

## Essential Components for an Effective Tobacco and Nicotine Retail Licensing Ordinance

### Why is a Tobacco and Nicotine Product Retail License Important?

Tobacco is unique among consumer products because it kills up to half of all regular users when used as intended.<sup>i</sup> More than 80% of adult tobacco users started using tobacco *before* the age of 18 with 99% starting by age 26.<sup>ii</sup> The landscape of tobacco products is ever evolving and now includes products that are smoked, smokeless products and electronic smoking devices. Electronic smoking devices, commonly referred to as e-cigarettes, come in a variety of forms that resemble cigarettes, pens and even USB drives used to deliver nicotine, flavorings, and other substances to the user.<sup>iii</sup> Unlike tobacco products that burn, most electronic smoking devices use a battery-powered coil to convert liquid solutions into an aerosol inhaled by the user.<sup>iv</sup> Flavored solutions for electronic smoking devices frequently come in “kid-friendly” flavors to attract and addict young users.<sup>v</sup> Despite claims to the contrary, the aerosol from e-cigarettes is not harmless and can expose product users and bystanders to harmful substances such as “heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”<sup>vi</sup>

Colorado has the highest high school e-cigarette use rate in the country at 27%.<sup>vii</sup> The overall rate of tobacco product use among high school students is over 32%;<sup>viii</sup> this is the highest rate of tobacco product use among youth in the past 20 years. A majority of youth report tobacco products are easy to get<sup>ix</sup> and yet Colorado remains one of only a handful of states that still does not require a license to sell tobacco and nicotine products.\* Unless a community implements a local tobacco and nicotine product retail license, any business in the jurisdiction with a sales tax license can sell these age-restricted products. Unfortunately, only a portion of those retailers who sell these age-restricted products are inspected even annually for compliance with laws that prohibit tobacco or nicotine sales to youth. Regular compliance checks of all retailers who sell tobacco and nicotine products are critically important to curtail under-aged sales of tobacco and nicotine products in retail environments. In a recent Colorado based study, 28% of 16- and 17-year-old e-cigarette users said they purchased their own e-cigarettes at a store (gas station, convenience store, grocery store or drug store).<sup>x</sup>

Many Colorado communities are protecting young people from the harms associated with tobacco and nicotine products by implementing a local tobacco and nicotine product license. Under the provisions of a tobacco and nicotine product license a community can provide retailer education, ensure compliance with tobacco and nicotine related laws and establish meaningful penalties for those retailers who break the law and sell tobacco and nicotine products to persons who are under-age.

The following provisions are **essential** for an effective local tobacco and nicotine product retail license. These strategies, when implemented together, are known to reduce youth access to tobacco and reduce tobacco product use<sup>xi</sup>:

1. An annual, non-transferable license for all retailers who choose to sell tobacco and nicotine products.
2. An annual license fee commensurate with the costs of administration, education, compliance and enforcement of the license.
3. At least two compliance checks per retailer conducted annually with persons under the minimum legal sales age and re-checks of retailers found not in compliance with the terms of the license within 45 days of a violation.
4. A graduated penalty structure for retailer violations consisting of suspension and revocation of the license for repeat offenders.

### License Administration:

- The tobacco and nicotine product retail license ordinance shall designate the person(s) or department responsible for administration of the license (the Licensing Authority). Options for the Licensing Authority include city clerk, town clerk or other government official.
- All tobacco and nicotine product retail licenses issued are effective for the period of one (1) year from issuance of the license.
- The retail tobacco and nicotine product license is non-transferrable to another person or entity except in an arm's length transaction.\*\* (meaning the license shall not be transferred from one person to another or from one location to another).
- In accordance with Colorado's Taxpayer Bill of Rights (TABOR) the tobacco and nicotine product retail license fee is calculated to cover the cost of administration, education, compliance and enforcement of the license (e.g. issuance of the license, administration of the licensing program, retailer education, retail inspections, compliance checks, documentation of violations, and prosecution of violations of the license). The license fees are non-refundable except as may be required by law.
- All retail tobacco and nicotine product license fees shall be deposited in a separate cash fund within the local unit of government as applicable. License fees are to be used exclusively for the tobacco and nicotine product retail licensing program and not for any other purpose.

**\* Tobacco Product** means: 1) any product which contains, is made or derived from tobacco or used to deliver nicotine, synthetic nicotine or other substances intended for human consumption, whether heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including, but not limited to Cigarettes, Cigars, Little Cigars, chewing tobacco, pipe tobacco, snuff, bidis, snus, nicotine product, mints, hand gels; and 2) an Electronic Smoking Device; 3) notwithstanding any provision of subsections (1) and (2) above to the contrary, "Tobacco Product" includes any component, part, accessory or associated Tobacco Paraphernalia of a Tobacco Product whether or not sold separately. The term "Tobacco Product" does not include: (i) any product that contains marijuana; and (ii) any product made from or derived from tobacco and approved by the Food and Drug Administration (FDA) for use in connection with cessation of smoking.

**\*\*Arm's Length Transaction** means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of the tobacco retail license is not an arm's length transaction.

### Requirements of a License:

- It is unlawful to act as a tobacco and nicotine product retailer in a local community with a local license requirement without first obtaining and then maintaining a license. Tobacco and nicotine product retailing without a valid tobacco and nicotine product license is a nuisance as a matter of law.
- No tobacco and nicotine product retail license shall be issued to any person under the minimum legal sales age.
- Raise the minimum legal sales age for tobacco and nicotine products in the jurisdiction to 21 years of age in order to be consistent with federal law.
- The tobacco and nicotine product retail license shall be prominently displayed in a publicly visible location at the licensed location at all times.
- The minimum legal sales age for tobacco products shall be posted in clearly visible locations on the licensed premises.

### License Restrictions:

- No tobacco and nicotine product retail license shall be issued within 1000 feet of a school or a youth centered facility.

- The tobacco and nicotine product retail license shall only be issued to fixed locations (no mobile vending or vending on foot of tobacco products).
- Self-service displays of tobacco or nicotine products are not permitted except in adult-only facilities. An adult-only facility must demonstrate sufficient procedures in place to ensure that persons under the minimum legal sales age for tobacco products are not permitted access into the establishment at any time.
- The minimum legal age to handle, stock or retrieve tobacco and nicotine products is determined by minimum legal sales age for tobacco products established in the tobacco and nicotine product retail license ordinance.
- Examination of government issued identification of tobacco and nicotine product purchasers who appear to be 30 years of age or younger shall be verified by retail sales clerk prior to completion of sale.
- An illegal sale of tobacco and nicotine product(s) by employees, agents or officers of the licensee is a violation of the license.

#### Enforcement of the License:

- An enforcement agency should be designated in the tobacco and nicotine product retail license (e.g. local health department or governmental agency such as local law enforcement or code enforcement).
- The designated agency shall conduct compliance checks of all tobacco and nicotine product retailers with persons under the minimum legal sales age for tobacco and nicotine products who enter licensed premises and attempt to purchase tobacco or nicotine products.
- All tobacco and nicotine product retail locations with compliance or inspection violations shall be re-checked for compliance within 45 days of a violation.
- The designated agency reports compliance check results (passed checks and violations) and hearing outcomes to the licensing authority.
- A database of compliance check results and hearing outcomes shall be maintained by \_\_\_\_\_ (licensing authority, public health department, other).

#### Consequences/Penalties for License Violations:

- Suspension and revocation of license.
  - One violation within thirty-six months: Suspension of the license for 3 days.
  - Two violations within thirty-six months: Suspension of the license for 7 days.
  - Three violations within thirty-six months: Suspension of the license for 30 days.
  - Four violations within thirty-six months: Revocation of the license.
- A violation of any local, state and/or federal tobacco law is a violation of the license.
- The removal of all tobacco and nicotine products from public view is required during the suspension or revocation of a license.
- When a tobacco and nicotine product retail license has been revoked, a license shall not be issued anew for one year following revocation.

Additional license provisions that are likely to further reduce youth tobacco use and support adult cessation:

- ☑ Prohibit the sale of flavored tobacco and nicotine products (including electronic smoking devices).
- ☑ Prohibit the redemption of price reduction instruments for tobacco and nicotine products (coupons, vouchers, etc.).
- ☑ Establish a minimum floor price for sale of tobacco and nicotine products.
- ☑ Limit the number of [new] tobacco and nicotine product retail licenses issued within a community (*zoning-density regulations*).
- ☑ Require licensed tobacco retail outlets to post the toll-free Colorado Quitline number.

The Colorado School of Public Health Legal Technical Assistance team can provide draft language to a community interested in the optional license provisions.

Colorado School of Public Health Legal Technical Assistance team provides information and technical assistance on issues related to tobacco and public health. The Colorado School of Public Health does not provide legal representation or legal advice. This document should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. We recommend that you consult with local legal counsel before implementing any of these measures.

<sup>i</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 3 (2012); U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, A REPORT OF THE SURGEON GENERAL 8 (2004).

<sup>ii</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, Adolescents and Tobacco Trends, Office of Population Affairs available at: <https://www.hhs.gov/ash/oah/adolescent-development/substance-use/drugs/tobacco/trends/index.html>

<sup>iii</sup> Campaign for Tobacco Free Kids. *Electronic Cigarettes, An Overview of Key Issues*. September 16, 2019 available at: <https://www.tobaccofreekids.org/assets/factsheets/0379.pdf>.

<sup>iv</sup> Ibid.

<sup>v</sup> Ibid.

<sup>vi</sup> Office of the Surgeon General. *E-cigarette Use among Youth and Young Adults: A Report of the Surgeon General*. Washington, DC: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention; 2016. [https://www.cdc.gov/tobacco/data\\_statistics/sgr/e-cigarettes/pdfs/2016\\_sgr\\_entire\\_report\\_508.pdf](https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf).

<sup>vii</sup> National Data from National Youth Tobacco Survey (NYTS) and state data from Colorado Healthy Kids Colorado Survey

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<sup>ix</sup> 2017, Healthy Kids Colorado Survey, Colorado Department of Public Health and Environment accessed at <https://drive.google.com/file/d/1XmLQUMLBpmjR3fWerN1BuT6o93hvnCl0/view>

<sup>x</sup> Arnold H. Levinson and Jennifer L. Patnaik. A Practical Way to Estimate Retail Tobacco Sales Violation Rates More Accurately *Nicotine Tob Res (2013) 15 (11): 1952-1955 first published online July 1, 2013 doi:10.1093/ntr/ntt084*. *Healthy Kids Colorado Survey 2017*. Brief Report: Arnold H. Levinson and Jennifer L. Patnaik A Practical Way to Estimate Retail Tobacco Sales Violation Rates More Accurately *Nicotine Tob Res (2013) 15 (11): 1952-1955 first published online July 1, 2013 doi:10.1093/ntr/ntt084*

<sup>xi</sup> Centers for Disease Control and Prevention. *Best Practices for Comprehensive Tobacco Control Pro- grams — 2014*. Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Dis- ease Prevention and Health Promotion, Office on Smoking and Health, 2014.