



Regulating Hookah and Water Pipe Smoking

Hookahs, also known as water pipes, are used for smoking flavored tobacco or other substances.¹ Hookah bars or “lounges” have grown in popularity in the United States, particularly in cities with large Middle-Eastern communities and in areas with many young adults, such as college campuses. Hundreds of hookah bars now operate throughout the U.S., with new establishments opening every month. This guide provides an overview of health risks associated with the use of hookahs and regulatory gaps and policy options for state, local, and tribal governments.²

Hookah and Water Pipe Smoking

Hookah pipes generally consist of a head, body, water bowl and hose (see photo). The tobacco used in hookahs is typically shredded tobacco leaf flavored with molasses, honey or dried fruit. This sweetened tobacco product is usually called shisha in the United States.



Several health risks are associated with hookah smoking.³ Hookah smoke contains significant amounts of nicotine, tar, heavy metals, and carcinogens, and may also contain charcoal or wood cinder byproduct carcinogens and carbon monoxide.⁴ Many of these substances are known to cause lung, bladder and oral cancers, as well as clogged arteries and heart disease.⁵ Secondhand hookah smoke is a demonstrated workplace hazard for hookah bar employees,⁶ and hookah use may be a gateway to conventional cigarette use among youth who have never smoked.⁷ An unfortunate myth persists that hookah use is less damaging to health than cigarette smoking because some people mistakenly believe that the water filtration system and extended hose serve as filters for harmful agents.⁸ In fact, the water filtration system only cools the smoke, allowing the user to inhale greater amounts of smoke over a longer period of time. A typical hookah session may last for an hour or more, a period of sustained inhalation that increases exposure to carcinogens. Also, because hookah smoking is typically practiced in groups, the same mouthpiece is passed from person to person, raising the risk of the transmission of infectious diseases such as herpes, hepatitis and tuberculosis.⁹ In a troubling sign, recent studies suggest that hookah use has passed conventional cigarette use among middle and high school students.¹⁰

Although hookah smoking is just as harmful as smoking cigars or cigarettes, the use of hookahs may not be adequately covered under existing smoke-free laws or other tobacco control laws.¹¹

Below are a few policy options for communities to consider when addressing the health concerns associated with hookah smoking.

Elements to a Comprehensive Smoke-Free Policy

A comprehensive smoke-free policy will be clear and unambiguous in its coverage of hookahs. Smoke-free policies generally address hookahs by either (1) specifically defining hookahs and explicitly prohibiting their use, or (2) creating broad definitions of “smoking” that encompass hookahs.

The preferred practice is to create a broad definition of “smoking” that describes the types of behavior or harms to be avoided, rather than focusing on the product. This prevents future business owners from attempting to circumvent the smoke-free law with technical changes to the product. For example, consider the following language, adapted from Hawaii’s smoke free law:

“Smoke” or “smoking” means inhaling or exhaling the fumes of any organic or synthetic material, including but not limited to plants, herbs, or tobacco, or possessing any product, device, or equipment producing smoke or vapors intended to be inhaled or exhaled.

A broad definition like this covers hookahs, whether or not the shisha contains tobacco, and also covers electronic cigarettes (“e-cigarettes”) and any future synthetic materials that might be developed to evade smoke-free laws. It focuses on the acts of inhaling and exhaling, rather than attempting to identify the many different products used to create smoke.

Challenges to Smoke-Free Policies

A key legal issue relating to regulation of hookah smoking is whether such activity is covered under a state clean indoor air statute or a local smoke-free ordinance. A significant challenge for effective enforcement of existing smoke-free laws is that hookah bars and lounges have often been able to evade regulation. Some hookah establishments have qualified for retail tobacco store or cigar bar exemptions. Other hookah establishments have argued that because shisha is heated, rather than lit or burned, it falls outside the applicable law’s definition of “smoking.” Some hookah bars have claimed to sell only non-tobacco shisha, which exempts them from regulation. Lastly, some laws specifically exclude hookah smoking from otherwise broad smoking restrictions.¹²

The strongest and most efficient solution to these problems is to craft a definition of “smoking” that includes shisha and is flexible enough to adapt to future products. Additionally, any exemptions for cigar bars or retail tobacco stores should be narrowly crafted to avoid allowing hookah bars to qualify.

Youth Access Laws

Under federal law, retailers cannot “sell cigarettes or smokeless tobacco to any person younger than eighteen years of age.”¹³ Since products smoked in hookah pipes are neither cigarettes nor

smokeless tobacco, they are not covered under this law. In fact, some materials smoked in hookahs are not even made from tobacco.¹⁴ The U.S. Food and Drug Administration (FDA) has proposed a regulation that would prohibit the sale of any hookah product derived from tobacco to anyone under the age of 18, but the regulation has not taken effect and would not apply to non-tobacco products smoked in hookah pipes.¹⁵

State, local, and tribal governments could consider passing stronger, more comprehensive youth access laws to include tobacco and other non-tobacco products smoked in hookahs. These laws could include related provisions, such as restrictions on self-service access to hookah paraphernalia. Some jurisdictions are also raising the minimum age to purchase such products to 21.¹⁶

Free Samples

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), the federal law giving the FDA the authority to regulate tobacco products, prohibits the distribution of free samples of “cigarettes, smokeless tobacco or other tobacco products.”¹⁷ However, the FDA has determined that this provision applies only to “cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.”¹⁸ Consequently, federal law does not currently prohibit the distribution of free samples of products smoked in hookah pipes. The FDA has proposed a regulation that would prohibit the distribution of free samples of tobacco products smoked in hookah pipes, but this regulation would not apply to non-tobacco hookah products.¹⁹ State, local, and tribal governments could prohibit the distribution of all free samples of other tobacco products, including hookah tobacco and non-tobacco products intended to be smoked in hookah pipes.

Flavoring

Under the Tobacco Control Act, tobacco companies are prohibited from producing cigarettes containing any characterizing flavor other than tobacco or menthol.²⁰ Because the FDA has not restricted flavors in any other tobacco product, the tobacco smoked in hookah pipes regularly comes in flavors such as fruit, mint, and vanilla.²¹ As a result, hookah smoking has grown in popularity, particularly among the young, who often find the smell, taste, and smoothness of the sweetened tobacco in hookahs more appealing than that in cigarettes.²²

Although the Tobacco Control Act limits the ability of state and local governments to regulate tobacco product standards, states and localities can regulate the sale and distribution of tobacco products.²³ Using this authority, some state and local governments have passed laws that restrict the sale of various flavored tobacco products, including hookah. Providence, Rhode Island,²⁴ and several municipalities in Massachusetts²⁵ have enacted restrictions on the sale of flavored, non-cigarette tobacco products, with exceptions for menthol or tobacco-flavored products. New York City²⁶ has enacted restrictions on the sale of flavored, non-cigarette tobacco products, with exceptions for electronic cigarettes and menthol or tobacco-flavored products. The tobacco industry challenged the New York City and Providence ordinances but both have been upheld by federal appeals courts as valid exercises of local authority to regulate the sale and distribution of tobacco products.²⁷ Additionally, Chicago, Illinois, has passed an ordinance restricting the sale

of tobacco products with any flavor (including menthol) near schools.²⁸ The success of these policies may help support similar state or local laws to prohibit or significantly restrict the sale of flavored tobacco products, including hookah tobacco.

Select Legislation and Policies

Below are examples of smoke-free policies from various state and local jurisdictions that have addressed hookah smoking. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Locality/State	Ordinance/Statute	Definition
Smoke-Free Laws		
<i>Hawaii</i>	HAW. REV. STAT. § 328J-1	“Smoke” or “smoking” means inhaling, exhaling, burning, or carrying any lighted or heated tobacco product or plant product intended for inhalation in any manner or in any form. “Smoking” includes the use of an electronic smoking device.
<i>Illinois</i>	410 ILL. COMP. STAT. § 82/10	“Smoke” or “smoking” means the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment. “Smoke” or “smoking” does not include smoking that is associated with a native recognized religious ceremony, ritual, or activity by American Indians that is in accordance with the federal American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a.
<i>Cheyenne River Sioux Tribe (SD)</i>	Tribal Ordinance No. 75, § 3(F)	“Smoking” of commercial tobacco means inhaling, exhaling, burning, carrying or possessing any lighted or heated commercial tobacco product, including but not limited to cigars, cigarettes, pipe tobacco, hookah pipes, or using any battery operated “Electronic cigarettes” or other gadget oral smoking devices promoted with the purpose of circumventing public anti-smoking laws.
<i>Fargo, North Dakota</i>	Fargo Code, Ch. 23-12-09(15)	“Smoking” means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, in any manner or in any form....
Youth Access Laws		
<i>Hawaii</i>	S.B. 1030 SD1 HD2, 28 th Leg. (Haw. 2015)	Effective January 1, 2016, it shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age.
<i>Minnesota</i>	MINN. STAT. § 609.685, Subd. 1	“Tobacco” means cigarettes and any product containing, made, or derived from tobacco that is

intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, or any component, part, or accessory of a tobacco product.... "Tobacco-related devices" means cigarette papers or pipes for smoking or other devices intentionally designed or intended to be used in a manner which enables the chewing, sniffing, smoking, or inhalation of vapors of tobacco or tobacco products....

Restriction on Free Samples

Providence, Rhode Island

Providence Ord. § 14-303

No person who holds a license issued under this article, or any employee or agent of same, shall ... accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price....

Flavor Restriction

New York, New York

New York City Administrative Code, Tit. 17-713 to 718

“Flavored tobacco product” means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor.... “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. . . . It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.

Chicago, Illinois

Municipal Code of Chicago § 4-64-180

No person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City of Chicago. This subsection does not apply to retail tobacco stores.

Other Helpful Resources

The Public Health Law Center has a [webpage](#) containing information on water pipe usage and associated health harms. [Americans for Nonsmokers’ Rights](#) (ANR) provides a [model smoke-free ordinance](#) with suggested language for addressing hookahs and other issues. ANR also has a [hookah bars webpage](#) with background information and recent news about hookahs, including

new scientific studies. The [Mayo Clinic website](#) addresses some common misconceptions about hookah smoking.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or publichealthlaw@mitchellhamline.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

Last updated: February 2016

Notes

¹ In this publication, “hookah” is used as a general term to describe all types of water pipes. A wide range of water pipe products are available, each with its own health risks. Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS OF HEALTH LAW 407, 408 (2012), <http://publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf>. This publication does not address e-hookahs, which is a variant of an electronic cigarette and would raise different policy questions.

² The information contained in this document is not intended to constitute or replace legal advice.

³ World Health Org., *WHO Study Group on Tobacco Product Regulation, Advisory Note: Waterpipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators* 3 (2005) [hereinafter *WHO Study Group*], http://www.who.int/tobacco/global_interaction/tobreg/Waterpipe%20recommendation_Final.pdf. See also *WHO Fact Sheet: Waterpipe Tobacco Smoking & Health* (2015), http://apps.who.int/iris/bitstream/10665/179523/1/WHO_NMH_PND_15.4_eng.pdf?ua=1.

⁴ Elie Akl et al., *The Effects of Waterpipe Tobacco Smoking on Health Outcomes: A Systematic Review*, 39 INT’L J. OF EPIDEMIOLOGY 834 (2010).

⁵ *WHO Study Group*, *supra* note 3, at 3.

⁶ Sherry Zhou et al., *Secondhand Hookah Smoke: An Occupational Hazard for Hookah Bar Employees*, TOBACCO CONTROL (Jan. 25, 2016) (epub ahead of print).

⁷ Veeranki et al., *Waterpipe Use and Susceptibility to Cigarette Smoking Among Never-Smoking Youth*, 49 AM. J. PREVENTIVE MEDICINE 502 (2015).

⁸ *Id.* at 3-5.

⁹ *Id.*

¹⁰ Arrazola et al., *Tobacco Use Among Middle and High School Students — United States, 2011–2014*, MORBIDITY AND MORTALITY WEEKLY REPORT (2015), 64(14);381-385, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?s_cid=mm6414a3_w. See also Palamar et al., *Hookah Use Among US High School Seniors*, 134 PEDIATRICS 1 (2014), <http://pediatrics.aappublications.org/content/pediatrics/early/2014/07/01/peds.2014-0538.full.pdf>.

¹¹ James Romoser, *No Ban Here: Some Hookah Bars Are Simply Ignoring State's New No-Smoking Law*, WINSTON-SALEM JOURNAL, Jan. 11 2010, <http://www2.journalnow.com/content/2010/jan/11/no-ban-here-some-hookah-bars-are-simply-ignoring-s/news>.

¹² See, e.g., *Instituting Smoke-Free Public Housing*, 80 Fed. Reg. 71,762 (proposed Nov. 17, 2015) (to be codified at 24 C.F.R. pts. 965-66), <http://www.regulations.gov/#!documentDetail;D=HUD-2015-0101->

0001 (excluding hookah smoking from proposed U.S. Department of Housing and Urban Development regulation restricting smoking in public housing); New Orleans, Louisiana, Smoke-Free Air Act, Sec. 66-73(6) (allowing hookah smoking in hookah bars).

¹³ 21 C.F.R. § 1140.14(a) (2010).

¹⁴ See, e.g., *Tobacco Regulation in the West a Boom for Shisha*, TOBACCO J. INT'L (2011) (“ . . . Soex herbal hookah molasses is 100 percent tobacco- and nicotine-free”).

¹⁵ See Tobacco Control Legal Consortium, *The FDA Takes Small Steps to Expand Tobacco Regulation* (2014), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-fda-takesmallstepexpandtobaccoregulation-2014.pdf>.

¹⁶ See, e.g., S.B. 1030 SD1 HD2, 28th Leg. (Haw. 2015). See also Tobacco Control Legal Consortium, *Raising the Minimum Legal Sales Age for Tobacco and Related Products* (2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2015.pdf>.

¹⁷ 21 C.F.R. § 1140.16(d)(1) (2010).

¹⁸ 21 U.S.C. § 387a(b) (2009).

¹⁹ *The FDA Takes Small Steps to Expand Tobacco Regulation*, supra note 15.

²⁰ 21 U.S.C. § 387g(a)(1)(A).

²¹ See, e.g., Melissa D. Blank et al., *Acute Effects of Waterpipe Tobacco Smoking: A Double-Blind, Placebo-Control Study*, 116 DRUG & ALCOHOL DEPENDENCE 102, 103 (2010).

²² Am. Lung Ass'n, *An Emerging Deadly Trend: Waterpipe Tobacco Use* 3 (2007), http://www.lungusa2.org/embargo/slati/Trendalert_Waterpipes.pdf.

²³ 21 U.S.C. § 387p(a)(1).

²⁴ Providence, R.I., Municipal Code art. XV, § 14-309 (2012), <https://www.providenceri.com/efile/2036>.

²⁵ See, e.g., Newton, Mass., Municipal Code art. 1, § 20:26(j); Sherborn, Mass., Municipal Code art. VI, § 8.0; Yarmouth, Mass., Municipal Code, § G.

²⁶ New York, N.Y., Municipal Code, § 17-715, <http://www.nyc.gov/html/doh/downloads/pdf/smoke/flavored-law.pdf>.

²⁷ *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

²⁸ See Tobacco Control Legal Consortium, *Chicago's Regulation of Menthol Flavored Tobacco Products: A Case Study* (2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-casestudy-chicago-menthol-2015.pdf>.