SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 160

46TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2004

AN ACT

RELATING TO DRUG PRECURSORS; PROVIDING THE BOARD OF PHARMACY WITH AUTHORITY TO ADD CERTAIN SUBSTANCES TO THE LIST OF DRUG PRECURSORS; REVISING THE FEE THAT THE BOARD MAY CHARGE FOR THE LICENSING AND CONTROL OF DRUG PRECURSORS; INCREASING PENALTIES; AMENDING SECTIONS OF THE DRUG PRECURSOR ACT.

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

Section 1. Section 30-31B-1 NMSA 1978 (being Laws 1989, Chapter 177, Section 1) is amended to read:

"30-31B-1. SHORT TITLE.--[~~Sections 1 through 18 of this act~~] Chapter 30, Article 31B NMSA 1978 may be cited as the "Drug Precursor Act"."

Section 2. Section 30-31B-2 NMSA 1978 (being Laws 1989, Chapter 177, Section 2) is amended to read:

"30-31B-2. DEFINITIONS.--As used in the Drug Precursor

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Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or his agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. "Agent" does not include a common or contract carrier, public warehouseman or employee of the carrier or warehouseman;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs of the United States department of justice or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or regulations adopted thereto;

F. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or which was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

(1) phenethylamines;

(2) N-substituted piperidines;

(3) morphinans;

(4) ecogonines;

(5) quinazolinones;

(6) substituted indoles; and

(7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances which are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled

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substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. "Drug" does not include devices or their components, parts or accessories;

L. "drug precursor" means any substance, material, compound, mixture or preparation listed in Section [~~3 of the Drug Precursor Act~~] 30-31B-3 NMSA 1978 or regulations adopted thereto or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures or preparations which are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance which is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, unless the board makes the findings required pursuant to Subsection B of Section 30-31B-4 NMSA 1978;

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M. "immediate precursor" means a substance which is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit the manufacture of controlled substances;

N. "license" means a license issued by the board to manufacture, possess, transfer or transport a drug precursor;

O. "manufacture" means the production, preparation, compounding, conversion or processing of a drug precursor by extraction from substances of natural origin, independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by a practitioner:

(1) as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(2) by his agent under his supervision for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

P. "person" includes an individual, sole proprietorship, partnership, corporation, association, the state or any political subdivision of the state or other legal

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entity;

Q. "possession" means to actively or constructively exercise dominion over;

R. "practitioner" means a physician, dentist, veterinarian or other person licensed to prescribe and administer drugs which are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto; and

T. "transfer" means the sale, possession with intent to sell, barter or giving away of a [~~controlled substance~~] drug precursor."

Section 3. Section 30-31B-4 NMSA 1978 (being Laws 1989, Chapter 177, Section 4) is amended to read:

"30-31B-4. DUTY TO ADMINISTER.--

A. The board shall administer the Drug Precursor Act and by regulation may add substances to the list of drug precursors enumerated in Section [~~3 of the Drug Precursor Act~~] 30-31B-3 NMSA 1978. The board shall promulgate regulations pursuant to the procedures of the Uniform Licensing Act.

B. In determining whether to add to the list of

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drug precursors a substance, material, compound, mixture or preparation that is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or that has been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is:

(a) a source of a substance already controlled under the Controlled Substances Act; or

(b) subject to being easily converted to an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses that would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor;

(4) whether the substance, material, compound, mixture or preparation is formulated to effectively prevent its conversion into an immediate precursor of a substance already controlled under the Controlled Substances Act; and

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(5) any other factors relevant to and consistent with the public health and safety.

[~~A.~~] C. In determining whether a substance, material, compound, mixture or preparation should be added to the list of drug precursors, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses which would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor; and

(4) any other factors relevant to and consistent with the public health and safety.

[~~B.~~] D. After considering the factors enumerated in [~~Subsection A~~] Subsection B or C of this section, the board shall make findings and issue regulations listing the substance, material, compound, mixture or preparation as a drug precursor if it finds that the substance, material, compound, mixture or preparation has a significant potential for use in the manufacture of controlled substances.

[~~C.~~] E. If the board designates a substance, material, compound, mixture or preparation as a drug precursor,

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then substances, materials, compounds, mixtures or preparations which are precursors of the drug precursor so designated shall not be subject to control solely because they are precursors of a drug precursor.

[~~D.~~] F. If any substance, material, compound, mixture or preparation is designated as controlled under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Drug Precursor Act after providing for a hearing pursuant to the Uniform Licensing Act.

[~~E.~~] G. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act."

Section 4. Section 30-31B-6 NMSA 1978 (being Laws 1989, Chapter 177, Section 6) is amended to read:

"30-31B-6. REGULATIONS.--

A. The board may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer and transportation of drug precursors [~~which~~]. The fees shall not be [~~less~~] more than two hundred fifty dollars ($250) per license for a wholesaler's license, a distributor's license or a manufacturer's license. The fees shall not be more than fifty dollars ($50.00) per license for a retail distributor's license, when the retail distributor has ten or more employees. The fees shall not be

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more than twenty-five dollars ($25.00) per license for a retail distributor's license, when the retail distributor has fewer than ten employees.

[~~A.~~] B. Every person who manufactures, possesses, transfers or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer or transportation of any drug precursor [~~must~~] shall obtain, annually, a license issued by the board.

[~~B.~~] C. Persons licensed by the board to manufacture, possess, transfer or transport drug precursors may manufacture, possess, transfer or transport those substances to the extent authorized by their license and in conformity with the other provisions of the Drug Precursor Act.

[~~C.~~] D. The following persons need not be licensed under the Drug Precursor Act and may lawfully possess drug precursors:

(1) physicians;

(2) an agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(3) an employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business; [~~or~~]

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(4) a student enrolled in a [~~college~~] chemistry class for credit; provided, however, that the student's use of the drug precursor is for a bona fide educational purpose and that the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the board;

(5) a consumer who uses a drug precursor for its intended purpose and who does not use the drug precursor to manufacture a substance controlled under the Controlled Substances Act;

(6) a pharmacy, an agent or employee of a pharmacy or a contractor for a pharmacy;

(7) a pharmacist, an agent or employee of a pharmacist or a contractor for a pharmacist; or

(8) an agent or employee of a licensed retail establishment or a contractor for a licensed retail establishment.

[~~D.~~] E. The board may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

[~~E.~~] F. The board may inspect the establishment of a licensee or applicant for license in accordance with the board's regulations."

Section 5. Section 30-31B-12 NMSA 1978 (being Laws 1989, Chapter 177, Section 12) is amended to read:

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"30-31B-12. DRUG PRECURSORS--PROHIBITED ACTS--PENALTIES.--

A. It is unlawful for any person:

(1) to transfer drug precursors except to an authorized licensee;

(2) to intentionally use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Drug Precursor Act or any record required to be kept by that act;

(5) who is a licensee to intentionally manufacture a drug precursor not authorized by his license or to intentionally transfer a drug precursor not authorized by his license to another licensee or authorized person;

(6) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Drug Precursor Act;

(7) to intentionally refuse an entry into any premises for any inspection authorized by the Drug Precursor Act; or

(8) to manufacture, possess, transfer or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the board.

B. Any person who violates any provision of this section is [~~(1) for the first offense~~] guilty of a [~~misdemeanor~~] fourth degree felony and shall be sentenced pursuant to the provisions of Section [~~31-19-1 NMSA 1978~~] 31-18-15 NMSA 1978

[~~(2) for the second offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and~~

~~(3) for the third or subsequent offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978~~].

C. When a person owns or operates a retail establishment where drug precursors are sold by an employee in violation of the provisions of this section, it is an affirmative defense to a prosecution of that owner or operator if he furnishes documentation that he provided the employee with a training program regarding state and federal laws and regulations regarding drug precursors; provided that, if the owner or operator knew or should have known of the employee's

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violation, the owner or operator shall also be in violation of the provisions of this section."

Section 6. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2004.

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