

Ohio Tobacco Retail License Model Policy

ORDINANCE NO. [_____]

AN ORDINANCE REGULATING THE SALE OF TOBACCO AND NICOTINE PRODUCTS AND RELATED DEVICES

PURPOSE

Responsible [CITY] retailers recognize the health risks associated with nicotine and tobacco use and addiction, especially for young people. However, U.S. Food and Drug Administration (FDA) data indicate that one in five Ohio retailers illegally sell these products to underage buyers. In addition, tobacco retailers may choose to concentrate near schools and in low-income neighborhoods. [CITY] believes that local licensing and regulation of retailers that sell nicotine and tobacco products offers the best opportunity to protect our children and other vulnerable populations while ensuring a level playing field for all retailers.

WHEREAS, commercial tobacco use is the foremost preventable cause of premature death in America, causing a half million deaths annually, and has been responsible for 20.8 million premature deaths in the U.S. since the first U.S. Surgeon General's report on smoking in 1964;

WHEREAS, [CITY] recognizes that young people are particularly susceptible to the addictive properties of tobacco and nicotine, and that youth who begin using tobacco and nicotine products are more likely to become lifelong users, reversing previous progress in the reduction of the overall tobacco use rate;

WHEREAS, [CITY] has the authority to protect life, health, and safety by requiring tobacco retailers within the [CITY] to obtain and maintain a tobacco retailer license ("TRL") as a condition for engaging in the business of selling tobacco products;

WHEREAS, TRL is an evidence-based strategy to reduce initiation to nicotine and tobacco through improved compliance with Minimum Legal Sales Age (MLSA) and other important tobacco sales regulations;

WHEREAS, TRL is a regulatory tool that further enables [CITY] to monitor tobacco sales, fund compliance efforts, and create effective penalty and suspension structures for repeated violations,

WHEREAS, TRL laws in other communities have been effective in reducing the number of illegal tobacco sales to underage purchasers; now, therefore,

BE IT ORDAINED by the Council of the [CITY], State of Ohio:

Note: The "Purpose" section is part of the ordinance and legislative record, but it usually does not become part of the municipal code. In addition to serving an educational purpose and building political and popular support for the ordinance, the findings can also serve a legal purpose. In the event of litigation, a "Purpose" section will provide a record of the legislature's intent and rationale for the policy. Common findings associated with a comprehensive tobacco control policy will identify health concerns and other problems related to use and/or access to commercial tobacco.

Findings specific to your jurisdiction, such as use rates among local teens and young adults, retailer violations rates, and high tobacco retailer density rates within your jurisdiction, will provide further rationale for your policy and should be included to the extent possible.

DEFINITIONS

Compliance Checks - The system the city uses to investigate and ensure that those authorized to sell tobacco products are following and complying with the requirements of this ordinance. Compliance Checks involve the use of persons over the age of 18, but under the age of 21 who purchase or attempt to purchase tobacco products. Compliance checks may also be conducted by the city or other units of government for educational, research, and training purposes or for investigating or enforcing federal, state, or local laws and regulations relating to tobacco products.

Delivery Sale - The sale of any tobacco product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the-counter sales transaction in a licensed retail establishment. Delivery Sale includes but is not limited to the sale of any tobacco product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. Delivery Sale includes delivery by licensees or third parties by any means, including curbside pick-up.

Electronic Smoking Device - Any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration for cessation purposes, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

Moveable Place of Business - Any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and that is not a fixed address or other permanent type of structure licensed for over-the-counter sales transactions.

Person - Any natural person.

Purchaser - Any person who obtains or attempts to obtain a tobacco product.

Sale - Any transfer of goods for money, trade, barter or other consideration.

Self-Service Display - Any display from which customers may select a tobacco product without assistance from the tobacco retailer or the tobacco retailer's agent or employee and without a direct person-to-person transfer between the purchaser and the tobacco retailer or tobacco retailer's agent or employee. A vending machine is a form of self-service display.

Tobacco Product - (1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; (2) any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or (3) any component, part, or accessory of (1) or (2), whether or not any of these contain tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, and pipes. Tobacco product does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration for cessation purposes, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

Tobacco Retail Establishment - Any place of business where tobacco products are available for sale to the general public. The term includes but is not limited to grocery stores, tobacco product shops, kiosks, convenience stores, gasoline service stations, bars, and restaurants.

Tobacco Retailer - Any person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation who owns, operates, or manages any tobacco retail establishment. Tobacco retailer does not mean the non-management employees of any tobacco retail establishment.

Vending Machine - Any mechanical, electric or electronic, or other type of device that dispenses tobacco products upon the insertion of money, tokens, or other form of payment into or onto the device by the person seeking to purchase the tobacco product.

Youth-Oriented Facility - Any facility with residents, customers, visitors, or inhabitants of which 25 percent or more are regularly under the age of 21 or that primarily sells, rents, or offers services or products that are consumed or used primarily by persons under the age of 21. Youth-oriented facility includes, but is not limited to, schools, playgrounds, recreation centers, and parks.

LICENSE REQUIRED

- A. Each tobacco retailer engaging in the sale of tobacco products, at each location in this city, shall secure, and display at all times, a tobacco retail sales license from the [Health Department] before engaging or continuing to engage in such business. No tobacco retailer may sell tobacco products without a valid tobacco retail sales license.

While Ohio law does require retail dealers of cigarettes to obtain a simple tax permit, it does not require retailers of tobacco products (electronic cigarettes, cigars, hookah, etc.) to obtain any kind of privilege permit or license. The state has no systematic way to know who is selling tobacco and nicotine products. A true tobacco retail license (TRL) should also include all tobacco and nicotine products.

- B. An application for a license to sell tobacco products must be made on a form provided by the [Health Department]. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the city deems necessary.

Ohio's Investigative Unit, an arm of the Ohio State Highway Patrol, is the designated enforcement agency. This unit is understandably designed to prioritize enforcement of criminal law. Tobacco sales are a critical health issue and local health departments are better-equipped to work with local retailers to ensure compliance.

- C. The [Health Department] may approve or deny the application for a license, or it may delay action for a reasonable period of time to complete any investigation of the application or the applicant deemed necessary. If the [Health Department] approves the application, the license will be issued to the applicant. If the [Health Department] denies the application, notice of the denial will be given to the applicant along with notice of the applicant's right to appeal the decision.

Licenses may be denied or fail to be renewed if:

1. The applicant is under 21 years of age;
2. The applicant has had prior suspensions or revocation;
3. The applicant fails to provide any of the information required on the licensing application or provision of false or misleading information;
4. The applicant was convicted within past 5 years of any violation of a federal, state, or local law, ordinance provision or other regulation relating to tobacco products;

5. The applicant has had a license to sell tobacco products suspended or revoked within the preceding 12 months of the date of application;
 6. The applicant is prohibited by federal, state, or other local law, ordinance, or other regulation from holding a license; or
 7. The business for which the license is requested is a moveable place of business. Only fixed-location retail establishments are eligible to be licensed.
- D. If a license is mistakenly issued or renewed to a person, the city will revoke the license upon the discovery that the person was ineligible for the license under this ordinance. The city will provide the license holder with notice of the revocation, along with information on the right to appeal.
- E. The fee for a tobacco retail sales license shall be set by the Health Department, who shall have the authority to adjust the fee amount from time to time. Such fees shall be calculated to recover the cost of administration and enforcement of this Ordinance, including, but not limited to, issuing licenses, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators. All fees and interest on proceeds from fees shall be used to exclusively fund the administration and enforcement of this Ordinance.
- [CITY] should establish and insert the desired initial application and license fee amounts prior to enacting this ordinance. As a reference, the city of Cincinnati has a \$300 annual tobacco retailer license fee for applications filed in 2019 and authorizes the city council to adjust the license fee from time to time by resolution.
- F. All licenses issued are valid only on the premises for which the license was issued and only for the person to whom the license was issued. The transfer of any license to another location or person is prohibited.
- G. Such license shall be renewed annually and valid for a period beginning with the date of license to the first day of [Month] next succeeding the date of the license unless sooner revoked as allowed by penalties in this article, or unless the retailer to whom it was issued discontinues business, in either of which cases the holder of the license shall immediately return it to the [Health Department] A license shall not be transferred from one retailer to another or from one location to another.
- H. A tobacco retail sales license cannot be renewed if the tobacco retailer has outstanding fines pursuant to this ordinance.
- I. The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.
- J. No tobacco retail sales license shall be issued or renewed to a tobacco retail sales licensee unless the tobacco retailer signs a form stating that the tobacco retailer has read this ordinance and has provided training to all employees on the sale of tobacco products. Such training shall include information that the sale of tobacco products to persons under 21 years of age is illegal, the types of identification legally acceptable for proof of age, and that sales to persons under 21 years of age shall subject the tobacco retailer to penalties.
- K. Any business found to be selling tobacco products without a license may be issued a No Sales Order for Tobacco Products and be ineligible to receive a tobacco retail license for a period not to exceed three (3) years.

MINIMUM LEGAL SALES AGE FOR TOBACCO PRODUCTS

The sale of any tobacco product to a person under the age of 21 is prohibited.

AGE VERIFICATION

Before distributing any tobacco product, the tobacco retailer or the tobacco retailer's agent or employee shall verify that the purchaser is at least 21 years of age. Each tobacco retailer or tobacco retailer's agent or employee shall examine the purchaser's government-issued photographic identification. No such verification is required for a person over the age of 30. That a purchaser appeared to be 30 years of age or older shall not constitute a defense to a violation of this section.

Identification verification is not required in Ohio state code.

SIGNAGE

No tobacco retailer shall sell, permit the sale of, or furnish tobacco products in the City unless a notice is posted at any location where tobacco products are available for purchase. All notices must be posted in a manner conspicuous to both employees and consumers, unobstructed from view in their entirety, and within six feet of each register where tobacco products are available for purchase. The [Health Department] shall provide this notice, which shall state "NO PERSON UNDER THE AGE OF 21 MAY BE SOLD NICOTINE OR TOBACCO PRODUCTS, INCLUDING ELECTRONIC SMOKING DEVICES." The notice must be at least 14" by 11" and the words on the notice must be legibly printed in a high contrast red color with capitalized letters at least one inch high.

PROHIBITED SALES

No tobacco retailer or their employee or agent shall sell, offer to sell, or furnish tobacco products:

1. By means of any type of vending machine.
2. By means of self-service display. All tobacco products must be stored behind the sales counter, in a locked case, in a storage unit, or in another area not freely
3. By means of delivery sales. All sales of tobacco products must be conducted in person, in a licensed retail establishment, in over-the-counter sales transactions.
4. By any other means, to any other person, or in any other manner or form prohibited by federal, state, or other local law, ordinance provision, or other regulation.

EDUCATION

The [Health Department] shall engage in a continuing public health education program to explain and clarify the purposes and requirements of this ordinance to persons affected by it, and to guide tobacco retailers and their agents or employees in their compliance. The program may include publication of a brochure for affected tobacco retailers explaining the provisions of this ordinance and signage mandated by this this ordinance.

PROXIMITY TO YOUTH-ORIENTED FACILITIES

No license will be granted to any person for a retail establishment location that is within [1,000] feet of a youth-oriented facility, as measured by the shortest line from the property line of the space to be occupied by the proposed licensee to the nearest property line of a youth-oriented facility. This restriction does not apply to an existing license holder who has been licensed to sell tobacco products in that same location for at least one year before the date this section was enacted into law.

RESPONSIBILITY

All licensees are responsible for the actions of their employees regarding the sale, offer to sell, and furnishing of tobacco products on the licensed premises. The sale, offer to sell, or furnishing of any tobacco product by an employee shall be considered an act of the licensee.

ENFORCEMENT

The tobacco retailer shall be subject to at least two unannounced compliance checks per year. The [Health Department/Designated Authority] shall conduct compliance checks by engaging persons between the ages of 18 and 20 to enter the tobacco retail establishment to attempt to purchase tobacco products. Unannounced follow-up compliance checks of all non-compliant tobacco retailers are required within three months of any violation of this ordinance. The results of all compliance checks shall be published by the [Health Department] at least annually and made available to the public upon request.

Ohio does not mandate a minimum number of annual compliance checks for underage sales. In the absence of a mandate, historically few checks are ever done. Without adequate enforcement, noncompliant retailers take full advantage of this loophole, putting both kids and law-abiding retailers at risk.

PENALTIES

- A. Tobacco retailers. Any tobacco retailer found to have violated this ordinance in person, by agent, representative, or employee or in any other way shall be subject to: (1) For a first violation, a fine no less than \$500; (2) For a second violation within a 36 month period, a fine no less than \$750 and the tobacco retailer shall be prohibited from distributing tobacco products for a minimum of seven days; (3) For a third violation within a 36 month period, a fine no less than \$1,000 and the tobacco retailer shall be prohibited from distributing tobacco products for a minimum of 30 days; and (4) For a fourth and any subsequent violation within a 36 month period, a fine no less than \$1,000 and the tobacco retailer shall be prohibited from distributing tobacco products for a period of three years.
- B. Other persons. Any person 21 years of age or older, besides a tobacco retailer or a tobacco retailer's agent or employee, who violates this ordinance is subject to an administrative fine of \$50.
- C. Related violations. A violation of any federal, state, or local law, ordinance provision, or other regulation relating to tobacco products is also a violation of this ordinance. In addition to any other penalty, a tobacco retailer who violates any provision of this ordinance or any federal, state, or local law, ordinance provision, or other regulation relating to tobacco products, shall be subject to penalties stated in this ordinance, including fines and a prohibition of the distribution of tobacco products.
- D. Criminal Prosecution. The City shall not initiate criminal proceedings against any person other than a tobacco retailer for any alleged violation of this ordinance.
- E. Affirmative Defense. It shall be an affirmative defense for any tobacco retailer charged with violation hereof that a purchaser or recipient exhibited to the tobacco retailer, or to the tobacco retailer's agent, employee, or representative that provided or sold the tobacco products, a valid driver's license or other form of federal or state identification showing that the purchaser was at least twenty-one years of age at the time of the alleged offense.
- F. Exceptions.
 1. The penalties in this ordinance do not apply to a person younger than 21 years old who purchases or attempts to purchase tobacco products while under the direct supervision of City staff or their authorized appointees for training, education, research, or enforcement purposes.

2. Nothing in this ordinance prohibits an underage person from handling tobacco products in the course of lawful employment by a tobacco retailer.
3. Nothing in this ordinance prevents the provision of tobacco products to any person as part of an indigenous practice or a lawfully recognized religious, spiritual, or cultural ceremony or practice.

Penalties for violations of selling to underage youth are not clearly defined in Ohio state code. Nor does state code indicate that selling privileges may be suspended or revoked for repeated violations.

RULES AND REGULATIONS

The [Health Department] is hereby authorized to promulgate rules and regulations to carry out the purpose and intent of this Ordinance in order to protect the public health, safety, and welfare.

LIBERAL CONSTRUCTION

This ordinance shall be liberally construed so as to further its purposes.

SEVERABILITY

If any provision of this ordinance, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other provision of this ordinance that can be given effect without the invalid provision or application. Each invalid provision or application of this ordinance is severable.

EFFECTIVE DATE

This ordinance shall take effect on [effective date].

Tobacco Retail License Model Policy Add-Ons

Additional Provisions That May Be Included in A TRL Ordinance:

Maximum number of licenses.

The maximum number of licenses issued by the city at any time is limited to [X]. When the maximum number of licenses has been issued, the city may place persons seeking licensure on a waiting list and allow them to apply on a first-come, first-served basis, as licenses are not renewed or are revoked. A new applicant who has purchased a business location holding a valid city license will be entitled to first priority, provided the new applicant meets all other application requirements in accordance with this ordinance.

Proximity to other licensed retailers.

No license will be granted to any person for a retail establishment location that is within [2,000] feet of any other existing licensed retail establishment, as measured by the shortest line from the property line of the space to be occupied by the applicant for a license to the nearest property line of the existing licensee. This restriction does not apply to an applicant who has been licensed to sell tobacco products in the same location for at least one year before the date this section was enacted into law.

Pharmacies ineligible for licensure.

No existing license will be eligible for renewal to any pharmacy, including any retail establishment that operates or contains an on-site pharmacy, and no pharmacy or any retail establishment that operates an on-site pharmacy will be granted a new license.

Prohibition on sales of flavored products.

No person shall sell or offer for sale any flavored products. For purposes of this section, “Flavored Products” means any tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb, or spice. A public statement or claim, whether express or implied, made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such products, that a product has or produces a taste or smell other than a taste or smell of tobacco will constitute presumptive evidence that the product is a flavored product.