Regulating the Retail Environment: Guidelines for Local Tobacco Compliance Checks

February 23, 2017
The Legal Resource Center for Public Health Policy provides information and technical assistance on issues related to public health in Maryland. The legal information and assistance does not constitute legal advice or legal representation. For legal advice, one should consult a lawyer licensed to practice law in their state.
Presenters

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- Kathi Hoke, Director, Legal Resource Center for Public Health Policy
- Brooke Torton, Staff Attorney, Legal Resource Center
- Emmie Burns, Legal Fellow, Legal Resource Center
<table>
<thead>
<tr>
<th>Category</th>
<th>SAMHSA</th>
<th>FDA</th>
<th>Local</th>
</tr>
</thead>
<tbody>
<tr>
<td>Source of Law</td>
<td>Alcohol, Drug Abuse, and Mental Health Admin. Reorganization Act (Synar Amendment)</td>
<td>Family Smoking Prevention and Tobacco Control Act</td>
<td>Md. Code, Crim. Law §10-107; Health-General § 24-305; or County ordinance</td>
</tr>
<tr>
<td>Number of Checks</td>
<td>10% random sample statewide conducted between May and September each year.</td>
<td>Undisclosed; random and targeted</td>
<td>Varies by jurisdiction</td>
</tr>
<tr>
<td>Enforcement</td>
<td>BHA (Behavioral Health Administration)</td>
<td>BHA</td>
<td>Civil enforcement or sworn law enforcement</td>
</tr>
<tr>
<td>Penalties</td>
<td><strong>No penalty for retailer</strong> State risks losing substance abuse prevention and treatment block grant dollars if the violation rate exceeds 20 percent.</td>
<td>1&lt;sup&gt;st&lt;/sup&gt; Violation – Warning letter 2&lt;sup&gt;nd&lt;/sup&gt; Violation in 12 mos. – $250 3&lt;sup&gt;rd&lt;/sup&gt; Violation in 24 mos. – $500 4&lt;sup&gt;th&lt;/sup&gt; Violation in 24 mos. – $2000 5&lt;sup&gt;th&lt;/sup&gt; Violation in 36 mos. – $5000 6&lt;sup&gt;th&lt;/sup&gt; Violation in 48 mos. – $10,000 or secretary’s discretion No Tobacco Sales Orders – may be issued against a person found to have committed repeated violations at a particular outlet.</td>
<td>Varies by jurisdiction $300 to $3,000</td>
</tr>
<tr>
<td>Covered Products</td>
<td>Cigarettes only (others may be checked in the future)</td>
<td>• Cigarettes  • Smokeless tobacco  • Cigars  • Hookah  • ENDS</td>
<td>• Cigarettes  • Smokeless tobacco  • Cigars  • Hookah  • E-cigarettes</td>
</tr>
<tr>
<td>Type of Law [i.e. state “statute” or local county “ordinance”]:</td>
<td>Section 10-107 of the Maryland Criminal Law Code</td>
<td>Section 24-305 of the Maryland Health General Code</td>
<td>Local County Ordinances (10* Counties)</td>
</tr>
<tr>
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</tr>
<tr>
<td>What does the law prohibit?</td>
<td>Distribution and/or Sale of tobacco products OTHER than ENDS to minors</td>
<td>Distribution and/or Sale of ENDS (electronic nicotine device systems) to minors</td>
<td>All 10 Counties: Distribution and/or Sale of tobacco products OTHER than ENDS Note: 3 Counties include ENDS</td>
</tr>
<tr>
<td>Is this a civil or criminal violation?</td>
<td>Criminal</td>
<td>Civil</td>
<td>Civil</td>
</tr>
<tr>
<td>Who can enforce the law?</td>
<td>Sworn Law Enforcement Only</td>
<td>Law Enforcement; County Health Officers and/or County Health Officer may Designate Individual</td>
<td>Varies by County, but generally includes local law enforcement, County Health Officers and/or a Designee</td>
</tr>
<tr>
<td>Potential Penalties:</td>
<td>$300 for first offense; $1000 for second offense (if within 2 years); and $3000 for each subsequent offense</td>
<td>Up to $1,000 Fine for each Violation</td>
<td>Varies by County; Penalties range from $50 to $1,000 for each violation.</td>
</tr>
<tr>
<td>Impact on Criminal Record:</td>
<td>Convictions added to Criminal Record</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

*Baltimore City, Baltimore County, Cecil County, Carroll County, Garrett County, Howard County, Kent County, Montgomery County, Prince George’s County, St. Mary’s County.*
Maryland Synar Compliance

DHMH launched the Responsible Tobacco Retailer Initiative:

- Education
- Compliance Checks
- Data Collection and Sharing
Local Compliance Process and Procedure

Step 1: Law restricts sales to minors

IT’S THE LAW.

NO CIGARETTES
NO CIGARS

NoTobaccoSalesToMinors.com

NO SPIT TOBACCO
NO E-CIGARETTES

RETAILERS MUST ASK FOR PHOTO I.D. FROM EVERYONE UNDER 27.

UNDER 18? NO TOBACCO.
Step 2

Compliance checks are conducted
### Step 3

Citations are issued and challenged or paid

<table>
<thead>
<tr>
<th>Criminal Law, 10–107</th>
<th>Health General, 24–305</th>
<th>County Ordinance</th>
</tr>
</thead>
</table>
| Violator **must** appear in District Court | 1. Pay fine OR 2. Challenge citation in District Court | 1. Pay fine OR challenge citation in 1 of the following: 
   a) Office of Administrative Hearings; or  
   b) Alternative Administrative Agency; or  
   c) District Court |
## Step 4

### Appellate rights

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<th>Criminal Law, 10–107/Health General 24–305</th>
<th>County Ordinance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. District Court</td>
<td>1. Office of Administrative Hearings, Alternative Administrative Agency or District Court</td>
</tr>
<tr>
<td>2. Circuit Court</td>
<td>2. Board of Appeals</td>
</tr>
<tr>
<td></td>
<td>3. Circuit Court</td>
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</tbody>
</table>
Step 5

Comptroller involvement

In 2016...

- 10,419 local checks
- 1,291 citations
- 201 reported to comptroller
- 42 suspensions

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<th>First, there are 2 adjudications (hearings or payments).</th>
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<td>Then, if referred, there is a comptroller hearing/decision.</td>
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<tr>
<td>If unsatisfied, one side may appeal to Circuit Court</td>
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Local Challenges: Citations Issued

- Royal Farms challenged 3 sets of citations issued by Baltimore County.

- Issues:
  1. Issuance of citations,
  2. Involvement of minor in the hearing, and
  3. Reasonableness of time between checks.
Royal Farms challenged the Comptroller’s decision to suspend the license at a retail location.

2 relevant issues:

1. Issuance of citations,
2. Comptroller does not have authority in this case because the facts presented do not amount to fraudulent or deceptive use of a license.

Court’s Decision: sales to minors did not amount to fraud or deception in this case.
Local Challenges: Comptroller’s Authority to Suspend License

- Judge references the following missing pieces of information:
  - Fake ID presented;
  - Any ID presented;
  - Age and appearance of minor;
  - Marketing/advertisement by retailer;
  - Location of products sold;
  - Signage;
  - Employee statements.
Hearing Guidelines for Referral to the Office of the Comptroller

- Exhibits
- Testimony
- Retailer information
- Signage
- Minor information
- History
FAQ

1. What does it mean to effectuate service on a retailer?

2. What is the best way to submit information to the Comptroller for these hearings?

3. If a retailer is found to have violated Health General, § 24–305, can the violations be referred to the Comptroller?

4. What impact does the Baltimore County Circuit Court decision have on the rest of the state?
Questions?
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