



## Prohibiting the Sale of Tobacco Products in Pharmacies

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures. For more details about these policy considerations, please contact the Consortium.

### Introduction

For years, the tobacco industry used pseudoscientific research and statements by medical professionals to perpetuate the myth that tobacco was a health product.<sup>1</sup> While this form of advertising is no longer prevalent, tobacco products are still a common fixture in pharmacies and drug stores. Recently, many healthcare professionals have taken steps to distance themselves from the sale of tobacco products<sup>2</sup> and several communities have adopted laws that restrict tobacco sales by pharmacies and other health-related establishments. This guide reviews policy options for restricting tobacco sales in pharmacies, and some related legal implications and possible challenges to such policies.



### Public Health Rationale & Policy Benefits

The dangers of tobacco use are well studied and widely publicized. Cigarette smoking accounts for approximately 443,000 deaths annually in the United States.<sup>3</sup> Smoking doubles a person's risk of coronary heart disease and stroke and increases the risk of developing lung cancer by 13 times for women and 23 times for men.<sup>4</sup> Smoking also causes coronary heart disease, cancer of the esophagus, larynx and oral cavity, as well as stomach, kidney and pancreatic cancer.<sup>5</sup> Moreover, tobacco use has been linked to infertility, low birth weight, stillbirth and sudden infant death syndrome.<sup>6</sup>

Given these dangers, it is no surprise that many national organizations support restricting the retail sale of tobacco products in pharmacies. The American Pharmacists Association,<sup>7</sup> the National Community Pharmacists Association<sup>8</sup> and the American

Academy of Pediatrics<sup>9</sup> have all issued statements in favor of restricting the retail sale of tobacco.

In 2008, shortly after the City and County of San Francisco implemented the first U.S. restriction of tobacco sales in pharmacies, the University of California's School of Pharmacy issued a statement in support of the ordinance.<sup>10</sup> The statement explains that the practice of selling tobacco products in pharmacies raises ethical questions. It points out that because cigarettes are known to cause many deadly diseases, it is inappropriate for them to be sold in stores that sell pharmaceutical drugs and other products that treat and prevent disease. Moreover, the statement adds, a pharmacy that does not sell tobacco products will be better equipped to promote health and wellness to customers. In addition to the strong public health rationale for restricting the sale of tobacco products in pharmacies, many pharmacies, along with the general public, support these types of laws.

### **Policy Options**

**Stand-alone Ordinance.** A tobacco sales restriction can be implemented in different ways. The most common method adopted by U.S. cities is through a local ordinance. States and local governments can use their police power to regulate specific behavior to benefit a common good.<sup>11</sup> Several cities have passed ordinances that prohibit pharmacies from selling tobacco products and impose monetary penalties on those that violate the law.<sup>12</sup> This type of policy is simple to adopt and implement, but may be a challenge to enforce, particularly if the law does not include penalties that are sufficient to induce compliance. A locality adopting such a policy must also be wary of potentially infringing on protected rights (discussed below).

**Licensing.** The second way to implement a tobacco sales restriction is by the use of a licensing law. Many states and localities require tobacco retailers to obtain a license or permit before they can sell tobacco within the jurisdiction's borders. For those states and localities that pursue this option, licensing can be a very powerful tool in tobacco control. In implementing this strategy, a locality can amend its licensing scheme to prohibit retail licenses from being issued to pharmacies and other healthcare organizations, and implement monetary and administrative penalties for any entity that sells tobacco without a license.

**Zoning.** A third way to implement a tobacco sales restriction is through local zoning power. Almost all U.S. cities and counties use zoning laws to regulate land use. These laws can also be used to regulate tobacco sales. The use of zoning to create "Tobacco-Free Zones" near schools and parks has been well established.<sup>13</sup> This same concept can be used to prohibit the sale of tobacco products by specific retailers or in certain commercial zones.

## Policy Elements

An effective tobacco sales restriction, like all tobacco control policies, should be carefully drafted and explicit in its language. Here are a few elements found in such policies:

- **Timely findings and clear statement of purpose.** Findings are brief statements of facts or statistics that outline the issue being addressed, support the need for the policy, help clarify the policy goal and are designed to help the law withstand legal challenges.
- **Clear definitions and concise language.** Regulations should specify exactly which entities are covered by a restriction and what behavior is being restricted. If exemptions are granted, it should be clear to whom they apply and why they do not apply to anyone else.
- **Meaningful enforcement provisions.** For policies to deter the prohibited behavior, they must have enforcement mechanisms that create a strong disincentive to violate them. For example, many policies that restrict tobacco sales in pharmacies define a violation as a single day on which tobacco is sold illegally, and allow for greater penalties for additional violations. Localities can consider revoking a pharmacy's business license for repeated violations.

## Potential Legal Challenges

As with most tobacco control policies, localities that adopt a policy must be careful to limit their exposure to potential litigation. The City and County of San Francisco faced three lawsuits upon their implementation of a tobacco sales restriction. Ultimately, San Francisco's restriction remains in place but its struggle serves as a lesson for any who wish to adopt a policy in the future.

**Preemption.** Before any local government attempts to implement a tobacco sales restriction, it must verify that it is not preempted from doing so by state law. Some states favor a uniform application of the law throughout the state. To accomplish this, a state can pass a law that will trump any local law purporting to regulate the same behavior. A local government that wishes to implement a tobacco sales restriction should investigate the state tobacco regulatory scheme to ensure that it is not preempted from regulating tobacco sales at the local level.

**First Amendment.** After the passage of a pharmacy sales restriction in San Francisco, Philip Morris filed suit alleging that the ordinance violated its First Amendment right to free expression. Philip Morris argued that the ordinance singled out the expressive activity of smokers and tobacco manufacturers. The court found that the ordinance did not have the effect of suppressing ideas, and that even if it did, any similar restriction would have the same effect, and that finding these restrictions invalid would make it impossible for the government to regulate commerce.<sup>14</sup>

Although the ordinance – a simple sales restriction – was upheld, this case helps illustrate that laws limiting tobacco sales may be challenged, but will tend to be among the more easily defended tobacco control policies.

**Equal Protection.** San Francisco’s original ordinance allowed an exemption for “Big Box Stores” and “General Grocery Stores,” which allowed Safeway, a grocery chain that includes a pharmacy, to sell tobacco while Walgreens, a pharmacy chain that sells grocery items, could not.<sup>15</sup> Walgreens filed suit claiming that the ordinance violated its equal protection rights because it was treated differently than Safeway even though their businesses were very similar. San Francisco faced difficulties justifying the unequal treatment and ultimately amended its ordinance to apply to all pharmacies.<sup>16</sup> States and localities who intend to institute this type of restriction must be very careful with any exemptions granted. Exemptions must have a rational relation to a legitimate governmental purpose.

**Due Process.** As discussed above, after the lawsuit occurred, San Francisco simply removed the exemptions from its ordinance, which meant that Safeway and Walgreens – and all pharmacies in San Francisco – are prohibited from selling tobacco products.<sup>17</sup> This prohibition prompted Safeway to file suit against San Francisco. In this lawsuit, Safeway argued that it had acquired lawful permits to sell pharmaceuticals and tobacco and San Francisco was depriving Safeway of property rights by forcing Safeway to discontinue its pharmacy business in order to sell tobacco. The court found that San Francisco’s ordinance was a reasonable and permissible use of its police power and thus not a Due Process violation.<sup>18</sup> A state or locality intending to implement a tobacco sales restriction should take care to work with local legal counsel to see whether any special steps are required to impose a tobacco sales restriction on a current business.

**Examples of Regulations that Restrict Tobacco Sales in Pharmacies**

Below are examples of regulations restricting the sale of tobacco products in pharmacies around the United States. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Locality	Definition of Pharmacy	Definition of Tobacco	Restriction	Penalties	Enforcement
<b>Boston, MA</b> <a href="#">Boston Public Health Comm’n, Regulation Restricting the Sale of Tobacco Products in the City of Boston</a>	“Health care institution: An individual... [or] corporation ... that provides health care services or employs health care providers licensed, or subject to licensing, by the Massachusetts department of public	“Any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco and dipping tobacco.”	“No health care institution located in the City of Boston shall sell or cause to be sold tobacco products. Additionally, no retail establishment that operates	Each calendar day of operation is a violation; 1 <sup>st</sup> violation: \$200 fine; 2 <sup>nd</sup> violation within 24 months: \$700 fine; 3 or more violations within 24 months: \$1,000 fine	Boston Public Health Commission, Boston Inspectional Services Dept., Boston Police Dept. Any person may register a

	health. Health care institution includes hospitals, clinics, health centers, pharmacies, drug stores and doctor and dentist offices.”		or has a health care institution within it, such as a pharmacy or drug store, shall sell or cause to be sold tobacco products.”		complaint.
<b>Newton, MA</b> <a href="#">Newton, Ma., Newton Code Online § 20-2 (2012)</a>	“Health care provider: An individual... [or] corporation ... that provides health care services or employs health care providers licensed, or subject to licensing, by the Massachusetts department of public health. Health care provider includes hospitals, clinics, health centers, pharmacies, drug stores and doctor and dentist offices.”	Cigarettes, cigars, chewing tobacco, pipe tobacco, snuff or tobacco in any of its forms.	“No health care provider located in the City of Newton shall sell tobacco products or cause tobacco products to be sold. No retail establishment that operates [sic] maintains or employs a health care provider within it, such as a pharmacy or drug store, shall sell tobacco products or cause tobacco products to be sold.”	1 <sup>st</sup> violation: \$100 fine; 2 <sup>nd</sup> violation within 36 months: \$200 fine; 3 or more violations within 36 months: \$300 fine	Commissioner of Health and Human Services of the City of Newton
<b>Richmond, CA</b> <a href="#">Richmond, Cal., Ordinance 38-09 (Nov. 17, 2012)</a>	“Drug Store: any business or other commercial enterprise that is (1) licensed as a pharmacy by the State of California pursuant to the California Business and Professions Code, and (2) identified as a Drug Store with the California Board of Equalization, or with the Richmond Finance Department, or is otherwise commonly known as a drugstore.”	“(1) Any substance containing tobacco leaf, including, but not limited, to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any	“No Drug Store shall sell, or otherwise distribute, tobacco products.”	1 <sup>st</sup> violation: \$250 fine; 2 <sup>nd</sup> violation within 24 months: \$500 fine; 3 or more violations within 24 months: \$1,000 fine; can also be prosecuted as a misdemeanor	No enforcing entity identified, but the City Manager may issue regulations relating to enforcement.



		product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.”			
<p><b>San Francisco, CA</b>  <a href="#">Ordinance 194-08, Prohibiting Pharmacies from selling Tobacco Products (2009)</a></p>	Pharmacy retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals.	Any substance containing tobacco leaf including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco.	No person shall sell tobacco products in a pharmacy.	1 <sup>st</sup> violation: \$100 fine; 2 <sup>nd</sup> violation within 12 months: \$200 fine; 3 or more violations within 12 months: \$500 fine; can also be prosecuted as a misdemeanor	No enforcing entity identified but the Director of the Department of Public Health may issue regulations relating to enforcement
<p><b>Walpole, MA</b>  <a href="#">Regulations Restricting the Sale of Tobacco Products in Walpole</a></p>	No definition	Any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipes, tobacco, snuff, chewing tobacco and dipping tobacco. The law also provides definitions for E-Cigarette, Liquid Nicotine and Nicotine Delivery Product.	No pharmacies, drugstores or retail establishments that have pharmacies or drugstores within their physical premises (such as a pharmacy or a supermarket or department store that contains a pharmacy) located in the Town of Walpole shall sell or cause to be sold tobacco products, e-cigarettes, or liquid nicotine or any other nicotine delivery product as defined above.	Each calendar day of operation is a violation; 1 <sup>st</sup> violation: \$200 fine; 2 <sup>nd</sup> violation within 36 months: \$300 fine; 3 or more violations within 36 months: fine determined at a hearing of the Board of Health	No enforcing entity identified
<p><b>Worcester, MA</b>  <a href="#">Tobacco Products Control</a></p>	“Health Care Provider: An individual... [or] corporation ... that provides health care services or employs health care providers	Cigarettes, cigars, chewing tobacco, pipe tobacco, snuff or tobacco in any of its forms.	“No health care provider shall sell tobacco products or cause or allow tobacco products to be sold on its	Each calendar day of operation is a violation; \$300 fine for each violation	No enforcing entity identified

<a href="#">Ordinance (2011)</a>	licensed, or subject to licensing, by the Massachusetts department of public health. Health care provider includes hospitals, clinics, health centers, pharmacies, drug stores and doctor and dentist offices.”		premises. No retail establishment that operates [sic] maintains or employs a health care provider within it, such as a pharmacy or drug store, shall sell tobacco products or cause tobacco products to be sold.”		
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## Other Resources

The Consortium’s parent organization, the [Public Health Law Center](#), has web pages containing information on [tobacco product regulation](#), [federal tobacco regulation](#), and [sales restrictions](#). Our site also includes several publications and resources on issues such as [Using Licensing and Zoning to Regulate Tobacco Retailers](#), [Federal Regulation of Tobacco and Its Impact on the Retail Environment](#), as well as [Preemption](#) and [Tobacco Control and the Equal Protection Clause](#). For tips on ways to draft tobacco control policies so they are better able to withstand legal challenges, see the Public Health Law Center’s [Policy Drafting Checklists](#).

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or [www.publichealthlaw@wmitchell.edu](mailto:www.publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing policies restricting tobacco sales in pharmacies.

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## Notes

<sup>1</sup> See Lane Medical Library, Stanford School of Medicine, available at <http://lane.stanford.edu/tobacco/index.html>.

<sup>2</sup> In 2010, the American Pharmacists Association adopted a policy that strongly urges all pharmacies, and facilities that include pharmacies, to discontinue the sale of tobacco products. 2010 Actions of the APhA House of Delegates (D.C., Mar. 12-15, 2010), available at [http://www.pharmacist.com/AM/Template.cfm?Section=House\\_of\\_Delegates&Template=/CM/ContentDisplay.cfm&ContentID=23014](http://www.pharmacist.com/AM/Template.cfm?Section=House_of_Delegates&Template=/CM/ContentDisplay.cfm&ContentID=23014).

<sup>3</sup> Ctrs. for Disease Control and Prevention, *Smoking & Tobacco Use, Health Effects of Cigarette Smoking* (2012), available at [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/effects\\_cig\\_smoking/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm); see also U.S. DEP’T OF HEALTH & HUMAN SERV., HOW TOBACCO SMOKE CAUSES

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DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE: A REPORT OF THE SURGEON GENERAL (2010), available at [http://www.cdc.gov/tobacco/data\\_statistics/sgr/2010/index.htm](http://www.cdc.gov/tobacco/data_statistics/sgr/2010/index.htm).

<sup>4</sup> See *Smoking & Tobacco Use*, *supra* note 3.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> Am. Pharmacists Ass'n, *APHA Announces New Policies Adopted by House of Delegates* (2010), available at [http://www.pharmacist.com/AM/Template.cfm?Section=News\\_Releases2&template=/CM/ContentDisplay.cfm&ContentID=23755](http://www.pharmacist.com/AM/Template.cfm?Section=News_Releases2&template=/CM/ContentDisplay.cfm&ContentID=23755).

<sup>8</sup> Nat'l Cmty. Pharmacists Ass'n, *NCPA Encourages Pharmacists to Consider Refraining From Selling Tobacco Products* (2008), available at [http://www.ncpanet.org/news\\_press/press\\_releases/2008/ncpa\\_encourages\\_member\\_pharmacists\\_to\\_11-20-2008.shtml](http://www.ncpanet.org/news_press/press_releases/2008/ncpa_encourages_member_pharmacists_to_11-20-2008.shtml).

<sup>9</sup> Am. Acad. of Pediatrics, *Policy Statement—Tobacco Use: A Pediatric Disease* 1482 (2009) available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;124/5/1474.pdf>.

<sup>10</sup> UCSF School of Pharmacy, *Position on City and County of San Francisco, Ordinance* (2008) (amending the San Francisco Health Code Sec. 1009.53 and adding Sec. 1009.60 and Art. 19J, to prohibit pharmacies from selling tobacco products), available at [http://www.no-smoke.org/pdf/Pharmacy%20UCSF-TobaccoSalesPositionPaper-v14-\(on%20letterhead\)1.pdf](http://www.no-smoke.org/pdf/Pharmacy%20UCSF-TobaccoSalesPositionPaper-v14-(on%20letterhead)1.pdf).

<sup>11</sup> A state can use its “police power” to regulate behavior and enforce order for the betterment of the general welfare, morals, health and safety of inhabitants within their jurisdiction. This special authority includes the protection of the public’s health. *Jacobson v. Massachusetts*, 197 US 11 (1905).

<sup>12</sup> See *infra*, Examples of Regulations that Restrict Tobacco Sales in Pharmacies.

<sup>13</sup> Tobacco Control Legal Consortium, *Using Licensing and Zoning to Regulate Tobacco Retailers* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-licensingandzoning-2011.pdf>.

<sup>14</sup> *Philip Morris USA, Inc. v. City and County of San Francisco*, 345 Fed. Appx. 276 (2009).

<sup>15</sup> SAN FRANCISCO, CAL., ORDINANCE § 194-08 (2008), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances08/o0194-08.pdf>.

<sup>16</sup> *Walgreen Co. v. City and County of San Francisco*, 110 Cal.Rptr.3d 498 (2010).

<sup>17</sup> SAN FRANCISCO, CAL., ORDINANCE § 245-10 (2008), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances10/o0245-10.pdf>.

<sup>18</sup> *Safeway Inc. v. City and County of San Francisco*, 797 F.Supp.2. 964 (2011).