



**ChangeLab Solutions**

Law & policy innovation for the common good.

# Model California Ordinance Requiring a Tobacco Retailer License

WITH ANNOTATIONS

Revised May 2015 (*Originally issued September 1998*)

Developed by ChangeLab Solutions

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[www.changelabsolutions.org/tobacco-control](http://www.changelabsolutions.org/tobacco-control)

## Introduction

ChangeLab Solutions developed this Model Licensing Ordinance to assist California cities and counties that are interested in establishing a local tobacco retailer licensing program. Communities have adopted tobacco retailer licensing laws to ensure compliance with local business standards, reduce youth access to tobacco, and limit the negative public health effects associated with tobacco use.

The current version of the Model Licensing Ordinance (revised in May 2015) includes changes to the definition of Tobacco Product. In the updated definition, electronic smoking devices, such as electronic cigarettes, are explicitly included in the definition of Tobacco Product. In addition, the definition of Tobacco Product now includes electronic devices with and without nicotine. Other related definitions have also been revised or deleted as a result of our change to the definition of Tobacco Product.

Communities that want to implement a basic licensing ordinance can adopt this model as is. Communities that want to enhance their licensing scheme to include additional provisions that further reduce the availability of tobacco to minors can incorporate ChangeLab Solutions' optional Plug-in provisions, discussed in more detail below.

In some instances, blanks (e.g., [ \_\_\_\_ ] ) prompt you to customize the language of the Model Licensing Ordinance to fit your community's needs. In other cases, the ordinance provides options (e.g., [ choice one / choice two ] ). Some of the ordinance options are followed by comments that describe the legal provisions in more detail. Some degree of customization is always necessary to ensure the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

Communities often have questions regarding whether the Model Licensing Ordinance applies to electronic cigarettes. Our Model Licensing Ordinance uses a definition of Tobacco Product that covers any product that contains tobacco, is derived from tobacco, or contains nicotine, including electronic cigarettes and other emerging products. Tobacco Product also includes electronic cigarettes with and without nicotine. The Model Licensing Ordinance also covers Tobacco Paraphernalia, which includes paraphernalia relating to conventional tobacco products in addition to electronic cigarettes, such as cartridges and liquid contents. Cities and counties that choose to define Tobacco Product and Tobacco Paraphernalia in this manner can require electronic cigarette retailers to comply with the requirements of their local tobacco retailer licensing law.

## Optional Plug-in Provisions

In 2008, ChangeLab Solutions drafted supplementary Plug-in provisions to accompany the model ordinance, any of which can be incorporated into a new ordinance or added to an existing tobacco retailer licensing law. In 2013, all of the optional Plug-in provisions were revised and combined into a single document, “*Plug-in Policy Options*,” which is available on our website: [www.changelabsolutions.org/publications/model-TRL-Ordinance](http://www.changelabsolutions.org/publications/model-TRL-Ordinance).

Since that time, we have released additional Plug-ins, including our *Model California Ordinance: Restricting Sales of Flavored Tobacco Products*, which is both a standalone model ordinance and a Plug-in restricting the sale of flavored tobacco products, and is available on our website: [www.changelabsolutions.org/publications/flavored-tobacco](http://www.changelabsolutions.org/publications/flavored-tobacco). Also available online is *TRL “Plug-in” Policy Options Regulating Price*: [www.changelabsolutions.org/publications/model-TRL-Ordinance](http://www.changelabsolutions.org/publications/model-TRL-Ordinance).

Each Plug-in addresses a different concern and provides a policy option. For example, Plug-ins can be used to control the density or location of tobacco retailers, prohibit certain types of businesses from selling tobacco, and restrict the sales of certain products. Currently, ChangeLab Solutions has a number of Plug-in provisions that (1) limit which retailers are eligible for a license; (2) further restrict the products that tobacco retailers can sell and the purchasers to whom they can sell; and (3) provide additional enforcement options for licensing laws.

Although the Plug-in provisions are intended to be incorporated into the Model Licensing Ordinance, some of them can be enacted independently, with revisions. Adopting a Plug-in provision both as part of a licensing ordinance *and* as a separate ordinance may provide additional enforcement options. Please consult your local government attorney if you want to incorporate any of the Plug-in provisions into your existing licensing ordinance and/or adopt the provisions as a separate ordinance.

The provisions regarding “No Tobacco Product Sampling” have been removed from this version of the Model Licensing Ordinance and are now a standalone ordinance. For a comprehensive strategy to address tobacco sampling in your community, please consult ChangeLab Solutions’ *Model California Ordinance Regulating Tobacco Product Sampling*, which is available on our website: [www.changelabsolutions.org/publications/model-ord-tobacco-sampling](http://www.changelabsolutions.org/publications/model-ord-tobacco-sampling).

## Questions?

If you have questions about the Model Ordinance, please contact ChangeLab Solutions via our website at [www.changelabsolutions.org/tobaccoquestions](http://www.changelabsolutions.org/tobaccoquestions).

**AN ORDINANCE OF THE [ CITY / COUNTY ] OF [ \_\_\_\_ ] REQUIRING  
THE LICENSURE OF TOBACCO RETAILERS AND AMENDING THE [ \_\_\_\_ ]  
MUNICIPAL CODE**

The [ City Council of the City / Board of Supervisors of the County ] of [ \_\_\_\_ ] does ordain  
as follows:

**COMMENT:** This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

**SECTION I. FINDINGS.** The [ City Council of the City / Board of Supervisors of the County ] of [ \_\_\_\_ ] hereby finds and declares as follows:

**COMMENT:** Each of the authorities identified in this model ordinance is available online or from ChangeLab Solutions.

WHEREAS, based in part on the information contained in this section, the [ City Council/ Board of Supervisors ] finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the [ City/ County ]; and

WHEREAS, the [ City Council/ Board of Supervisors ] finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the [ City/County ], to protect the health, safety, and welfare of our residents; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making tobacco use the nation's leading cause of preventable death;<sup>1</sup> and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 8.3 million deaths per year and will be responsible for 10 percent of all deaths worldwide;<sup>2</sup> and

WHEREAS, 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness;<sup>3</sup> and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and tobacco paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308); and
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Cal. Bus. & Prof. Code § 22956) and provides procedures for using minors to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and
- State law prohibits the sale of tobacco products and paraphernalia through self-service displays with limited exceptions for tobacco stores (Cal. Bus. & Prof. Code § 22960, 22962); and
- State law prohibits the sale of “bidis” (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and
- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3); and
- State law prohibits the sale or furnishing of electronic cigarettes to minors (Cal. Health & Safety Code § 119405); and

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

WHEREAS, California courts have affirmed the power of the [ City / County ] to regulate business activity to discourage violations of law. See, e.g., *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985); *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993); *Prime Gas, Inc. v. City of Sacramento*, 184 Cal. App. 4th 697 (2010); and

WHEREAS, despite the state’s [ and City’s / County’s ] efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- In California, 36.8 percent of high school students have smoked a whole cigarette by 14 years of age;<sup>4</sup> and
- In California, 64 percent of adult smokers started by the age of 18;<sup>5</sup> and
- Among middle school students who were current cigarette users in 2004, 70.6 percent were not asked to show proof of age when they purchased or attempted to purchase cigarettes from a store, and 66.4 percent were not refused purchase because of their age;<sup>6</sup> and
- In 2002, youth smoked approximately 540 million packs of cigarettes, generating nearly \$1.2 billion in tobacco industry revenue<sup>7</sup>; and
- [ insert local data if available ] [ ; and ]

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- 7.6 percent of all tobacco retailers were witnessed unlawfully selling to minors in 2013;<sup>8</sup> and
- Among the 14.2 percent of minors nationwide who smoked cigarettes in 2011, 14.0 percent had usually obtained their own cigarettes by buying them in a store or gas station;<sup>9</sup> and
- [ insert local sales rate to minors, if available ] [ ; and ]

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes. For example:

- A review of 33 California communities with strong tobacco retailer licensing ordinances shows that the youth sales rate declined in 31 of these communities after the ordinances were enacted, with an average decrease of 26 percent in the youth sales rate;<sup>10</sup> and
- Over 90 percent of enforcement agencies surveyed in 2000 rated license suspension or revocation after repeated violations as an effective strategy to reduce youth access to tobacco;<sup>11</sup> and
- A study found that odds of daily smoking were reduced by 2% for each 1% increase in merchant compliance with youth access laws;<sup>12</sup> and
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85 percent in 1994 to 43 percent in 1998;<sup>13</sup>

- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 39.8 percent to 4.9 percent in the number of youth able to purchase tobacco;<sup>14</sup> and

WHEREAS, over 100 cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from using tobacco;<sup>15</sup> and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the [ City / County ] to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

WHEREAS, [ City / County ] has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults; and

NOW THEREFORE, it is the intent of the [ City Council / Board of Supervisors ], in enacting this ordinance, to ensure compliance with the business standards and practices of the [ City / County ] and to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein.

**COMMENT:** These findings lay out the policy rationale for the ordinance. They also demonstrate why local licensing laws are not preempted by Penal Code section 308(a), which is the state law that prohibits sales of tobacco products to minors. Courts have found that the Penal Code does not preempt local tobacco retailer licensing ordinances where the ordinance discourages violations of state law and does not attempt to expand the acts that are criminally prohibited by state law. *Prime Gas, Inc. v. City of Sacramento*, 184 Cal. App. 4th 697 (2010); *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993).

It is not necessary to include all the findings in your ordinance, but policymakers may find it helpful to state the ordinance's rationale. The findings should be tailored to the needs of your community.

**SECTION II.** [ Article / Section ] of the [ \_\_\_\_ ] Municipal Code is hereby amended to read as follows:

**Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS.** The following words and phrases, whenever used in this [ article / chapter ], shall have the meanings defined in this section unless the context clearly requires otherwise:

- (a) “Arm’s Length Transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this [ article / chapter ] is not an Arm’s Length Transaction.
- (b) “Department” means [ \_\_\_\_ ], and any agency or Person designated by the Department to enforce or administer the provisions of this [ article / chapter ].

**COMMENT:** This term is used in the ordinance to refer to the city or county agency charged with issuing licenses and enforcing the ordinance. The primary enforcing agency may designate additional agencies to assist in administering and/or enforcing the ordinance.

- (c) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.
- (d) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

**COMMENT:** The Municipal Code likely contains a definition of “person” and, if so, the definition provided here can be omitted.

- (e) “Proprietor” means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to



exist when a Person can or does have or share ultimate control over the day-to-day operations of a business.

**COMMENT:** This term is defined to help prevent sham ownership changes made to evade the license penalty provisions.

- (f) “Self-Service Display” means the open display or storage of Tobacco Products or Tobacco Paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.
- (g) “Tobacco Paraphernalia” means any item designed for the consumption, use, or preparation of Tobacco Products.
- (h) “Tobacco Product” means:
  - (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and
  - (2) any Electronic Smoking Device.
  - (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “tobacco product” includes any component, part, or accessory of a tobacco product, whether or not sold separately. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

**COMMENT:** This definition is written broadly to include nonconventional tobacco and nicotine products, such as electronic cigarettes, nicotine gel, and nicotine lollipops. The definition also includes electronic cigarettes that do not contain nicotine. There is an exception for FDA-approved cessation products intended to benefit public health (e.g., nicotine patches and other nicotine cessation products).

- (i) “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products or Tobacco Paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

Sec. [ \_\_\_\_ (\*2) ]. REQUIREMENTS AND PROHIBITIONS

- (a) TOBACCO RETAILER’S LICENSE REQUIRED. It shall be unlawful for any Person to act as a Tobacco Retailer in the [City / County] without first obtaining and maintaining a valid Tobacco Retailer’s license pursuant to this [ article / chapter ] for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer’s license is a nuisance as a matter of law.

**COMMENT:** This is the primary operative section of the ordinance. It requires a license for each retail location. So, for example, a supermarket chain would need a tobacco retailer license for each store. Note that because this ordinance will most often be adopted as an amendment to an existing business license ordinance, it uses the term “license.” A city or county could choose to label the requirement a “permit,” as the two terms are generally interchangeable. The term used should be consistent with other provisions of the city or county code to which this ordinance is added.

- (b) LAWFUL BUSINESS OPERATION. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this [ article / chapter ] for a licensee, or any of the licensee’s agents or employees, to violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing.

**COMMENT:** This provision makes licensing an effective tool for comprehensively enforcing tobacco control laws. A city or county can use the license suspension provisions to encourage compliance with all tobacco-related laws. This provision also gives a city or county additional enforcement options. The local jurisdiction may enforce the underlying tobacco law—such as the prohibition on selling tobacco to minors (Penal Code section 308 or the STAKE Act). It may also discourage illegal behavior by suspending or revoking a license. Losing the right to sell tobacco for a period of time will likely be a bigger financial deterrent than an occasional fine imposed under other laws.

- (c) DISPLAY OF LICENSE. Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- (d) POSITIVE IDENTIFICATION REQUIRED. No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of [ twenty-seven (27) ] years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the Tobacco Product or Tobacco Paraphernalia.

**COMMENT:** This provision eliminates the excuse that a purchaser arguably looked to be 18 years old. Further, this provision is consistent with federal law, which requires age verification for purchasers who are under age 27.

- (e) **MINIMUM AGE FOR PERSONS SELLING TOBACCO.** No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

**COMMENT:** This provision deliberately omits stating a specific age, such as 18, so the law will not need to be amended if state law changes the legal age for using tobacco.

- (f) **SELF-SERVICE DISPLAYS PROHIBITED.** Tobacco Retailing by means of a Self-Service Display is prohibited.

**COMMENT:** This provision goes beyond state law because the definition of Tobacco Product in this ordinance is broader than state law. For example, this provision would prohibit open displays of electronic cigarettes that are accessible without employee assistance. Further, unlike state law, this provision does not provide an exception for tobacco stores that restrict access to minors. As a result, this provision would prohibit self-service displays of Tobacco Products by all Tobacco Retailers.

- (g) **FALSE AND MISLEADING ADVERTISING PROHIBITED.** A Tobacco Retailer without a valid Tobacco Retailer license or a Proprietor without a valid Tobacco Retailer license, including, for example, a Person whose license has been suspended or revoked:

- (1) Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section [ \_\_\_\_(\*12) ]; and
- (2) Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

**COMMENT:** This subsection provides that a retailer who cannot legally sell Tobacco Products or Tobacco Paraphernalia may not display or advertise such products. To do so would be misleading to consumers (see Business & Professions Code section 17500) and could invite illegal sales. False commercial speech is not protected by the First Amendment.

[ (h) [ \_\_\_\_ ] (The City or County may wish to add other desired requirements that, if violated, will constitute a violation of the license.) ]

**COMMENT:** Please see the optional Plug-in provisions available from ChangeLab Solutions for additional requirements and prohibitions to consider for this section. Adding provisions to this section is a convenient and efficient method of enacting additional tobacco control measures, and a failure to comply with these provisions can be enforced as a violation of the license. In addition to including the Plug-in provisions within a licensing ordinance, some communities can adopt the Plug-in provisions as a separate ordinance to maximize enforceability. Contact ChangeLab Solutions for more information on enforcement options.

Sec. [ \_\_\_\_ ] (\*3). LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE.

- (a) MOBILE VENDING. No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

**COMMENT:** Prohibiting mobile vending aids in enforcement by ensuring that communities can conduct regular inspections at the retailer's permanent place of business.

[ (b) [ \_\_\_\_ ] (The City or County may wish to add other desired limits.) ]

**COMMENT:** Please see the optional Plug-in provisions available from ChangeLab Solutions for further limits on eligibility for a Tobacco Retailer License.

Sec. [ \_\_\_\_ ] (\*4). APPLICATION PROCEDURE.

- (a) Application for a Tobacco Retailer's license shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each Proprietor or an authorized agent thereof.

It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer's license. No Proprietor may rely on the issuance of a license as a determination by the [ City / County ] that the Proprietor has complied with all laws applicable to Tobacco Retailing. A license issued contrary to this [ article /

chapter ], contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section [ \_\_\_\_(\*11)(c) ] of this [ article / chapter ]. Nothing in this [ article / chapter ] shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer's license any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain the following information:

- (1) The name, address, and telephone number of each Proprietor of the business seeking a license.
- (2) The business name, address, and telephone number of the single fixed location for which a license is sought.
- (3) A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this [ article / chapter ]. If an Authorized Address is not supplied, each Proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph (2) above.
- (4) Proof that the location for which a Tobacco Retailer's license is sought has been issued a valid state license for the sale of Tobacco Products, if the Tobacco Retailer sells products that require such license.
- (5) Whether or not any Proprietor or any agent of the Proprietor has admitted violating, or has been found to have violated, this [ article / chapter ] and, if so, the dates and locations of all such violations within the previous five years.

**COMMENT:** This is an important provision because it requires a tobacco retailer to disclose past violations, which will make it easier for administrative and enforcement staff to determine if the application requires closer scrutiny. If the retailer does not disclose past violations and a license is issued, the license can be revoked as soon as the past violations are discovered pursuant to Section [ \_\_\_\_(\*11)(c) ] below.

- (6) Such other information as the Department deems necessary for the administration or enforcement of this [ article / chapter ] as specified on the application form required by this section.

**COMMENT:** This requirement authorizes administrative and enforcement staff to establish application forms that require various types of information to aid effective operation and enforcement of the ordinance. For example, it may be useful to include in the application a statement, perhaps made under penalty of perjury, that the applicant has familiarized himself or herself with the legal requirements applicable to tobacco retailing. It would, of course, be helpful to provide written information about those requirements to those who apply for a license.

- (b) A licensed Tobacco Retailer shall inform the Department in writing of any change in the information submitted on an application for a Tobacco Retailer's license within [ ten (10) ] business days of a change.
- (c) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code section 6250 *et seq.*) or any other applicable law, subject to the laws' exemptions.

**Sec. [ \_\_\_\_ (\*5) ]. ISSUANCE OF LICENSE.** Upon the receipt of a complete application for a Tobacco Retailer's license and the license fee required by this [ article / chapter ], the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (a) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this [ article / chapter ].
- (b) The application seeks authorization for Tobacco Retailing at a location for which this [ article / chapter ] prohibits issuance of Tobacco Retailer licenses. [ However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the [ City / County ] with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction from a Tobacco Retailer that is exempt from all applicable location prohibitions in this [ article / chapter ]. ]

**COMMENT:** This section denies a license to an applicant who wishes to obtain a license in a location where issuance of a license is prohibited. For example, Plug-in provisions that prohibit Tobacco Retailers in certain locations may be inserted in Sec. [ \_\_\_\_ (\*3) ]. See "*Plug-in*" Policy Options, which is available on our website: [www.changelabsolutions.org/publications/model-TRL-Ordinance](http://www.changelabsolutions.org/publications/model-TRL-Ordinance). The second sentence in this section allows a license to be issued to an applicant who purchases a Tobacco

Retailer's business (in a *bona fide* sale) from a Tobacco Retailer who is exempt from all applicable location prohibitions. This effectively allows a Tobacco Retailer who is exempt from a location prohibition to sell the business – along with the privilege of selling Tobacco Products – to a willing a buyer. Adopting this optional provision limits the public health impact of a location prohibition.

- (c) The application seeks authorization for Tobacco Retailing for a Proprietor to whom this [ article / chapter ] prohibits a license to be issued.
- (d) The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this [ article / chapter (e.g., mobile vending)], that is unlawful pursuant to this Code [ including without limitation the [ e.g., zoning ordinance, building code, and business license tax ordinance ] ], or that is unlawful pursuant to any other law.

**COMMENT:** This section makes issuance of licenses a mandatory, ministerial duty of staff unless substantial evidence can be shown supporting one of the four justifications for denial of the license. “Substantial evidence” referred to in Section \*5 is oral or written evidence within the city’s or county’s records that is sufficiently reliable and persuasive that a court will accept it. The usual test is that it must be the kind of evidence upon which responsible people rely in making important business, personal, and other decisions. The technical rules of evidence used for court proceedings do not apply.

Providing evidence of the bases for denial under Section \*5(b) and (c) should be simple and can take the form of a memo from Department staff or from staff members who maintain the records of suspensions and revocations. Proving that an application contains false information will be more difficult and require greater attention to the quality of evidence (i.e., its persuasiveness and reliability). If oral evidence is to be relied upon, such as citizen complaints, it should be reduced to writing, as by a staff memo to the file.

Although a license technically should not be issued if prohibited elsewhere in the city or county code, it is valuable to make note of the other ordinances staff should consider under Section \*5(d). For example, if the code contains a zoning or conditional use permit ordinance affecting tobacco retailers, the licensing ordinance should refer to it directly to assist staff in implementing the ordinance. It is also helpful to cite building codes (to ensure the structure has been permitted) and any business license tax (to ensure that these taxes are also paid).

## Sec. [ \_\_\_\_ (\*6) ]. LICENSE RENEWAL AND EXPIRATION.

- (a) RENEWAL OF LICENSE. A Tobacco Retailer’s license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired. The term of a Tobacco Retailer license is [ one year ]. Each Tobacco Retailer shall apply for

the renewal of his or her Tobacco Retailer's license and submit the license fee no later than [ thirty (30) ] days prior to expiration of the term.

**COMMENT:** The payment term of licenses is a matter for local policy. If this ordinance is adopted as an amendment to a local business license ordinance, many administrative details, such as the term of licenses, may be covered by the existing license ordinance.

(b) EXPIRATION OF LICENSE. A Tobacco Retailer's license that is not timely renewed shall expire at the end of its term. To renew a license not timely renewed pursuant to subparagraph (a), the Proprietor must:

(1) Submit the license fee and application renewal form; and

(2) Submit a signed affidavit affirming that the Proprietor:

(i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or

(ii) has waited the period of time required by Section [ \_\_\_\_(\*12)(a) ] of this [ article / chapter ] for Tobacco Retailing without a valid license before seeking renewal of the license.

Sec. [ \_\_\_\_ (\*7) ]. LICENSES NONTRANSFERABLE.

(a) A Tobacco Retailer's license may not be transferred from one Person to another or from one location to another. A new Tobacco Retailer's license is required whenever a Tobacco Retailing location has a change in Proprietor(s).

**COMMENT:** This provision requires a new license for any change in ownership. For example, if a Proprietor to whom a license has been issued changes business locations, that Proprietor must apply for a new license prior to acting as a Tobacco Retailer at the new location. Or, if the business is sold or otherwise transferred to a new owner, the new owner must apply for a license for that location before acting as a Tobacco Retailer.

(b) Notwithstanding any other provision of this [ article / chapter ], prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:



- (1) the location has been transferred to new Proprietor(s) in an Arm's Length Transaction; and
- (2) the new Proprietor(s) provide the [ City / County ] with clear and convincing evidence that the new Proprietor(s) have acquired or are acquiring the location in an Arm's Length Transaction.

**COMMENT:** This provision prevents sham transfers of ownership from defeating the effect of past violations. For example, if a retailer who is found in violation of the licensing law subsequently transfers ownership to his brother, and if the brother also violates the ordinance, it would be counted as the second violation, not the first.

Sec. [ \_\_\_\_ (\*8) ]. LICENSE CONVEYS A LIMITED, CONDITIONAL PRIVILEGE.

Nothing in this [ article / chapter ] shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location in the [ City / County ] identified on the face of the permit. For example, nothing in this [ article / chapter ] shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code [ including without limitation the [ e.g., zoning ordinance, building codes, and business license tax ordinance ] ], or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Retailer's license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

**COMMENT:** This section makes clear that granting a Tobacco Retailer license does not affect a Tobacco Retailer's status under other local, state, or federal law. For example, obtaining a local license does not transform a business into a "retail or wholesale tobacco shop" in which smoking is allowed pursuant to California Labor Code section 6404.5(d)(4). The reference to zoning, building, and business tax licensing ordinances is intended to allow each community to enforce all of its local regulations and to not allow a Tobacco Retailer to claim that he or she reasonably believed that a Tobacco Retailer's license was all that was needed to do business in a given location. Tailor the list as appropriate.

Sec. [ \_\_\_\_ (\*9) ]. **FEE FOR LICENSE.** The fee to issue or to renew a Tobacco Retailer's license shall be established from time to time by resolution of the [ City Council / Board of Supervisors ]. The fee shall be calculated so as to recover the cost of administration and enforcement of this [ article / chapter ], including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance

checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this [ article / chapter ]. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

**COMMENT:** It is lawful to impose a fee on applicants in an amount sufficient to offset the cost of the entire tobacco retailer enforcement program of the locality. *Sinclair Paint Co. v. Board of Equalization*, 15 Cal. 4th 866 (1997); *Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982 (2012).

The license fee can incorporate the cost of enforcing *all* tobacco laws related to Tobacco Retailing because a violation of any tobacco-related law is a basis for suspension of a license. For example, if the enforcing agency is the police department, a new police officer could be hired for tobacco retailer enforcement activities and a percentage of the cost of the hire could be included in the fee so long as the same percentage of the officer's efforts are used to monitor and enforce license-related tobacco laws.

One approach to setting the fee is to estimate the cost of administration and enforcement of the licensing program. For example, estimate the number of stores in the city or county and how much time it will take a government employee to review applications and issue licenses. The fraction of that employee's time can then be used to calculate the annual cost of license administration, based on the cost of that employee's salary, benefits, and his or her share of administrative overhead, such as rent, insurance, legal advice, etc. As for enforcement costs, calculate, for example, how many yearly inspections are necessary (ideally one to four per retailer) and how much staff time each inspection demands.

It is important to document these calculations for two reasons: to provide support for the fee amount and to refute a legal challenge claiming the fee exceeds the cost of administration and enforcement. *Budgeting for a Local Tobacco Retailer License Fee in California*, available at [www.changelabsolutions.org/publications/trl-fee-calculator-checklist](http://www.changelabsolutions.org/publications/trl-fee-calculator-checklist), is a checklist designed to help jurisdictions think through all the costs of implementing and enforcing a tobacco retailer licensing ordinance. ChangeLab Solutions has also developed an online tobacco retailer license fee calculator, available at [www.changelabsolutions.org/tobacco-control/trl-fee-calculator](http://www.changelabsolutions.org/tobacco-control/trl-fee-calculator). Additional guidance on calculating a fee can also be found in the *Griffith* case cited above.

Note that the city or county can avoid having to calculate staff time by mandating that a set amount of time, e.g., 15 hours a week, shall be spent on license enforcement activity (including enforcing the tobacco laws that give rise to a license violation). New staff could be hired to meet this mandate and the cost could be incorporated into the license fee.

Sec. [ \_\_\_\_ (\*10) ]. COMPLIANCE MONITORING.

- (a) Compliance with this [ article / chapter ] shall be monitored by the Department. In addition, any peace officer may enforce the penal provisions of this [ article / chapter ]. The [ City / County ] may designate any number of additional Persons to monitor compliance with this [ article / chapter ].

**COMMENT:** It is important to designate who will monitor Tobacco Retailers' compliance with the ordinance. Explicitly naming the department responsible for inspections helps ensure that the ordinance will be enforced.

Historically, reducing the sale of Tobacco Products to minors has been the focus of Tobacco Retailer licensing laws, and many communities have focused their inspections on youth access laws. Communities can also conduct inspections to determine compliance with a range of laws relating to the point of sale. For example, a community that has adopted ChangeLab Solutions' optional Plug-in provision establishing a minimum pack size for cigars could inspect Tobacco Retailers for compliance with this provision.

- (b) The Department shall [ (\*see note on counties below) ] inspect each Tobacco Retailer at least [ three (3) ] times per twelve (12) month period. Nothing in this paragraph shall create a right of action in any licensee or other Person against the [ City / County ] or its agents.

**COMMENT:** Providing a minimum number of inspections helps ensure some level of enforcement. One to four inspections per year may be appropriate depending on the number of Tobacco Retailers in a community and the level of funding established through the license fee. Communities with a large number of retailers may wish to inspect a subset of retailers that are selected either randomly or based on past violations and complaints.

\*Note that counties cannot directly mandate that the county sheriff conduct inspections. However, a county can provide dedicated funding to the sheriff that can be used only to conduct inspections. If this is desired, replace the first sentence in subsection (b) with:

*The Department shall be funded to inspect each Tobacco Retailer at least [ three (3) ] times per twelve (12) month period.*

Alternatively, the county could contract for enforcement and inspections. Cities, on the other hand, can directly mandate that a certain city law enforcement agency conduct inspections.

- (c) The [ City / County ] shall not enforce any law establishing a minimum age for Tobacco Product purchases or possession against a Person who otherwise might be

in violation of such law because of the Person's age (hereinafter "Youth Decoy") if the potential violation occurs when:

- (1) the Youth Decoy is participating in an inspection supervised by a peace officer, code enforcement official, or the Person designated by the [ City / County ] to monitor compliance with this [ article / chapter ];
- (2) the Youth Decoy is acting as an agent of a Person designated by the [ City / County ] to monitor compliance with this [ article / chapter ]; or
- (3) the Youth Decoy is participating in an inspection funded in part, either directly or indirectly through subcontracting, by the [ name of city health department / name of county health department ] or the California Department of Health Services.

**COMMENT:** This provision is intended to permit youth to participate in inspections without first obtaining a letter of immunity from the city or county. However, this provision does not provide protection from prosecution by agencies other than the city or county adopting this ordinance. A letter of immunity from the local district attorney is still recommended.

Sec. [ \_\_\_\_ (\*11) ]. SUSPENSION OR REVOCATION OF LICENSE.

- (a) SUSPENSION OR REVOCATION OF LICENSE FOR VIOLATION. In addition to any other penalty authorized by law, a Tobacco Retailer's license shall be suspended or revoked if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this [ article / chapter ] or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in Section [ \_\_\_\_ (\*2) ] above.

**COMMENT:** The entire procedure for suspension of a license is not set forth in this Model Ordinance. The administrative procedure, civil proceeding, or combination of both, should be tailored to the needs of your community and must comply with the basic requirements of due process (notice to retailer and an opportunity to be heard). ChangeLab Solutions can assist in creating a procedure for suspension of licenses that is appropriate for your community.

A plea of “no contest” or “nolo contendere” is usually used by a defendant to prevent having a “guilty” plea used against him in a subsequent civil suit. This provision puts a Tobacco Retailer on notice that even a “no contest” plea can still be used to establish a licensing violation and will result in the suspension of the retailer’s tobacco retailer license. Precedent exists in California state law for considering a “no contest” plea in relation to a license. See, e.g., Business and Professions Code section 5063 regarding CPA licenses. Note that a “no contest” plea can be used only to suspend a license, not to impose any other enforcement provisions provided in the ordinance. If imposing additional enforcement provisions is desired (e.g., imposing a civil fine), the city or county will need to prove that the underlying violation occurred and not rely on the “no contest” plea as conclusive evidence of a violation.

- (1) Upon a finding by the Department of a first violation of this [ article / chapter ] at a location within any [ sixty-month (60) ] period, the license shall be suspended for [ thirty (30) ] days.
- (2) Upon a finding by the Department of a second violation of this [ article / chapter ] at a location within any [ sixty-month (60) ] period, the license shall be suspended for [ ninety (90) ] days.
- (3) Upon a finding by the Department of a third violation of this [ article / chapter ] at a location within any [ sixty-month (60) ] period, the license shall be suspended for [ one (1) ] year.
- (4) Upon a finding by the Department of four or more violations of this [ article / chapter ] at a location within any [ sixty-month (60) ] period, the license shall be revoked.

**COMMENT:** This is the primary provision designating the length of time a Tobacco Retailer is ineligible to sell tobacco products once the retailer’s license is suspended pursuant to subsection (a). Stronger or more lenient penalties may be provided as a matter of local policy. For example, some local ordinances permit first-time offenders to “settle” their way out of a first suspension by instead paying a fine (\$1,000, for example). ChangeLab Solutions has prepared an optional Plug-in provision, which, if incorporated into the Model Ordinance, would establish guidelines for this policy alternative.

By providing mandatory penalties, this model does not provide any discretion to enforcement staff. This lack of discretion makes for a simple ordinance and standardized, even-handed enforcement. If discretion with respect to penalties is desired, the ordinance must state the standard by which that discretion is to be exercised (e.g., financial hardship, history of compliance, etc.). Note, too, that these penalty provisions do not prevent the use of other legal tools, such as criminal

prosecution under Penal Code section 308, enforcement of the Stop Tobacco Access to Kids Enforcement Act (“STAKE Act,” Business and Professions Code sections 22950-22962), or the several judicial remedies discussed below.

Note that if a Tobacco Retail outlet is sold in an Arm’s Length Transaction, then the violations no longer count against the location under the new owner’s license pursuant to Section \*7(b).

- (b) **APPEAL OF SUSPENSION OR REVOCATION.** A decision of the Department to suspend or revoke a license is appealable to [ the name of appellate agency, panel, or person (e.g., police permit board, Board of Supervisors, city manager, or director of the health department) ] and any appeal must be filed in writing with [ the name of the agency, panel, or person to receive the notice (e.g., City Clerk or Clerk of the Board of Supervisors)] within ten days of mailing of the Department’s decision. If such an appeal is timely made, it shall stay enforcement of the appealed action. An appeal to [ the name of appellate agency, panel, or person ] is not available for a revocation made pursuant to subsection (c) below.

**COMMENT:** Some appeal right should be provided to ensure due process and to permit the city or county to correct any errors that may occur in the administrative process. How many levels of appeal to permit, which officer or body should hear the appeal, which officer should receive the notice of appeal, the time limits to set, etc. are local policy questions. Local governments would do well to trigger the 90-day statute of limitations for legal challenges by complying with the notice requirements of California Code of Civil Procedure section 1094.6(f) in making and giving notice of determinations under this ordinance.

- (c) **REVOCATION OF LICENSE WRONGLY ISSUED.** A Tobacco Retailer’s license shall be revoked if the Department finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section [ \_\_\_\_(\*5) ] existed at the time application was made or at any time before the license issued. The decision by the Department shall be the final decision of the [ City / County ]. Such a revocation shall be without prejudice to the filing of a new license application.

Sec. [ \_\_\_\_ (\*12) ]. **TOBACCO RETAILING WITHOUT A VALID LICENSE.**

- (a) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer’s license,

either directly or through the Person's agents or employees, the Person shall be ineligible to apply for, or to be issued, a Tobacco Retailer's license as follows:

- (1) After a first violation of this section at a location within any [ sixty-month (60) ] period, no new license may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until [ thirty (30) ] days have passed from the date of the violation.
- (2) After a second violation of this section at a location within any [ sixty-month (60) ] period, no new license may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until [ ninety (90) ] days have passed from the date of the violation.
- (3) After of a third or subsequent violation of this section at a location within any [ sixty-month (60) ] period, no new license may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until [ five (5) ] years have passed from the date of the violation.

**COMMENT:** This provision prohibits a Person who sells Tobacco or Tobacco Paraphernalia without a valid license from obtaining a license for a set amount of time. It does not apply to a wholly new business at the same site. This ineligibility period is in addition to any other penalty the city or county might pursue, such as the fines set forth in Section \*13.

If a Tobacco Retailing location is sold in an Arm's Length Transaction, then the violations will not count against the location under the new owner's license pursuant to Section \*7(b).

- (b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this section are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for sale or exchange in violation of this [ article / chapter ]. The decision by the Department may be appealed pursuant to the procedures set forth in Section [ \_\_\_\_ (\*11)(c) ]. Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code of Civil



Procedure section 1094.6 or other applicable law has expired without the filing of a lawsuit or, if such a suit is filed, after judgment in that suit becomes final.

**COMMENT:** Seizing and destroying illegally offered products requires additional procedures beyond the normal hearing for license suspension. In part, this is because of the possibility that the true owner of products seized is not the licensee. For example, cigarettes could be sold on a consignment basis (i.e., the store owner sells products owned by someone else in exchange for a portion of the sales price). Such owners must be provided due process before their property is destroyed. An independent administrative hearing regarding the forfeiture of any seized products is recommended.

- (c) For the purposes of the civil remedies provided in this [ article / chapter ]:
- (1) each day on which a Tobacco Product or Tobacco Paraphernalia is offered for sale in violation of this [ article / chapter ]; or
  - (2) each individual retail Tobacco Product and each individual retail item of Tobacco Paraphernalia that is distributed, sold, or offered for sale in violation of this [ article / chapter ];
- shall constitute a separate violation of this [ article / chapter ].

Sec. [ \_\_\_\_ (\*13) ]. ADDITIONAL REMEDIES.

- (a) The remedies provided by this [ article / chapter ] are cumulative and in addition to any other remedies available at law or in equity.

**COMMENT:** The following subsections are designed to offer a variety of options to the drafter and the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in all cases or from case to case. For example, an agency may want to use these alternative enforcement options to address violations that do not directly involve sales to minors, such as self-service displays or failure to post STAKE Act signs. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

- (b) Whenever evidence of a violation of this [ article / chapter ] is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this [ article / chapter ] and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.



**COMMENT:** This provision is designed to eliminate any legal right a defendant might otherwise have to compel a youth decoy to testify or be deposed. If criminal remedies are pursued, constitutional rights of criminal defendants to confront witnesses against them may require a youth decoy to testify.

- (c) Violations of this [ article / chapter ] are subject to a civil action brought by the [ City Prosecutor / District Attorney ] or the [ City Attorney / County Counsel ], punishable by a civil fine not less than [ two hundred fifty dollars (\$250) ] and not exceeding [ one thousand dollars (\$1,000) ] per violation.

**COMMENT:** This provision provides civil fines for violating the licensing ordinance. It requires that the city or county file a traditional civil suit. The fine amounts can be adjusted but cannot exceed \$1,000 per violation. Government Code section 36901.

- (d) Violations of this [ article / chapter ] may, in the discretion of the [ City Prosecutor / District Attorney ], be prosecuted as infractions or misdemeanors when the interests of justice so require.

**COMMENT:** Sometimes called a “wobbler,” this provision affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in county jail). Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

- (e) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [ article / chapter ] shall also constitute a violation of this [ article / chapter ].

**COMMENT:** This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

- (f) Violations of this [ article / chapter ] are hereby declared to be public nuisances.

**COMMENT:** By expressly stating that violations are public nuisances, this provision allows enforcement of the ordinance via the administrative nuisance abatement procedures commonly found in municipal codes. Such a declaration also facilitates injunctive relief (where a court orders that a defendant do certain things or refrain from doing certain things, such as selling tobacco to minors).

- (g) In addition to other remedies provided by this [ article / chapter ] or by other law, any violation of this [ article / chapter ] may be remedied by a civil action brought by the [ City Attorney / County Counsel ], including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

**COMMENT:** It is common to provide that local government lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d 63 (1983).

Think carefully about the nuisance abatement procedure you choose. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.7 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

**SECTION III. SEVERABILITY.** If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [ City Council / Board of Supervisors ] of the [ City / County ] of [ \_\_\_\_ ] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

**COMMENT:** This is standard language. Often this “boilerplate” is found at the end of an ordinance but its location is irrelevant.

- <sup>1</sup> U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*, [www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf](http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf)
- <sup>2</sup> World Health Organization. 2007. *World Health Statistics 2007, Part 1: Ten Statistical Highlights in Global Public Health*, p. 12, [www.who.int/whosis/whostat2007\\_10highlights.pdf](http://www.who.int/whosis/whostat2007_10highlights.pdf)
- <sup>3</sup> U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*, [www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf](http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf)
- <sup>4</sup> Chapman, R. 2012. *State Health Officer's Report on Tobacco Use and Promotion in California*. California Department of Public Health, California Tobacco Control Program, p. 5, [www.cdph.ca.gov/Documents/EMBARGOED%20State%20Health%20Officers%20Report%20on%20Tobacco.pdf](http://www.cdph.ca.gov/Documents/EMBARGOED%20State%20Health%20Officers%20Report%20on%20Tobacco.pdf)
- <sup>5</sup> Chapman, R. 2012. *State Health Officer's Report on Tobacco Use and Promotion in California*. California Department of Public Health, California Tobacco Control Program, p. 6, [www.cdph.ca.gov/Documents/EMBARGOED%20State%20Health%20Officers%20Report%20on%20Tobacco.pdf](http://www.cdph.ca.gov/Documents/EMBARGOED%20State%20Health%20Officers%20Report%20on%20Tobacco.pdf)
- <sup>6</sup> U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. 2005. *Morbidity and Mortality Weekly Report: Tobacco Use, Access & Exposure to Tobacco Among Middle & High School Students, U.S., 2004*. 54(12): 297-301, [www.cdc.gov/mmwr/preview/mmwrhtml/mm5412a1.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5412a1.htm)
- <sup>7</sup> Heaton C, Farrelly MC, Weitzkamp D, et al. 2006. "Youth Smoking Prevention and Tobacco Industry Revenue." *Tobacco Control* 15: 103-106, 2006.
- <sup>8</sup> California Department of Public Health, Tobacco Control Program. 2013. *Youth Tobacco Purchase Survey*, p. 1, [www.cdph.ca.gov/programs/tobacco/Documents/News\\_and\\_Alerts/YTPS\\_Charts\\_2013.pdf](http://www.cdph.ca.gov/programs/tobacco/Documents/News_and_Alerts/YTPS_Charts_2013.pdf)
- <sup>9</sup> U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. 2012. *Morbidity and Mortality Weekly Report: Youth Risk Behavior Surveillance—United States, 2011*, p. 15, [www.cdc.gov/mmwr/pdf/ss/ss6104.pdf](http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf)
- <sup>10</sup> American Lung Association in California, Center for Tobacco Policy & Organizing. 2013. *Tobacco Retail Licensing is Effective*, <http://center4tobaccopolicy.org/wp-content/uploads/2013/09/Tobacco-Retailer-Licensing-is-Effective-September-2013.pdf>
- <sup>11</sup> California Department of Health Services, Tobacco Control Section. 2003. *Final Report, Independent Evaluation of the California Tobacco Control Prevention & Education Program: Waves 1, 2, and 3 (1996-2000)*, p. 110, [www.cdph.ca.gov/programs/tobacco/Documents/WavesComplete.pdf](http://www.cdph.ca.gov/programs/tobacco/Documents/WavesComplete.pdf)
- <sup>12</sup> U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*, [www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/](http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/)
- <sup>13</sup> Ma GX, Shive S and Tracy M. 2001. "The Effects of Licensing and Inspection Enforcement to Reduce Tobacco Sales to Minors in Greater Philadelphia, 1994-1998." *Addictive Behaviors* 26(5): 677-687.
- <sup>14</sup> Forster JL, Murray DM, Wolfson M, et al. 1988. "The Effects of Community Policies to Reduce Youth Access to Tobacco." *American Journal of Public Health* 88(8): 1193-1197.
- <sup>15</sup> American Nonsmokers' Rights Foundation. 2012. *California Municipalities with Laws Restricting Youth Access to Tobacco*, [www.changelabsolutions.org/publications/anrf-list](http://www.changelabsolutions.org/publications/anrf-list).