

RESTRICTING TOBACCO ADVERTISING



The commercial tobacco industry¹ spends over \$7 billion annually advertising and promoting cigarettes and e-cigarettes.² Studies have shown that tobacco marketing increases youth initiation and makes it harder for tobacco users to quit.³ As a result, restricting tobacco advertising has long been a key tobacco control strategy.

The 2009 Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) expanded the ability of the U.S. Food & Drug Administration (FDA) and state and local governments to regulate tobacco product advertising⁴ and in 2016, the FDA exercised its authority to regulate e-cigarettes.⁵ This broadened authority, combined with the youth vaping epidemic, has led many states



Photo: Counter Tobacco

and local communities to consider ways to restrict tobacco advertising. The main public health goals of these policies are to prevent and reduce tobacco use — particularly by the young.

Ways to Restrict Tobacco Advertising

Governments approach restricting tobacco advertising in three ways:

1. By restricting all advertising without regard to its content, which is called a content-neutral restriction and affects all types of advertising, including tobacco advertisements.⁶
2. By restricting the content, messages, or imagery within some tobacco advertisements.
3. By restricting the time, place, or manner of tobacco advertisements.

These approaches can be used at the state and local levels to regulate advertising in the retail environment, in the community (i.e., outdoor advertising), and, in some cases, online. Policies restricting tobacco advertising can be standalone policies or incorporated into tobacco retailer licensing laws and zoning laws.⁷

State and local governments can adopt content-neutral advertising restrictions, which are the least controversial means of regulating advertising.⁸ For example, a local policy limiting advertisements for any product or service to a certain percentage of the total window area or frontage of businesses for aesthetic and safety reasons is a content-neutral restriction.⁹

Policies that place restrictions only on tobacco advertisements face more complex legal hurdles. This fact sheet provides information for governments interested in learning more about restrictions on the time, place, or manner of tobacco advertising, the need for these policies, examples of such restrictions, and potential legal challenges.

The Need for State and Local Tobacco Advertising Policies

Most cigarette and smokeless tobacco advertising is prohibited in television, radio, billboard, and transit ads pursuant to Federal Trade Commission regulations and provisions of the tobacco Master Settlement Agreement.¹⁰ E-cigarettes did not exist when these laws and agreements were adopted and are subject to federal and state consumer protection laws prohibiting unfair and deceptive trade practices,¹¹ as well as a narrow set of FDA regulations prohibiting false or misleading advertising and unauthorized modified risk claims.¹² State and local policies restricting tobacco advertising can address gaps in federal policy and play a role in limiting exposure to tobacco product advertising, which may decrease youth initiation and the ongoing use of these harmful products. For example, advertising for all types of tobacco

products is still prevalent inside retail stores, on store windows, and in store parking lots. This marketing often targets children and adolescents, a particularly susceptible audience. Studies have shown that even brief exposure to tobacco advertising can influence the attitudes and perceptions of youth about smoking and the use of tobacco products.¹³

Time, Place, or Manner Restrictions

Time, place, or manner restrictions may be imposed on tobacco advertising subject to the legal considerations discussed later in this fact sheet.¹⁴ Time refers to the time of day or days of the week that certain advertising is permitted. Place refers to where advertisements may be placed, and manner refers to the types of tobacco advertising that may be used. Below are a few examples of state policies limiting the place and manner of e-cigarette advertising. Note that these policies are relatively new and could be subject to legal challenges.

Type of Restriction State Advertising Policies for E-Cigarettes¹⁵

Place

- **Alabama:** Specialty retailers or manufacturers of electronic nicotine delivery systems may not use the brand name of such products to sponsor events for which individuals under age 21 make up 85 percent or more of participants performing in the event.¹⁶
- **New Jersey:** Advertising e-cigarettes is prohibited on NJ Transit.¹⁷
- **Washington:** Sales/distribution and/or advertisement of e-cigarettes on certain state university campuses is prohibited.¹⁸

Manner

- **Colorado:** A retailer may not advertise an electronic smoking device product in a manner that is visible from outside the retail location.¹⁹
- **Delaware:** Marketing or advertising tobacco substitutes on online or mobile applications directed to children is prohibited.²⁰

Place & Manner

- **Alabama:** Advertising flavored electronic nicotine delivery systems (other than tobacco, mint or menthol) on a billboard within 1,000 feet of any school or public playground is prohibited.²¹
- **New York:** Advertisements for e-cigarettes and vapor products intended to be used for the consumption of nicotine are prohibited from display in store fronts, exterior windows and doors of stores within 1,500 feet of a school (except that in New York City, this provision applies to stores within 500 feet of a school).²²



Photo: Counter Tobacco

Policy Findings

No matter what approach a community takes in regulating advertising, local laws are always more legally defensible if they contain substantial factual findings to justify them. Policy findings include statements of fact or statistics that outline the issue being addressed, support the need for the policy, clarify the policy goal, and help the law withstand legal challenges.

Findings should include well-supported evidence about how prevalent tobacco advertising is, the significant dollars spent on it, and the direct connection between youth exposure to tobacco ads and youth tobacco initiation.²³ Where possible this should include evidence, such as state or local studies of the types and number of tobacco marketing materials youth are exposed to in the community seeking to restrict tobacco advertising.

Legal Challenges

Communities need to be aware of potential legal challenges by those who argue that state or local tobacco advertising restrictions conflict with federal law, violate the First Amendment, or are preempted by state law.²⁴ Attempts to regulate tobacco advertisements should always be approached with caution and involve discussions with legal counsel.

The Federal Cigarette Labeling and Advertising Act

Prior to June 2009, The Federal Cigarette Labeling and Advertising Act (FCLAA) preempted state or local government efforts to regulate *cigarette* advertising.²⁵ The Tobacco Control Act amended FCLAA so that it now authorizes state and local governments to regulate the time, place, and manner, but not the content, of cigarette advertisements.²⁶ State and local governments can limit tobacco advertisements, but any state or local regulation of cigarette advertising must comply with limitations remaining under FCLAA (i.e., states and localities cannot regulate the packaging of cigarettes), and must be consistent with the First Amendment.²⁷ Because FCLAA only applies to cigarettes, laws that regulate the promotion and advertising of other tobacco products like e-cigarettes should be safer from FCLAA challenges.

The First Amendment

To determine whether a law violates the First Amendment, courts look to previous U.S. Supreme Court decisions for guidance. The U.S. Supreme Court has developed a series of tests to determine whether the First Amendment's speech protections are being violated. Different tests are applied depending on what type of speech is being regulated. Tobacco advertising is a form of commercial speech that the courts afford less protection than other kinds of speech, such as individual political expression. The First Amendment's free speech tests consist of several components — often called prongs. The law must meet each prong's requirement to be held constitutional. If the law fails to meet any one of these prongs, it violates the First Amendment and is unconstitutional.

The following table describes the First Amendment free speech test used for time, place, or manner advertising restrictions and contains drafting tips on how to anticipate legal challenges.²⁸

Free Speech Test Applied to Time, Place, or Manner Advertising Restrictions

Test Applied by Courts

Central Hudson Gas v. Public Services Commission

Four Prongs

1. Is the restricted speech false, deceptive, or promoting illegal activities?
2. Is the law justified by a substantial governmental interest?
3. Does the law directly and materially advance the governmental interest?
4. Is there a reasonable fit between the goal and the means chosen to accomplish the goal?

Or:

Does the law restrict the least possible amount of speech necessary to achieve its goal?

Drafting Tips

- Fully document extent of the problem the law was drafted to solve and include a careful, thorough analysis of how the law would impact commercial speech in the law's findings.
- Clearly state the government's goal in enacting the law, because doing so helps to show the law satisfies prong two and prong three.
- The law must clearly advance the objective the government enacted the law to achieve.
- The findings should also indicate why the law's approach must be taken and why other approaches to solving the problem that have a lesser impact on commercial speech would not work.
- Be sure the new law restricts the least amount of speech as possible while still achieving the law's goal.

State Law

Some local regulations that restrict certain tobacco product advertising may be preempted, or restricted by state law.²⁹ In addition, it is possible that a state court might interpret a state constitution's free speech clause more broadly than the U.S. Supreme Court has construed the First Amendment. State law should always be consulted prior to enacting local policies regulating tobacco advertising.

Other Helpful Resources

The Public Health Law Center's website features [resources on several topics related to the regulation of tobacco marketing and advertising](#), including fact sheets on content-neutral advertising, placement of tobacco products, and retail policies. The website's [web page on federal regulation](#) contains additional resources on how federal legislation impacts the tobacco

control authority of state and local governments, including the regulation of tobacco advertising. Please feel free to contact the Public Health Law Center at (651) 290-7509 or publichealthlaw@mitchellhamline.edu with any questions about the information included in this fact sheet or to discuss local concerns you may have about implementing policies restricting tobacco advertising.

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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.itcmi.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 FED. TRADE COMM’N, CIGARETTE REPORT FOR 2020 (2021), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2020-smokeless-tobacco-report-2020/p114508fy20cigarettereport.pdf> (finding that U.S. tobacco marketing costs increased from \$7.62 billion in 2019 to \$7.84 billion in 2020).
- 3 See, e.g., Tobacco Control Legal Consortium, *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use: Findings from the 2012 Surgeon General’s Report on Youth and Young Adult Tobacco Use* (2012), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-SGReport-Findings-Youth-Marketing-2012.pdf>.
- 4 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 et seq. (2010)).
- 5 Tobacco Control Legal Consortium, *The Deeming Regulation: FDA Authority Over E-Cigarettes, Cigars, and Other Tobacco Products* (2016), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-deemingreg-regulation-authority-Dec2016.pdf>.
- 6 Public Health Law Center., *Content-Neutral Advertising Laws* (2022), <https://www.publichealthlawcenter.org/sites/default/files/resources/Content-Neutral-Advertising.pdf>.
- 7 Laura Brossart et al., Ctr. for Pub. Health Systems Sci., *Point-of-Sale Strategies: A Tobacco Control Guide* (2014), <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1102&context=cphss>.
- 8 For a discussion and examples of content-neutral policies restricting retail advertising, see the Public Health Law Center’s publication, *Content-Neutral Advertising Laws*. Several publications on the [Public Health Law Center’s website](https://www.publichealthlawcenter.org) explain additional First Amendment issues related to tobacco advertising.
- 9 Public Health Law Center, *supra* note 7.
- 10 CTRS. FOR DISEASE CONTROL & PREVENTION, SMOKING & TOBACCO USE, LEGISLATION (2020), https://www.cdc.gov/tobacco/data_statistics/by_topic/policy/legislation/index.htm.

- 11 As of March 2022, two states had entered into settlement agreements with an individual e-cigarette manufacturer to limit that company from conducting certain forms of advertising in their states. Vaping Prevention Resource & Public Health Law Ctr., *Policy Playbook for E-Cigarettes Version 2.0* (2022), <https://www.publichealthlawcenter.org/sites/default/files/resources/Policy-Playbook-ECigarettes.pdf>.
- 12 The FDA has not yet exercised its authority to regulate e-cigarette advertising and marketing more broadly. Tobacco Control Legal Consortium, *supra* note 6.
- 13 Douglas A. Luke et al., *Family Smoking Prevention and Tobacco Control Act: Banning Outdoor Tobacco Advertising Near Schools and Playgrounds*, 40 AM. J. PREV. MED. 295 (2011).
- 14 Under the Federal Cigarette Labeling and Advertising Act, state and local governments can impose specific bans or restrictions on the time, place, and manner, but not content related to smoking and health, of the advertising or promotion of any cigarettes. 15 U.S.C. § 1334(c).
- 15 This table is adapted from Public Health Law Center., *U.S. E-Cigarette Regulations PHLC — 50 State Review* (2022), <https://www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review>.
- 16 ALA. CODE § 28-11-16(b) (2021).
- 17 N.J. ADMIN. CODE § 16:86-1.2(a)(8) (2021).
- 18 See, e.g., WASH. ADMIN. CODE § 172- 122-310(3) (2021) (Eastern Washington University); WASH. ADMIN. CODE §§ 504-37-020(5), (7) (2021) (WSU Vancouver); WASH. ADMIN. CODE §§ 504-38- 020(6), (8) (2021) (Washington State University Pullman).
- 19 COLO. REV. STAT. § 44-7-104.7(2) (2021).
- 20 DEL. CODE ANN. tit. 6 § 1204C(e), (f)(3) (2021).
- 21 ALA. CODE § 28-11-16(a) (2021)
- 22 N.Y. PUB. HEALTH LAW § 1399-dd-1(2) (2021); N.Y. GEN. BUS. LAW § 396-aaa(2) (2021).
- 23 Tamara Lange, et al., *Regulating Tobacco Product Advertising and Promotions in the Retail Environment: A Roadmap for States and Localities*, 43 J. OF LAW MED. & ETHICS 878 (2015).
- 24 15 U.S.C.A. § 1331 (2010).
- 25 Note that FCLAA has never explicitly placed any restrictions on the regulation of non-cigarette tobacco products.
- 26 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 (2010).
- 27 See, e.g., Kevin R. J. Schroth, *Ten Years of the Tobacco Control Act in New York City*, 40 J. OF LEGAL MED. 321 (2020) (discussing examples of FCLAA preemption as applied to New York City tobacco control laws).
- 28 The information contained in this table does not address government speech or expressive conduct. For more information on these topics, please see the Public Health Law Center's [resources](#) on regulating tobacco marketing and commercial speech issues.
- 29 CTRS. FOR DISEASE CONTROL & PREVENTION, STATE SYSTEM PREEMPTION FACT SHEET (2022), <https://www.cdc.gov/state-system/factsheets/preemption/Preemption.html>.