2017 ASSEMBLY BILL 359

June 1, 2017 - Introduced by Representatives OTT, MURPHY, BERNIER, BRANDTJEN, R. BROOKS, DUCHOW, GANNON, HUTTON, JACQUE, KATSMA, KLEEPSCH, KOOYENGA, KREMER, SKOWRONSKI and TIESFELD, cosponsored by Senators VUKMIR, CRAIG, CARPENTER, COWLES, DARLING, KAPENGA and STROEBEL. Referred to Committee on Small Business Development.

AN ACT to amend 100.30 (2) (am) 2., 100.30 (2) (c) 2., 100.30 (3) and 134.04 (1); and to create 100.30 (2) (ck) and 100.30 (6) (a) 10. of the statutes; relating to: regulating the sale of prescription drugs and other merchandise below cost.

Analysis by the Legislative Reference Bureau

This bill eliminates the prohibition on selling prescription drugs and certain types of merchandise at below cost under the Unfair Sales Act.

This state’s Unfair Sales Act, also known as the “minimum markup” law, prohibits retailers and wholesalers from selling merchandise for less than the cost of the merchandise to the seller, if the below-cost sale is intended to induce the purchase of other merchandise or divert trade unfairly from a competitor. In addition, current law requires a retailer or wholesaler of motor vehicle fuel, tobacco products, fermented malt beverages, liquor, or wine to sell those items for a specified amount more than the cost of the merchandise to the retailer or wholesaler to cover a portion of the cost of doing business. Current law does not require such a minimum markup for sales of prescription drugs. The prohibition on below-cost sales and the minimum markup requirements do not apply to merchandise that is sold in clearance sales, damaged merchandise, merchandise at risk of spoiling, and merchandise that is priced in good faith to meet the existing price of a competitor.

This bill eliminates the prohibition on retailers and wholesalers selling prescription drugs for less than the cost of those items to the seller. The bill also eliminates the prohibition on retailers and wholesalers selling merchandise, other than motor vehicle fuel, tobacco products, fermented malt beverages, liquor, or wine,
or groceries, for less than the cost of the merchandise to the seller. The bill does not affect the prohibition on below-cost sales of motor vehicle fuel, tobacco products, fermented malt beverages, liquor, or wine, or groceries. The bill also does not affect the minimum markup requirements for sales of motor vehicle fuel, tobacco products, fermented malt beverages, liquor, or wine.

For further information see the state 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:

SECTION 1. 100.30 (2) (am) 2. of the statutes is amended to read:

100.30 (2) (am) 2. With respect to the sale of merchandise other than cigarettes or other tobacco products, fermented malt beverages, intoxicating liquor or wine, or motor vehicle fuel groceries, “cost to retailer” means the invoice cost of the merchandise to the retailer, or replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on such merchandise or the sale thereof other than excise taxes collected by the retailer, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth.

SECTION 2. 100.30 (2) (c) 2. of the statutes is amended to read:

100.30 (2) (c) 2. With respect to the sale of merchandise other than cigarettes or other tobacco products, fermented malt beverages, intoxicating liquor or wine, or motor vehicle fuel groceries, “cost to wholesaler” means the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on the sale thereof prior to the sale at retail, and any cost incurred for transportation and any other charges not otherwise
included in the invoice cost or the replacement cost of the merchandise as herein set forth.

**SECTION 3.** 100.30 (2) (ck) of the statutes is created to read:

100.30 (2) (ck) “Groceries” means food or beverage items, other than fermented malt beverages or intoxicating liquor or wine.

**SECTION 4.** 100.30 (3) of the statutes is amended to read:

100.30 (3) **Illegality of Loss Leaders.** Any sale of any item of merchandise either cigarettes or other tobacco products, fermented malt beverages, intoxicating liquor or wine, motor vehicle fuel, or groceries by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited. Evidence of any sale of any item of merchandise cigarettes or other tobacco products, fermented malt beverages, intoxicating liquor or wine, motor vehicle fuel, or groceries by any retailer, wholesaler, wholesaler of motor vehicle fuel or refiner at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

**SECTION 5.** 100.30 (6) (a) 10. of the statutes is created to read:

100.30 (6) (a) 10. The merchandise sold is a prescription drug, as defined in s. 450.01 (20).

**SECTION 6.** 134.04 (1) of the statutes is amended to read:

134.04 (1) No person, firm or corporation engaged in any enterprise in this state shall by any method or procedure directly or indirectly by itself or through a
subsidiary agency owned or controlled in whole or in part by such person, firm or
corporation, sell or procure for sale or have in its possession or under its control for
sale to its employees or any person any article, material, product or merchandise of
whatsoever nature not of the person’s, firm’s or corporation’s production or not
handled in the person’s, firm’s or corporation’s regular course of trade, excepting
meals, candy bars, cigarettes and tobacco for the exclusive use and consumption of
such employees of the employer, and excepting tools used by employees in said
enterprise and such specialized appliances and paraphernalia as may be required in
said enterprise for the employees’ safety or health and articles used by employees or
other persons which insure better sanitary conditions and quality in the
manufacture of food or food products. The provisions of this subsection shall not
apply to lumber producers, loggers and dealers nor to any cooperative association
organized under ch. 185 or 193. This section shall not be construed as authorizing
the sale of cigarettes or other tobacco products, fermented malt
beverages, intoxicating liquor or wine, motor vehicle fuel, or groceries at less than
cost as defined in s. 100.30.