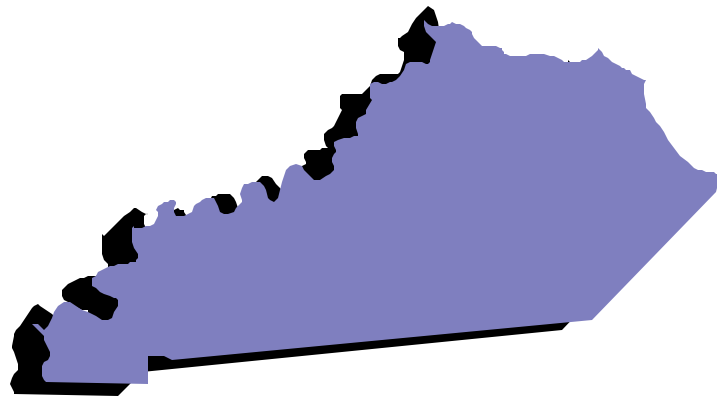


**A REVIEW OF THE
COMMONWEALTH OF KENTUCKY
TOBACCO CONTROL LAWS**



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INTRODUCTION

An overview of the prevalence of tobacco use in Kentucky indicates the need for tobacco-specific environmental strategies throughout the state. According to the Centers for Disease Control and Prevention (CDC), current cigarette smoking among adults in Kentucky (aged 18 and older) is 30.5 percent compared to the all states median of 23.3 percent. The current youth rate for Kentucky youth, grades 6-8, is 21.5 percent compared to a national rate of 11 percent (current cigarette smoking equals smoked cigarettes on > 1 of the 30 days preceding the survey). Current use of any tobacco product for youth, grades 6-8, is 28.3 percent for Kentucky youth versus 15.1 percent for national youth. The current youth smoking rate for Kentucky youth, grades 9-12, is 37.4 percent compared to a 28 percent national rate. And, current use of any tobacco product by Kentucky youth, grades 9-12, is 46.2 percent versus 34.5 percent for national youth.

According to the CDC, Kentucky ranks 50th (number 1 is the lowest) in overall average annual deaths related to smoking (1990-1994), recording 7,953 tobacco-related deaths and places medical costs related to smoking at \$798,230,000. The CDC reports the average annual years of potential life lost (1990-1994 -- calculated to life expectancy) at 112,695 years or an average of 14.2 years for each death due to smoking.

Retail availability and social availability of tobacco products is another important area of tobacco control and prevention. Although the 2003 Synar rates indicate a statewide underage sale rate of 6.6 percent, several areas of the state are significantly above that rate. However, the wide gap between the 6.6 percent retail rate and the 46.2 percent current smoking rate for 9th-12th graders indicates there may be a need to look at social availability.

It is important to take a comprehensive approach to tobacco prevention that includes both individual approaches and environmental approaches. Individual approaches target individual youth and adults and seek to socialize, instruct, guide, or counsel. Examples are curriculum delivery in schools, the faith community, and civic or social groups or programs that teach parenting skills. Environmental approaches target the shared environment for youth and adults and seek to shape and support positive, healthy behavior and thwart negative, health-compromising behaviors.

There are three factors in the shared environment that shape both positive and negative behavior: norms, availability, and regulations. Norms are basic orientations concerning the acceptability or unacceptability of certain behaviors for specific community or community group. Availability is determined by how much time, energy, and money must be expended to obtain a commodity. Regulations are formalized laws, rules, and policies that serve to control availability and codify community norms. Regulatory efforts include advertising and promotion, product regulation, clean indoor air regulation, and minors' access to tobacco. According to the U.S. Department of Health and Human Services "Reducing Tobacco Use: A report of the Surgeon General," these regulatory approaches provide evidence of effectiveness in reducing tobacco use. Additionally, implementation and enforcement of regulations impact both community norms and availability and are therefore, a critical factor in tobacco prevention efforts.

The following discussion of the current status of the Commonwealth of Kentucky tobacco prevention and control laws and recommendations to strengthen existing laws and regulations is

intended as an advocacy tool for community groups working to reduce tobacco use and its negative consequences.

STATE CLEAN INDOOR AIR LAWS

Health Facilities: None

Private Workplace: None

Public Places: None

Restaurants: None

Day Care: The home and area accessible to children in care must be free of hazards including matches, cigarettes, and cigarette lighters. During hours of operation, the provider and other persons in the home must prohibit smoking in the presence of children. 922 KAR 2:100 (Certification of Family Child Care Homes)

Government Buildings: Smoking policies in state or local government office buildings may be adopted. If such a policy is adopted, it must be by executive order of the Governor, action of the General Assembly or the local governing authority; require accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority. KRS 61.165 (1994). An administrative regulation restricts smoking to designated areas in state owned or leased buildings occupied by the executive branch agencies. Designated areas cannot be places used by all employees or visitors, such as hallways, elevators, restrooms, conference rooms, and libraries. 200 KAR 6.045 (1993).

Schools: Smoking is restricted to designated smoking areas in school buildings or on school grounds. Every secondary school may have a designated area for adults and students; other schools designated area must be for adults only. The superintendent or principal may designate the smoking areas. Violation is punishable by a fine of \$1 to 5 dollars. KRS 438.050 (1988).

RECOMMENDATIONS: CLEAN INDOOR AIR
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Health Facilities: *

Private Workplace: *

Public Places: *

Restaurants: *

*Local communities should set tobacco policy for health facilities, private workplaces, public places, and restaurants through local ordinance or public health regulation. A 2004 Kentucky Supreme Court decision upheld the ability of local governments to enact ordinances that would restrict smoking in places of public assembly including health facilities, private workplaces, public places, and restaurants. Additionally, County Boards of Health may make rules and

regulations and do all things reasonable and necessary in order to perform the duties of a public health department. Local ordinance is preferable to a health regulation.

Rationale: Research demonstrates that tobacco use and exposure to secondhand smoke are threats to health. Policies restricting the use of tobacco in environments such as health care facilities, workplaces, public places, and restaurants reduce adolescents' exposure to tobacco and places where they can use tobacco and reduces the health risks associated with tobacco use and secondhand smoke.¹

Residents and businesses also have a higher level of awareness of local ordinances than of state statutes.² And, local ordinances more accurately reflect the community norms and therefore enjoy more local support and are easier to enforce. The ability of health departments to enforce a regulation may be compromised by staffing and budget constraints and the logistics of health departments prosecuting violators in the court system.

Public health agencies should recognize preemption as a critical public health problem. Local control should be viewed as a public health tool that must be protected. States with existing preemption laws should consider the repeal of these laws to be a high priority public health issue.³

Day Care: Local clean indoor air ordinances should include day care facilities. In the absence of a local ordinance or health regulation, smoking should be prohibited in the day care facility as well as in the presence of children.

Rationale: Even in places where smokers made a point of not smoking near others, residue from the smoke was detected on surfaces around the house and in household dust. This residue, researchers conclude, could pose a hazard for young children who spend much time on the floor and explore things by mouth.

Government Buildings: Policies requiring or favoring smoking in state or local government office buildings (200 KAR 6.045 and KRS 61.165) are commonly known as "dirty air" laws. These laws should be repealed or revised to require smoking outdoors – only in designated areas out of public view or indoors.

Rationale: State and local governments should be role models for the private sector. Research demonstrates that tobacco use and exposure to secondhand smoke are threats to health. Policies restricting the use of tobacco in the workplace reduce the health risks associated with tobacco use and secondhand smoke.

Schools: KRS 438.050 should be revised to be consistent with the Federal Pro-Children Act of 1994. Revisions should be expanded to include use of all tobacco products and to cover the grounds, athletic facilities, and all school vehicles as well as the facilities of all schools.

Rationale: The Pro-Children Act of 1994 established a nonsmoking policy in facilities (does not cover grounds, vehicles, or outdoor athletic areas) that provide children's services and receive money from a Federal funding stream. This Federal law supercedes state law.

TOBACCO EXCISE TAXES

Cigarettes

Tax rate per pack of 20: 3 cents

Date last changed: July 1, 1970 – 2.5 cents to 3 cents

Year first enacted: 1936

One-half of the cigarette excise tax is earmarked to the Tobacco Research Trust Fund. Money appropriated for the Fund goes to the University of Kentucky Tobacco and Health Research Institute (THRI) and is applied exclusively to projects and programs directed toward improvements in the tobacco industry and proving or disapproving questions of health hazards to tobacco users and toward preserving and strengthening the tobacco industry in Kentucky. A 14-member Tobacco Research Board, including a president or member of the board of directors of a tobacco company, located in the Commonwealth, authorizes and reviews the research projects and makes yearly reports. KRS 248.510 et. seq. (1988)

Other Tobacco Products

Chewing tobacco and snuff: None

Loose tobacco: None

RECOMMENDATIONS: TOBACCO EXCISE TAXES
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All tobacco products – cigarettes, cigars, smokeless, chewing tobacco, and loose tobacco – should be taxed equitably. The Kentucky state tobacco tax should be increased significantly, be indexed so that the nominal tax rate increases in step with prices (expressed in cents per pack), and should include an allocation of resulting revenues for community health education, tobacco use prevention and cessation programs for youth and adults, and tobacco-related prevention and disease research. At the very least, Kentucky should raise the cigarette tax to an amount that represents a fair share of the retail tax – on average, in the United States, federal and state cigarette taxes account for about 23 percent of the retail price.

Rationale: At 3 cents, Kentucky has the lowest tobacco tax in the United States and has not been increased in 30 years. Tobacco tax increases are effective in reducing the prevalence of tobacco use by adolescents and are most effective when combined with a comprehensive prevention program. The tax should be indexed (adjusted for inflation) to maintain the benefits of the increase. Youth, minorities and low-income populations are particularly sensitive to price increases. Otherwise, benefits will shrink as inflation erodes the real value of the tax increase. There is strong evidence that initiating tobacco tax increases is an effective approach to reduce the prevalence of adolescent tobacco use, especially when the tax is sufficiently high and linked to the consumer price index.⁴

YOUTH ACCESS

Age Restrictions on Sales of Tobacco Products

Minimum age for sales of cigarettes and smokeless tobacco: 18

Minors (purchase or receipt of tobacco)

Except for the provisions of KRS 438.330, it is unlawful for a person under age 18 to purchase or accept receipt of, or attempt to purchase or accept receipt of a tobacco product. It is also unlawful to present or offer to any person any purported proof of age, which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product. Exemption: It is not unlawful for a minor to accept receipt of a tobacco product from a family member, or from an employer when required in the performance of the person's duties. KRS 438.311 (2000)

Penalties to Minors: Violations shall be punishable by a fine of \$50 and 20 hours of community service work for a first offense within a one-year period, and a fine of \$200 and 40 hours of community service for a second or subsequent offense within a one-year period.

This offense shall be deemed a status offense and shall be under the jurisdiction of the juvenile session of the District court. KRS 438.311 (2000).

All peace officers with general law enforcement authority and employees of the Department of Alcoholic Beverage Control may issue a uniform citation, but may not make an arrest, or take a child into custody for violation of this section. However, if a child fails to appear in court in response to a uniform citation issued under this section, the court may compel the attendance of the defendant in the manner specified by law. KRS 438.311. (2000).

Wholesalers, Retailers, or Manufacturers

It is unlawful for wholesalers, retailers, or manufacturers of cigarette or tobacco products to distribute cigarettes or tobacco products, including samples, free or otherwise, to any person under age 18. Wholesalers, retailers, or manufacturers of cigarette or tobacco products must require proof of age from any prospective buyer or recipient (in the case of free samples) if the person has reason to believe that the prospective purchaser or recipient is under the age of 18. KRS 438.313

Penalties to Wholesalers, Retailers, or Manufacturers

Any person who violates the provisions of this section shall be fined not less than \$1,000 or more than \$2,500 for each offense. The fine shall be administered by the Department of Alcoholic Beverage Control using a civil enforcement procedure for persons 18 years of age or older. For persons under the age of 18, the offense shall be deemed a status offense and shall be under the jurisdiction of the juvenile session of the District Court.

All peace officers with general law enforcement authority and employees of the Department of Alcoholic Beverage Control may issue a uniform citation, but may not make an arrest, or take a child into custody for violation of KRS 438.313. (2000).

Enforcement: The Department of Alcoholic Beverage Control shall devise a plan and time frame for enforcement to determine by random inspection if the percentage of retailers or distributors making illegal sales to minors does or does not exceed federal guidelines preventing tobacco sales to minors. The Department may use minors in their compliance checks if the testing is conducted under the direct supervision of the Department, sheriff, or chief of police, or their employees, and written parental consent has been obtained. The Department of Alcoholic Beverage Control is entitled to the revenue produced by one-twentieth of one cent (\$0.0005) of the three-cent (\$0.03) per pack revenue collected by the Revenue Cabinet from the state excise

tax on the sale of cigarettes, and to keep fifty percent (50%) of any fines collected under KRS 438.305 to 438.340 to offset the costs of enforcement. **This law supersedes any subsequently enacted local law, ordinance, or regulation that relates to the use, display, sale, or distribution of tobacco products.** KRS 438.330 (1996)

The Department of Alcoholic Beverage Control is responsible for maintaining and compiling statistics for required reports to be submitted to the United States Department of Health and Human Resources. KRS 438.337 (2000).

Sign posting requirement: Notice must be posted in a conspicuous place stating that it is illegal to sell tobacco products to persons under age eighteen. Fine of \$100 to \$500 for the first violation and \$500 to \$1000 for subsequent violations. KRS 438.310 (1996).

Other provisions: All retail sales clerks must signify in writing that they understand that it is illegal under state law for persons to sell or distribute tobacco products to persons under 18 and for minors to purchase such products. The owner of the retail establishment shall keep the signed notice in a place that is easily accessible to persons conducting a compliance inspection. Any owner of a retail establishment who violates this provision is subject to a fine of \$10 to \$25 for each violation. KRS 438.325 (1996).

RECOMMENDATIONS: YOUTH ACCESS

Minors: Remove preemptive language and exemptions.

Wholesalers, Retailers, or Manufacturers: The law provides only for penalties for the individuals who sell to minors, provisions should be added to the law to acknowledge the responsibility of the retailer. This can be accomplished through licensing or registration and an administrative mechanism, i.e., loss of license, which ensures compliance with the law.

Enforcement: If SYNAR (underage sales) rates are not met, substance abuse prevention and treatment risks losing \$17 million in block grant dollars. But many Kentucky counties are “dry” (do not allow alcohol sales) and ABC agents must concentrate their efforts on “wet” (allow alcohol sales) and “moist” (county is dry but alcohol sales are allowed in specified cities or precincts) counties since that is their primary focus. Because of scarce resources – time, monetary, and human – a limited number of tobacco compliance checks are conducted and even fewer are conducted in dry counties.

Authority to conduct compliance should be shared with other state agencies with a vested interest in conducting compliance checks. Also, the law should be broadened to allow communities to conduct unconsummated compliance checks or “mock” compliance checks. Unconsummated sales occur when underage investigative aides try to purchase tobacco products but do not have identification or enough money to consummate the sale – there is no intent to buy. Mock compliance checks are conducted by investigative aides who are over age 18 but appear to be younger and should be asked for identification.

Rationale: Research indicates that adolescents obtain tobacco products through direct purchase from retailers, such as convenience and grocery stores, service stations, and pharmacies as well as through friends and family members, and shoplifting. Therefore, enforcing laws prohibiting

tobacco sales to minors, in addition to educating merchants, clerks, and the community about these laws and about adolescents' tobacco use, should reduce tobacco sales to minors.

YOUTH POSSESSION

No person under the age of 18 shall possess or use tobacco products. Any tobacco product found in the possession of a person under the age of 18 and in plain view of the law enforcement officer shall be confiscated by the law enforcement officer making the charge. KRS 438.350

Exemption: This section does not apply to persons exempted by KRS 438.311 and 438.330, which states, "it shall not be unlawful for such a person to accept receipt of a tobacco product from a family member, or from an employer when required in the performance of the person's duties."

RECOMMENDATIONS: YOUTH POSSESSION
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The "in plain view" language and exemptions should be removed. This legislation is problematic. Most tobacco control advocates oppose outlawing tobacco possession by minors because criminalizing tobacco possession by kids puts an unfair burden of responsibility on youth when the legal and moral burden should rightfully fall on sellers and distributors.⁵

Rationale: The "in plain view" language dilutes this law, making it a "confiscation" law rather than a "possession" law. The exemptions increase social availability of tobacco to adolescents. Retail availability and social availability contribute to the overall supply of tobacco. State retail availability rates are at 6.6 percent, however, youth prevalence rates (grades 9-12) are 46.2 percent. As a rule of thumb, as retail availability goes down, social availability goes up. In order to reduce youth prevalence, the overall supply of tobacco must go down.

RESTRICTIONS ON DISTRIBUTION OF TOBACCO PRODUCT SAMPLES OR SALES OF SINGLE CIGARETTES ("LOOSIES")

Samples: No wholesaler, retailer, or manufacturer of cigarettes or tobacco products may distribute samples of these products free of charge or otherwise, to any person under 18 years old. Violators shall be fined not less than \$100 or more than \$250 for each offense. KRS 438.313 (1996).

Single Cigarettes: No person may sell cigarettes in units of fewer than twenty cigarettes. Violation is a fine of not less than \$100 nor more than \$500. KRS 438.317 (1998)

RESTRICTIONS ON THE SALE OF TOBACCO PRODUCTS IN VENDING MACHINES

Placement Restriction: The sale of tobacco products dispensed through a vending machine is prohibited to any person under the age of 18 years. The purchase of tobacco products dispensed through a vending machine is prohibited to any person under 18 years of age. Vending machines from which tobacco products are dispensed shall be located in the line of sight of the cashier for the retail establishment. This does not apply to vending machines located in factories, or bars or taverns to which minors are not permitted access. KRS 438.315 (1994).

Penalty: Any owner of a retail establishment violating this section shall be subject to a fine of not less than \$100 nor more than \$500 for each violation. The fine shall be administered by the Department of Alcoholic Beverage Control. KRS 438.315 (1994).

<p style="text-align: center;">RECOMMENDATIONS: RESTRICTIONS ON THE SALE OF TOBACCO PRODUCTS IN VENDING MACHINES</p>

The laws restricting placement of vending machines should be revised to eliminate cigarette vending machines.

Rationale: Laws aimed at restricting youth access to vending machines (such as line of sight, locking devices, etc.) are ineffective. In fact, there is substantial evidence of the ineffectiveness of enacting ordinances requiring locking devices on cigarette machines to reduce access by minors.⁶ Although not a major source of cigarettes for all minors; they are a major tobacco source for young children. Tobacco buying surveys have proven conclusively that minors can buy cigarettes from vending machines almost all of the time.⁷

LICENSING REQUIREMENTS

Tobacco Sales: No licensing or registration required.

Vending Machines: Any person who operates one or more cigarette vending machines shall first secure a license from the revenue cabinet. Retailers are not required to obtain a license to sell tobacco products. KRS 138.195 (1988).

License Fee: \$25 annually (to operate, not per vending machine)

<p style="text-align: center;">RECOMMENDATIONS: LICENSING REQUIREMENTS</p>

Tobacco Sales: The law should be revised to include minimally, registration of tobacco retailers, but preferably licensing of tobacco retailers.

Vending Machines: A license for vending machines means that one license can cover one to one thousand machines or more. At a minimum, vendors should be required to provide a listing of the location of each machine.

Rationale: The primary purpose of licensing is to restrict access of tobacco to minors. The condition of obtaining a license is that the licensee will not sell tobacco products to minors. Licensing is essentially an administrative mechanism which, if properly managed and enforced, provides a most effective and comprehensive approach to reducing tobacco sales to minors.⁴ Tobacco licensing, if accompanied by appropriate penalties, can create a strong economic incentive for retailers not to sell tobacco to minors.

Vending Machines: According to the 2000 Surgeon General's Report, "retail licensure for tobacco represents another approach for facilitating youth access enforcement efforts and strengthening sanctions for violators of the law. Retail licensure can facilitate the identification

of retailers. The lack of a current and accurate list of tobacco vendors has been cited by many states as a serious impediment to efficient enforcement.”⁸

SMOKING PROTECTION LAWS

An employer may not fail or refuse to hire, or to discharge any individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because the individual is a smoker or nonsmoker; limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee because the individual is a smoker or nonsmoker; or require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment, as long as the person complies with any workplace policy concerning smoking. KRS 344.040 (1994).

RECOMMENDATIONS: SMOKING PROTECTION LAWS

This smoker anti-discrimination law appears to elevate smokers to a protected class. This law should be repealed.

Rationale: Smokers are not a protected class and existing Federal anti-discrimination laws are sufficient to protect smokers and nonsmokers.

ADVERTISING AND PROMOTION

No cigarette or tobacco product advertising shall be posted on a billboard with display space larger than 50 square feet located within 500 feet of any elementary or secondary school building or adjacent school-owned property. Violators shall be fined at least \$100 for each offense. KRS 438.047 (1992).

RECOMMENDATIONS: ADVERTISING AND PROMOTION

The preemptive language in KRS 438.330, “this law supersedes any subsequently enacted local law, ordinance, or regulation that relates to the use, display, sale, or distribution of tobacco products,” has been broadly interpreted to mean that the state tobacco law in Kentucky is the ceiling. That is, no local tobacco ordinances can be enacted including restriction of advertising and promotion.

The preemptive language should be removed from KRS 438.330, to give local communities the ability to set tobacco policy, including restriction of advertising and promotion.

Rationale: The impact of tobacco advertising on adolescent tobacco experimentation and use is well documented. Research demonstrates that adolescents develop attitudes, beliefs, and behaviors regarding tobacco use from peers, family members, television and other cultural sources. Adolescents often have the perception that tobacco use among their peers is common and acceptable. They are also exposed to messages through advertising that links tobacco use with peer acceptability, success, and fun.⁹ Research also demonstrates that tobacco company

sales promotions are reaching adolescents and that may put them at greater risk for smoking. Therefore, the reduction of youth exposure to particular types of marketing or to the quantity of marketing should reduce adolescent smoking.¹⁰

TOBACCO LIABILITY

In a civil action against a tobacco grower for damages alleged to have occurred as a result of use or consumption of tobacco products, in order for liability to be found against a grower, the plaintiff must prove by clear and convincing evidence that the tobacco that caused the alleged damage was planted, cultivated, and harvested by that specific grower and not by any other person. In a similar civil action against a warehouseman the plaintiff must prove by clear and convincing evidence that the tobacco that caused the alleged damage was sold by that specific warehouseman and not by any other person. If the suit is dismissed or the defendant prevails at trial, the defendant may be entitled to three times the entire cost of defending the action. KRS 454 (1998).

ENDNOTES

¹Reducing Tobacco Use Among Youth: Community-Based Approaches. A Guideline. Prevention Enhancement Protocols System (PEPS). Substance Abuse and Mental Health Services Administration (SAMHSA) and the Center for Substance Abuse Prevention (CSAP). Printed 1997.

²Preemption: Tobacco Control's Enemy #1. Americans for Nonsmokers' Rights. October 15, 1998.

³Preemption in Tobacco Control: Review of an Emerging Public Health Problem. Health Law and Ethics. The Journal of the American Medical Association. Volume 278. September 10, 1997.

⁴Reducing Tobacco Use Among Youth: Community-Based Approaches. A Guideline. Prevention Enhancement Protocols System (PEPS). Substance Abuse and Mental Health Services Administration (SAMHSA) and the Center for Substance Abuse Prevention (CSAP). Printed 1997.

⁵Tobacco Free Youth. How to Reduce Sales to Minors in Your Community. Stanford Center for Research in Disease Prevention and North Bay Health Resources Center. Petaluma, CA. 1992.

⁶Reducing Tobacco Use Among Youth: Community-Based Approaches. A Guideline. Prevention Enhancement Protocols System (PEPS). Substance Abuse and Mental Health Services Administration (SAMHSA) and the Center for Substance Abuse Prevention (CSAP). Printed 1997.

⁷Tobacco Free Youth. How to Reduce Sales to Minors in Your Community. Stanford Center for Research in Disease Prevention and North Bay Health Resources Center. Petaluma, CA. 1992.

⁸U.S. Department of Health and Human Services. *Reducing Tobacco Use: A Report of the Surgeon General*. Atlanta, Georgia: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2000.

⁹Tobacco Free Youth. How to Reduce Sales to Minors in Your Community. Stanford Center for Research in Disease Prevention and North Bay Health Resources Center. Petaluma, CA. 1992.

¹⁰Reducing Tobacco Use Among Youth: Community-Based Approaches. A Guideline. Prevention Enhancement Protocols System (PEPS). Substance Abuse and Mental Health Services Administration (SAMHSA) and the Center for Substance Abuse Prevention (CSAP). Printed 1997.