER 15, 2021, AND INCLUDE SUCH ON ITS WEBSITE; TO DEFINE TERMINOLOGY; TO REQUIRE EVERY MANUFACTURER OF A VAPOR PRODUCT SOLD OR INTENDED TO BE SOLD IN THIS STATE TO EXECUTE AN ATTESTATION TO THE ATTORNEY GENERAL, UNDER PENALTY OF PERJURY, THAT ITS PRODUCTS ARE IN COMPLIANCE BY CERTIFYING THE PRODUCTS WERE AVAILABLE ON THE MARKET AS OF AUGUST 16, 2016; TO PROHIBIT THE MANUFACTURE, DISTRIBUTION OR SALE OF VAPOR PRODUCTS NOT LISTED IN THE DIRECTORY; AMEND SECTION 97-32-21, MISSISSIPPI CODE OF 1972, IN CONFORMITY THERETO; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 97-32-51, Mississippi Code of 1972, is amended as follows:

97-32-51. (1) For the purposes of this chapter:

(a) (i) "Alternative nicotine product" means:

1. An electronic cigarette;

2. Any other product that consists of or contains nicotine that can be ingested into the body by chewing, smoking, absorbing, aerosolizing, vaporizing, dissolving, inhaling or by any other means;

3. Any electronic device that can be used to deliver nicotine to an individual inhaling from the device, including, but not limited to, any cartridge component, liquid, capsule or powder used to refill or resupply such an electronic device; or

4. An electronic cigar or cigarillo.

(ii) Alternative nicotine product does not include:

1. A cigarette or other tobacco product as defined in Section 97-32-3;

2. A product that is a drug under 21 USCS 321(g)(1);

3. A product that is a device under 21 USCS 321(h); or

4. A combination product described in 21 USCS 353(g).

(b) (i) "Electronic cigarette" means an electronic product or device that produces a vapor that delivers nicotine or other substances to the person inhaling from the device to simulate smoking, and is likely to be offered to, or purchased by,

consumers as an electronic cigarette, electronic cigar, electronic cigarillo or electronic pipe.

(ii) Electronic cigarette does not include:

1. A cigarette or other tobacco products as defined in Section 97-32-3;

2. A product that is a drug under 21 USCS 321(g)(1);

3. A product that is a device under 21 USCS 321(h); or

4. A combination product described in 21 USCS 353(g).

(2) No person, either directly or indirectly by an agent or employee, or by a vending machine owned by the person or located in the person's establishment, shall sell, offer for sale, give or furnish any alternative nicotine product, or any cartridge, component, liquid, capsule or powder thereof, to an individual under twenty-one (21) years of age. The penalties described in this subsection shall be treble the fines described in this section, plus any other penalty provided by law, for the sale, use, possession or furnishing of a controlled substance or other substance to a person, if the alternative nicotine product contains any controlled substance that is otherwise prohibited by law, or any other substance that causes the recipient of such to require emergency medical care as a result of using the product. Each violation of the provisions of this section shall be treated

as a separate offense. A violation of this subsection is punishable as follows:

(a) By a fine of Two Hundred Fifty Dollars ($250.00) for a first offense;

(b) By a fine of Five Hundred Dollars ($500.00) for a second offense; and

(c) By a fine of One Thousand Dollars ($1,000.00) for a third or subsequent offense.

(3) Before selling, offering for sale, giving or furnishing an alternative nicotine product, or any cartridge, component liquid, capsule or powder thereof, to an individual, a person shall verify that the individual is at least twenty-one (21) years of age by:

(a) Examining *** * *** a government-issued photographic identification that establishes the individual is at least twenty-one (21) years of age; or

(b) For sales made through the internet or other remote sales methods, performing an age verification through an independent, third-party age verification service that compares information available from public records to the personal information entered by the individual during the ordering process that establishes the individual is twenty-one (21) years of age or older.

SECTION 2. Section 97-32-5, Mississippi Code of 1972, is amended as follows:

97-32-5. It shall be unlawful for any person, or retailer, to sell, barter, deliver or give tobacco products to any individual under * * * twenty-one (21) years of age unless the individual under * * * twenty-one (21) years of age holds a retailer's license to sell tobacco under Section 27-69-1 et seq., Mississippi Code of 1972.

It shall be an absolute affirmative defense that the person selling, bartering, delivering or giving tobacco products over the counter in a retail establishment to an individual under eighteen (18) years of age in violation of this article had requested and examined a government-issued photographic identification from such person establishing his age as at least * * * twenty-one (21) years prior to selling such person a tobacco product. The failure of a seller, barterer, deliverer or giver of tobacco products over the counter in a retail establishment to request and examine photographic identification from a person under * * * twenty-one years of age prior to the sale of a tobacco product to such person if the individual is not known to the seller, barterer, deliverer or giver of the tobacco product to be over the age of * * * twenty-one (21) years, shall be construed against the seller, barterer, deliverer or giver and form a conclusive basis for the seller's violation of this section.

It shall be an absolute affirmative defense that the person or entity giving tobacco products through the mail to an individual under * * * twenty-one (21) years of age in violation

of this article had requested and received documentary or written evidence from such person purportedly establishing his age to be at least *** * *** twenty-one (21) years of age.

Any person who violates this section shall be liable as follows: For a first conviction, a fine of Fifty Dollars ($50.00); for a second conviction, a fine of Seventy-five Dollars ($75.00); and for all subsequent convictions, a fine of One Hundred Fifty Dollars ($150.00) shall be imposed.

Any person found in violation of this section shall be issued a citation and the holder of the retailer permit shall be sent notification of this citation by registered mail by the law enforcement agency issuing the citation. Notification shall include the opportunity for hearing before the appropriate court. For a first conviction, the retailer shall be sent a warning letter informing him of the retailer's responsibility in the selling of tobacco products. For a second conviction, the retailer, or retailer's designee, shall be required to enroll in and complete a "Retailer Tobacco Education Program."

For a third or subsequent violation of this section by any retailer, within one (1) year of the two (2) prior violations, any retailer's permit issued pursuant to Section 27-69-1 et seq., Mississippi Code of 1972, may be revoked or suspended for a period of at least one (1) year after notice and opportunity for hearing. If said permit is revoked by the Department of Revenue, the retailer may not reapply for a permit to sell tobacco for a period

of six (6) months. For the purposes of this section, "subsequent violations" are those committed at the same place of business.

It is the responsibility of all law enforcement officers and law enforcement agencies of this state to ensure that the provisions of this article are enforced.

It shall not be considered a violation of this section on the part of any law enforcement officer or person under eighteen (18) years of age for any law enforcement officer of this state to use persons under * * * twenty-one (21) years of age to purchase or attempt to purchase tobacco products for the purpose of monitoring compliance with this section, as long as those persons are supervised by duly authorized law enforcement agency officials.

Any law enforcement agency conducting enforcement efforts undertaken pursuant to this article shall prepare a report as prescribed by the Attorney General which includes the number of unannounced inspections conducted by the agency, a summary of enforcement actions taken pursuant to this article, the name and permit number of the retailer pursuant to Section 27-69-1 et seq., Mississippi Code of 1972, and final judicial disposition on all enforcement actions. Reports shall be forwarded to the Office of the Attorney General within twenty (20) working days of the final judicial disposition.

On notification from local law enforcement that a retailer has violated this article so as to warrant a revocation of the

retailer's permit, the Attorney General shall notify in writing the Department of Revenue within twenty (20) working days.

In accordance with the procedures of Section 27-69-9, Mississippi Code of 1972, the Department of Revenue shall initiate revocation procedures of the retailer's permit. The Office of the Attorney General shall provide legal assistance in revocation procedures when requested by the Department of Revenue.

SECTION 3. Section 97-32-7, Mississippi Code of 1972, is amended as follows:

97-32-7. (1) Every person engaged in the business of selling tobacco products or alternative nicotine products at retail shall notify each individual employed by that person as a retail sales clerk that state law:

(a) Prohibits the sale or distribution of tobacco products or alternative nicotine products, including samples, to any person under twenty-one (21) years of age and the purchase or receipt of tobacco products or alternative nicotine products by any person under twenty-one (21) years of age; and

(b) Requires that proof of age be demanded by examining government-issued photographic identification from a prospective purchaser or recipient if the prospective purchaser or recipient is under the age of twenty-one (21) years. Every person employed by a person engaged in the business of selling tobacco products or alternative nicotine products at retail shall sign an agreement with his employer in substantially the following or similar form:

"I understand that state and federal law prohibit the sale or distribution of tobacco products and alternative nicotine products to persons under the age of twenty-one (21) years and out-of-package sales, and requires that proof of age be demanded by examining government-issued photographic identification from a prospective purchaser or recipient under twenty-one (21) years of age if the individual is not known to the seller, barterer, deliverer or giver of the tobacco product or alternative nicotine product to be over the age of twenty-one (21) years. I promise, as a condition of my employment, to observe this law."

(2) Any person violating the provisions of this section shall be penalized not less than Fifty Dollars ($50.00) nor more than One Hundred Dollars ($100.00).

(3) No retailer who instructs his employee as provided in this section shall be liable for any violations committed by such employees.

SECTION 4. Section 97-32-11, Mississippi Code of 1972, is amended as follows:

97-32-11. Point of sale warning signs are required, and each seller shall place and maintain in legible condition, at each point of sale of tobacco products to consumers, a sign no smaller than eight and one-half (8-1/2) by eleven (11) inches or ninety-three (93) square inches stating: "STATE LAW PROHIBITS THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER THE AGE OF * * * 21 YEARS. PROOF OF AGE REQUIRED."

Any person who violates this section shall be punished by a penalty of not more than One Hundred Dollars ($100.00).

SECTION 5. Section 97-32-15, Mississippi Code of 1972, is amended as follows:

97-32-15. It shall be unlawful for any person to sell tobacco products through a vending machine, unless the vending machine is located in an establishment to which individuals under the age of *** * *** twenty-one (21) years are denied access or are required to be accompanied by an adult. A person who violates this section shall be punished by a penalty of not more than Two Hundred Fifty Dollars ($250.00).

SECTION 6. Section 97-32-17, Mississippi Code of 1972, is brought forward as follows:

97-32-17. No retailer shall distribute tobacco products other than cigars and pipe tobacco for commercial purposes other than in a sealed package provided by the manufacturer with the required health warning. A retailer who is in violation of this section shall be liable for a penalty of not more than One Hundred Dollars ($100.00) for the first violation or enrollment in a Retailer Tobacco Education Prevention Program, or both; not more than Two Hundred Dollars ($200.00) for a second violation within one (1) year of a prior violation; and a penalty of Three Hundred Dollars ($300.00) for all subsequent violations.

In addition, for a third and all subsequent violations within one (1) year of two (2) prior violations, the permit to sell

tobacco products of any person violating this section may be suspended or revoked under the provisions of Section 27-69-1 et seq., Mississippi Code of 1972, for a period of one (1) year after notice and opportunity for a hearing. For the purposes of this section, "subsequent violations" are those committed at the same place of business.

SECTION 7. Section 97-32-19, Mississippi Code of 1972, is brought forward as follows:

97-32-19. No distributor or wholesaler of tobacco products shall sell, distribute, deliver, or in any other manner transfer any tobacco products for sale at retail to any person not possessing a valid tobacco permit under Section 27-69-1 et seq., Mississippi Code of 1972.

Any distributor or wholesaler who violates this section shall be liable for a penalty of up to Two Hundred Fifty Dollars ($250.00) for a first offense. For a second offense within one (1) year of the prior offense, any distributor or wholesaler shall be liable for a penalty of up to Five Hundred Dollars ($500.00).

For all subsequent offenses within one (1) year of two (2) prior offenses, the distributor or wholesaler may become ineligible to hold a tobacco distributor's permit for a period of at least one (1) year under Section 27-69-1 et seq., Mississippi Code of 1972, and shall be liable for a penalty of One Thousand Dollars ($1,000.00).

SECTION 8. Section 97-32-9, Mississippi Code of 1972, is brought forward as follows:

97-32-9. No person under twenty-one (21) years of age shall purchase any tobacco or alternative nicotine product. No student of any high school, junior high school or elementary school shall possess tobacco or alternative nicotine on any educational property as defined in Section 97-37-17.

(a) If a person under twenty-one (21) years of age is found by a court to be in violation of any other statute and is also found to be in possession of a tobacco or alternative nicotine product, the court shall punish the minor as follows:

(i) For a first offense, pay a fine of One Hundred Dollars ($100.00), and perform no more than fifteen (15) hours of community service;

(ii) For a second offense, a fine of Three Hundred Dollars ($300.00), and no more than twenty-five (25) hours of community service;

(iii) For a third offense or subsequent offense, a fine of Five Hundred Dollars ($500.00), and no more than forty (40) hours of community service.

(b) A violation under this section is not to be recorded on the criminal history of the minor and, upon proof of satisfaction of the court's order, the record shall be expunged from any records other than youth court records.

SECTION 9. Section 97-32-13, Mississippi Code of 1972, is brought forward as follows:

97-32-13. Any person under the age of twenty-one (21) years who falsely states he is twenty-one (21) years of age or older, or presents any document that indicates he is twenty-one (21) years of age or older, for the purpose of purchasing or possessing any alternative nicotine product, tobacco or tobacco product shall be penalized not less than Twenty-five Dollars ($25.00) nor more than Two Hundred Dollars ($200.00) or required to complete at least thirty (30) days' community service, or both.

SECTION 10. As used in this act, the following terms shall have the meaning ascribed in this section, unless context of use clearly requires otherwise:

(a) "Attorney General" means the chief legal officer and advisor for the State of Mississippi, for both civil and criminal matters of litigation.

(b) "Directory" means the Attorney General's list of all manufacturers that have provided attestations that comply with Section 2 of this act and all vapor products that are listed in such certifications.

(c) "E-liquid" means a liquid that may contain nicotine, which may include flavorings or other ingredients that are intended for use in a vapor product.

(d) "Manufacturer" means an entity that manufactures vapor products, anywhere in the world, which are intended for sale in the United States, either directly or through an importer.

(e) "Person" means any natural person, partnership, company, corporation or other entity.

(f) "Vapor products" means an electronic device that delivers nicotine through e-liquid, as defined in this paragraph (c), in aerosol form into the mouth and lungs when inhaled. "Vapor product" includes, but is not limited to:

(i) An electronic cigarette;

(ii) An electronic cigar;

(iii) An electronic cigarillo;

(iv) An electronic pipe;

(v) An electronic hookah;

(vi) A vape pen or vapor product; and

(vii) Any related device and any cartridge or other component of such device, including e-liquid.

"Vapor product" does not include any tobacco or marijuana product or any product that is regulated by the United States Food and Drug Administration under Chapter V of the Federal Food, Drug, and Cosmetic Act (21 USCS Section 351 et seq.).

SECTION 11. (1) Beginning July 1, 2021, every manufacturer of a vapor product that is sold or intended to be sold in this state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute and deliver

an attestation, under the penalty of perjury to the Attorney General certifying that, as of the date of such attestation:

(a) The vapor product was on the United States market as of August 8, 2016, and the manufacturer has applied for a marketing order for the vapor product by submitting a Premarket Tobacco Product Application on or before September 9, 2020, to the United States Food and Drug Administration; or

(b) The manufacturer has received a marketing order or other authorization under the 21 USCS Section 387j for the vapor product from the United States Food and Drug Administration.

(2) The manufacturer shall notify the Attorney General within thirty (30) days of any material change to the attestation, including if the United States Food and Drug Administration has issued a market order or other authorization, issued a no marketing order or has ordered the manufacturer to remove the vapor product, either temporarily or permanently, from the United States market.

(3) The Attorney General shall develop a directory, as defined in subsection (1) of this section, and:

(a) On or before September 15, 2021, the Attorney General shall make the directory available for public inspection on its website; and

(b) Shall update the directory as necessary in order to correct mistakes and to add or remove manufacturers or vapor

products to keep the directory in conformity with the requirements of this section.

(4) It shall be unlawful for any person knowingly, directly or indirectly, to manufacture, distribute, sell, barter, or furnish in this state any vapor product that is not included in the directory.

SECTION 12. Section 97-32-21, Mississippi Code of 1972, is amended as follows:

97-32-21. (1) The Office of the Attorney General or local law enforcement agencies shall at least annually conduct random, unannounced inspections at locations where alternative nicotine products, tobacco or tobacco products are sold or distributed to ensure compliance with the Mississippi Juvenile Tobacco Access Prevention Act of 1997. Persons under the age of twenty-one (21) years may be enlisted by the Office of the Attorney General or local law enforcement to test compliance with the Mississippi Juvenile Tobacco Access Prevention Act of 1997, provided that the parent or legal guardian of the person under twenty-one (21) years of age so utilized has given prior written consent for the minor's participation in unannounced inspections. The Office of the Attorney General must prepare a report of the findings, and report these findings to the Department of Health and Department of Mental Health. The Department of Mental Health shall prepare the annual report required by Section 1926, subpart 1 of Part B, Title XIX of the Federal Public Health Service Act (42 USCS 300X-26).

The report shall be approved by the Governor and then promptly transmitted to the Secretary of the United States Department of Health and Human Services.

(2) The Office of the Attorney General shall develop a directory of all manufacturers of vapor products that deliver e-liquids, which have provided attestations that comply with Section 2 of this act.

SECTION 13. This act shall take effect and be in force from and after July 1, 2021.