

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.

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. As of January 1, 2017, the state law was strengthened to include 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. Local Laws help impose more meaningful penalties, like the revocation of a license, if necessary.¹

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

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. The STAKE Act (Stop Tobacco Access to Kids Enforcement) and Penal Code 308 establish the minimum age to purchase tobacco products in the state of California. As of June 9, 2016, the minimum age to purchase tobacco products, including electronic cigarettes, was raised from 18 to 21 years old.¹ 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.² 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%.²

- Davis: \$344 annual fee; adopted August 2007; rates dropped from 30.5% to 7.8%.²
- Baldwin Park: \$342 annual fee; adopted October 2008; rates dropped from 34% to 9%.²

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 – \$582³
- State Pharmacy License: original fee – \$260 application; biennial renewal fee – \$372⁴
- State Gambling Establishment License – \$1000 application fee; sliding annual fee based on number of tables and revenue, minimum \$500⁵

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. This is the strongest way to regulate electronic cigarettes through a local tobacco retailer licensing ordinance to include special language in the definition of tobacco products, specifically electronic cigarettes. The age to purchase electronic cigarettes is 21 years old. As of January 1, 2017, stores that sell only electronic cigarette products will also be subject to the same state license requirements, including an annual renewal fee, as stores that sell traditional tobacco product. For model ordinance language please refer to [ChangeLab Solutions](#).

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. 144 cities and counties throughout the state have taken steps to regulate these products through their local tobacco retail law.⁶

Does the provision to not allow a license to be transferred to a new owner constitute a “taking” of a property interest?

No, according to analysis by ChangeLab Solutions, it is extremely unlikely that this argument would hold up in court. Opposition groups have 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 retail 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.⁷ More than 144 municipalities have adopted a strong local tobacco retailer licensing ordinance in California and no lawsuits regarding license transfer have occurred.

Won't a new fee burden tobacco retailers?

These fees are not a burden for tobacco retailers. According to the Association for Convenience Stores (NACS), cigarettes are the top-selling product sold inside stores while other tobacco products follow. The NACS 2018 State of the Industry Report shows that while tobacco products, including cigarettes were 34.1% of in-store sale dollars, they accounted for only 17.1% of gross profit dollars per convenience store. Retailers are worried about lost sales if their license is revoked for selling to youth, not about affording the annual license fee.⁸ This is why licensing ordinances with fees and strong enforcement are effective at reducing sales to youth. Protecting minors from the harmful effects of tobacco is vital. The consequences of not protecting youth are too great when 10,900⁹ youth in California become new daily smokers each year.

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 youth and young adults, and was undertaken primarily to improve the tobacco industry's image and to reduce regulation and enforcement of existing laws.¹⁰ To effectively combat the problem of illegal sales to underage youth and young adults, 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?

Retail licensing can't eliminate all the sources used to obtain tobacco. But illegal sales to underage individuals 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 licensing laws.

Research as shown that children under the age of 18 rely heavily on their peer network to access tobacco products. However, by raising the minimum age to purchase tobacco products, the state made it less likely that teen peer networks will include people who are old enough to legally purchase tobacco products. This puts further responsibility on tobacco retailers to verify that their customers are of age. 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.¹¹

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

Our opponents frequently use this argument. They claim that their members are law-abiding and shouldn't be "punished" by having to get a license. Licensing fees themselves are not a punishment, but rather cover the costs of enforcing public health regulations. The fines and suspensions for selling youth and young adults are 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.

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 later. 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 these laws are being followed by the retailers when they engage in the lucrative business of selling cigarettes. Setting a fee that will cover enforcement is essential and will allow for constant enforcement of tobacco regulations.

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3. 2016 License Fee Schedule. California Department of Alcoholic Beverage Control. <http://www.abc.ca.gov/permits/2016%20Off%20Sale%20Fee%20Schedule.pdf>
4. 2016 License Fee Schedule. California Department of Consumer Affairs, Board of Pharmacy. http://www.pharmacy.ca.gov/about/fee_schedule.shtml
5. 2016 California Office of the Attorney General, Bureau of Gambling Control. https://oag.ca.gov/gambling/forms/forms_license
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