

Special Edition of Police Prosecutor Update

Issue No. 252
May 2013

SYNTHETIC DRUGS AND SYNTHETIC DRUG LOOKALIKE SUBSTANCES

On May 7, 2013, Governor Pence signed new legislation regarding synthetic drugs and synthetic drug lookalike substances. Its provisions took effect immediately. Senate Enrolled Act 536 is a comprehensive approach to assist law enforcement combat the growing problem of synthetic drugs and their lookalikes. This special edition of the PPU will briefly discuss the changes to current law and the NEW sections added throughout the criminal and civil sections of the Indiana Code. Please see the full text of the statutes for a complete review of these changes and additions to Indiana law.

Definitions

The definition of intoxication in both Title 9 and Title 35 was amended to include impairment caused by “any other substance”. There are exceptions for food, food ingredients, tobacco and dietary supplements. Prior to this change, law enforcement and prosecutors were unable to prosecute drivers who were impaired by synthetic drug lookalikes that were not yet scheduled as controlled substances. (See I.C. 9-13-2-86 and I.C. 35-46-9-2).

I.C. 35-31.5-2-321 expands the definition of synthetic drug to include additional chemical compounds.

I.C. 35-31.5-2-321.5 adds a NEW definition of a “synthetic drug lookalike substance”. The law creates a reasonable person standard for assessing whether a drug is a synthetic lookalike substance.

- (a) “Synthetic drug lookalike substance”, except as provided in subsection (b), means one (1) or more of the following:
- (1) A substance, other than a synthetic drug, which any of the factors listed in subsection (c) would lead a reasonable person to believe to be a synthetic drug.
 - (2) A substance, other than a synthetic drug:
 - (A) that a person knows or should have known was intended to be consumed;
and
 - (B) the consumption of which the person knows or should have known to be intended to cause intoxication.
- (b) The term “synthetic drug lookalike substance” does not include the following:
- (1) Food and food ingredients (as defined in IC 6-2.5-1-20).
 - (2) Alcohol (as defined in IC 7.1-1-3-4).
 - (3) A legend drug (as defined in IC 16-18-2-199).
 - (4) Tobacco.
 - (5) A dietary supplement (as defined in IC 6-2.5-1-16).
- (c) In determining whether a substance is a synthetic drug lookalike substance, the following factors may be considered:

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- (1) The overall appearance of a dosage unit of the substance, including its shape, color, size, markings or lack of markings, taste, consistency, and any other identifying physical characteristics.
- (2) How the substance is packaged for sale or distribution, including the shape, color, size, markings or lack of markings, and any other identifying physical characteristics of the packaging.
- (3) Any statement made by the owner or person in control of the substance concerning the substance's nature, use, or effect.
- (4) Any statement made to the buyer or recipient of the substance suggesting or implying that the substance may be resold for profit.
- (5) The overall circumstances under which the substance is distributed, including whether:
 - (A) The distribution included an exchange of, or demand for, money or other property as consideration; and
 - (B) The amount of the consideration was substantially greater than the reasonable retail market value of the substance the seller claims the substance to be.

Crimes and Penalties

I.C. 35-48-4-11.5 creates a new section defining the crime and penalty for Possession of a Synthetic Drug or Synthetic Drug Lookalike Substance. This crime will no longer be part of the possession of marijuana statute. The penalties are as follows:

- Class B infraction for possession
- Class A misdemeanor for knowingly or intentionally possessing
- Class D felony if a prior unrelated conviction for the same offense

I.C. 35-48-4-10.5 creates a new section defining the crime of Dealing/Manufacture of a Synthetic Drug or Synthetic Drug Lookalike Substance. This crime will no longer be part of the dealing/manufacturing of marijuana statute. The penalties are as follows:

- Class A infraction for dealing, financing the manufacture of, delivering, financing the delivery of, possession with intent to deliver or possession with intent to finance the delivery
 - Class D felony for above offense if the person knowingly and intentionally committed the offense AND the person has a prior unrelated conviction for the same offense
- Class A misdemeanor if a person knowingly or intentionally manufactures, finances the manufacture of, delivers or finances the delivery OR possesses with intent to manufacture, finance the manufacture of, deliver or finance the delivery

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- Class D felony for above offense if intended recipient is under eighteen (18), the amount is more than 2 grams OR the person has a prior conviction involving a synthetic drug or synthetic drug lookalike substance
- Class C felony for above offense if more than 2 grams and the person delivered or financed the delivery on a school bus OR within five hundred (500) feet of school property or a public park while a person under eighteen (18) was reasonably expected to be present

I.C. 35-48-4-10.5 also creates additional penalties for retail merchants who deal synthetic drugs or synthetic drug lookalike substances. Subsection (d) sets out the additional penalties as follows:

- Court **shall** recommend suspension of the registered retail merchant certificate for one (1) year for a criminal conviction
- Court **may** recommend suspension of the registered retail merchant certificate for six (6) months if the violation resulted in an adjudication that the person committed an infraction
- Indiana Department of Revenue **shall** suspend the registered retail merchant certificate in accordance with the recommendation of the court

Emergency Scheduling

The change to I.C. 25-26-13-4.1 allows the Board of Pharmacy, on its own initiative or upon formal request from the state police, the federal Drug Enforcement Administration or a poison control center to adopt an emergency rule declaring a substance to be a synthetic drug. The amendment also sets out factors the board must consider when making its determination. The prior law required that the substance be scheduled by the DEA or another state before adopting the emergency rule.

Additional Changes to the Indiana Code

The new law adds dealing in a synthetic drug or synthetic drug lookalike substance to the list of racketeering offenses under I.C. 35-45-6-1.

I.C. 34-24-1-1 is amended to authorize the seizure for forfeiture of certain property used in connection with dealing in synthetic drugs or synthetic drug lookalike substances.

Civil Remedies

The new law also contains numerous civil licensing penalties to be administered by the Attorney General, licensing boards, Department of Revenue, Homeland Security and other entities.

- Allows the Attorney General's Consumer Protection Division to have immediate access under the Civil Investigative Demand statute to records and material for

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investigation of alleged synthetic drug and synthetic drug lookalike substance violations. (See I.C. 4-6-3-4)

- This immediate access will allow access to evidence of improper sales before it is moved, concealed or destroyed.
- Adds a provision to the Deceptive Consumer Sales Act that allows a court to order the Department of Revenue to revoke a retail merchant certificate in judgments issued based on Deceptive Consumer Sales Act violations relating to synthetic drugs or synthetic drug lookalike substances. (See I.C. 24-5-0.5-4(c)(5))
 - Currently the certificates can only be revoked by the Department of Revenue through an administrative process. When the AG's Consumer Protection Division obtains civil judgments this allows judges to order the revocation of the certificate.
- Adds the Attorney General to the list of prosecutors, city and county attorneys and property owners who can enforce the existing drug nuisance statutes and specifically adds synthetic drug and synthetic drug lookalike substance sales. (See I.C. 32-30-8-2).
- I.C. 32-30-8-10.5 is a new section which allows the court in nuisance actions to issue restraining orders, preliminary injunctions, temporary forfeiture, closure orders, and abatement orders depending on the nature of the violation and the response.

Various Civil Issues

I.C. 6-2.5-8-7 allows the Department of Revenue to revoke a retail merchant certificate for good cause on their own initiative. Good cause for revocation may include sales involving synthetic drugs or synthetic drug lookalike substances OR failure to collect sales tax on a sale involving a synthetic drug or synthetic drug lookalike substance. This process requires a public hearing and a finding by a preponderance of the evidence that the person committed a violation.

Synthetic drug and synthetic drug lookalike substance convictions are added to the list of offenses that allow for denial, revocation or suspension of licenses or certificates issued by various state agencies.

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