

# Federal Tobacco 21:

Considerations for Tribal Communities



American Indian  
Cancer Foundation.



PUBLIC HEALTH  
LAW CENTER  
at Mitchell Hamline School of Law



DEPARTMENT  
OF HEALTH



# FEDERAL TOBACCO 21: Considerations for Tribal Communities

## OVERVIEW

On December 20, 2019, the United States Congress passed legislation amending the Family Smoking Prevention and Tobacco Control Act of 2009 (“TCA”) to increase the minimum legal sales age (“MLSA”) from 18 to 21 for all commercial tobacco products in all U.S. states and territories, and on all Tribal lands.<sup>1</sup> The Tobacco Control Act specifically establishes that its retail sale provisions are applicable and enforced on Tribal lands.<sup>2</sup> This means that, under U.S. federal law, all retailers located on and off of Tribal lands cannot sell commercial tobacco products to people under the age of 21. To comply with the law, these retailers must check the photo identification of anyone who appears to be under the age of 30 and deny sales to anyone under the age of 21. The law took effect immediately after it was passed and applies to all commercial tobacco products made or derived from tobacco, as was recently confirmed by the U.S. Food and Drug Administration (FDA). This includes combustible tobacco products (e.g., cigarettes, cigars) as well as electronic tobacco products (e.g., electronic cigarettes like JUUL, liquid nicotine, and vape mods).

Questions remain as to the FDA’s interpretation of how the new MLSA applies to components, parts, and accessories that do not contain commercial tobacco. The FDA was tasked with proposing amendments to its regulations by June 17, 2020, and although this deadline has come and gone, the FDA has communicated it is actively working on releasing these changes soon.<sup>3</sup> Unfortunately, until the FDA provides this information, the answer to many specific questions remain unknown.

## SPECIFIC TRIBAL CONSIDERATIONS

### Vending Machine Sales

A provision that may be of interest to Tribes is the minimum age to enter an adult-only facility. Under the Tobacco Control Act, vending machines (self-service machines that distribute commercial tobacco products) are only permitted to be operative in adult-only facilities, where those under the age of 18 are not permitted to enter or be present at any time.<sup>4</sup> Depending on whether a Tribal casino has a minimum age limit of 18 or 21, the federal Tobacco 21 (T21) mandate may have implications for facilities where employees under the age of 21 are working in locations where tobacco vending machines are used, or patrons 18 or older are permitted. Since Congress did not specifically mandate whether the T21 change applies to the federal vending machine laws, the FDA must clarify this when it issues rules implementing the new MLSA.

### Compliance Checks

The FDA works with organizations, agencies, and Tribes to establish contracts to conduct compliance checks of tobacco retailers throughout the country. To enforce the federal MLSA, the FDA contractor sends a youth decoy into a retail store to attempt to purchase a commercial tobacco product to ensure the retailer is complying with the federal MLSA. The youth may not lie about their age or use false identification during the sale. Youth decoys that are chosen are intended to dress and look their actual age. If the retailer sells to the youth and/or fails to ask for identification, the retailer is in violation of the TCA and subject to penalties.

The penalties for selling to someone under the age of 21 are established by statute and are amended yearly. The established penalties as of March 2020 are:<sup>5</sup>

Number of Regulation Violations	Civil Money Penalty Amount
1	\$0 (+ the FDA will send a Warning Letter)
2 within a 12-month period	\$297
3 within a 24-month period	\$594
4 within a 24-month period	\$2,381
5 within a 36-month period	\$5,952
6 within a 48-month period	\$11,904

Additionally, “repeat offenders” as defined in the TCA, are subject to a temporary suspension of all commercial tobacco sales, called a “no-tobacco-sales order,” or NTSO.

Tribal governments (or Tribal organizations with Tribal government permission) and state governments can contract with the FDA to perform these inspections on Tribal lands. State governments are only permitted to conduct these checks with permission from the Tribe. Currently, only one Tribe is contracting with the FDA to perform these inspections. In the past, three other Tribes have also established these contracts. If there are no FDA contracts (and thus no retail compliance checks occurring), retailers that are on Tribal lands may not be fully adhering to the federal law and may be risking the health of youth in Tribal communities by allowing those under the federal MLSA to purchase commercial tobacco products.

### **Detrimental Effects of Commercial Tobacco Penalties on Youth**

It is important to note that federal law only penalizes the sale of commercial tobacco products. It clearly does not penalize the purchase of commercial tobacco products. This means that people under the age of 21 who attempt to or actually purchase commercial tobacco products are not penalized under the law. While enforcement of the federal MLSA through compliance checks of commercial tobacco retailers is vital in reducing youth access to harmful commercial tobacco products, there is not substantial evidence to show that penalization of young people is nearly as effective as focusing on the retailers. For this reason, the federal MLSA focus on tobacco retailer sales (and not underage purchase, use, or possession or “PUP”) is considered a best public health policy practice.

While Tribes and State governments are able to establish a penalty structure that punishes young people for purchasing, using, or possessing commercial tobacco products, many do not. More states are removing these regulations likely due to lack of strong evidence to support that penalties discourage tobacco use in adolescents and young adults. Moreover, as commercial tobacco companies target their messaging at Indigenous communities and youth, there is a concern that PUP penalties open the door to selective enforcement against youth from certain racial, ethnic, and socio-economic groups.<sup>6</sup> The U.S. Department of Education and the U.S. Department of Justice recognize the connection “between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems.”<sup>7</sup>

In contrast to focusing on punishment, an approach that provides a supportive and fulfilling environment can serve to reduce addiction and promote recovery.<sup>8</sup> According to the Centers for Disease Control and Prevention, the current (past 30 day use) use of e-cigarettes, cigarettes, and smokeless tobacco actually decreased among middle and high school students from 2019 to 2020. This can likely be attributed both policy and education interventions, such as establishing a national MLSA of 21, exposure to education about the risks of commercial tobacco use, and community support promoting resources related to cessation particularly over the last year.<sup>7</sup> Thus, such supportive practices are encouraged for Tribal communities, as penalty provisions for PUP generally do not benefit the public's health.

While overwhelming evidence has accumulated over the decades documenting the underage use of combustible tobacco products like cigarettes and cigars, the federal government was pushed to move on increasing the MLSA due to the recent youth e-cigarette use epidemic (i.e., "youth vaping epidemic"). From 2011 to 2019, past 30 day use of e-cigarettes by high schoolers significantly increased from 1.5% to 27.5%-- amounting to approximately 4.1 million youth cigarette users nationwide.<sup>9</sup> When analyzed based on specific racial demographics, Native American youth were found to use e-cigarettes at a higher rate compared to their non-Native counterparts.<sup>10</sup> Further, e-cigarette companies have specifically targeted Tribes with harmful and addictive products falsely disguised as smoking cessation products, furthering and perpetuating nicotine addiction in Tribal communities.<sup>11</sup> E-cigarettes are harmful because they contain nicotine derived from commercial tobacco. Using nicotine in adolescence can permanently alter the neurological pathways in the developing brain, making nicotine addiction stronger, longer, and harder to break. Because of this, nicotine can have a significant impact on a youth's mental, emotional, and physical well-being, as well as make youth more susceptible to other addictions.<sup>12</sup>

### **Supplemental Tribal Policies**

One option for Tribes to address the youth vaping epidemic is to consider adopting their own Tribal policies that use their own compliance check system. The changes in the law establish the minimum age of consumers that tobacco retailers can sell to, but the TCA specifically reserves Tribal authority to implement their own laws and to go further than the protections found in federal law.<sup>13</sup> Going further could include adopting policies that prohibit the sale of flavored commercial tobacco products, reducing the density of tobacco retailers, and setting a MLSA higher than 21. A scientific report from the National Academy of Medicine (formerly the Institute of Medicine) concluded that raising the MLSA to 21 would produce a significant decrease in youth use of commercial tobacco products, but even greater increase if the MLSA were raised to 25.<sup>14</sup>

### **Neighboring Jurisdictions**

While the federal government established a MLSA of 21, there have been reports that some retailers in counties and cities that have not also passed state or local laws establishing a MLSA of 21 have continued to sell to those aged 18-20 in violation of federal law. The FDA is in the process of establishing new contracts with contractors to ensure that youth decoys age 18 – 20 years old will be used in federal compliance checks. When those new protocols are established, retailers who sell to anyone under the age of 21 will begin to receive penalties under federal law. It is possible that states will amend laws more quickly than the FDA establishes new compliance check contracts and procedures. As of August 1, 2020, the State of Minnesota has also established a MLSA of 21, joining 32 other states that have passed such laws.<sup>15</sup> While there is no deadline for Tribes, other states, or localities to amend current laws to reflect this change, best practices are for each jurisdiction to make these updates as soon as possible. This clarifies the law both for those who wish to comply, in this case retailers, and those that are enforcing the law.

If a Tribal community wishes to adopt a policy related to the regulation of commercial tobacco the Public Health Law Center is available to support these efforts by providing legal technical assistance, which can include reviewing draft language, or providing examples from other Tribes.

## RESOURCES

✓ **American Indian Cancer Foundation**  
[www.AmericanIndianCancer.org](http://www.AmericanIndianCancer.org)

✓ **Public Health Law Center**  
[www.PublicHealthLawCenter.org](http://www.PublicHealthLawCenter.org)

✓ **Minnesota Department of Health**  
[www.health.state.mn.us](http://www.health.state.mn.us)

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<sup>1</sup> Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, 3123 (2019).

<sup>2</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(1)(G), 123 Stat. 1776, 1830–33 (2009) (codified at 21 U.S.C. § 387a–1 (2018)).

<sup>3</sup> While the COVID-19 pandemic has resulted in the FDA requesting extensions for other deadlines, the FDA has not yet requested any extensions for these Congressional deadlines as of October 2020.

<sup>4</sup> 21 C.F.R. § 1140.16(c)(2019).

<sup>5</sup> While these penalties are the established penalties, retail inspections are not currently being performed because of the COVID-19 pandemic. When the need to reduce exposure passes, the FDA's contractors will continue retail inspections. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 103(q)(2)(A), 123 Stat. 1776, 1839–40 (2009) (codified at 21 U.S.C. § 333 (2018)).

<sup>6</sup> Public Health Law Center, Minnesota City Retail Tobacco Licensing Ordinance (2020). <https://www.publichealthlawcenter.org/sites/default/files/resources/MN-City-Retail-Tobacco-Lic-Ord.pdf>.

<sup>7</sup> Public Health Law Center, Student Commercial Tobacco Use In Schools: Alternate Measures (2019).

<https://www.publichealthlawcenter.org/sites/default/files/resources/Addressing-Student-Commercial-Tobacco-Use-in-Schools-Alternative-Measures-2019.pdf>.

<sup>8</sup> Public Health Law Center, Student Commercial Tobacco Use In Schools: Alternate Measures (2019).

<https://www.publichealthlawcenter.org/sites/default/files/resources/Addressing-Student-Commercial-Tobacco-Use-in-Schools-Alternative-Measures-2019.pdf>.

<sup>9</sup> Teresa W. Wang et al., Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019, C.D.C. Morbidity & Mortality Wkly. Rep. Surveillance Summaries 2019; 68(12), <https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm>.

<sup>10</sup> Satomi Odani, Racial/Ethnic Disparities in Tobacco Product Use Among Middle and High School Students — United States, 2014–2017, C.D.C. Morbidity & Mortality Wkly. Rep. Surveillance Summaries 2018; 67(34), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6734a3.htm>.

<sup>11</sup> Alex Norcia, JUUL Pitched Native American Tribes. It Did Not Go Well, VICE (Jul. 25, 2019), [https://www.vice.com/en\\_us/article/vb999b/juul-pitched-native-american-tribes-it-did-not-go-well](https://www.vice.com/en_us/article/vb999b/juul-pitched-native-american-tribes-it-did-not-go-well). A Congressional report also found that e-cigarette companies had targeted Tribal communities. Staff of H. Comm. on Oversight & Reform, Subcomm. on Econ. & Consumer Policy, 116th Cong., Memorandum: Update on the Subcommittee's E-Cigarette Investigation (Feb. 5, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-02-04.RK%20Memo%20re%20JUUL.pdf>.

<sup>12</sup> U.S. Dep't of Health & Human Servs., Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General 23–29 (2012), [https://www.cdc.gov/tobacco/data\\_statistics/sgr/2012/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/2012/index.htm).

<sup>13</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 916(a)(1), 123 Stat. 1776, 1823–24 (2009) (codified at 21 U.S.C. § 387p (2018)).

<sup>14</sup> Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products, Inst. of Medicine of the Nat'l Acads. (Mar. 2015), [https://www.nap.edu/resource/18997/tobacco\\_minimum\\_age\\_report\\_brief.pdf](https://www.nap.edu/resource/18997/tobacco_minimum_age_report_brief.pdf).

<sup>15</sup> <https://tobacco21.org/>





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