
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 193 **Hearing Date:** March 26, 2019
Author: Nielsen
Version: January 31, 2019
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Nitrous Oxide: Retail Sales*

HISTORY

Source: Author

Prior Legislation: SB 631 (Nielsen), not set for hearing Assembly Judiciary 2017
AB 1735 (Hall) Chapter 458, Stats. 2014
AB 1015 (Torlakson) Chapter 266, Stats. 2009

Support: California District Attorneys Association

Opposition: None known

PURPOSE

The purpose of this bill is to prohibit a retailer of tobacco or tobacco-related products, as defined, from selling or offering for sale nitrous oxide.

Existing law provides that possession of nitrous oxide with the intent to breathe, inhale, or ingest for the purpose of intoxication is a misdemeanor. (Pen. Code, § 381b)

Existing law provides that intentionally being under the influence of nitrous oxide is a misdemeanor, except pursuant to legitimate dental or medical use. (Pen. Code, § 381b.)

Existing law provides that selling, furnishing, administering, distributing, giving away, or offering to sell, furnish, administer, distribute, or give away a device, canister, tank, or receptacle containing nitrous oxide to a person under 18 years of age is a misdemeanor. (Pen. Code, § 381c.)

Existing law provides that it is a misdemeanor to dispense or distribute nitrous oxide to a person if the dispenser or distributor of the nitrous oxide knows or should know that the person is going to use the nitrous oxide for the purpose of intoxication, and that person proximately causes great bodily injury or death to himself, herself, or another person. (Pen. Code, § 381d.)

Existing law requires that a person who dispenses or distributes nitrous oxide record each transaction in a written or electronic document. (Pen. Code, § 381e.)

Existing law provides that the person dispensing or distributing the nitrous oxide require the purchaser to sign the document recording the transaction, provide a complete residential address, and present valid government-issued photo identification. Existing law also requires that the person dispensing or distributing the nitrous oxide sign and date the document and retain the document at the person's business address for one year from the date of the transaction for inspection. (Pen. Code, § 381e.)

Existing law requires that the document signed by the purchaser include all of the following:

- 1) That inhalation of nitrous oxide outside of a clinical setting may have dangerous health effects.
- 2) That it is a violation of state law to possess nitrous oxide with the intent to breathe, inhale, or ingest it for the purpose of intoxication.
- 3) That it is a violation of state law to knowingly distribute or dispense nitrous oxide to a person who intends to breathe, inhale, or ingest it for the purpose of intoxication. (Pen. Code, § 381e.)

This bill makes it a misdemeanor for any retailer of tobacco or tobacco-related products who sells or offers for sale any device, canister, tank, or receptacle either exclusively containing nitrous oxide or containing a chemical compound mixed with nitrous oxide.

This bill makes an employee of a retailer of tobacco or tobacco-related products who sells or offers for sale, or who is in charge during the sale or offer for sale of, any device, canister, tank, or receptacle containing nitrous oxide liable.

This bill requires a court to order the suspension of the business license, for a period of up to one year, of a person who knowingly violates this section, after having been previously convicted of a violation of this section, unless the owner of the business license can demonstrate a good faith attempt to prevent violations of this section by the owner or the owner's employees.

This bill does not apply to the sale of nitrous oxide contained in food products for use as a propellant.

This bill defines a retailer of tobacco or tobacco-related products as any business that engages in the retail sale to consumers of cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, or any liquid containing nicotine for use in an electronic vaporizing device, or any cigarette lighters, cigar cutters, rolling papers, smoking pipes, water pipes, hookahs, electronic cigarettes or electronic vaporizing device, or any other paraphernalia associated with the smoking or ingesting of tobacco, whether or not these products are the primary type of merchandise sold by that retailer.

COMMENTS

1. Need for This Bill

According to the author:

In October of 2016, a constituent contacted my office upon learning that his 20-year-old son had been using nitrous oxide, also known as "whippets," which he legally purchased through a smoke shop. The substance abuse degraded his health

to the point that he is unable to walk without assistance and was confined to a wheelchair.

Although this case is the catalyst for SB 631, it is far from an isolated incident. In 2012, two brothers – Christopher and Robert Ohlander – were killed by a driver who lost control of his car while under the influence of nitrous oxide, which he had legally purchased from a Folsom smoke shop. In 2010, a 35-year-old married schoolteacher and law school student, Jason Starn, started using nitrous oxide when an employee at a Modesto head shop suggested it to him. After two months of steady use, he lost all feeling below his rib cage and suffered a seizure and spinal cord degeneration, leaving him reliant on a walker for mobilization.

Most Californians will encounter nitrous oxide at the dentist in the form of “laughing gas,” or when using pre-made whipped cream (e.g., Reddi-Wip). Nitrous oxide cartridges are also sold with the intended use of aerating homemade whipped cream. These cartridges are often purchased in smoke shops or head shops for recreational use and go by a variety of nicknames, including “whippits” and “hippy crack.” Usually, the canisters will be dispensed into a balloon, from which the nitrous oxide is inhaled.

Unlike the “laughing gas” administered by dentists, who carefully control and monitor its use to ensure that there is a safe amount of oxygen mixed in with the gas, nitrous oxide abuse is dangerous. According to the National Institute on Drug Abuse, recreational use of nitrous oxide can lead to “death from lack of oxygen to the brain, altered perception and motor coordination, loss of sensation, limb spasms, blackouts caused by blood pressure changes, [and] depression of heart muscle functioning.”

In short, although nitrous oxide cartridges have unusual yet legitimate uses, it is unlikely that they are being purchased at smoke shops and head shops for use in making homemade whipped cream. Instead, they are almost certainly being inhaled as a dangerous inhalant by individuals who are unaware of the serious risks of using this so-called “hippy crack.”

2. Background on Nitrous Oxide: Its Uses and Abuse

Nitrous oxide is a colorless and odorless to sweet-smelling inorganic gas. It has several uses, including managing pain and anxiety in dentistry, use in food preparation, and as an oxidizer in model rockets and motor vehicle racing. According to the American Dental Association, inhaled nitrous oxide-oxygen is the most used gaseous anesthetic in the world and a 2007 survey by the ADA estimated that 70% of dental practices using any form of sedation employed nitrous oxide-oxygen sedation. (<<http://www.ada.org/en/member-center/oral-health-topics/nitrous-oxide>> [as of Mar. 20, 2019].)

Household products such as solvents and aerosol sprays are commonly inhaled by young people for the purpose of intoxication. The National Institute for Drug Abuse (NIDA) website states:

Inhalants are various products easily bought and found in the home or workplace—such as spray paints, markers, glues, and cleaning fluids. They contain dangerous substances that have *psychoactive* (mind-altering) properties

when inhaled. People don't typically think of these products as drugs because they're not intended for getting "high," but some people use them for that purpose. When these substances are used for getting high, they are called *inhalants*. Inhalants are mostly used by young kids and teens and are the only class of substance used more by younger than by older teens. (<<https://www.drugabuse.gov/publications/drugfacts/inhalants>> [as of Mar. 20, 2019].))

Nitrous oxide is inhaled from balloons filled with the gas. The NIDA notes that “although the high that inhalants produce usually lasts just a few minutes, people often try to make it last by continuing to inhale again and again over several hours.” (*Id.*) Short-term effects of inhalant use include slurred or distorted speech, lack of coordination, euphoria, dizziness, light-headedness, hallucinations, delusions, vomiting, headaches, and drowsiness. Long-term effects of inhalant use include liver and kidney damage, hearing loss, bone marrow damage, loss of coordination and limb spasms from nerve damage, delayed behavioral development, and brain damage from a lack of oxygen. Inhalant abuse can also cause seizures, coma, and death.

The National Survey on Drug Use and Health (NSDUH) provides data on substance use, including inhalant use. The 2016 survey found that approximately 600,000 people aged 12 or older—or 0.2 percent of the population—were current users of inhalants, and inhalant use was more common among adolescents aged 12 to 17. (<<https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.pdf>> [as of Mar. 20, 2019].) The survey also found the following data regarding the percentages of people in different age groups who were current users of inhalants: 0.6 percent of adolescents, 0.4 percent of young adults aged 18 to 25, and 0.2 percent of adults aged 26 or older. (*Id.*)

3. Effect of This Bill

Existing law prohibits the possession, use, and dispensation of nitrous oxide as a recreational drug. Retailers are prohibited from selling nitrous oxide to customers under the age of 18. Retailers are required to provide specified information to customers about the dangers of nitrous oxide and prohibitions on the product, and retailers must record each transaction in a written or electronic document. The purchaser must also sign the document and provide government-issued photo identification and his or her residential address.

This bill seeks to place additional limits on the sale of nitrous oxide by prohibiting retailers of tobacco and tobacco-related products from selling nitrous oxide.

4. Issues and Concerns

a. Definition of Retailer of Tobacco or Tobacco-Related Products is Too Broad

This bill defines a retailer of tobacco or tobacco-related products as:

any business that engages in the retail sale to consumers of cigarettes, cigar, little cigars, chewing tobacco, pipe tobacco, or snuff, or any liquid containing nicotine for use in an electronic vaporizing device, or any cigarette lighters, cigar cutters, rolling papers, smoking pipes, water pipes, hookahs, electronic cigarettes or electronic vaporizing

device, or any other paraphernalia associated with the smoking or ingesting of tobacco, *whether or not these products are the primary type of merchandise sold by that retailer.*

This definition includes many types of retailers, including grocery stores, drug stores and large general retailers like Target, where customers may purchase products containing nitrous oxide for legitimate purposes (e.g., cooking). Given that the intent of this bill is to prohibit smoke shops and head shops from selling nitrous oxide, members may wish to consider the following amendments:

- 1) Define a retailer of tobacco or tobacco-related products as “any business that *primarily* engages in the retail sale to consumers of cigarettes, cigar, little cigars, chewing tobacco, pipe tobacco, or snuff, or any liquid containing nicotine for use in an electronic vaporizing device, or any cigarette lighters, cigar cutters, rolling papers, smoking pipes, water pipes, hookahs, electronic cigarettes or electronic vaporizing device, or any other paraphernalia associated with the smoking or ingesting of tobacco.”
- 2) Eliminate the final clause “whether or not these products are the primary type of merchandise sold by that retailer.”

b. Employee Liability

This bill would make both the retailer and its employees criminally liable for violating the provisions in this bill. With respect to employee liability, subdivision (b) of the proposed Penal Code section 381f reads:

“An employee of a retailer of tobacco or tobacco-related products who sells or offers for sale, or who is in charge during the sale or offer for sale of, any item described in subdivision (a) is liable under this section.”

Members may wish to consider whether the retailer, employee, or both should be liable for the failure to comply with the provisions in this bill. If the intent is to hold both a retailer and its employees liable for selling nitrous oxide, members may wish to consider an amendment to eliminate the following clause: “or who is in charge during the sale or offer for sale of, any item described in subdivision (a) is liable under this section.” This clause appears unnecessary given that the employee who is actually selling or offering to sell nitrous oxide is covered by this subdivision. Alternatively, if the intent is to only hold the retailer liable, the members may wish to consider an amendment to strike the entirety of subdivision (b).

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