

# Becoming a Policy Wonk on Local Tobacco Retailer Licensing



## Answers to Tough Questions from Opponents and Elected Officials

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Communities and coalitions working on tobacco retailer licensing campaigns will likely need to answer questions from opponents and elected officials about the effectiveness and necessity of strong local tobacco retailer licensing ordinances. Below are some common questions which have arisen in local licensing campaigns. The suggested answers are meant to help effectively address opponents' arguments against a tobacco retailer licensing ordinance. For more materials on licensing ordinances, visit the Center's website at [www.Center4TobaccoPolicy.org/localpolicies-licensing](http://www.Center4TobaccoPolicy.org/localpolicies-licensing).

### Why do we need a local licensing law? Aren't there state laws on licensing?

There is a state licensing law, however it alone is not sufficient to reduce illegal tobacco sales to minors in California. The Cigarette and Tobacco Products Licensing Act (passed in 2003) created a statewide licensing program administered by the Board of Equalization. Recent legislation, set to go into effect on January 1, 2017, has strengthened the state law by including requirements for an annual fee, rather than a one-time fee, for tobacco retailers.

While the increased revenue will help the state licensing program enforce tobacco tax regulations, local licensing programs are still the best means of reducing illegal tobacco sales to minors and addressing the unique challenges faced by each community. Local fees help communities fund enforcement of minimum age to purchase laws. Local-level licensing laws can also help communities respond to emerging trends in the tobacco retail environment, such as the rising popularity of electronic cigarettes. Additionally, because penalties for violating the statewide license are so weak that retailers are at little risk of losing their licenses if they violate the law, strong local licensing laws allow communities to impose more meaningful penalties.

### Selling tobacco products to minors is illegal under state and federal law, why can't state and federal agencies enforce these laws?

Enforcement of these laws by local agencies through adoption of a local licensing ordinance allows for consistent compliance checks of all retailers and is the most effective strategy for reducing illegal sales to underage youth. State laws (Penal Code 308 and the Stop Tobacco Access to Kids Enforcement (STAKE) Act) establish minimum age to purchase tobacco products in the state of California. Recent legislation raised the minimum age to purchase from 18 to 21 years old (including electronic cigarettes) as of June 9, 2016. However, the STAKE program can only do compliance checks annually in seven percent of stores that sell tobacco. Additionally, there is no direct federal enforcement of minimum age to purchase laws. Local tobacco retailer licensing ordinances are not preempted by either state or federal law and are essential to getting compliance checks in all stores in your community.

## Are licensing and enforcement operations really successful in reducing youth access to tobacco?

Enforcement programs do work. A report by the California Tobacco Control Program found that cities and counties that have a strong local ordinance conduct four times as many decoy operations as jurisdictions without a strong ordinance.<sup>2</sup> In addition, jurisdictions with a strong local ordinance have seen their youth access rates fall dramatically (illegal tobacco sales rates are determined by youth purchase surveys administered by local health agencies).

- Burbank: \$350 annual fee; adopted December 2006; rates dropped from 26.7% to 4%
- Baldwin Park: \$342 annual fee; adopted October 2008; rates dropped from 34% to 9%
- Desert Hot Springs: \$350 annual fee; adopted August 2007; rates dropped from 48% to 4%<sup>3</sup>

## Is it legal to require a retailer to pay for a tobacco license from the state and from a city or county?

It is legal and fair. The two license fees pay for two different enforcement programs—funds from the state fee combat smuggling and black market cigarettes by enforcing tobacco taxes, while funds from local fees pay to prevent sales to youth. These fees cover the costs to regulate tobacco sales; they are not a punishment for selling tobacco.

The state tobacco license fee is comparable to, or even less than, fees paid by other industries in order to conduct business in the state.

Examples of these fees include:

- State Liquor License for stores that sell beer, wine and spirits for consumption off premises: original fee – \$13,800; annual renewal fee – \$582<sup>4</sup>
- State Pharmacy License: original fee – \$260 application; biennial renewal fee – \$207<sup>5</sup>
- State Gambling Establishment License – \$500 application fee; sliding annual fee based on number of tables and revenue, minimum \$300<sup>6</sup>

The requirement to obtain both a local and a state license is also not unique to tobacco retailers. Many cities also require certain professionals (contractors, attorneys, dentists, engineers, insurance brokers, physicians, real estate brokers, etc.) to obtain a local license in addition to required state licenses.

## Since state law now includes electronic cigarettes, do local tobacco retailer license laws also need to account for electronic cigarettes?

Yes, local licensing laws still need to specifically include electronic cigarettes. Otherwise, local policies that go above and beyond the state regulations will not automatically include electronic cigarettes.

Recent state legislation has raised the age to purchase electronic cigarettes to 21 years old. Also, as of January 1, 2017, stores that sell only electronic cigarette products will also be subject to the same state licensing requirements, including an annual renewal fee, as stores that sell traditional tobacco products.

The best way for local communities to reduce underage purchases of electronic cigarette products is to specifically include these products in their local retail licensing ordinances. With an estimated growth of 24.2% over the next four years and evidence that the traditional tobacco retail environment will likely remain a major distribution outlet, 109 cities and counties throughout the state have taken steps to regulate these products through their local tobacco retailer license law.<sup>7,8</sup>

The strongest way to regulate electronic cigarettes through a local tobacco retailer licensing ordinance is by including special language in the definition of tobacco product to include electronic cigarettes. For model ordinance language, please refer to ChangeLab Solutions at <http://www.changelabsolutions.org/tobacco-control>.

## Does the provision to not allow a license to be transferred to a new owner constitute a “taking” of a property interest as argued by the Neighborhood Market Association (NMA)?

No, according to analysis by ChangeLab Solutions, it is extremely unlikely that this argument would hold up in court. The NMA has threatened legal action over this provision, arguing that retailers must be compensated financially because a nontransferability provision in a licensing law would constitute a governmental “taking” of private property interests. Under the Fifth Amendment to the United States Constitution (as well as Article I, Section 19 of the California Constitution) if the government takes private property for public use, it must compensate the property owner. It is well established that a taking would occur in two instances: (1) if the government physically takes private property from a business or person (e.g., through eminent domain), or (2) if a government regulatory

action deprives a business of all economic viability (a “regulatory taking”).

California courts have consistently ruled that a license is not a protected property interest, so nontransferability restrictions on the license would not constitute a taking in any event. In addition, the nontransferability provision in a tobacco retailer licensing ordinance does not come close to removing all economic viability from a retailer’s business. Retailers are still able to sell many other things and are not completely prohibited from running a business in that location. They can even sell tobacco; they just cannot transfer the license to another person or business. In most cases, denying a business the opportunity to sell its tobacco retailer license will have a minimal effect on its economic value. More than 126 municipalities have adopted a strong local tobacco retailer licensing ordinance in California and there has not been a single lawsuit challenging any of those laws regarding the takings issue.

### **Won’t a new fee burden tobacco retailers?**

Protecting minors from the harmful effects of tobacco is vital. The consequences of not protecting kids from tobacco are too great when 16,800 youth in California become new daily smokers each year.<sup>9</sup> In addition, these fees are not a burden for tobacco retailers. According to the Association for Convenience & Petroleum Retailing (NACS), cigarettes are the top selling product sold inside stores while other tobacco products come in fourth. The NACS 2013 State of the Industry Report shows that in 2012, cigarettes accounted for 36.27% of all in-store sales and generated average sales of \$622,248 per convenience store.<sup>10</sup> Retailers are worried about lost sales if their license is revoked for selling to youth, not about affording the annual license fee. This is why licensing ordinances with fees and strong enforcement are effective at reducing sales to youth. And the bottom line is, if a retailer does not sell to youth, they have nothing to worry about.

### **Aren’t trainings done by retailers and the “We Card” program effective at reducing sales to youth?**

Research has shown that merely educating storeowners and clerks about illegal tobacco sales does not reduce tobacco sales to youth over time. Studies also show that the tobacco industry’s own “We Card” merchant education and signage program does not decrease tobacco sales to minors, and was undertaken primarily to improve the tobacco industry’s image and to reduce regulation and enforcement of existing

laws.<sup>11, 12</sup> In order to effectively combat the problem of illegal sales to underage youth, communities need to pass local licensing laws with all the elements of a strong local licensing ordinance.

### **Won’t kids just get cigarettes from their parents or friends? How does licensing prevent that?**

Retailer licensing can’t eliminate all of the sources youth use to obtain tobacco. But illegal sales to underage youth are a big part of the problem, along with youth accessing tobacco via their peers. This is a public health problem, and tobacco retailers need to be part of the solution. That can only happen through strong licensing laws. Although research has shown that children under the age of 18 rely heavily on their peer networks to access tobacco products, the recent state law that raises the legal purchase age addresses this issue.<sup>3</sup> With this new law in place, it becomes less likely that teen peer networks include people who are legally able to purchase tobacco products, enforcing these laws in the retail environment becomes even more important. Strong tobacco retail license requirements at the local level can provide additional protections beyond those that the state requirements offer. Moreover, they provide the best means for communities to ensure that they have the resources to enforce laws that restrict youth purchasing of tobacco.

### **Isn’t it really clerks who should be punished if they sell to minors?**

Clerks are already punished under Penal Code §308, but this provision has not been effective at reducing illegal sales. Storeowners claim that mistakes are made because clerks are busy and can’t check everyone’s ID. This is an argument that would be unacceptable for illegal alcohol or gun sales and should be just as unacceptable for illegal tobacco sales. The fact is that storeowners, not clerks, are responsible for what happens in their stores. They must train clerks to ask for ID and must enforce minimum age requirements, even during busy times. This is even more important with the passage of the new state laws.

### **Why not just require those who violate the law to get licenses?**

The California Grocers Association (CGA) frequently uses this argument. They claim that their members are law-abiding and shouldn’t be “punished” by having to get a license. Licensing fees are not a punishment, but rather cover the costs of enforcing public health regulations. The fines and suspensions for selling tobacco to minors is the punishment and those are only applied to violators. Retailers

reap significant financial benefits from selling tobacco and it is fair to require them to pay a small amount to enforce tobacco regulations. Also, youth purchase surveys show that grocers do sell tobacco products to kids, just sometimes at a lower rate than some other types of retailers.<sup>14</sup>

## Why not use Master Settlement Agreement (MSA) monies or other funds to pay for the enforcement?

First, MSA funds and monies from the general fund are not sustainable and could be taken away from the enforcement program at a later date. An annual fee on retailers is the only way to ensure that there will be a stable supply of money for enforcement that cannot be used to pay for other priorities. Secondly, it makes sense to require retailers to pay a licensing fee to verify that the laws are being followed by the retailers when they engage in the lucrative business of selling cigarettes. Having the fee set high enough to cover enforcement will provide a consistent amount of money available to enforce tobacco regulations.

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