

2001 ASSEMBLY BILL 805

February 12, 2002 – Introduced by Representatives LIPPERT, URBAN, SUDER, SHILLING, JESKEWITZ, ALBERS, HUNDERTMARK, HINES, MCCORMICK, RYBA, VRAKAS, WASSERMAN, KRAWCZYK, KREIBICH, WALKER, OTT, STASKUNAS, BERCEAU, MILLER, TURNER, UNDERHEIM, LA FAVE and J. LEHMAN, cosponsored by Senators ROBSON, ROESSLER, COWLES and DARLING. Referred to Committee on Public Health.

1 **AN ACT to repeal** 134.66 (2) (d) and 254.916 (4); **to amend** 134.66 (2) (b) 2., 134.66
2 (3) (intro.), 134.66 (4) (a) 1., 134.66 (5), subchapter IX (title) of chapter 254
3 [precedes 254.911], 254.911 (2), 254.916 (1) (b), 254.916 (1) (c), 254.916 (3) (e),
4 254.916 (3) (f) (intro.), 254.916 (5), 254.916 (8) and 254.916 (11); **to repeal and**
5 **recreate** 254.916 (title) and 254.916 (1) (a); and **to create** 134.65 (1m), 134.66
6 (2m), 254.92 (4) and 778.25 (1) (a) 4. of the statutes; **relating to:** investigations
7 to determine compliance with certain prohibitions against selling or giving
8 cigarettes and tobacco products to minors, requiring retailers to provide
9 training to their employees on compliance with those prohibitions, authorizing
10 counties and municipalities to enact ordinances prohibiting minors from
11 purchasing or possessing cigarettes and tobacco products, requiring certain
12 information to be included on an application for a license to sell, expose for sale,
13 possess with intent to sell, exchange, barter, dispose of, or give cigarettes or

ASSEMBLY BILL 805

1 tobacco products to a person, and providing an exemption from rule-making
2 procedures.

Analysis by the Legislative Reference Bureau

Under current law, a person is prohibited from directly or indirectly selling, exposing for sale, possessing with intent to sell, exchanging, bartering, disposing of, or giving cigarettes or tobacco products to any person unless the person is licensed by a city, village, or town clerk.

Under this bill, a city, village, or town clerk may not issue a license to sell, exchange, barter, dispose of, or give away cigarettes or tobacco products unless the applicant specifies in the license application whether the applicant will sell, exchange, barter, dispose of, or give away the cigarette or tobacco products over the counter or in a vending machine, or both.

Current law prohibits a retailer, manufacturer, distributor, jobber, subjobber, or independent contractor, or the agent or employee of any of these persons, from selling or giving cigarettes or tobacco products to a minor unless the minor purchased or possessed the cigarettes or tobacco products in the course of the minor's employment. In addition, these persons are prohibited from giving cigarettes or tobacco products to any person unless the cigarettes or tobacco products are provided in a place where minors are not permitted to enter. Current law authorizes a county, town, city, or village to adopt an ordinance regulating the sale or gift of cigarettes or tobacco products to a minor as long as the ordinance strictly conforms to these statutory prohibitions.

This bill requires a retailer, at the time the retailer hires a new employee whose duties will include the sale of cigarettes or tobacco products, to provide the employee with training in compliance with these prohibitions against the unlawful selling or giving of cigarettes or tobacco products to a minor and the unlawful giving of cigarettes or tobacco products to any person, including the penalties for noncompliance with these prohibitions. That training requirement, however, does not apply to an employee who has received that training as part of a responsible beverage server training course, which is a course offered by a technical college district that a person must successfully complete as a prerequisite for the issuance of any license relating to alcohol beverages. The bill also requires the technical college system board to include the training required under the bill in the curriculum guidelines specified by that board for the responsible beverage server training course.

Under the bill, if an employee who has not received the training required under the bill unlawfully sells or gives cigarettes or tobacco products to a minor or unlawfully gives cigarettes or tobacco products to any person, the department of health and family services (DHFS), a local health department, or a law enforcement agency (governmental regulatory authority) may issue a citation based on that violation only to the retailer that hired the employee and not to the employee. Conversely, if an employee who has received that training unlawfully sells or gives

ASSEMBLY BILL 805

cigarettes or tobacco products to a minor or unlawfully gives cigarettes or tobacco products to any person and a governmental regulatory authority issues a citation to the retailer that hired the employee, the governmental regulatory authority must also issue a citation based on that violation to the employee.

Under current federal law, as a condition of receiving certain substance abuse prevention and treatment block grant funds, this state must prohibit manufacturers, retailers, or distributors of tobacco products from selling or distributing tobacco products to minors, must conduct random unannounced investigations of retail outlets where cigarettes or tobacco products are sold, and must report annually to the federal department of health and human services on these enforcement activities and the success of these activities.

Current law authorizes DHFS to contract with governmental regulatory authorities, as agents of DHFS, to conduct unannounced investigations of retail outlets where cigarettes or tobacco products are sold to survey overall levels of compliance with the prohibitions against selling cigarettes or tobacco products to minors. Current law authorizes governmental regulatory authorities to use, as part of the governmental regulatory authority's unannounced investigations, a minor who is at least 15 years of age to buy, attempt to buy, or possess cigarettes or tobacco products if the minor has the permission of his or her parent or guardian, is directly supervised by an adult employee of the governmental regulatory authority, and has prior written authorization to participate in the investigation from the governmental regulatory authority, authorized agent of the governmental regulatory authority, or district attorney.

Current law also requires that an unannounced investigation comply with standards established by DHFS and meet all of the following requirements:

1. A minor, if asked his or her age during the course of an investigation, must give his or her age.
2. A governmental regulatory authority may not use a minor in an investigation if the minor is a regular customer at the retail outlet that is the subject of the investigation.
3. The appearance of a minor who is used in an investigation may not be materially altered to indicate greater age.
4. A photograph or videotape of the minor must be made on the day of the investigation and, if a prosecution results from the investigation, the governmental regulatory authority must retain the photograph or videotape until the final disposition of the case.
5. If a violation of the prohibition against selling or providing cigarettes or tobacco products to minors occurs during the investigation, the governmental regulatory authority conducting the investigation is required to make a good faith effort to notify a retailer of the violation and to issue a citation, if any, within 72 hours after the investigation.
6. Within ten days after an investigation, the governmental regulatory authority conducting the investigation must report to the retailer the name and position of the governmental regulatory authority employee who supervised the

ASSEMBLY BILL 805

investigation, the age of a minor used in the investigation, the date and time of the investigation, and the results of the investigation.

Finally, with respect to investigations of retail outlets, current law prohibits a governmental regulatory authority from subjecting a retailer to more than two investigations annually unless both of the investigations reveal that the retailer violated the prohibition against selling or giving cigarettes or tobacco products to minors.

This bill permits DHFS or another governmental regulatory authority, without first contracting with DHFS, to conduct unannounced investigations at retail outlets to enforce compliance with the statutory prohibitions against selling or giving cigarettes or tobacco products to minors, or a local ordinance that strictly conforms to the statutory prohibitions. The bill requires that any investigation that is conducted comply with the current statutory requirements for investigations and any standards established by DHFS. The bill also requires a person who contracts to conduct investigations to agree to train all individuals conducting investigations under the contract in accordance with those standards and to suspend from conducting any further investigations for not less than six months an individual who fails to meet those requirements and standards.

In addition, under this bill a governmental regulatory authority may not conduct more than two investigations annually at a retail outlet unless the most recent investigation reveals that the retailer violated the prohibition against selling or giving cigarettes or tobacco products to minors.

Finally, under current law, a minor may not purchase, attempt to purchase, or possess cigarettes or tobacco products except in the course of the minor's employment or in the course of an investigation that is conducted in accordance with the statutory requirements and standards established by DHFS for those investigations. This bill permits a county, city, village, or town to enact an ordinance prohibiting a minor from purchasing, attempting to purchase, or possessing cigarettes or tobacco products as long as the ordinance strictly conforms to those statutory prohibitions.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 134.65 (1m) of the statutes is created to read:
- 2 134.65 **(1m)** A city, village, or town clerk may not issue a license under sub. (1)
- 3 unless the applicant specifies in the license application whether the applicant will
- 4 sell, exchange, barter, dispose of, or give away the cigarette or tobacco products over
- 5 the counter or in a vending machine, or both.

ASSEMBLY BILL 805

1 **SECTION 2.** 134.66 (2) (b) 2. of the statutes is amended to read:

2 134.66 **(2)** (b) 2. A vending machine operator shall attach a notice in a
3 conspicuous place on the front of his or her vending machines stating that the
4 purchase of any cigarette or tobacco product by a person under the age of 18 is
5 unlawful under s. 254.92 and that the purchaser is subject to a forfeiture of ~~not to~~
6 exceed ~~\$25~~ \$50.

7 **SECTION 3.** 134.66 (2) (d) of the statutes is repealed.

8 **SECTION 4.** 134.66 (2m) of the statutes is created to read:

9 134.66 **(2m)** TRAINING. (a) Except as provided in par. (b), at the time a retailer
10 hires or contracts with an agent, employee, or independent contractor whose duties
11 will include the sale of cigarettes or tobacco products, the retailer shall provide the
12 agent, employee, or independent contractor with training on compliance with sub.
13 (2) (a) and (am), including training on the penalties under sub. (4) (a) 2. for a violation
14 of sub. (2) (a) or (am). The department of health and family services shall make
15 available to any retailer on request a training program developed or approved by that
16 department that provides the training required under this paragraph. A retailer
17 may comply with this paragraph by providing the training program developed or
18 approved by the department of health and family services or by providing a
19 comparable training program approved by that department. At the completion of the
20 training, the retailer and the agent, employee, or independent contractor shall sign
21 a form provided by the department of health and family services verifying that the
22 agent, employee, or independent contractor has received the training, which the
23 retailer shall retain in the personnel file of the agent, employee, or independent
24 contractor.

ASSEMBLY BILL 805

1 (b) Paragraph (a) does not apply to an agent, employee, or independent
2 contractor who has received the training described in par. (a) as part of a responsible
3 beverage server training course or a comparable training course, as described in s.
4 125.04 (5) (a) 5., successfully completed by the agent, employee, or independent
5 contractor. The department of health and family services shall make the training
6 program developed or approved by that department under par. (a) available to the
7 technical college system board, and that board shall include that training program
8 or a comparable training program approved by that department in the curriculum
9 guidelines specified by that board under s. 125.04 (5) (a) 5. The department of health
10 and family services shall also make the training program developed or approved by
11 that department under par. (a) available to any provider of a comparable training
12 course, as described in s. 125.04 (5) (a) 5., on request, and the department of revenue
13 or the educational approval board may approve a comparable training course under
14 s. 125.04 (5) (a) 5. only if that training course includes the training program
15 developed or approved by the department of health and family services under par.
16 (a) or a comparable training program approved by that department.

17 (c) If an agent, employee, or independent contractor who has not received the
18 training described in par. (a) commits a violation of sub. (2) (a) or (am), a
19 governmental regulatory authority, as defined in s. 254.911 (2), may issue a citation
20 based on that violation only to the retailer that hired or contracted with the agent,
21 employee, or independent contractor and not to the agent, employee, or independent
22 contractor who has not received that training. If an agent, employee, or independent
23 contractor who has received the training described in par. (a) commits a violation of
24 sub. (2) (a) or (am) for which a governmental regulatory authority issues a citation
25 to the retailer that hired or contracted with the agent, employee, or independent

ASSEMBLY BILL 805

1 contractor, the governmental regulatory authority shall also issue a citation based
2 on that violation to the agent, employee, or independent contractor who has received
3 that training.

4 **SECTION 5.** 134.66 (3) (intro.) of the statutes is amended to read:

5 **134.66 (3)** ~~DEFENSE OF RETAILER, MANUFACTURER AND DISTRIBUTOR; SALE TO MINOR.~~
6 (intro.) Proof of all of the following facts by a retailer, manufacturer ~~or~~, distributor,
7 jobber, or subjobber, an agent, employee, or independent contractor of a retailer,
8 manufacturer, distributor, jobber, or subjobber, or an agent or employee of an
9 independent contractor who sells cigarettes or tobacco products to a person under the
10 age of 18 is a defense to any prosecution for a violation of sub. (2) (a):

11 **SECTION 6.** 134.66 (4) (a) 1. of the statutes is amended to read:

12 **134.66 (4) (a) 1.** In this paragraph, “violation” means a violation of sub. (2) (a),
13 (am), (cm), (d) or (e) or a local ordinance which strictly conforms to sub. (2) (a), (am),
14 (cm), (d) or (e).

15 **SECTION 7.** 134.66 (5) of the statutes is amended to read:

16 **134.66 (5)** A county, town, village, or city may adopt an ordinance regulating
17 the conduct regulated by this section only if it strictly conforms to this section. A
18 county ordinance adopted under this subsection does not apply within any town,
19 village, or city that has adopted or adopts an ordinance under this subsection. If a
20 county, town, village, or city conducts unannounced investigations of retail outlets,
21 as defined in s. 254.911 (5), to determine compliance with an ordinance adopted
22 under this subsection, as authorized under s. 254.916 (1), the investigations shall
23 meet the requirements of s. 254.916 (3) (a) to (f) and any standards established by
24 the department of health and family services under s. 254.916 (1) (b).

ASSEMBLY BILL 805

1 conducting investigations under the contract in accordance with the standards
2 established under par. (b) and to suspend from conducting any further investigations
3 for not less than 6 months any individual who fails to meet the requirements of sub.
4 (3) (a) to (f) and the standards established by the department.

5 **SECTION 12.** 254.916 (1) (b) of the statutes is amended to read:

6 254.916 (1) (b) The department, in consultation with ~~retailers and other~~
7 governmental regulatory authorities and with retailers, shall establish standards
8 for procedures and training for conducting investigations under this section.

9 **SECTION 13.** 254.916 (1) (c) of the statutes is amended to read:

10 254.916 (1) (c) No retailer may be ~~subject to unannounced investigations~~
11 subjected to an unannounced investigation more than twice annually unless the
12 retailer is found to have violated s. 134.66 (2) (a) or (am), or a local ordinance adopted
13 under s. 134.66 (5), during each the most recent investigation.

14 **SECTION 14.** 254.916 (3) (e) of the statutes is amended to read:

15 254.916 (3) (e) A governmental regulatory authority shall make a good faith
16 effort to make known to the retailer or the retailer's employee or agent, within 72
17 hours after the occurrence of the violation, the results of an investigation, including
18 the issuance of any citation by a governmental regulatory authority for a violation
19 that occurs during the conduct of the investigation. This paragraph does not apply
20 to investigations conducted under a grant received under ~~42 USC 300x-021~~ 42 USC
21 300x-21.

22 **SECTION 15.** 254.916 (3) (f) (intro.) of the statutes is amended to read:

23 254.916 (3) (f) (intro.) Except with respect to investigations conducted under
24 ~~42 USC 300x-021 or 21 CFR part 897~~ a grant received under 42 USC 300x-21, all

ASSEMBLY BILL 805

1 of the following information shall be reported to the retailer within 10 days after the
2 conduct of an investigation under this section:

3 **SECTION 16.** 254.916 (4) of the statutes is repealed.

4 **SECTION 17.** 254.916 (5) of the statutes is amended to read:

5 254.916 (5) No evidence obtained during or otherwise arising from the course
6 of an investigation under this section that is used to prosecute a person for a violation
7 of s. 134.66 (2) (a) or (am) or a local ordinance adopted under s. 134.66 (5) may be used
8 in the prosecution of an alleged violation of s. 125.07 (3).

9 **SECTION 18.** 254.916 (8) of the statutes is amended to read:

10 254.916 (8) A governmental regulatory agency that conducts an investigation
11 under this section shall meet the requirements of sub. (3) (a) to (f) and the standards
12 established by the department of health and family services. ~~The department shall~~
13 ~~annually evaluate the investigation program of each governmental regulatory~~
14 ~~authority. If, at any time, a governmental regulatory authority fails to meet the~~
15 ~~standards, the department of health and family services may terminate the contract~~
16 ~~under sub. (1).~~

17 **SECTION 19.** 254.916 (11) of the statutes is amended to read:

18 254.916 (11) ~~The department shall hold a hearing under ch. 227 if any~~
19 ~~interested person, in lieu of proceeding under ch. 68, appeals to the department~~
20 ~~alleging that the A person making~~ conducting ~~an investigation of the appellant has~~
21 under this section may not have a financial interest in a regulated cigarette and
22 tobacco product retailer, a tobacco vending machine operator, a tobacco vending
23 machine premises or, or a tobacco vending machine that may interfere with his or her
24 ability to properly take that action ~~conduct that investigation.~~ A person who is
25 investigated under this section may request the local health department or local law

ASSEMBLY BILL 805

1 enforcement agency that contracted for the investigation to conduct a review under
2 ch. 68 to determine whether the person conducting the investigation is in compliance
3 with this subsection or, if applicable, may request the state agency or state law
4 enforcement agency that contracted for the investigation to conduct a contested case
5 hearing under ch. 227 to make that determination. The results of an investigation
6 that is conducted by a person who is not in compliance with this subsection may not
7 be used to prosecute a violation of s. 134.66 (2) (a) or (am) or a local ordinance adopted
8 under s. 134.66 (5).

9 **SECTION 20.** 254.92 (4) of the statutes is created to read:

10 254.92 (4) A county, town, village, or city may enact an ordinance regulating
11 the conduct regulated by this section only if the ordinance strictly conforms to this
12 section. A county ordinance enacted under this subsection does not apply within a
13 town, village, or city that has enacted or enacts an ordinance under this subsection.

14 **SECTION 21.** 778.25 (1) (a) 4. of the statutes is created to read:

15 778.25 (1) (a) 4. Under s. 254.92 or under a local ordinance strictly conforming
16 to s. 254.92 brought against an adult in circuit court or against a minor in the court
17 assigned to exercise jurisdiction under chs. 48 and 938.

18 **SECTION 22. Nonstatutory provisions.**

19 (1) COMPLIANCE TRAINING PROGRAM DEVELOPMENT. By the first day of the 3rd
20 month beginning after the effective date of this subsection, the department of health
21 and family services shall develop or approve the training program, and shall develop
22 the form, required under section 134.66 (2m) (a) of the statutes, as created by this
23 act. Notwithstanding section 227.10 (1) of the statutes, the department of health and
24 family services is not required to promulgate that training program or form as rules.

