

THE NICOTINE-FREE GENERATION APPROACH

Overview for California Communities



 The rapid market growth of e-cigarettes and related nicotine delivery products in California,¹ and their popularity among young people including youth under 18 years old,² has raised concerns among public health authorities about the harmful impact of these devices and spurred discussion about effective ways to reduce commercial tobacco consumption.³

In addition to evidence-based commercial tobacco control measures, such as pricing increases and licensing and marketing restrictions, some U.S. public health experts have considered

additional innovative ways to reduce commercial tobacco use, including what has been described as “endgame” strategies or policies. This is one of two resources for California public health professionals and advocates on an endgame strategy — the nicotine-free generation approach — and policy considerations for California communities. The companion fact sheet, *The Nicotine-Free Generation Approach: Legal Authority for California Communities*, provides a more detailed examination of California’s legal authority to adopt this endgame strategy.

Background

The Youth Commercial Tobacco Epidemic in California and the U.S.

In the U.S., over 3 million people under 18 years of age regularly use commercial tobacco products, including e-cigarettes and combustible cigarettes.⁴ In 2022, the Centers for Disease Control and Prevention and the U.S. Food and Drug Administration found that over 2.5 million U.S. middle and high school students use e-cigarettes on a regular basis.⁵ The rapid rise of young people using these products is concerning, given the impact of nicotine on the developing brain, as well as other health impacts. As a result, national and local public health authorities prioritize reducing youth consumption of all tobacco products, including e-cigarettes.

California is no exception to national trends, and while youth use of cigarettes follows general declines in cigarette use in recent years, the number of young people using any tobacco product — especially e-cigarettes or vaping devices — shows signs of increasing.⁶

Commercial Tobacco Endgame: No More Consumers

In recent years, endgame strategies have transitioned from abstract public health aspirations to tangible policy enacted in select U.S. locales. The most impactful measure is a complete prohibition of commercial tobacco product sales, exemplified by initiatives in Beverly Hills and Manhattan Beach, California.⁷

The Beverly Hills City Council unanimously passed a near-total prohibition on the sale of tobacco products in 2019, which took effect in January 2021. The law, however, exempted cigar lounges and hotel sales to guests.⁸ The Manhattan Beach City Council followed in 2020 with a total ban (no exceptions) on the retail sale of tobacco products in their city, which also took effect in January 2021.⁹ While these two cities remain the only examples of total or near-total tobacco product sales prohibitions in the U.S., a survey of Californians in 2023 found majority support for comprehensive sales prohibitions.¹⁰

Nevertheless, because community readiness to undertake such a measure varies, other endgame options are worth considering as ways of transitioning to a commercial tobacco-free world. One approach with different — and potentially more palatable — social and political implications is a “nicotine- (or commercial tobacco-) free generation” strategy (also described as a birthdate strategy). This policy approach was first introduced in 2010¹¹ and involves gradually phasing out the legal sale of tobacco products each year by fixing a date — for example, January 1, 2000 — as the date after which anyone born may never legally be sold commercial tobacco products. While this allows sales to continue to any of-age person at the time of the ordinance’s passage, it creates a generation of people to whom sales are illegal in perpetuity. This approach may be more palatable politically because the change is phased in over time, instead of adopted immediately, as with other endgame policies.¹² On the other hand, these policies have the potential to entrench health inequities and tend to leave behind people who currently use tobacco products.

A Comprehensive Program to Prevent Commercial Tobacco Use

Nicotine-free generation policies are complementary to other commercial tobacco control efforts, as well as cessation programs. Such policies should be framed as part of a comprehensive program to prevent commercial tobacco use, while addressing the ongoing harms from commercial tobacco, including prohibitions on the sale of flavored tobacco products.

Nicotine-Free Generation: An Inclusive Reframing

Although “tobacco-free generation” is a prevalent term for describing a generational ban on tobacco product sales, the term is not universally accepted. Many Tribal communities in the U.S. use sacred tobacco for cultural and spiritual ceremonies and practices.¹³ Because of concern about the term “tobacco-free,” some public health advocates describe these approaches as “nicotine-free generation” policies or “birthdate-based sales restrictions.” The sacred relationship that many Tribal community members have with tobacco is distinct from the commercialized — and often exploitative — relationship that the tobacco industry has cultivated with consumers. Including Tribal communities in mainstream commercial tobacco control dialogues is essential in advancing health equity, as is recognizing that traditional sacred use for tobacco is a practice distinct from commercial tobacco consumption.¹⁴

“Nicotine-free generation” may also be an important reframing because the term “tobacco-free generation” unduly limits the endgame strategy to tobacco products that contain commercial tobacco leaf and omits electronic smoking devices and other addictive and harmful nicotine products. While combustible tobacco products are a key target of this endgame strategy, a stronger and more comprehensive policy includes all noncombustible and nicotine products. The Public Health Law Center uses the term **“nicotine-free generation,” or NFG**, with the understanding that this term does not apply to sacred use of tobacco in Tribal communities.

Authority to Adopt Nicotine-Free Generation Policies in California

Local authority encompasses both state and federal law as higher levels of government authority. In California, there are no federal legal barriers that would prevent a locality from adopting an NFG policy. In fact, the Tobacco Control Act preserves the authority of state, Tribal, and local governments to enact measures that go beyond federal regulations and that are related to “the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products *by individuals of any age...*”¹⁵

California state law is a bit more complex. In state law, there are statutes that regulate the state minimum legal sales age: the Stop Tobacco Access to Kids Enforcement (STAKE) Act¹⁶ and Penal Code § 308.¹⁷ While the STAKE Act gives localities the authority to go beyond state law, the Penal Code provision seems to preempt local authority to raise the minimum legal sales age.¹⁸ Because the STAKE ACT and Penal Code could potentially conflict, local jurisdictions, as well as courts in California, would look to relevant caselaw. The most pertinent case for such a review is *Prime Gas v. City of Sacramento*.¹⁹ In this case, the court found that localities are not preempted under state law to enact Tobacco Retail Licensing and to regulate similar aspects to state law under administrative authority rather than criminal authority. Following the same logic as the decision in *Prime Gas*, localities that pursue nicotine-free generation policies under their administrative authority through licensing would likely be successful in arguing that, in combination with the STAKE Act, they can raise the minimum legal sales age beyond state law.

For a full analysis of federal and state authority, please see the companion publication, [The Nicotine-Free Generation Approach: Legal Authority for California Communities](#).

Note

Policymakers should not be deterred from enacting a more stringent local tobacco control measure than neighboring jurisdictions.²⁰ It is true that if one locality has a policy (such as high product prices) that is more restrictive than another city, some consumers may travel to the locality with the less restrictive policy to purchase products. Other consumers, however — especially cost-sensitive groups like youth and young adults — will be less likely to make these trips.

 **Considerations for Pursuing a Nicotine-Free Generation Policy**

This resource and companion publication focus on the legal authority of California cities and counties to adopt nicotine-free generation policies in their communities. However, communities must also weigh important political and equity considerations when pursuing these policies. The table below identifies some of these considerations. For a more detailed examination of these issues, please see the 2024 article by Ruth Malone and Tim McAfee, *Birthdate-based Commercial Tobacco Sales Restrictions: Will “Tobacco-free Generation” Policies Advance or Delay the Endgame?*²¹

Upsides and Benefits	Challenges and Unknowns
Legally sound at the state and local levels in CA	Ordinances potentially face legal challenges; CA courts have few cases to draw upon
Provides current retailers a long window of continued product sales before closure	Retailers and industry unlikely to be receptive to the idea of <i>any</i> limits on sales in the present or future
Implementation costs low to immaterial as the policy relies on current minimum legal sales age enforcement	Benefits maximized years into the future, which presents risks that political or other factors could change in time to be less supportive of maintaining a nicotine-free generation approach
Nicotine-free generation policy is equally applied to all persons born after a particular date, which can support implementation and enforcement	There are significant health equity and public health concerns that these policies leave behind those that already are targeted by the tobacco industry and addicted to nicotine



Conclusion

California cities and counties have the legal authority to adopt nicotine-free generation policies in their communities. However, localities interested in pursuing these policies also need to factor in important political and equity considerations. The strongest and most effective nicotine-free generation policy would be part of a comprehensive tobacco retail license ordinance that significantly curbs the sale of commercial tobacco products in ways beyond just adjusting the minimum legal sales age.

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Endnotes

- 1 CAL. DEPT PUB. HEALTH, CALIFORNIA TOBACCO FACTS AND FIGURES 2022 (2023).
- 2 Eunice Park-Lee et al., *Tobacco Product Use Among Middle and High School Students — United States, 2022*, 71 MORBIDITY & MORTALITY WKLY. REP. 1429, 1429 (2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7145a1.htm?s_cid=mm7145a1_w. See also Monica Cornelius et al., *Tobacco Product Use Among Adults — United States, 2021*, 72 MORBIDITY & MORTALITY WKLY. REP. 475-83 (2023), https://www.cdc.gov/mmwr/volumes/72/wr/mm7218a1.htm?s_cid=mm7218a1_w.

- 3 Traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and Tribes for centuries. Commercial tobacco is manufactured for recreational use and profit, resulting in disease and death. When the word “tobacco” is used throughout this document, a commercial context is implied and intended. For more information, visit the National Native Network website: <https://keepitsacred.itcmi.org>.
- 4 See, e.g., Ctrs. for Disease Control & Prevention, *Quick Facts on the Risks of E-cigarettes for Kids, Teens, and Young Adults* (2023), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html.
- 5 Press Release, Ctrs. for Disease Control & Prevention, *More than 2.5 Million Youth Reported E-Cigarette Use in 2022* (Oct. 6, 2022), <https://www.cdc.gov/media/releases/2022/p1007-e-cigarette-use.html>.
- 6 *Supra* note 1.
- 7 Smoke Free MB, City of Manhattan Beach, <https://www.manhattanbeach.gov/departments/environmental-sustainability/breathe-free-mb-smoke-free-public-areas>.
- 8 *First-of-its-Kind Tobacco Sales Ban Takes Effect in Beverly Hills*, CBS NEWS (Jan. 1, 2021), CBS NEWS (Feb. 6, 2020), <https://www.cbsnews.com/losangeles/news/first-of-its-kind-tobacco-sales-ban-takes-effect-in-beverly-hills>.
- 9 *Manhattan Beach Moves Forward With Ban on Sale of Tobacco, E-Cigarettes*, <https://www.cbsnews.com/losangeles/news/manhattan-beach-moves-forward-with-ban-on-sale-of-tobacco-e-cigarettes>.
- 10 CAL. DEP’T PUB. HEALTH, KEY FINDINGS FROM THE 2023 ONLINE CALIFORNIA ADULT TOBACCO SURVEY (2024).
- 11 Deborah Khoo et al., *Phasing-out Tobacco: Proposal to Deny Access to Tobacco for Those Born from 2000*, 19 TOBACCO CONTROL 355, 356 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2978941/pdf/tobaccocontrol31153.pdf>.
- 12 A.J. Berrick, *The Tobacco-Free Generation Proposal*, 22 TOBACCO CONTROL i22 (2013), https://tobaccocontrol.bmj.com/content/tobaccocontrol/22/suppl_1/i22.full.pdf.
- 13 Sojourner Ahebee, *Sacred Tobacco and American Indians, Tradition and Conflict*, WHY.ORG (May 14, 2021), <https://why.org/segments/keep-it-sacred-smoking-indigenous-people-tradition-and-conflict>.
- 14 Gina Boudreau et al., *Why the World Will Never Be Tobacco-Free: Reframing “Tobacco Control” Into a Traditional Tobacco Movement*, 106 AM. J. PUB. H. 1188 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4984762>. As discussed by Boudreau et al., different terminologies are used by different communities.
- 15 21 U.S.C. § 387p(a) (2009) (emphasis added).
- 16 CAL. BUS. & PROF. CODE § 22964 (2021).
- 17 CAL. PENAL CODE § 308(d) (2018).
- 18 *Id.*
- 19 *Prime Gas v. City of Sacramento*, 184 Cal. App. 4th 967 (2010). Because the STAKE Act expressly grants cities and counties the authority to adopt tobacco retailer license ordinances, many jurisdictions in California have adopted TRLs that are more restrictive than state law.
- 20 See, e.g., Kristin Ackert et al, *Countering Tobacco Industry Tactics on the Economic Costs of Restricting Menthol Tobacco*, 29 TOBACCO CONTROL e113-14 (2020), <https://tobaccocontrol.bmj.com/content/29/e1/e113>.
- 21 Ruth Malone & Tim McAfee, *Birthdate-based Commercial Tobacco Sales Restrictions: Will “Tobacco-free Generation” Policies Advance or Delay the Endgame?*, TOBACCO CONTROL Published Online First (2024), <https://tobaccocontrol.bmj.com/content/early/2024/06/19/tc-2024-058716>.