

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of dextromethorphan; providing administrative, civil, and criminal penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 6, Health and Safety Code, is amended by adding Chapter 486 to read as follows:

CHAPTER 486. DEXTROMETHORPHAN

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 486.001. DEFINITIONS. In this chapter:

(1) "Board" means the Texas Board of Health.

(2) "Commissioner" means the commissioner of public health.

(3) "Deliver" means an actual or constructive transfer from one person to another, regardless of whether there is an agency relationship. The term includes an offer to sell.

(4) "Delivery" means the act of delivering.

(5) "Department" means the Texas Department of Health.

(6) "Dextromethorphan" includes a product containing any detectable amount of dextromethorphan.

(7) "Sell" includes a conveyance, exchange, barter, or trade.

Sec. 486.002. RULES. The board shall adopt rules necessary to implement and enforce this chapter.

[Sections 486.003-486.010 reserved for expansion]

1           SUBCHAPTER B. SALES OF DEXTROMETHORPHAN AND SIGNS

2           Sec. 486.011. SIGNS. A business establishment that sells  
3 dextromethorphan at retail shall display a conspicuous sign, in  
4 English and Spanish, that states the following:

5           "It is unlawful for a person to sell or deliver a product  
6 containing dextromethorphan to a person younger than 18 years of  
7 age. Except in limited situations, such an offense is a Class B  
8 misdemeanor.

9           It is also unlawful for a person younger than 18 years of age  
10 to abuse a product containing dextromethorphan by ingesting, using,  
11 or possessing with intent to ingest or use the product in a manner  
12 designed to affect the central nervous system. Such an offense is a  
13 Class B misdemeanor."

14           Sec. 486.012. RESTRICTION OF ACCESS TO DEXTROMETHORPHAN.

15           (a) A business establishment that displays dextromethorphan shall  
16 display the dextromethorphan in a manner that makes the  
17 dextromethorphan accessible to a patron of the business  
18 establishment only with the assistance of an employee of the  
19 establishment.

20           (b) A court may issue a warning to a business establishment  
21 or impose a civil penalty of \$50 on the business establishment for a  
22 first violation of this section. After receiving a warning or  
23 penalty for the first violation, the business establishment is  
24 liable to the state for a civil penalty of \$100 for each subsequent  
25 violation.

26           (c) For the third violation of this section in a calendar  
27 year, a court may issue an injunction prohibiting the business

1 establishment from selling dextromethorphan for a period of not  
2 more than two years. A business establishment that violates the  
3 injunction is liable to the state for a civil penalty of \$100, in  
4 addition to any other penalty authorized by law, for each day the  
5 violation continues.

6 (d) If a business establishment fails to pay a civil penalty  
7 under this section, the court may issue an injunction prohibiting  
8 the establishment from selling dextromethorphan until the  
9 establishment pays the penalty, attorney's fees, and court costs.

10 (e) The district or county attorney for the county in which  
11 a violation of this section is alleged to have occurred, or the  
12 attorney general, if requested by the district or county attorney  
13 for that county, may file suit for the issuance of a warning, the  
14 collection of a penalty, or the issuance of an injunction.

15 Sec. 486.013. COMPUTERIZED CHECKOUT SYSTEMS. If a business  
16 establishment that sells dextromethorphan at retail has in place a  
17 computerized checkout system at the point of sale for merchandise,  
18 the system must alert the cashier that a person purchasing  
19 dextromethorphan must be 18 years of age or older.

20 [Sections 486.014-486.030 reserved for expansion]

21 SUBCHAPTER C. CRIMINAL PENALTIES

22 Sec. 486.031. POSSESSION AND USE OF DEXTROMETHORPHAN BY  
23 MINOR. (a) A person commits an offense if the person:

24 (1) is younger than 18 years of age; and

25 (2) ingests, uses, or possesses dextromethorphan with  
26 intent to ingest or use the dextromethorphan in a manner:

27 (A) contrary to directions for use, cautions, or

1 warnings appearing on a label of a container of the  
2 dextromethorphan; and

3 (B) designed to:

4 (i) affect the person's central nervous  
5 system;

6 (ii) create or induce a condition of  
7 intoxication, hallucination, or elation; or

8 (iii) change, distort, or disturb the  
9 person's eyesight, thinking process, balance, or coordination.

10 (b) An offense under this section is a Class B misdemeanor.

11 Sec. 486.032. DELIVERY TO A MINOR. (a) A person commits an  
12 offense if the person knowingly delivers dextromethorphan to a  
13 person who is younger than 18 years of age.

14 (b) It is an affirmative defense to prosecution under this  
15 section that:

16 (1) the person making the delivery is an adult having  
17 supervisory responsibility over the person younger than 18 years of  
18 age and:

19 (A) the adult permits the use of the  
20 dextromethorphan only:

21 (i) under the adult's direct supervision;

22 (ii) in the adult's presence;

23 (iii) for its intended purpose; and

24 (iv) according to the directions for use,  
25 cautions, or warnings appearing on a label of the container of the  
26 dextromethorphan; and

27 (B) the adult removes the dextromethorphan from

1 the person younger than 18 years of age on completion of that use;  
2 or

3 (2) the person to whom the dextromethorphan was  
4 delivered presented to the defendant an apparently valid driver's  
5 license or personal identification certificate, issued by the Texas  
6 Department of Public Safety and containing a physical description  
7 consistent with the person's appearance, that purported to  
8 establish that the person was 18 years of age or older.

9 (c) Except as provided by Subsection (d), an offense under  
10 this section is a Class B misdemeanor.

11 (d) An offense under this section is a felony of the third  
12 degree if it is shown on the trial of the defendant that at the time  
13 of the delivery the defendant or the defendant's employer did not  
14 hold a sales tax permit for the location of the sale.

15 Sec. 486.033. FAILURE TO POST SIGN. (a) A person commits an  
16 offense if the person sells dextromethorphan in a business  
17 establishment and the person does not display the sign required by  
18 Section 486.011.

19 (b) An offense under this section is a Class C misdemeanor.

20 Sec. 486.034. PROOF OF OFFER TO SELL. Proof of an offer to  
21 sell dextromethorphan must be corroborated by a person other than  
22 the offeree or by evidence other than a statement of the offeree.

23 Sec. 486.035. SUMMARY FORFEITURE. Dextromethorphan seized  
24 as a result of an offense under this chapter is subject to summary  
25 forfeiture and to destruction or disposition in the same manner as  
26 controlled substance property under Subchapter E, Chapter 481.

27 Sec. 486.036. PREPARATORY OFFENSES. Title 4, Penal Code,

1 applies to an offense under this subchapter.

2 [Sections 486.037-486.050 reserved for expansion]

3 SUBCHAPTER D. ADMINISTRATIVE PENALTY

4 Sec. 486.051. IMPOSITION OF PENALTY. The department may  
5 impose an administrative penalty on a person who sells  
6 dextromethorphan at retail who violates this chapter or a rule or  
7 order adopted under this chapter.

8 Sec. 486.052. AMOUNT OF PENALTY. (a) The amount of the  
9 penalty may not exceed \$1,000 for each violation, and each day a  
10 violation continues or occurs is a separate violation for purposes  
11 of imposing a penalty. The total amount of the penalty assessed for  
12 a violation continuing or occurring on separate days under this  
13 subsection may not exceed \$5,000.

14 (b) The amount shall be based on:

15 (1) the seriousness of the violation, including the  
16 nature, circumstances, extent, and gravity of the violation;

17 (2) the threat to health or safety caused by the  
18 violation;

19 (3) the history of previous violations;

20 (4) the amount necessary to deter a future violation;

21 (5) whether the violator demonstrated good faith,  
22 including when applicable whether the violator made good faith  
23 efforts to correct the violation; and

24 (6) any other matter that justice may require.

25 Sec. 486.053. REPORT AND NOTICE OF VIOLATION AND PENALTY.

26 (a) If the department initially determines that a violation  
27 occurred, the department shall give written notice of the report by

1 certified mail to the person.

2 (b) The notice must:

3 (1) include a brief summary of the alleged violation;

4 (2) state the amount of the recommended penalty; and

5 (3) inform the person of the person's right to a  
6 hearing on the occurrence of the violation, the amount of the  
7 penalty, or both.

8 Sec. 486.054. PENALTY TO BE PAID OR HEARING REQUESTED. (a)  
9 Before the 21st day after the date the person receives notice under  
10 Section 486.053, the person in writing may:

11 (1) accept the determination and recommended penalty  
12 of the department; or

13 (2) make a request for a hearing on the occurrence of  
14 the violation, the amount of the penalty, or both.

15 (b) If the person accepts the determination and recommended  
16 penalty or if the person fails to respond to the notice, the  
17 commissioner by order shall approve the determination.

18 Sec. 486.055. HEARING. (a) If the person requests a  
19 hearing, the commissioner shall refer the matter to the State  
20 Office of Administrative Hearings, which shall promptly set a  
21 hearing date and give written notice of the time and place of the  
22 hearing to the person. An administrative law judge of the State  
23 Office of Administrative Hearings shall conduct the hearing.

24 (b) The administrative law judge shall make findings of fact  
25 and conclusions of law and promptly issue to the commissioner a  
26 proposal for a decision about the occurrence of the violation and  
27 the amount of a proposed penalty.

1       Sec. 486.056. DECISION BY COMMISSIONER. (a) Based on the  
2 findings of fact, conclusions of law, and proposal for a decision,  
3 the commissioner by order may:

4           (1) find that a violation occurred and impose a  
5 penalty; or

6           (2) find that a violation did not occur.

7       (b) The notice of the commissioner's order under Subsection  
8 (a) that is sent to the person in the manner provided by Chapter  
9 2001, Government Code, must include a statement of the right of the  
10 person to judicial review of the order.

11       Sec. 486.057. OPTIONS FOLLOWING DECISION: PAY OR APPEAL.  
12 Before the 31st day after the date the order of the commissioner  
13 under Section 486.056 that imposes an administrative penalty  
14 becomes final, the person shall:

15           (1) pay the penalty; or

16           (2) file a petition for judicial review of the  
17 commissioner's order contesting the occurrence of the violation,  
18 the amount of the penalty, or both.

19       Sec. 486.058. STAY OF ENFORCEMENT OF PENALTY. (a) Within  
20 the period prescribed by Section 486.057, a person who files a  
21 petition for judicial review may:

22           (1) stay enforcement of the penalty by:

23                   (A) paying the penalty to the court for placement  
24 in an escrow account; or

25                   (B) giving the court a supersedeas bond approved  
26 by the court that:

27                           (i) is for the amount of the penalty; and



1                    (ii) is effective until all judicial review  
2 of the commissioner's order is final; or

3                    (2) request the court to stay enforcement of the  
4 penalty by:

5                    (A) filing with the court a sworn affidavit of  
6 the person stating that the person is financially unable to pay the  
7 penalty and is financially unable to give the supersedeas bond; and

8                    (B) sending a copy of the affidavit to the  
9 commissioner by certified mail.

10                   (b) If the commissioner receives a copy of an affidavit  
11 under Subsection (a)(2), the commissioner may file with the court,  
12 before the 6th day after the date the copy is received, a contest to  
13 the affidavit. The court shall hold a hearing on the facts alleged  
14 in the affidavit as soon as practicable and shall stay the  
15 enforcement of the penalty on finding that the alleged facts are  
16 true. The person who files an affidavit has the burden of proving  
17 that the person is financially unable to pay the penalty or to give  
18 a supersedeas bond.

19                   Sec. 486.059. COLLECTION OF PENALTY. (a) If the person  
20 does not pay the penalty and the enforcement of the penalty is not  
21 stayed, the penalty may be collected.

22                   (b) The attorney general may sue to collect the penalty.

23                   Sec. 486.060. DECISION BY COURT. (a) If the court sustains  
24 the finding that a violation occurred, the court may uphold or  
25 reduce the amount of the penalty and order the person to pay the  
26 full or reduced amount of the penalty.

27                   (b) If the court does not sustain the finding that a

1 violation occurred, the court shall order that a penalty is not  
2 owed.

3 Sec. 486.061. REMITTANCE OF PENALTY AND INTEREST. (a) If  
4 the person paid the penalty and if the amount of the penalty is  
5 reduced or the penalty is not upheld by the court, the court shall  
6 order, when the court's judgment becomes final, that the  
7 appropriate amount plus accrued interest be remitted to the person  
8 before the 31st day after the date that the judgment of the court  
9 becomes final.

10 (b) The interest accrues at the rate charged on loans to  
11 depository institutions by the New York Federal Reserve Bank.

12 (c) The interest shall be paid for the period beginning on  
13 the date the penalty is paid and ending on the date the penalty is  
14 remitted.

15 Sec. 486.062. RELEASE OF BOND. (a) If the person gave a  
16 supersedeas bond and the penalty is not upheld by the court, the  
17 court shall order, when the court's judgment becomes final, the  
18 release of the bond.

19 (b) If the person gave a supersedeas bond and the amount of  
20 the penalty is reduced, the court shall order the release of the  
21 bond after the person pays the reduced amount.

22 Sec. 486.063. ADMINISTRATIVE PROCEDURE. A proceeding to  
23 impose the penalty is considered to be a contested case under  
24 Chapter 2001, Government Code.

25 SECTION 2. (a) This Act takes effect September 1, 2003.

26 (b) Chapter 486, Health and Safety Code, as added by this  
27 Act, applies only to conduct engaged in or an offense committed on

1 or after September 1, 2003.

2 (c) Conduct engaged in or an offense committed before  
3 September 1, 2003, is covered by the law in effect when the conduct  
4 was engaged in or the offense was committed, and the former law is  
5 continued in effect for that purpose. For purposes of this  
6 subsection, an offense was committed before September 1, 2003, if  
7 any element of the offense was committed before that date.