

Write it Right: *Drafting Your Smoke-Free Law*



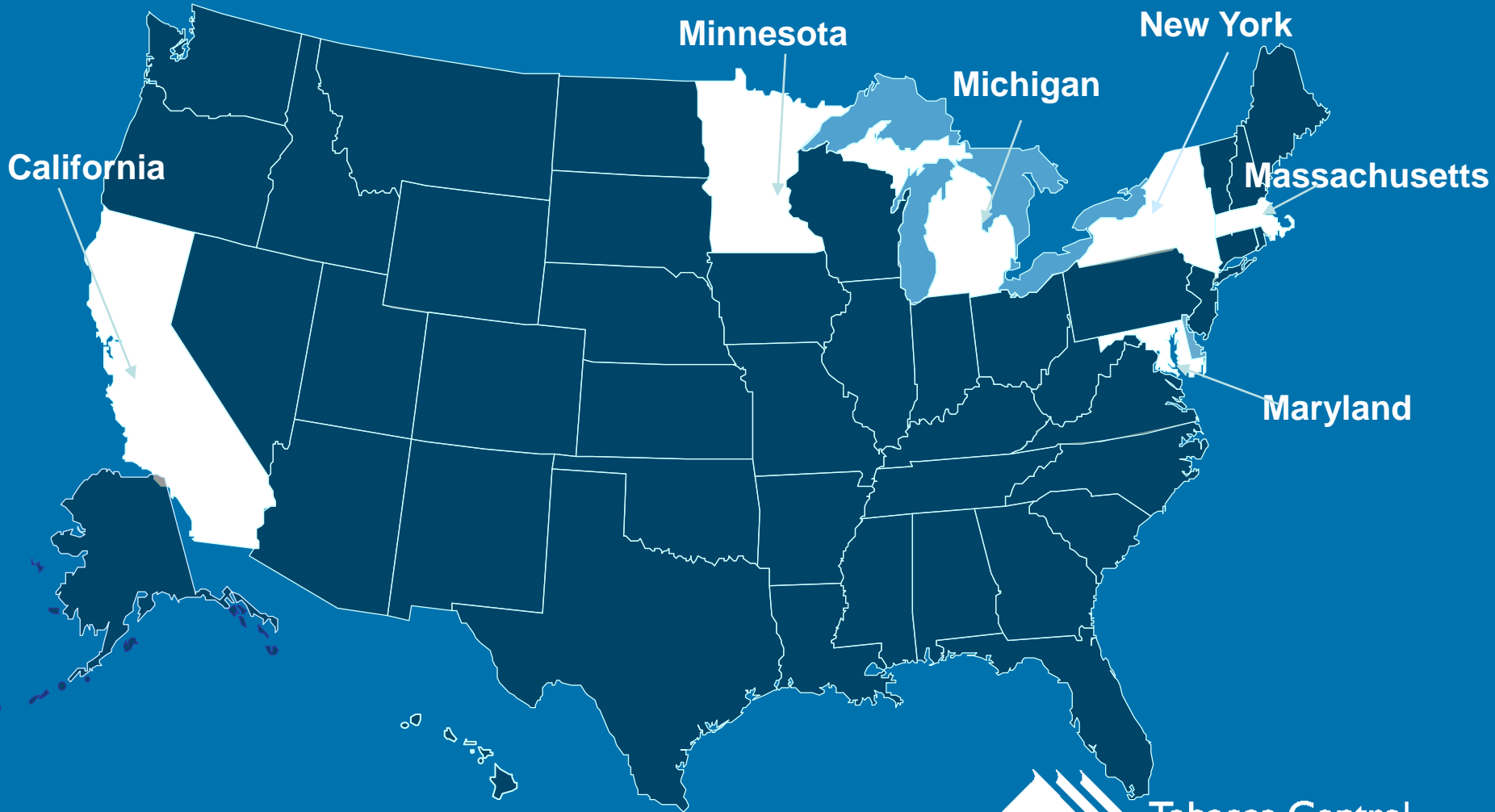
Tobacco Control
Legal Consortium

Doug Blanke
June 2-4, 2010
Washington, D.C.

The Tobacco Control Legal Consortium

The legal network for tobacco control policy.

Tobacco Law Centers



Tobacco Control
Legal Consortium

www.PublicHealthLawCenter.org



Improving health through the power of law

SEARCH:
Advanced Search

- About Us
- Our Staff
- Programs
- Public Health Topics
- Publications and Resources
- Public Health Law at William Mitchell
- Contact Us

We welcome your feedback!

Our new site is currently in beta testing. Please direct questions or comments about the site to our staff at publichealthlaw@wmitchell.edu. Thank you!

EMAIL NEWSLETTER SIGNUP

NAME
ORGANIZATION
E-MAIL

Click the courthouse to submit.



Healthy Eating

Active Living

Tobacco Control

Public Health Law Basics

Other Public Health Law

Announcement

New Publications

Public Health Blog

Welcome

Public Health Law Center Receives New Grant to Expand the Field of Public Health Law

The Public Health Law Center (former Tobacco Law Center) at the William Mitchell College of Law and the Robert Wood Johnson Foundation are working collaboratively to bolster the growing field of public health law. Robert Wood Johnson Foundation has awarded a grant to the Public Health Law Center, a leading legal resource on health improvement, to develop a network of experts and to provide legal technical assistance, analysis, coordination and training to public health professionals, lawyers

NEWS

[Minnesota Passes Expansive Tobacco Product Legislation](#)

Minnesota Governor Tim Pawlenty signed into law the state's Tobacco Modernization and Compliance Act of 2010, which expands Minnesota's definition of "tobacco products" to cover new smokeless tobacco products, including those currently in test markets around the U.S. The legislation was nicknamed the "Tic Tac Tobacco Act" because many of the products the law seeks to regulate, such as sticks, strips and orbs, resemble candy-shaped

The Tobacco Control Legal Consortium



Tobacco Control
Legal Consortium

TCLC
Tobacco Control
Legal Consortium

WHAT IS THE LEGAL CONSORTIUM?

The Tobacco Control Legal Consortium is a network of legal resource centers helping to strengthen America's tobacco control policies.

WHO DO WE HELP?

ADVOCATES & HEALTH PROFESSIONALS

Advocates, community coalitions, and health professionals develop and enact policy proposals to reduce tobacco use.

COMMUNITY LEADERS & POLICYMAKERS

Public officials and other community leaders analyze tobacco laws and other policies to improve public health.

COURT ATTORNEYS

State and county attorneys draft, implement, enforce, and litigate local ordinances.

ATTORNEYS

Attorneys representing community coalitions, organizations, and private litigants, to help advance public health.

RESEARCHERS

Researchers identify the legal aspects of tobacco control and develop procedures and jargon into



AFFILIATED LEGAL CENTERS

CALIFORNIA



COLORADO

MARYLAND

MASSACHUSETTS

MICHIGAN

MINNESOTA

NEW JERSEY

WHAT DO WE DO?

WE CAN HELP YOU:

- Develop strong smoke-free laws that affect your workplace
- Respond to legal arguments and proposals
- Draft laws to increase tobacco control sales practices and control programs
- Defend tobacco-related challenges
- Prepare "friend of the court" briefs for important court cases

CONTACT US

Tobacco Control Legal Consortium
William Mitchell College of Law
875 Summit Avenue
St. Paul, Minnesota 55105-3001
Tel: 651.290.7506 Fax: 651.290.7507
tobaccolaw@wmitchell.edu
www.tclconline.org



Education, Training and Materials

- *Legal Update*
- Law Synopses
- Fact Sheets
- Sample language
- Case law
- www.PublicHealthLawCenter.org



Legal research, analysis, and interpretation



Policy development




Tobacco Control
Legal Consortium

Litigation support





Tobacco Control
Legal Consortium

Litigation Support



Challenges to Smoke-Free Laws

Support for this database was provided by grants from the
Robert Wood Johnson Foundation and the American Cancer Society's Cancer Action Network



Database Functions
[Enter a New Record](#)

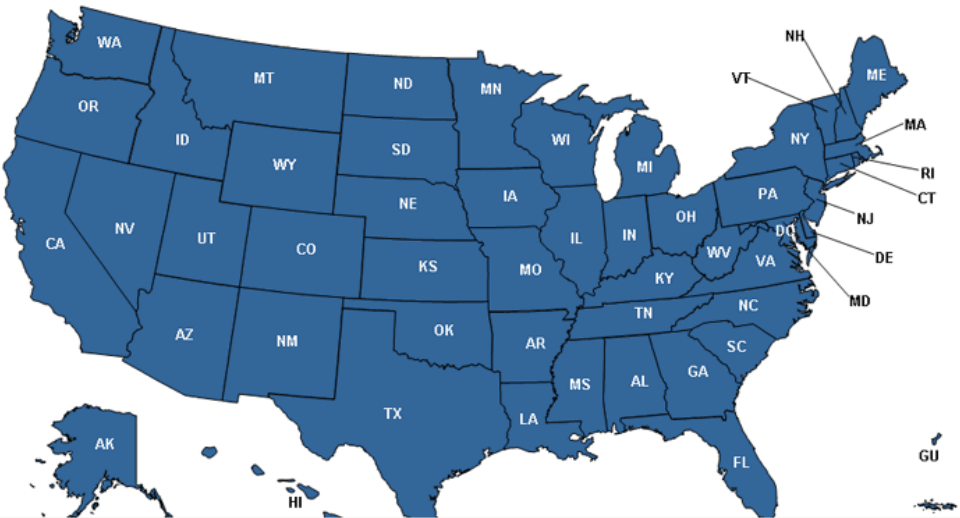
List Cases which Contain:
[Due Process](#)
[Enactment/Referendum Process](#)
[Equal Protection](#)
[Housing](#)
[Implementation](#)
[Other Constitutional Claims](#)
[Preemption](#)
[Takings](#)
[TRO/Injunction Standards](#)

QuickSearch By:
Any Fields

If you do not get what you want, try [Advanced Search](#)

Search By
[Date Created](#)
[Date Last Edited](#)

[List All Cases](#) or List Cases by State:



Smoke-Free Laws



Tobacco Control
Legal Consortium

Drafting Effective Smoke-Free Laws

Drafting Pointers – “DOs”

- ✓ be clear & succinct
- ✓ be consistent
- ✓ be specific
- ✓ be practical



Do: Be Clear & Succinct



Do: Be Clear & Succinct

- Use definitions appropriately
- Eliminate unnecessary words

“There is a useless lawsuit in every useless word of a statute.”

Elihu Root, 1914

Do: Be Clear & Succinct

(E) Owners, managers, operators, or employees of establishments regulated by this Ordinance shall inform persons seen violating this Ordinance of the requirements of this Ordinance. In the event an owner, manager, operator or employee of an establishment regulated by this Ordinance observes a person or persons violating this Ordinance, he or she shall immediately direct the person or persons in violation to extinguish the item being smoked. Failure of the person directed to extinguish his/her item shall result in the violator being directed to leave the premise.

1. In the event the person [or persons] violating this Ordinance complies with this directive, no violation shall exist for the owner, manager, operator or employee witnessing the violation. In the event an owner, manager, operator or employee of an establishment regulated by this Ordinance observes a person or persons violating this Ordinance and fails to immediately direct the person [or persons] in violation to extinguish the item being smoked, the owner, manager, operator or employee failing to take appropriate steps required by this Ordinance shall be in violation of this Ordinance.

2. In the event the person [or persons] violating this Ordinance fails or refuses to comply with this directive, the owner, manager, operator or employee directing the person [or persons] violating this Ordinance shall take immediate and reasonable steps to obtain the removal of the person [or persons] from the premises. As an example of the reasonableness required, if there is a person violating the ordinance who, the owner, manager, operator or employee of an establishment regulated by this Ordinance is required to remove from the premises, but the person is intoxicated or otherwise reasonably believed to be unable to safely drive or conduct himself or herself if required to leave those premises, in this event the owner, manager, operator or employee reasonably determine to allow the person violating this ordinance to remain on the premises until appropriate arrangements may be made for the person's removal.

In the event the person [or persons] violating this Ordinance is timely removed from the premises; no violation shall exist for any owner, manager, operator or employee related to the establishment in which these events occurred. In no event is an owner or agent of the premises to forcibly remove the person violating the Ordinance. Compliance is achieved under this subsection if the owner or agent of the premises orders the person violating the Ordinance to leave its premises and promptly notifies the police if the person refuses.

(E) Owners, managers, operators, or employees of establishments regulated by this Ordinance shall inform persons seen violating this Ordinance of the requirements of this Ordinance. In the event an owner, manager, operator or employee of an establishment regulated by this Ordinance observes a person or persons violating this Ordinance, he or she shall immediately direct the person or persons in violation to extinguish the item being smoked. Failure of the person directed to extinguish his/her item shall result in the violator being directed to leave the premise.

1. In the event the person [or persons] violating this Ordinance complies with this directive, no violation shall exist for the owner, manager, operator or employee witnessing the violation. In the event an owner, manager, operator or employee of an establishment regulated by this Ordinance observes a person or persons violating this Ordinance and fails to immediately direct the person [or persons] in violation to extinguish the item being smoked, the owner, manager, operator or employee failing to take appropriate steps required by this Ordinance shall be in violation of this Ordinance.

2. In the event the person [or persons] violating this Ordinance fails or refuses to comply with this directive, the owner, manager, operator or employee directing the person [or persons] violating this Ordinance shall take immediate and reasonable steps to obtain the removal of the person [or persons] from the premises. As an example of the reasonableness required, if there is a person violating the ordinance who, the owner, manager, operator or employee of an establishment regulated by this Ordinance is required to remove from the premises, but the person is intoxicated or otherwise reasonably believed to be unable to safely drive or conduct himself or herself if required to leave those premises, in this event the owner, manager, operator or employee reasonably determine to allow the person violating this ordinance to remain on the premises until appropriate arrangements may be made for the person's removal.

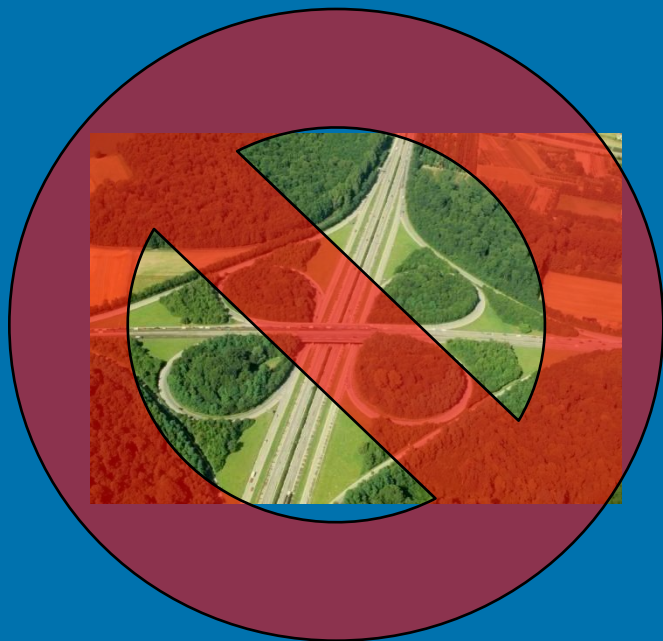
In the event the person [or persons] violating this Ordinance is timely removed from the premises; no violation shall exist for any owner, manager, operator or employee related to the establishment in which these events occurred. In no event is an owner or agent of the premises to forcibly remove the person violating the Ordinance. Compliance is achieved under this subsection if the owner or agent of the premises orders the person violating the Ordinance to leave its premises and promptly notifies the police if the person refuses.

If an owner, manager, operator, or employee of an establishment regulated by this Ordinance observes a person[s] violating this Ordinance, he or she shall immediately ask the person[s] in violation to stop smoking. If the person[s] violating the Ordinance does not stop smoking, the owner, manager, operator, or employee shall immediately ask the person[s] to leave the premises. If the person[s] in violation refuses to leave the premises, the owner, manager, operator, or employee shall call the police or other appropriate enforcement agency.

In no event is an owner or agent of the premises to forcibly remove the person[s] violating the Ordinance. Compliance is achieved under this subsection if the owner or agent of the premises follows these steps.

An employee who observes a person[s] violating this Ordinance may immediately notify the owner, manager or supervisor of the violation in satisfaction of the employee's responsibility under this Ordinance. The failure of the owner, manager, or supervisor to take the steps required by this subsection in response to the employee's notice shall not constitute a violation on the part of the employee.

Do: Be Consistent



Tobacco Control
Legal Consortium

Do: Be Consistent

- Focus on ordinance objectives
- Avoid faulty logic
 - smoking allowed if minors not present
 - smoking allowed in private offices, or if employees give their consent
 - exempting certain places of employment (e.g., bars, factories, small employers)

Do: Be Specific



- Proprietors'
Duties

- Enforcement

- Penalties

- Findings &
Intent

- Severability



Do: Be Specific

- Spell out the essential elements
 - Proprietors' responsibilities
 - Enforcement agents and mechanisms
 - Penalty procedures for violations
 - Findings and Intent
 - Severability

Do: Be Practical



Do: Be Practical

- Know what works
 - Make “reasonable distances” reasonable
 - Avoid overnight or delayed effective dates
 - Be wary of timing provisions (e.g., temporary exemptions, “sunset” provisions, and grandfather clauses)

Drafting Smoke-Free Laws Effectively

Common Drafting Mistakes – “DON'Ts”

- ✓ don't forget your homework
- ✓ don't draft by “Xerox”
- ✓ don't draft in isolation
- ✓ don't misuse exemptions



Don't Forget Your Homework



Tobacco Control
Legal Consortium

Don't Forget Your Homework

- Meet early with your lawyer
- Use a strong model ordinance
- Stick to your “dealbreakers”
- Know the stakeholders
- Understand your authority
- Anticipate legal challenges

Don't Forget Your Homework



Anticipate Legal Challenges

- Equal Protections
- Due Process
- Privileges and Immunities
- Special Legislation



Tobacco Control
Legal Consortium

Don't Draft by "Xerox"



Don't Draft by "Xerox"

- Don't cut and paste entire ordinances
- Don't lift clauses in their entirety
- Don't simply do what's been done before – it may not work for you

Don't Draft in Isolation



Tobacco Control
Legal Consortium

Don't Draft in Isolation

- You are not alone
- Your smoke-free ordinance is not an island

Don't Create Exemptions



Exemptions and Exceptions:

- Weaken the law's justifications and objectives.
- Make law more difficult to interpret, implement, and enforce.
- Often inspire litigation.

Do: Call Us!

Tobacco Control Legal Consortium
tobacco@wmitchell.edu
(651)-290-7506

