

HOUSE FLOOR SUBSTITUTE FOR
HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 70

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO FIRE PREVENTION; ENACTING THE FIRE-SAFER CIGARETTE
AND FIREFIGHTER PROTECTION ACT; IMPOSING PENALTIES; MAKING AN
APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Fire-Safer Cigarette and Firefighter Protection Act".

Section 2. DEFINITIONS.--As used in the Fire-Safer
Cigarette and Firefighter Protection Act:

A. "agent" means any person authorized by the
taxation and revenue department to purchase and affix stamps on
packages of cigarettes;

B. "cigarette" means:

(1) any roll of tobacco wrapped in paper or in
any substance not containing tobacco; or

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1 (2) any roll of tobacco wrapped in any
2 substance containing tobacco that, because of its appearance,
3 the type of tobacco used in the filler or its packaging and
4 labeling, is likely to be offered to or purchased by consumers
5 as a cigarette as described in Paragraph (1) of this
6 subsection;

7 C. "manufacturer" means:

8 (1) any entity that manufactures or otherwise
9 produces cigarettes or causes cigarettes to be manufactured or
10 produced that are intended to be sold in New Mexico, including
11 cigarettes intended to be sold in New Mexico through an
12 importer; or

13 (2) any entity that becomes a successor of an
14 entity described in Paragraph (1) of this subsection;

15 D. "quality control and assurance program" means
16 the laboratory procedures implemented to ensure that operator
17 bias, systematic and nonsystematic methodological errors and
18 equipment-related problems do not affect the results of the
19 testing and that the testing repeatability remains within the
20 required repeatability values in Subsection C of Section 3 of
21 the Fire-Safer Cigarette and Firefighter Protection Act for all
22 test trials used to certify cigarettes under that act;

23 E. "repeatability" means the range of values within
24 which the repeat results of cigarette test trials from a single
25 laboratory will fall ninety-five percent of the time;

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1 F. "retail dealer" means any person, other than a
2 manufacturer or wholesale dealer, engaged in selling cigarettes
3 or tobacco products;

4 G. "sale" or "sell" means a transfer of or an offer
5 or agreement to transfer title or possession by exchange,
6 barter or any other means. In addition to cash and credit
7 sales, giving cigarettes as samples, prizes or gifts and
8 exchanging cigarettes for any consideration other than money is
9 a "sale"; and

10 H. "wholesale dealer" means any person other than a
11 manufacturer who sells cigarettes or tobacco products to retail
12 dealers or other persons for purposes of resale and any person
13 who owns, operates or maintains one or more cigarette or
14 tobacco product vending machines on premises owned or occupied
15 by another person.

16 Section 3. TEST METHOD AND PERFORMANCE STANDARD.--

17 A. Except as provided in Subsection K of this
18 section, cigarettes shall not be sold or offered for sale in
19 New Mexico unless:

20 (1) the cigarettes have been tested in
21 accordance with the test method and meet the performance
22 standard specified in this section;

23 (2) a written certification has been filed by
24 the manufacturer with the state fire marshal in accordance with
25 Section 4 of the Fire-Safer Cigarette and Firefighter

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1 Protection Act; and

2 (3) the cigarettes have been marked in
3 accordance with Section 5 of that act.

4 B. Testing of cigarettes shall be conducted in
5 accordance with the American society of testing and materials
6 standard E2187-04 standard test method for measuring the
7 ignition strength of cigarettes and shall be conducted on ten
8 layers of filter paper. No more than twenty-five percent of
9 the cigarettes tested in a test trial in accordance with this
10 section shall exhibit full-length burns. Forty replicate tests
11 shall constitute a complete test trial for each cigarette
12 tested. The performance standard required by this section
13 shall only be applied to a complete test trial. Written
14 certifications shall be based upon testing conducted by a
15 laboratory that has been accredited pursuant to standard
16 ISO/IEC 17025 of the international organization for
17 standardization or other comparable accreditation standard
18 required by the state fire marshal.

19 C. Laboratories conducting testing in accordance
20 with this section shall implement a quality control and quality
21 assurance program that includes a procedure that will determine
22 the repeatability of the testing results. The repeatability
23 value shall be no greater than 0.19.

24 D. Testing performed or sponsored by the state fire
25 marshal to determine a cigarette's compliance with the

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1 performance standard required by this section shall be
2 conducted in accordance with this section.

3 E. This section does not require additional testing
4 if cigarettes are tested consistent with the Fire-Safer
5 Cigarette and Firefighter Protection Act for any other purpose.

6 F. Each cigarette listed in a certification
7 submitted pursuant to Section 4 of the Fire-Safer Cigarette and
8 Firefighter Protection Act that uses lowered permeability bands
9 in the cigarette paper to achieve compliance with the
10 performance standard set forth in this section shall have at
11 least two nominally identical bands on the paper surrounding
12 the tobacco column. At least one complete band shall be
13 located at least fifteen millimeters from the lighting end of
14 the cigarette. For cigarettes on which the bands are
15 positioned by design, there shall be at least two bands fully
16 located at least fifteen millimeters from the lighting end and
17 ten millimeters from the filter end of the tobacco column or
18 ten millimeters from the labeled end of the tobacco column for
19 non-filtered cigarettes.

20 G. A manufacturer of a cigarette that the state
21 fire marshal determines cannot be tested in accordance with the
22 test method prescribed in Subsection B of this section shall
23 propose a test method and performance standard for the
24 cigarette to the state fire marshal. Upon approval of the
25 proposed test method and a determination by the state fire

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1 marshal that the performance standard proposed by the
2 manufacturer is equivalent to the performance standard
3 prescribed in Subsection B of this section, the manufacturer
4 may employ that test method and performance standard to certify
5 the cigarette pursuant to Section 4 of the Fire-Safer Cigarette
6 and Firefighter Protection Act. If the state fire marshal
7 determines that another state has enacted reduced cigarette
8 ignition propensity standards that include a test method and
9 performance standard that are the same as those contained in
10 the Fire-Safer Cigarette and Firefighter Protection Act, and
11 the state fire marshal finds that the officials responsible for
12 implementing those requirements have approved the proposed
13 alternative test method and performance standard for a
14 particular cigarette proposed by a manufacturer as meeting the
15 fire safety standards of that state's law or regulation under a
16 legal provision comparable to this section, the state fire
17 marshal shall authorize that manufacturer to employ the
18 alternative test method and performance standard to certify
19 that cigarette for sale in New Mexico, unless the state fire
20 marshal demonstrates a reasonable basis why the alternative
21 test should not be accepted under the Fire-Safer Cigarette and
22 Firefighter Protection Act. All other applicable requirements
23 of this section shall apply to the manufacturer.

24 H. Each manufacturer shall maintain copies of the
25 reports of all tests conducted on all cigarettes offered for

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1 sale for a period of three years and shall make copies of the
2 reports available to the state fire marshal and the attorney
3 general upon written request. Any manufacturer who fails to
4 make copies of the reports available within sixty days of
5 receiving a written request may be assessed a civil penalty not
6 to exceed ten thousand dollars (\$10,000) for each day after the
7 sixtieth day that the manufacturer does not make the copies
8 available.

9 I. The state fire marshal may adopt a subsequent
10 American society of testing and materials standard test method
11 for measuring the ignition strength of cigarettes upon a
12 finding that the subsequent method does not result in a change
13 in the percentage of full-length burns exhibited by any tested
14 cigarette when compared to the percentage of full-length burns
15 the same cigarette would exhibit when tested in accordance with
16 the American society of testing and materials standard E2187-04
17 and the performance standard in Subsection B of this section.

18 J. The state fire marshal shall review the
19 effectiveness of this section and report findings and make
20 recommendations to the legislature every three years.

21 K. The requirements of Subsection A of this section
22 shall not prohibit:

23 (1) wholesale or retail dealers from selling
24 their existing inventory of cigarettes on or after the
25 effective date of this section if the wholesale or retail

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1 dealer can establish that state tax stamps were affixed to the
2 cigarettes prior to the effective date and the wholesale or
3 retail dealer can establish that the inventory was purchased
4 prior to the effective date in comparable quantity to the
5 inventory purchased during the same period of the prior year;
6 or

7 (2) the sale of cigarettes solely for the
8 purpose of consumer testing. For purposes of this subsection,
9 the term "consumer testing" means an assessment of cigarettes
10 that is conducted by a manufacturer, or under the control and
11 direction of a manufacturer, for the purpose of evaluating
12 consumer acceptance of the cigarettes, utilizing only the
13 quantity of cigarettes that is reasonably necessary for an
14 assessment.

15 L. The Fire-Safer Cigarette and Firefighter
16 Protection Act shall be interpreted and construed to effectuate
17 its general purpose and to make that act uniform with the laws
18 of those states that have enacted reduced cigarette ignition
19 propensity laws as of the date that the Fire-Safer Cigarette
20 and Firefighter Protection Act is enacted.

21 Section 4. CERTIFICATION AND PRODUCT CHANGE.--

22 A. Each manufacturer shall submit to the state fire
23 marshal a written certification attesting that each cigarette
24 listed in the certification has been tested in accordance with
25 the test method and meets the performance standard in Section 3

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1 of the Fire-Safer Cigarette and Firefighter Protection Act.

2 B. Each cigarette listed in the certification shall
 3 be described with the following information:

- 4 (1) the brand or the trade name on the
 5 package;
- 6 (2) the style, such as light or ultralight;
- 7 (3) the length in millimeters;
- 8 (4) the circumference in millimeters;
- 9 (5) the flavor, such as menthol or chocolate,
 10 if applicable;
- 11 (6) whether the cigarette has a filter or is a
 12 nonfilter cigarette;
- 13 (7) the package description, such as soft pack
 14 or box;
- 15 (8) the marking pursuant to Section 5 of the
 16 Fire-Safer Cigarette and Firefighter Protection Act;
- 17 (9) the name, address and telephone number of
 18 the laboratory, if different than the manufacturer that
 19 conducted the test; and
- 20 (10) the date that the testing occurred.

21 C. The state fire marshal shall verify that the
 22 manufacture's certifications have been approved by the state
 23 fire marshal and shall make the verified certifications
 24 available to the attorney general for purposes consistent with
 25 the Fire-Safer Cigarette and Firefighter Protection Act and to

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1 the taxation and revenue department for the purposes of
2 ensuring compliance with this section.

3 D. Each cigarette certified under this section
4 shall be recertified every three years.

5 E. For each cigarette listed in a certification, a
6 manufacturer shall pay to the state fire marshal a fee of two
7 hundred fifty dollars (\$250). The state fire marshal may
8 adjust the amount of the fee by rule on an annual basis as
9 necessary to defray the costs of processing, testing,
10 enforcement and oversight activities required by the Fire-Safer
11 Cigarette and Firefighter Protection Act, but in no case shall
12 the fee exceed four hundred dollars (\$400). The state fire
13 marshal may establish the amount of the fee by rule on an
14 annual basis.

15 F. If a manufacturer has certified a cigarette
16 pursuant to this section, and thereafter makes any change to
17 the cigarette that is likely to alter its compliance with the
18 reduced cigarette ignition propensity standards required by the
19 Fire-Safer Cigarette and Firefighter Protection Act, that
20 cigarette shall not be sold or offered for sale in New Mexico
21 until the manufacturer retests the cigarette in accordance with
22 the testing standards set forth in Section 3 of that act and
23 maintains records of that retesting as required by Section 3 of
24 that act. Any altered cigarette that does not meet the
25 performance standard set forth in Section 3 of that act shall

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1 not be sold in New Mexico.

2 Section 5. MARKING OF CIGARETTE PACKAGING.--

3 A. Cigarettes that are certified by a manufacturer
 4 in accordance with the Fire-Safer Cigarette and Firefighter
 5 Protection Act shall be marked to indicate compliance with that
 6 act. The marking shall be in eight-point type or larger and
 7 consist of the letters "FSC", which signifies fire standard
 8 compliant, and shall be permanently printed, stamped, engraved
 9 or embossed on the package at or near the universal product
 10 code.

11 B. A manufacturer shall use only one marking and
 12 shall apply this marking uniformly for all packages, including
 13 packs, cartons and cases, and for brands marketed by that
 14 manufacturer.

15 C. A manufacturer certifying cigarettes in
 16 accordance with Section 4 of the Fire-Safer Cigarette and
 17 Firefighter Protection Act shall provide a copy of the
 18 certifications to all wholesale dealers and agents to which it
 19 sells cigarettes. Wholesale dealers, agents and retail dealers
 20 shall permit the state fire marshal, the taxation and revenue
 21 department and the attorney general to inspect markings of
 22 cigarette packaging marked in accordance with this section.

23 Section 6. PENALTIES.--

24 A. A manufacturer, wholesale dealer, agent or any
 25 other person who knowingly sells cigarettes, other than through

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1 retail sales, in violation of Section 3 of the Fire-Safer
2 Cigarette and Firefighter Protection Act may be assessed a
3 civil penalty not to exceed one hundred dollars (\$100) for each
4 pack of the cigarettes sold; provided that in no case shall the
5 penalty against any person or entity exceed one hundred
6 thousand dollars (\$100,000) for sales during any thirty-day
7 period.

8 B. A retail dealer who knowingly sells cigarettes
9 in violation of Section 3 of the Fire-Safer Cigarette and
10 Firefighter Protection Act may be assessed a civil penalty not
11 to exceed one hundred dollars (\$100) for each pack of the
12 cigarettes sold; provided that in no case shall the penalty
13 against any retail dealer exceed twenty-five thousand dollars
14 (\$25,000) for sales during any thirty-day period.

15 C. In addition to any penalty prescribed by law,
16 any corporation, partnership, sole proprietor, limited
17 partnership or association engaged in the manufacture of
18 cigarettes that knowingly makes a false certification pursuant
19 to Section 4 of the Fire-Safer Cigarette and Firefighter
20 Protection Act may be assessed a civil penalty of at least
21 seventy-five thousand dollars (\$75,000), not to exceed two
22 hundred fifty thousand dollars (\$250,000) for each false
23 certification.

24 D. A person violating any other provision of the
25 Fire-Safer Cigarette and Firefighter Protection Act may be

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1 assessed a civil penalty for a first offense not to exceed one
2 thousand dollars (\$1,000), and for a subsequent offense subject
3 to a civil penalty not to exceed five thousand dollars (\$5,000)
4 for each violation.

5 E. Whenever a law enforcement agency or duly
6 authorized representative of the state fire marshal discovers
7 any cigarettes for which no certification has been filed as
8 required by Section 4 of the Fire-Safer Cigarette and
9 Firefighter Protection Act or that have not been marked as
10 required by Section 5 of that act, the state fire marshal or
11 law enforcement agency may seize and take possession of the
12 cigarettes. Cigarettes seized pursuant to this section shall
13 be destroyed; provided, however, that, prior to the destruction
14 of any cigarette seized pursuant to these provisions, the
15 attorney general and the true holder of the trademark rights in
16 the cigarette brand shall be permitted to inspect the
17 cigarettes.

18 F. In addition to any other remedy provided by law,
19 the attorney general may file an action in district court for a
20 violation of the Fire-Safer Cigarette and Firefighter
21 Protection Act, including petitioning for preliminary or
22 permanent injunctive relief or to recover costs, damages and
23 attorney fees. Each violation of the Fire-Safer Cigarette and
24 Firefighter Protection Act or of rules or regulations adopted
25 under that act constitutes a separate civil violation for which

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1 the state fire marshal or attorney general may obtain relief.
2 Upon obtaining judgment for injunctive relief under this
3 section, the state fire marshal or attorney general shall
4 provide a copy of the judgment to all wholesale dealers and
5 agents to which a cigarette has been sold.

6 Section 7. IMPLEMENTATION.--

7 A. The state fire marshal may promulgate rules
8 pursuant to the Administrative Procedures Act, necessary to
9 effectuate the purposes of the Fire-Safer Cigarette and
10 Firefighter Protection Act and for inspection, seizure and
11 destruction of cigarettes pursuant to the Forfeiture Act.

12 B. The taxation and revenue department in the
13 regular course of conducting inspections of wholesale dealers,
14 agents and retail dealers, pursuant to the Cigarette Tax Act,
15 may inspect cigarettes to determine if the cigarettes are
16 marked as required by Section 5 of the Fire-Safer Cigarette and
17 Firefighter Protection Act. If the cigarettes are not marked
18 as required, the taxation and revenue department shall notify
19 the state fire marshal.

20 Section 8. INSPECTION.--To enforce the provisions of the
21 Fire-Safer Cigarette and Firefighter Protection Act, the
22 attorney general, the taxation and revenue department and the
23 state fire marshal, their duly authorized representatives and
24 other law enforcement personnel may examine the books, papers,
25 invoices and other records of any person in possession, control

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1 or occupancy of premises where cigarettes are placed, stored,
 2 sold or offered for sale, as well as the stock of cigarettes on
 3 the premises. Every person in the possession, control or
 4 occupancy of premises where cigarettes are placed, sold or
 5 offered for sale is hereby directed and required to give the
 6 attorney general, the taxation and revenue department and the
 7 state fire marshal and other law enforcement personnel the
 8 means, facilities and opportunity for the examinations
 9 authorized by this section.

10 Section 9. FIRE-SAFER CIGARETTE AND FIREFIGHTER
 11 PROTECTION ACT FUND.--The "fire-safer cigarette and firefighter
 12 protection fund" is created in the state treasury. The fund
 13 consists of appropriations, income from investment of the fund,
 14 money otherwise accruing to the fund, certification fees paid
 15 under Section 4 of the Fire-Safer Cigarette and Firefighter
 16 Protection Act and money recovered as penalties under Section 6
 17 of that act. Money in the fund shall not revert to any other
 18 fund at the end of a fiscal year. Money in the fund is
 19 appropriated to the state fire marshal to enforce the Fire-
 20 Safer Cigarette and Firefighter Protection Act and to support
 21 fire safety and prevention programs and shall be disbursed on
 22 warrants signed by the secretary of finance and administration
 23 pursuant to vouchers signed by the state fire marshal or the
 24 state fire marshal's authorized representative.

25 Section 10. SALE OUTSIDE OF NEW MEXICO.--Nothing in the

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1 Fire-Safer Cigarette and Firefighter Protection Act shall be
2 construed to prohibit a person or entity from manufacturing or
3 selling cigarettes that do not meet the requirements of Section
4 3 of that act if the cigarettes are or will be stamped for sale
5 in another state or are packaged for sale outside the United
6 States and that person or entity has taken reasonable steps to
7 ensure that the cigarettes will not be sold or offered for sale
8 to persons located in New Mexico.

9 Section 11. CONTINGENT REPEAL.--The Fire-Safer Cigarette
10 and Firefighter Protection Act is repealed, effective on the
11 date that the New Mexico compilation commission receives
12 certification from the state fire marshal that the federal
13 government has adopted or enacted a reduced cigarette ignition
14 propensity standard and that the standard is in effect.

15 Section 12. STATE PREEMPTION.--Cities, counties, home
16 rule municipalities and other political subdivisions of the
17 state shall not adopt or continue in effect any ordinance,
18 rule, regulation, resolution or statute on cigarette testing
19 and standards. The Fire-Safer Cigarette and Firefighter
20 Protection Act preempts any local law, ordinance or regulation
21 that conflicts with any provision of that act or any policy of
22 the state of New Mexico implemented in accordance with that
23 act, and, notwithstanding any other provision of law, a
24 governmental unit of the state of New Mexico shall not enact or
25 enforce an ordinance, local law or regulation conflicting with

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1 or preempted by that act.

2 Section 13. EFFECTIVE DATE.--The effective date of the
3 provisions of Sections 1 through 6 and 8 through 11 of this act
4 is January 1, 2010.

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