

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 several 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.

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

There is a state licensing law, but it does not effectively address reducing 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 that requires retailers to purchase a one-time state license. However, this bill was enacted to prevent smuggling and does little to reduce underage sales.¹ Also, penalties for violating the statewide license are so weak that retailers are at little risk of losing their licenses if they violate the law.

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 minors. State laws (Penal Code 308 and the Stop Tobacco Access to Kids Enforcement (STAKE) Act) and federal law (Family Smoking Prevention and Tobacco Control Act) make it illegal to sell tobacco products to minors. However, the STAKE program can only do compliance checks annually in 7 percent of stores that sell tobacco.² Since January 2012, the Food and Drug Administration has awarded California an FDA Tobacco Retail Inspection Contract to supplement California's ongoing efforts. 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, but they must be funded. 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.³ 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%
- Yolo County: \$344 annual fee; adopted May 2006; rates dropped from 28% to 0%⁴

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 - the state fee pays to combat smuggling and black market cigarettes while a local fee would pay to prevent sales to youth. These fees cover the costs to regulate tobacco sales; they are not a punishment for selling tobacco.

Furthermore, the state tobacco license fee is only a one-time \$100 fee. Many other businesses in California must pay much larger license fees for the privilege of conducting their businesses. 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 – \$582⁵
- State Pharmacy License: original fee – \$260 application; biennial renewal fee – \$207⁶

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.

Should a local tobacco retailer license law regulate the sales of electronic cigarettes too?

Currently, electronic cigarettes are unregulated in California. While state law makes it illegal to sell electronic cigarettes to minors, there is no licensing and enforcement structure to ensure this does not happen. Recent evidence indicates youth use of electronic cigarettes has increased dramatically, with more than 250 e-cigarette brands in flavors that appeal to children and teens, such as Captain Crunch, cotton candy, and bubble gum. 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, 94 cities and counties throughout the state have taken steps to regulate these products through their local tobacco retailer license law.^{7,8}

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://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 110 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 21,300 youth in California become new daily smokers each year.⁹ 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.¹⁰ Retailers are worried about lost sales if their license is revoked for selling to minors, not about affording the annual license fee. This is why licensing ordinances with fees and strong enforcement are effective at reducing sales to minors. 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 children 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.^{11,12} In order to effectively combat the problem of illegal sales to minors, 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 minors use to obtain tobacco. But illegal sales to minors are a big part of the problem. This is a public health problem, and tobacco retailers need to be part of the solution. That can only happen through strong licensing laws.

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.

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.¹³

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.

Shouldn’t my community pass a temporary moratorium to prohibit new retailers while it considers a retail licensing policy?

Recently, some communities have enacted urgency ordinances that establish a moratorium on allowing new tobacco retailers to set up shop in the community for a period of anywhere between 15 days to 22 months. Because these moratoriums are temporary, the benefits will disappear and your community could be left without important protections, like those afforded by a strong tobacco retailer licensing ordinance. Furthermore, like any tobacco control ordinance, moratoriums can be challenging to pass. The campaign to pass a moratorium will consume resources that might better be used to establish permanent protections for the community such as strong tobacco retailer licensing ordinances which allow your community to ensure that cigarettes are kept out of the hands of children.

1. California Business and Professions Code, Sections 22970-22995.

2. 2015 Synar Report, California Department of Health Care Services. <http://www.dhcs.ca.gov/provgovpart/Documents/SynarReport2015.pdf>.

3. Rogers, T., Feighery, E.C., Haladjian, H.H. Current Practices in Enforcement of California Laws Regarding Youth Access to Tobacco Products and Exposure to Secondhand Smoke. Sacramento, CA: California Department of Public Health; 2008.

4. Tobacco Retailer Licensing is Effective. The Center for Tobacco Policy & Organizing, American Lung Association in California. August 2012.

5. 2015 License Fee Schedule. California Department of Alcoholic Beverage Control.

6. 2012 License Fee Schedule. California Department of Consumer Affairs, Board of Pharmacy.

7. Williams RJ, Knight R. Insights in Public Health Electronic Cigarettes: Marketing to Hawai’i’s Adolescents. Maddock J, Hayes D, St. John TL, Starr R, eds. Hawai’i Journal of Medicine & Public Health. 2015;74(2):66-70.

8. Reducing Youth Access to Electronic Cigarettes Through TRL. The Center for Tobacco Policy & Organizing, American Lung Association in California. April 2015.

9. Key State-Specific Tobacco-Related Data & Rankings. Campaign for Tobacco-Free Kids. January 2015.

10. NACS State of the Industry Annual Report Convenience & Petroleum Retailing Totals, Trends and Analysis of 2011 Industry Data. The Association for Convenience & Petroleum Retailing. 2012.

11. Percent of Retailers Selling Tobacco to Youth by Store Type, 2009. California Department of Public Health, Tobacco Control Program, July 2009.

12. Apollonio, Dorie E. and Malone, Ruth E. The “We Card” Program: Tobacco Industry “Youth Smoking Prevention” as Industry Self-Preservation. American Journal of Public Health 2010 100, 7, 1188-1201.

13. Cigarette Company Youth Access Initiatives: Fake and Ineffective. Campaign for Tobacco-Free Kids. October 2005.