



## Placement of Tobacco Products

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.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

### Laws Restricting Placement of Tobacco Products

Local governments have legitimate reasons for wanting to restrict the placement of tobacco products in retail stores. The checkout counters at gas stations, convenience stores, grocery stores and pharmacies often feature prominent arrays of tobacco products.



These shelves of products, often referred to as “power walls,” are typically located behind the cash register, at the point of purchase. Tobacco companies often develop power walls to draw attention to their products and to spark impulse purchases.<sup>2</sup> Because power walls are so prevalent in retail establishments, they may also create an impression, particularly among youth, that tobacco use is both socially acceptable and popular.<sup>3</sup> Studies

have shown a link between youth exposure to tobacco product displays and an increased likelihood that these youth will start smoking.<sup>4</sup>

Local governments can restrict the placement of tobacco products in different ways, such as by requiring that all tobacco products be kept out of consumer view or by prohibiting vending machines and requiring all tobacco sales to be completed through to face-to-face transactions.<sup>5</sup> Such restrictions may trigger a legal challenge on the basis that they unconstitutionally violate freedom of speech protections, since product packages may contain elements of commercial speech.<sup>6</sup> This guide contains pointers that communities might want to keep in mind when considering the placement of tobacco products, so their policies are in the best possible position to withstand a lawsuit.

## Policy Benefits

A policy restricting the placement of tobacco products promotes public health by reducing consumer exposure to, and impulse purchases of, the products.<sup>7</sup> One study showed that four times as many smokers support restrictions on the placement of tobacco products than those who are unsupportive, and that 28 percent of its subjects agreed that such restrictions would make it easier to quit.<sup>8</sup> Tobacco companies use predatory marketing tactics to target youth, particularly susceptible consumers, by placing a large number of tobacco products at retail stores popular with the young.<sup>9</sup> By limiting the placement of tobacco products in retail stores, a policy can help prevent a new generation from being influenced to start smoking.<sup>10</sup> Restricting displays like power walls can also help limit shoplifting.

## Policy Elements

As with all effective tobacco control measures, a policy restricting tobacco product placement must be drafted carefully. Strong policies often include substantial findings that cite studies and other data to present the rationale for the policy. These findings might explain, for example, why the shelving of tobacco products is a problem and why the proposed restriction is needed to address this problem. To ensure that the policy is interpreted effectively, the policy should define important terms clearly and concisely. The policy should also identify the enforcement agency and procedures, and address what constitutes a violation and how the penalty process works.

Here are a few ways in which communities might restrict the placement of tobacco products:

- **Place:** Communities could prohibit retailers from shelving tobacco products where consumers can view the products before asking to buy them. Such a prohibition would allow retailers to choose how they comply. For example, retailers could choose to store tobacco products under the counter; in closed, opaque shelving; behind opaque doors; in rooms accessible only to sales staff; or in any other location that is not visible to consumers.

Along with the above place restriction, communities could permit retailers to show tobacco consumers a “Tobacco Menu” indicating which tobacco products are available and the prices of those products. This menu would only be shown to age-verified consumers and would not be displayed publicly.

- **Time:** A community might require retailers to conceal tobacco products displays during the hours that children are most likely entering the stores. For example, a law might allow tobacco products to be visible only during the hours when local K-12 schools are in session.

## Policy Challenges

Any law restricting the placement of tobacco products has to be carefully drafted and supported by persuasive evidence to justify the restriction. Even so, there is always a chance that such a law might trigger a lawsuit alleging that it unconstitutionally violates freedom of speech protections. In establishing restrictions, a government may want to keep in mind several drafting tips that could make the law better able to survive a legal challenge that it violates freedom of speech protections.<sup>11</sup> To determine the constitutionality of restrictions on commercial speech, courts often apply what is known as the *Central Hudson* test (named after the lawsuit on which it was based).<sup>12</sup> In applying this test, the court asks four questions:

- Is the speech false or deceptive, or does it promote illegal activities? (If the answer is yes, the speech does not warrant First Amendment protection.)
- Is the law justified by a substantial government interest?
- Does the law directly and materially advance the asserted governmental interest?
- Is there a reasonable fit between the goal and the means chosen?

A law restricting tobacco product placement is likely to satisfy the first two questions (or “prongs”) of this test, because a law that protects public health can restrict lawful activities, even if it indirectly or potentially affects commercial speech.<sup>13</sup> To address the third and fourth prongs, which are sometimes the most challenging, communities should be prepared to provide substantial evidence that the law would successfully address the problem. They should also be able to show that any restriction on commercial speech is incidental and no more extensive than necessary. For example, they could draft the law so it would not restrict commercial communications beyond the display of products. The law might also point out that, while it restricts product displays, it also allows for other avenues of commercial speech for those products. A community might also want to show how its other attempts to address the problem of youth tobacco initiation, such as minimum age restrictions and other measures, have failed, and that youth initiation is still a significant public health concern.

Finally, a law restricting the placement of tobacco products may be challenged under the Federal Cigarette Labeling and Advertising Act (FCLAA), which places limits on the ability of state and local governments to regulate cigarette advertising.<sup>14</sup> If, however, restricting the placement of products is considered an advertising or promotion restriction, it should be allowed under the FCLAA, which explains that state and local governments can regulate the time, place and manner of the advertising or promotion of cigarettes.<sup>15</sup>

## Select Legislation and Policies

Although several countries have enacted laws that prohibit the display of tobacco products, no U.S. state has passed a law to date that completely prohibits tobacco product displays.<sup>16</sup> Some jurisdictions have passed laws that place restrictions on the display of

tobacco products at the point of sale, and have not faced legal challenges. Below are a few examples of these restrictions.

If you consider adapting any language from the following policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. We have included these examples simply to illustrate how various jurisdictions have regulated the placement of tobacco products in retail stores.

Locality/State Organization	Location	Text of Policy
Minnesota	<a href="#">MINN. STAT. § 461.18, subd. 1.</a>	<p>Ban on Self-Service Sale of Packs; Exceptions Subdivision 1. Except in adult-only facilities.</p> <p>(a) No person shall offer for sale tobacco or tobacco-related devices, as defined in section 609.685, subdivision 1, in open displays which are accessible to the public without the intervention of a store employee. . . .</p> <p>(d) This subdivision shall not apply to retail stores which derive at least 90 percent of their revenue from tobacco and tobacco-related products and where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time.</p>
New York	<a href="#">N.Y. PUB. HEALTH LAW § 1399-cc(7).</a>	<p>7. No person operating a place of business wherein tobacco products or herbal cigarettes are sold or offered for sale shall sell, permit to be sold, offer for sale or display for sale any tobacco product or herbal cigarettes in any manner, unless such products and cigarettes are stored for sale</p> <p>(a) behind a counter in an area accessible only to the personnel of such business, or</p> <p>(b) in a locked container; provided, however, such restriction shall not apply to tobacco businesses, as defined in subdivision eight of section thirteen hundred ninety-nine-aa of this article, and to places to which admission is restricted to persons eighteen years of age or older.</p>
Ontario, Canada	<a href="#">Smoke-Free Ontario Act § 3.1.(2)</a>	<p>No person shall display or permit the display of tobacco products in any place where tobacco products are sold or offered for sale in any manner that will permit a consumer to view any tobacco product before purchasing the tobacco.</p>
Framework Convention on Tobacco Control <sup>17</sup>	<a href="#">Article 13</a>	<p>To ensure that points of sale of tobacco products do not have any promotional elements, parties should introduce a total ban on any display and on the visibility of tobacco products at points of sale, including fixed retail outlets and street vendors.</p>

## Other Helpful Resources

As noted above, a restriction on the placement of tobacco products may be challenged under the First Amendment or the FCLAA. The Consortium's parent organization, the [Public Health Law Center](#), features on its website several resources related to the regulation of tobacco marketing and advertising, such as a series on the regulation of [tobacco advertising and "commercial speech" issues](#), as well as publications related to [regulating tobacco retailers](#). Another helpful resource is the [Center for Public Health and Tobacco Policy's](#) white paper on [Tobacco Product Display Bans](#). The Consortium's federal regulation of tobacco [web page](#) also features a series of publications that explain how the federal legislation impacts the [tobacco control authority of state and local governments](#), including the regulation of the retail environment.

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7509 or [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing policies restricting the placement of tobacco products.

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<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> Richard W. Pollay, *More Than Meets the Eye: On the Importance of Retail Cigarette Advertising*, 16 TOBACCO CONTROL 270, 271 (2007) (detailing how these "power walls" are carefully designed for maximum impact, using high tech devices such as eye gaze cameras to plan out the displays); O. B. Carter, B. W. Mills, R. J. Donovan, *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results for Immediate Post-purchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2009) (explaining how shelves of products at the point of sale influence nearly four times as many unplanned purchases as planned purchases of tobacco products).

<sup>3</sup> *Id.*

<sup>4</sup> Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 346 (2006).

<sup>5</sup> See Christopher Banthin, Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010), at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010_0.pdf).

<sup>6</sup> See, for example, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565-66 (2001). Several Tobacco Control Legal Consortium publications on the [Public Health Law Center's](#) website explain First Amendment issues related to tobacco advertising, including Elisa P. Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: "Commercial Speech" Guidelines for State and Local Governments* (2010), at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-speech-2010.pdf>.

<sup>7</sup> Carter, *supra* note 2, at 220.

<sup>8</sup> *Id.*

<sup>9</sup> Lisa Henriksen et al., *Reaching Youth at the Point of Sale: Cigarette Marketing is More Prevalent at Stores Where Adolescents Shop Frequently*, 12 TOBACCO CONTROL 315, 317 (2004).

<sup>10</sup> Ann McNeill et al., *Evaluation of the Removal of Point-of-Sale Tobacco Displays in Ireland*, 20 TOBACCO CONTROL 137, 141 (2011); J. Paynter et al., *Point-of-Sale Tobacco Displays and*

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*Smoking Among 14-15 Year Olds in New Zealand: A Cross-Sectional Study*, 18 TOBACCO CONTROL 268, 272-73 (2009).

<sup>11</sup> See Laird-Metke, *supra* note 6 (describing the prongs of the “commercial speech” test developed in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980)).

<sup>12</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980). The fourth prong is sometimes interpreted as “Is the law ‘narrowly tailored’ and does it restrict the least possible amount of speech necessary to achieve its goal?”

<sup>13</sup> See Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments 2, 4-6* (2010), at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-speech-2010.pdf>.

<sup>14</sup> 15 U.S.C.A. § 1331 et seq. (West 2010).

<sup>15</sup> See Laird-Metke, *supra* note 6 (explaining how state and local regulation of tobacco product marketing and promotion might be limited by the provisions of the Federal Cigarette Labeling and Advertising Act or the First Amendment to the U.S. Constitution).

<sup>16</sup> See Center for Public Health and Tobacco Policy, *Tobacco Product Display Bans* (2010) (providing an overview of international legislation prohibiting the display of tobacco products), at <http://publichealthlawcenter.org/sites/default/files/resources/nycenter-syn-tobproductdisplaybans-2010.pdf>.

<sup>17</sup> WORLD HEALTH ORGANIZATION, GUIDELINES FOR IMPLEMENTATION: ARTICLE 5.3; ARTICLE 8; ARTICLE 11; ARTICLE 13 (2009), at [http://www.who.int/fctc/guidelines/article\\_13.pdf](http://www.who.int/fctc/guidelines/article_13.pdf).

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