

LEGISLATIVE HOT TOPICS
NOVEMBER 3, 2003

Legislative Update Q & A:
Assembly Bill 71 (California Cigarette and Tobacco Products
Licensing Act of 2003)

What does Assembly Bill 71, the new statewide tobacco licensing law, do?

AB 71 sets up a new statewide program that requires retail stores, as well as tobacco wholesalers, distributors, manufacturers and importers to get a license. The primary purpose of the new licensing program is to reduce cigarette smuggling and the resulting loss of tobacco tax revenues to the state by having a stepped-up enforcement program to catch smugglers and cigarette counterfeiters. In addition, AB 71 sets up a system for suspending or revoking a tobacco retailer's license if they are convicted a certain number of times for selling tobacco to minors.

Do businesses have to get other licenses for other things, or is this an unusual requirement?

It is customary for businesses in California to obtain some kind of permit or license in order to conduct business, sell products or offer services. These licenses and permits generally require an annual fee or payment.

Can a retailer lose their tobacco license for selling tobacco to minors under AB 71?

In theory, yes, but, in reality, no. To start with, the penalties that could lead to the revocation or suspension of a tobacco license for selling tobacco to minors only go into effect in years when the statewide sales of tobacco to minors rate is greater than 13 percent. On January 1, 2004, when the bill goes into effect, this "trigger" mechanism will not be activated because the 2003 statewide illegal sales rate was 12.2 percent. Any convictions that occur under the laws prohibiting tobacco sales to minors, Penal Code (PC) Section 308 or the Stop Tobacco Access to Kids Enforcement (STAKE) Act, during this time will have no effect on a tobacco retailer's state license.

Even in years when the state's illegal sales rate is greater than 13 percent a retailer is at little to no risk of losing their license. Under AB 71, the state would not suspend a retailer's license until that retailer has been convicted of selling to minors four times in one year. It takes eight convictions in two years before a license can be revoked. These conviction rates are unrealistic considering that since 1995 the STAKE program has not fined the same retailer more than three times, due to a lack of sufficient funding to do enforcement compliance checks and inspections.

Doesn't AB 71 provide funding for increased enforcement, to conduct undercover stings and other enforcement actions aimed at catching retailers illegally selling tobacco to minors?

No. AB 71 provides no funding for enforcement to reduce illegal sales of tobacco to minors. The primary purpose of AB 71 is to address cigarette smuggling, not to help reduce illegal sales of tobacco to minors.

Does a local ordinance have to follow the state guidelines in AB 71 for triggering the suspension or revocation of a tobacco license if the retailer is caught selling tobacco to minors?

No. The state law does not dictate or restrict the penalties included in local licensing ordinances for violations of tobacco control laws.

Does AB 71 preempt cities or counties from passing their own local tobacco licensing ordinance?

NO. AB 71 specifically does NOT preempt local governments from passing their own tobacco licensing ordinance, including annual fees on retailers to pay for local enforcement of the laws against selling tobacco to minors. In fact, the anti-preemption language in AB 71 supports stronger local licensing ordinances. This language states, "Nothing in this division preempts or supersedes any local tobacco control law other than those related to the collection of state taxes. Local licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law."

Can a city or county charge a retailer an annual tobacco license fee even though they have to pay for a license under AB 71?

Yes. AB 71 requires a tobacco retailer to pay a \$100 one-time only licensing fee. There is nothing in AB 71 or any other state law that prohibits a city or county from requiring an annual tobacco license fee. In addition, AB 71 will not provide any funding for enforcement of laws against selling tobacco to children, so local cities and counties will need to consider fees on local retailers in order to help reduce illegal sales of tobacco to minors.

Is it legal to require a retailer to pay for a tobacco license from the state and from a city or county? Isn't that excessive?

It is neither illegal nor excessive. The two fees combat two different issues surrounding tobacco sales in California - the state fee pays to combat smuggling and black market cigarettes, and a local fee would pay to combat sales to youth. These fees are the cost to regulate tobacco sales, not punishment for selling tobacco. Furthermore, the state fee is only a one-time \$100 fee.

Many businesses in California must obtain licenses and pay fees for the privilege of conducting their business. Examples of these fees include:

- Stores that sale beer, wine and sprits for consumption off premises: original fee \$12,000 – Annual renewal fee \$446.
- State Gambling Incense - \$500 application fee. Annual fee based on the number of tables in the facility.
- Pharmacy - \$400 application - \$250 annual fee
- Produce Dealers - \$100-\$500 annual fee.
- Furniture and bedding retailer - \$240 biennially
- Retail Water Facility License - \$325.80 – adjusted annually
- Guide Dog School License - \$250 application – annual fee based on expenditures.

If the double fee does create a good deal of opposition, one option would be to deduct the \$100 from the retailers' fee in the year that the retailer is required to pay both fees. The requirement to obtain both a local and a state license is not unique to tobacco retailers. For example, gambling facilities (card rooms) in California must have both a state and local license.

Shouldn't cities and counties wait and see what happens under AB 71 before considering a local tobacco licensing ordinance?

No. The sales to minors provisions in AB 71 are so weak and there is no reason to believe that they will do anything to protect the youth in your community. AB 71 does not provide increased funding to enforce sales to minors laws. In fact, even if enforcement occurs, a conviction would not matter under AB 71 unless the state's illegal sales rate goes above 13 percent. However, last year when the state's sales to minors rate was established at 12.2 percent, many communities that conducted local youth purchase surveys found their rates to be much higher. Strong local tobacco retail licensing programs that fully fund enforcement measures are needed to make a difference.

Can a local city or county pass a law when the state already has a law that does the same thing?

Yes, AB 71 in no way preempts locals' efforts. However, if locals are interested in passing good public policy that makes a difference in their community they should want an ordinance that does much more than AB 71. The following are examples of provisions that local tobacco retail licensing ordinances can include that AB 71 does not include:

- An annual fee that funds an enforcement program.
- The establishment of an enforcement plan that requires a specific number of compliance checks per year, per retail outlet.
- Coordination of tobacco regulations so that a violation of any existing local, state or federal tobacco regulation violates the local license.
- A ban on cigarette sales by mobile venders, bars and card rooms.
- Language that requires retailers to remove tobacco advertisements when their license is suspended or revoked.

Why do we need local enforcement when the state already conducts enforcement programs to reduce illegal sales of tobacco to minors?

The State's enforcement program conducts approximately 2,500 compliance checks a year. That means that the state's enforcement program checks just about 3% of the estimated 80,000 tobacco retailers in California each year (The California State Board of Equalization estimates that there are 80,000 tobacco retailers state wide). The amount of enforcement will not increase with the passage of AB 71. Yet enforcement has shown to be the most significant factor in changing retailer behavior. Clearly, more enforcement is needed.

If the state license is a one-time only \$100 fee, why would a city or county need to charge another fee for its local licensing program?

Good public policy requires that sufficient funding be allocated to the program so that it may achieve its stated goals. For a local licensing ordinance to be effective, that is, to reduce the illegal sales of tobacco to minors in the city or county, it will require a sustainable funding source to pay for local enforcement. Whether it is assigned to the police department, sheriff or the health department, conducting the enforcement actions leading to reduced illegal tobacco sales will require local funding. AB 71 is not designed to specifically accomplish the goal of reducing illegal sales to minors, so it doesn't provides enforcement funding for this purpose.

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