

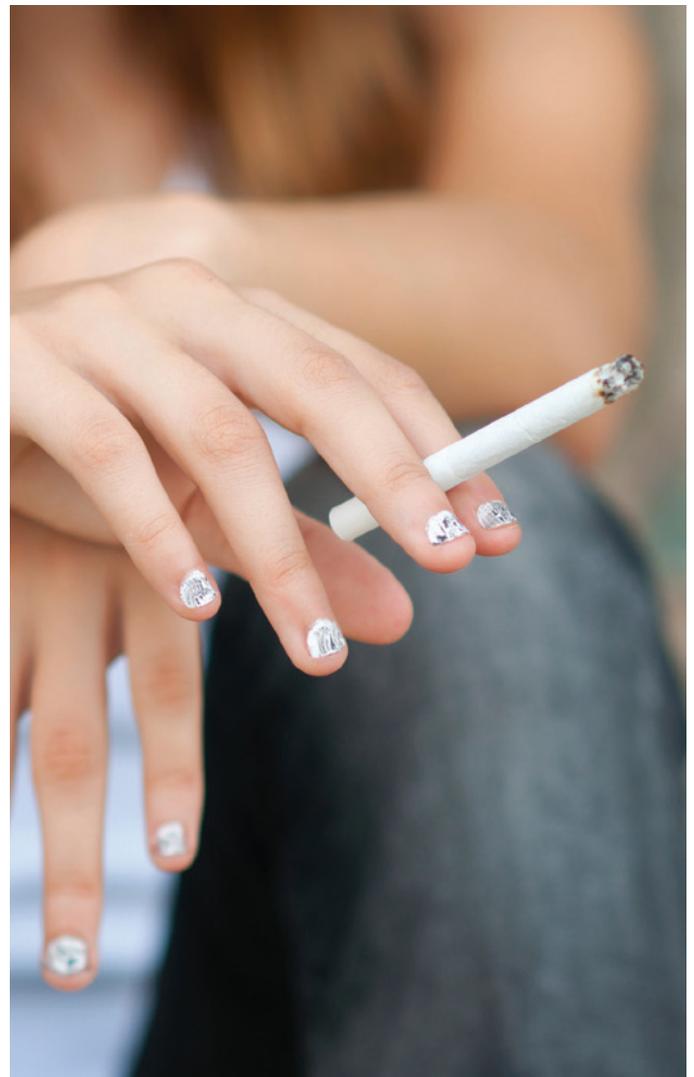


# TOBACCO21: SAMPLE ORDINANCE



**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 for tobacco products to 21, and evidence suggests that doing so will lower smoking rates while only minimally impacting retail tobacco sales.



A strong tobacco MLSA 21 ordinance would contain the following:

- A definition of tobacco products that includes current and future tobacco products, including e-cigarettes;
- A prohibition on the sale of tobacco products to recipients under the age of 21;
- A requirement that tobacco retailers post notices stating that sales to persons under the age of 21 are prohibited;
- Authority for the county or municipality to inspect retailers for compliance; and
- Designated enforcement agency and clear enforcement protocol.

The Tobacco Control Legal Consortium has created the following sample ordinance to assist counties and municipalities that are considering

a measure to raise the minimum legal sales age for tobacco products. The document provides detailed annotations explaining the reasoning behind the policy language, and is intended to be used only as a guide. Each county or municipality should consider modifications that reflect local needs and situations. Be sure to review your policy with an attorney familiar with the laws of your jurisdiction to ensure consistency with other laws in your jurisdiction, especially if you change terms or delete provisions. You might also want to research to what extent state authority might preempt any part of your ordinance, and to what extent your ordinance might conflict with other local authority.

The Consortium's publication *Raising the Minimum Legal Sale Age for Tobacco and Related Products* provides an in-depth discussion about legal issues related to raising the tobacco MLSA. For





more information about general policy drafting, please refer to our website at [www.publichealth-lawcenter.org](http://www.publichealth-lawcenter.org) and our Policy Drafting Checklists. The Consortium also offers training to certain local communities on effective drafting methods, and may be able to review a draft of your ordinance. Please check our [website](#) for the latest version of this model ordinance. To request assistance or provide suggestions, e-mail [publichealthlaw@mitchellhamline.edu](mailto:publichealthlaw@mitchellhamline.edu).

## I. Findings of fact and purpose

- a. [County/municipality] recognizes that the use of tobacco products has devastating health and economic consequences.
- b. Tobacco use is the foremost preventable cause of premature death in America.<sup>1</sup> It causes half a million deaths annually<sup>2</sup> and has been responsible for 20.8 million premature deaths in the U.S. over the past 50 years since the first Surgeon General's report on smoking in 1964.<sup>3</sup>
- c. This leads to more than \$300 billion in health care and lost worker productivity costs each year.<sup>4</sup>
- d. [County/municipality] further recognizes that young people are particularly susceptible to the addictive properties of tobacco products, and are particularly likely to become lifelong users.
- e. An estimated 5.6 million youth aged 0 to 17 are projected to die prematurely from a tobacco-related illness if prevalence rates do not change.<sup>5</sup>
- f. National data show that about 95 percent of adult smokers begin smoking before they turn 21. The ages of 18 to 21 are a critical period when many smokers move from experimental smoking to regular, daily use.<sup>6</sup>

### Findings

The purpose of including findings in a tobacco MLSA 21 ordinance is to clearly identify the problems to be addressed with the policy.

Findings can provide guidance to not only the policy drafters and decision makers, but the readers of the policy as well.

Common findings associated with a comprehensive tobacco MLSA policy will identify health concerns and other problems related to use and/or access to tobacco.

Findings specific to your jurisdiction, such as use rates among local teens and young adults, will provide further rationale for your ordinance.



- g. Young minds are particularly susceptible to the addictive properties of nicotine.<sup>7</sup> As a result, approximately 3 out of 4 teen smokers end up smoking into adulthood.<sup>8</sup>
- h. Electronic smoking device use among minors has recently tripled.<sup>9</sup>

### Electronic smoking devices

This finding supports the inclusion of electronic smoking devices in the sales restriction.

- i. In 2015, the Institute of Medicine concluded that raising the minimum legal sales age for tobacco products nationwide will reduce tobacco initiation, particularly among adolescents aged 15 to 17, improve health across the lifespan, and save lives; and that raising the minimum legal sales age for tobacco products nationwide to 21 would, over time, lead to a 12 percent decrease in smoking prevalence.<sup>10</sup>
- j. The Institute of Medicine also predicts that raising the minimum legal sales age for tobacco products nationwide to 21 would result in 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer, and 4.2 million fewer years of life lost for those born between 2000 and 2019, and would result in near immediate reductions in preterm birth, low birth weight, and sudden infant death syndrome.<sup>11</sup>
- k. A growing number of communities, including the states of Hawaii and California, have enacted MLSA 21 laws to further restrict access to tobacco.<sup>12</sup>
- l. Three-quarters of adults favor raising the MLSA for tobacco products to 21, including seven in ten smokers.<sup>13</sup>
- m. The financial impact of tobacco MLSA 21 ordinances on retailers is likely to be minimal, decreasing tobacco sales by only 2%.<sup>14</sup>

### Retail impact

Tobacco retailers may oppose a tobacco MLSA 21 ordinance out of concern that they may lose business. This finding addresses that concern.

- n. Raising the minimum age to purchase tobacco products is consistent with raising the legal drinking age to 21, which led to reduced alcohol use and dependence among youth, and contributed to the decline in drunk driving fatalities.<sup>15</sup>



## Legal drinking age

Raising the legal drinking age to 21 has had significant public health benefits. Raising the tobacco MLSA to 21 may have similar benefits.

- o. [County/municipality] adopts the following tobacco MLSA 21 ordinance to reduce tobacco use by keeping tobacco products out of the hands of young people.

## II. Jurisdiction

Pursuant to [provide applicable citation], this ordinance applies throughout [describe area subject to regulation].

### Jurisdiction

Some ordinances include a description of where the regulations that follow will apply.

This type of provision can be particularly important when one type of local government (such as a county) has the authority to enforce its regulation within another unit of government (such as a city or village).

## III. Definitions

As used in this ordinance:

### Definitions

A thorough definitions section explains the language and wording used in an ordinance and also helps ensure the language is consistent throughout the entire document. A well-thought-out definition section can help reduce ambiguity and confusion. For example, defining “tobacco products” is important so those responsible for enforcing the policy know what products are included. This is critical because the tobacco industry is developing new ways to deliver nicotine to users.

Before writing a definitions section, you need to determine to what extent your county or municipality has the power to define terms. It is also important to see if any of these terms are already defined in other local authority. If one or more of these terms are defined differently, you might consider using an alternative term to avoid confusion.



- a. **“Distribute”** or **“Distribution”** means to furnish, give, provide, or to attempt to do so, whether gratuitously or for any type of compensation.
- b. **“Distributor”** means a person who distributes a tobacco product.

### **“Distribute” and “distributor”**

“Distribute” and “distributor” are common terms in local ordinances, and may already be defined elsewhere. If so, and if they mean something different than what you intend, consider using other terms instead to avoid confusion.

- c. **“Electronic smoking device”** means any device that can be used to deliver aerosolized or vaporized nicotine to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic smoking device includes any component, part, or accessory of such a device, whether or not sold separately, and includes any substance intended to be aerosolized or vaporized during the use of the device. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

### **Electronic smoking devices**

Electronic smoking devices should be defined because they are included in this ordinance’s age-based sales restriction.

- d. **“Person”** means any natural person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation, or any officer, agent, employee, factor, or any other personal representative thereof, in any capacity.
- e. **“Recipient”** means any person who obtains or attempts to obtain a tobacco product.
- f. **“Tobacco product”** means any product that is made from or derived from tobacco, or that contains nicotine, that is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus. “Tobacco product” also means electronic smoking devices and any component or accessory used in the consumption of a tobacco product, such as filters, rolling



papers, pipes, and liquids used in electronic smoking devices, whether or not they contain nicotine. Tobacco product does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

### **Tobacco product**

A strong tobacco control policy must contain a thorough “tobacco product” definition.

First, a comprehensive definition(s) will cover all current, known tobacco products (as well as pipes, rolling papers, electronic smoking devices, and other related devices), and will be likely to cover future products as well.

Second, unless cessation products are specifically exempted, the sale of those products to persons under 21 may also be prohibited.

Finally, providing a comprehensive definition of “tobacco products” can aid in compliance and enforcement by clearly specifying what exactly is being prohibited.





#### IV. Minimum legal sales age for tobacco products

The distribution of any tobacco product to a person under the age of 21 is prohibited.

##### Possession, use, and purchase by underage individuals

Prohibiting the possession, use, and purchase (PUP) of tobacco products by underage persons is a part of many ordinances. However, this ordinance does not include restrictions on the possession or use of tobacco products by those under 21.

PUP laws may be unlikely to reduce youth smoking significantly. Also, they may undermine other conventional avenues of youth discipline, divert attention from more effective tobacco control strategies, and relieve the tobacco industry of responsibility for its marketing practices. Some communities are concerned that PUP provisions may be enforced inconsistently with respect to youth from certain racial and ethnic groups, resulting in their introduction into the criminal justice system.

If a PUP provision seems politically necessary, it could be worded as follows:

*The purchase or attempted purchase of any tobacco product by or on behalf of a person under the age of 21 is prohibited.*

Some of the above concerns about PUP laws may be somewhat alleviated by including non-monetary, non-criminal consequences in the penalties section:

*Individuals under the age of 21 who unlawfully purchase or attempt to purchase tobacco products may be subject to completing tobacco-related education classes, diversion programs, or community service programs.*

For a discussion of the merits of PUP laws, see Gary Giovino & Melanie Wakefield, *Teen Penalties for Tobacco Possession, Use and Purchase: Evidence and Issues*, 12 TOBACCO CONTROL 6 (2003), [http://tobaccocontrol.bmj.com/content/12/suppl\\_1/i6.full](http://tobaccocontrol.bmj.com/content/12/suppl_1/i6.full).



## V. Age verification

Before distributing any tobacco product, the distributor shall verify that the recipient is at least 21 years of age.

Each distributor shall examine the recipient's government-issued photographic identification. No such verification is required for a person over the age of 30. That a recipient appeared to be 30 years of age or older shall not constitute a defense to a violation of this section.

### Age verification

Federal regulations require distributors to "card" cigarette and smokeless tobacco recipients who look younger than 27 years old. 21 C.F.R. § 1140.14(b)(2). However, state and local governments generally can adopt more restrictive tobacco regulations without being preempted by federal law. 21 U.S.C.A. § 387p.

Because this ordinance raises the minimum legal sale age for tobacco products, it makes sense to make a corresponding increase to the minimum carding age. Moreover, 30 years old is a simple, intuitive visual age line.

## VI. Signage

No person shall sell or permit the sale of tobacco products in [county/municipality] unless a clearly visible notice is posted at the location where tobacco products are available for purchase. The [County/municipality] shall provide this notice, which shall state "No person under the age of 21 may be sold tobacco products," legibly printed in letters at least one-half inch high.

### Signage

Requiring tobacco sellers to post a standardized notice raises awareness of the age restriction (both among distributors and the general public) and helps promote compliance.

If a state or local authority has an existing age-related signage requirement, mirroring that standard may be preferable.



## VII. Enforcement<sup>16</sup>

[County/municipality] or its authorized designee may conduct random, unannounced inspections at locations where tobacco products are distributed to test and ensure compliance with this ordinance.

### Enforcement

An enforcement section empowers your county or municipality to inspect distributors for compliance.

It may be helpful to grant enforcement authority to multiple agencies, such as law enforcement agencies, the health department, and the local agency that enforces general business licensing laws.

This can help ensure that youth can be used to test for compliance. It may also result in compliance checks of stores without a tobacco retailer license.

## VIII. Penalties

- a. **In General.** Any person found to have violated this ordinance shall be subject to a fine of no less than \$300 for the first offense, no less than \$600 for the second offense, and no less than \$1000 for each offense thereafter. Each violation, and every day in which a violation occurs, shall constitute a separate violation.

### Penalties

A penalties section specifies the consequences for violations.

Local governments often have the ability to impose criminal and/or civil penalties for ordinance violations.

When deciding what penalty to attach to these violations, you may want to review the authority for penalties provided for similar offenses in your county or municipality.



- b. **Licensees.** In addition to any other penalty, a licensee who violates any provision of this ordinance may be subject to license suspension, revocation, and/or non-renewal.

### Licensing consequences

When distributors are licensed by the county or other municipality, the threat of license suspension revocation may be a more effective deterrent than a fine or other related sanction. Regardless of whether tobacco retailer licensing exists in your jurisdiction, penalties can be imposed against any general business license.

See the Consortium's publication *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool* for further discussion of tobacco license penalties.

- c. **Criminal Prosecution.** Nothing in this section shall prohibit the [County/municipality] from initiating criminal proceedings for any alleged violation of this ordinance.

## IX. Exceptions and defenses

- a. The penalties in this ordinance do not apply to a person younger than 21 years old who purchases or attempts to purchase tobacco products while under the direct supervision of [County/municipality] staff for training, education, research, or enforcement purposes.

### Employment exemption

This exemption clarifies that underage employees can sell or otherwise handle tobacco products. Because young retail clerks are more likely to sell tobacco to underage buyers, an ordinance may want to omit this exception. For an argument against allowing retail clerks under the age of 21 to sell tobacco, see Joseph Di-Franza & Mardia Coleman, *Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws*, 10 TOBACCO CONTROL 323 (2001), <http://tobaccocontrol.bmj.com/content/10/4/323.full>.

- b. Nothing in this ordinance prohibits an underage person from handling tobacco products in the course of lawful employment.
- c. It shall be an affirmative defense to a violation of this ordinance for a person to have reasonably relied on proof of age as described by state law.



## **X. Severability**

If any provision of this ordinance, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other provision of this ordinance that can be given effect without the invalid provision or application. Each invalid provision or application of this ordinance is severable.

### **Severability clause**

A severability clause improves the likelihood that even if some part of this ordinance is found invalid, the rest will stand.

## **XI. Effective date**

This ordinance shall take effect on [effective date].

### **Effective date**

A county or municipality should select an effective date that will provide sufficient time to educate distributors and the public of these new restrictions.

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota.

The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not provide legal representation or advice. This document should not be considered legal advice.

## Endnotes

- 1 Ctrs. for Disease Control & Prevention, *Current Cigarette Smoking Among Adults, United States, 2011*, 61(44) MORBIDITY & MORTALITY WLY. REP. 889, 889 (2012), <http://www.cdc.gov/mmwr/pdf/wk/mm6144.pdf>.
- 2 U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING — 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, ch. 12 p. 659 (2014), <http://www.surgeon-general.gov/library/reports/50-years-of-progress/index.html>.
- 3 *Id.*
- 4 *Id.* at 679; see also Xin Xu et al., *Annual Health Care Spending Attributable to Cigarette Smoking: An Update*, 48 AM. J. PREV. MED. (2015).
- 5 U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 2.
- 6 Calculated by the Campaign for Tobacco-Free Kids based on data in the National Survey on Drug Use and Health (2014), U.S. Dep't of Health and Human Services. Substance Abuse and Mental Health Services Administration. Ctr. for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health (2014); David Hammond, *Smoking Behaviour Among Young Adults: Beyond Youth Prevention*, 14 TOBACCO CONTROL 181 - 5 (2005); Paula M. Lantz, *Smoking on the Rise Among Young Adults: Implications for Research and Policy*, 12 TOBACCO CONTROL (Suppl 1) i60 - i70 (2003).
- 7 Angelica M. Morales et al., *Cigarette Exposure, Dependence, and Craving Are Related to Insula Thickness in Young Adult Smokers*, 39 NEUROPSYCHOPHARMACOLOGY 1816 (2014), <http://www.nature.com/npp/journal/v39/n8/full/npp201448a.html>.
- 8 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, A REPORT OF THE SURGEON GENERAL: PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS (2012), <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use>.
- 9 *E-cigarette Use Triples Among Middle and High School Students in Just One Year*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 16, 2015), <http://www.cdc.gov/media/releases/2015/p0416-e-cigarette-use.html>.
- 10 INST. OF MED., *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products* (2015), <http://iom.nationalacademies.org/Reports/2015/TobaccoMinimumAgeReport.aspx>.
- 11 *Id.*
- 12 *Tobacco 21 Cities*, TOBACCO21.ORG (Apr. 2015), <http://tobacco21.org/state-by-state>; HAW. REV. STAT. § 709-908 (2015); CAL. BUS. & PROF. CODE § 22958(a)(2).
- 13 Brian A. King et al., *Attitudes Toward Raising the Minimum Age of Sale for Tobacco Among U.S. Adults*, 49 (4) AM. J. PREVENTATIVE MED. 583, 583 (2015).
- 14 See Jonathan P. Winickoff et al., *Retail Impact of Raising Tobacco Sales Age to Twenty-One*, 104 AM. J. PUB. HEALTH 18, 18 (2014).
- 15 William DeJong & Jason Blanchette, *Case Closed: Research Evidence on the Positive Public Health Impact of the Age 21 Minimum Legal Drinking Age in the United States*, J. STUD. ALCOHOL DRUGS 108 (Supp. 17 2014).
- 16 *Tobacco Twenty-One: Raising the Tobacco Sale Age to 21: Building Strong Enforcement into the Law* (2016), <http://tobacco21.org/wp-content/uploads/2016/05/Memo-T21-enforcement-FINAL-4.22.16.pdf>.