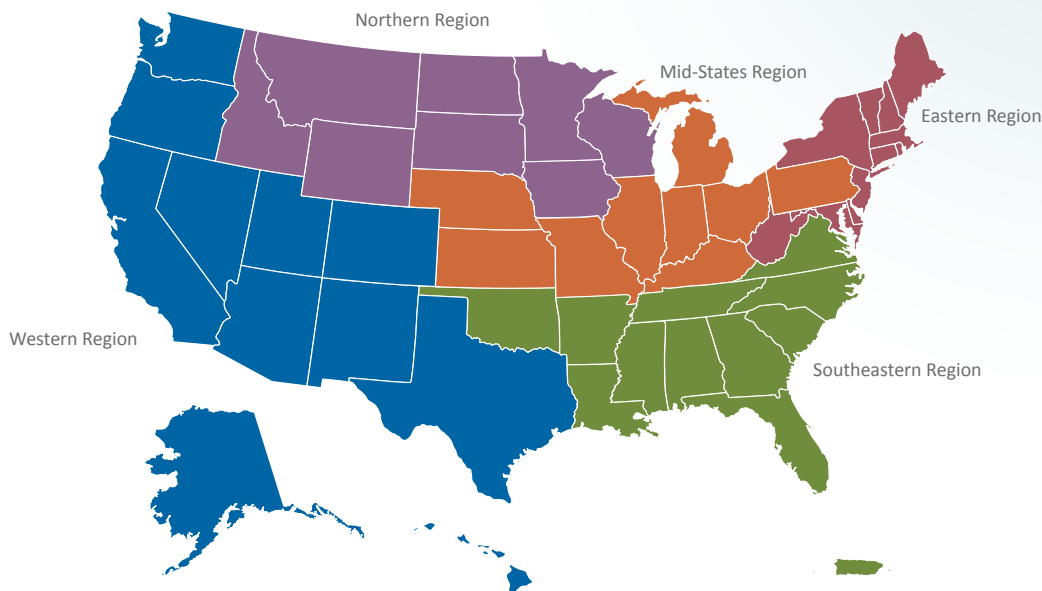




Legal Update



Public Health Law Network Opens

On September 20, 2010, the Public Health Law Center (home of the Tobacco Control Legal Consortium) became the national coordinating center for the [Public Health Law Network](#), a new national resource for those working at the intersection of health and law. The Network lends its public health legal expertise to professionals grappling with complex public health challenges – from local, state, federal, tribal officials and their legal counsel to public health practitioners, policy-makers and advocates.

The Network connects public health legal experts with those who need help developing, implementing and enforcing laws that solve public health problems.

On a broader level, the Network aims to increase the use and effectiveness of public health

laws in protecting, promoting and improving public health. Its experts provide legal technical assistance on many public health topics, and education and training to those working to apply the law to pressing public health issues.

The Network is organized by regions to provide support on a wide-range of public health law topics across all areas of the United States. In addition to William Mitchell College of Law, where the Public Health Law Center is located, Network institutions include the University of Michigan, Arizona State University, the University of New Mexico, the University of Maryland, Johns Hopkins University and the University of North Carolina-Chapel Hill. Click on your region of the map to learn more.

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Visit the Public Health Law Network's new website at www.publichealthlawnetwork.org and learn more about how the Network's experts can assist you in these public health law areas:

- [Cross-Border Public Health](#)
- [Emergency Legal Preparedness and Response](#)
- [Environmental Public Health](#)
- [Food Safety](#)
- [Health Reform](#)
- [Health Information Data Sharing](#)
- [Injury Prevention and Safety](#)
- [Obesity Prevention](#)
- [Public Health Agency Accreditation and Shared Service Delivery](#)
- [Public Health Statutes and Regulatory Information](#)
- [Tobacco Control](#)
- [Tribal Public Health Law](#)
- [Other](#)

New Tools for Tobacco Regulation under FDA Legislation

The Tobacco Control Legal Consortium recently released a set of resources that explain state and local tobacco control options in light of the new federal tobacco legislation. These Consortium publications can be found on the Public Health Law Center's website at www.publichealthlawcenter.org in the Federal Regulation of Tobacco Collection.

- [Regulating Tobacco Advertising and Promotion: A "Commerce Clause" Overview for State & Local Governments](#) (2010).
This publication provides an overview of potential ways in which state and local regulation of tobacco product marketing and promotion might be limited by the U.S. Constitution's Commerce Clause, as well as a summary of key considerations and drafting tips for local authorities in constructing and enforcing tobacco advertising and promotion policies. Prepared for the Consortium by Kathleen Datchile, Director of the Center for Tobacco Regulation at the University of Maryland School of Law.
- [Regulating Tobacco Retailers: Options for State and Local Governments](#) (2010).
This summary of guidelines and drafting tips is designed to help state and local governments identify strategies for regulating tobacco retailers (such as face-to-face only transactions, out-of-sight requirements for tobacco products and tobacco-free buffer zones around schools and playgrounds), as well as potential ways these strategies might be limited by law. Prepared for the Consortium by Christopher Banthin, Senior Staff Attorney at Public Health Advocacy Institute and Director of the Tobacco Control Resource Center.
- [Regulating Tobacco Pricing: Guidelines for State and Local Governments](#) (2010).
This publication gives a brief overview of common price-related marketing strategies used by tobacco manufacturers, and describes regulatory tools that state and local governments might want to consider to limit these strategies, such as tobacco taxation, coupon restriction, and minimum price requirements. Prepared for the Consortium by Marlo Miura, Assistant Director of the Center for Public Health and Tobacco Policy at New England Law | Boston.



>> [Read other Tobacco Control Legal Consortium's resources about the federal regulation of tobacco.](#)

Legal Consortium Files Comments to FDA on Dissolvable Tobacco Products

On September 17, the Tobacco Control Legal Consortium filed comments with the Food and Drug Administration for agency consideration in evaluating the public health impact of dissolvable tobacco products. The comments focus on weaknesses in state and federal regulation of these products, which increase the likelihood that dissolvable tobacco products, such as Ariva, Stonewall and Camel Orbs, will be used by youth and that tobacco users will continue to use tobacco. The Consortium's comments recommend several measures that the FDA could take to address regulatory gaps that increase access to these unhealthy products.

>> [Read the Legal Consortium's comments to the FDA on the impact of dissolvable tobacco use.](#)



Consortium Notes: Submitting Comments to the Food and Drug Administration

Like other federal agencies, the Food and Drug Administration often invites comments from the public on proposed rules, notes and “guidance documents” that describe the agency’s thinking on regulatory issues. Although the thought of submitting comments to a federal agency may seem intimidating to the average person, the process is actually quite simple, due to an electronic submission system on a federal website called Regulations.gov, which allows people to search, view and comment on rules quickly and efficiently online.

The U.S. government’s Federal Register publishes proposed rules and other documents on the Regulations.gov website. The site includes U.S. government regulations from nearly 300 federal agencies on a wide range of topics including many on tobacco product regulation (such as advertising, promotion, enforcement and compliance issues). Approximately 8,000 regulations are published each year and every day the public submits thousands of comments on proposed or final regulations.

Submitting comments to the Food and Drug Administration gives you an opportunity to share your knowledge or opinions about a proposed tobacco product rule or notice, as well as any data, research, legal or policy issues, recommendations, supporting materials or other information that may help the agency in the rulemaking process. The agency relies on this information in deciding whether to revise or adopt proposed rules and regulations. Members of the public and the health community, attorneys, the tobacco industry – all have views on tobacco regulation, and some proposed rules can attract thousands of comments.

Guidelines on submitting, searching and reviewing comments are on the Regulations.gov website. Comments can vary in length, ranging from short and simple to long and detailed. You can submit comments electronically or by mail. Comments are accepted within a defined time frame, known as an open comment period. Once you submit a comment, the FDA (or other federal agency) sends you a tracking number, and then processes and reviews your comment before posting it on Regulations.gov for public access.

By submitting comments to the FDA about proposed tobacco rules and regulations, you are participating in the rulemaking process, and may even have an impact on the way in which laws are implemented and administered. To learn more about the process of submitting comments on tobacco regulation to the FDA, [visit www.Regulations.gov](http://www.Regulations.gov).

FDA Releases Enforcement Plan for Restricting Tobacco Promotion and Advertising

The Food and Drug Administration's Center for Tobacco Products recently released an [Enforcement Action Plan for Promotion and Advertising Restrictions](#). The goal of the plan is to help prevent the sale and distribution of cigarettes and smokeless tobacco to children and adolescents and to reduce exposure to marketing efforts that entice the young to start smoking. The focus is on enforcing laws and regulations related to the promotion and advertising of tobacco menthol and other cigarettes to youth.

The plan describes the Food and Drug Administration's intent to establish a system where consumers can report tobacco product advertising and promotion violations under the federal tobacco law and related rules. In the meantime, the FDA encourages those who want to report tobacco product violations to contact the FDA's Consumer Complaint Coordinators located in FDA offices throughout the U.S. and Puerto Rico. These coordinators will document each complaint about an FDA-regulated product and follow up, as appropriate. Complaints may trigger inspections and investigations of alleged violations.

>> [Visit the FDA's Tobacco Product Center website for state coordinator contacts and additional guidance, compliance and regulatory information about the FDA tobacco law.](#)

>> [Read the Enforcement Action Plan for Promotion and Advertising Restrictions.](#)

The Latest from the Public Health Law Center

This feature presents news and resources from the Tobacco Control Legal Consortium's parent organization, the Public Health Law Center at William Mitchell College of Law.



Preemption and Movement Building in Public Health. The Public Health Law Center recently launched a new website as part of its Preemption and Movement Building project with tools and background information to support grassroots public health movements and provide information about how preservation of state and local power can impact community health. The new site features a blog called [preemptionwatch](#) and news about federal and state preemption in public health and health policy. The website includes a new [Preemption Checklist for Advocates and Other Decision Makers](#), a fact sheet, and links to dozens of resources for understanding how preemption's impact on public health policy development.

If preemption and grassroots movement building are issues of interest to you, please visit [Preemption and Movement Building in Public Health](#) and join us in educating the public health community about the role of grassroots movements in improving public health, and about how preemption can impact that role. Access the site at <http://www.preemptionwatch.org/>, or www.PMBPH.org. If you have information to share about federal or state preemption or grassroots public health movements, please send it to pertschuk@gmail.org or julie.ralstonaoki@wmitchell.edu. Support for this project is provided by a grant from the Robert Wood Johnson Foundation.

Ask A Lawyer

Q “Can multi-unit residential property owners prohibit the smoking of medically-prescribed marijuana in their properties when the state permits its use?”

A The owners of thousands of multi-unit dwellings have in recent years adopted smoke-free policies for their entire buildings, including the living units. With the passage of “medical marijuana” laws in a number of states, concerns have arisen as to whether multi-unit dwelling owners who have adopted overall smoke-free policies can prohibit the state sanctioned smoking of marijuana in their properties.

The answer is that the owners of both market-rate, non-federally subsidized buildings and lower-rate, federally subsidized properties can institute comprehensive smoke-free policies that also ban the smoking of medically-prescribed marijuana. In the case of federally subsidized properties, even in the absence of a smoke-free policy, the applicable federal laws and the policy of the U.S. Department of Housing and Urban Development (HUD) prohibit the use of any form of marijuana in public housing and other HUD-assisted housing.

Some residents who are registered users of medically-prescribed marijuana may seek to obtain “reasonable accommodations” under the federal Fair Housing Act (FHA) to enable them to use marijuana within their units based on a claim of disability. The FHA states, however, that a handicap “does not include current, illegal use of or addiction to a controlled substance” as defined by the federal Controlled Substances Act, which prohibits marijuana use of any kind. Thus, it seems unlikely that a case brought under the FHA would withstand court review, even when the state permits the use of medically-prescribed marijuana.

If an accommodation were granted in a given case, it would be important to ensure that the accommodation did not result in exposure of other residents to second-hand marijuana smoke. In such a case, the individual could be advised to determine in consultation with the prescribing physician the most effective, non-smoked form of marijuana to be used in the treatment of his or her illness.

For more information on this topic, visit the [Smoke-Free Environments Law Project website](#), which provides links to a full analysis of the issue, the HUD memorandum, and other information. The original analysis on which this column is based was prepared by Cliff Douglas for the Smoke Free Environment Law Project.



Clifford E. Douglas, J.D., a consulting attorney for the Smoke-Free Environments Law Project, is Director of the University of Michigan Tobacco Research Network and teaches the tobacco control policy course at the University of Michigan School of Public Health.

If you have a question about a tobacco law-related issue that you'd like us to address in this column, or a topic you'd like us to cover in future publications, please send us an e-mail at tobaccolaw@wmitchell.edu. Thank you!

California County Passes Strong New Tobacco Control Laws

In October the Santa Clara County Board of Supervisors unanimously passed three strong tobacco control ordinances that will make the California county one of the most aggressive jurisdictions in the U.S. in preventing youth tobacco use and protecting residents from secondhand smoke. Under the [Tobacco Retailer Permit Ordinance](#), retailers that sell tobacco in unincorporated areas of the county must obtain and maintain annual permits. The [Multi-Unit Residences Ordinance](#) prohibits smoking in duplexes, condos, townhouses, apartment complexes, and common areas, and requires new or renewed lease agreements to include a clause that would prohibit smoking inside units. The [Smoking Pollution Control Ordinance](#) prohibits smoking at county fairgrounds, outdoor shopping malls, county parks, retail stores that exclusively sell tobacco and smoking products, and in hotels and motels.

Before the measures take effect, they must be read a second time this month and receive final approval. Funding for public education about the new tobacco control ordinances, and for working on similar comprehensive tobacco control policies, will come out of a \$7 million [Communities Putting Prevention to Work Tobacco Prevention and Control Program grant](#) that Santa Clara County received through the American Recovery and Reinvestment Act.

ANR's Latest Tally of Smoke-free Laws

As of October 1, 2010, 62.2 percent of the U.S. population lived in cities or states with smoke-free non-hospitality workplaces, 73.9 percent in areas with smoke-free restaurants, and 63.4 percent in areas with smoke-free freestanding bars, according to the most recent quarterly tally by the Americans for Nonsmokers' Rights Foundation. The Foundation reports that 3,173 U.S. municipalities have some kind of local smoke-free indoor air law in effect.

Thirty-five states and the Commonwealths of Puerto Rico and the Northern Mariana Islands all have strong state or commonwealth laws in effect that provide 100 percent smoke-free protection for non-hospitality workplaces, and/or restaurants, and/or bars.

Check out the state and municipalities with new or strengthened smoke-free laws, as well as other smoke-free cities, counties and states, at ANR's [smoke-free lists, maps and data web page](#).

Tobacco in the Courts

Florida Juries Side with Tobacco Companies in Latest "Engle Progeny" Lawsuits

Breaking a string of rulings against the tobacco companies, Florida juries in the last few months have ruled in favor of Philip Morris USA Inc. and R.J. Reynolds Tobacco Co. in five separate product liability cases. The verdicts are part of the so-called Engle progeny cases, named after the Florida Supreme Court 2006 ruling that decertified the Engle lawsuit against the tobacco industry, but enabled factual findings made by the jury in the Engle class action to be used in future cases heard in Florida. Up until August 2010, plaintiffs had won 19 of the 22 Engle progeny cases that went to a jury. While punitive awards in previous cases have varied, some have been substantial, with many coming in at \$20 million or more. Approximately 4,000 related cases have been filed and are awaiting trial in Florida.

>> For more information on [Engle v. R. J. Reynolds](#) (PDF, 250 Kb), see our *Legal Updates* [Fall 2009](#) (1.78 Mb), [Spring 2009](#) (PDF, 1.5 Mb), and [September / October 2007](#) (PDF, 1 Mb).

Uruguay to Strengthen Tobacco Controls

Uruguay officials have announced their intent to take stronger measures to discourage tobacco use, including pricing, packaging, education, advertising, and smoke-free legislation, despite a pending legal challenge from Philip Morris International. Earlier this year, Philip Morris sued Uruguay before the World Bank's International Center for the Settlement of Disputes, arguing that the country's proposed tobacco control measures – requiring large warning labels on tobacco product packs and colored or plain packaging – violate a bilateral investment treaty, infringe on the company's intellectual property rights, and harm its market competitiveness in Uruguay. (Australia is also facing legal confrontations with the tobacco industry over its adoption of plain packaging as a tobacco control measure.)



Uruguay, a standing participant in the [World Health Organization's Framework Convention on Tobacco Control](#), is one of the most economically developed countries in South America, and in 2006, became the first country in the region to pass a law prohibiting smoking in enclosed public areas and work places. According to officials, the smoking population in Uruguay has decreased from 32 percent in 2006 to 25 percent today.

The conflict between Philip Morris and Uruguay has significant implications for international public health, since it highlights ways in which global health law is used to support and legitimize governmental decisions to protect health through tobacco control legislation. Several international organizations, including the Pan American Health Organization and the NGO Tobacco Free Kids, have offered legal assistance to Uruguay in this lawsuit, if needed.

>> [Read about tobacco litigation in Uruguay.](#)

>> [Read *Philip Morris versus Uruguay: Health Governance Challenged*, 376 Lancet 9744 \(2010\).](#)

New Study Supports Need for Stronger Regulation of Chinese Cigarettes

A new international research project has found high levels of heavy metals in Chinese domestic cigarettes, with some containing three times the level of lead, cadmium and arsenic in Canadian brands. The International Tobacco Control Project, which brings together experts from twenty countries, recently released a series of eleven research studies that found China was endangering cigarette buyers at home and abroad by failing to enforce stronger controls.

According to the project, an estimated million smokers die each year in China from tobacco-related diseases and 100,000 people from exposure to second-hand smoke. The project predicts that if current trends continue, China's death toll from tobacco will reach two million per year by 2020. These statistics, along with China's status as one of the [world's largest manufacturers of tobacco](#), and the latest research on toxic elements in Chinese cigarettes, highlight the need for greater regulation of the global tobacco industry.

>> Read [Identifying the Challenges to Tobacco Control in China: Findings from the International Tobacco Control \(ITC\) China Project](#), published as a supplement to 19 TOBACCO CONTROL (Oct. 2010).

Policy Fact Sheets for State Health Improvement Initiatives

The Public Health Law Center has released a series of fact sheets focused on policy systems and environmental changes designed to curb Minnesota obesity and tobacco crises. These resources were developed in conjunction with the [Statewide Health Improvement Program](#) (SHIP), an integral part of Minnesota's Vision for a Better State of Health, which is an important package of state health reforms that the Minnesota Legislature passed in 2008.

Although this information is designed to be Minnesota-specific, much of it is applicable nationwide. For example, one of the resources available is [Public Health Policy Drafting Guidelines](#) – checklists of steps used in planning, drafting and reviewing a public health policy to ensure that it is comprehensive, understandable and will achieve its goals.

>> [Visit the SHIP Special Collection web page](#) on the Public Health Law Center's website for tools and publications that the Center policy developed on healthy eating, physical activity and reduced tobacco use. The Center's attorneys are preparing and posting new resources on our website regularly, so please check this web page often.

Model Policy for a Tobacco-free Environment in Minnesota's K-12 Schools

To promote a tobacco-free environment in primary and secondary schools around Minnesota, the Public Health Law Center and the Start Noticing Coalition developed a comprehensive model K-12 tobacco-free policy.

The policy—

- Defines tobacco products to include current and future tobacco products.
- Prohibits tobacco products and tobacco-related devices, imitation tobacco products, lighters, and electronic cigarettes on campus (inside or outside) and at off-campus, school-sponsored events
- Prohibits accepting any donations or curriculum from any tobacco-related industry
- Prohibits any promotion of tobacco products.

>> [Read the Public Health Law Center's tobacco-free policy for Minnesota schools.](#)

New Resources on Tobacco Product Display Bans & Tobacco Retail Licensing

The Center for Public Health and Tobacco Policy at New England | Boston has just published two publications that address options that state and local governments might want to consider in regulating tobacco product advertising and promotion, as well as tobacco retail licensing.

- [Tobacco Product Display Bans](#) (Oct. 2010). This publication explains why tobacco product display bans are an appropriate tobacco policy intervention, provides examples of international tobacco product display bans and their impact, describes current federal and New York State law regulating the display of tobacco products, highlights potential legal challenges and implementation and enforcement concerns, and includes a model tobacco product display ban ordinance.
- [Tobacco Retail Licensing: Local Regulation of the Number, Location and Type of Tobacco Retail Establishments in New York](#) (Oct. 2010). This publication focuses on the ways that tobacco retail licensing can be used by state and local governments in New York to address the serious problems and negative health impacts caused by the proliferation and clustering of tobacco retail establishments. The report explains the benefits of regulating tobacco retail outlet density and licensing, describes the current law related to tobacco retail licensing, highlights legal considerations and potential challenges, as well as implementation and enforcement issues, and includes a New York model ordinance for tobacco retail licensing.

List of Smoke-free Public Housing Authorities

For a recent listing of public housing authorities that have adopted smoke-free policies for some or all their buildings, visit the Apartment section of the Smoke-Free Environments Law Project website at <http://www.tcsg.org/sfelp/apartment.htm>. For a pdf listing, click [here](#).

Over 200 local housing authorities currently have smoke-free policies for some or all their buildings. The 27 states with such policies include Michigan (46), Minnesota (34), Maine (19), Colorado (14), Washington (14), Oregon (14), California (8), Nebraska (6), New Hampshire (5), Alaska (4), Idaho (3), Utah (3), New Jersey (2), Wisconsin (2), Arkansas (2), Florida, Montana, Indiana, Kentucky, Pennsylvania, Texas, Massachusetts, Connecticut, Vermont, Illinois, New York and Kansas.

Upcoming Events

APHA Annual Meeting & Exposition

Nov. 6 – 10, 2010

The American Public Health Association's 138th Annual Meeting & Exposition will be held in Denver this year. The APHA conference is the oldest and largest gathering of public health professionals in the world, attracting more than 13,000 national and international physicians, administrators, nurses, educators, researchers, epidemiologists, and related health specialists. Its 2010 theme is "Social Justice: A Public Health Imperative."

>> [Visit the event website for program and registration information.](#)

WHO FCTC Conference of the Parties

Nov. 15 – 20, 2010

The fourth session of the Conference of the Parties to the World Health Organization's Framework Convention on Tobacco Control will be held at the conference centre of the Conrad Hotel in Punta del Este, Uruguay.

>> [Visit the WHO website for more information about this event.](#)

Public Health Law Opportunities

The Fund for Public Health in New York, Inc., a non-profit organization dedicated to the advancement of the health and well-being of all New Yorkers, is seeking a Senior Legal Counsel for Policy to head its Bureau of Tobacco Control's Policy Unit. This attorney will develop and implement legislative and regulatory strategies, including those to lower the prevalence of smoking in adults and youth, reduce exposure to secondhand smoke, and curb illegal sales of cigarettes. [Learn more about this position.](#)



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[Public Health Law Center](#)

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[Tobacco Control Policy and Legal
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Tobacco Policy](#)

Disclaimer: While we make every effort to ensure the information in this newsletter is accurate and complete, the Tobacco Control Legal Consortium is unable to guarantee this information. Material is provided for informational purposes and is not intended as legal advice. We encourage readers with questions to consult an attorney familiar with the laws of their jurisdictions.

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