

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 326
93RD GENERAL ASSEMBLY

Reported from the Committee on Economic Development, Tourism and Local Government, April 28, 2005, with recommendation that the Senate Committee Substitute do pass.

1283S.05C

TERRY L. SPIELER, Secretary.

AN ACT

To amend chapters 149 and 196, RSMo, by adding thereto seven new sections relating to the tobacco master settlement agreement, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapters 149 and 196, RSMo, is amended by adding thereto seven new sections, to be known as sections 149.220, 196.1020, 196.1023, 196.1026, 196.1029, 196.1032, and 196.1035, to read as follows:

149.220. 1. Notwithstanding any law or rule to the contrary, any person licensed and required under chapter 149, to affix a tax stamp on cigarette packages or any retailer, who in good faith offers for sale or sells cigarettes that do not comply with state law, shall not be subject to any administrative, civil, or criminal seizures, forfeitures, suspensions, fines, or punishments for offering for sale or selling the noncompliant cigarette. The provisions of this section shall not relieve a wholesaler or retailer from any penalty imposed by law for the sale of cigarettes where a tax stamp has not been lawfully applied in accordance with chapter 149.

2. In the event a cigarette is declared to be not in compliance with state law, cigarette wholesalers are prohibited from making further purchases from manufacturers of the noncompliant cigarette, but cigarette wholesalers may lawfully stamp and sell to retailers any inventory of the noncompliant cigarettes for thirty days from the declaration date, and retailers have sixty days from the declaration date to purchase from wholesalers and sell lawfully any of the noncompliant cigarette.

3. The declaration that a cigarette does not comply with state law shall be published immediately and conspicuously posted on the website of both the attorney general and the department of revenue. The director of the department

of revenue shall also directly notify all wholesalers in writing sent via United States mail of the manufacturers and cigarette brands that are no longer lawful to sell in this state and within five days of such notification the wholesaler shall provide the director with a count of said manufacturer's cigarette brands that the wholesaler is holding in inventory for sale in this state.

4. The director of the department of revenue and attorney general shall notify a cigarette manufacturer, in writing sent via United States mail, thirty days prior to making such manufacturer's cigarette brands unlawful for sale in this state and shall state the reason or reasons such cigarettes shall no longer be lawfully sold. The cigarette manufacturer shall have the right to remedy any reason the director or attorney general gives for making it unlawful to sell such cigarette brands in this state and in the event said manufacturer provides such remedy, the director and attorney general shall cease any impending action to make such manufacturer's brands unlawful for sale. Any manufacturer who is aggrieved by any declaration of noncompliance shall have the right to seek relief, including injunctive relief, in a court of competent jurisdiction.

5. The definition of the terms "cigarette", "manufacturer", "tax stamp", and "wholesaler" are contained in section 149.011.

196.1020. As used in sections 196.1020 to 196.1035, the following terms mean:

(1) "Brand family", all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including but not limited to "menthol", "lights", "kings", and "100s", and includes any brand name alone or in conjunction with any other word trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

(2) "Cigarette", the same meaning as such term is defined in section 196.1000;

(3) "Director", the director of the Missouri department of revenue;

(4) "Master settlement agreement", the same meaning as such term is defined in section 196.1000;

(5) "Nonparticipating manufacturer", any tobacco product manufacturer that is not a participating manufacturer;

(6) "Participating manufacturer", the same meaning as such term is defined in section II(jj) of the master settlement agreement and all amendments thereto;

(7) "Qualified escrow fund", the same meaning as such term is defined in section 196.1000;

(8) "Stamping agent", a person who is authorized to affix tax stamps to packages or other containers or cigarettes under chapter 149, RSMo, or any person

who is required to pay the tax imposed under section 149.160, RSMo, on other tobacco products;

(9) "Tobacco product manufacturer", the same meaning as such term is defined in section 196.1000;

(10) "Units sold", the same meaning as such term is defined in section 196.1000.

196.1023. 1. Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver on a form prescribed by the director a certification to the director no later than the thirtieth day of April each year certifying under penalty of perjury that as of the date of such certification such tobacco product manufacturer is:

(1) A participating manufacturer or is in full compliance with section 196.1003; and

(2) Registered to do business in the state or has appointed a resident agent for service of process.

2. (1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update such list thirty calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the director.

(2) A nonparticipating manufacturer shall include in its certification:

(a) A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year;

(b) A list of all of its brand families that have been sold in the state at any time during the current calendar year;

(c) Indicating by an asterisk any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of such certification; and

(d) Identifying by name and address any other manufacturer of such brand families in the preceding or current calendar year.

The nonparticipating manufacturer shall update such list thirty calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the director.

(3) For a nonparticipating manufacturer, such certification shall further certify:

(a) That such nonparticipating manufacturer is registered to do business in the state or has appointed a resident agent for service of process and provided notice thereof as required in subsection 1 of section 196.1023;

(b) That such nonparticipating manufacturer has established and continues to maintain a qualified escrow fund and has executed a qualified escrow agreement that has been reviewed and approved by the director and that governs the qualified escrow fund;

(c) That such nonparticipating manufacturer is in full compliance with section 196.1003 and sections 196.1020 to 196.1035 and any rules promulgated thereunder;

(d) a. The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund required under section 196.1003 and all rules promulgated thereunder;

b. The account number of such qualified escrow fund and any subaccount number for the state;

c. The amount such nonparticipating manufacturer placed in such fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the director to confirm the foregoing; and

d. The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments under section 196.1003 and all rules promulgated thereunder.

(4) A tobacco product manufacturer may not include a brand family in its certification unless:

(a) In the case of a participating manufacturer, such participating manufacturer affirms that the brand family is deemed to be its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined under the master settlement agreement; and

(b) In the case of a nonparticipating manufacturer, such nonparticipating manufacturer affirms that the brand family is deemed to be its cigarettes for purposes of section 196.1003.

Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of section 196.1003.

(5) Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

3. By June 1, 2006, the director shall develop and make available for public inspection or publish on its website a directory listing of all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsections 1 and 2 of this section and all brand families that are listed in such certifications, except:

(1) The director shall not include or retain in such directory the name or brand families of any tobacco product manufacturer that fails to provide the required certification or whose certification the director determines is not in compliance with subdivisions (2) and (3) of subsection 2 of this section, unless the director has determined that such violation has been cured to the satisfaction of the director;

(2) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the director concludes in the case of a nonparticipating manufacturer that:

(a) Any escrow payment required under section 196.1003 for any period for any brand family whether or not listed by such nonparticipating manufacturer has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the director; or

(b) Any outstanding final judgment including interest thereon for violations of section 196.1003 has not been fully satisfied for such brand family and such manufacturer;

(3) Every stamping agent shall provide and update as necessary an electronic mail address to the director for the purpose of receiving any notifications that may be required by sections 196.1020 to 196.1035.

4. It shall be unlawful for any person to:

(1) Affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory, but cigarette wholesalers may lawfully stamp and sell to retailers any inventory of noncompliant cigarettes for thirty days from the date of removal or exclusion from the directory; or

(2) Sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory, but retailers have sixty days from the date of removal or exclusion from the directory to purchase from wholesalers and sell lawfully any of the noncompliant cigarettes.

196.1026. 1. Any nonresident or foreign tobacco product manufacturer that has not registered to do business in this state as a foreign corporation or business entity shall as a condition precedent to having its brand families listed or retained

in the directory appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of sections 196.1003 and 196.1020 to 196.1035 may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the nonparticipating manufacturer. The tobacco product manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of such agent to the satisfaction of the director.

2. The tobacco product manufacturer shall provide notice to the director thirty calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the director of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the tobacco product manufacturer shall notify the director of the termination within five calendar days and shall include proof to the satisfaction of the director of the appointment of a new agent.

3. Any tobacco product manufacturer whose cigarettes are sold in this state and who has not appointed and engaged an agent as herein required shall be deemed to have appointed the secretary of state as such agent and may be proceeded against in courts of this state by service of process upon the secretary of state. However, the appointment of the secretary of state as such agent shall not satisfy the condition precedent for having the brand families of the tobacco product manufacturer included or retained in the directory.

196.1029. 1. Each stamping agent shall include in the report required under section 149.040, RSMo, such information as the director requires to facilitate compliance with sections 196.1020 to 196.1035, including but not limited to a list by brand family of the total number of cigarettes or, in the case of roll your own, the equivalent stick count for which the stamping agent affixed stamps during the previous calendar month or otherwise paid the tax due for such cigarettes. The stamping agent shall maintain and make available to the director all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the director for a period of five years.

2. The director shall disclose to each nonparticipating manufacturer and the attorney general, by March 1 of each year, the number of units sold by such nonparticipating manufacturer in the previous calendar year. The director is authorized to disclose to the attorney general any information received under sections 196.1020 to 196.1035 and requested by the attorney general for purposes

of determining compliance with and enforcing the provisions of sections 196.1020 to 196.1035. The director and attorney general shall share with each other the information received under section 196.1003, sections 196.1020 to 196.1035, or corresponding laws of other states.

3. Each nonparticipating manufacturer shall provide to the director proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with section 196.1003 of the amount of money in such fund exclusive of interest, and the amount and date of each deposit to such fund, and the amount and date of each withdrawal from such fund.

4. In addition to any other information required to be submitted under sections 196.1020 to 196.1035, the director may require a stamping agent or tobacco product manufacturer to submit any additional information, including but not limited to samples of the packaging or labeling of each brand family, as is necessary to enable the director to determine whether a tobacco product manufacturer is in compliance with sections 196.1020 to 196.1035.

5. To promote compliance with sections 196.1020 to 196.1035, the director may promulgate rules requiring a tobacco product manufacturer that prior to June 1, 2006 had not been listed on the attorney general website as a compliant tobacco manufacturer or any tobacco product manufacturer who has previously violated the provisions of sections 196.1003 to 196.1035 to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The director may require production of information sufficient to enable the director to determine the adequacy of the amount of the installment deposit.

196.1032. 1. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent or any person has violated subsection 3 of section 196.1023 or any regulation adopted under sections 196.1020 to 196.1035, the director may revoke or suspend the license of any stamping agent in the manner provided in subsection 3 of section 149.035, RSMo. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection 3 of section 196.1023 shall constitute a separate violation. For each such violation, the director may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of a violation of subsection 3 of section 196.1023 or any regulations adopted thereunder.

2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of subsection 3 of section 196.1023 shall be deemed

contraband and such cigarettes shall be subject to seizure and forfeiture as provided in chapter 149, RSMo, and all such cigarettes so seized and forfeited shall be destroyed and not resold.

3. The attorney general on behalf of the director may seek an injunction to restrain a violation of subsection 3 of section 196.1023, or subsection 1 or 4 of section 196.1029 by a stamping agent and to compel the stamping agent to comply with such provisions. In any action brought under this section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

4. It shall be unlawful for a person to sell or distribute cigarettes, or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of subsection 3 of section 196.1023. A violation of this section is a class A misdemeanor.

5. A person who violates subsection 3 of section 196.1023 engages in an unfair practice in violation of section 407.020, RSMo.

196.1035. 1. A determination of the director not to list or to remove from the directory a brand family or tobacco product manufacturer shall be subject to judicial review in a court of competent jurisdiction.

2. No person shall be issued a license or granted a renewal of a license under chapter 149, RSMo, unless such person has certified in writing under the penalty of perjury that such person will comply fully with sections 196.1020 to 196.1035.

3. For 2005, if the effective date of sections 196.1020 to 196.1035 is later than March 16, 2005:

(1) The first report of stamping agents required in subsection 1 of section 196.1029 shall be due on the twentieth day of the following month;

(2) The certification by a tobacco product manufacturer described in subsection 1 of section 196.1023 shall be due forty-five calendar days after such effective date; and

(3) The directory described in subsection 2 of section 196.1023 shall be published or made available within ninety calendar days after such effective date.

4. The director may promulgate rules necessary to implement and administer sections 196.1020 to 196.1035. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the

powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

5. In any action brought by the state to enforce sections 196.1020 to 196.1035, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action and reasonable attorney fees.

6. If a court of competent jurisdiction determines that a person has violated sections 196.1020 to 196.1035, the court shall order any profits, gains, gross receipts, or other benefits from the violation to be disgorged and paid to the state treasurer for deposit in the "Tobacco Control Special Fund", which is hereby created. Unless otherwise expressly provided the remedies or penalties provided by sections 196.1020 to 196.1035 are cumulative to each other and to the remedies or penalties available under all other laws of this state.

7. If a court of competent jurisdiction finds that the provisions of section 196.1003 and sections 196.1020 to 196.1035 conflict and cannot be harmonized, the provisions of section 196.1003 shall control. If any section or portion of a section in sections 196.1020 to 196.1035 causes section 196.1003 to no longer constitute a qualifying or model statute, as those terms are defined in the master settlement agreement, that portion of sections 196.1020 to 196.1035 shall be invalid. If any section or portion of a section in sections 196.1020 to 196.1035 is for any reason held to be invalid, unlawful, or unconstitutional, such decision shall not affect the validity of the remaining portions of sections 196.1020 to 196.1035.

Section B. Because immediate action is necessary to protect the economic welfare of the citizens of this state, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace, and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.

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