

CHAPTER 10
FORMERLY
SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 25

AN ACT TO AMEND TITLE 11, TITLE 16, AND TITLE 30 OF THE DELAWARE CODE RELATING TO DELIVERY AND SALES OF TOBACCO PRODUCTS.

WHEREAS, tobacco remains this nation's number 1 preventable cause of premature death and disease, killing more than 480,000 Americans, including 1,400 Delawareans annually; and

WHEREAS, the Institute of Medicine ("IOM"), one of the most prestigious scientific authorities in the United States, concluded in a March 2015 report, "Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products" ("IOM report"), that raising the tobacco sale age to 21 will have a substantial positive impact on public health and save lives through reductions in youth tobacco use initiation; and

WHEREAS, the IOM report is based on a thorough literature review and expert panel consensus; and

WHEREAS, the IOM report finds that raising the tobacco sale age will do all of the following: significantly reduce the number of adolescents and young adults who start smoking; reduce smoking-caused death; and immediately improve the health of adolescents, young adults, and young mothers who would be deterred from smoking; and

WHEREAS, the IOM report further predicts that raising the minimum age for the sale of tobacco products to 21 will, over time, do all of the following: reduce the smoking rate by about 12%; reduce smoking-related deaths by 10%, resulting in 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer, and 4.2 million fewer years of life lost nationwide; and reduce smoking-related health outcomes like low birth weight, pre-term births, and SIDS deaths; and

WHEREAS, 95% of adults who smoke started before age 21; and

WHEREAS, each day, more than 2,500 Americans try their first cigarette and another 580 become new regular, daily smokers; and

WHEREAS, tobacco use is known to cause cancer, heart disease, and respiratory diseases, among other serious health problems; and

WHEREAS, exposure to nicotine can have lasting effects on adolescent brain development; and

WHEREAS, the use of electronic smoking devices, which contain unregulated amounts of nicotine, among minors has recently tripled; and

WHEREAS, the use of cigars by youth recently surpassed the use of cigarettes; and

WHEREAS, the Centers for Disease Control and Prevention estimates that tobacco use costs approximately \$170 billion, including \$532 million for health care costs in Delaware each year, with \$95.6 million in costs to Delaware's Medicaid program.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 1115, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1115. Definitions.

(4) "Proof of age" means a driver's license or other government-issued identification with a photograph of the individual affixed thereon that indicates that the individual is ~~18~~ 21 years old or older.

(9)a. "Tobacco product" means any product that ~~contains tobacco, including, but not limited to, is made from or derived from tobacco or that contains nicotine, including:~~ cigarettes, cigars, pipe tobacco, snuff hookah tobacco, chewing tobacco, snuff, snus, or smokeless tobacco and is intended for human consumption ~~or use, by any means including smoking, heating, chewing, absorbing, dissolving, inhaling, or ingesting.~~

b. "Tobacco product" also means a component or accessory used in the consumption of a tobacco product, including filters, rolling papers, and pipes.

c. "Tobacco product" does not mean a drug, device, or combination product authorized for sale by the United States Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 USCS §§ 301 et seq.).

(11)a. "Tobacco substitute" means ~~any~~ an electronic smoking device employing a mechanical heating element, battery, or circuit, ~~regardless of shape or size, that can be used to deliver nicotine into the body through inhalation and that has not been approved by the United States Food and Drug Administration for tobacco cessation or other medical purposes, or any noncombustible product containing nicotine intended for use in such a device that has not been approved by the United States Food and Drug Administration for tobacco cessation or other medical purposes,~~ circuit to produce aerosol or vapor for inhalation into the body of an individual.

b. "Tobacco substitute" also means liquid used in a device under paragraph (11)a. of this section, including liquids that contain nicotine and liquids that do not contain nicotine.

c. "Tobacco substitute" does not mean a drug, device, or combination product authorized for sale by the United States Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 USCS §§ 301 et seq.).

Section 2. Amend § 1116, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1116. Sale or distribution of tobacco products or tobacco substitutes to ~~minors,~~ individuals under the age of 21 years.

(a) It shall be unlawful for any person to sell or distribute any tobacco product or tobacco substitute to ~~another person~~ an individual who has not attained the age of ~~18~~ 21 years or to purchase any tobacco product or tobacco substitute on behalf of ~~another such person, except that this section shall not apply to the parent or guardian of another such person,~~ an individual under 21 years of age.

(c) A person engaged in the sale or distribution of tobacco products or tobacco substitutes shall demand proof of age from a prospective purchaser or recipient of such products who is under ~~27~~ 30 years of age.

Section 3. Amend § 1117, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1117. Notice.

A person engaged in the sale or distribution of tobacco products or tobacco substitutes shall post conspicuously at each point of purchase and each tobacco vending machine a notice stating that selling tobacco products or tobacco substitutes to anyone under ~~18~~ 21 years of age is illegal, that the purchase of tobacco products or tobacco substitutes by anyone under ~~18~~ 21 years of age is illegal and that a violator is subject to fines. The notice shall also state that all persons selling tobacco products or tobacco substitutes are required, under law, to check the proof of age of any purchaser of tobacco products or tobacco substitutes under the age of ~~27~~ 30 years. The notice shall include a toll-free telephone number to the Department of Safety and Homeland Security for persons to report unlawful sales of tobacco products or tobacco substitutes. The owners of an establishment who fail to post a notice in compliance with this section shall be subject to a fine of \$100.

Section 4. Amend § 1118, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1118. Distribution of ~~samples to minors~~; samples or coupons.

(a) It shall be unlawful for any person to distribute tobacco product or tobacco substitute samples or coupons for subsequent receipt of free or discounted tobacco products or tobacco substitutes to ~~another person~~ an individual who has not attained the age of ~~18~~ 21 years.

Section 5. Amend § 1119, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1119. Distribution of ~~cigarettes~~; tobacco products or tobacco substitutes through vending machines.

(a) It shall be unlawful for any person to distribute or permit the distribution of tobacco products or tobacco substitutes through the operation of a vending machine in a public place, except as provided in subsection (b) of this section.

(b) Pursuant to subsection (a) of this section, a person may distribute or permit the distribution of tobacco products or tobacco substitutes through the operation of a vending machine in a taproom, tavern, tobacco shop or in premises in which ~~a person~~ an individual who has not attained the age of ~~18~~ 21 years is prohibited by law from entering. A tobacco vending machine must be operated a minimum of 25 feet from any entrance to the premises and must be directly visible to the owner or supervisor of the premises.

(c) It shall be unlawful for any person who owns, operates or manages a business establishment where tobacco products or tobacco substitutes are offered for sale over the counter at retail to maintain such products in any display accessible to customers that is not under the control of a cashier or other employee. This prohibition shall not apply to business establishments to which ~~persons~~ individuals under the age of ~~18~~ 21 are not admitted unless accompanied by an adult, tobacco vending machines as permitted under subsection (b) of this section, or tobacco stores. As used in this subsection, "under the control" means customers cannot readily access the tobacco products or tobacco substitutes without the assistance of a cashier or other employee. A display that holds tobacco products or

tobacco substitutes behind locked doors shall be ~~constructed~~ construed as under the control of a cashier or other employee.

Section 6. Amend § 1121, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1121. Penalties.

(a)(1) Notwithstanding any other provision of Delaware law, a person who violates § 1116, § 1118, ~~§ 1119~~ § 1119, or § 1120 of this title ~~shall be~~ regarding an individual who is under 18 years old is guilty of a violation and ~~shall be~~ is fined \$250 for the first ~~offense~~ offense, \$500 for the second ~~offense~~ offense, and \$1,000 for the third and all subsequent offenses.

(2) Notwithstanding any other provision of Delaware law, a person who violates § 1116, § 1118, § 1119, or § 1120 of this title regarding an individual who is at least age 18 years old but less than 21 years old is subject to a civil penalty as follows:

- a. For a first occurrence, fined \$250.
- b. For a second occurrence, fined \$500.
- c. For a third or subsequent occurrence, fined \$1,000.

(3)a. Notwithstanding any other provision of Delaware law, a person who violates § 1116, § 1118, § 1119, or § 1120 of this title is subject to a civil penalty for selling or distributing any of the following:

1. A tobacco substitute that does not contain nicotine.
2. A tobacco product under paragraph § 1115(9)b. of this title.
- b. The civil penalty under paragraph (3)a. of this section is as follows:
 1. For a first occurrence, fined \$250.
 2. For a second occurrence, fined \$500.
 3. For a third or subsequent occurrence, fined \$1,000.

(b) Additionally, and notwithstanding any other provision of Delaware law, in imposing a penalty for a second, ~~third~~ third, or other subsequent offense under this subpart, the court may order the Department of Finance to suspend the defendant's license for sale of tobacco products, issued ~~pursuant to~~ under § 5307 of Title 30, for a period not to exceed 6 months. Upon the suspension of such license, the court shall advise the Department of Finance of the suspension in writing. The holder of the license shall surrender the license to the Department of Finance and no refund of fees ~~shall~~ will be paid. For purposes of this subpart, a subsequent offense is one that occurs within 12 months of a prior like offense.

Section 7. Amend § 1122, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1122. Affirmative defense.

In any prosecution for an offense under this subpart, it shall be an affirmative defense that the purchaser or recipient of tobacco products or tobacco substitutes who had not reached the age of ~~18~~ 21 years presented to the

accused proof of age which set forth information that would lead a reasonable person to believe that such individual was ~~18~~ 21 years of age or older.

Section 8. Amend § 1123, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1123. Liability of employer.

(a) If a sale or distribution of any tobacco product or tobacco substitute or coupon is made in violation of § 1116, § 1118, ~~§ 1119 or~~ § 1119, or § 1120 of this title, the owner, proprietor, franchisee, store manager or other person in charge of the establishment where the violation occurred shall be guilty of the violation and shall be subject to the fine only if the retail licensee has received written notice of the provisions of §§ 1116 through 1121 of this title by the Department of Safety and Homeland Security. For purposes of determining the liability of a person who owns or controls franchises or business operations in multiple locations, for a second or subsequent violation of this subpart, each individual franchise or business location shall be deemed a separate establishment.

(b) Notwithstanding any other provision of this subpart, in any prosecution for a violation of §§ 1116, ~~1118 and 1118~~, or 1120 of this title, the owner, proprietor, franchisee, store manager or other person in charge of the establishment where the alleged violation occurred shall have an affirmative defense if such person or entity can establish that prior to the date of the violation the person or entity:

(1) ~~Had adopted~~ Adopted and enforced a written policy against selling tobacco products or tobacco substitutes to persons under ~~18~~ 21 years of age;

(2) ~~Had informed~~ Informed its employees of the applicable laws regarding the sale of tobacco products or tobacco substitutes to persons under ~~18~~ 21 years of age;

(3) Required employees to sign a form indicating that they have been informed of and understand the written policy required herein;

(4) Required employees to verify the age of tobacco product or tobacco substitute customers by means of photographic identification; and

(5) ~~Had established~~ Established and enforced disciplinary sanctions for noncompliance.

(c) The affirmative defense established in subsection (b) of this section may be used by an owner, proprietor, franchisee, store ~~manager~~ manager, or other person in charge of the establishment no more than ~~twice~~ 1 time at each location within any ~~12 month~~ 36 month period.

Section 9. Amend § 1124, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1124. ~~Purchase or receipt of tobacco products or tobacco substitutes by minors.~~ [Reserved.]

(a) ~~It shall be unlawful for any person who has not attained the age of 18 years to purchase a tobacco product or tobacco substitute, to accept receipt of a sample, to exchange a coupon for a tobacco product or tobacco substitute, or to present or offer to another person a purported proof of age which is false, fraudulent or not actually that person's own proof of age, for the purpose of purchasing or receiving any tobacco product or tobacco substitute or redeeming a coupon for a tobacco product or tobacco substitute.~~

~~(b) A person who violates subsection (a) of this section shall be adjudged delinquent and shall for a first adjudication be fined \$50 or ordered to perform 25 hours of community service work, and for a second adjudication and for all subsequent adjudications be fined \$50 and ordered to perform 50 hours of community service work. A subsequent adjudication of delinquency is one that occurs within 12 months of a prior like offense.~~

Section 10. Amend § 1125, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1125. Unannounced inspections; reporting; enforcement.

(b) ~~Persons~~ An individual under the age of ~~18~~ 21 may be enlisted by the Department of Safety and Homeland Security or its delegates to test compliance with and enforcement of ~~§§ 1116-1120 and 1124~~ §§ 1116 through 1120 and § 1124 of this title, provided however, that ~~such persons~~ the individual may be used only under the direct supervision of the Department of ~~Public Safety,~~ Safety and Homeland Security, its employees or delegates and only where written parental consent has been ~~provided.~~ provided for an individual under the age of 18.

(c) Participation in the inspection and enforcement activities of this section by ~~a person~~ an individual under ~~18~~ 21 years of age shall not constitute a violation of this subpart for the ~~person~~ individual under ~~18~~ 21 years of age, and the ~~person~~ individual under ~~18~~ 21 years of age is immune from prosecution thereunder, or under any other provision of law prohibiting the purchase of these products by ~~a person~~ an individual under ~~18~~ 21 years of age.

(d) The Department of Safety and Homeland Security shall adopt and publish guidelines for the use of ~~persons~~ individuals under ~~18~~ 21 years of age in inspections conducted ~~pursuant to~~ under this section.

Section 11. Amend § 2908, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2908. Vapor establishments.

(b) Any vapor establishment permitted to have emissions produced by electronic smoking devices in such vapor establishment pursuant to this section, and which permits such emissions, shall prohibit anyone under the age of ~~18~~ 21 from entering and shall display a sign at all entrances stating that no one under the age of ~~18~~ 21 is allowed in such vapor establishment.

(c)(1) An employee who is under the age of 21 and who is employed by a vapor establishment on [the effective date of this Act] may continue as an employee of that vapor establishment, if the vapor establishment provides the Division of Alcohol and Tobacco Enforcement with all of the following information:

a. The employee's name.

b. The employee's date of birth.

c. The employer's name.

d. Proof that the employee was employed by the vapor establishment on [the effective date of this Act] by providing any of the following:

1. A paystub.

2. An Internal Revenue Service W-2 tax form.

3. A State UC-8A Quarterly Report.

4. Other documentation of monetary pay to an employee by an employer in return for work performed.

(2) The information required under paragraph (c)(1) of this section must be received by the Division of Alcohol and Tobacco Enforcement no later than 30 days from [the effective date of this Act].

(3) The Division of Alcohol and Tobacco Enforcement shall retain the information provided under this subsection for 3 years.

Section 12. Amend § 5361, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and by redesignating Delaware Code provisions and internal references accordingly:

§ 5361. Definitions.

For purposes of this subchapter:

(1) "Adult" means a person who is at least the legal minimum purchase age.

(3) "Delivery sale" means any sale of any tobacco product or tobacco substitute to a consumer in this State where either:

b. The tobacco products or tobacco substitutes are delivered by use of the mails or of a delivery service.

A sale of any tobacco product or tobacco substitute shall be a delivery sale regardless of whether the seller is located within or without this State. A sale of any tobacco product or tobacco substitute not for personal consumption to a person who is a distributor or a retail dealer shall not be a delivery sale.

(6) "Legal minimum purchase age" is the minimum age at which an individual may legally purchase any tobacco product or tobacco substitute in this ~~State.~~ State under § 1124 of Title 11.

(11) ~~"Tobacco products" means 1 or more cigarettes, herbal cigarettes, bidis, chewing tobacco, powdered tobacco, snuff or any other, noncigar or nonpipe tobacco product.~~ "Tobacco product" means as defined under paragraph § 1115(9)a. of Title 11.

() "Tobacco substitute" means as defined under § 1115 of Title 11."

Section 13. Amend § 5362, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5362. Requirements for delivery sales.

(a) No person shall make a delivery sale of any tobacco product or tobacco substitute to any individual who is under the legal minimum purchase age in this State.

(b) Each person accepting a purchase order for a delivery sale shall comply with:

(6) All other laws of this State generally applicable to sales of any tobacco product or tobacco substitute that occur entirely within this State, including, but not limited to, those laws imposing:

Section 14. Amend § 5363, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5363. Age verification requirements.

(a) No person shall mail, ship or otherwise deliver any tobacco product or tobacco substitute in connection with a delivery sale unless prior to the ~~1st~~ first delivery sale to such consumer:

(1) Receives both a copy of a valid form of government identification showing date of birth to verify the purchaser is age ~~18~~ 21 years or over and an attestation from the purchaser certifying that the information on the government identification truly and correctly identifies the purchaser and the purchaser's current address. Such attestation shall also confirm:

a. That the prospective consumer understands that signing another person's name to such certification is illegal;

b. That the sale of tobacco products, including cigarettes, or tobacco substitutes to individuals under the legal minimum purchase age is illegal; and

c. That the purchase of tobacco products, including cigarettes, or tobacco substitutes by individuals under the legal minimum purchase age is illegal under the laws of this State;

(2) Delivers the tobacco product or tobacco substitute to the address of the purchaser given on the valid form of government identification and by a postal or package delivery service method that either limits delivery to that purchaser and requires the purchaser to sign personally to receive the delivery or requires a signature of an adult at the purchaser's address to deliver the package;

(4) In the case of an order for any tobacco product or tobacco substitute pursuant to an advertisement on the Internet, receives payment for the delivery sale from the prospective consumer by a credit or debit card that has been issued in such consumer's name.

(c) Any wholesale or retail seller of cigars or pipe tobacco shall affirm that the purchaser of said product is ~~18-~~ 21 years of age or older before the time of sale.

Section 15. Amend § 5364, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5364. Disclosure requirements.

The notice required under § 5363(a)(3) of this title shall include:

(1) A prominent and clearly legible statement that any tobacco product or tobacco substitute sales to consumers below the legal minimum purchase age are illegal;

Section 16. Amend § 5365, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5365. Shipping requirements.

(a) Each person who mails, ships or otherwise delivers ~~any a tobacco product product, as defined under § 5301 of this title,~~ in connection with a delivery sale shall become affixing agents as defined ~~by under § 5301 of this title and shall be eligible to receive commissions pursuant to under § 5318 of this title and further shall:~~ title. Each person who mails, ships or otherwise delivers a tobacco product or tobacco substitute, as defined under § 5361 of this title, must do all of the following:

(1) Include as part of the bill of lading or other shipping documents a clear and conspicuous statement providing as follows: "Any Tobacco ~~Product~~ Product or Tobacco Substitute; Delaware Law Prohibits Shipping to Individuals Under ~~18~~, 21, and Requires the Payment of all Applicable Taxes";

(2) Use a method of mailing, shipping or delivery that obligates the delivery service to require:

a. The consumer placing the purchase order for the delivery sale or another adult of legal minimum purchase age residing at the consumer's address, to sign to accept delivery of the shipping container; and

b. Proof, in the form of a valid, government-issued identification bearing a photograph of the individual who signs to accept delivery of the shipping container, demonstrating that the individual is either the addressee or another adult of legal minimum purchase age residing at the consumer's address.

However, proof of the legal minimum purchase age shall be required only if such individual appears to be under ~~27~~, 30 years of age; and

(3) Provide to the delivery service retained for such delivery sale evidence of full compliance with § 5367 of this title.

(b) If the person accepting a purchase order for a delivery sale delivers the any tobacco product or tobacco substitute without using a delivery service, such person shall comply with all requirements of this subchapter applicable to a delivery service and shall be in violation of the provisions of this subchapter if he or she fails to comply with any such requirement.

Section 17. Amend § 5366, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5366. Registration and reporting requirements.

(a) Prior to making delivery sales or mailing, shipping or otherwise delivering any tobacco ~~product~~ product, as defined under § 5301 of this title, in connection with any such sales, every person shall file with the Department a statement setting forth such person's name, trade name and the address of such person's principal place of business and any other place of business.

(b) Not later than the tenth day of each calendar month, each person that has made a delivery sale or mailed, shipped or otherwise delivered any tobacco ~~product~~ product, as defined under § 5301 of this title, in connection with any such sale during the previous calendar month shall file with the Department a memorandum or a copy of the invoice that provides for each and every such delivery sale:

(2) The brand or brands of the any tobacco ~~product~~ product, as defined under § 5301 of this title, that were sold in such delivery sale; and

Section 18. Amend § 5368, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5368. Penalties.

(a) Except as otherwise provided in this section, a first violation of any provision of this subchapter shall be punishable by a fine of \$1,000 or 5 times the retail value of the any tobacco product or tobacco substitute involved, whichever is greater. A second or subsequent violation of any provision of this subchapter shall be punishable by a

fine of \$5,000 or 5 times the retail value of the ~~cigarettes~~ tobacco products or tobacco substitutes involved, whichever is greater.

Section 19. This Act takes effect 90 days after its enactment into law.

Approved April 17, 2019