

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. 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 obtain a state license. However, this bill was enacted to prevent smuggling and does little to reduce underage sales.¹ Penalties for violating the statewide license are also 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 approximately eight percent of stores that sell tobacco.² On the federal level, the Food and Drug Administration has yet to award a contract to California for enforcement of illegal sales to minors. When enforcement does begin, it is likely to have the same challenges as existing state enforcement efforts and be unable to do compliance checks consistently on all retailers. 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). Examples include:

- Coachella: \$350 annual fee; adopted July 2007; rates dropped from 69% to 11%
- Elk Grove: \$270 annual fee; adopted September 2004; rates dropped from 17% 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 – \$12,000; annual renewal fee – \$582.⁵
- State Pharmacy License: original fee – \$400 application; annual renewal fee – \$250⁶

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.

Now that Proposition 26 has passed, doesn't this mean a fee on tobacco retailers will have to be approved by the voters?

No, elected officials still have the authority to adopt a tobacco retailer licensing fee by a majority vote. Proposition 26 was passed on the November 2010 statewide ballot and amends the California Constitution to reclassify many local fees as taxes. All local taxes must be approved by the local electorate; fees can be imposed by a majority of the local elected body. There are several exceptions written into the language of Proposition 26, specifying certain categories of government charges that are still considered "fees" rather than "taxes." A tobacco retailer license fee should fit within the specific exception for charges "imposed for the reasonable regulatory costs to a local government for issuing licenses and permits" including the administrative and enforcement costs associated with the license or permit.⁷ An analysis by the Technical Assistance Legal Center concludes that this type of fee fits into that exception and several city and county elected bodies have adopted tobacco retailer license fees since the passage of Proposition 26. As always, it is important to ensure that a thorough fee study is done which carefully documents all of the activities that will be paid for by the fee to show that this fee will only be used for administrative and enforcement costs associated with the tobacco retailer license program.

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?

No, according to analysis by the Technical Assistance Legal Center, it is extremely unlikely that this argument would hold up in court. The Neighborhood Market Association is threatening 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 retail license will have a minimal effect on its economic value. More than 80 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.

Shouldn’t communities wait until the economy improves to create a new fee on tobacco retailers?

No, protecting minors from the harmful effects of tobacco should not have to wait. The consequences of not protecting kids from tobacco are too great when 36,900 youth in California become smokers each year.⁸ In addition, these fees are not a burden for tobacco retailers. According to the Association for Convenience & Petroleum Retailing (NACS), cigarettes are the top product sold inside stores. The NACS 2010 State of the Industry Report shows that in 2009, cigarettes accounted for 35.9% of all in-store sales and generated average sales of \$576,354 per convenience store.⁹ 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.

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.¹⁰

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.¹¹ 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.

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 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.

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.

1. California Business and Professions Code, Sections 22970-22995.
2. 2011 Synar Report, California Department of Alcohol and Drug Services. <http://www.adp.cahwnet.gov/Funding/synar.shtml>
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. March 2011.
5. 2010 License Fee Schedule. California Department of Alcoholic Beverage Control.
6. 2010 License Fee Schedule. California Department of Consumer Affairs, Board of Pharmacy.
7. Official Voter Information Guide, California General Election, Tuesday, November 2, 2010. California Secretary of State.
8. Key State-Specific Tobacco-Related Data & Rankings. Campaign for Tobacco-Free Kids. January 2011.
9. NACS State of the Industry Annual Report Convenience & Petroleum Retailing Totals, Trends and Analysis of 2009 Industry Data. The Association for Convenience & Petroleum Retailing. 2010.
10. Percent of Retailers Selling Tobacco to Youth by Store Type, 2009. California Department of Public Health, Tobacco Control Program, July 2009.
11. Cigarette Company Youth Access Initiatives: Fake and Ineffective. Campaign for Tobacco-Free Kids. October 2005.

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