

Health Department Implementation and Enforcement of Tobacco 21

Designing A Better System

Tobacco Youth Access Laws: A Broken System

Created Decades Ago by Tobacco Retailers

Historically, the vast majority of tobacco youth-access laws in the U.S. are enforced by placing a criminal penalty on the minimum-wage clerk offering to sell and the adolescent attempting to buy. As a result, the retailer or establishment owner is often shielded from any significant enforcement action. Moreover, because violations are generally defined as criminal misdemeanors, the principal enforcing agencies have been police departments that are usually neither sufficiently funded nor motivated to conduct effective youth-based compliance checks.

As these youth access laws were crafted decades ago at the behest of the tobacco industry lobbyists, the outcomes have been predictably dismal. Kids under age have easy access to nicotine and tobacco products, either through direct purchase or from their 18-20-year-old friends. Despite substantial counter-marketing efforts, increased taxes, FDA enforcement, and other public health policies, last year, the 30-day 12th grade nicotine and tobacco use rate was 27.5% ([YRBS 2017](#), p 42), reminiscent of the high rates of the 1990s.

Well-written Tobacco 21 laws enhance youth prevention in two ways. First, a 17-year old has a much harder time passing as 21, and second, younger adolescents often obtain nicotine products from 18-20-year-olds in their social circle. Unfortunately, most of the population covered by Tobacco 21 laws reside in jurisdictions that use antiquated compliance and enforcement mechanisms. Simply raising the age – crossing out 18 and replacing it with 21 – produces an ineffective policy under the guise of real reform.

Creating A Better Structure: Health Department Civil Enforcement

A Public Health, Common-Sense Solution to the Teen Nicotine Epidemic

Because tobacco use remains the leading cause of preventable illness and death in the United States, public health departments should oversee and enforce local tobacco control initiatives, particularly, Tobacco 21 policies. Unlike police enforcement, public health departments are uniquely motivated by virtue of their purpose and expertise to ensure the Tobacco 21 policy is adequately enforced and effective. In addition, public health department professionals better understand the health implications of nicotine initiation and the policy's downstream effect on overall public health.

No one would consider sending the police out to assess sanitation issues at a restaurant. Nor has it ever made sense for police departments to enforce smoke-free laws in bars and restaurants. Food safety, sanitation and tobacco control are clear health department functions. Thus, health department enforcement of these public health measures is an evident and logical extension of their immediate responsibility for public health.

Because the majority of nicotine retailers also prepare food, these establishments are already subject to health department oversight and compliance checks. Importantly, civil rather than criminal enforcement is substantially less intrusive, more efficient and less expensive. This is due, in part, to the fact that civil violations require a lower standard of proof than criminal convictions, which require a burden of proof “beyond a reasonable doubt”, while civil law requires only “the preponderance of evidence.” Moreover, civil penalties imposed on the retailer, rather than criminal charges and fines on the clerk or youthful purchaser, place responsibility on the retailer and result in higher compliance rates and ultimately, a more effective law. In most cases, local governments may empower their health department to naturally and logically carry out civil Tobacco-21-related, public health law. (*Continued on reverse.*)

An Outline of Best Practices for Health Departments

Local Tobacco Retail Licensing (TRL) Administered by the Health Department

Funding Enforcement and Backstopping Fines

In those states where a local tobacco retail license is not preempted by state law, a local TRL is an important tool to identify all nicotine retailers, fund compliance enforcement and provide the threat of license suspension and revocation in those circumstances where traditional monetary fines do not produce retailer compliance. Local government, namely county commissions or city councils, should enact a TRL that requires all nicotine and tobacco retailers to purchase an annual license, administered by their health department. The license fee should be set by the health department and commensurate with the projected costs associated with retailer education, signage, compliance checks and enforcement actions. Local government should give discretionary authority to the health department to deny, suspend or revoke a license based on repeated non-compliance with the law.

Initial Retailer Education and Signage Provision

Combining Routine Sanitarian Visits with Retailer Training

For the majority of nicotine and tobacco retailers that have an existing food safety compliance relationship with the health department, health inspectors are readily able to provide initial retailer education about the law at no to little additional cost. During regular visits, inspectors or sanitarians can educate tobacco retailers about the Tobacco 21 law, including ID requirements, compliance checks and potential sanctions, as well as provide the required signage. The health department can undertake separate arrangements for tobacco and nicotine retailers that do not also prepare food, such as scheduling an educational session for these retailers and/or sending health department professionals to meet with retailers and provide educational materials and signage.

Semi-annual Youth-Based Compliance Checks Are the Lynchpin of a Successful Program

Early High Failure Rates Abate with Repeated Inspections

When most Tobacco 21 youth-based compliance checks begin, health departments discover a 25-50% underage sales rate, which is not unexpected for a new law with a novel form of implementation. However, it underscores the need for regular unannounced under-age attempts to purchase. Even a 10% sales rate implies access for savvy teens, so repeat compliance checks are required to encourage retailer compliance. The remote threat of license suspension and revocation often induces tobacco retailers to provide improved training to its employees and even utilize their own “secret shopper” agents to self-monitor compliance.

To be effective, compliance checks must mimic real world experiences. Youth buyers should use whatever methods a typical adolescent would use, short of a fake ID. This includes dressing to look older, involving clerks in social banter or exposing their existing Juul or vape device. Health department supervisors are not required to accompany the 19 or 20-year-old into the store, but instead they may observe from a separate vehicle outside of the store. After the purchase, the youth buyer should provide all purchased products to the health department representative who then places these products into a pre-labeled evidence bag. The representative should also complete a Chain of Custody Record for each purchase.

These compliance checks are safe: there is no need for on-the-spot confrontation with the clerk whatsoever. The entire compliance check process, including documentation, takes less than fifteen minutes. Three to five youth-based compliance checks can be easily accomplished in an hour. After the visit, the health department should send a letter by certified mail to the retailer notifying them of the results, either congratulating them on compliance or initiating appropriate action with a complaint, fine or, if necessary, license suspension.