Legal Update

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

The Public Health Law Center (the former Tobacco Law Center and home of the Tobacco Control Legal Consortium) 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 and health advocacy organizations across the country.

The project will be led by Dan Stier, formerly with the Centers for Disease Control and Prevention’s Public Health Law Program, where he served as liaison to the attorneys within state health departments, and former chief legal counsel to Wisconsin’s health and social services department. Also leading the project is former Minnesota Assistant Attorney General Doug Blanke, who directs the Public Health Law Center at William Mitchell College of Law.

The success of life-saving smoke-free air laws, seat belt and helmet laws, immunization laws and other statutes, regulations and policies demonstrates that the use of law is among the most powerful health improvement strategies. It is as essential to public health as surveillance, evaluation and communications. This investment will support public health professionals, legal counsel and advocates in their use of and advocacy for public health laws that make it easier for people to make healthy choices and help all Americans live healthier lives.

Dan Stier, J.D.

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Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption

Our latest Tobacco Control Legal Consortium publication straddles two public health areas: tobacco control and obesity prevention. Titled *Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption*, this law synopsis summarizes lessons learned about the use of tobacco taxation as a legal public health intervention, and describes the potential impact of increased taxes on sugar-sweetened beverages. It also explores parallels between dedicated revenue plans for tobacco taxes and the earmarking of sugar-sweetened beverage tax increases for obesity prevention.

This publication was written by Frank J. Chaloupka, Distinguished Professor of Economics and Public Health at the University of Illinois at Chicago, and Patricia A. Davidson, Senior Staff Attorney at the Public Health Advocacy Institute. You can find this synopsis online at www.publichealthlawcenter.org under Publications and Resources, Law Synopses.

As always, we hope you find our publication a useful and informative resource in your work as a tobacco control professional. We also welcome any feedback you may have about our publications and suggestions on other tobacco and public health law-related topics you would like us to address.

» Browse our eighteen other law synopses on issues ranging from smoking regulation to tobacco sales practices.

Tobacco in the Courts

Ohio Supreme Court to Hear Appeal in Tobacco Control Funds Case

The Ohio Supreme Court recently agreed to hear the appeal in a two-year battle to preserve Ohio tobacco funds and the tobacco control programs they support. Legacy(SM), a national public health foundation devoted to tobacco cessation and prevention, is spearheading a legal challenge to the state’s authority to appropriate more than $200 million in tobacco settlement funds that had been dedicated for state tobacco control programs. The state’s diversion of tobacco control funds resulted in the reduction and elimination of Ohio’s tobacco prevention programs, including the Legal Consortium’s Ohio affiliate, the Tobacco Public Policy Center at Capital University Law School.

The court will review the December 2009 decision of the Ohio Court of Appeals of Franklin County, Tenth Appellate District, which reversed a lower court’s order permanently enjoining the state from confiscating the Tobacco Use Prevention and Control Endowment Fund. The Ohio Supreme Court’s decision could determine whether these funds are used to preserve tobacco prevention and cessation efforts in a state where the adult smoking rate is 20.1 percent, annual smoking-attributable deaths are 18,590, and yet the amount of state funding committed to tobacco control efforts is only $5 of every $100 recommended by the Centers for Disease Control and Prevention.
U.S., Public Health Groups and Big Tobacco Ask Supreme Court to Review Racketeering Case

The U.S. government, six public health groups, and three cigarette manufacturers have separately petitioned the U.S. Supreme Court to review a racketeering verdict against major tobacco companies that was upheld by an appeals court last year. The health groups are intervenors in the case, making them formal parties to the lawsuit. The request for the high court to consider the case stems from a landmark ruling in 2006 in which the cigarette manufacturers were found guilty of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). In that ruling, U.S. District Court Judge Gladys Kessler found that major cigarette manufacturers had violated civil racketeering laws, defrauded the American people by lying for decades about the health risks of smoking and aggressively marketed their deadly products to children. Judge Kessler was constrained in the penalties she could impose on the tobacco companies because of a controversial appeals court ruling that restricted financial remedies under the civil RICO law to “forward-looking” remedies aimed at future racketeering violations. The U.S. Court of Appeals for the District of Columbia Circuit unanimously upheld Judge Kessler’s ruling on May 22, 2009.

In their petitions, both the government and the six public health intervenors are asking the Supreme Court to overturn the part of the U.S. v. Philip Morris decision that restricted the penalties Judge Kessler could order. They argue that RICO is not limited to remedies to restrain future violations, but instead allows courts to fashion remedies that fully redress past violations, including through the disgorgement of billions of dollars in ill-gotten gains by the tobacco industry, as well as equitable remedies such as smoking cessation and public education programs. The tobacco companies (Altria Group Inc.’s Philip Morris USA unit, Lorillard Inc., and R.J. Reynolds Tobacco) are asking the Court to overturn the verdict. If the Supreme Court agrees to take this case, millions – even billions – of dollars in equitable penalties could be at stake.

» Read the Department of Justice’s petition PDF, 142 Kb
» Read the public health intervenors’ petition PDF, 143 Kb
» Read Philip Morris’s petition PDF, 252 Kb
» Read the Tobacco Control Legal Consortium’s series of publications, The Verdict Is In, on this historic Department of Justice litigation

FDA Issues Rule Restricting Access and Marketing of Cigarettes and Smokeless Tobacco Products to Youth

The Food and Drug Administration exercised its new authority under the Family Smoking Prevention and Control Act to pass a final rule curbing access to cigarettes and smokeless tobacco products to children and adolescents in the U.S. The rule, published March 19, 2010, takes effect June 22, 2010, and has the force and effect of law. Among other things, the rule prohibits the sale of cigarettes or smokeless tobacco to people younger than 18, prohibits the sale of cigarette packages with fewer than 20 cigarettes, prohibits distribution of free samples of cigarettes, restricts distribution of free samples of smokeless tobacco, and prohibits tobacco brand name sponsorship of any athletic, musical or other social or cultural events.

» Read the FDA rule restricting access and marketing of tobacco products to youth.

FDA Names Tobacco Products Scientific Advisory Committee

The Food and Drug Administration has taken a critical step in implementing its new authority to regulate tobacco products by appointing a group of highly qualified scientists and health professionals to its Tobacco Products Scientific Advisory Committee. The new panel includes some of the world’s foremost scientific authorities on tobacco products and marketing – experts who will provide advice, information and recommendations to the FDA on a wide range of tobacco-related issues.

The committee’s first meeting on March 30-31, 2010 focused on the impact of the use of menthol in cigarettes on the public health.

» Read the roster of the Tobacco Products Scientific Advisory Committee.
» Visit the website of the FDA Center for Tobacco Products.
» Read the Tobacco Control Legal Consortium’s factsheets about the federal regulation of tobacco.
Micah Berman, New England Law | Boston professor and director of New York State’s new Center for Public Health and Tobacco Policy, is no novice when it comes to tobacco law and policy. From 2005 to 2008, he directed Ohio’s Tobacco Public Policy Center until it was forced to close as a result of the state’s decision to divert funds it had previously committed to the Ohio Tobacco Control and Prevention trust fund. (See earlier article.) A national authority on tobacco control policy, Professor Berman has worked closely over the years with state and local tobacco policy programs, as well as the national Tobacco Control Legal Consortium. Not only does he an expert on tobacco control, public health policy, and health-related litigation, but he is also a member of the National Institutes of Health’s Council of Public Representatives.

Located at New England Law | Boston, the new Center is funded by the New York State Department of Health under a five-year grant. Professor Berman and his small staff will work with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York. Although New York has a successful tobacco control program, smoking continues to kill approximately 25,000 people in the state each year, and 2,500 New Yorkers die of secondhand smoke annually. Some of the Center’s public events will be scheduled in Boston, and webinars for the New York tobacco community may also be made available to the public at large.

Visit the new website for the Center for Public Health and Tobacco Policy.
**Ask A Lawyer**

**Q** “I’m a member of a tobacco control coalition. Could you please give us some basic pointers about lobbying by nonprofit organizations?”

**A** It’s best not to rely on bright-line tests or rules of thumb when analyzing lobbying situations. The laws that govern lobbying activities are highly context-specific. Different rules govern different situations, depending on where you work (for example, government, private business, or nonprofit organization) and who or what you are attempting to influence (for example, federal, state, or local legislation). You may be subject to several different sets of laws at the same time, and they may all use different standards and terminology.

Each lobbying situation should be analyzed on a case-by-case basis, depending on the specific facts at hand. That said, what follows is some general guidance about lobbying by non-profit organizations.

**What’s the difference between advocacy and lobbying?**

Although people often use these terms interchangeably, there are important distinctions between “advocacy” and “lobbying” that nonprofit organizations need to understand.

- “Advocacy” is the promotion of an idea or a cause through education, outreach, and grassroots organizing. Advocacy can be viewed as the act of mobilizing individuals to spur changes in practices, programs, and policies. The missions of nonprofit organizations are often focused on promoting change in some aspect of society, whether by appealing to individuals to change their behavior, private entities to change their policies, or the government to change its laws. Such activities may, but do not always, constitute lobbying.

- “Lobbying” is one specific type of advocacy. Lobbying refers to advocacy efforts aimed at attempting to influence legislation. Essentially, you are lobbying when you ask an elected or appointed official to take a particular position or vote a certain way on a specific piece of pending or proposed legislation.

**How does federal law define “lobbying”?**

Federal tax regulations governing nonprofit organizations divide lobbying communications into two types: direct and grassroots.

- “Direct lobbying” is defined as communications with a legislator that express a view about specific legislation. It includes contacting legislators and executive branch employees or their staff who participate in the formulation of legislation and attempting to influence proposed or pending legislation. It also includes urging members of your coalition to engage in communications with legislators about specific legislation. In addition, if an issue is to be decided through a ballot measure (such as an initiative or referendum), efforts calling on the public to support or oppose such measures are considered direct lobbying, because the voting public in this instance acts as the legislature.
“Grassroots lobbying” is defined as communications with the general public that express a view about specific legislation and include a “call to action” – in other words, appealing to members of the public to contact their legislators about a pending legislative proposal. Note that “calls to action” can be direct (i.e., a communication overtly telling the public to contact their legislator and providing the legislator’s contact information or a mechanism to contact the legislator) or indirect (i.e., a communication listing the recipient’s legislator, the names of legislators voting on a bill, or those undecided or opposed to an organization’s view on specific legislation).

“Specific legislation” is a bill or resolution that has been introduced in a legislative body or proposed legislation that identifies a problem and presents a specific legislative solution to that problem. Note that proposed legislation may qualify as specific legislation, even if it has not been introduced or reduced to writing. Under federal regulations, specific legislation does not include federal agency rulemaking or promulgation of regulations, enforcement of existing laws, executive orders, or litigation. (But state laws may define lobbying as including attempts to influence state agency rulemaking or other administrative action, and your organization may be subject to those laws as well.)

What activities are not considered “lobbying” under federal law?

Federal regulations identify four categories of exceptions to the definitions of direct and grassroots lobbying. A communication that refers to and reflects a view on specific legislation is nevertheless not lobbying if it constitutes: (1) nonpartisan analysis, study, or research; (2) examination and discussion of broad, social, economic, and similar problems; (3) a request for technical advice or assistance; or (4) “self-defense,” such as communications affecting an organization’s legal rights or tax-exempt status. Very specific conditions must be met to qualify for one of these lobbying exemptions.

Can a nonprofit organization engage in lobbying?

Generally, yes. Nonprofit organizations are legally allowed to engage in lobbying activities, subject to certain limits. Federal tax law governs the amount of lobbying in which 501(c)(3) public charities can engage. The Internal Revenue Code sets forth two tests under which public charities can measure their lobbying expenditures: the “section 501(h) expenditure test” and the “insubstantial part test.” Public charities that want to be subject to the more certain expenditure test must take the affirmative step of filing an election; organizations that do not file such an election are subject to the insubstantial part test. Regardless of which test is used, it is important that 501(c)(3) public charities understand that staff preparation and research time spent in anticipation of lobbying also counts as reportable lobbying activity.

Although 501(c)(3) public charities are allowed to lobby under federal law, the analysis does not stop there. Nonprofit organizations may also be subject to restrictions in grants or contracts that fund their activities. A nonprofit organization’s funding sources may restrict lobbying or prohibit it altogether. Further, nonprofit organizations may be subject to state or local lobbying laws. Therefore, it is important that nonprofit organizations not only look at how lobbying is defined under federal tax law, but also understand their obligations to report lobbying expenditures under state and local law and any lobbying restrictions imposed by their funders.

For more information on lobbying by nonprofit organizations, consult the Alliance for Justice’s materials on Nonprofit Advocacy and Lobbying. Please note that the Tobacco Control Legal Consortium provides information and technical assistance on issues related to tobacco and public health, but does not provide legal representation or advice. As always, if you have specific legal questions, we recommend that you consult with an attorney familiar with the laws of your jurisdiction.
Historic International Tobacco Treaty Now Five Years Old

On Feb. 26, the first and only global public health treaty – the World Health Organization’s Framework Convention on Tobacco Control (FCTC) – celebrated its fifth year, marking an important milestone in public health history. The FCTC has had a remarkable global impact, elevating the importance of tobacco control as a global health and political issue, stimulating policy change at the domestic level, and bringing new public and private resources into the field. The treaty requires ratifying countries to enact smoke-free policies, as well as price and tax measures; to regulate the packaging and labeling of tobacco products; and to curb tobacco advertising and sponsorship. To date, 168 out of 195 eligible countries have joined the treaty through ratification or accession, and more are set to join.

Despite this progress, the World Health Organization recently said that governments must do more to protect workers in bars, restaurants and the entertainment sector from harmful tobacco smoke, and also curb tobacco advertising and sponsorship. According to the agency, tobacco continues to kill more than 5 million people a year from cardiovascular disease, cancers, diabetes, and other chronic illnesses, including approximately 600,000 from secondhand smoke. Developing countries are the new frontier for tobacco companies, which often target women and girls, and smoking rates remain high among poor people in affluent countries.

Even among countries that have enacted smoke-free laws, most of the laws cover smoking in government buildings and health-care facilities, rather than in entertainment and hospitality areas, such as bars and restaurants. Fewer than one third of treaty members restrict advertising, promotion and sponsorship of tobacco products.

Countries that have not yet ratified the landmark FCTC treaty include Indonesia, the world’s fourth most-populous country; tobacco-producing Zimbabwe; and the United States.

» Read more about the Framework Convention on Tobacco Control.

Federal Initiative Supports Public Health Prevention and Wellness Strategies

Under the American Recovery and Reinvestment Act of 2009, the U.S. Department of Health and Human Services has launched a major initiative to reduce chronic disease risk factors, prevent/delay chronic disease, and promote wellness in children and adults at state and local levels. The Communities Putting Prevention to Work initiative is focused on implementing evidence-based obesity, nutrition, physical activity and tobacco control strategies through state and local policy and environmental change. Its main goals are to:

1. Increase levels of physical activity;
2. Improve nutrition;
3. Decrease obesity rates; and
4. Decrease smoking prevalence, teen smoking initiation, and exposure to second-hand smoke.

This federal program includes an allotment of nearly $450 million to support intensive community approaches to chronic disease prevention and control in select urban, rural and tribal communities. It provides an additional $120 million to support states and territories in promoting wellness and preventing chronic disease through state-wide policy and environmental change, and in increasing tobacco cessation through expanded quit lines and tobacco cessation media.

The Communities Putting Prevention to Work initiative strongly promotes partnerships among organizations such as local and state health departments and other governmental agencies, health centers, schools, businesses, health care and mental health/substance abuse organizations, faith-based organizations, and other public health organizations. It also supports robust multi-pronged strategies to ensure that communities are successful in policy implementation and able to evaluate the impact of their efforts. This initiative provides exciting public health policy opportunities for communities across the U.S.
Interactive Tobacco Control Policy Map
The Robert Wood Johnson Foundation (RWJF) recently launched a new interactive tobacco control policy map that gives policy-makers and advocates a nationwide and state-by-state picture of progress on key policies, including tobacco taxes, smoke-free workplace laws and funding for tobacco prevention/cessation programs. The map uses data from the Campaign for Tobacco-Free Kids and Americans for Non-Smokers' Rights and will be updated as new information becomes available.

» View the Tobacco Control Policy Map.
» View a video of RWJF’s Public Health Team Leader, Michelle Larkin, introducing the map.

Ground-breaking State Reports Rank Counties on Health Outcomes
A set of 50 state reports is now available online that for the first time rank counties within each state on overall health outcomes, as well as factors that affect health. These factors include adult smoking, obesity, binge drinking, access to primary care providers, rates of high school graduation, rates of violent crime, air pollution levels, liquor store density, unemployment rates and number of children living in poverty. The reports were prepared by the Robert Wood Johnson Foundation and the University of Wisconsin’s Population Health Institute.

» Read County Health Rankings: Mobilizing Action Toward Community Health.

State and Local Policy as a Tool to Complement and Supplement the FDA Law
Leslie Zellers, Legal Director, and Ian McLaughlin, Senior Staff Attorney at the Technical Assistance Legal Center, a project of Public Health Law & Policy, wrote an article in the Hastings Science and Technology Law Journal, Vol. 2, Issue 1 (2010), discussing state and local tobacco control policy options in the wake of the new federal tobacco regulation.

» Read State and Local Policy as a Tool to Complement and Supplement the FDA Law

CDC’s Tobacco Control State Highlights: 2010
The Centers for Disease Control and Prevention just released its 2010 report with state-specific data on proven, high impact tobacco prevention strategies, such as increasing the price of tobacco products; implementing smoke-free policies and norms; reducing tobacco advertising and promotion; controlling access to tobacco products; and promoting and assisting tobacco users to quit. According to the CDC, although smoking rates have declined since the mid 1990s, the nationwide rate has stalled at approximately 20 percent. The report states that the estimated tax burden on American households due to smoking averages $619 annually, and that for every one person who dies of a smoking-related disease, 20 more suffer with at least one serious illness caused by smoking.

» Read the CDC’s Tobacco Control State Highlights: 2010 report.

Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns
The Public Health Law Center recently released case studies of smoke-free campaigns in seven multi-jurisdictional Minnesota regions between 2000 and 2006, prior to Minnesota’s enactment of its statewide smoke-free law in 2007. The research for this ClearWay Minnesota-funded project was published in the American Journal of Medicine in 2008, but this is the first time the seven case studies have been released – both in individual files and in a compiled version.

» Read Going Smoke-free in the Land of Lakes.

New Report Suggests Cigarette Tax Hikes Could Fill State Budget Gaps
According to a new report released by a coalition of public health organizations, cash-strapped states could raise more than $9 billion annually by increasing tobacco taxes by $1 a pack, while also reducing smoking and improving health. A national poll released with the report found that 67 percent of voters support a $1 tobacco tax increase, and prefer that tax over other revenue-raising options.

» Read “Tobacco Taxes: A Win-Win-Win for Cash-Strapped States.”
» Read related materials about tobacco taxation.

NALBOH’s Latest Tobacco Control Publications
The National Association of Local Boards of Health has two new publications available:

- Tobacco Use Prevention and Control Tool Kit: A resource guide to help boards of health make informed decisions about tobacco use prevention and control programs and policies.
- Board of Health Success Stories: Implementing and Supporting Tobacco Control Laws: Stories from the field on how boards of health across the U.S. have successfully implemented and supported local and statewide tobacco control efforts.

» Read more about these publications. (Available for purchase)
Upcoming Events

Promising Practices: Achieving Health and Social Equity in Tobacco Control
April 27-28, 2010
The Health Education Council’s Break Free Alliance and the National African American Tobacco Education Network will hold its national conference in New Orleans, Louisiana, at the Hotel Monteleone. The purpose of the conference is to bring together those seeking to reduce the burden of tobacco use in low socioeconomic status and ethnic minority populations.
» Visit the event website for program and registration information.

Annual Tobacco Documents Workshop
May 21, 2010
The University of California, San Francisco Center for Tobacco Control Research and Education will hold its one-day workshop on using tobacco industry documents for advocacy at the University of California, San Francisco, from 9:30 a.m. to 4 p.m. For more information and to register for the workshop, please contact Jennifer Lau at Jennifer.Lau@ucsf.edu.

World No Tobacco Day
May 31, 2010
The World Health Organization has selected “Gender and Tobacco with an Emphasis on Marketing to Women” as the theme for the 2010 World No Tobacco Day. This annual celebration informs the public of the danger of using tobacco, the business practices of tobacco companies, and what people around the world can do to claim their right to health and healthy living.
» Learn more about this celebration.

NALBOH’s 18th Annual Conference
The National Association of Local Boards of Health will hold its 18th annual conference August 5-7, 2010, in Omaha, Nebraska. The focus of this year’s conference is “The Journey to the Future: Facing Public Health Challenges Today for a Healthier Tomorrow.”
» Visit the event website for conference and registration information.