

# MINNESOTA CITY RETAIL TOBACCO LICENSING ORDINANCE



Through licensing and related regulations, Minnesota cities have the opportunity to address the sale of commercial tobacco and related devices and products in the retail environment.

This model ordinance includes all of the minimum retail tobacco sales restrictions required by Minnesota state and federal law. It also includes a number of additional provisions a city may choose to adopt in order to further advance public health. A city planning to adopt this model ordinance, in whole or in part, should review it with its city attorney beforehand to determine suitability for the city's circumstances. While the model ordinance language can be modified by adding or omitting content concerning activities that a city does or does not seek to regulate, doing so may result in an ordinance that does not conform to state law, federal law, and best public health policy practices.

Because provisions within this model ordinance are controlled by statute and rules, the city



attorney should review any modifications to ensure they conform to state and federal law. In addition, because the ordinance establishes rights and responsibilities of both the city and license applicants and holders, the city attorney should review the entire ordinance before it is adopted. The Public Health Law Center provides legal technical assistance to help communities that wish to adopt commercial tobacco control ordinances. We encourage communities to contact us for assistance when considering this model language.

## Notice

This ordinance is drafted in the form prescribed by state law for statutory cities. Statutory cities must publish their ordinances — or a summary thereof — in the city’s official newspaper before they become effective. Home rule charter cities may have to follow the formatting and/or other procedural requirements found in their city’s charter. Charter cities should consult their charter and their city attorney to ensure that they comply with all charter requirements. All cities must provide copies of their ordinances to the county law library or its designated depository pursuant to Minn. Stat. § 415.021.

This ordinance may affect existing license holders. Under Minn. Stat. § 461.19, a city is required to give retailers notice that it is considering adopting or substantially amending a retail tobacco licensing ordinance. The city must take reasonable steps to send notice by mail at least 30 days prior to the meeting to the last known address of each licensee or person required to hold a license. The notice must state the time, place, and date of the meeting and the subject matter of the proposed ordinance. A city may also mail a copy of the proposed ordinance to all existing license holders to inform them of its contents and to provide them an opportunity to make their views known.

Additionally, Minn. Stat. § 415.19 requires statutory and home rule charter cities to post proposed new ordinances and ordinance amendments on the city website at least 10 days prior to a final vote by the city council, if the city already posts ordinances on its site. Under the same statute, within 10 days of a final vote, cities must also provide this same notice to all city listserv subscribers via their electronic notification system or, if the city does not have an electronic notification system, in the location that the city posts public notices. Cities must also provide new or renewing licensees with information about the city’s notification procedure at the time of application.

## Tips for Using This Model Ordinance

The best possible world is one without the death and health harms associated with commercial tobacco use. Communities differ on their readiness and willingness to adopt certain commercial tobacco control policies that are intended to help make that world a reality. As such, this model ordinance represents a balance between state and federal minimum standards, best public health policy practices, and practicality for city governments in Minnesota. This model ordinance contains several policy components that communities may or may not choose to adopt at this time that may go beyond minimum state and federal requirements, including:

- Prohibiting the sale of all flavored tobacco products, including menthol-flavored products;

- Regulating the price of commercial tobacco products, such as establishing minimum prices for cigars and restricting the redemption of price promotions and coupons;
- Limiting the number of retailers in a jurisdiction and regulating the distance between tobacco retailers and between retailers and youth-oriented facilities and other retailers;
- Prohibiting the delivery and/or online sales of commercial tobacco products; and
- Prohibiting pharmacies from selling commercial tobacco products.

### **Context Box**

Context boxes are included throughout this model ordinance to explain some key provisions. These boxes are not meant to be included in any final ordinance. A city wishing to adopt all or part of this model ordinance should keep this in mind and remove the context boxes.

While the Public Health Law Center does not lobby, advocate, or directly represent communities, adopting effective commercial tobacco control policies starts early with education, stakeholder and community engagement, and a strong advocacy plan. If a community is unaware of the resources available to them for engaging the community and developing an advocacy plan, or if a city is considering adopting an ordinance and is interested in learning about the range of resources available, the Public Health Law Center can provide assistance through our publications and referrals to experts in the field. In certain, limited circumstances, Public Health Law Center staff may be able to speak at public hearings or work sessions to provide education about particular policy options.

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This retail tobacco licensing ordinance was prepared by the Public Health Law Center, located at the Mitchell Hamline School of Law in St. Paul, Minnesota.

The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not lobby nor does it provide direct legal representation or advice. This document should not be considered legal advice.

**This publication represents the only Minnesota city model retailer licensing policy endorsed by the Public Health Law Center.**

**ORDINANCE NO.** [ \_\_\_\_\_ ]

**AN ORDINANCE REGULATING THE SALE OF TOBACCO  
AND RELATED DEVICES AND PRODUCTS WITHIN  
THE CITY OF [ \_\_\_\_\_ ], MINNESOTA**

**THE CITY COUNCIL OF THE CITY OF [ \_\_\_\_\_ ]  
DOES ORDAIN:**

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## Section 1. Findings of Fact and Purpose.

Because the city recognizes that the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products to persons under the age of 21 violates both state and federal law; and because studies, which the city accepts and adopts, have shown that high school use of any commercial tobacco product has increased to 27.6% in Minnesota; and because nearly 90% of people who smoke begin smoking before they have reached the age of 18 years, and that almost no one starts smoking after age 25; and because marketing analysis, public health research, and commercial tobacco industry documents reveal that tobacco companies have used menthol, mint, fruit, candy, and alcohol flavors as a way to target youth and young adults and that the presence of such flavors can make it more difficult to quit; and because studies show that youth and young adults are especially susceptible to commercial tobacco product availability, advertising, and price promotions at tobacco retail environments; and because commercial tobacco use has been shown to be the cause of many serious health problems which subsequently place a financial burden on all levels of government, this ordinance is intended to regulate the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products for the purpose of enforcing and furthering existing laws, to protect youth and young adults against the serious health effects associated with use and initiation, and to further the official public policy of the state to prevent young people from starting to smoke, as stated in Minn. Stat. § 144.391, as it may be amended from time to time.

In making these findings, the City Council accepts the conclusions and recommendations of: the U.S. Surgeon General reports, *E-cigarette Use Among Youth and Young Adults* (2016), *The Health Consequences of Smoking — 50 Years of Progress* (2014) and *Preventing Tobacco Use Among Youth and Young Adults* (2012); the Centers for Disease Control and Prevention in their studies, *Tobacco Use Among Middle and High School Students — United States, 2011-2015* (2016), and *Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students, United States, 1997(1998)*; and of the following scholars in these scientific journals: Chen, J., & Millar, W. J. (1998). Age of smoking initiation: implications for quitting. *Health Reports*, 9(4), 39-46; D'Avanzo, B., La Vecchia, C., & Negri, E. (1994). Age at starting smoking and number of cigarettes smoked. *Annals of Epidemiology*, 4(6), 455-459; Everett, S. A., Warren, C. W., Sharp, D., Kann, L., Husten, C. G., & Crossett, L. S. (1999). Initiation of cigarette smoking and subsequent smoking behavior among U.S. high school students. *Preventive Medicine*, 29(5), 327-333; Giovino, G. A. (2002). Epidemiology of tobacco use in the United States. *Oncogene*, 21(48), 7326-7340; Khuder, S. A., Dayal, H. H., & Mutgi, A. B. (1999). Age at smoking onset and its effect on smoking cessation. *Addictive Behaviors*, 24(5), 673-677; Luke, D. A., Hammond, R. A., Combs, T., Sorg, A., Kasman, M., Mack-Crane, A., Henriksen,

L. (2017). Tobacco Town: Computational Modeling of Policy Options to Reduce Tobacco Retailer Density. *American Journal of Public Health*, 107(5), 740–746; Minnesota Department of Health. (2020). *Data Highlights from the 2019 Minnesota Youth Tobacco Survey*. Saint Paul, MN; Tobacco Control Legal Consortium. (2006). *The Verdict Is In: Findings from United States v. Philip Morris, The Hazards of Smoking*. University of California San Francisco. Truth Tobacco Industry Documents, <https://www.industrydocumentslibrary.ucsf.edu/tobacco>; Xu, X., Bishop, E. E., Kennedy, S. M., Simpson, S. A., & Pechacek, T. F. (2015) Annual healthcare spending attributable to cigarette smoking: an update. *American Journal of Preventive Medicine*, 48(3), 326–333, copies of which are adopted by reference.

### Findings of Fact and Purpose

A Findings of Fact and Purpose section is important because it provides the evidentiary basis for the proposed commercial tobacco control policies and demonstrates the city's reasoning for adopting specific provisions. This Findings of Fact and Purpose section reflects language appropriate for all of the provisions suggested. The Public Health Law Center can provide support for communities to determine which Findings of Fact and Purpose statements and references should be retained in a final ordinance, depending on which provisions from the model ordinance the city chooses to adopt.

## Section 2. Definitions.

Except as may otherwise be provided or clearly implied by context, all terms are given their commonly accepted definitions. For the purpose of this ordinance, the following definitions apply unless the context clearly indicates or requires a different meaning:

**CHILD-RESISTANT PACKAGING.** Packaging that meets the definition set forth in Code of Federal Regulations, title 16, section 1700.15(b), as in effect on January 1, 2015, and was tested in accordance with the method described in Code of Federal Regulations, title 16, section 1700.20, as in effect on January 1, 2015.

**CIGAR.** Any roll of tobacco that is wrapped in tobacco leaf or in any other substance containing tobacco, with or without a tip or mouthpiece, which is not a cigarette as defined in Minn. Stat. § 297F.01, subd. 3, as it may be amended from time to time.

**COMPLIANCE CHECKS.** The system the city uses to investigate and ensure that those authorized to sell licensed products are following and complying with the requirements of this ordinance.

COMPLIANCE CHECKS involve the use of persons under the age of 21 who purchase or attempt to purchase licensed products. COMPLIANCE CHECKS may also be conducted by the city or other units of government for educational, research, and training purposes or for investigating or enforcing federal, state, or local laws and regulations relating to licensed products.

**DELIVERY SALE.** The sale of any licensed product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the-counter sales transaction in a licensed retail establishment. DELIVERY SALE includes but is not limited to the sale of any licensed product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. DELIVERY SALE includes delivery by licensees or third parties by any means, including curbside pick-up.

### Prohibiting delivery sales

Local communities may be interested in prohibiting delivery sales as an effective means of curtailing underage access to licensed products, especially e-cigarettes sold online. This definition supports the [Delivery Sales Prohibition on page 16](#).

**ELECTRONIC DELIVERY DEVICE.** Any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption through the inhalation of aerosol or vapor from the product. ELECTRONIC DELIVERY DEVICE includes, but is not limited to, devices manufactured, marketed, or sold as e-cigarettes, e-cigars, e-pipes, vape pens, mods, tank systems, or under any other product name or descriptor. ELECTRONIC DELIVERY DEVICE includes any component part of a product, whether or not marketed or sold separately. ELECTRONIC DELIVERY DEVICE does not include any nicotine cessation product that has been authorized by the U.S. Food and Drug Administration to be marketed and for sale as “drugs,” “devices,” or “combination products,” as defined in the Federal Food, Drug, and Cosmetic Act.

**FLAVORED PRODUCT.** Any licensed product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb, or spice. A public statement or claim, whether express or implied, made or disseminated by the manufacturer of a licensed product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such

products, that a product has or produces a taste or smell other than a taste or smell of tobacco will constitute presumptive evidence that the product is a flavored product.

**IMITATION TOBACCO PRODUCT.** Any edible non-tobacco product designed to resemble a tobacco product, or any non-edible tobacco product designed to resemble a tobacco product and intended to be used by children as a toy. IMITATION TOBACCO PRODUCT includes, but is not limited to, candy or chocolate cigarettes, bubble gum cigars, shredded bubble gum resembling chewing tobacco, and shredded beef jerky in containers resembling tobacco snuff tins. IMITATION TOBACCO PRODUCT does not include electronic delivery devices or nicotine or lobelia delivery products.

**INDOOR AREA.** All space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent.

**LICENSED PRODUCTS.** The term that collectively refers to any tobacco, tobacco-related device, electronic delivery device, or nicotine or lobelia delivery product.

**LOOSIES.** The common term used to refer to single cigarettes, cigars, and any other licensed products that have been removed from their original retail packaging and offered for sale. LOOSIES does not include premium cigars that are hand-constructed, have a wrapper made entirely from whole tobacco leaf, and have a filler and binder made entirely of tobacco, except for adhesives or other materials used to maintain size, texture, or flavor.

### **Prohibiting the sale of single cigarettes and other products removed from their original packaging**

Federal law and the Master Settlement Agreement prohibits the sale of single cigarettes. State and local governments can replicate and expand on the federal provisions. This definition includes and expands on the existing federal ban on the sale of single cigarettes (commonly referred to as “loosies”) to also prohibit the sale of cigars and other tobacco products (e.g., smokeless pouches and Juul pods) that have been removed from their intended packaging. The exception language here removes premium cigars from the definition, and thus the sales prohibition, of loosies.

**MOVEABLE PLACE OF BUSINESS.** Any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and that is not a fixed address or other permanent type of structure licensed for over-the-counter sales transactions.

**NICOTINE OR LOBELIA DELIVERY PRODUCT.** Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not tobacco or an electronic delivery device as defined in this section. NICOTINE OR LOBELIA DELIVERY PRODUCT does not include any nicotine cessation product that has been authorized by the U.S. Food and Drug Administration to be marketed and for sale as “drugs,” “devices,” or “combination products,” as defined in the Federal Food, Drug, and Cosmetic Act.

**PHARMACY.** A place of business at which prescription drugs are prepared, compounded, or dispensed by or under the supervision of a pharmacist and from which related clinical pharmacy services are delivered.

**RETAIL ESTABLISHMENT.** Any place of business where licensed products are available for sale to the general public. RETAIL ESTABLISHMENT includes but is not limited to grocery stores, tobacco products shops, convenience stores, liquor stores, gasoline service stations, bars, and restaurants.

**SALE.** Any transfer of goods for money, trade, barter or other consideration.

**SELF-SERVICE DISPLAY.** The open display of licensed products in a retail establishment in any manner where any person has access to the licensed products without the assistance or intervention of the licensee or the licensee’s employee and where a physical exchange of the licensed product from the licensee or the licensee’s employee to the customer is not required in order to access the licensed products.

**SMOKING.** Inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated product containing, made, or derived from nicotine, tobacco, marijuana, or other plant, whether natural or synthetic, that is intended for inhalation. SMOKING also includes carrying or using an activated electronic delivery device.

**TOBACCO.** Any product containing, made, or derived from tobacco that is intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, or any component, part, or accessory of a tobacco product including but not limited to cigarettes; cigars; cheroots; stogies; perique; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco; and other kinds and forms of tobacco. TOBACCO does not include any nicotine cessation product that has been authorized by the U.S. Food and Drug Administration to be marketed and for sale as “drugs,” “devices,” or “combination products,” as defined in the Federal Food, Drug, and Cosmetic Act.

**TOBACCO-RELATED DEVICE.** Any rolling papers, wraps, pipes, or other device intentionally designed or intended to be used with tobacco products. TOBACCO-RELATED DEVICE includes components of tobacco-related devices or tobacco products, which may be marketed or sold separately. TOBACCO-RELATED DEVICES may or may not contain tobacco.

**VENDING MACHINE.** Any mechanical, electric or electronic, or other type of device that dispenses licensed products upon the insertion of money, tokens, or other form of payment into or onto the device by the person seeking to purchase the licensed product.

**YOUTH-ORIENTED FACILITY.** Any facility with residents, customers, visitors, or inhabitants of which 25 percent or more are regularly under the age of 21 or that primarily sells, rents, or offers services or products that are consumed or used primarily by persons under the age of 21. Youth-oriented facility includes, but is not limited to, schools, playgrounds, recreation centers, and parks.

### Section 3. License.

- (A) **License required.** No person shall sell or offer to sell any licensed product without first having obtained a license to do so from the city.
- (B) **Application.** An application for a license to sell licensed products must be made on a form provided by the city. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the city deems necessary. Upon receipt of a completed application, the City Clerk will forward the application to the City Council for action at its next regularly scheduled meeting. If the City Clerk determines that an application is incomplete, it will be returned to the applicant with notice of the information necessary to make the application complete.
- (C) **Action.** The City Council may approve or deny the application for a license, or it may delay action for a reasonable period of time to complete any investigation of the application or the applicant deemed necessary. If the City Council approves the application, the City Clerk will issue the license to the applicant. If the City Council denies the application, notice of the denial will be given to the applicant along with notice of the applicant's right to appeal the decision.
- (D) **Term.** All licenses issued are valid for one calendar year from the date of issue.
- (E) **Revocation or suspension.** Any license issued may be suspended or revoked following the procedures set forth in Section 11.

- (F) **Transfers.** All licenses issued are valid only on the premises for which the license was issued and only for the person to whom the license was issued. The transfer of any license to another location or person is prohibited.
- (G) **Display.** All licenses must be posted and displayed at all times in plain view of the general public in the retail establishment.
- (H) **Renewals.** The renewal of a license issued under this ordinance will be handled in the same manner as the original application. The request for a renewal must be made at least 30 days, but no more than 60 days, before the expiration of the current license.
- (I) **Issuance as privilege and not a right.** The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.
- (J) **Instructional program.** Licensees must complete and ensure that all employees complete a training program on the legal requirements related to the sale of licensed products and the possible consequences of license violations. Any training program must be pre-approved by the city. Licensees must maintain documentation demonstrating their compliance and must provide this documentation to the city at the time of renewal, or whenever requested to do so during the license term.
- (K) **Minimum clerk age.** Individuals employed by a licensed retail establishment under this ordinance must be at least [ 18 or 21 ] years of age to sell licensed products.

### Minimum Age for Clerks

Cities may be interested in establishing a minimum age for employees to sell commercial tobacco products at licensed retail establishments. The tobacco industry has acknowledged that peer pressure facing young clerks from their underage peers seeking to purchase commercial tobacco products at the counter plays a role in youth access. Establishing a minimum clerk age addresses the peer pressure and impacts youth access. If a city chooses to establish a minimum clerk age below the age of 21 (e.g., 18), clerks between the ages of 18 and 20 could legally sell licensed products within the purview of their employment but would be unable to purchase them. This sample language allows that people under the minimum clerk age may still work for a licensed retailer but cannot engage in sales of commercial tobacco products.

- (L) **Maximum number of licenses.** The maximum number of licenses issued by the city at any time is limited to [ see “Licensing Cap” below ]. When the maximum number of licenses has been issued, the city may place persons seeking licensure on a waiting list and allow them to apply on a first-come, first-served basis, as licenses are not renewed or are revoked. A new applicant who has purchased a business location holding a valid city license will be entitled to first priority, provided the new applicant meets all other application requirements in accordance with this ordinance.

### Licensing Cap

Communities with a higher concentration of commercial tobacco retailers within their jurisdiction expose more youth and young adults to commercial tobacco industry marketing, making it easier for them to obtain licensed products. This heavier concentration of retailers also influences the brands chosen by young people and encourages their initiation of commercial tobacco use. One way to address retailer density issues is to place a limit or cap on the number of tobacco retailer licenses that may be issued by the city. The above provision would set the maximum number of licenses available.

Cities can choose how to structure a licensing cap to meet the needs of their communities. Potential options include setting the cap at the number of existing licensed retailers or limiting the number of licensed retailers based on population density. A city may also want to limit licenses to those that currently exist and reduce the number of available licenses over time, as licenses are revoked or expire and are not renewed. It is possible to craft language that would ultimately reduce the number of licenses over time to zero. Cities are encouraged to work with local public health departments, city attorneys, and the Public Health Law Center to determine the appropriate licensing cap provision for their community.

For more information on retailer density, review our publication [Location, Location, Location: Tobacco & E-Cig Point of Sale.](#)

- (M) **Proximity to youth-oriented facilities.** No license will be granted to any person for a retail establishment location that is within [ 1,000 ] feet of a youth-oriented facility, as measured by the shortest line from the property line of the space to be occupied by the proposed licensee to the nearest property line of a youth-oriented facility. This restriction does not apply to an existing license holder who has been licensed to sell licensed products in that same location for at least one year before the date this section was enacted into law.

- (N) **Proximity to other licensed retailers.** No license will be granted to any person for a retail establishment location that is within [ 2,000 ] feet of any other existing licensed retail establishment , as measured by the shortest line from the property line of the space to be occupied by the applicant for a license to the nearest property line of the existing licensee. This restriction does not apply to an applicant who has been licensed to sell licensed products in the same location for at least one year before the date this section was enacted into law.

### Proximity Restrictions

Research has demonstrated that policies requiring set distances between retailers and between retailers and youth-oriented facilities help to reduce tobacco retailer density and increase prices for commercial tobacco products. These proximity buffers may have significant impact in urban, low-income neighborhoods, which have been historically targeted by the tobacco industry with pervasive marketing and price promotions at the point-of-sale. The greatest public health impacts are seen when these policies are combined with a cap on the number of licenses issued.

For more information on proximity restrictions, review our publication, [Location, Location, Location: Tobacco & E-Cig Point of Sale.](#)

Luke, D. A., Hammond, R. A., Combs, T., Sorg, A., Kasman, M., Mack-Crane, A. Henriksen, L. (2017). Tobacco Town: Computational Modeling of Policy Options to Reduce Tobacco Retailer Density. *American Journal of Public Health*, 107(5), 740-746; Myers, A. E., Hall, M. G., Isgett, L. F., & Ribisl, K. M. (2015). A Comparison of Three Policy Approaches for Tobacco Retailer Reduction. *Preventive Medicine*, 74, 67-7; and Ribisl, K. M., Luke, D. A., Bohannon, D. L., Sorg, A. A., & Moreland-Russell, S. (2017). Reducing Disparities in Tobacco Retailer Density by Banning Tobacco Product Sales near Schools. *Nicotine & Tobacco Research: Official Journal of the Society for Research on Nicotine and Tobacco*, 19(2), 239-244.

- (O) **Pharmacies ineligible for licensure.** No existing license will be eligible for renewal to any pharmacy, including any retail establishment that operates or contains an on-site pharmacy, and no pharmacy or any retail establishment that operates an on-site pharmacy will be granted a new license.

### Pharmacy Prohibitions

Several communities have adopted laws prohibiting pharmacies from selling commercial tobacco products. These laws have been shown to significantly reduce commercial tobacco retailer density when compared to communities without similar laws. Some studies have shown that pharmacy prohibitions are most effective in reducing health disparities when combined with proximity restrictions.

Giovenco, D. P., Spillane, T. E., Mauro, C. M., & Hernández, D. (2018). Evaluating the Impact and Equity of a Tobacco-free Pharmacy Law on Retailer Density in New York City Neighbourhoods. *Tobacco Control*, tobaccocontrol-2018-054463. Jin, Y., Lu, B., Klein, E. G., Berman, M., Foraker, R. E., & Ferketich, A. K. (2016). Tobacco-Free Pharmacy Laws and Trends in Tobacco Retailer Density in California and Massachusetts. *American Journal of Public Health*, 106(4), 679–685.

- (P) **Smoking prohibited.** Smoking, including smoking for the purpose of the sampling of licensed products, is prohibited within the indoor area of any retail establishment licensed under this ordinance.
- (Q) **Samples prohibited.** No person shall distribute samples of any licensed product free of charge or at a nominal cost. The distribution of licensed products as a free donation is prohibited.

### Section 4. Fees.

No license will be issued under this ordinance until the appropriate license fees are paid in full. The fees will be established by the city's fee schedule and may be amended from time to time.

### Licensing Fees

Fees provide revenue for the administration and enforcement of the ordinance and for retailer and community education. Periodic review and adjustment of licensing fees will ensure that they are sufficient to cover all administration, implementation, and enforcement costs, including compliance checks. Our publication, *Retail License Fees*, provides more information about retail licensing fees and a license fee checklist.

## Section 5. Basis for Denial of License.

- (A) Grounds for denying the issuance or renewal of a license include, but are not limited to, the following:
- (1) The applicant is under 21 years of age.
  - (2) The applicant has been convicted within the past five years of any violation of a federal, state, or local law, ordinance provision, or other regulation relating to licensed products.
  - (3) The applicant has had a license to sell licensed products suspended or revoked within the preceding 12 months of the date of application.
  - (4) The applicant fails to provide any of the information required on the licensing application, or provides false or misleading information.
  - (5) The applicant is prohibited by federal, state, or other local law, ordinance, or other regulation from holding a license.
  - (6) The business for which the license is requested is a moveable place of business. Only fixed-location retail establishments are eligible to be licensed.
- (B) If a license is mistakenly issued or renewed to a person, the city will revoke the license upon the discovery that the person was ineligible for the license under this ordinance. The city will provide the license holder with notice of the revocation, along with information on the right to appeal.

## Section 6. Prohibited Sales.

- (A) **In general.** No person shall sell or offer to sell any licensed product:
- (1) By means of any type of vending machine.
  - (2) By means of loosies.
  - (3) Containing opium, morphine, jimson weed, bella donna, strychnos, cocaine, marijuana, or other deleterious, hallucinogenic, toxic, or controlled substances except nicotine and other substances found naturally in tobacco or added as part of an otherwise lawful manufacturing process. It is not the intention of this provision to ban the sale of lawfully manufactured cigarettes or other products subject to this ordinance.
  - (4) By means of self-service display. All licensed products must be stored behind the sales counter, in a locked case, in a storage unit, or in another area not freely

accessible to the general public. Any retailer selling licensed products at the time this ordinance is adopted must comply with this section within 90 days of the effective date of this ordinance.

- (5) By means of delivery sales. All sales of licensed products must be conducted in person, in a licensed retail establishment, in over-the-counter sales transactions.

### **Delivery Sales Prohibition**

The traditional compliance check system with which we are familiar was designed for use in brick-and-mortar, fixed location retail establishments — and when conducted at regular intervals as required by state and local laws, this approach can be successful in weeding out bad actors among those retailers. But this means of monitoring and enforcement does not transfer well to the rapidly growing online tobacco retailer environment, where underage persons can often gain access to a tobacco retailer’s website simply by clicking a prompt claiming they are of legal age to purchase and can then make purchases by taking advantage of lax age verification processes and loopholes.

Local communities may be interested in prohibiting delivery sales as an effective means of curtailing underage access to licensed products. This approach recognizes the challenges inherent in trying to effectively monitor online retailers and prevent underage access to the enormous numbers of e-cigarette products found online, acknowledging that age verification processes do not prevent underage persons from obtaining e-cigarettes and other licensed products online.

Because online age verification systems do not prevent underage access and purchases, and because the vast scope of online marketing of e-cigarettes to youth and young adults has contributed to a huge surge in underage access to and use of e-cigarettes — reversing decades of progress in reducing initiation and use of tobacco — state and local jurisdictions are increasingly choosing to completely prohibit delivery sales of licensed products to consumers (sales conducted by any means other than in-person, over-the-counter sales transactions in a licensed retail establishment). Cities are encouraged to work with the local public health department, city attorney, and the Public Health Law Center in considering this policy. For more information on this topic, please review our publications, *Online Sales of E-Cigarettes & Other Tobacco Products* (2019) and *Online E-Cigarette Sales & Shipments to Consumers: State Laws Prohibiting Them* (2019).

- (6) By any other means, to any other person, or in any other manner or form prohibited by federal, state, or other local law, ordinance provision, or other regulation.

- (B) **Legal age.** No person shall sell any licensed product to any person under the age of 21.
- (1) **Age verification.** Licensees must verify by means of government-issued photographic identification containing the bearer's date of birth that the purchaser is at least 21 years of age. Verification is not required for a person over the age of 30. That the person appeared to be 30 years of age or older does not constitute a defense to a violation of this subsection.
  - (2) **Signage.** Notice of the legal sales age, age verification requirement, and possible penalties for underage sales must be posted prominently and in plain view at all times at each location where licensed products are offered for sale. The required signage, which will be provided to the licensee by the city, must be posted in a manner that is clearly visible to anyone who is or is considering making a purchase.

### **Minimum Legal Sales Age (MLSA) of 21**

In 2015, the Institute of Medicine (now the Health and Medicine Division of the National Academies of Sciences, Engineering, and Medicine) (IOM) released a report containing compelling evidence of the significant public health benefits of raising the MLSA for tobacco products. The IOM concluded that raising the MLSA today to 21 would result in a 12 percent decrease in tobacco use, approximately 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer, and 4.2 million fewer years of life lost for those born between 2000 and 2019. Based on studies showing the effectiveness of enforced youth access laws, increasing the MLSA is likely to be particularly effective in reducing tobacco usage among high school-aged youth by reducing their access to commercial tobacco products. Studies have also indicated that older underage youth (i.e. those who are closer to age 18) are more likely to succeed in buying tobacco in stores. Further, high school friends and peers of legal age are an important social source of commercial tobacco products for underage youth.

Under federal and Minnesota state law (effective August 1, 2020), it is unlawful to sell licensed products to any person under the age of 21 Pub.L. 111-31, H.R. 1256; Minn. Stat. § 609.685; Minn. Stat. § 609.6855. State law does not prohibit local jurisdictions from enacting a higher minimum legal sales age. Jurisdictions in Minnesota may consider increasing the MLSA to 25, as the IOM report suggests being most protective of public health.

### Minimum Legal Sales Age (MLSA) of 21 (continued)

As of August 1, 2020, Minnesota law requires licensed retailers to display a sign in plain view to provide public notice that selling licensed products to any person under the age of 21 is “illegal and subject to penalties.” Minn. Stat. § 461.22, Sec. 10. Federal and state law require retailers to verify age as set forth in the above provision. *Id.*; Pub.L. 111-31, H.R. 1256. However, local jurisdictions could require licensed retailers to verify the age of all people attempting to purchase licensed products, regardless of how old the customer appears to be.

DiFranza, J R, Savageau, J. A., & Aisquith, B. F. (1996). Youth access to tobacco: the effects of age, gender, vending machine locks, and “it’s the law” programs. *American Journal of Public Health*, 86(2), 221-224. DiFranza, Joseph R., & Coleman, M. (2001). Sources of tobacco for youths in communities with strong enforcement of youth access laws. *Tobacco Control*, 10(4), 323-328. DiFranza, Joseph R., Savageau, J. A., & Fletcher, K. E. (2009). Enforcement of underage sales laws as a predictor of daily smoking among adolescents — a national study. *BMC Public Health*, 9(1), 107. Institute of Medicine. (2015). *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products: Health and Medicine Division*.

(C) **Flavored products.** No person shall sell or offer for sale any flavored products.

### Sales of Flavored Products

Research demonstrates that flavored licensed products are especially attractive to youth. These products increase initiation amongst all populations by masking the harsh taste of tobacco and nicotine. Flavors like menthol and clove also provide a numbing effect that lead to longer breath-holding. This makes quitting flavored licensed products more difficult. Overwhelmingly, youth users of licensed products initiate commercial tobacco use by using flavored products. Prohibiting the sale of flavored licensed products would reduce youth access to and advertisements for these products.

Many jurisdictions in Minnesota, municipalities across the U.S., and the state of Massachusetts have completely prohibited the sale of flavored tobacco products. Some other jurisdictions restricted the sale of flavored licensed products with the limited exemptions for 21+ retailers. In addition to improving public health and advancing health equity, complete prohibitions on the sale of flavored tobacco products are clear, easy to understand, and remove much of the guesswork and frustration associated with the tobacco industry’s response to exceptions to flavored tobacco sales regulations (see below). Communities interested in enacting a complete prohibition or ban on the sale of flavored tobacco products can review how these policies are legally defensible in our publication, [\*Regulating Flavored Tobacco Products\*](#).

**Sales of Flavored Products** *(continued)*

If a community is not ready to adopt a complete ban but wants to limit the sale of flavored tobacco products to 21+ retailers, we have included that language below for consideration. Please note that it is important to include language to prevent an increase in the density or concentration of 21+ tobacco product shops. In response to flavored tobacco sales restriction ordinances enacted in Minnesota, some tobacco retailers have divided their establishment into two sections, separated by a wall or other structural divider. This has resulted in an alleged, makeshift 21+ licensed tobacco product shop on one side that sells flavored licensed products, and a licensed tobacco retailer on the other side that sells only unflavored licensed products. Adding structural requirements, as suggested in the sample exemption language below, would restrict such practices:

- (C) Flavored products. No person shall sell or offer for sale any flavored products. This prohibition does not apply to retail establishments that:
- (1) Prohibit persons under 21 from being present or entering at all times;
  - (2) Derive at least 90 percent of its gross revenues from the sale of licensed products; and
  - (3) Meet all of the following building or structural criteria:
    - (a) Shares no wall with, and has no part of its structure adjoined to any other business or retailer, unless the wall is permanent, completely opaque, and without doors, windows, and pass-throughs to the other business or retailer;
    - (b) Shares no walls with, and has no part of its structure directly adjoined to, another licensed tobacco retailer; and
    - (c) Is accessible by the public only by an entrance door opening directly to the outside.

Any retail establishment that sells flavored products must provide financial records documenting its annual gross sales, upon request by the city.

(D) **Cigars.** No person shall sell or offer to sell:

- (1) Any cigar unless it is within a package containing a minimum of [ five ] cigars; and
- (2) Any package of cigars for a sales price of less than [ \$15.00 ] per package, after any discounts are applied and before sales taxes are imposed.

This provision does not prohibit the sale of a single cigar with a sales price of at least [ \$4.00 ], after any discounts are applied and before sales taxes are imposed.

**Individual low-cost cigars**

Tobacco retailers frequently sell low-cost cigars individually or in small packages (e.g., containing two or three cigars), often in candy or fruit flavors. Inexpensive cigars are more accessible to all users, but are especially appealing to price-sensitive youth who might be experimenting with different licensed products. A growing number of Minnesota communities have adopted laws that increase the price of these appealing and addictive products. The language above (1) sets the minimum price of a single, individually-packaged cigar at a deterrent price (e.g., \$4.00) and (2) requires that any pack of cigars contains at least five cigars, priced at a total of no less than \$15.00 (or a similarly-deterrent price) per pack. Recall from Prohibiting the sale of single cigarettes on page 8, this model prohibits the sale of cigars that have been removed from their original packaging, except for a premium cigar as defined by state law. Jurisdictions may choose to adopt the entirety of the provision above, one of the two above policies (e.g., minimum price for single cigars), or similar combination.

- (E) **Imitation tobacco products.** No person shall sell, offer to sell, or otherwise distribute any imitation tobacco products within the city.
- (F) **Liquid packaging.** No person shall sell or offer to sell any liquid, whether or not such liquid contains nicotine, which is intended for human consumption and use in an electronic delivery device, in packaging that is not child-resistant. Upon request by the city, a licensee must provide a copy of the certificate of compliance or full laboratory testing report for the packaging used.
- (G) **Coupon and price promotion.** No person shall accept or redeem any coupon, price promotion, or other instrument or mechanism, whether in paper, digital, electronic, mobile, or any other form, that provides any licensed products to a consumer at no cost

or at a price that is less than the non-discounted, standard price listed by a retailer on the item or on any related shelving, posting, advertising, or display at the location where the item is sold or offered for sale, including all applicable taxes.

### Product Discounts

The price of tobacco products directly affects consumption levels, particularly among price-sensitive consumers, including and young adults. The commercial tobacco industry devotes billions of dollars per year to these innovative pricing strategies to entice new customers to purchase their products, to discourage current users from quitting, and to reduce the effectiveness of tobacco tax increases in decreasing tobacco sales and increasing users' quit attempts. These pricing strategies include coupons or in-store price promotions that offer "buy-one-get-one" offers, cents- or dollar-off promotions, and multi-pack offers, and pairing of different tobacco products or other tobacco "freebies" which are often marketed and redeemed at the point-of-sale. Jurisdictions can prohibit the redemption of these price promotions and coupons to negate the sophisticated discount marketing strategies of the commercial tobacco industry. Please see our publication, *Death on a Discount: Regulating Tobacco Product Pricing*, for more information on product pricing.

### Section 7. Responsibility.

All licensees are responsible for the actions of their employees regarding the sale, offer to sell, and furnishing of licensed products on the licensed premises. The sale, offer to sell, or furnishing of any licensed product by an employee shall be considered an act of the licensee.

### Section 8. Compliance Checks and Inspections.

All licensed premises must be open to inspection by law enforcement or other authorized city officials during regular business hours. From time to time, but at least [ twice ] per year, the city will conduct compliance checks. In accordance with state law, the city will conduct a compliance check that involves the participation of a person at least 17 years of age, but under the age of 21 to enter the licensed premises to attempt to purchase licensed products. Prior written consent from a parent or guardian is required for any person under the age of 18 to participate in a compliance check. Persons used for the purpose of compliance checks will be supervised by law enforcement or other designated personnel.

### Compliance Checks

State law requires every local licensing authority to conduct at least one compliance check each year. This state-mandated compliance check “must involve persons at least 17 years of age, but under the age of 21” as of August 1, 2020. For retailer education purposes, and to identify and cite repeat offending retailers, the model language above requires at least two compliance checks per year.

### Section 9. Other Prohibited Acts.

Unless otherwise provided, the following acts are an administrative violation of this ordinance:

- (A) **Prohibited furnishing or procurement.** It is a violation of this ordinance for any person 21 years of age or older to purchase or otherwise obtain any licensed product on behalf of a person under the age of 21. It is also a violation for any person 21 years of age and older to coerce or attempt to coerce a person under the age of 21 to purchase or attempt to purchase any licensed product.
- (B) **Use of false identification.** It is a violation of this ordinance for any person to use any form of false identification, whether the identification is that of another person or has been modified or tampered with to represent an age older than the actual age of the person using that identification.

### Penalizing Underage Purchase, Use, and Possession and the Use of a False Identification

Neither state nor federal law penalizes the attempted or actual possession, use, and purchase (PUP) of licensed products by underage persons. This model ordinance does not include penalties for underage PUP and only provides non-criminal, non-monetary penalties for the use of false IDs.

At its core, a licensing ordinance is intended to regulate the behavior of licensees. Penalizing underage persons detracts from the focus of the licensing code and siphons enforcement resources away from the licensees to young consumers, many of whom are addicted to nicotine. A *2017 Minnesota Annual Synar Report* on youth access enforcement found that underage persons were cited 3.6 times, and assessed fines 2.6 times, more often than retailers. It is important to note that, even if PUP provisions are not included in an ordinance, retailers have the authority to ask underage persons to leave the premises if they attempt to purchase products.

**Penalizing Underage Purchase, Use, and Possession and the Use of a False Identification** *(continued)*

There is no strong evidence to support an assertion that PUP penalties are effective in significantly reducing youth smoking. Historically, these laws were lobbied for by the commercial tobacco industry to punish youth users while the industry simultaneously targeted, and continues to target, youth to replace a dying consumer base and maintain profits in a dwindling market.

Furthermore, many advocates are concerned that PUP penalties open the door to selective enforcement against youth from certain racial, ethnic, and socio-economic groups. Evidence suggests that youth of color in Minnesota are disproportionately over-represented in similar status-level offenses, increasing their interactions with law enforcement and resulting in their introduction to the criminal justice system. Jurisdictions that currently have PUP penalties no longer aligning with state law should consider removing those penalties from their ordinance.

This model ordinance only offers alternative non-criminal, non-monetary penalties for underage use of false identification to purchase or attempt to purchase licensed products as described below in section 11(B)(3).

For further reading on the history of PUP laws and the disproportionate enforcement of laws against youth of color and indigenous youth, please see Minnesota Juvenile Justice Advisory Committee's report, *2016 Annual report to Governor Mark Dayton and the Minnesota State Legislature* (2016) and Wakefield, M., & Giovino, G. (2003). Teen penalties for tobacco possession, use, and purchase: evidence and issues. *Tobacco Control*, 12(suppl 1), i6-i13.

**Section 10. Exceptions and Defenses.**

- (A) **Religious, Spiritual, or Cultural Ceremonies or Practices.** Nothing in this ordinance prevents the provision of tobacco or tobacco-related devices to any person as part of an indigenous practice or a lawfully recognized religious, spiritual, or cultural ceremony or practice.
- (B) **Reasonable Reliance.** It is an affirmative defense to a violation of this ordinance for a person to have reasonably relied on proof of age as described by state law.

## Section 11. Violations and Penalties.

### (A) Violations.

- (1) **Notice.** A person violating this ordinance may be issued, either personally or by mail, a citation from the city that sets forth the alleged violation and that informs the alleged violator of their right to a hearing on the matter and how and where a hearing may be requested, including a contact address and phone number.
- (2) **Hearings.**
  - (a) Upon issuance of a citation, a person accused of violating this ordinance may request in writing a hearing on the matter. Hearing requests must be made within 10 business days of the issuance of the citation and delivered to the City Clerk or other designated city officer. Failure to properly request a hearing within 10 business days of the issuance of the citation will terminate the person's right to a hearing.
  - (b) The City Clerk or other designated city officer will set the time and place for the hearing. Written notice of the hearing time and place will be mailed or delivered to the accused violator at least 10 business days prior to the hearing.
- (3) **Hearing Officer.** The City Council will designate a hearing officer. The hearing officer will be an impartial employee of the city or an impartial person retained by the city to conduct the hearing.
- (4) **Decision.** A decision will be issued by the hearing officer within 10 business days of the hearing. If the hearing officer determines that a violation of this ordinance did occur, that decision, along with the hearing officer's reasons for finding a violation and the penalty to be imposed, will be recorded in writing, a copy of which will be provided to the city and the accused violator by in-person delivery or mail as soon as practicable. If the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, those findings will be recorded and a copy will be provided to the city and the acquitted accused violator by in-person delivery or mail as soon as practicable. The decision of the hearing officer is final, subject to an appeal as described in section 11, paragraph (A)(6) of this section.
- (5) **Costs.** If the citation is upheld by the hearing officer, the city's actual expenses in holding the hearing up to a maximum of [ \$1,000 ] must be paid by the person requesting the hearing.

- (6) **Appeals.** Appeals of any decision made by the hearing officer must be filed in [ \_\_\_\_\_ ] County district court within 10 business days of the date of the decision.
- (7) **Continued violation.** Each violation, and every day in which a violation occurs or continues, shall constitute a separate offense.

(B) **Administrative penalties.**

- (1) **Licensees.** Any licensee cited for violating this ordinance, or whose employee has violated this ordinance, will be charged an administrative fine of [ \$300 ] for a first violation; [ \$600 ] for a second offense at the same licensed premises within a 36-month period; and [ \$1,000 ] for a third or subsequent offense at the same location within a 36-month period. Upon the third violation, the license will be suspended for a period of not less than [ 30 ] consecutive days and may be revoked. Upon a fourth violation within a 36-month period, the license will be revoked.

**Minimum fine schedule**

As of August 1, 2020, state law set a minimum fine schedule for underage sales or other ordinance violations by licensed tobacco retailers at: \$300 for a first violation, \$600 for a second violation within 36 months, and \$1,000 for a third or subsequent violation within 36 months. Upon the third or subsequent violation within 36 months of the first violation, state law requires a suspension of at least seven days and allows for license revocation. The sample language provided above includes a longer suspension period for a third violation (30 days) and requires license revocation for repeat offenders (four violations) within 36 months.

- (2) **Employees of licensees and other individuals.** Individuals, other than persons under the age of 21 regulated by paragraph (B)(3) of this section, who are found to be in violation of this ordinance may be charged an administrative fine of [ \$50 ].
- (3) **Persons under the age of 21.** Persons under the age of 21 who use a false identification to purchase or attempt to purchase licensed products may only be subject to non-criminal, non-monetary civil penalties or remedies such as tobacco-related education classes, diversion programs, community services, or another non-monetary, civil penalty that the city determines to be appropriate. The City Council will consult with educators, parents, guardians, persons under the age of 21, public health officials, court personnel, and other interested parties to determine an appropriate remedy for persons

under the age of 21 in the city in the best interest of the underage person. The remedies for persons under 21 who use a false identification to purchase or attempt to purchase licensed products may be established by ordinance and amended from time to time.

- (4) **Statutory penalties.** If the administrative penalty for violations against licensed retailers under Section 11(B)(1) authorized to be imposed by Minn. Stat. § 461.12, as it may be amended from time to time, differ from that established in this section, then the higher penalty will prevail.

- (C) **Misdemeanor prosecution.** Nothing in this section prohibits the city from seeking prosecution as a misdemeanor for an alleged second violation of this ordinance by a person 21 years of age or older within five years of a previous conviction under the ordinance.

### Section 12. Severability.

If any section or provision of this ordinance is held invalid, such invalidity will not affect other sections or provisions that can be given force and effect without the invalidated section or provision.

### Section 13. Effective Date.

This ordinance becomes effective on the date of its publication, or upon the publication of a summary of the ordinance as provided by Minn. Stat. § 412.191, subd. 4, as it may be amended from time to time, which meets the requirements of Minn. Stat. § 331A.01, subd. 10, as it may be amended from time to time.