

HOUSE BILL REPORT

HB 2163

As Reported by House Committee On:

Public Safety

Appropriations Subcommittee on General Government & Information Technology

Title: An act relating to dextromethorphan.

Brief Description: Establishing dextromethorphan provisions.

Sponsors: Representatives Harris, Haler and Morrell.

Brief History:

Committee Activity:

Public Safety: 1/24/14, 1/31/14 [DPS];

Appropriations Subcommittee on General Government & Information Technology:
2/6/14 [DP2S(w/o sub PS)].

Brief Summary of Second Substitute Bill

- Makes the first offense for: (1) a retailer or a retailer's employee to sell dextromethorphan (DM) to a minor; or (2) a minor to purchase a product containing DM punishable by a written warning.
- Makes subsequent offenses a class 1 civil infraction.
- Requires the trade association representing manufacturers of DM products to supply retailers with an annual list of all products that contain DM.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Goodman, Chair; Roberts, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Appleton, Holy, Moscoso and Takko.

Minority Report: Do not pass. Signed by 2 members: Representatives Hope and Ross.

Staff: Yvonne Walker (786-7841).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Dextromethorphan (DXM or DM) is an antitussive (cough suppressant) drug. The primary use of dextromethorphan is as a cough suppressant, for the temporary relief of a cough caused by minor throat and bronchial irritation (such as that which commonly accompanies the flu and common cold), as well as those resulting from inhaled particle irritants. It is one of the active ingredients in many over-the-counter (OTC) cold and cough medicines, including generic labels and store brands, such as Benylin DM, Mucinex DM, Robitussin, NyQuil, Dimetapp, Vicks, Coricidin, Delsym, TheraFlu, and others.

Dextromethorphan has also other uses in medicine, ranging from pain relief to psychological applications. It is sold in syrup, spray, capsule, liquid, liquid gelatin capsule, lozenge, and tablet forms. It also is available in powdered form on the Internet—typically for sale to laboratories conducting research on DM. In its pure form, DM occurs as a white powder.

Dextromethorphan is a synthetically produced substance that is chemically related to codeine, though it is not an opiate. Dextromethorphan is an ingredient in more than 140 OTC cough and cold remedies since the 1950s, and has gradually replaced codeine as the most widely used cough suppressant in the United States.

When ingested at recommended dosage levels, DM generally is a safe and highly effective cough suppressant; however, when ingested in larger amounts, DM produces negative physiological effects. Reports of DM abuse have resulted in monitoring by the Drug Enforcement Administration (DEA).

Slang terms for DM include: DM, robo, rojo, and velvet. Slang terms for DXM intoxication include: robo tripping, skittling, and dexing.

In 2003 legislation was introduced in Texas and North Dakota to prohibit the sale of DM to minors. The proposed legislation did not pass in either state. However, five states have enacted legislation to ban or limit the sale of DM products to minors. In 2011 California became the first state to prohibit the sale of OTC cough medicines containing the active ingredient DM to minors. Minnesota, New York, and Pennsylvania have since enacted measures to regulate DM products to minors and making it an infraction with penalties ranging from \$250 to \$500. Some retail stores including Rite Aid and Wal-Mart chains currently have policies that require identification for purchase of medications containing DM.

Summary of Substitute Bill:

New crimes and penalties are created for receiving, possessing, and distributing DM products. A retailer selling a finished drug product containing any quantity of DM must require and obtain proof of age from the purchaser before completing the sale, unless it can reasonably be presumed that the purchaser is 25 years of age or older.

It is a class 1 civil infraction offense for:

- any commercial entity (manufacturer, distributor, or retailer whose employee or representative during the course of the employee's or representative's employment or association with that entity) to knowingly or willfully sell or trade any quantity of a finished DM product to a minor under the age of 18 years old (except for a retailer that demonstrates a good faith effort to comply with the statute);
- any employee or representative of a commercial entity, during the course of his or her employment or association with the employer, to sell or trade any quantity of a finished DM product to a minor under the age of 18 years old; or
- a minor under the age of 18 years old to purchase a finished drug product containing any quantity of DM.

A class 1 civil infraction is punishable by a maximum fine of \$250.

It is an unranked class C felony offense for a person to:

- possess or receive unfinished DM with intent to distribute, unless he or she is registered under the Federal Food, Drug, and Cosmetic Act (FD&C Act) or is appropriately licensed with the Pharmacy Quality Assurance Commission; or
- distribute unfinished DM to any person other than a person registered under the FD&C Act or appropriately licensed with the Pharmacy Quality Assurance Commission.

The maximum sentence for unranked felonies is one year of confinement in jail, along with possible community restitution, legal financial obligations, and up to one year of community custody.

This act does not apply to a common carrier that possesses, receives, or distributes unfinished DM for purposes of distributing such unfinished DM between persons registered under the FD&C Act or appropriately licensed with the Pharmacy Quality Assurance Commission.

Nothing in this act is construed to impose any compliance requirement on any retailer other than manually obtaining and verifying proof of age as a condition of sale, including placement of products within a store, other restrictions on consumers' direct access to finished drug products, or the maintenance of transaction records. Medication containing DM that is sold pursuant to a valid prescription is exempt from the act. Any ordinance regulating the sale, distribution, receipt, or possession of DM enacted by a county, city, town, or other political subdivision of Washington is preempted by this act, and DM is not subject to further regulation by such subdivisions.

"Common carrier" means any person who holds himself or herself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise, whether or not the person actually operates the vessel, vehicle, or aircraft by which the transportation is provided, between a port or place and a port or place in the United States.

"Finished drug product" means a drug legally marketed under the FD&C Act, which is in finished dosage form.

"Proof of age" means any document issued by a governmental agency that contains a description or photograph of the person and gives the person's date of birth, including a passport, military identification card, or driver's license.

"Unfinished dextromethorphan" means DM in any form, compound, mixture, or preparation that is not a drug in finished dosage form.

Substitute Bill Compared to Original Bill:

The penalty is reduced from a misdemeanor to a class 1 Civil Infraction for a retailer or a retailer's employee to sell DXM/DM to a minor or for a minor to purchase a product containing DM.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect July 1, 2015.

Staff Summary of Public Testimony:

(In support) Dextromethorphan is a non-narcotic product found in a variety of cough syrups. Most of the national retailers are already monitoring the sale of DM and many of the larger retailers already request that identification be shown prior to a person purchasing a product containing DM. Upon enactment of this bill, the only action that small retailers have to do is install a program that allows a person to scan an item, thereby alerting the cashier that the purchaser needs to show identification prior to purchase.

There must be regulations for controlling the sale of DXM and while this bill is a start, there are some that would advocate for a more stringent policy. The abuse of this drug is not new but the scope has been changing. Rates of abuse of DM have increased significantly over the last decade. This bill attempts to address the issue of preteen abuse of over-the-counter products that contain DM. There are educational resources available to parents, students, and the industry to make people more aware of the problem. However something needs to be done to curb abuse and the point of sale is a good start.

This bill will create a level playing field to ensure that all retailers are adhering to the same process and rules when selling DXM/DM products. The criminal penalties, on the other hand, in the current version of the bill are too high and it is suggested that a more graduated response to the problem should be put in place first such as warning or a fine.

The felony penalties in the bill relate to unfinished DM. This is not something that a person can pick up off the shelf at their local pharmacy. This is usually sold online and normally only medical researchers and drug manufacturers should have possession of this product.

(Opposed) The Washington Food Industry Association was not aware that this is a problem in contrast to the Sudafed issues that were associated with the methamphetamine problems. This bill is adding an additional regulatory burden to the check stands and the industry would like to have some time for training. There needs to be more discussion and education before

civil and criminal penalties are put into place. These products need to be sold safely and effectively but a lot more work needs to take place before this bill passes.

Persons Testifying: (In support) Representative Harris, prime sponsor; Steve Lindstrom, Vancouver Evergreen High School; Scott Sigman and Sean Moore, Consumer Healthcare Products Association; and Seth Dawson, Washington Association for Substance Abuse and Violence Prevention.

(Opposed) Carolyn Logue, Washington Food Industry Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON GENERAL GOVERNMENT & INFORMATION TECHNOLOGY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Public Safety. Signed by 8 members: Representatives Hudgins, Chair; Parker, Ranking Minority Member; Buys, Christian, Dunshee, S. Hunt, Jinkins and Springer.

Minority Report: Do not pass. Signed by 1 member: Representative Taylor.

Staff: Alex MacBain (786-7288).

Summary of Recommendation of Committee On Appropriations Subcommittee on General Government & Information Technology Compared to Recommendation of Committee On Public Safety:

The Appropriations Subcommittee on General Government and Information Technology recommended elimination of the class C felony penalty for persons that possess, receive, or distribute unfinished dextromethorphan (DM) without being licensed or registered. If a retailer or a retailer's employee sells a product with DM to a minor or a minor purchases a DM product, the first offense is punishable by a written warning issued by law enforcement. The trade association representing manufacturers of DM products is required to supply retailers with an annual list of all products that contain DM.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect on July 1, 2015.

Staff Summary of Public Testimony:

(In support) Dextromethorphan (DM) is a non-narcotic product found in a variety of cough syrups. It is a very accessible product and a number of youth are misusing products that contain DM to get high. This bill would require a person to be 18 years old to acquire DM. Most of the national retailers are already monitoring the sale of DM and many of the larger

retailers already request that identification be shown prior to a person purchasing a product containing DM. Small retailers can install a program that allows a person to scan an item, alerting the cashier that the purchaser needs to provide identification. Medical centers, law enforcement, and poison control centers agree that we should stop teens and preteens from purchasing products with DM.

This bill will create a level playing field to ensure that all retailers are adhering to the same processes and rules when selling DM products. Of most concern is the retail application of the bill and preventing kids from misusing DM. We don't want the class C felony for trafficking in the unfinished DM product to weigh this bill down. Local area students canvassed small local retailers and found general acceptance of the idea of carding for purchases of DM. The biggest concern raised by retailers was not wanting to be burdened by additional recordkeeping.

(In support with amendment(s)) Walgreens has a written policy to card patrons who appear age 25 or under who purchase products with DM. Cashiers are trained to be aware of the products that contain DM. Clarification that having written policies would satisfy the good faith effort to comply with the act would be helpful.

(Opposed) The Washington Food Industry Association was not aware that this was a widespread problem. There are concerns about adding all these civil penalties and the uncertainty about which products are the ones that require purchasers to be carded. It's not like tobacco or alcohol where all the purchases are carded. There are many different types of medicine and it might be difficult to readily identify the ones that contain DM. Members and employees would be subject to civil penalties even on a first time occurrence as a result of the uncertainty about which products contain DM.

Persons Testifying: (In support) Representative Harris, prime sponsor; Scott Sigman, Consumer Health Products Association; and Steve Lindstrom, Evergreen High School.

(In support with amendment(s)) Jim Hedrick, Walgreens.

(Opposed) Carolyn Logue, Washington Food Industry Association.

Persons Signed In To Testify But Not Testifying: None.