



Photo: Counter Tobacco

# Online and Other Delivery Sales of Commercial Tobacco Products

Through licensing and related regulations, local governments (cities and counties) have the opportunity to address the sale of e-cigarettes and all other commercial tobacco<sup>1</sup> products in the retail environment. This fact sheet provides an overview of current federal and state law regarding online and other delivery sales of commercial tobacco products, including the rationale for prohibiting delivery sales and guidance on local policy options. This is one in a series of resources providing Minnesota-specific information on local retail tobacco licensing and point-of-sale policy options.

## Background

Regulation of online and other delivery sales of all commercial tobacco products is an important topic for local governments to consider when seeking to stop underage access and use. Local policies that could be undermined by online and delivery sales include minimum legal sales age<sup>2</sup>, restrictions on the sale of flavored tobacco products, and minimum price laws.

The traditional compliance check system with which we are familiar was designed for use in brick-and-mortar, fixed-location retail stores — and when conducted at regular intervals as required by federal, state, and local laws, this approach can successfully reduce unlawful sales to underage persons by addressing illegal sales among retailers. But this means of monitoring and enforcement does not transfer well to the now

ubiquitous online tobacco retailer environment, where persons under the age of 21 can gain access to a tobacco retailer's website by clicking a prompt claiming they are of legal age and, upon gaining entry, make unlawful purchases by taking further advantage of lax and flawed age verification processes.

Local communities may be interested in prohibiting delivery sales as an effective means of curtailing underage access to commercial tobacco products. As used in this context, a **delivery sale** refers to the sale of any commercial tobacco product to an individual consumer for personal consumption, not for resale, when the sale is conducted online or by another means other than an in-person, over-the-counter sales transaction in a licensed retail establishment. **Delivery sales** include sales transacted by phone, mail, the internet, or app-based services. This regulatory approach recognizes the

inherent challenges local governments face in trying to effectively monitor online retailers and prevent underage access to the enormous array of e-cigarette products marketed online, and addresses the common failure of age verification processes to prevent underage persons from making online purchases.

Because online age verification systems have failed to prevent underage purchases, and because online marketing of e-cigarettes has contributed to a huge surge in underage use of these and other tobacco products — *reversing decades of progress in reducing youth initiation and use* — some state and local jurisdictions have chosen to completely prohibit delivery sales to consumers. (See [Resources](#) below.)

## Current Federal and State law

### Federal Law

Congress amended the federal Prevent All Cigarette Trafficking (PACT) Act in December 2020, adding new regulations to address delivery and sales of “electronic nicotine delivery systems” (ENDS).<sup>3</sup> As amended, the PACT Act now requires any retailer who advertises or sells cigarettes, smokeless tobacco, ENDS products, or roll-your-own tobacco through interstate commerce (i.e., shipping into a state or locality, or into Indian country of a Tribe that taxes the sale or use of such products) to comply with detailed registration, shipping, and record-keeping requirements.<sup>4</sup>

As a result of this amendment, out-of-state retailers can no longer ship e-cigarette products directly to consumers in Minnesota through the U.S. Postal Service. Although online retailers are still permitted to ship e-cigarette products using common carriers other than the U.S. Postal Service as long as they comply with all applicable federal, state, and any Tribal government or local laws regulating delivery sales, options have narrowed considerably. Each of the three leading common carriers — UPS, FedEx, and DHL — have ceased making domestic shipments of e-cigarettes and related products.

The PACT Act requires all retailers who transact delivery sales to register at the federal level with the U.S. Attorney General and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). They are also required to register at the state level with state tobacco tax administrators, Tribal governments, and local tobacco tax administrators, where applicable.

The PACT Act does not apply to delivery sales of cigars or pipe tobacco. The law also excludes delivery

sales of drugs, devices, or combination products, as defined by the Federal Food, Drug, and Cosmetic Act, that have been approved for sale by the U.S. Food and Drug Administration as a tobacco cessation product, tobacco dependence product, or for other therapeutic purposes, and is marketed and sold solely for such approved purposes.

### State Law

Delivery sales of commercial tobacco products to Minnesota consumers are also regulated under [state law](#).<sup>5</sup> This statute applies to delivery sales made to a Minnesota consumer by an in-state or out-of-state retailer when the consumer places the order for products by phone, mail, internet, or other delivery or online service and the products are delivered to the consumer by mail or any other type of delivery service.

The Minnesota Legislature amended this statutory provision in 2021 by expanding the meaning of “tobacco products” to include virtually all commercial tobacco products regulated under Minnesota law. Previously, the state’s delivery sales restrictions applied only to cigarettes, premium cigars, and smokeless tobacco. As amended, products now covered under a “delivery sale” includes all cigarettes, cigars, smokeless tobacco, e-cigarettes (defined as “nicotine solution products”<sup>6</sup>) and all other commercial tobacco, including pipe tobacco, that come within the meaning of “tobacco products” as defined in the section.<sup>7</sup>

Minnesota law (Sec. 325.781) requires out-of-state retailers to register with the state commissioner of revenue prior to making delivery sales to a Minnesota consumer. In addition, all retailers making delivery sales, whether in-state or out-of-state, must comply with Minnesota tobacco tax filing, reporting, collection, payment, and record retention requirements.<sup>8</sup> (See [Minnesota Department of Revenue, PACT Act overview](#).) Any retailer making delivery sales who fails to pay taxes when due is now subject to an additional penalty of 50 percent of tax due but unpaid. These changes took effect January 1, 2022.

**Age verification requirements.** Age verification processes are required for delivery sales of commercial tobacco products under both federal and state law. The PACT Act requires online retailers who make sales and shipments to consumers in Minnesota to comply with all the federal law’s registration, shipping, and other requirements.

Minnesota law requires that retailers making delivery sales of tobacco products verify that each person

who places an order for a delivery sale is at least 21 years of age.<sup>9</sup> The statute further provides that retailers must follow several specific age verification procedures and shipping requirements. For example, before processing a person's first order, the retailer must obtain a valid copy of the person's government-issued photo identification, including the person's name, current address, and date of birth; check the information provided against a commercially available database; and obtain a signed, written statement acknowledging that the person is of legal age to make a purchase and understands that penalties apply for using false identification or selling or giving products to persons under 21. If the tobacco products ordered have been advertised online, the retailer must process the consumer's payment by credit card or check only. The retailer must mark the outside of packages, as required by the statute, and must use a delivery service that follows all of the statutory delivery requirements (i.e., obtaining the signature and checking the government-issued photo identification of a person 21 or over who resides at the delivery address). These processes can be cumbersome and challenging to monitor and enforce.

**Penalties.** Penalties for violating this law include the following:<sup>10</sup>

- Products sold or attempted to be sold in violation of this statute are subject to forfeiture;
- For a violation that is not within two (2) years of any previous violation, the commissioner of commerce may issue a cease and desist order, providing the retailer with the right to request a hearing;
- A violation that is within two (2) years of a previous violation constitutes a misdemeanor;
- A first violation includes a civil fine of no more than \$1,000;
- A second or subsequent violation includes a civil fine of no more than \$5,000;
- The Minnesota Attorney General may request an injunction, fines, penalties, and further actions to stop wrongful conduct by retailers or others acting on their behalf; and
- A violation of this law is also a violation of Minnesota's Unlawful Trade Practices Act.

## Local Policy Options

As previously noted, Minnesota's tobacco retailer licensing law allows cities and counties to enact stricter tobacco retailer policies than those required by state statutes and, in this instance, federal law. To effectively curb unlawful sales of e-cigarettes and all other commercial tobacco products to persons under the age of 21, local jurisdictions may go beyond current state law by totally prohibiting delivery sales. Some jurisdictions, such as the cities of Moorhead and Eagan, have enacted such policies. Please contact the Public Health Law Center for additional information and/or technical assistance on local policy options to regulate online sales.

## Best Practices Guidance

The Public Health Law Center's model Minnesota City Retail Tobacco Licensing Ordinance prohibits delivery sales by requiring that all sales of licensed products be conducted in person, at a fixed-location, in a licensed retail store, and in over-the-counter transactions only.

- As set out in the Center's model ordinance, a total prohibition on delivery sales would prohibit tobacco retailers from providing **curbside delivery**. This is an issue that surfaced early during the COVID-19 pandemic when the governor issued a stay-at-home order, allowing only essential businesses to remain open for retail sales. Some tobacco shop owners attempted to hold their shops out as essential businesses and transacted sales curbside, but the Minnesota Department of Employment and Economic Development deemed tobacco shops non-essential businesses during the pandemic or stay-at-home order.
- A total prohibition on delivery sales of tobacco products also would prohibit sales of commercial tobacco products by the type of retail business exemplified by **Gopuff**, which functions on a delivery-only retail business model, operating out of warehouses instead of retail storefronts. Retailers operating under this relatively new business model rely solely on orders that consumers place via app, internet, or phone; delivery sales are completed at the point of delivery by drivers who either are directly employed by, or contracted with, the retailer.

Cities and counties are encouraged to work with their local public health department, city or county attorney, and the Public Health Law Center in considering this policy option.

## Resources

For more information on this topic, please review our publications, *Online Sales of E-Cigarettes & Other Tobacco Products* (2019); *Online E-Cigarette Sales & Shipments to Consumers: State Laws Prohibiting Them* (2019); and the model *Minnesota City Retail Tobacco Licensing Ordinance* (2020).

## Contact Us

Please feel free to contact the Public Health Law Center at 651-290-7506 or [publichealthlaw@mitchellhamline.edu](mailto:publichealthlaw@mitchellhamline.edu) with any questions about the information included in this fact sheet or to discuss concerns you may have about implementing these policy options.

## Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit: <http://www.keepitsacred.itcml.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 MINN. STAT. § 461.19 allows cities and counties to enact ordinances that provide for more restrictive regulation of sales of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia products.
- 3 See 15 U.S.C. § 375 (2021). Examples of ENDS products include, but are not limited to, e-cigarettes, e-hookah, vape pens, refillable vaporizers, and all e-liquids, components, and accessories for these devices. ENDS products are defined under Minnesota law as “nicotine solution products” in MINN. STAT. §297F.01, subd. 22b, for tobacco tax law purposes, and as an “electronic delivery device” in MINN. STAT. § 609.685, subd. 1 (c), with regard to regulation of retail sales to underage persons. In effect, the December 2020 amendment of PACT Act expanded the definition of “cigarette” to include all e-cigarettes, e-juices, and components, parts, and accessories of e-cigarettes, in addition to conventional cigarettes and roll-your-own tobacco.
- 4 See 15 U.S.C. § 375 (2021).
- 5 MINN. STAT. § 325F.781.
- 6 MINN. STAT. § 297F.01, subd. 22b.
- 7 MINN. STAT. § 297F.01, subd. 19.
- 8 MINN. STAT. Chapter 297F.
- 9 *Id.*
- 10 *Id.*