

## **BILL ANALYSIS**

Senate Research Center

H.B. 164  
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Criminal Justice  
5/19/2005  
Engrossed

### **AUTHOR'S/SPONSOR'S STATEMENT OF INTENT**

The manufacture, delivery, and consumption of methamphetamines is a growing epidemic in Texas. In 2000, the Texas Commission on Alcohol and Drug Abuse (TCADA) reported that 1,821 people were admitted into Texas treatment centers for methamphetamine abuse; in 2004, that number rose to 11,238, illustrating the dramatic trend of rising use.

The monetary and human costs of methamphetamine use are high. The manufacture of methamphetamine exposes those around it, including children, to toxic chemicals, as well as a significant danger of fire or explosion. Those who use methamphetamines tax our state's public health and welfare resources. The cleanup of seized methamphetamine labs and training for narcotics officers cost the state additional funds. Additionally, peace officers often sustain serious and life threatening injuries from encountering methamphetamine labs.

H.B. 164 addresses these issues by authorizing certain state officers to take possession of a child that has been permitted to remain on premises used for the manufacture of methamphetamine, regulating over-the-counter sales of pseudoephedrine, and placing new requirements and responsibilities on non-prescription drug wholesalers.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the State Health Services Council in SECTION 2.03 (Section 486.003, Health and Safety Code) and SECTION 2.05 of this bill.

Rulemaking authority is expressly granted to the commissioner of state health services in SECTION 2.03 (Section 486.004, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the Department of State Health Services in SECTION 2.03 (Section 486.012, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the director of the Department of Public Safety in SECTION 2.04 of this bill.

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 3.05 (Section 431.204, Health and Safety Code) and SECTION 3.06 (Section 461.207, Health and Safety Code), of this bill.

### **SECTION BY SECTION ANALYSIS**

#### **ARTICLE 1. CIVIL AND CRIMINAL CONSEQUENCES OF ENGAGING IN CERTAIN CONDUCT RELATED TO THE MANUFACTURE OF METHAMPHETAMINE**

SECTION 1.01. Amends Section 481.124(b), Health and Safety Code, to include glassware, a plastic or metal container, tubing, a hose, or another item specially designed, assembled, or adapted for use in the manufacture, processing, analyzing, storing, or concealing of methamphetamine amongst the items that, if an actor possess or transports, for purposes of this section, an intent to unlawfully manufacture the controlled substance of methamphetamine is presumed.

SECTION 1.02. Amends Section 481.136(a), Health and Safety Code, to make conforming changes.

SECTION 1.03. Amends Section 99.003, Civil Practice and Remedies Code, to increase damages owed by a person who manufactures methamphetamine and exposes the drug or its by-products to an individual to \$20,000, rather than \$10,000.

SECTION 1.04. Amends Section 262.104, Family Code, as follows:

Sec. 262.104. TAKING POSSESSION OF A CHILD IN EMERGENCY WITHOUT A COURT ORDER. (a) Creates this subsection from existing text. Makes a conforming change.

(b) Authorizes an authorized representative of the Department of Family and Protective Services, a law enforcement officer, or a juvenile probation officer to take possession of a child under Subsection (a) on personal knowledge or information furnished by another, that has been corroborated by personal knowledge, that would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine.

SECTION 1.05. Amends Section 22.041, Penal Code, by adding Subsection (c-1), to provide that, for purposes of Subsection (c), it is presumed that a person engaged in conduct that places a child in imminent danger of death, bodily injury, or physical or mental impairment if the person manufactured the controlled substance methamphetamine in the presence of the child.

SECTION 1.06. Makes application of Sections 481.124 and 481.136, Health and Safety Code, as amended by this Act, and Section 22.041(c-1), Penal Code, as added by this Act, prospective. Provides that, for purposes of this section, an offense was committed before September 1, 2005, if any element of the offense was committed before that date.

SECTION 1.07. Makes application of Section 99.003, Civil Practice and Remedies Code, as amended by this Act, prospective.

## ARTICLE 2. DISTRIBUTION AND RETAIL SALES OF PSEUDOPHENDRINE

SECTION 2.01. Amends Section 481.077(1), Health and Safety Code, to provide that this section does not apply to the sale or transfer of any compound, mixture, or preparation containing certain substances, including norpseudoephedrine that is in liquid, liquid capsule, or gel capsule form and that contains at least one active ingredient other than ephedrine, pseudoephedrine, or norpseudoephedrine. Deletes existing text relating to phenylpropanolamine and substances sold with a prescription or over the counter.

SECTION 2.02. Amends Subchapter C, Chapter 481, Health and Safety Code, by adding Section 481.0771, as follows:

Sec. 481.0771. RECORDS AND REPORTS ON PSEUDOEPHEDRINE. (a) Requires a wholesaler who sells, transfers, or otherwise furnishes pseudoephedrine to a retailer to make available to the director of the Department of Public Safety (director) all records of the transaction in accordance with Department of Public Safety (DPS) rule.

(b) Requires a wholesaler, not later than five business days after receipt of an order for pseudoephedrine, to submit to the director in accordance with DPS rule a report of the order if the order requests delivery of a suspicious quantity of pseudoephedrine as determined by DPS rule.

(c) Authorizes a wholesaler who, with reckless disregard for the duty to report under Subsection (b), fails to report as required by that subsection to be subject to disciplinary action in accordance with DPS rule.

SECTION 2.03. Amends Subtitle C, Title 6, Health and Safety Code, by adding Chapter 486, as follows:

## CHAPTER 486. PSEUDOPHEDRINE

### SUBCHAPTER A. GENERAL PROVISIONS

Sec. 486.001. DEFINITIONS. Defines "commissioner," "council," "department," "pseudoephedrine," and "sale." Provides that a term used in this chapter but is not defined in this section has the meaning assigned by Section 481.002.

Sec. 486.002. APPLICABILITY. Provides that this chapter does not apply to the sale of any product dispensed or delivered by a pharmacist according to a prescription issued by a practitioner for a valid medical purpose and in the course of professional practice.

Sec. 486.003. RULES. Requires the State Health Services Council (council) to adopt rules necessary to implement and enforce this chapter.

Sec. 486.004. FEES. (a) Requires the Department of State Health Service (DSHS) to collect certain fees.

(b) Requires the commissioner of state health services (commissioner), by rule, to set the fees in amounts that allow DSHS to recover the biennial expenditures of state funds by DSHS in completing certain duties associated with this chapter.

(c) Requires fees collected under this section to be deposited to the credit of a special account in the general revenue fund and appropriated to DSHS to implement and enforce this chapter.

Sec. 486.005. STATEWIDE APPLICATION AND UNIFORMITY. (a) Provides that, to ensure uniform and equitable implementation and enforcement throughout this state, this chapter constitutes the whole field of regulation regarding over-the-counter sales of products that contain pseudoephedrine.

(b) Provides that this chapter preempts and supersedes a local ordinance, rule, or regulation adopted by a political subdivision of this state pertaining to over-the-counter sales of products that contain pseudoephedrine.

(c) Provides that this section does not preclude a political subdivision from imposing administrative sanctions on the holder of a business or professional license or permit issued by the political subdivision who engages in conduct that violates this chapter.

[Reserves Sections 486.006-486.010 for expansion.]

### SUBCHAPTER B. OVER-THE-COUNTER SALES OF PSEUDOEPHEDRINE

Sec. 486.011. SALES BY PHARMACIES. Authorizes a business establishment that operates a pharmacy licensed by the Texas State Board of Pharmacy to engage in over-the-counter sales of pseudoephedrine.

Sec. 486.012. SALES BY ESTABLISHMENTS OTHER THAN PHARMACIES; CERTIFICATE OF AUTHORITY. (a) Authorizes a business establishment that does not operate a pharmacy licensed by the Texas State Board of Pharmacy to engage in over-the-counter sales of pseudoephedrine only if the establishment holds a certificate of authority issued under this section.

(b) Authorizes DSHS issue a certificate of authority to engage in over-the-counter sales of pseudoephedrine to a business establishment that does not operate a pharmacy licensed by the Texas State Board of Pharmacy if the establishment meets certain requirements.

(c) Requires DSHS, by rule, to establish requirements for the issuance of a certificate of authority under this section. Requires the rules to include a consideration by DSHS of whether the establishment meets certain requirements.

(d) Authorizes DSHS to inspect or audit a business establishment that is issued a certificate of authority under this section at any time DSHS determines necessary.

Sec. 486.013. RESTRICTION OF ACCESS TO PSEUDOEPHEDRINE. Requires a business establishment that engages in over-the-counter sales of pseudoephedrine to display the pseudoephedrine in a manner that makes the pseudoephedrine accessible to a patron of the business establishment only with the assistance of an employee of the establishment.

Sec. 486.014. PREREQUISITES TO SALE OF PSEUDOEPHEDRINE. Requires a business establishment that engages in the sale of pseudoephedrine, before completing an over-the-counter sale, to take certain precautions.

Sec. 486.015. MAINTENANCE OF RECORDS. Requires a business establishment that engages in over-the-counter sales of pseudoephedrine to maintain all records made under Section 486.014(2) in a secure centralized location. Requires the establishment to maintain each record until at least the second anniversary of the date the record is made.

[Reserves Sections 486.016-486.020 for expansion.]

#### SUBCHAPTER C. ADMINISTRATIVE PENALTY

Sec. 486.021. IMPOSITION OF PENALTY. Authorizes DSHS impose an administrative penalty on a person who violates this chapter.

Sec. 486.022. AMOUNT OF PENALTY. (a) Prohibits the amount of the penalty from exceeding \$1,000 for each violation, and each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. Prohibits the total amount of the penalty assessed for a violation continuing or occurring on separate days under this subsection from exceeding \$10,000.

(b) Requires the amount to be based on certain information.

Sec. 486.023. REPORT AND NOTICE OF VIOLATION AND PENALTY. (a) Requires DSHS to give written notice of the report by certified mail to a person if DSHS initially determines that a violation occurred,.

(b) Sets forth information required to be included in the notice.

Sec. 486.024. PENALTY TO BE PAID OR HEARING REQUESTED. (a) Authorizes the person, before the 21st day after the date the person receives notice under Section 486.023, in writing, to accept the determination and recommended penalty or make a request for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) Requires the commissioner, by order, to approve the determination if the person accepts the determination and recommended penalty or if the person fails to respond to the notice.

Sec. 486.025. HEARING. (a) Requires the commissioner, if the person requests a hearing, to refer the matter to the State Office of Administrative Hearings, which is required to promptly set a hearing date and give written notice of the time and place of the hearing to the person. Requires an administrative law judge of the State Office of Administrative Hearings to conduct the hearing.

(b) Requires the administrative law judge to make findings of fact and conclusions of law and promptly issue to the commissioner a proposal for a

decision about the occurrence of the violation and the amount of a proposed penalty.

Sec. 486.026. DECISION. (a) Authorizes the commissioner, by order, to make certain determinations, based on the findings of fact, conclusions of law, and proposal for a decision.

(b) Requires the notice of the commissioner's order under Subsection (a) that is sent to the person in the manner provided by Chapter 2001 (Administrative Procedure), Government Code, to include a statement of the right of the person to judicial review of the order.

Sec. 486.027. OPTIONS FOLLOWING DECISION: PAY OR APPEAL. Requires the person to take certain actions before the 31st day after the date the order under Section 486.026 that imposes an administrative penalty becomes final.

Sec. 486.028. STAY OF ENFORCEMENT OF PENALTY. (a) Authorizes a person who files a petition for judicial review to take certain actions within the period prescribed by Section 486.027, a person who files a petition for judicial review

(b) Authorizes the commissioner, following receipt of a copy of an affidavit under Subsection (a)(2), to file with the court, before the sixth day after the date of receipt, a contest to the affidavit. Requires the court to hold a hearing on the facts alleged in the affidavit as soon as practicable and to stay the enforcement of the penalty on finding that the alleged facts are true. Provides that the person who files an affidavit has the burden of proving that the person is financially unable to pay the penalty or to give a supersedeas bond.

Sec. 486.029. COLLECTION OF PENALTY. (a) Authorizes the penalty to be collected if the person does not pay the penalty and the enforcement of the penalty is not stayed.

(b) Authorizes the attorney general to sue to collect the penalty.

Sec. 486.030. DECISION BY COURT. (a) Authorizes the court, if the court sustains the finding that a violation occurred, to uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty.

(b) Requires the court to order that a penalty is not owed if the court does not sustain the finding that a violation occurred.

Sec. 486.031. REMITTANCE OF PENALTY AND INTEREST. (a) Requires the court, if the person paid the penalty and if the amount of the penalty is reduced or the penalty is not upheld by the court, when the court's judgment becomes final, to order that the appropriate amount plus accrued interest be remitted to the person before the 31st day after the date that the judgment of the court becomes final.

(b) Provides that the interest accrues at the rate charged on loans to depository institutions by the New York Federal Reserve Bank.

(c) Requires the interest to be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

Sec. 486.032. RELEASE OF BOND. (a) Requires the court, if the person gave a supersedeas bond and the penalty is not upheld by the court, when the court's judgment becomes final, to order the release of the bond.

(b) Requires the court to order the release of the bond after the person pays the reduced amount if the person gave a supersedeas bond and the amount of the penalty is reduced.

Sec. 486.033. ADMINISTRATIVE PROCEDURE. Provides that a proceeding to impose the penalty is considered to be a contested case under Chapter 2001 (Administrative Procedure), Government Code.

SECTION 2.04. Requires the director of the Department of Public Safety to adopt any rules necessary to administer and enforce Section 481.0771, Health and Safety Code, as added by this Act, not later than September 1, 2006.

SECTION 2.05. Requires the State Health Services Council to adopt rules to implement and enforce Chapter 486, Health and Safety Code, as added by this Act, not later than September 1, 2006.

### ARTICLE 3. REGULATION OF WHOLESALE NONPRESCRIPTION DRUG DISTRIBUTORS UNDER THE TEXAS FOOD, DRUG, AND COSMETIC ACT

SECTION 3.01. Amends the heading to Subchapter I, Chapter 431, Health and Safety Code, to read as follows:

#### SUBCHAPTER I. WHOLESALE DISTRIBUTORS OF NONPRESCRIPTION DRUGS

SECTION 3.02. Amends Section 431.201, Health and Safety Code, to define "nonprescription drug" and "place of business." Redefines "wholesale distribution." Deletes existing definition of "place of business."

SECTION 3.03. Amends Subchapter I, Chapter 431, Health and Safety Code, by adding Section 431.2011, as follows:

Sec. 431.2011. APPLICABILITY OF SUBCHAPTER. Provides that this subchapter applies only to the wholesale distribution of nonprescription drugs.

SECTION 3.04. Amends Section 431.202, Health and Safety Code, as follows:

Sec. 431.202. New heading: LICENSE REQUIRED. (a) Prohibits a person from engaging in wholesale distribution of nonprescription drugs in this state unless the person holds a wholesale drug distribution license issued by the Texas Department of Health (TDH) under this subchapter or Subchapter N.

(b) Requires an applicant for a license under this subchapter to submit an application to TDH on the form prescribed by TDH or electronically on the TexasOnline Internet website. Deletes existing text relating to the annual filing of a license statement.

(c) Provides that a license issued under this subchapter expires on the second anniversary of the date of issuance.

SECTION 3.05. Amends Section 431.204, Health and Safety Code, as follows:

Sec. 431.204. FEES. (a) Requires TDS, rather than the Texas Board of Health (board), to collect certain fees.

(b) Requires the executive commissioner of the Health and Human Service Commission, rather than the board, by rule, to set the fees in amounts that allow TDH to recover the biennial, rather than annual, expenditures of state funds by TDH in administering this subchapter.

(c) Redesignates text from existing Subsection (d). Makes nonsubstantive changes.

SECTION 3.06. Amends Sections 431.206 and 431.207, Health and Safety Code, as follows:

Sec. 431.206. CHANGE OF LOCATION OF PLACE OF BUSINESS. (a) Creates this subsection from existing text. Makes a conforming change.

(b) Creates this subsection from existing text.

(c) Creates this subsection from existing text. Requires the licensee, not more than 10 days after the completion of the change of location, to notify TDH in writing to confirm the completion of, rather than verify, the change of location and provide verification of the information previously provided or correct and confirm any information that has changed since providing the notice of intent. Deletes existing text relating to specific details of the new location.

(d) Provides that the notice and confirmation required by this section are deemed adequate if the licensee sends the notices by certified mail, return receipt requested, to the central office of TDH or submits them electronically through the TexasOnline Internet website.

Sec. 431.207. REFUSAL TO LICENSE; SUSPENSION OR REVOCATION OF LICENSE. (a) Authorizes the commissioner of state health services to refuse an application for a license or to suspend or revoke a license if the applicant or licensee has committed certain modified violations.

(b) Requires the executive commissioner of the Health and Human Services Commission, by rule, to establish minimum standards required for the issuance or renewal of a license under this subchapter. Deletes existing text relating to reasons for which a license application can be refused or a license can be revoked or suspended.

(c) Makes conforming changes.

SECTION 3.07. Amends Section 431.021, Health and Safety Code, to set forth a modified list of acts and the causing of such acts that are unlawful and prohibited.

SECTION 3.08. Repealer: Sections 431.2021 (Exemption from Licensing) and 431.205 (Expiration Date), Health and Safety Code.

SECTION 3.09. Requires the executive commissioner of the Health and Human Services Commission, not later than January 1, 2006, to adopt the rules necessary to implement the changes in law made by this article by amending Subchapter I, Chapter 431, Health and Safety Code.

SECTION 3.10. Requires the Department of State Health Services, not later than January 1, 2006, to prescribe the forms required to implement the changes in law made by this article by the amendment of Subchapter I, Chapter 431, Health and Safety Code.

SECTION 3.11. Makes application of this Act prospective to March 1, 2006. Provides that, for purposes of this section, an offense was committed before March 1, 2006, if any element of the offense was committed before that date.

SECTION 3.12. (a) Provides that, subject to Subsection (b) of this section, this article takes effect on the date designated by Section 4.01 of this Act, except that Sections 3.01-3.07 of this article take effect March 1, 2006.

(b) Provides that this article takes effect only if Senate Bill 1685 or another similar bill of the Regular Session of the 79th Legislature adding Subchapter N, Chapter 431, Health and Safety Code, regulating wholesale prescription drug distributors is enacted and becomes law. Provides that if Senate Bill 1685 or another similar bill of the Regular Session of the 79th Legislature adding Subchapter N, Chapter 431, Health and Safety Code, regulating wholesale prescription drug distributors does not become law, this article does not take effect.

ARTICLE 4. EFFECTIVE DATE

SECTION 4.01. Effective date: September 1, 2005.