

The Tobacco Control Act

What Retailers Need to Know

EXCERPTS FROM THE TOBACCO CONTROL ACT

- 20** (1) Every person who contravenes a provision of section 4, 5, 6, 7, 8 or 9 is guilty of an offence and liable on summary conviction:
- for a first offence, to a fine of not more than \$3,000;
 - for a second offence, to a fine of not more than \$5,000;
 - for a third offence, to a fine of not more than \$15,000; and
 - for a fourth or subsequent offence, to a fine of not more than \$50,000.
- (2) It is not a defence to a prosecution for a contravention of section 4 for the person accused of furnishing tobacco or a tobacco-related product to a young person to show that the young person appeared to be 18 years of age or older.
- 22** Where a retailer is convicted of an offence arising from a contravention of section 8 of the Tobacco Act (Canada), the conviction pursuant to the Tobacco Act (Canada) is deemed to be a conviction pursuant to subsection 20(1) for the purposes of determining any applicable penalty pursuant to subsection 20(1) or 23(1) for a contravention of section 4.
- 23** (1) Where a retailer is convicted of a second or subsequent offence pursuant to subsection 20(1) for a contravention of section 4, the convicting judge shall also make an order:
- prohibiting the retailer or any successor to the retailer from keeping or furnishing tobacco or tobacco-related products at the place or premises at which the offence took place or at any place or premises to which the business of the retailer or the retailer's successor is moved:
 - for a period of seven days from the date of conviction in the case of a second offence;
 - for a period of six months from the date of conviction in the case of a third offence; and
 - for a period of one year from the date of conviction in the case of a fourth or subsequent offence; and
 - requiring the retailer or any successor to the retailer to post clearly visible signs that:
 - meet the requirements of the regulations; and
 - state that the retailer or successor to the retailer is prohibited from keeping or furnishing tobacco or tobacco-related products at the place or premises for the period specified in the order.
- 24** Every person who contravenes an order made pursuant to subsection 23(1) is guilty of an offence and liable on summary conviction to a fine of not more than:
- \$5,000 in the case of an order with respect to an offence mentioned in subclause 23(1)(a)(i) and, in the case of a continuing offence, to a further fine of not more than \$5,000 for each day or part of a day during which the offence continues;
 - \$15,000 in the case of an order with respect to an offence mentioned in subclause 23(1)(a)(ii) and, in the case of a continuing offence, to a further fine of not more than \$15,000 for each day or part of a day during which the offence continues; or
 - \$50,000 in the case of an order with respect to an offence mentioned in subclause 23(1)(a)(iii) and, in the case of a continuing offence, to a further fine of not more than \$50,000 for each day or part of a day during which the offence continues.
- 26** Every director, officer or agent of a corporation who directed, authorized, assented to, acquiesced in or participated in an act or omission of the corporation that would constitute an offence by the corporation is guilty of that offence, and is liable on summary conviction to the penalties provided for the offence whether or not the corporation has been prosecuted or convicted.
- 27** In a prosecution for an offence pursuant to this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted or convicted for the offence, unless the accused establishes that the offence was committed without his or her knowledge and that the accused exercised all due diligence to prevent its commission.

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This is the third in a series of bulletins, sent to all tobacco retailers, manufacturers and various interest groups, to provide tobacco retailers with information about Saskatchewan's *Tobacco Control Act*.

This bulletin is for the purposes of providing assistance to retailers in understanding the requirements of the Act. It is intended as a general guide and should not be used as a substitute for the legislation. The Act and regulations should be consulted for all purposes of interpretation and application of the requirements of the law.

The Tobacco Control Act, which received Royal Assent in July 2001, is expected to be proclaimed in the coming weeks. Retailers will be expected to comply with provisions of the Act when *The Tobacco Control Act* is proclaimed. The purpose of the Act is to control the sale and use of tobacco and tobacco-related products in an effort to reduce tobacco use and exposure among Saskatchewan young people.

In the last bulletin we provided retailers with information about keeping tobacco products out of public view and information on retailer signage. This bulletin will provide you with:

- Information about due diligence;
- Information about subsequent convictions;
- Further information on signage in retail outlets.

DUE DILIGENCE WITH RESPECT TO SALES TO MINORS

Under *The Tobacco Control Act*, tobacco retailers can be held responsible for the actions of their employees and agents who commit offences under the Act.

Is this something new?

No. Retailers have been responsible for the actions of their employees and agents in selling tobacco products under the federal *Tobacco Act* since it came into force in April, 1997. *The Tobacco Control Act* does not make retailers any more responsible for the actions of their employees or agents in relation to underage sale than they already are under the federal legislation.

Is a retailer responsible for every action of employees or agents?

No. The Act specifies that a retailer will not be responsible for the actions of employees and agents where the retailer can establish that:

- The employee or agent committed the offence without the knowledge of the retailer; and
- The retailer exercised all due diligence to prevent the commission of the offence.

It is the retailer that must establish that all due diligence was exercised to prevent the offence. Accordingly, it is important that retailers keep all records and document all steps that have been taken to prevent employees and agents from violating the Act.

What is due diligence and how do I establish it?

In very basic terms, to establish due diligence a retailer must be able to demonstrate that the offence occurred without the retailer's knowledge and that the retailer took all reasonable and appropriate steps to prevent the offence from occurring.

Whether the steps taken by a retailer are sufficient to demonstrate that all due diligence has been taken will depend significantly on the facts of the situation which lead to the violation. The standard of due diligence or steps considered reasonable and appropriate may vary from retailer to retailer dependent on things such as size of operation and the previous history of the retailer related to sales to persons under 18. **Ultimately it will be the court that will decide in any given circumstance whether the retailer's actions are sufficient to constitute due diligence.**

The Tobacco Control Act

What Retailers Need to Know

Court cases in Saskatchewan which have considered this issue under the similar wording of the federal *Tobacco Act* do provide some guidance. These cases suggest:

- it is not sufficient for a retailer to simply post signs respecting the legal age of sale throughout the store;
- it is not sufficient for the retailer to simply have policies in place respecting sale of tobacco products, and to instruct employees and agents about the requirements of the law to ensure they are aware of those laws and the sanctions for violation;
- in addition to the above, the retailer should have a reasonable monitoring system in place to attempt to ensure that the policies respecting sale are being followed and observed by employees and agents.

What can retailers do to prevent sales to persons under 18?

Three important components of a program which will help prevent tobacco sales to persons under 18 are:

- policies and procedures;
- training; and
- monitoring.

The following are a few examples of steps we encourage retailers to take in these three areas to prevent employees and agents from selling tobacco or tobacco-related products to anyone under the age of 18.

Policies and Procedures

Establish store policies, practises and procedures which are consistent with the Act, and make sure these are a part of the day-to-day operations of the retail outlet. Make certain that employees know the policies and procedures, the necessity of following them and what steps the retailer will take if an employee does not follow the policies and procedures. Listed below are just a few policies, practises and procedures that may be effective:

- A mandatory policy regarding I.D. requests to people who appear under a specified age (e.g. 25 years of age or under), with reminders that the physical characteristics of individuals may not reflect age;
- Where technology permits, a reminder in the cash register system to “check I.D. before sale”;
- Directions for dealing with customers who cannot provide the required I.D.;
- Instructions for examining photo I.D. to determine if it complies with the Act; and
- Restricting tobacco sales to fewer cash registers or to certain employees.

Training

Train every employee on all aspects of *The Tobacco Control Act* and your store’s policies and procedures for tobacco sales. Ensure that employees are trained and confident before they are allowed to handle tobacco products. Staff should be made aware and understand that they could personally face significant fines for providing tobacco to someone under the age of 18. Make sure that they understand *The Tobacco Control Act*, especially the laws related to tobacco sales to persons under 18 and the penalties for breaking the law.

At minimum, the following provisions of the legislation should be communicated to your staff:

- The definition of tobacco and tobacco related products;
- I.D. requirements for establishing proof of age;
- That furnishing of tobacco and tobacco-related products to anyone under the age of 18 is prohibited;
- That selling cigarettes in packages with fewer than 20 cigarettes is prohibited;
- The fines and penalties related to offences under the Act. Information about the fines and offences was included in Retailer Bulletin #1.

You may wish to administer an exam after employees are fully trained to verify that they have a complete understanding of their responsibilities.

Monitoring

Ongoing monitoring will help identify employees who are not complying with *The Tobacco Control Act* and/or store policies. The following are some steps retailers can take to determine if employees are complying with *The Tobacco Control Act* and the store’s policy and procedures:

- Supervise employees regularly;
- Conduct your own compliance checks to ensure that your employees are complying with the law;
- Review store videos to ensure that employees are not selling tobacco products to anyone under 18 when a supervisor is not present.

The Tobacco Control Act

What Retailers Need to Know

Additional Suggestions for Preventing the Sale of Tobacco to Persons Under 18

- Periodically, include information about tobacco sales as it applies to persons under 18 with your employees’ pay cheques. This information might include updates on your store’s policies and procedures, bulletins from Saskatchewan Health and Health Canada, or newspaper clippings related to tobacco sales to persons under 18;
- Keep records of all steps taken to prevent tobacco sales, including policies and procedures, training and monitoring.

Retailers are encouraged to consider these and additional steps to attempt to prevent employees from selling tobacco and tobacco products to minors. Clearly, the more steps that a retailer takes to attempt to prevent employees and agents from selling tobacco products to minors, the greater the likelihood that the retailer will satisfy the due diligence requirements in defence of a charge. Further, such steps may prevent a charge from being laid against the retailer in the first place.

SUBSEQUENT CONVICTIONS

The Tobacco Control Act provides for increased penalties for subsequent offences by the same retailer. It further directs the court to make an order prohibiting the sale of tobacco products for specified periods in an establishment where the retailer is convicted of a subsequent offence. The order prohibits sale for a period of seven days for a second offence, six months for a third offence and one year for a fourth or subsequent offence. The relevant provisions of the Act relating to offences are enclosed with this bulletin.

Things retailers should know:

- You should be aware that a retailer’s previous conviction for sale to underage persons under the federal *Tobacco Act* counts as a conviction under *The Tobacco Control Act*. Accordingly, a retailer convicted under the federal legislation would be subject to the second offence penalties when convicted for selling tobacco products to underage persons for the first time under *The Tobacco Control Act*.
- A retailer who sells tobacco from more than one location and is convicted of violating the age requirements for sale at different locations is subject to the subsequent offence penalties. For example, if the same retailer is convicted for underage sale from store 1 (in Prince Albert) and then from store 2 (in Yorkton), that retailer would be subject to the fines set out in the Act for subsequent offences. However, the order prohibiting sale of tobacco products would only apply to the store where the subsequent offence took place (i.e. store 2, not store 1).
- For the subsequent conviction penalties to apply, it must be the same person who is convicted. For example, in franchise situations, if the franchise holder is convicted at one location, and a second conviction is made against a different franchise holder at another location, the retailers are different so the convictions are first convictions for both franchise holders.

SIGNAGE

Further to the proposed regulations and policies regarding signage in retail outlets, please note that:

- Signs listing brands of tobacco products for sale cannot be posted under *The Tobacco Control Act*.
- **Signs provided by Saskatchewan Health respecting the legal age to purchase tobacco products, and that contain health warnings, must be posted. Signs provided pursuant to the *Tobacco Act (Canada)* may also be posted. No other signage will be authorized at this time. Some retailers have expressed a concern that the draft policy guidelines for signage (mentioned in bulletin #1), and the criteria listed therein for endorsing signs other than government signage, are no longer being applied. Based on our consultations and to ensure uniformity throughout the province and across retail stores, it is the decision of government that only government signage will be accepted once *The Tobacco Control Act* is proclaimed.**
- There is a correction needed to Bulletin #2. Bulletin #2 showed tobacco retailer signage that states “It is illegal to SELL tobacco to anyone under 18.” Please note that the signage actually states “It is illegal to PROVIDE tobacco to anyone under 18.”

For more information, call Saskatchewan Health at **(306) 787-3084**. A copy of *The Tobacco Control Act* is available from the Saskatchewan Government, Queen’s Printer Web Site at www.qp.gov.sk.ca