

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 "cigarette" as defined in
Subsection D of Section 6-4-12 NMSA 1978;

C. "manufacturer" means:

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1 (1) any entity that manufactures or otherwise
2 produces cigarettes or causes cigarettes to be manufactured or
3 produced that are intended to be sold in New Mexico, including
4 cigarettes intended to be sold in New Mexico through an
5 importer; or

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

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

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

19 F. "retail dealer" means any person, other than a
20 manufacturer or wholesale dealer, engaged in selling cigarettes
21 or tobacco products;

22 G. "sale" or "sell" means a transfer of or an offer
23 or agreement to transfer title or possession by exchange,
24 barter or any other means. In addition to cash and credit
25 sales, giving cigarettes as samples, prizes or gifts and

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1 exchanging cigarettes for any consideration other than money is
2 a "sale"; and

3 H. "wholesale dealer" means any person other than a
4 manufacturer who sells cigarettes or tobacco products to retail
5 dealers or other persons for purposes of resale and any person
6 who owns, operates or maintains one or more cigarette or
7 tobacco product vending machines on premises owned or occupied
8 by another person.

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

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

13 (1) the cigarettes have been tested in
14 accordance with the test method and meet the performance
15 standard specified in this section;

16 (2) a written certification has been filed by
17 the manufacturer with the state fire marshal in accordance with
18 Section 4 of the Fire-Safer Cigarette and Firefighter
19 Protection Act; and

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

22 B. Testing of cigarettes shall be conducted in
23 accordance with the American society of testing and materials
24 standard E2187-04 standard test method for measuring the
25 ignition strength of cigarettes and shall be conducted on ten

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1 layers of filter paper. No more than twenty-five percent of
2 the cigarettes tested in a test trial in accordance with this
3 section shall exhibit full-length burns. Forty replicate tests
4 shall constitute a complete test trial for each cigarette
5 tested. The performance standard required by this section
6 shall only be applied to a complete test trial. Written
7 certifications shall be based upon testing conducted by a
8 laboratory that has been accredited pursuant to standard
9 ISO/IEC 17025 of the international organization for
10 standardization or other comparable accreditation standard
11 required by the state fire marshal.

12 C. Laboratories conducting testing in accordance
13 with this section shall implement a quality control and quality
14 assurance program that includes a procedure that will determine
15 the repeatability of the testing results. The repeatability
16 value shall be no greater than 0.19.

17 D. Testing performed or sponsored by the state fire
18 marshal to determine a cigarette's compliance with the
19 performance standard required by this section shall be
20 conducted in accordance with this section.

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

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

13 G. A manufacturer of a cigarette that the state
14 fire marshal determines cannot be tested in accordance with the
15 test method prescribed in Subsection B of this section shall
16 propose a test method and performance standard for the
17 cigarette to the state fire marshal. Upon approval of the
18 proposed test method and a determination by the state fire
19 marshal that the performance standard proposed by the
20 manufacturer is equivalent to the performance standard
21 prescribed in Subsection B of this section, the manufacturer
22 may employ that test method and performance standard to certify
23 the cigarette pursuant to Section 4 of the Fire-Safer Cigarette
24 and Firefighter Protection Act. If the state fire marshal
25 determines that another state has enacted reduced cigarette

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

17 H. Each manufacturer shall maintain copies of the
18 reports of all tests conducted on all cigarettes offered for
19 sale for a period of three years and shall make copies of the
20 reports available to the state fire marshal and the attorney
21 general upon written request. Any manufacturer who fails to
22 make copies of the reports available within sixty days of
23 receiving a written request may be assessed a civil penalty not
24 to exceed ten thousand dollars (\$10,000) for each day after the
25 sixtieth day that the manufacturer does not make the copies

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1 available.

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

11 J. The state fire marshal shall review the
12 effectiveness of this section and report findings and make
13 recommendations to the legislature every three years.

14 K. The requirements of Subsection A of this section
15 shall not prohibit:

16 (1) wholesale or retail dealers from selling
17 their existing inventory of cigarettes on or after the
18 effective date of this section if the wholesale or retail
19 dealer can establish that state tax stamps were affixed to the
20 cigarettes prior to the effective date and the wholesale or
21 retail dealer can establish that the inventory was purchased
22 prior to the effective date in comparable quantity to the
23 inventory purchased during the same period of the prior year;
24 or

25 (2) the sale of cigarettes solely for the

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1 purpose of consumer testing. For purposes of this subsection,
2 the term "consumer testing" means an assessment of cigarettes
3 that is conducted by a manufacturer, or under the control and
4 direction of a manufacturer, for the purpose of evaluating
5 consumer acceptance of the cigarettes, utilizing only the
6 quantity of cigarettes that is reasonably necessary for an
7 assessment.

8 L. The Fire-Safer Cigarette and Firefighter
9 Protection Act shall be interpreted and construed to effectuate
10 its general purpose and to make that act uniform with the laws
11 of those states that have enacted reduced cigarette ignition
12 propensity laws as of the date that the Fire-Safer Cigarette
13 and Firefighter Protection Act is enacted.

14 Section 4. CERTIFICATION AND PRODUCT CHANGE.--

15 A. Each manufacturer shall submit to the state fire
16 marshal a written certification attesting that each cigarette
17 listed in the certification has been tested in accordance with
18 the test method and meets the performance standard in Section 3
19 of the Fire-Safer Cigarette and Firefighter Protection Act.

20 B. Each cigarette listed in the certification shall
21 be described with the following information:

22 (1) the brand or the trade name on the
23 package;

24 (2) the style, such as light or ultralight;

25 (3) the length in millimeters;

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

14 C. The state fire marshal shall verify that the
15 manufacture's certifications have been approved by the state
16 fire marshal and shall make the verified certifications
17 available to the attorney general for purposes consistent with
18 the Fire-Safer Cigarette and Firefighter Protection Act and
19 Section 6-4-18 NMSA 1978 and to the taxation and revenue
20 department for the purposes of ensuring compliance with this
21 section.

22 D. Each cigarette certified under this section
23 shall be recertified every three years.

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

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

21 Section 5. MARKING OF CIGARETTE PACKAGING.--

22 A. Cigarettes that are certified by a manufacturer
23 in accordance with the Fire-Safer Cigarette and Firefighter
24 Protection Act shall be marked to indicate compliance with that
25 act. The marking shall be in eight-point type or larger and

1 consist of the letters "FSC", which signifies fire standard
2 compliant, and shall be permanently printed, stamped, engraved
3 or embossed on the package at or near the universal product
4 code.

5 B. A manufacturer shall use only one marking and
6 shall apply this marking uniformly for all packages, including
7 packs, cartons and cases, and for brands marketed by that
8 manufacturer.

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

17 Section 6. PENALTIES.--

18 A. A manufacturer, wholesale dealer, agent or any
19 other person who knowingly sells cigarettes, other than through
20 retail sales, in violation of Section 3 of the Fire-Safer
21 Cigarette and Firefighter Protection Act may be assessed a
22 civil penalty not to exceed one hundred dollars (\$100) for each
23 pack of the cigarettes sold; provided that in no case shall the
24 penalty against any person or entity exceed one hundred
25 thousand dollars (\$100,000) for sales during any thirty-day

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1 period.

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

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

18 D. A person violating any other provision of the
19 Fire-Safer Cigarette and Firefighter Protection Act may be
20 assessed a civil penalty for a first offense not to exceed one
21 thousand dollars (\$1,000), and for a subsequent offense subject
22 to a civil penalty not to exceed five thousand dollars (\$5,000)
23 for each violation.

24 E. Whenever a law enforcement agency or duly
25 authorized representative of the state fire marshal discovers

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1 any cigarettes for which no certification has been filed as
2 required by Section 4 of the Fire-Safer Cigarette and
3 Firefighter Protection Act or that have not been marked as
4 required by Section 5 of that act, those cigarettes shall be
5 deemed contraband pursuant to Section 6-4-22 NMSA 1978 and the
6 state fire marshal or law enforcement agency may seize and take
7 possession of the cigarettes. Cigarettes seized pursuant to
8 this section shall be destroyed; provided, however, that, prior
9 to the destruction of any cigarette seized pursuant to these
10 provisions, the attorney general and the true holder of the
11 trademark rights in the cigarette brand shall be permitted to
12 inspect the cigarettes.

13 F. In addition to any other remedy provided by law,
14 the attorney general may file an action in district court for a
15 violation of the Fire-Safer Cigarette and Firefighter
16 Protection Act, including petitioning for preliminary or
17 permanent injunctive relief or to recover costs, damages and
18 attorney fees. Each violation of the Fire-Safer Cigarette and
19 Firefighter Protection Act or of rules or regulations adopted
20 under that act constitutes a separate civil violation for which
21 the state fire marshal or attorney general may obtain relief.
22 Upon obtaining judgment for injunctive relief under this
23 section, the state fire marshal or attorney general shall
24 provide a copy of the judgment to all wholesale dealers and
25 agents to which a cigarette has been sold.

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1 Section 7. IMPLEMENTATION.--

2 A. The state fire marshal may promulgate rules
3 pursuant to the Administrative Procedures Act, necessary to
4 effectuate the purposes of the Fire-Safer Cigarette and
5 Firefighter Protection Act and for inspection, seizure and
6 destruction of cigarettes pursuant to the Forfeiture Act.

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

15 Section 8. INSPECTION.--To enforce the provisions of the
16 Fire-Safer Cigarette and Firefighter Protection Act, the
17 attorney general, the taxation and revenue department and the
18 state fire marshal, their duly authorized representatives and
19 other law enforcement personnel may examine the books, papers,
20 invoices and other records of any person in possession, control
21 or occupancy of premises where cigarettes are placed, stored,
22 sold or offered for sale, as well as the stock of cigarettes on
23 the premises. Every person in the possession, control or
24 occupancy of premises where cigarettes are placed, sold or
25 offered for sale is hereby directed and required to give the

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1 attorney general, the taxation and revenue department and the
2 state fire marshal and other law enforcement personnel the
3 means, facilities and opportunity for the examinations
4 authorized by this section.

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

20 Section 10. SALE OUTSIDE OF NEW MEXICO.--Nothing in the
21 Fire-Safer Cigarette and Firefighter Protection Act shall be
22 construed to prohibit a person or entity from manufacturing or
23 selling cigarettes that do not meet the requirements of Section
24 3 of that act if the cigarettes are or will be stamped for sale
25 in another state or are packaged for sale outside the United

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1 States and that person or entity has taken reasonable steps to
2 ensure that the cigarettes will not be sold or offered for sale
3 to persons located in New Mexico.

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

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

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

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