



PRACTICAL AND POLICY CONSIDERATIONS FOR TOBACCO 21 LAWS



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LEGAL TECHNICAL ASSISTANCE



Legal Research



Policy Development



Publications



Trainings



Direct Representation



Lobby



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based on work for First Nations Health Authority at Gathering Wisdom VI

Drawing
change

Photo credit: Sam Bradd <https://drawingchange.com/gathering-wisdom-visuals-for-a-healthy-future/>



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TOBACCO 21 MOVEMENT



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LOTS OF T21 POLICY ACTIVITY



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OVERVIEW

- Regulatory authority.
- Why Tobacco 21?
- Pause to discuss late-breaking public health epidemic
- Best practices.
- Implementation & enforcement.
- We won't be sued, right?
- Beyond Tobacco 21.



The Family Smoking Prevention and Tobacco Control Act



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TOBACCO CONTROL ACT OF 2009

“This chapter shall apply to all
cigarettes,
cigarette tobacco,
roll-your-own tobacco, and
smokeless tobacco



and to any other tobacco products that the
Secretary by regulation deems to be subject to
this chapter.”

TOBACCO CONTROL ACT

STATE AND LOCAL AUTHORITY

Preservation of State/Local Authority

Nothing in the Act limits state/local authority to enact a law “prohibiting the sale . . . of tobacco products.”

Preemption of State/Local Laws

No state/locality may establish “any requirement which is different from . . . any requirement under [the Act] relating to tobacco product standards.”

Saving Clause

The preemption restriction above “does not apply to [state or local] requirements relating to the sale” of tobacco products.

FEDERAL REGULATION 2016 – DEEMING RULE



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DEEMING RULE REQUIREMENTS FOR RETAILERS

	Cigarettes	Smokeless Tobacco	Cigars	E-Cigarettes & Others
Minimum legal sales of 18 and age verification under 27	✓	✓	✓	✓
Prohibition on vending machine sales	Allowed in adult-only facilities	Allowed in adult-only facilities	Allowed in adult-only facilities	Allowed in adult-only facilities
Prohibition on self-service displays	Allowed in adult-only facilities	Allowed in adult-only facilities		
Minimum package requirements	✓			
Prohibition on breaking packages by retailers	✓	✓		
Prohibition on free samples	✓	Allowed in qualified adult-only facility	✓	✓
Prohibition on characterizing flavors	Menthol and tobacco allowed			



The Act: State and Local Authority

The FDA

- YES: Product standards
 - Nicotine yields
 - Ingredients, constituents
 - How constructed
- NO:
 - Smoke-free
 - Tax
 - Ban a class of products (e.g., all cigars)



States/Locals

- NO: Product standards
- YES:
 - Smoke-free
 - Youth access
 - Taxes and pricing
 - Sales & distribution
 - Advertising and promotion

WHY?

“If a man has never smoked by age 18, the odds are three-to-one he never will. By age 21 the odds are twenty-to-one.”

-Marketing Report for R.J. Reynolds, 1982



WHY TOBACCO 21?

2015 Institute of Medicine Report

- 95% of smokers begin before age 21
- 15% reduction in smoker initiation among those under 21
- Those born between 2000 and 2019 would experience:
 - 223,000 fewer premature deaths;
 - 50,000 fewer deaths from lung cancer;
 - 4.2 million fewer years of life lost.



WHY TOBACCO 21?

- Nicotine affects the adolescent brain differently than adults
- Consistent with alcohol
- High level of support
 - 75% of adults support it
 - 70% of smokers support it
- Financial impact is estimated to be approximately 2%

Sources: King, et al, *Attitudes Toward Raising the Minimum Age of Sale of Tobacco Among U.S. Adults*, Am. J. of Prev. Med. (2015) and Winickoff et al, *Retail Impact of Raising Tobacco Sales Age to Twenty-One*, Am. J. Publ. Health.



WHY TOBACCO 21?

Is it an effective policy?

- We are still learning, but:
 - Chicago experienced 36% drop in youth 18-20 smoking cigarettes in year after policy was implemented;
 - California statewide retailer violation rates of sales to 18-year olds has decreased from 10.3% to 5.7%.

Source: Tobacco21.org



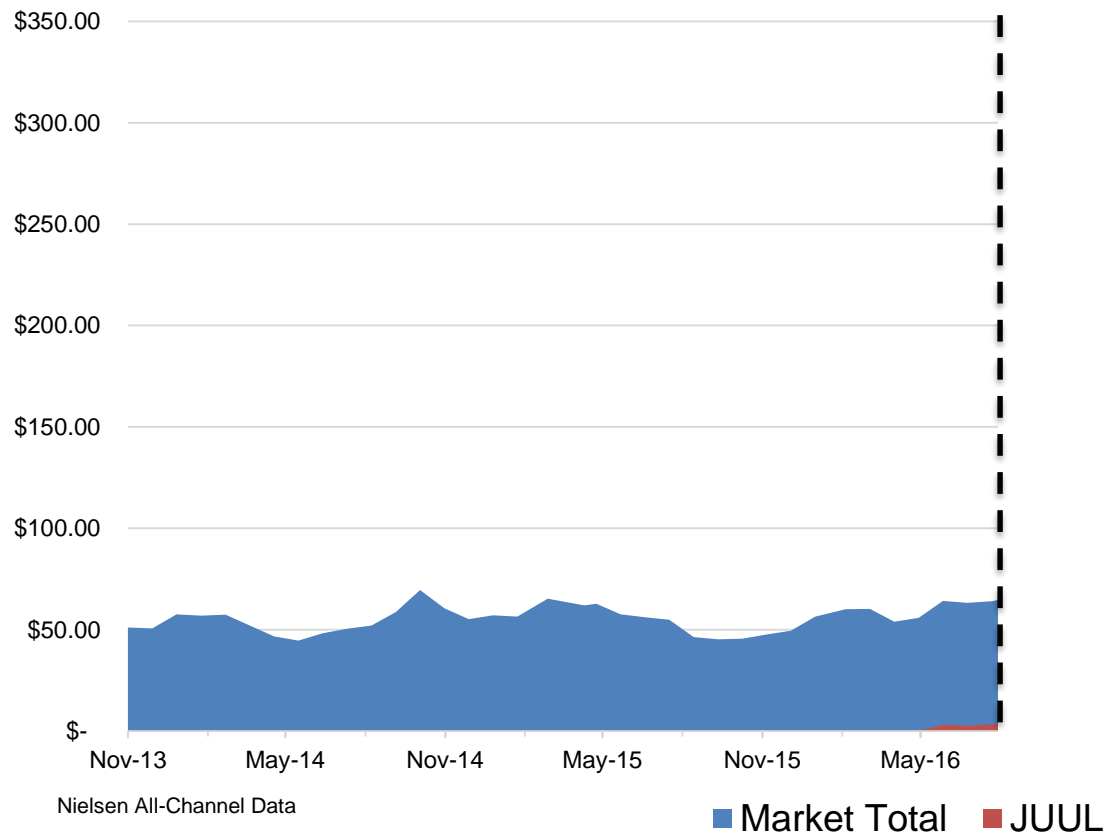
WHY TOBACCO 21?

Youth use of cigarettes has been dropping, but other addictive dangers have come to the forefront...



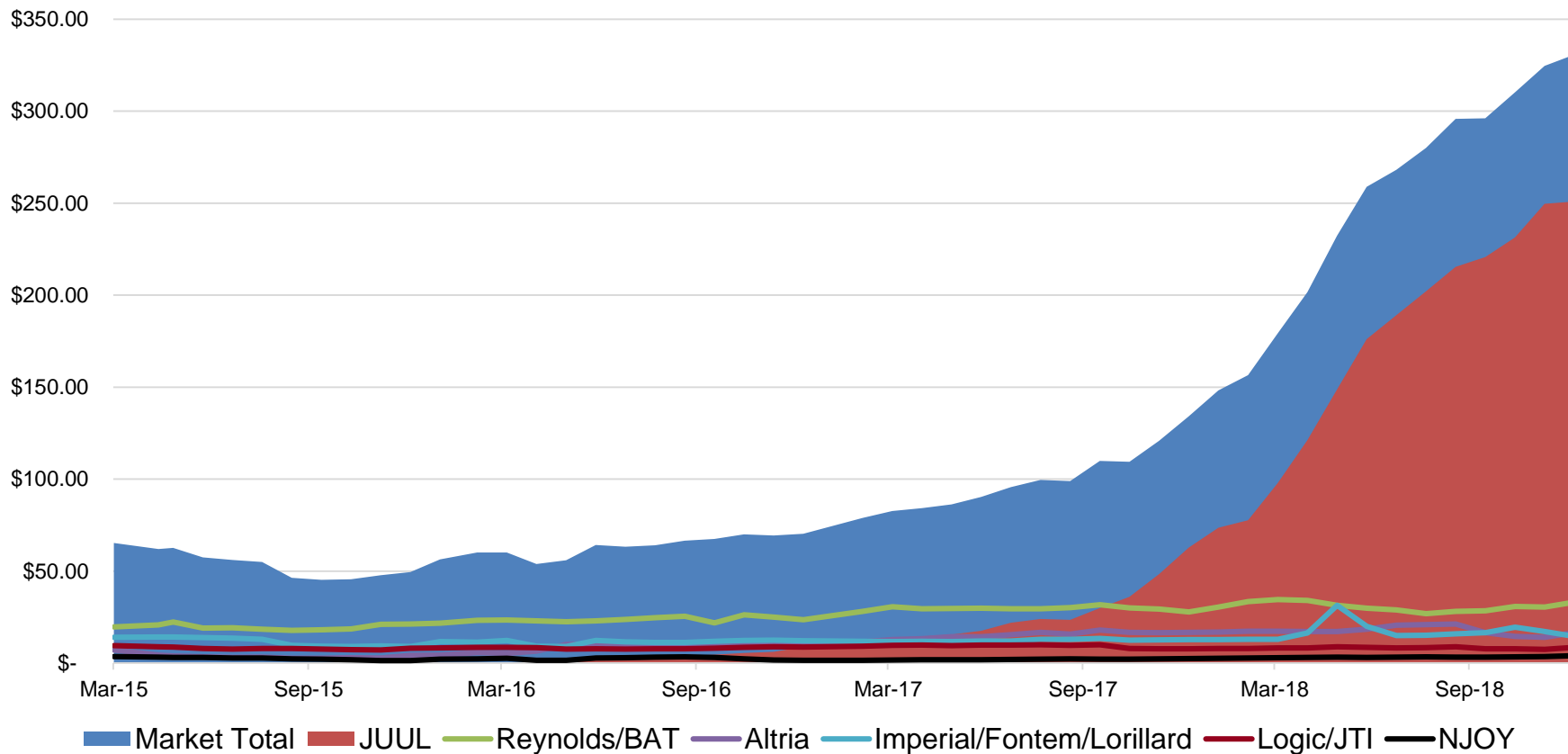
THE RISE OF JUUL

Monthly E-Cigarette Sales



THE RISE OF JUUL

Monthly E-Cigarette Sales



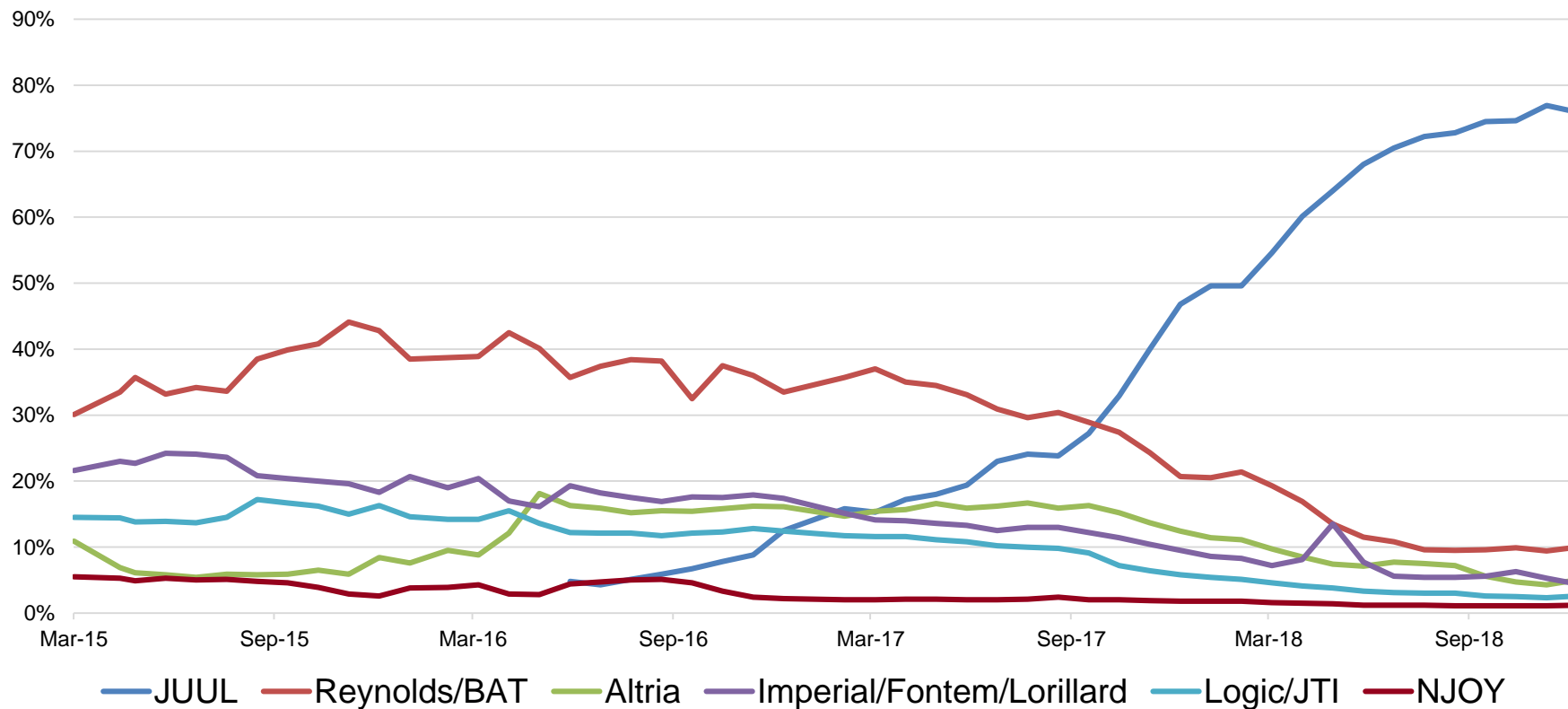
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THE RISE OF JUUL

E-Cigarette Market Share



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WHAT ARE THE PUBLIC HEALTH COMMUNITY'S CONCERNS?

2018 use rates (past 30 days):

- 4.8% of middle school students
- 20.8% of high school students (Kansas 10.6% in 2017)
 - 78% increase from 2017
 - Over 3 million high school students!
- Kids who initiate with e-cigarettes are more likely to progress to combustible cigarettes.
- Source: CDC, FDA, and National Academy of Sciences



WHERE ARE YOUTH & YOUNG ADULTS GETTING JUUL?

Retail Stores (74%)

Convenience stores, gas stations,
adult-only (18+ or 21+)

Social sources (52%)

Internet (6%)

JUUL and other websites

Social media hype spurs use:

YouTube, Reddit, Instagram

Source: Truth Initiative



SURGEON GENERAL'S ADVISORY

I...am emphasizing the importance of protecting our children from a lifetime of nicotine addiction and associated health risks by immediately addressing the epidemic of youth e-cigarette use. The recent surge in e-cigarette use among youth, which has been fueled by new types of e-cigarettes that have recently entered the market, is a cause for great concern. We must take action now to protect the health of our nation's young people.



U.S. Surgeon General Vice Adm. Jerome M.
Adams, 12/18/18



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KEY POLICY ELEMENTS – SCAN CURRENT LAW

- Not just finding 18 and replacing with 21 – review existing law!
- Check for cross-references & inconsistencies
 - Age of majority laws
 - Juvenile code
 - Relationship to alcohol laws
- Look for terms such as “minors” or “youth”
- Talk to an attorney



POLICY DRAFTING

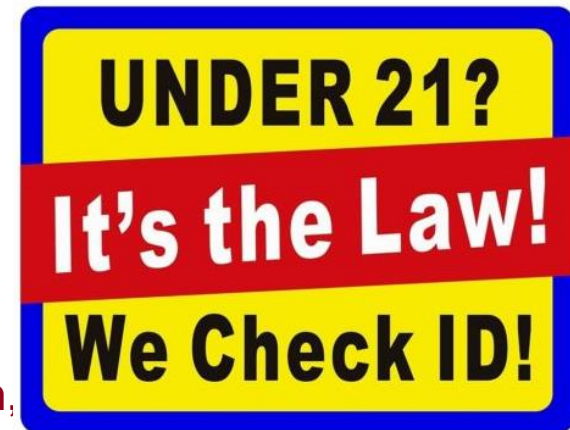
DON'T FORGET ABOUT...

- Strong findings section
- Clear, consistent definitions
 - Comprehensive definition of tobacco
- Penalties focused on the retailer, not youth
- Retailer education and signage requirements
- Minimum age for retailer (licensee?) and clerk
- Dedicated funding for enforcement
- Anti-preemption language for state laws
- Watch out for exemptions



PURCHASE, USE & POSSESSION LAWS

- “PUP” laws can:
 - Divert attention from more effective tobacco control strategies
 - Relieve the tobacco industry of responsibility for its marketing practices
 - Exacerbate disparities within the criminal justice system, if enforced inconsistently with respect to youth from different racial and ethnic groups
- “PUP” laws haven’t been shown to reduce youth use



IMPLEMENTATION & ENFORCEMENT

- Well-Planned Implementation
 - Notice to retailers
 - Age verification requirements – ID anyone under age 30
 - Integrated cessation assistance
- Enforcement
 - Identify appropriate enforcement agency
 - Mandated compliance checks – including purchasers between 18-20
- Consequences for Violations
 - Ideally license suspension and revocation for repeat offenders



POSSIBLE EXEMPTIONS

- Yes
 - Cessation products
 - Participants in compliance checks
- No
 - Military
 - “Grandfathering” the “Underage”
 - Certain products



COMMON LEGAL CHALLENGES

- Equal Protection
 - Similarly situated people entitled to equal treatment under the law
 - Must be a fair and logical basis for distinctions
- Preemption
 - When a “higher” level of government prevents a “lower” level from legislating in a particular area



LITIGATION!

- *The Vapebar Topeka and Puffs 'n' Stuff v. City of Topeka.*
- Field preemption argument.



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TOPEKA

ATTORNEY GENERAL'S VIEW

- “...[A] municipality has the right to legislate...local police powers even though there are state laws on the subject uniformly applicable to all municipalities.” *Blevins v. Hiebert*, 247 Kan. 1 (1990).
- “...[W]here an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition...there is no conflict.” *Junction City v. Lee*, 216 Kan. 495 (1975).
- Preemptive language was removed from existing state law.



TOPEKA DECISION

- District court held for plaintiffs finding field preemption.
- Appealed to Kansas Supreme Court.
- Many (23?) Kansas jurisdictions have Tobacco 21 laws.



TOPEKA DECISION – WHAT’S NEXT?

- Briefs filed by both parties.
- Amicus briefs filed by Kansas Attorney General and public health organizations in support of Topeka’s authority.
- Final decision??



POLICY OPTIONS



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CLEAN INDOOR AIR – ADD E-CIGARETTES POLICY JUSTIFICATIONS

- Why? It's just harmless water vapor.
- Nicotine and small particulate matter.
- Renormalization.
- Stroke and heart disease?
- Precautionary principle.



LICENSING: WHAT IS IT?



- Permission to do something
- Rules
- Enforcement of those rules

LOCATION

Restricting Retailers

- Location
 - Near schools
 - Residential areas
- Density
 - How close to each other
- Quantity
 - Total number overall
- Type of Retailer
 - Pharmacies



POLICY OPTIONS – FLAVORED TOBACCO PRODUCTS

- 15,500 e-liquid flavors on market
- 85% of youth e-cigarette use them
- 81% of youth cite flavors as a primary reason for using an e-cigarette
- 95% of African-American youth smokers use menthol from 2008-2010
- Flavored cigars are being marketed directly to African-American youth

– Sources: California Department of Public Health, Truth Initiative, and Bloomberg News



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FLAVORED TOBACCO RESTRICTIONS

PHASE I

New York City (2009)

- No sale of flavored OTPs except in “tobacco bars”
- District Court & 2nd Circuit upheld
- Sales restriction, not product standard



Providence, Rhode Island (2012)

- No sale of flavored OTPs except in “smoking bars”
- District Court & 1st Circuit upheld
- Sales restriction, not product standard



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FLAVORED POLICIES PHASE II



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TAXATION

Kansas

- Cigarette tax is \$1.29/pack (33rd nationally)
- Other tobacco products – 10% of wholesale
- E-cigarettes – 5 cents/milliliter consumable material



NON-TAX PRICING POLICIES

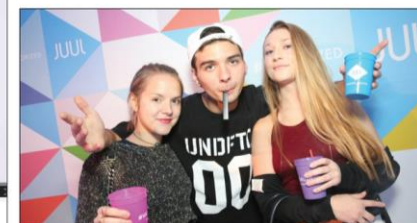
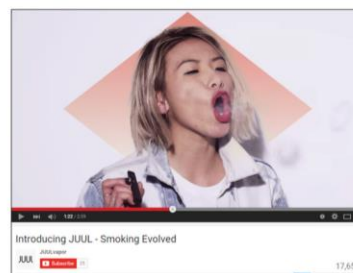
DISCOUNTS AND MINIMUM PRICES

Juul Starter Kit



POLICY OPTIONS

ADVERTISING AND MARKETING RESTRICTIONS

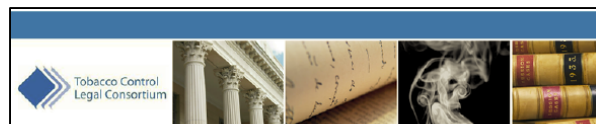


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RESOURCES



MINIMUM LEGAL SALES AGE

October 2016

TOBACCO21: TIPS AND TOOLS



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.¹ For more details about these policy considerations, please contact the Consortium.



Background

All states in the U.S. have laws prohibiting retailers from selling tobacco products to minors. In most states, the minimum legal sales age (MLSA) for tobacco products is 18, and a few states have raised it to 19. In 2015, Hawaii became the first state to raise the MLSA to 21, with the law taking effect on January 1,

Legal Sales Age for Tobacco and Related Products

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Laws prohibiting retailers from selling tobacco products to minors. In most states, the minimum legal sales age (MLSA) for tobacco products is 18, and a few states have raised it to 19. In 2015, over 100 states raised the MLSA to 21¹⁻³, which in November 2013, the U.S. to raise its



The Institute of Medicine released a report containing compelling evidence of the benefits of raising the tobacco sales age.⁴ The Institute's literature on tobacco use patterns, development of tobacco use, and national youth access laws, and public health outcomes of raising the minimum legal sales age to 21 and 25 years. The report found that an increase in the minimum legal sales age leads to lower smoking rates in health care costs as well as significantly reduced mortality of life, across populations. The Institute concludes that raising the minimum legal sales age today to 21 would result in a 12 percent decrease in premature deaths, 50,000 fewer deaths from heart disease, and 100,000 fewer deaths from cancer. Laws have been controversial, particularly when they are implemented by retailers and impose penalties on users of tobacco and related products.⁵

The law (known as the Synar Amendment⁶) which requires states to prevent and treatment block grants on the

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MINIMUM LEGAL SALES AGE

October 2016

TOBACCO21: SAMPLE ORDINANCE



Tobacco products kill half a million Americans each year. Youth access to tobacco products compounds this problem because young people exposed to nicotine are particularly likely to become lifelong users.

In 1992, Congress took a step to address this issue with the Synar Amendment, which penalizes states that do not effectively prohibit the distribution of tobacco products to minors. Recently, many communities, including the states of Hawaii and California, have gone even further to restrict youth access by raising the minimum legal sales age ("MLSA"), prohibiting the sale of tobacco products to people under the age of 21. A large majority of Americans support raising the MLSA



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CONTACT US



651.290.7506



publichealthlawcenter@mitchellhamline.edu



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