

MEMORANDUM

October 16, 2015

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Public Hearing:** Bill 41-15, Health – Distribution of Tobacco Products to Minors
– Penalties

Bill 41-15, Health – Distribution of Tobacco Products to Minors – Penalties, sponsored by Lead Sponsor Councilmember Rice and Co-Sponsors Council President Leventhal, Council Vice President Floreen, and Councilmembers Elrich, Navarro, Hucker, Katz, and Riemer, was introduced on September 29, 2015. A Health and Human Services Committee worksession is tentatively scheduled for November 5, 2015 at 9:30 a.m.

Distributing a tobacco product to a minor already violates County law. The current maximum penalty is a Class A civil violation, punishable by a fine of \$500 for a first offense and \$750 for a subsequent offense. Md. Local Gov't Code, §10-202(b) authorizes the County to enforce a County law by a civil fine not exceeding \$1000. Bill 41-15 would increase the maximum civil fine for distributing a tobacco product to a minor to \$1000 for a first offense and \$1000 for a subsequent offense.

Distributing a tobacco product to a minor is also a misdemeanor under Md. Criminal Law Code, §10-107, punishable by a fine of \$300 for a first offense, \$1000 for a second offense, and \$3000 for each subsequent offense within 2 years after the preceding offense. An enforcement official would have the option of citing a violator under the State Criminal Law or under the County law.

The County Attorney's Office issued a bill review memorandum raising a potential State implied preemption issue for the existing County law prohibiting the distribution of tobacco, but ultimately concluded that the Bill is probably not preempted by State law. See ©5-7.

This packet contains:

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Bill No. 41-15
Concerning: Health -- Distribution of Tobacco Products to Minors -- Penalties
Revised: 9-29-15 Draft No. 4
Introduced: September 29, 2015
Expires: March 29, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Rice
Co-Sponsors: Council President Leventhal, Council Vice President Floreen, and Councilmembers Elrich, Navarro, Hucker, Katz, and Riemer

AN ACT to:

- (1) increase the maximum civil fine for distributing a tobacco product to a minor; and
- (2) generally amend the law prohibiting the distribution of a tobacco product to a minor.

By amending

Montgomery County Code
Chapter 24, Health and Sanitation
Section 24-11

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 24-11 is amended as follows:

24-11. Distribution of tobacco products to minors.

(a) Definitions. In this Section the following words have the meanings indicated.

(1) Tobacco product means any substance containing tobacco, including cigarettes, cigars, smoking tobacco, snuff, or smokeless tobacco.

(2) Distribute means to:

(A) give away, sell, deliver, dispense, or issue;

(B) offer to give away, sell, deliver, dispense, or issue; or

(C) cause or hire any person to give away, sell, deliver, dispense, or issue or offer to give away, sell, deliver, dispense, or issue.

(b) Unlawful distribution.

(1) A person engaged in the business of selling or otherwise distributing tobacco products for commercial purposes must not:

(i) distribute any tobacco product to a minor, unless the minor is acting solely as the agent of the minor's employer who is engaged in the business of distributing tobacco products;

(ii) distribute cigarette rolling papers to a minor; or

(iii) distribute to a minor a coupon redeemable for any tobacco product.

(2) A person, who is not a person described under paragraph (b)(1), must not:

(i) buy for or sell to a minor any tobacco product; or

(ii) deliver or sell to a minor cigarette rolling papers.

27 (c) Subsection (b) does not apply to the distribution of a coupon which is
28 redeemable for any tobacco product when the coupon is contained in a
29 newspaper, a magazine, or any other type of publication in which the
30 coupon is incidental to the primary purpose of the publication, or sent
31 through the mail.

32 (d) A person has not violated this Section if:
33 (1) that person examined a driver's license or another valid
34 identification issued by an employer, a government entity, or an
35 institution of higher education; and
36 (2) that license or other identification positively identified the buyer
37 or recipient of a tobacco product as at least 18 years old.

38 (e) If a minor bought a tobacco product from a vending machine, this
39 Section does not apply to the owner of the vending machine or any
40 other person with control over the vending machine.

41 (f) A person who violates this Section is liable for a [class A] civil
42 violation. The maximum civil fine is \$1000 for a first offense and
43 \$1000 for each subsequent offense.

44 *Approved:*

45

George Leventhal, President, County Council

Date

46 *Approved:*

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Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 41-15

Health – Distribution of Tobacco Products to Minors – Penalties

- DESCRIPTION:** Bill 41-15 would increase the civil fine for a violation of County law from \$500 for a first offense and \$750 for a subsequent offense to \$1000 for each offense.
- PROBLEM:** The penalties under County law are too low.
- GOALS AND OBJECTIVES:** Eliminate the distribution of tobacco products to minors in the County.
- COORDINATION:** Police, Department of Liquor Control
- FISCAL IMPACT:** To be determined.
- ECONOMIC IMPACT:** To be determined.
- EVALUATION:** n/a
- EXPERIENCE ELSEWHERE:** To be researched.
- SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney
- APPLICATION WITHIN MUNICIPALITIES:** To be researched.
- PENALTIES:** \$1000 for each offense.



Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Uma Ahluwalia, Director, DHHS

FROM: Kristen Kalaria, Assistant County Attorney, OCA *KK/EBZ*

VIA: Edward Lattner, Chief, Division of Government Operations, OCA *EBZ*

DATE: October 12, 2015

RE: Bill 41-15 Distribution of Tobacco Products to Minors - Penalties CORRECTED

Summary

Bill 41-15 raises the maximum civil fine for distributing a tobacco product to a minor in violation of County Code § 24-11 from \$300 to \$1000. As described in further detail below, the proposed amendment does not raise any legal issues. While a court could find that § 24-11 itself is preempted because the Court of Appeals recently concluded that “state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field,” we believe, on balance, that § 24-11 is probably not preempted.

Clarity

Bill 41-15 is clear.

Liability Exposure

Bill 41-15 does not expand the County’s exposure to liability, except as noted below under “Preemption.”

Constitutionality

As tobacco is heavily regulated by the state and federal governments, it is necessary to consider the possibility that local regulation in the area may be preempted. Preemption may be either express or implied. Neither the state nor federal government expressly prohibits local regulation of tobacco sales. Implied preemption, however, is a significant concern. Preemption will be implied where the state or federal government has regulated a field so forcibly that its

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intent to occupy the entire field must be inferred. *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 323 (1969). As described below, it is unlikely that a court would find that Bill 41-15, and the underlying Section 24-11, is preempted by state law.

Section 24-11 is Not Preempted by Federal Law

Federal law prohibits sale of cigarettes to persons under 18 and requires retailers to check photo identification for persons under the age of 26. 21 C.F.R. 1140.14. According to the Food and Drug Administration's most recent guidance document for retailers, the penalty for violation of Part 1140.14 varies based on the number of violations within a four year period. The penalty could range from a warning letter for the first violation to \$11,000 for six or more violations within four years. Preemption by federal law is not a concern. The Supreme Court has held that federal law does not preempt local regulation of tobacco sales to minors. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 552 (2001).

Section 24-11 Is Probably Not Preempted by State Law

State law also prohibits the sale of cigarettes to minors. The state prohibition is found in § 10-107 of the Criminal Law Article, Maryland Code. Section 10-107 is almost identical to the existing county law, § 24-11 of the County Code. Like § 24-11, § 10-107 prohibits distribution of tobacco products, paraphernalia, or coupons redeemable for tobacco products to minors. Both sections also prohibit other individuals from buying tobacco products on behalf of minors. The laws differ only regarding the penalties: the state law provides penalties not exceeding \$300 for a first offense, \$1000 for a second offense within two years, and \$2000 for a third offense within two years. The existing county law is punishable by a fine not exceeding \$500 for a first offense and \$750 for a subsequent offense. Bill 41-15 would increase the fine to \$1000 for a first offense and \$1000 for each subsequent offense. A separate provision prohibits possession or use of tobacco products by a minor. Md. Code Criminal Law §10-108

The Court of Appeals recently struck down a Prince George's County ordinance requiring cigars to be sold in packages of at least five, finding that the ordinance was preempted by extensive State regulation in the field. *Altadis U.S.A. Inc. v. Prince George's County*, 431 Md. 307, 309 (2013). The Court specifically held that "state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field." *Altadis* at 316. This is not the first time the Court has struck down a local tobacco regulation on the basis of preemption. In *Allied Vending v. City of Bowie*, 332 Md. 279 (1993), the Court invalidated two municipal ordinances restricting the placement of state-licensed cigarette vending machines in an effort to make them less accessible to minors. The Court held that the comprehensive state regulation "manifested an intent for the state to completely occupy the field of the sale of cigarettes through vending machines." *Allied Vending* at 310.

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But it is possible to draw some distinctions between § 24-11 and the ordinances invalidated by *Altadis* and *Allied Vending*. Both cases relied primarily on the comprehensive state regulation of tobacco retailers found in Titles 16 and 16.5 of the Business Regulations Article, Maryland Code. In contrast, the sale of cigarettes to minors is regulated in the Criminal Law Article. Thus, it could be argued that this provision is not part of the comprehensive civil regulatory scheme considered by *Altadis*. Also, because the county law differs from the state law only in penalties assessed, one could argue that there is no potential for confusion if different municipalities have different penalties because the prohibited acts are still identical. The potential for confusion created by different municipal requirements was one of the concerns cited by the court in *Allied Vending*.

In addition, after the County enacted § 24-11 in 1998, the General Assembly amended § 10-107 (Laws of Maryland 2007, Ch. 218), and it did not disapprove or even make any reference to the preexisting County law. The Maryland Court of Appeals has previously concluded that the General Assembly does not intend to impliedly preempt a field containing preexisting local legislation and the General Assembly takes no action to "oust" that preexisting local legislation. *National Asphalt v. Prince George's County*, 292 Md. 75, 79, 437 A.2d 651, 653 n.4 (1981). In such cases, the General Assembly is charged with knowledge of the preexisting local law and is said to have acquiesced to the presence of local legislation in the field.¹

Other issues

Section 24-11 does not apply to e-cigarettes. This is not a problem, but the Council may consider amending § 24-11 to include e-cigarettes, as it recently expanded Section 24-9 (the smoking ban) to do the same. If you have any concerns or questions concerning this memorandum please call me.

cc: Bonnie Kirkland, Assistant CAO
Robert H. Drummer, Senior Legislative Attorney
Marc P. Hansen, County Attorney

¹ The Fourth Circuit concluded that § 10-107, then codified at Md. Ann. Code art. 27, §§ 404 & 405, did not impliedly preempt a Baltimore City law prohibiting cigarette advertising on billboards located in designated zones. *Penn Adver. of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318, 1324, 1995 WL 530257 (4th Cir. 1995) cert. granted, judgment vacated sub nom. *Penn Adver. of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030, 116 S. Ct. 2575, 135 L. Ed. 2d 1090 (1996) and adopted as modified, 101 F.3d 332 (4th Cir. 1996).