Linda Willard

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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#89006

NO.
STATE OF NEBRASKA
OFFICIAL
FEB 9 1989
DEPT. OF JUSTICE

DATE: February 6, 1989

SUBJECT: Limitation on Distribution of Smokeless Tobacco Products--LB48 (1989)

REQUESTED BY: Senator Don Wesley, Chairperson
Health and Human Services Committee

WRITTEN BY: Robert M. Spire, Attorney General
Linda L. Willard, Assistant Attorney General

You have requested an opinion as to whether the provisions of LB48 of the 1989 Session are in violation of either the Commerce Clause or the First Amendment of the United States Constitution. LB48 concerns the limitation on the distribution of smokeless tobacco.

We have reviewed LB48 with the amendments submitted by your office and determined that it is not in conflict with either the Commerce Clause or the First Amendment of the United State Constitution.

We have also reviewed the amendments proposed by the Smokeless Tobacco Council as they relate to the Commerce Clause and First Amendment to the United States Constitution. We have also determined that these amendments are not in conflict with the authorities mentioned.

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The United States Supreme Court decision in Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) has been alluded to by others in support of the argument that the proposed legislation is unconstitutional. However, in Central Hudson the State had placed a total ban on all advertising. At the time the ban was imposed, the State had an overriding state interest precipitated by a fuel shortage. After the fuel shortage had eased, the State attempted to continue the total ban on advertising based on their interest in conserving fuel and in securing fair and effective utility rates. The United States Supreme Court struck down the prohibition because the link between the advertising prohibation and the State's interest was too tenuous and the ban was more extensive than necessary to further the State's interest.

LB 48 has a stated purposed of enforcing the prohibition of smokeless tabacco use by minors. The Legislative Bill does not ban advertising of smokeless tobacco products but merely limits the distribution of free samples or the offer of coupons or rebate offers for smokeless tobacco products. The Bill has a legitimate purpose of protecting minors from the use or abuse of smokeless tobacco and makes use of a means less than a complete ban on advertisement or sale of the product.

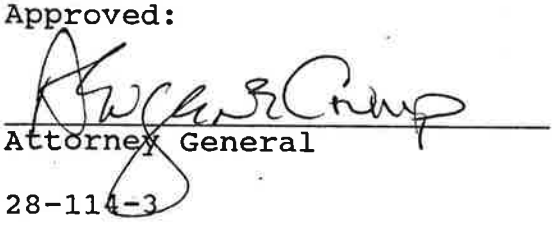
Similar legislation is in effect in other states in relation to smokeless tobacco. Also, several States have had legislation in place for several years in the area of alcoholic beverages that is similar to the restrictions in LB 48.

Sincerely yours,

ROBERT M. SPIRE
Attorney General

Linda L. Willard
Assistant Attorney General

Approved:



Attorney General

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