



February 14, 2018 – Attachment 2

SB 1255

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

Via Email and USPS Mail

December 13, 2017

The Honorable Fred S. Martin
Idaho State Senate
3672 Tumbleweed Place
Boise, ID 83713
fmartin@senate.idaho.gov

Re: DRELB009, Tobacco 21

Dear Senator Martin:

This letter is in response to your inquiry for a legal analysis regarding DRELB009, also known as Tobacco 21. This proposed legislation would amend the Idaho Prevention of Minors' Access to Tobacco Act, title 39, chapter 57, Idaho Code (Minors' Access Act). As discussed below, I do not perceive any constitutional infirmity that would endanger the legality of the proposed legislation. Nor do I perceive any other legal issue with the bill.

DRELB009 would amend the Minors' Access Act by raising the legal smoking and tobacco use age in Idaho to 21. Various provisions in the Act that relate to this would accordingly be changed to reflect this new age requirement. We note that a number of States have passed similar legislation, including Hawaii, New Jersey, California, Maine, and Oregon. Over 200 communities across the country have also raised the smoking age within their jurisdiction to 21.

There is nothing in the proposed legislation that raises any constitutional concerns. The Equal Protection Clauses of the United States and Idaho Constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law. United States Constitution Amend. XIV § 1; Idaho Constitution, art. 1, § 2.

Under both federal and state law, in analyzing an equal protection claim, the first step is to identify the statutory classification under attack. The next step is to determine the proper standard by which the legislative classification is to be reviewed. Finally, the last step is to determine whether the appropriate standard has been satisfied. *State, Department of Health and Welfare v. Reid*, 124 Idaho 908, 912, 865 P.2d 999, 1003 (1993).

The classification that appears subject to review is the age by which a person may smoke, purchase or sell tobacco products.

There are three standards of review used in equal protection analysis. Where the classification is based upon a suspect classification, such as nationality or race, or involves a fundamental right, the courts use a 'strict scrutiny' test. *State v. Missamore*, 119 Idaho 27, 33, 803 P.2d 528, 534 (1990). Courts use the "means focus" test where the classification "is discriminatory on its face and clearly bears no relationship to the statute's declared purpose." *State v. Avelar*, 129 Idaho 700, 703, 931 P.2d 1218, 1221 (1997). The "rational basis" test applies to all other situations. The rational basis test is specifically applicable where the classification statute "deals with economic matters or matters of social welfare." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 710-11, 791 P.2d 1285, 1289-90 (1990).

Under the rational basis test, the statutory classification must bear a rational relationship to legitimate government interests. *Avelar*, 129 Idaho at 703, 931 P.2d at 1221. Courts uphold statutes under this test if "any conceivable set of facts will support the finding of a rational relationship." *Id.* Stated another way, under the rational basis test "equal protection is offended only if classifications are based solely on reasons totally unrelated to the pursuit of state's goals and only if no grounds can be advanced to justify those goals." *Olsen*, 117 Idaho at 711, 791 P.2d at 1290. Idaho's age for when a person can smoke should be reviewed under the rational basis statute. Smoking is neither a fundamental right, nor a classification that has ever been assigned to a strict scrutiny or intermediate standard of review.

Idaho has a concededly legitimate government interest in protecting the health of its citizens and expenditures related to the public health, and has done so, in part, by establishing a current statutory age of 18 before a person is allowed to smoke. This current age limit is rationally based and there is nothing constitutionally different about raising that age to 21. In short there is no equal protection problem in raising the age to 21.

There is likewise no Commerce Clause concern. While the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant Commerce Clause limits the states' ability to enact legislation that adversely affects interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979).

State legislation may violate the dormant Commerce Clause if it either (1) facially discriminates in favor of intrastate interests or (2) although facially neutral, has the "practical effect" of directly controlling "commerce occurring wholly outside the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). State regulation that is evenhanded passes constitutional muster even if it imposes an incidental burden on interstate commerce, unless it can be shown that the burden is "clearly excessive" when compared to the local benefits. *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).


DRELB009 does not facially discriminate in favor of intrastate commerce, nor does it have the practical effect of directly controlling commerce occurring wholly outside Idaho's borders. The proposed bill only affect the age by which persons in Idaho may purchase, sell, or use tobacco products. There are thus no Commerce Clause issues.

There is also no valid Due Process Clause claim either. In deciding whether due process has been denied, the court must engage in a two-step analysis. First, it must determine whether the interest claimed is protected. This is a threshold question: "Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). A protected interest exists "where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001). The court must examine relevant statutes to determine whether the interest in question is protected. *Id.*, 136 Idaho at 73, 28 P.3d at 1016.

Second, if a protected interest is found, the court must determine what process is due. *Id.*, (internal citation omitted). It will look to both statutory and constitutional procedural protections. "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Here there is no protected interest, statutory or constitutional, that protects a smoker's age. We thus do not need to proceed to the second part of the inquiry regarding what sort of process or protection is due, although I will note that any person opposed to DRELB009 will have a full and fair opportunity to communicate and present those views to the Legislature in a variety of different ways. In short, though, there is no due process concern.

In conclusion, there are no constitutional infirmities with Tobacco 21, as set forth in DRELB009.

Very truly yours,



BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Division

BTD/tt