

House Bill 2233

Sponsored by Representative GREENLICK (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Directs State Board of Pharmacy to adopt rules making nicotine Schedule III controlled substance. Provides for phase-in of penalties by board.

Creates crime of unlawful possession of nicotine, effective until rules adopted. Punishes by maximum of one year's imprisonment, \$6,250 fine, or both.

Creates crime of unlawful distribution of nicotine, effective until rules adopted. Punishes by maximum of one year's imprisonment, \$6,250 fine, or both.

A BILL FOR AN ACT

1
2 Relating to tobacco; creating new provisions; amending ORS 163.575, 163.580, 323.709, 339.883,
3 431.853, 433.835, 475.035, 476.755, 809.380 and 809.423; and repealing ORS 167.400, 167.401,
4 167.402, 167.404, 167.407, 431.840, 431.845 and 431.850.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1. (1)(a) Notwithstanding ORS 475.045, the State Board of Pharmacy may not**
7 **adopt rules that exempt a product containing nicotine from classification as a controlled**
8 **substance.**

9 **(b) The board shall adopt rules to classify nicotine as a Schedule III controlled substance.**

10 **(2) Records of transactions involving products containing nicotine are subject to in-**
11 **spection by the board and law enforcement agencies. A person required to make or maintain**
12 **records of transactions involving products containing nicotine shall forward the records to**
13 **the Department of State Police if directed to do so by the department. Failure to forward**
14 **records as required is a Class A misdemeanor.**

15 **SECTION 2. No later than July 1, 2012, the State Board of Pharmacy shall make amend-**
16 **ments to the board's administrative rules that are necessary to bring the rules into compli-**
17 **ance with section 1 of this 2011 Act. The board shall provide that rules or amendments to**
18 **rules required by this section take effect on July 1, 2012.**

19 **SECTION 3. For the period beginning on the effective date of this 2011 Act and ending**
20 **on the date the rules required by section 2 of this 2011 Act take effect:**

21 **(1) The State Board of Pharmacy may adopt rules placing requirements and limitations**
22 **on the sale or transfer of products containing nicotine.**

23 **(2) If the board requires a person who sells or transfers products containing nicotine to**
24 **make or maintain records relating to the sale or transfer, the records are subject to in-**
25 **spection by the board and law enforcement agencies. A person required to make or maintain**
26 **records pursuant to rules adopted under this section shall forward the records to the De-**
27 **partment of State Police if directed to do so by the department. Failure to make or maintain**
28 **records required by rules adopted under this section or to forward records as required by**
29 **this subsection is a Class A misdemeanor.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 **(3) Notwithstanding subsection (1) of this section, the board may not require a licensed**
 2 **veterinarian or physician or other licensed health care practitioner authorized to prescribe**
 3 **nicotine to make or maintain a record of the sale or transfer of products containing nicotine**
 4 **if the veterinarian, physician or other health care practitioner makes and maintains a record**
 5 **of the sale or transfer under other applicable laws or rules regarding prescribing and dis-**
 6 **persing regulated or controlled substances by veterinarians, physicians and other health care**
 7 **practitioners.**

8 **(4)(a) Except as otherwise provided in paragraphs (b) and (c) of this subsection, a person**
 9 **commits the crime of unlawful possession of nicotine if the person knowingly possesses more**
 10 **than 0.1 milligram of nicotine.**

11 **(b) Paragraph (a) of this subsection does not apply to a person who possesses nicotine**
 12 **obtained directly from or pursuant to a valid prescription or order issued by a practitioner**
 13 **as defined in ORS 475.005 while acting in the course of professional practice.**

14 **(c) Paragraph (a) of this subsection does not apply to a veterinarian, physician,**
 15 **pharmacist, retail distributor, wholesaler, manufacturer, warehouse operator or common**
 16 **carrier or an agent of any of these persons if the possession is in the regular course of lawful**
 17 **business activities.**

18 **(d) Unlawful possession of nicotine is a Class A misdemeanor.**

19 **(5)(a) A person commits the crime of unlawful distribution of nicotine if the person sells**
 20 **or otherwise transfers nicotine:**

21 **(A) In violation of a rule of the board; or**

22 **(B) To a person other than:**

23 **(i) A person with a valid prescription or order for nicotine issued by a practitioner as**
 24 **defined in ORS 475.005 while acting in the course of professional practice; or**

25 **(ii) A veterinarian, physician, pharmacist, retail distributor, wholesaler, manufacturer,**
 26 **warehouse operator or common carrier or an agent of any of these persons in the regular**
 27 **course of lawful business activities.**

28 **(b) Unlawful distribution of nicotine is a Class A misdemeanor.**

29 **SECTION 4. It is an affirmative defense to a charge of violating ORS 475.840 by possess-**
 30 **ing nicotine that the person obtained the nicotine directly from or pursuant to a valid pre-**
 31 **scription or order issued by a practitioner as defined in ORS 475.005 while acting in the**
 32 **course of professional practice.**

33 **SECTION 5. ORS 475.035 is amended to read:**

34 475.035. (1) In arriving at any decision on changes in or addition to classification when changes
 35 or additions are proposed by the federal Drug Enforcement Administration or by any other reliable
 36 source, the State Board of Pharmacy shall review the scientific knowledge available regarding the
 37 substance, its pharmacological effects, patterns of use and misuse, and potential consequences of
 38 abuse, and consider the judgment of individuals with training and experience with the substance.

39 (2) Whenever the board determines that a change in or an addition to the schedule of a con-
 40 trolled substance is justified, the board by rule may order the change and fix the effective date
 41 thereof.

42 (3) If a substance is an ingredient of a controlled substance, the ingredient shall be considered
 43 to be in the same schedule as that controlled substance. Substances which are precursors of the
 44 ingredient shall not be subject to control solely because they are precursors of the ingredient. The
 45 use of the term "precursor" in this subsection does not control and is not controlled by the use of

1 the term “precursor” in ORS 475.840 to 475.980.

2 (4) The board shall administer ORS 475.005 to 475.285 and 475.840 to 475.980 in accordance with
3 ORS chapter 183.

4 (5) Authority to control under this section does not extend *[to tobacco or]* to alcoholic beverages
5 as defined in ORS 471.001.

6 **SECTION 6.** ORS 163.575 is amended to read:

7 163.575. (1) A person commits the crime of endangering the welfare of a minor if the person
8 knowingly:

9 (a) Induces, causes or permits an unmarried person under 18 years of age to witness an act of
10 sexual conduct or sadomasochistic abuse as defined by ORS 167.060; *[or]*

11 (b) Permits a person under 18 years of age to enter or remain in a place where unlawful activity
12 involving controlled substances is maintained or conducted; *[or]*

13 (c) Induces, causes or permits a person under 18 years of age to participate in gambling as de-
14 fined by ORS 167.117; or

15 *[(d) Distributes, sells, or causes to be sold, tobacco in any form to a person under 18 years of age;*
16 *or]*

17 *[(e)]* (d) Sells to a person under 18 years of age any device in which tobacco, marijuana, cocaine
18 or any controlled substance, as defined in ORS 475.005, is burned and the principal design and use
19 of which is directly or indirectly to deliver tobacco smoke, marijuana smoke, cocaine smoke or
20 smoke from any controlled substance into the human body including but not limited to:

21 (A) Pipes, water pipes, hookahs, wooden pipes, carburetor pipes, electric pipes, air driven pipes,
22 corn cob pipes, meerschaum pipes and ceramic pipes, with or without screens, permanent screens,
23 hashish heads or punctured metal bowls;

24 (B) Carburetion tubes and devices, including carburetion masks;

25 (C) Bonges;

26 (D) Chillums;

27 (E) Ice pipes or chillers;

28 (F) Cigarette rolling papers and rolling machines; and

29 (G) Cocaine free basing kits.

30 (2) Endangering the welfare of a minor *[by violation of subsection (1)(a), (b), (c) or (e) of this*
31 *section, involving other than a device for smoking tobacco,]* is a Class A misdemeanor.

32 *[(3) Endangering the welfare of a minor by violation of subsection (1)(d) of this section or by vio-*
33 *lation of subsection (1)(e) of this section, involving a device for smoking tobacco, is a Class A violation*
34 *and the court shall impose a fine of not less than \$100.]*

35 **SECTION 7.** ORS 433.835 is amended to read:

36 433.835. As used in ORS 433.835 to 433.875:

37 (1) “Cigar bar” means a business that:

38 *[(a) Has on-site sales of cigars as defined in ORS 323.500;]*

39 *[(b)]* (a) Has a humidor on the premises;

40 *[(c)]* (b) Allows the smoking of cigars on the premises but prohibits the smoking of all other
41 tobacco products in any form including, but not limited to, loose tobacco, pipe tobacco, cigarettes
42 as defined in ORS 323.010 and cigarillos as defined by the Oregon Health Authority by rule;

43 *[(d)]* (c) Has been issued and operates under a full on-premises sales license issued under ORS
44 471.175;

45 *[(e)]* (d) Prohibits persons under 21 years of age from entering the premises and posts notice of

1 the prohibition;

2 [(f)] (e) Does not offer video lottery games as authorized under ORS 461.217;

3 [(g)] (f) Has a maximum seating capacity of 40 persons;

4 [(h)] (g) Has a ventilation system that is certified by the assistant to the State Fire Marshal
5 described in ORS 476.060 for the jurisdiction in which the cigar bar is located as adequate to remove
6 the cigar smoke in the cigar bar and vents the smoke from the cigar bar in a manner that prevents
7 the smoke from entering any other establishment; and

8 [(i)] (h) Requires all employees to read and sign a document that explains the dangers of expo-
9 sure to secondhand smoke.

10 (2) "Enclosed area" means all space between a floor and a ceiling that is enclosed on three or
11 more sides by permanent or temporary walls or windows, exclusive of doors or passageways, that
12 extend from the floor to the ceiling.

13 (3) "Place of employment" means every enclosed area under the control of a public or private
14 employer that employees frequent during the course of employment, including but not limited to
15 work areas, employee lounges, vehicles that are operated in the course of an employer's business
16 that are not operated exclusively by one employee, rest rooms, conference rooms, classrooms, cafe-
17 terias, hallways, meeting rooms, elevators and stairways. "Place of employment" does not include a
18 private residence unless it is used as a child care facility as defined in ORS 657A.250 or a facility
19 providing adult day care as defined in ORS 410.490.

20 (4) "Public place" means any enclosed area open to the public.

21 (5) "Smoke shop" means a business that:

22 (a) Is primarily engaged in the sale of [*tobacco products and*] smoking instruments, with at least
23 75 percent of the gross revenues of the business resulting from such sales;

24 (b) Prohibits persons under 18 years of age from entering the premises;

25 (c) Does not offer video lottery games as authorized under ORS 461.217, social gaming or betting
26 on the premises;

27 (d) Does not sell or offer on-premises consumption of alcoholic beverages; and

28 (e) Is a stand-alone business with no other businesses or residential property attached to the
29 premises.

30 (6) "Smoking instrument" means any cigar, cigarette, pipe or other smoking equipment.

31 **SECTION 8.** ORS 476.755 is amended to read:

32 476.755. As used in ORS 476.755 to 476.790 and 476.995:

33 (1) "Cigarette" means a roll for smoking:

34 (a) That is made wholly of tobacco, or of tobacco and any other substance, regardless of size,
35 shape or flavoring or adulteration by or mixing with other ingredients, the wrapper of which is made
36 of paper or other nontobacco materials; and

37 (b) That, because of its appearance, the type of tobacco used in the filler or its packaging and
38 labeling, is likely to be offered to or purchased by consumers as a cigarette.

39 (2) "Distribute" means to do any of the following:

40 (a) Sell cigarettes or deliver cigarettes for sale by another person to consumers.

41 (b) Receive or retain more than 199 cigarettes at a place of business where the person receiving
42 or retaining the cigarettes customarily sells cigarettes or offers cigarettes for sale to consumers.

43 [(c) *Place cigarettes in vending machines.*]

44 [(d)] (c) Sell or accept orders for cigarettes that are to be transported from a point outside this
45 state to a consumer within this state.

1 [(e)] (d) Buy cigarettes directly from a manufacturer or wholesale dealer for resale in this state.

2 [(f) Give cigarettes as a sample, prize, gift or other promotion.]

3 (3) "Manufacturer" means:

4 (a) An entity that produces, or causes the production of, cigarettes for sale in this state;

5 (b) An importer or first purchaser of cigarettes that intends to resell within this state cigarettes
6 that were produced for sale outside this state; or

7 (c) A successor to an entity, importer or first purchaser described in paragraph (a) or (b) of this
8 subsection.

9 (4) "Packaging" includes, but is not limited to, cigarette soft packs, boxes, cartons and cases.

10 (5) "Quality control and assurance program" means laboratory procedures implemented to en-
11 sure that operator bias, systematic and nonsystematic methodological errors and equipment-related
12 problems do not affect the results of testing.

13 (6) "Reduced ignition propensity" means meeting the fire safety performance standard described
14 in ORS 476.770 (6).

15 (7) "Repeatability" means the range of values within which the repeat results of ignition pro-
16 pensity testing by a single laboratory will fall 95 percent of the time.

17 (8) "Retail dealer" means a person, other than a manufacturer or wholesale dealer, that engages
18 in distributing cigarettes.

19 (9) "Sell" means to transfer, or agree to transfer, title or possession for a monetary or non-
20 monetary consideration.

21 (10) "Variety" means a type of cigarette marketed by the manufacturer as being distinct from
22 other types of cigarettes on the basis of brand name, length, filter, wrapping, flavoring or other
23 characteristics as the State Fire Marshal may provide by rule.

24 (11) "Wholesale dealer" means a person that distributes cigarettes to[:]

25 [(a)] a retail dealer or other person for resale[: or]

26 [(b) A person that owns, operates or maintains cigarette vending machines on premises owned or
27 operated by another person].

28 **SECTION 9.** ORS 431.853 is amended to read:

29 431.853. (1) The Oregon Health Authority shall:

30 (a) Coordinate with law enforcement agencies to conduct random, unannounced inspections of
31 Oregon wholesalers and retailers of tobacco products to [*insure*] **ensure** compliance with Oregon
32 laws designed to discourage the use of tobacco by minors including ORS 163.575[,] **and** 163.580[,
33 167.400, 167.402 and 431.840]; and

34 (b) Submit a report describing:

35 (A) The activities carried out to enforce the laws listed in paragraph (a) of this subsection
36 during the previous fiscal year;

37 (B) The extent of success achieved in reducing the availability of tobacco products to minors;
38 and

39 (C) The strategies to be utilized for enforcing the laws listed in paragraph (a) of this subsection
40 during the year following the report.

41 (2) The Oregon Health Authority shall adopt rules concerning random inspections of places that
42 sell tobacco products consistent with section 1921, Public Law 102-321, 1992. The rules shall provide
43 that inspections may take place:

44 (a) Only in areas open to the public;

45 (b) Only during hours that tobacco products are sold or distributed; and

1 (c) No more frequently than once a month in any single establishment unless a compliance
2 problem exists or is suspected.

3 **SECTION 10.** ORS 809.423 is amended to read:

4 809.423. (1) Upon request by a school superintendent or a school district board under ORS
5 339.254, the Department of Transportation shall suspend the driving privileges of a person. The
6 suspension shall be for the amount of time stated in the request. A person is entitled to adminis-
7 trative review under ORS 809.440 of a suspension under this subsection.

8 *[(2) Upon receipt of notification of a court order that a person's driving privileges be suspended for*
9 *violation of ORS 167.401, the department shall suspend the driving privileges of the person subject to*
10 *the order for the time specified in the order. A person is entitled to administrative review under ORS*
11 *809.440 of a suspension under this subsection.]*

12 *[(3)]* (2) Upon receipt of a notice under ORS 339.257 that a person under 18 years of age has
13 withdrawn from school, the department shall notify the person that driving privileges will be sus-
14 pended on the 30th day following the date of the notice unless the person presents documentation
15 that complies with ORS 807.066. A suspension under this subsection shall continue until the person
16 reaches 18 years of age or until the person presents documentation that complies with ORS 807.066.
17 Appeals of a suspension under this subsection shall be as provided by a school district or private
18 school under a policy adopted in accordance with ORS 339.257.

19 **SECTION 11.** ORS 809.380 is amended to read:

20 809.380. All of the following apply to a person whose driving privileges have been suspended:

21 (1) The period of suspension shall last as long as provided for that particular suspension by law.

22 (2) During the period of suspension, the person is not entitled to exercise any driving privileges
23 in this state except as provided under this subsection. Unless otherwise specifically provided by law,
24 a person whose driving privileges are suspended may obtain, if the person qualifies, a hardship
25 driver permit under ORS 807.240, and exercise driving privileges under the driver permit.

26 (3) Upon expiration of the suspension, the Department of Transportation shall reissue, upon re-
27 quest of the person, the suspended driving privileges and any license or driver permit that evidences
28 the driving privileges. The reissuance shall be without requalification by the person except that the
29 department may require the person to furnish evidence satisfactory to the department that the per-
30 son is qualified to continue to exercise driving privileges in this state before the department reissues
31 the driving privileges.

32 (4) The department may not issue any driving privileges in contradiction to this section.

33 (5) If the person fails to surrender to the department any license or driver permit issued as ev-
34 idence of driving privileges that are suspended, the person is subject to the penalties under ORS
35 809.500.

36 (6) No reinstatement of suspended driving privileges will be made by the department until the
37 fee for reinstatement of suspended driving privileges established under ORS 807.370 is paid to or
38 waived by the department. The department may waive the reinstatement fee for any of the following
39 reasons:

40 (a) The suspension occurred under ORS 809.419 for failure to take an examination upon request
41 of the department under ORS 807.340.

42 (b) The suspension occurred under ORS 809.419 for failure to obtain required medical clearance
43 upon request of the department under ORS 807.070 or 807.090.

44 (c) The suspension occurred under ORS 809.419 for incompetence to drive a motor vehicle or
45 having a mental or physical condition or impairment that affects the person's ability to safely op-

1 erate a motor vehicle.

2 (d) The suspension occurred under ORS 809.419 upon notification by the superintendent of a
3 hospital under ORS 807.700 that a person should not drive.

4 (e) The suspension occurred under ORS 809.419 upon notification by a court under ORS 810.375
5 that a person charged with a traffic offense has been found guilty except for insanity.

6 (f) The department committed an error in issuing the suspension.

7 (g) The suspension was the result of an error committed by an insurance company in issuing or
8 failing to issue a certification of insurance or in canceling a certification of insurance filed with the
9 department under ORS 806.270.

10 (h) The department issued the suspension without error because the person failed to respond as
11 required under ORS 806.160 or to furnish proof of exemption under ORS 806.210 from the filing re-
12 quirement of ORS 806.200, but the department later determines that the person in fact was in com-
13 pliance with financial responsibility requirements as of the date of the department's letter of
14 verification under ORS 806.150 or at the time of an accident described in ORS 806.200.

15 (i) The department issued the suspension without error because the person was not in compli-
16 ance with financial responsibility requirements as of the date of the department's letter of verifica-
17 tion under ORS 806.150 or at the time of an accident described in ORS 806.200, but the department
18 later determines that the person reasonably and in good faith believed that the person was in com-
19 pliance with financial responsibility requirements on the date of the department's letter of verifica-
20 tion or at the time of the accident.

21 (j) The suspension was the result of an error committed by an insurance company in notifying
22 the department regarding the correctness of a certification under ORS 806.150.

23 (k) The suspension occurred because the person failed to make future responsibility filings but
24 the department later determines that the reason for the failure was that the person was a military
25 reservist or a member of a national guard unit that was ordered to active military duty to a location
26 outside of the United States. The effective date of the military orders must be prior to the effective
27 date of a suspension issued by the department for failure to make a future responsibility filing.

28 (L) The department issued the suspension without error because the department received a no-
29 tice to suspend from a court under ORS 809.210 or 809.220, but the department later determines that
30 the person in fact was in compliance with the requirements of the court prior to the effective date
31 of the suspension.

32 (7) The department shall waive the reinstatement fee for a person whose driving privileges were
33 suspended under ORS 809.423 [(3)] (2) if the person:

34 (a) Has graduated from high school and provides the department with proof of graduation sat-
35 isfactory to the department; or

36 (b) Has received a General Educational Development (GED) certificate from a community col-
37 lege and provides the department with proof of the certificate satisfactory to the department.

38 **SECTION 12.** ORS 163.580 is amended to read:

39 163.580. (1) Any person who sells any of the smoking devices listed in ORS 163.575 [(1)(e)] (1)(d)
40 shall display a sign clearly stating that the sale of such devices to persons under 18 years of age
41 is prohibited by law.

42 (2) Any person who violates this section commits a Class B violation.

43 **SECTION 13.** ORS 323.709 is amended to read:

44 323.709. A person may not mail or ship tobacco in connection with a delivery sale order unless
45 the person, before mailing or shipping the tobacco, does all of the following:

1 (1) Obtains a certification from the prospective consumer that includes a written statement
2 signed by the prospective consumer that:

3 (a) Certifies the prospective consumer's address and that the prospective consumer is at least
4 the legal minimum purchase age; and

5 (b) Confirms that the prospective consumer understands that signing another person's name to
6 the certification is illegal[, *that the sale of tobacco to individuals under the legal minimum purchase*
7 *age is illegal and that the purchase of tobacco by individuals under the legal minimum purchase age*
8 *is illegal under ORS 167.401*];

9 (2) Verifies the information contained in the certification against a commercially available da-
10 tabase of government-collected information showing the age or date of birth of the individual placing
11 the order and obtains a photocopy or other image of a valid, government-issued identification stating
12 the age or date of birth of the individual placing the order;

13 (3) Provides a notice to the prospective consumer, via electronic mail or other means, that meets
14 the requirements of ORS 323.715; and

15 (4) In the case of an order for tobacco placed through an Internet website, receives payment for
16 the delivery sale from the prospective purchaser by a credit or debit card that has been issued in
17 the name of the prospective purchaser or by a personal check issued by the prospective purchaser.

18 **SECTION 14.** ORS 339.883 is amended to read:

19 339.883. (1) A facility shall not permit any person under 18 years of age to possess tobacco
20 products[, *as defined in ORS 431.840,*] while the person is present on facility grounds or in facility
21 buildings or attending facility-sponsored activities.

22 (2) The facility must have written policies prohibiting the possession of tobacco products de-
23 scribed in subsection (1) of this section by persons under 18 years of age. The facility must have
24 written plans to implement such policies.

25 (3) This section does not apply to any person for whom a tobacco or nicotine product has been
26 lawfully prescribed.

27 (4) As used in this section, "facility" means public or private schools, youth correction facilities
28 or juvenile detention facilities. "Facility" does not include colleges or universities, career and
29 technical education schools or community colleges.

30 **SECTION 15.** ORS 167.400, 167.401, 167.402, 167.404, 167.407, 431.840, 431.845 and 431.850 are
31 **repealed.**

32