



Laws Restricting the Sale of Tobacco Products in Pharmacies

The Family Smoking Prevention and Tobacco Control Act of 2009 grants the U.S. Food and Drug Administration (FDA) broad authority to regulate the manufacturing, marketing, and sale of tobacco products. This authority is not limitless, however. One of the limits placed on the FDA's authority by the Act is the provision indicating that the FDA cannot "prohibit the sale of any tobacco product in face-to-face transactions by a specific category of retail outlets." In other words, the FDA cannot pass a rule that prohibits the sale of tobacco products in a particular type of sales outlet.

The Act does not, however, limit the ability of state and local governments to restrict the sale of tobacco products in certain types of sales outlets. The City and County of San Francisco enacted a law in 2008, prohibiting the sale of tobacco products in most, but not all, types of pharmacies. A few cities in Massachusetts, such as Boston and Needham, enacted laws in 2009 that prohibit the sale of tobacco products in a variety of health care institutions and retailers that operate as health care institutions, including pharmacies. Some states and other local governments have considered enacting similar measures.

Thus far, there have been two lawsuits challenging the legality of local laws that prohibit the sale of tobacco products in pharmacies; both challenged the San Francisco law.

Philip Morris v. City and County of San Francisco (filed in federal court)

- Philip Morris' primary argument to the court was that the law violated the company's First Amendment rights because the law prohibited product packages from being seen by consumers in certain pharmacies.
- The trial court denied Philip Morris' request to put the law on hold while the lawsuit was pending, finding that it was unlikely that Philip Morris would prevail on the merits of the case. It said that the law, a sales restriction, did not violate the First Amendment. It said that any speech impacted by the sales restriction, such as communication about tobacco products through their packaging, did not rise to the level of warranting First Amendment protection.
- In September 2009, the Ninth Circuit Court of Appeals affirmed the trial court's decision to refuse to put the law on hold while the litigation was pending.
- Philip Morris voluntarily dismissed the case.

Walgreens v. City and County of San Francisco (filed in state court)

- Walgreens' primary argument to the court was that the law violated the Equal Protection Clause. It argued that because the law applied to some pharmacies, but not others, the law was unfair.
- Before a trial was held, the City and County moved to dismiss the case on the basis that there were insufficient allegations to support Walgreens' argument. The trial court agreed and dismissed the lawsuit. In June 2010, however, the California Court of Appeals reversed the decision, finding that Walgreens' complaint had adequate allegations for the lawsuit to move forward to trial.
- A new ordinance was introduced in August 2010, designed to counter Walgreens' equal protection argument and address the Court of Appeals' concern. The new ordinance removed the exemptions for grocery stores and big box stores with pharmacies and, as a result, made the law more comprehensive. On September 28, 2010, the San Francisco Board of Supervisors approved the ordinance expanding the city's ban on tobacco sales at stores with pharmacies, and Mayor Gavin Newsom signed it. The law took effect November 4, 2010, effectively ending the lawsuit by bringing the city's law into compliance with the court's ruling and applying the prohibition on tobacco sales to all stores with pharmacies.

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