

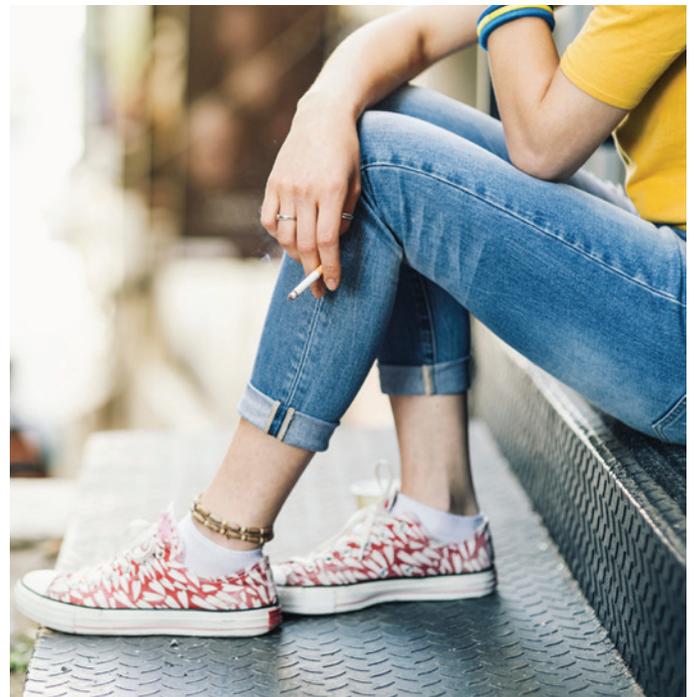


TOBACCO21: TIPS AND TOOLS



The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures.

We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.



Background

All states in the U.S. have laws prohibiting retailers from selling tobacco products to minors. In most states, the minimum legal sales age (MLSA) for tobacco products is 18, and a few states have raised it to 19. In 2015, Hawaii became the first state to raise the MLSA to 21, with the law taking effect on January 1, 2016.² California followed suit soon after, with its MLSA 21 law taking effect on June 9, 2016.³ As of September 2016, at least 200 localities in fourteen states have raised the MLSA to 21,⁴ including New York City, which in November 2013 became the first major city in the U.S. to raise its tobacco sales age to 21.⁵



In 2015, the Institute of Medicine (now the Health and Medicine Division of the National Academies of Sciences, Engineering, and Medicine) (IOM) released a report containing compelling evidence of the significant public health benefits of raising the legal sales age for tobacco products.⁶ The Institute studied existing literature on tobacco use patterns, developmental biology and psychology, health effects of tobacco use, and national youth access laws. It also conducted mathematical modeling to predict the likely public health outcomes of raising the minimum legal sales age for tobacco products to 19, 21 and 25 years. The report found that an increased tobacco sales age helps delay smoking initiation among youth, which leads to lower smoking prevalence rates. In turn, this would significantly increase not just the length, but also the quality, of life across populations. The IOM concluded that raising the minimum sales age today to 21 would result in a 12 percent decrease in tobacco use, approximately 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer, and 4.2 million fewer years of life lost for those born between 2000 and 2019.⁷

In 1992, Congress passed a law (known as the Synar Amendment⁸) which conditioned state eligibility for substance abuse prevention and treatment block grants on the state setting its MLSA for tobacco products no lower than 18 years old. Later that decade, the U.S. Food and Drug Administration (FDA) issued a regulation that established a federal MLSA of 18 years old and required state and local governments to request a waiver to increase the MLSA in their jurisdictions. However, the FDA regulation was invalidated by

the U.S. Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*⁹ In that case, the Court held that the FDA did not have authority to regulate tobacco products. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act,¹⁰ which expressly gave the FDA authority to regulate tobacco products while also delineating the areas where states retained their authority to regulate these products. This 2009 law actually *prohibits* the FDA from establishing a MLSA higher than 18 years old.¹¹ However, it also required the FDA to convene an expert panel to study the public health implications of raising the MLSA and report its findings to Congress by 2014.¹² Regardless of these current limitations on the FDA, all state and many local governments continue to have authority to increase the MLSA for tobacco products.

This guide provides information for state and local policymakers, advocates, and others who are considering raising the MLSA for tobacco and related products as a tobacco control strategy.

Policy Benefits

- **Raising the MLSA would likely lower overall tobacco use rates by reducing and delaying the onset of tobacco use.** Increasing the MLSA for tobacco and related products could promote tobacco control efforts by helping to reduce the number of young people who start using tobacco, as well as by delaying the potential onset of tobacco use by many youth and young adults. Delaying the onset of tobacco use is associated with several long-term health benefits. Not only does it reduce the number of life-years available



for tobacco use (and of course, the longer a person uses tobacco, the higher the risk of developing severe health consequences), but delays in onset are also associated with a higher probability of successful cessation efforts later.¹³ Raising the MLSA also has been linked to reduced smoking prevalence rates, especially among older youth. For example, studies of England's experience when it raised the MLSA for cigarettes from 16 to 18 years of age in late 2007 have shown that this increase was associated with rapid and significant drops in smoking prevalence among 16 and 17 year olds regardless of socioeconomic status, even though *smoking by* (as opposed to *sales to*) this age group was not made illegal.¹⁴

- **Raising the MLSA would likely reduce youth access and usage in particular.** Based on studies showing the effectiveness of youth access laws when they are enforced,¹⁵ increasing the MLSA is likely to be particularly effective in reducing tobacco usage among high school-aged youth by reducing their access to tobacco products. Studies have indicated that older underage youth (i.e. those who are closer to age 18) are more likely to succeed in buying tobacco in stores.¹⁶ Further, high school friends and peers of legal age are an important social source of tobacco for underage youth.¹⁷ Increasing the MLSA would not only make it more difficult for older youth to buy tobacco products, but would reduce the likelihood that a high school student will be of legal age and able to buy tobacco products for younger classmates or underage friends.¹⁸

- **Raising the MLSA would offer a complement to proven tobacco control measures.** While tobacco control strategies such as smoke-free laws have proven highly effective, increasing the MLSA could be a complementary strategy, and in some cases, may be more politically viable.
- **Raising the MLSA would simplify ID checks for retailers.** Finally, an administrative benefit of increasing the MLSA to 21 years old is that it could facilitate compliance efforts in some jurisdictions. State drivers' licenses typically indicate that a driver is under the age of 21 in some way (using format, colors, photo placement, etc.); some jurisdictions also require an indication that the driver may be under 18 years old. In these jurisdictions, making the MLSA for tobacco and alcohol the same could simplify ID checks for retailers.

Policy Considerations

- **Looking at the bigger public policy picture.** Proposals to increase the MLSA for tobacco have generated mixed reactions among public health advocates when such laws are linked with laws that penalize underage youth for purchase, use, or possession of tobacco products (PUP laws).¹⁹ PUP laws have been criticized as not being effective in reducing underage tobacco use.²⁰ Advocates also have argued that they divert focus and energy from addressing irresponsible retailers and tobacco industry behavior, are difficult to enforce, can hinder enforcement efforts of MLSA laws by prohibiting use of underage buyers in compliance check operations,



and open the door to selective enforcement against young persons of color.²¹ Some PUP laws also have been used to preempt local tobacco control authority.²² Thus, advocates have at times expressed doubts that efforts to increase age limits are a good use of limited resources when other measures — such as tax increases, smoke-free laws, and promoting better enforcement of existing tobacco control laws — have proven track records and focus on industry responsibility for marketing an addictive and disease-causing product.²³ While these are important considerations to bear in mind, a developing body of research indicates that raising the sale age could be a useful tobacco control policy option in certain circumstances. Thus, it continues to be one of several reasonable alternatives in the tobacco control tool box.

- **Understanding the larger legal framework.** A comprehensive understanding of the state or local network of tobacco control laws also is important—age restrictions could be implicated in a number of areas, including MLSA provisions, separate PUP laws, provisions restricting the age of sales clerks who can handle tobacco sales, or provisions applying to where vending machines can be located, to name a few. In addition, in some states, the age restriction may be tied to the state’s age-of-majority law. Thus, an understanding of all these laws and how they may relate to each other is necessary.
- **Increasing the legal age for sales as opposed to purchases.** For the states with a MLSA law where it is not politically feasible to repeal PUP laws, one way to address concerns raised by PUP laws would be to increase the age only for legal *sales*, and remove the PUP altogether, or leaving the legal *possession* or *use* age at 18. A potential benefit of this approach is that it could help in the transition for those tobacco users who would be made newly underage but nonetheless are addicted — while they could no longer legally buy tobacco products, at least they would not be subject to civil and/or criminal liability for doing so or for using or possessing tobacco products. On the other hand, in addition to enforcement challenges, it could raise concerns about fairness and equal protection if young teenagers (i.e., under 18 years old) are subject to sanctions for purchasing, using, or possessing tobacco products, but not young adults (i.e. ages 18–20 years old).²⁴ The equal protection arguments are further explained below.



- **Determining how much to increase the MLSA.** At least seven jurisdictions in the U.S. (four states²⁵ and two counties²⁶) set the minimum legal age limit for tobacco purchases or sales at 19 years old. Many cities such as Boston, Chicago, Cleveland, Kansas City, New York and the states of Hawaii and California, have set the MLSA at 21,²⁷ and other jurisdictions have considered similar laws.²⁸ Increasing the MLSA to age 21 would delay or reduce tobacco usage to a greater extent than to age 19, and could have a larger effect in reducing underage access to tobacco through the social source of legal-age peers.
- **Allowing exemptions.** California's MLSA 21 law exempts "active duty military personnel who are 18 years of age or older."²⁹ Also, two New York counties that have raised their MLSA to 19 years of age exempt sales to members of the U.S. military who are 18 years old.³⁰ Although these exemptions may have political appeal, no public health rationale justifies them. Moreover, they complicate enforcement. For example, military identifications typically do not specify whether or not a soldier is "active duty," which poses challenges for enforcing California's law. Finally, exemptions can make a law more susceptible to equal protection challenges because it treats similar people differently. (Incidentally, Hawaii's law has no exemptions.)
- **Restricting the age of sales clerks.** As explained above, friends or peers who work in stores that sell tobacco products are a key social source of tobacco for underage youth.³¹ Thus, to maximize the public health

benefits of increasing the MLSA, the legal minimum age for sales clerks handling tobacco products could also be set or increased. However, this may raise concerns among convenience store owners because they often hire teenagers and young adults to staff their store. Also, such a policy might limit employment opportunities for youth in rural areas, where fewer jobs for young people are available.

- **Implementation considerations.** Increasing the MLSA might also increase the number of addicted users who would become underage as a result of the change in the MLSA. Of course, this concern would be resolved within three years or less, depending on whether the MLSA was increased to 19, 20, or 21 years of age. One way to address these concerns would be to require notices about the MLSA posted in the store to include information about how users can obtain help with cessation efforts. Another approach could be to exempt from the new law those who are 18 and over at the time the law goes into effect, but who would otherwise be underage under the new law — in other words, to "grandfather" in those who were of legal age to buy or use tobacco, but would be made underage by increasing the MLSA. Before Hawaii's statewide MLSA 21 law took effect, Hawaii County passed a law that included such a provision.³² While grandfather provisions might seem feasible, they pose enforcement challenges not present with a universal MLSA 21 law and minimize the law's immediate public health benefits. In addition, communities need to know what effective enforcement



mechanisms exist — or need to be established — for successful implementation, such as a retailer licensing program.

Possible Legal Challenges

While laws that increase the MLSA for tobacco products might encounter challenges brought on other grounds, the more likely challenges would be based on preemption or equal protection grounds.

- **Preemption.** Preemption occurs when a higher level of government (e.g. federal or state) eliminates or limits the authority of a lower level of government (e.g. state or local) to regulate a certain issue. Preemption has important implications for public health issues because of the vital role of state and local authorities in this area.³³ Many of the lessons learned about preemption come from the field of tobacco control. One tobacco industry strategy has been to push for the inclusion of language in state youth access laws that could preempt local government authority to pass smoke-free and other tobacco control laws.³⁴ The Centers for Disease Control and Prevention have identified 22 states with youth access laws that include preemptive language relating to local authority over sales of tobacco products.³⁵ Thus, particularly for local jurisdictions, it would be important to assess whether any state law might limit local authority to increase the MLSA, and if so, what the scope of those limitations might be (e.g. the state law only limits local authority to pass tobacco control laws with criminal sanctions, but local governments can pass laws that only impose

civil sanctions).³⁶ Also, it is important to assess whether a state's age-of-majority law might impliedly preempt an effort to raise the MLSA for tobacco products. Such an argument seems unlikely to prevail in most cases, but each situation would depend on the state law's language and how the law has been interpreted by courts.³⁷

- **Equal Protection.** The concept of equal protection comes from the U.S. Constitution and is included in many state constitutions as well. It embodies the principle that similarly-situated people are entitled to equal treatment by the law — so that if the law treats one person differently from another, there must be a fair and logical basis for the differential treatment.³⁸ Typically, laws relating to age limits are treated with great deference by courts. As long as these laws are rationally related to a legitimate government interest, they are usually upheld.³⁹ Thus, equal protection challenges to state laws increasing the MLSA for alcohol purchases or consumption, for example, have not been successful.⁴⁰ Similarly, laws increasing the MLSA for tobacco products likely would be upheld, given the government's legitimate interest in protecting public health and preventing youth access to tobacco products, and the research indicating that delaying onset of tobacco use among young people has both immediate and long-term public health and safety benefits. Also, avoiding exemptions to the law is another way to minimize the likelihood of successful equal protection challenges.

Select legislation and policies

Below are examples from some jurisdictions that have set the minimum legal age for the sale and/or purchase of tobacco products at 21 years of age.⁴¹ A state or local government considering whether to adapt any language from the following policies should take care to ensure that the language is appropriate, practical, and legal for its jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. We have included these examples simply to illustrate how various jurisdictions have regulated the minimum legal age for sale and/or purchase of tobacco and related products.

Jurisdiction	Ordinance/ Statute	Excerpts from text of law
Hawaii	S.B. 1030 SD1 HD2, 28th Leg. (Haw. 2015)	<p>Section 3. § 709-903. Tobacco products and electronic smoking devices; persons under twenty-one years of age.</p> <p>(1) Effective January 1, 2016, it shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age.</p> <p>(2) Effective January 1, 2016, signs using the statement, "The sale of tobacco products or electronic smoking devices to persons under twenty-one is prohibited," shall be posted on or near any vending machine in letters at least one-half inch high and at or near the point of sale of any other location where tobacco products or electronic smoking devices are sold in letters at least one-half inch high.</p> <p>(3) It shall be unlawful for a person under twenty-one years of age to purchase any tobacco product or electronic smoking device, as those terms are defined in subsection (5)....</p> <p>(4) Any person who violates subsection (1) or (2), or both, shall be fined \$500 for the first offense. Any subsequent offenses shall subject the person to a fine not less than \$500 nor more than \$2,000. Any person under twenty-one years of age who violates subsection (3) shall be fined \$10 for the first offense. Any subsequent offense shall subject the violator to a fine of \$50, no part of which shall be suspended, or the person shall be required to perform not less than forty-eight hours nor more than seventy-two hours of community services during hours when the person is not employed and is not attending school.</p>

continued



Jurisdiction	Ordinance/ Statute	Excerpts from text of law
California	S.B. 7 (Cal. 2015)	<p>Section 4. § 22956. All persons engaging in the retail sale of tobacco products shall check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 21 years of age.</p> <p>Section 5. § 22958(a).</p> <p>(1) An enforcing agency may assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under 21 years of age, any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance ...</p> <p>(2) This subdivision does not apply to the sale, giving, or furnishing of any of the products specified in paragraph (1) to active duty military personnel who are 18 years of age or older. An identification card issued by the United States Armed Forces shall be used as proof of age for this purpose.</p> <p>Section 6. § 22963(a). The sale, distribution, or nonsale distribution of tobacco products directly or indirectly to any person under 21 years of age through the United States Postal Service or through any other public or private postal or package delivery service at locations, including, but not limited to, public mailboxes and mailbox stores, is prohibited.</p> <p>Section 8. § 308(a)(1)(A)(i). Every person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under 21 years of age any tobacco, cigarette, or cigarette papers, or blunt wraps, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action ...</p>

continued



Jurisdiction	Ordinance/ Statute	Excerpts from text of law
Suffolk County, NY	Regulatory Local Laws ch. 792	<p>§792-3 (A)(2) Prohibitions; posting of sign; proof-of-age</p> <p>Sale of tobacco products or herbal cigarettes in such places, other than by a vending machine, shall be made only to an individual who demonstrates, through a valid driver’s license or nondriver’s identification card issued by the Commissioner of Motor Vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States or a provincial government of the dominion of Canada, or a valid passport issued by the United States government or any other country, or an identification card issued by the Armed Forces of the United States, that the individual is at least 21 years of age. Such identification need not be required of any individual who reasonably appears to be at least 27 years of age; provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of a tobacco product or herbal cigarettes to an individual under 21 years of age.</p> <p>§792-9 Sales restrictions</p> <p>No person shall sell or offer for sale e-cigarettes or liquid nicotine within the County of Suffolk to persons under 21 years of age.</p> <p>http://legis.suffolkcountyny.gov/Resos2014/i1039-14.pdf</p>
Dover, MA	Smoking: Sale of Tobacco and Nicotine Delivery Products	<p>§ 220-6 Retail sale of tobacco products.</p> <p>B. No person shall sell tobacco products or nicotine delivery products to any person under the age of 21 years or, not being his/her parent or guardian, give tobacco products or nicotine delivery products to any person under the age of 21.</p> <p>http://ecode360.com/10428043</p>

continued

Jurisdiction	Ordinance/ Statute	Excerpts from text of law
New York City, NY	Local Laws No. 094 (Nov. 19, 2013)	<p>§ 17-706 Sale of cigarettes, tobacco products, or electronic cigarettes to minors and young adults prohibited.</p> <p>a. Any person operating a place of business wherein cigarettes, tobacco products, or electronic cigarettes are sold or offered for sale is prohibited from selling such cigarettes, tobacco products, or electronic cigarettes to individuals under twenty-one years of age. Sale of cigarettes, tobacco products, or electronic cigarettes in such places, shall be made only to an individual who demonstrates, through a driver's license or other photographic identification card issued by a government entity or educational institution, that the individual is at least twenty-one years of age. Such identification need not be required of any individual who reasonably appears to be at least thirty years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of cigarettes, tobacco products, or electronic cigarettes to an individual under twenty-one years of age.</p>



Other helpful resources

The Tobacco Control Legal Consortium's website includes a [Sample Resolution](#) and a [Sample Ordinance for Creating a Minimum Legal Sales Age of 21 for Tobacco Products](#). The website also features several [publications](#) explaining the federal Family Smoking Prevention and Tobacco Control Act of 2009, and its [impact on state and local tobacco control authority](#). The Preventing Tobacco Addiction Foundation supports increasing the MLSA for tobacco and related products to 21 years old. Its website (<http://www.tobacco21.org>) has additional information, including model legislation. The Institute of Medicine's report, along with related materials on raising the legal tobacco sales age, is available on the Health and Medicine Division's [website](#). The CDC has a [fact sheet](#) on youth and tobacco use, with links to other resources and data about youth tobacco access and use. The [Campaign for Tobacco-Free Kids](#) has a [website](#) on the topic and also has created fact sheets with data about [increasing the minimum legal sale age for tobacco products, enforcing Tobacco21 laws, and policy issues relating to laws that penalize underage users](#).

Contact us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@mitchellhamline.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota.

The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not provide legal representation or advice. This document should not be considered legal advice.

Endnotes

- 1 The information contained in this document is not intended to constitute or replace legal advice.
- 2 HAW. REV. STAT. § 709-908 (2015); CAL. BUS. & PROF. CODE § 22958(a)(2) (2016). Other state legislatures that have considered raising the legal minimum age for purchasing tobacco products to 21 include New Jersey, New York, Texas, Utah, and Washington D.C. See, e.g., Lee Davidson, *Lawmakers Seek to Raise Smoking Age to 21*, SALT LAKE TRIB., Nov. 26, 2013, <http://www.sltrib.com/sltrib/politics/56930258-90/age-among-health-limit.html.csp>; *More States Consider Raising Minimum Age for Tobacco Sales*, CONVENIENCE STORE NEWS, May 17, 2013, <http://www.csnews.com/top-story-tobacco-more-states-consider-raising-minimum-age-for-tobacco-sales-63672.html>.
- 3 California Department of Public Health, *New Landmark California Tobacco 21 Law*, <https://www.cdph.ca.gov/programs/tobacco/Pages/Tobacco21.aspx>.
- 4 Campaign for Tobacco-Free Kids, *States and Localities That Have Raised The Minimum Legal Sale Age for Tobacco Products to 21* (last accessed Sept. 19, 2016), http://www.tobaccofreekids.org/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf; see also Tobacco Twenty-One (website containing list of all tobacco communities with MLSA of 21) (last accessed September 20, 2016), <http://tobacco21.org>.
- 5 New York City, N.Y., Local Laws No. 94-2013 (Nov. 19, 2013), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=664290&GUID=4223E26A-7F3F-4B7D-9E3A-0E3F7B850155&Options=ID|Text|&Search=minimum+legal+smoking+age>.
- 6 Institute of Medicine, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products* (2015), http://www.nationalacademies.org/hmd/-/media/Files/Report%20Files/2015/TobaccoMinAge/tobacco_minimum_age_report_brief.pdf.
- 7 *Id.*



- 8 42 U.S.C. § 300x-26 (2011), with implementing regulations found at 45 C.F.R. § 96.130 (2001).
- 9 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
- 10 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.), <http://www.publichealthlawcenter.org/sites/default/files/resources/fda-tobacco-regulation-final-bill.pdf>.
- 11 21 U.S.C. § 387f (d)(3)(A)(ii) (2011).
- 12 Pub. L. No 111-31, Div. A § 104.
- 13 See Tammy Tengs et al., *The Public Health Impact of Changes in Smoking Behavior: Results From the Tobacco Policy Model*, 39 MED. CARE 1131 (Oct. 2001); Sadik Khuder et al., *Age at Smoking Onset and Its Effect on Smoking Cessation*, 24 ADDICT. BEHAV. 673 (Sept.-Oct.1999); and Jiajian Chen & Wayne Millar, *Age of Smoking Initiation: Implications for Quitting*, 9 HEALTH REP. 39 (Spring 1998).
- 14 Christopher Millett et al., *Increasing the Age for the Legal Purchase of Tobacco in England: Impacts on Socio-Economic Disparities in Youth Smoking*, 66 THORAX 862 (Oct. 2011); and Jennifer Fidler & Robert West, *Changes in Smoking Prevalence in 16-17-Year-Old versus Older Adults Following a Rise in Legal Age of Sale: Findings From an English Population Study*, 105 ADDICTION 1984 (Nov. 2010).
- 15 See, e.g., Joseph DiFranza et al., *Enforcement of Underage Sales Laws as a Predictor of Daily Smoking Among Adolescents — A National Study*, 9 BMC PUB. HEALTH, <http://www.biomedcentral.com/content/pdf/1471-2458-9-107.pdf> (April 17, 2009).
- 16 See, e.g., Joseph DiFranza et al., *Youth Access to Tobacco: The Effects of Age, Gender, Vending Machine Locks, and “It’s The Law” Programs*, 86 AM. J. PUB. HEALTH 221 (Feb. 1996).
- 17 Joseph DiFranza & Mardia Coleman, *Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws*, 10 TOBACCO CONTROL 323, 327 (Dec. 2001). One unpublished survey of minor-aged high school students found that 90% of the adults who purchased tobacco products for them were less than 21 years old. *Id.* See also Lorna Schmidt, *Campaign for Tobacco-Free Kids, Where Do Youth Get Their Cigarettes?* (Jan. 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0073.pdf>.
- 18 DiFranza & Coleman, *supra* note 17.
- 19 According to the American Lung Association, 41 states and the District of Columbia have laws that prohibit the purchase or attempted purchase of tobacco products by minors. American Lung Association, *State Legislated Actions on Tobacco Issues Overview Data*, (last accessed September 20, 2016) <http://www.lungusa2.org/slati/slatiOverview.php>. In 1994, the Institute of Medicine issued a report that recommended that the MLSA for tobacco products be set at 18 years of age, and not higher. GROWING UP TOBACCO-FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 223-24 (Barbara S. Lynch & Richard J. Bonnie eds., Inst. of Medicine, 1994).
- 20 See, e.g., Gary Giovino & Melanie Wakefield, *Teen Penalties for Tobacco Possession, Use and Purchase: Evidence and Issues*, 12 TOBACCO CONTROL 6 (2003). *But see* Leonard A. Jason et al., *A Randomized Trial Evaluating Tobacco Possession-Use-Purchase Laws in the USA*, 67 SOC. SCIENCE & MED. 1700 (2008) (indicating that enforcement of underage PUP laws may be effective in reducing youth smoking rates).
- 21 See, e.g., Jessica Guilfoyle, *Campaign for Tobacco Free Kids, Youth Access Laws That Penalize Kids for Purchase, Use, or Possession Are Not Proven To Reduce Tobacco Use* (March 2016), <http://www.tobaccofreekids.org/research/factsheets/pdf/0074.pdf>.
- 22 Robin Hobart, Am. Med. Ass’n, *Preemption: Taking the Local Out of Tobacco Control* (2003).
- 23 See, e.g., Susan Haigh, *Lawmakers Consider Raising Smoking Age from 18 to 21*, BOSTON.COM, Mar. 5, 2007, http://www.boston.com/news/local/connecticut/articles/2007/03/05/lawmakers_consider_raising_smoking_age_from_18_to_21; and John Ritter, *California Considers Raising Smoking Age*, USATODAY.COM, Mar. 3, 2002, <http://www.usatoday.com/news/nation/2002/03/04/smoking.htm>.
- 24 See *Johnson v. State Hearing Examiner’s Office*, 838 P.2d 158 (Wyo. 1992) (invalidating state law which imposed driver’s license suspension penalty on teen drivers 18 years old and younger who are convicted of unrelated alcohol or drug offenses, but which did not impose same penalty on underage 19 and 20 year-olds); *but see* *Allam v. State*, 830 P.2d 435 (Alaska Ct. App. 1992) (noting that law which criminally penalized 18 year olds, but not those 19 and over, for possessing small amounts of marijuana was not irrational because “many 18-year-olds attend high school and regularly associate with students under the age of 18 years ... [and thus] if 18-year-olds were allowed to possess and use marijuana, they would share the drug with other younger students or would at least frequently expose those younger students to drug use”).



- 25 The states are: Alabama (Ala. Code § 28-11-13 (2011)); Alaska (Alaska Stat. §§ 11.76.100 & 11.76.105 (2011)); New Jersey (N.J. Stat. Ann. § 2A:170-51.4 (2011)), and Utah (Utah Code Ann. §§ 76-10-104 et seq. & 76-10-105 (2011)).
- 26 The counties are in New York: Nassau (Nassau County, N.Y., Local Law No. 5-2006 (Apr. 26, 2006)); Onondaga (Onondaga County, N.Y., Local Law No. 2-2009 (Jan. 12, 2009)).
- 27 See, e.g., Campaign for Tobacco-Free Kids, *supra* note 4.
- 28 See, e.g., Susan K. Livio, *Christie's Veto Leaves Smoking Age in N.J. at 19*, [NJ.COM](http://www.nj.com/politics/index.ssf/2016/01/19-and_20-year-olds_may_still_buy_tobacco_e-cigs.html), Jan. 19, 2016, http://www.nj.com/politics/index.ssf/2016/01/19-and_20-year-olds_may_still_buy_tobacco_e-cigs.html.
- 29 Cal. Bus. & Prof. Code § 22958(a)(2) (2016), https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC§ionNum=22958.
- 30 Onondaga County, N.Y., Local Law No. 2-2009 (Jan. 12, 2009); Nassau County, N.Y., Local Law No. 5-2006 (Apr. 26, 2006).
- 31 DiFranza & Coleman, *supra* note 17.
- 32 Leila Fujimori, *Big Island Raises Legal Age for Tobacco Sales*, HONOLULU STAR-ADVERTISER, July 1, 2014, <http://health.hawaii.gov/tobacco/files/2014/01/BigIs21.pdf>.
- 33 The Public Health Law Center's website (<http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health>) has more information about preemption as well as resources for understanding how it works and how it can impact public health policy development.
- 34 In the early and mid-1990s, tobacco industry lobbyists actively fostered a false belief that the Synar Amendment and its regulations required broad preemptive clauses be included in state youth access laws. Hobart, *supra* note 22, at 7.
- 35 CDC, U.S. Dep't of Health and Human Services, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access — United States, 2000–2010*, 60 Morbidity & Mortality Weekly Rep. 1124 (August 26, 2011), <http://www.cdc.gov/mmwr/pdf/wk/mm6033.pdf>.
- 36 See, e.g., Prime Gas, Inc. v. City of Sacramento, 184 Cal. App.4th 697 (Cal. Ct. App. 2010).
- 37 See, e.g., Burnett v. San Francisco Police Dep't, 36 Cal. App.4th 1177, 1182-1185 (Cal. Ct. App. 1995) (rejecting argument that California's age of majority law expressly or impliedly preempted city ordinance restricting access to cabarets to people 21 years old and up); and Allam v. Alaska, 830 P.2d 435, 438 (Alaska Ct. App. 1992) (noting that "[t] here is no legal requirement that the same age of majority apply to all activities and circumstances").
- 38 See, e.g., City of Cleburne v. Cleburne Living Ctr, 473 U.S. 432 (U.S. 1985).
- 39 See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (U.S. 1991) (holding that Missouri constitutional provision requiring most state judges to retire by age of 70 did not violate Equal Protection); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (U.S. 1976) (upholding state law requiring uniformed police officers to retire at age 50); Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990) (upholding Missouri's minimum age requirement of 24 years old for state legislators); Manuel v. State, 692 So. 2d 320, 340 (La. 1996) (reversing original decision on rehearing) (upholding state law raising minimum drinking age to 21); and Maine v. Dube, 409 A.2d 1102 (Me. 1979) (upholding state regulation requiring drivers of common and interstate carriers to be at least 21).
- 40 Gabree v. King, 614 F.2d 1 (1st Cir. 1980) (upholding Massachusetts law that increased minimum drinking age to 20); Felix v. Milliken, 463 F. Supp. 1360 (E.D. Mich. 1978) (upholding Michigan constitutional amendment raising minimum drinking age to 21). Some state courts have interpreted their state constitution's equal protection provisions to require a less deferential standard of review for statutory age limits, but even then, such laws have been upheld. See, e.g., Manuel v. State, *supra* note 39.
- 41 For additional examples of jurisdictions that have raised the minimum legal sales age for tobacco products, see the Institute of Medicine report, *supra* note 5, Appendix A (State and Local Laws on the Minimum Age of Legal Access to Tobacco Products).