



# **Model California Ordinance Prohibiting Self-Service Displays of Tobacco Products (with Annotations)**

March 2002

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## INTRODUCTION

This model ordinance was produced by the Technical Assistance Legal Center (TALC) to help guide California cities and counties that wish to regulate youth access to tobacco.<sup>1</sup> The model ordinance provides comments after most provisions, and offers options for changing or customizing the ordinance at various points.

An ordinance prohibiting the self-service display of tobacco products reduces youth access to tobacco by reducing tobacco theft. It also increases the level of interaction required before a clerk can sell tobacco to a minor by requiring the minor to specifically ask for tobacco and the clerk to consciously provide it. This model ordinance applies to all tobacco products and paraphernalia and is therefore more comprehensive than state law, which prohibits only the self-service display of cigarettes and explicitly provides that broader local requirements may be enacted.<sup>2</sup>

Note that a community may wish to consider additional tobacco control measures. For example, a tobacco-retailer-licensing ordinance requires merchants to obtain a license to sell tobacco products and provides for the suspension or revocation of the license if the merchant sells tobacco to minors or violates other tobacco-related laws. Communities also may consider using land use tools to limit the number and location of new tobacco retailers in their communities. Unlike licensing, which regulates how a tobacco retailer does business, land use regulation dictates where a tobacco retailer can locate. For example, a land use ordinance can prohibit tobacco retailers from locating within 1,000 feet of a school, church, park, and other youth-oriented locations.

Please contact TALC at 510-444-8252 or [talc@phi.org](mailto:talc@phi.org) with any questions about adapting this ordinance for your community.

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<sup>1</sup> TALC has developed model ordinances on other tobacco issues, such requiring a license to sell tobacco and regulating the location of tobacco retailers. For copies of TALC publications or questions about this ordinance please contact TALC at (510) 444-8252 or by e-mail: [talc@phi.org](mailto:talc@phi.org). Additionally, all materials are available on our website at <http://talc.phi.org>.

<sup>2</sup> Cal. Bus. & Prof. Code § 22962.

**AN ORDINANCE OF THE [ CITY / COUNTY ] OF [ \_\_\_\_ ]  
PROHIBITING SELF-SERVICE DISPLAYS OF TOBACCO PRODUCTS**

The [ City Council of the City / Board of Supervisors of the County ] of [ \_\_\_\_ ] does ordain as follows:

| **COMMENT:** This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

**SECTION I. FINDINGS.** The [ City Council of the City / Board of Supervisors of the County ] of [ \_\_\_\_ ] hereby finds and declares as follows:<sup>3</sup>

WHEREAS, state law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308); and

WHEREAS, state law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Bus. & Prof. Code § 22956) and provides procedures for using persons under 18 years of age to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and

WHEREAS, state law prohibits the sale or display of cigarettes through a self-service display. This law, which applies only to cigarettes, explicitly provides that broader local requirements may be enacted (Cal. Bus. & Prof. Code § 22962); and

WHEREAS, despite these and other state and local laws related to tobacco, minors continue to obtain tobacco products at alarming rates. Each year, an estimated 924 million packs of cigarettes are consumed by minors 12 to 17 years of age, yielding the tobacco industry \$480 million in profits from underage smokers;<sup>4</sup> and

WHEREAS, in a 2001 California youth buying survey, 17.1% of retailers surveyed sold tobacco product to minors;<sup>5</sup> and

[ WHEREAS, ] [ insert local sales rate to minors, if available from the County Department of Health or elsewhere ] [ ; and ]

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<sup>3</sup> Each of the authorities identified in this model ordinance can be obtained from the Technical Assistant Legal Center at the address, phone, and e-mail address indicated on the first page.

<sup>4</sup> Joseph R. DiFranza, M.D. & John J. Librett, M.P.H., *State and Federal Revenues from Tobacco Consumed by Minors*, 89 Am. J. Pub. Health 1106 (1999).

<sup>5</sup> Cal. Dep't Health Servs, Tobacco Control Section, *Youth Tobacco Purchase Survey 2001* (forthcoming 2002) (upon release, survey results are expected to be available at <http://www.dhs.ca.gov/tobacco/html/pressreleases.htm>). Note that the youth sale rate cited above is a statewide average. Youth sales rates for a particular city or county may be significantly higher. Check with your local tobacco prevention project, usually located in the county Health Department, to see if local figures are available.

WHEREAS, it is estimated that 7.1% of children in California smoke<sup>6</sup> and [ number / percentage ] children residing in [ region ] smoke;<sup>7</sup> and

WHEREAS, 19.2% of ninth- to twelfth-grade boys use smokeless tobacco (snuff, plug, dipping tobacco, or chewing tobacco);<sup>8</sup> and 73% of high school seniors who had ever tried smokeless tobacco, did so by the ninth grade;<sup>9</sup> and

WHEREAS, 57% of 10th graders and 38% of 8th graders perceive that it would be easy for them to obtain cigarettes from a retail source;<sup>10</sup> and

WHEREAS, the best predictor of adolescent experimentation with cigarettes is the perception that they are easily available;<sup>11</sup> and

WHEREAS, grocery retailers have reported that cigarettes are the most frequently stolen item;<sup>12</sup> and

WHEREAS, over 20% of middle school students and over 15% of high school students report that shoplifting is their primary means of obtaining smokeless tobacco;<sup>13</sup> and

WHEREAS, over 100 California local governments have passed an ordinance requiring the sale of tobacco products to be vendor-assisted;<sup>14</sup> and

NOW THEREFORE, it is the intent of the [ City Council / Board of Supervisors ], in enacting this ordinance, to discourage access to tobacco products by minors.

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<sup>6</sup> Cal. Dep't of Health Servs., Tobacco Control Section, *Adult & Youth Smoking Prevalence 1994-2000* (2001), at <http://www.dhs.ca.gov/tobacco/documents/401graph.pdf> (last updated Jan. 9, 2001).

<sup>7</sup> Please consult with your local health department to obtain local statistics.

<sup>8</sup> Laura Kann, PhD et al., *Results from the National School-Based 1991 Youth Risk Behavior Survey and Progress Toward Achieving Related Health Objectives for the Nation*, 108 (Supp. 1) Pub. Health Rep. 47, 51 (1993).

<sup>9</sup> U.S. Dep't of Health & Hum. Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 101 (1994).

<sup>10</sup> Cal. Dep't of Health Servs., Tobacco Control Section, *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Wave 2 Data, 1998, Wave 1 & Wave 2 Data Comparisons 1996-1998* 76 (2001), available at <http://www.dhs.ca.gov/tobacco/documents/Wave2IEreport.pdf> (last updated Apr. 24, 2001).

<sup>11</sup> Leslie A. Robinson et al., *Predictors of Risk for Different States of Adolescent Smoking in a Biracial Sample*, 65 J. of Consultative Clinical Psychol. 653, 657 (1997).

<sup>12</sup> Rod Little, *Hottest Picks in Grocery Stores*, USA Today, Dec. 13, 1990, (USA Snapshots), available at <http://pqasb.pqarchiver.com/USAToday/> (last visited May 29, 2001).

<sup>13</sup> Fla. Dept. of Health, *Florida Youth Tobacco Survey (1999), Highlights from Pilot Program Areas—at the end of year 1*, (June 10, 1999), available at [http://www.doh.state.fl.us/disease\\_ctrl/epi/FYTS/vol2rep\\_2.pdf](http://www.doh.state.fl.us/disease_ctrl/epi/FYTS/vol2rep_2.pdf) (last visited Feb. 28, 2002).

<sup>14</sup> American Nonsmokers' Rights Foundation, *California Ordinances Restricting Youth Access to Tobacco*, (Dec. 13, 2001), available at <http://birch.he.net/~talc/PDFs/licordlst.pdf> (last visited Feb. 1, 2002).

**SECTION II.** [ Article / Section ] of the [ \_\_\_\_ ] Municipal Code is hereby amended to read as follows:

**Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS.** The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) “Person” means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

**COMMENT:** The City or County Code likely contains a definition of “person” and, if so, the definition provided here can be omitted.

(b) “Tobacco Product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

**COMMENT:** This is a common definition, found in a number of local ordinances regulating tobacco advertising.

(c) “Tobacco Paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of Tobacco Products.

**COMMENT:** This definition draws on the language of Penal Code section 308(a). Whether to regulate sales of Tobacco Paraphernalia in addition to sales of Tobacco Products is a question of local policy. If only tobacco sales are to be regulated, both this definition and the words “Tobacco Paraphernalia” as used in the operative sections below, should be omitted.

(d) “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

**COMMENT:** These definitions only reach persons who sell Tobacco Products or exchange them for something of value. Tobacco-related products, such as t-shirts and the like, are not included so as to avoid difficult First Amendment issues.

(e) “Self-Service Display” means the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer.

**COMMENT:** This definition tracks the language used in the state self-service display ban of cigarettes, Business and Professions Code section 22962. Self-Service Displays include open or unlocked racks, shelves, and counter-top displays.

(f) “Vending Machine” means a machine, appliance, or other mechanical device operated by currency, token, debit card, or credit card that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

**COMMENT:** This definition tracks the language used in the state vending machine ban, Business and Professions Code section 22960, except that it includes all currency, not just coins, and adds machines operated by debit or credit cards.

**Sec. [ \_\_\_\_ (\*2) ]. SALE OF TOBACCO PRODUCTS BY SELF-SERVICE DISPLAY PROHIBITED.** It is unlawful for any Person to display Tobacco Products or Tobacco Paraphernalia by means of a Self-Service Display or to engage in Tobacco Retailing by means of a Self-Service Display. Tobacco Retailing by means of a Vending Machine [ is / is not ] prohibited by this section.

**COMMENT:** This is the primary operative section of the ordinance. This section requires that all tobacco products be sold only with vendor/employee assistance, with tobacco products either in a locked case or otherwise inaccessible to the public.

Some communities have, for political and other reasons, chosen to exempt stores that primarily sell tobacco products, if these stores do not allow minors to enter. Such an exemption is not legally required and many communities have successfully implemented self-service display bans without such an exemption. Additionally, if a goal of a self-service display ban is to reduce shoplifting, this concern applies to adult consumers as well as to minors.

If a community is considering an exemption for tobacco stores, some questions to consider include: how many stores would be exempted, whether these stores vigorously enforce their policies of preventing minors from entering the store, and whether the stores sell products other than tobacco that are legal for minors to purchase, such as magazines or candy. If a store sells products that minors legally may purchase, it is a violation of the Unruh Civil Rights Act for that store to exclude minors.<sup>15</sup> If your community chooses to provide an exemption for such “tobacco-only” stores, TALC can provide sample language.

State law bans vending machines except if placed at least fifteen feet from the doorway of an establishment licensed for “on-sale” alcoholic beverage sales (usually bars). Bus. & Prof. Code § 22960. State law explicitly permits local laws to impose greater restrictions, and this ordinance offers a city or county the choice to enact a complete ban on tobacco vending machines.

**Sec. [ \_\_\_\_ (\*3) ]. ENFORCEMENT.** The remedies provided by this [ article / chapter ] are cumulative and in addition to any other remedies available at law or in equity.

<sup>15</sup> Cal. Civ. Code § 51.5 (2000); *see* 79 Ops. Cal. Att’y Gen. 8 (1996).

**COMMENT:** The following section is designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in any particular case. As a practical matter, these enforcement options are not likely to be applied simultaneously.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall constitute a violation.

**COMMENT:** This is standard language that is typically included in a City or County Code and may be omitted if duplicative of existing Code provisions.

(b) This ordinance shall be enforced by [ \_\_\_\_ ].

**COMMENT:** Designating the city or county agency charged with enforcing the ordinance likely will ease implementation and enforcement of the ordinance provisions.

(c) Violations of this ordinance may, in the discretion of the [ City / County ] Prosecutor, be prosecuted as [ infractions / misdemeanors ].

**COMMENT:** This is standard language to provide for criminal enforcement of the ordinance. This model presents two choices: (1) enforcement under the code section for an infraction (like a parking ticket); and (2) enforcement under the code section for a misdemeanor (like vandalism). Other possibilities exist. For instance, the ordinance could be enforced under the code section for the City’s or County’s “wobbler” ordinance, which gives the prosecutor discretion whether to charge a particular violation as an infraction or a misdemeanor. Or it could be enforced using a sliding scale that provides for infraction enforcement in most cases, with misdemeanor enforcement against repeat violators. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code. Note that if violations are defined as infractions, the fines imposed cannot exceed the relatively low penalties authorized by the Penal Code for infractions. Accordingly, it may be preferable to define these violations as misdemeanors and rely on a “wobbler” ordinance to authorize prosecution as an infraction in appropriate cases.

(d) Violations of this ordinance are hereby declared to be public nuisances.

**COMMENT:** By expressly stating that violations are public nuisances, this provision allows enforcement of the ordinance via the administrative nuisance abatement procedures commonly found in municipal codes. In addition, together with the provision for injunctive relief below, this provision authorizes a civil public nuisance action as an enforcement device by either public or private actors.

(e) Violations of this ordinance are hereby declared to be unfair business practices and are presumed to at least nominally damage each and every resident of the community in which the business operates.

**COMMENT:** This express statement serves to emphasize the fact that a violation of this ordinance can be enforced using Business & Professions Code section 17200, the California law prohibiting unfair business acts or practices.

(f) In addition to other remedies provided by this [ article / chapter ] or by other law, any violation of this ordinance may be remedied by a civil action brought by the [ City Attorney / County Counsel ], including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

**COMMENT:** It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d 63 (1983).

Think carefully about the nuisance abatement procedure you choose. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5 (see Govt. Code § 38773.7). Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

(g) Any Person aggrieved by a violation of this [ article / chapter ] may bring an action for injunctive relief to prevent future such violations or to recover such actual damages as he or she may prove.

**COMMENT:** In addition to the remedies provided above, local governments may wish to provide for enforcement by private parties. If so, the right of private action must be expressly provided, as this section provides. Note that injunctions are issued only by the Superior Court of unlimited jurisdiction and, practically speaking, require an attorney.

#### **Sec. [ \_\_\_\_ (\*4) ]. EFFECTIVE DATE AND NON-CONFORMING USES.**

(a) The effective date of this ordinance shall be thirty (30) days from the date of its enactment.

(b) Self-Service Displays that were in place at the time this ordinance was introduced may remain in place for no more than sixty (60) days after the effective date.

**COMMENT:** This model ordinance gives all of those subject to its restrictions thirty days to comply. It then automatically grants another sixty days for preexisting self-service displays that are in violation. This appears to be plenty of time, for example, for retailers to make tobacco products inaccessible to the public.

**SECTION III. SEVERABILITY.** If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [ City Council / Board of Supervisors ] of the [ City / County ] of [ \_\_\_\_ ] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.