



Tobacco Retail Licensure: Environmental Scan Analysis of 50 United States

Abstract

Purpose: Tobacco use is one of the leading causes of preventable death in the United States. Tobacco retail licensure (TRL) is a key policy lever to end tobacco use and nicotine addiction.

Design: An environmental policy scan was conducted to explore existing tobacco retail licensure state laws and regulation to provide a comprehensive analysis of the tobacco retailer policy landscape in the U.S.

Setting: State regulatory agencies

Participants: American Heart Association (AHA) field staff in every state provided key information in their relationships with relevant agencies.

Method: The AHA policy research team analyzed state legislative and regulatory retail licensure requirements, application of enforcement and compliance practices, and evaluated national trends to better understand the tobacco retailer policy landscape. Data was collected through state agency and legislative websites and internal government relations staff. This analysis informed the development of a database to be used as an internal and external resource to inform policy development and implementation evaluation.

Results: Of the 50 states reviewed, 23 required tobacco retail licensure, while 11 states have no tobacco retail licensure provisions. Additionally, 31 of the 50 states require criminal or monetary penalties for possession, use, or purchase by minors.

Conclusion: Robust TRL can be used to ensure compliance with other tobacco policies, including tobacco minimum legal sales age (MLSA), excise taxes, and flavoring restrictions.

Introduction

Tobacco retail licensing policies are evidence-based strategies that are foundational for implementation of tobacco endgame policies like Tobacco 21 (T21) implementation, excise taxes, and flavoring restrictions; and can address retailer density and retailer location. Assuring comprehensive tobacco retail licensing laws and regulations can effectively reduce tobacco use, particularly among youth.^{2,3} TRL policies require new and existing businesses to maintain a license before they are permitted to sell tobacco products. Implementation of these policies can vary at the state, city, and/or county level with varying license requirements, fees, and penalties. However, some states preempt or prohibit local retailer licensing laws.⁴ For the purpose of this paper, **Table 1** provides a list of terms and definitions used in the environmental scan.

To provide regulatory oversight of tobacco retail licensure, the federal government has implemented two key initiatives – the Substance Abuse and Mental Health Services Administration Synar Regulation and the FDA Tobacco Retail Compliance Inspection Contracts. In 1996, the Substance Abuse and Mental Health Services Administration (SAMSHA) issued the Synar Regulation requiring states to have laws that prohibit the sale and distributions to anyone younger than 18 as a condition for receiving their full Substance Abuse Prevention Treatment Block Grant awards. The Family Smoking Prevention and Tobacco Control Act of 2009 gave the FDA the authority to regulate the manufacture, marketing, and distribution of tobacco products and reduce tobacco use by minors.⁵ The Federal Drug Administration (FDA) developed the FDA Tobacco Retail Compliance Inspection Contracts that authorize the FDA to contract with states and U.S territories to assist in the inspection of tobacco retail establishments. The Substance Abuse and Mental Health Services Administration (SAMHSA) Synar Program and FDA Tobacco Retail Compliance Program are applied together to achieve the common aim of monitoring and reducing youth access to tobacco products.⁵ Synar inspection requirements only include cigarettes, smokeless tobacco, cigarette tobacco, and roll-your-own tobacco. However, states may revise their inspection protocols to include electronic nicotine delivery systems (ENDS) if state law includes the devices as tobacco products.⁶ FDA compliance checks use “undercover buyers” posing as underage customers that are trained to expose illegal tobacco sale practices by retailers.

Most states work in coordination with federal agencies to conduct annual random compliance checks required by the Synar Program, FDA Compliance Checks, or both.

With the introduction of electronic nicotine delivery systems (ENDS) into the tobacco market and the recent implementation of the federal law raising the minimum sale age from 18 to 21 in December 2019, the tobacco retailer environment has been faced with addressing the changing tobacco landscape. Brick-and-mortar retailers have become the dominant seller of e-cigarettes.⁷ The development of vape shops, shops that specialize in the sale of refillable devices and tank systems, are a relatively new entrant to the tobacco retailer environment and few states have included them as establishments that require tobacco retailer licenses.⁷ Tobacco retailers now face the challenge of expanding the scope of regulation beyond traditional tobacco products to ensure comprehensive equitable retailer requirements.

Methodology

Importance of Conducting Environmental Scan

To gain a better understanding of the tobacco retailer regulatory environment in the U.S., the American Heart Association conducted a 50-state scan of state policies, legislation, and regulations related to current tobacco retailers. Findings from our assessment may better inform policy makers and tobacco control and prevention advocates to develop more comprehensive and effective tobacco retailer requirements and regulations.

Environmental Scan Strategy:

The AHA adopted an environmental scan model as a novel approach to identify and assess the landscape of tobacco retail licensure activities at the state level. Utilizing data retrieved through legislative, regulatory, and state level review; this project looked at the following data elements: *license requirement and any associated fees, frequency of renewal, level of compliance checks and subsequent penalty, the degree of penalty application, and enforcement criteria*. Data analysis at the macro and micro levels was used to identify areas for deeper discovery of the retail licensure climate, to aid in the recommended development of stronger policies critical to controlling tobacco use and reduce disparities in how tobacco products are marketed.

Over the course of several months, AHA Advocacy Department staff conducted a comprehensive review of state laws and regulations and synthesized data elements into one concise spreadsheet. The Microsoft Excel spreadsheet was separated by state headers and included the following sub-headers: yes/no license requirement, annual fee amount, renewal year, number of state required compliance check, state penalty for selling tobacco products without license, presence of a business and/or employee penalty, requirement for license suspension or revocation, requirement for recheck upon compliance failure, and criminal or monetary penalties for possession use and purchase (PUP). Each state's information was represented on individual rows. An all-state analysis tab was created for an at-a-glance view with the headers chosen to ensure a consistent review of data across each state. Additional tabs utilized the same section sub-headings but were delineated by AHA defined regions (Midwest, Eastern, Western, Southeastern, and Southwestern) and included more details about specific requirements for licensing fee—whether locality distinctions are applicable or if fees vary by location; renewal time periods—start of fiscal year or calendar year; what products the license applied to—tobacco products, vapor products, alternative nicotine products; required forms; enforcement body; and legislation passage dates, as applicable. . It is the breakdown of data in these tabs that provided the level of granularity used to determine commonalities and evaluate gaps. The environmental assessment was supported by information obtained from an internal survey of AHA's state government relations and field staff and expert guidance from state agency staff where clarification was needed. A two-person verification was conducted on the final data set. Any noted discrepancies were reviewed and corrected by contacting the respective state to verify.

The process of data collection and review focused only at the state level and did not include local community retail licensing policies or the collection of any data on local pre-emption. All information summarized in the spreadsheet was entered into a database located on AHA's website at www.tobaccoretaillicensure.heart.org. The data set will be maintained by AHA staff.

Summary of Findings and Results:

The standards and application of licensure requirement within each state's tobacco sector varied widely. For instance, several state laws interpret licensure requirements differently, as well as the definition and categorization of different tobacco products. As shown in Figure 1, the overall findings indicate wide variances in state usage of licenses, as well as the amount of initial application fee and requirement for renewal. More specifically, some states did not require a licensure fee at all yet other states required fees as high as seven hundred fifty dollars, with frequency of renewal extending as high as five years. Additionally, there is no direct correlation with enforcement and penalty application, with differences in the enforcing agency and/or the regulatory authority. Thereby, indicating differences in civil and criminal penalties structures.

States with TRL: Of the 50 states reviewed, 23 required tobacco retail licenses while 11 states had no tobacco retail license provisions. Of note, and referenced previously, there appears to be a lack of consensus in defining a retail license. Some licenses are applied to distributors and wholesalers, others just to brick and mortar retail establishments.

Licensure Fee and Renewal Requirements: Twenty-two states have fees less than \$100. Six states identified as having no licensure fee, while other state fees were as high as several hundred dollars. The average licensing fee was \$150. Of interest, four states that show TRL requirement do not subsequently require licensure renewal.

Enforcement and Penalties: Oversight and compliance was governed by different state agencies resulting in varying regulatory and statutory authorities, enforcement practices, and governance requirements. Upon review of state enforcement and penalty activities, 31 states require a form of criminal or monetary penalty for purchase, use, and possession (PUP), which are largely concentrated in the Southern and Midwest regions. Also, PUP penalties were shown to be most prevalent in states with Native American populations. The Department of Revenue, Department of Taxation and the Department of Health were the commonly identified agencies for enforcement; however, 4 states use the Office of Alcohol and Control.

Research Gaps and Recommendations

Extensive review of literature and state level tobacco retail licensure policies revealed several common elements that support a strong retailer licensure environment. While tobacco retail licensure is a necessary step toward tobacco endgame efforts, considering all elements—enforcement, compliance, licensure fees, and retailer education -- are needed in a comprehensive approach to establish equitable policy recommendations. **Table 2** outlines key elements to be considered when developing sustainable policies at all levels. Additional resources can be found in **Table 3**.

Enforcement and Compliance:

Enforcement of tobacco retailer requirements can be done at the state or local level, but for many states it is done through the state Department of Health's regulatory control branch. Often the Department of Health has the primary role of enforcement but is supported by other authoritative organizations such as the state Attorney General's office or even the Bureau of Alcohol and Tobacco Control, which may not be housed within the Department of Health. The enforcement body can vary from state to state although effective enforcement practices require a level of collaboration across agencies and within state and local jurisdiction.

Local ordinances and regulations supported by local health departments have been deemed more effective at enforcing compliance in rural communities, where sales of youth tobacco products have increased.⁸ One of the benefits of local level compliance checks is the ability to monitor higher risk TRL retailers who have received violations in the past.

Since the annual license and renewal fee for TRL retailers varies greatly across the states, with some states not requiring a fee for a permit, violation penalties act as the strongest method to ensure compliance with the law. Yet even penalties for employees and employers vary significantly depending upon the occurrence and level of violation—some states have no penalty provisions while others implement steep sanctions and possible jail time. Ideally, fines should apply more to employers than employees. Strong compliance check practices,

including rechecks for violators, serve a dual purpose: they provide a deterrent for underage sales and ensure enforcement of tobacco state statutes and local ordinances. The requirements for conducting compliance checks are not standardized for either the state or local level but with consistency in practice a decrease in sales to youth may be more evident over the long term.⁹ Further, robust compliance checks are a critical component of effective TRL to reduce youth exposure to all tobacco products.

Location & Retailer Density:

High tobacco retail density is associated with higher smoking rates among youth.¹⁰ Unequal distribution of tobacco retailers disproportionately impacts communities historically targeted by the tobacco industry. A 2019 study examining changes in tobacco retailer density in Philadelphia, Pennsylvania after the implementation of tobacco retailer licensing policies that included retailer density and location regulations found an overall reduction in retailer density, particularly among low-income districts, and a significant decrease in the number of tobacco outlets within 500 feet of school property.¹¹ Incorporating tobacco retailer density stipulations into TRL can be an effective strategy for decreasing socioeconomic disparities and reducing the availability of tobacco products, especially to youth and those who have been disproportionately affected by tobacco use.

Licensure Fees:

To administer and enforce licensure, states, cities, and other local jurisdictions incur costs related to successful implementation and enforcement. Fees related to licensure allow state and local governments to recover costs by placing the financial burden on tobacco retailers.¹² Costs related to issuing licensing, supervising, inspecting, educational trainings, and regulating the license holders and their employees should be considered when determining licensure fees. Variations in licensing fee structures reflect the complex tobacco environment of different states and communities. When the retail licensing fees are not substantial enough to cover the costs related to implementing and enforcing the license, states and localities are essentially subsidizing the sale of tobacco.¹²

Retailer Education:

Retailer education is an important element contributing to the success of TRL compliance. Tobacco retailers and their employees are foundational for enforcing tobacco related laws. Adequate financial resources should be dedicated to supporting proper education of retailers and their employees on new age limits, tobacco product classifications, penalties, and other tobacco retailer related laws.

Equity Considerations:

Tobacco retail licensing policies are an effective strategy to reduce tobacco sales to youth, but inequities in tobacco regulation and retailer location can undermine progress. Retailer policies that fail to review or address the possible consequences of inequitable regulation and enforcement place an increased strain on youth, smaller retailers, and communities historically targeted by the tobacco industry. Additionally, enforcement of youth purchase, use, or possession laws further exacerbates disparities among youth, particularly those from historically marginalized and low-income communities.¹³ PUP laws shift responsibility from the industry and retailer to the youth, further stigmatizing and punishing youth who have often been targeted by the tobacco industry to their addictive products.¹⁴ To ensure equitable TRL policy it is important to provide culturally and linguistically sensitive education trainings, incorporate involvement with local communities and small business owners in policy development, equitable enforcement, and considerations to combat the existing inequities present within the community related to tobacco licensure.¹⁴

Conclusion

With the introduction of new tobacco products into the market, some states have adjusted license requirements or revised their definitions of tobacco products to include items such as e-cigarettes or other nicotine vapor products. The most successful retailer licensure regulation often occurs at the local level, however state pre-emption laws can hinder tobacco control and retailer efforts. As of September 2020, 14 states have preemption laws that prohibit localities from passing ordinances related to tobacco product licensure, including over-the-counter and vending machine sales of tobacco.¹⁷ Unfortunately, most states use TRL systems as a method to enforce tobacco tax laws rather than a strategy that could be used to improve

population health.¹⁸ The results of the tobacco retail licensure scan have revealed a lot of variance among licensure requirements and regulations demonstrating a need for stronger enforcement and compliance guidelines at the state and local levels. While this environmental scan focused predominately on state level laws and regulations, successful implementation requires a consolidated approach between state and local practices as well as agency oversight. Additionally, with the rapid growth of vaping and increased rates of marijuana use due to legalization by states, it is important for regulatory entities to consider issues related to the sale of tobacco and marijuana products by different retailers. Future research should explore the proximity or overlap of tobacco retailers to cannabis retailers and the possible synergies and regulatory approach to products that are used to deliver both tobacco and marijuana, especially e-cigarette devices.¹⁶

Data Availability Statement: *Due to continual data collection, as laws and policies are often known to change, we are constantly updating our information to inform our internal database. The data underlying this article will be shared on reasonable request to the corresponding author.*

Table 1: Terms and Definitions.

<u>Glossary of Terms</u>	
Brick and Mortar Retailers	Physical presence of a tobacco establishment.
Cigarette	(1) any roll for smoking containing tobacco wrapped in paper or in any substance other than tobacco leaf; (2) any roll for smoking containing tobacco, wrapped in any substance, weighing four and a half (4.5) pounds per thousand or less except those wrapped entirely in tobacco leaf that do not have a filter; and (3) any roll for smoking containing tobacco wrapped in any substance, however labeled or named, which because of its appearance, size, the type of tobacco used in the filler, or its packaging, pricing, marketing, or labeling, is likely to be offered to, purchased by, or consumed by consumers as a cigarette as defined above
Compliance	A business follows state and federal laws and regulations relevant to its operations
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, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
Enforcement	Measures the extent to which regulations are fairly and effectively implemented.
Flavored tobacco product	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, a tobacco product, including, but not limited to, any taste or smell relating to menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, fruit, dessert, alcoholic beverage, herb, or spice.
Licensing Fee	Fees assessed to applicants for a business-related function.
Modified risk tobacco product (MRTP)	A single specific tobacco product that has been authorized by the Food and Drug Administration under Section 911 of the Federal Food, Drug and Cosmetics Act to be marketed as modified risk based on evidence that the product is expected to pose lower health risks to individual users and the population as a whole compared to traditional tobacco products on the market, during the time period in which it holds this FDA designation, not permanently.
Other Tobacco Products	All other tobacco products not included in the cigarette or e-cigarette tax, including, but not limited to snuff, chewing and smoking tobacco, and cigars.
Possession Use Penalties (PUP)	Laws prohibiting the possession, use, and purchase of tobacco products by minors.
Public Place	An area to which the public is invited or in which the public is permitted, including but not limited to, banks, bars, educational facilities, gambling facilities, health care facilities, hotels and motels, laundromats, parking structures, public transportation vehicles and facilities, reception areas, restaurants, retail food production and marketing establishments, retail service

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	establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms. A private residence is not a “public place” unless it is used as a childcare, adult day care, or health care facility.
Retailer Density	A measure of the number of tobacco outlets in a defined area.
Smoking	Inhaling, exhaling, burning, or any lighted or heated cigar, cigarette, pipe, hookah, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. “Smoking” includes the use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Article.
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 as defined in this section 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 contains 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, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
Tobacco Retailer License	A special license the government issues to businesses that sell tobacco products.

Figure 1:

Tobacco Retail Licensure Environmental Scan Analysis of 50 United States

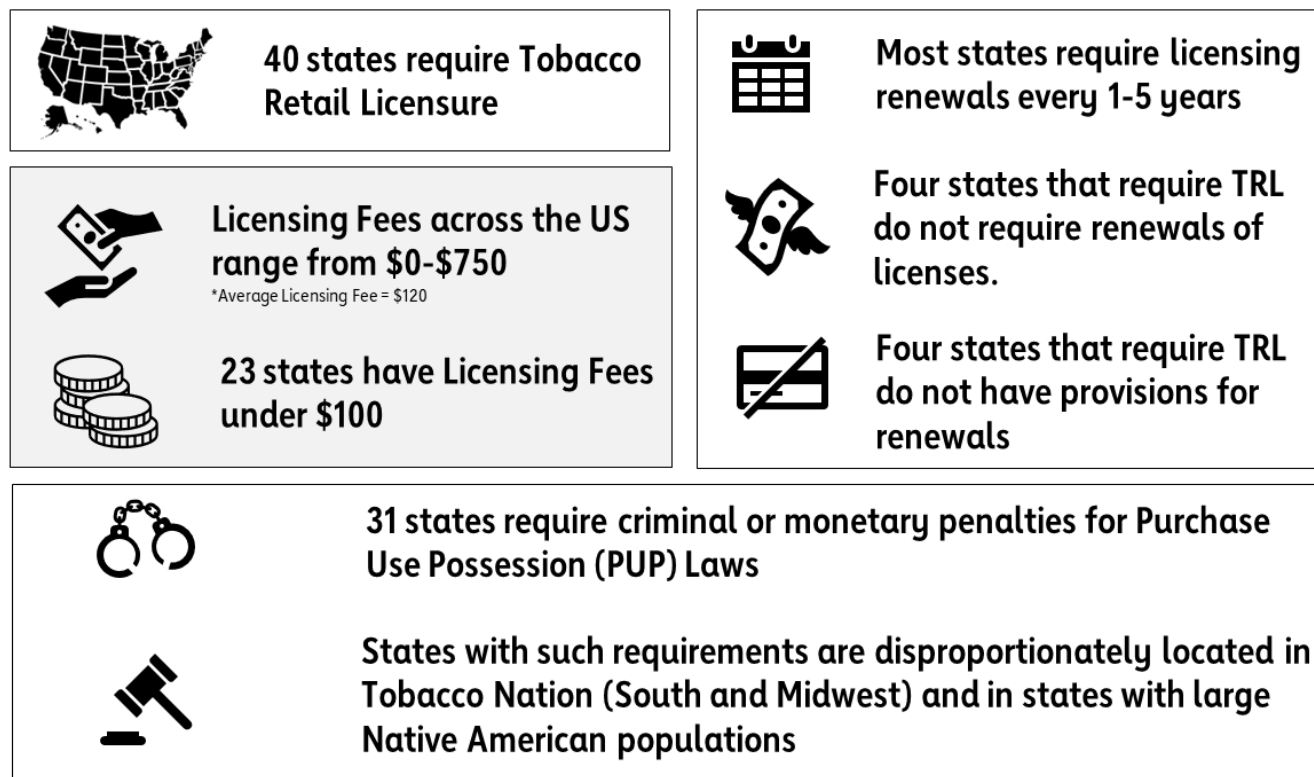


Table 2: Policy Considerations for Best Practices of Tobacco Retail Licensure.

Category	Recommendation
Licensure Requirement	Should include the process by which the tobacco retailer applies, receives, and maintains permission to sell all tobacco products, including electronic nicotine delivery systems. The requirements should also address form types, deadlines, and the annual renewal process.
Licensure Fees	Annual retail license fee, that is paid by all tobacco retailers, which goes towards the enforcement of licensure requirements. The annual fee should be high enough to comprehensively cover the cost of enforcement, education trainings, and operational or administrative costs.
Enforcement and Compliance	Should be a minimum of at least one compliance check for violations of minimum legal sales age per tobacco retail license per year. Violations found through compliance checks should also require a recheck, ideally within 3 months
	Tobacco retail establishments must be required to comply with all federal, state and local laws, and subject to relevant fines or penalties for violations.
	Specific to violations of the minimum legal sales age, penalties should include an escalating monetary penalty paid by the store or business owner.
Penalties	Penalties for sale should be levied on the owner/operator of the retail establishment
	Any violation count must be applied to the store, and not the employee, so that simply firing an employee does not reset the count on compliance violations by a store.
	It is preferred that penalties be levied on the owner/operator and not only the employee; however if a penalty is placed on the employee, it should not include potential jail time and should be lower than the penalty imposed on the retail owner. There should also be a penalty on the retailer for selling tobacco products without a license.

Table 3: Additional Resources.

Organization Name	Resource Link	Description
ASPiRe Center	https://aspirecenter.org/wp-content/uploads/2020/07/TobaccoRetailPolicyTrends_2019.pdf	Provides a general overview of insights and trends from the existing tobacco retail licensure landscape including retail policy activity, barriers and opposition to implementing policies, use of store assessments, and additional resources
	https://aspirecenter.org/tobaccoretailers/	A centralized map of tobacco retailers in 30 cities representing the ASPiRE community with tailored fact sheets, data snapshots, and other resources
Preventing Tobacco Addiction Foundation	https://tobacco21.org/wp-content/uploads/2020/09/TRL-BEST-PRACTICES-GUIDE-PTAF-September-2020-1.pdf	A guide to using tobacco retailer licensing as a method to reduce youth use and promote health equity
ChangeLab Solutions	https://www.changelabsolutions.org/product/tobacco-retailer-licensing	A fact sheet that explains how TRL works, the importance of TRL, and elements to include when developing and implementing strong TRL laws.
Center for Disease Control and Prevention (CDC), Office of Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion	https://www.cdc.gov/statesystem/factsheets/licensure/Licensure.html	Nationwide map of current state or territorial licensing requirements of tobacco retailers
Public Health Law Center at Mitchell Hamline School of Law	https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/retail-policy-and-licensure	Information regarding tobacco control policy options, including licensure

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18. Over 40 states require some form of a tobacco retailer license.
www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2010/index.htm. Most of the state tobacco retailer licensing laws are implemented and enforced by the state agency that enforces tax laws.