

# THE NICOTINE-FREE GENERATION APPROACH

## Legal Authority for California Communities

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

As nicotine-free generation (NFG) policies have been passed internationally and in the United States, some California communities may wonder whether they have legal authority to pass similar policies at the local level.

This publication focuses on the legal authority of California localities to adopt nicotine-free generation policies. It is a companion to *The Nicotine-Free Generation Approach: Overview for California Communities*, which describes the strategy in general and describes policy



considerations for California communities. Communities must also take care to weigh important political and equity considerations when pursuing these policies, such as the risk that a stand-alone approach could leave behind those that are already targeted by the tobacco industry and addicted to nicotine. Some of these considerations are flagged in our companion resource. For a fuller discussion of these considerations, 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?*<sup>1</sup>

## Nicotine-Free Generation Policies: U.S. Federal Law

No federal legal barrier prevents U.S. communities from enacting their own nicotine-free generation policies. There is no constitutional right to smoke or use commercial tobacco<sup>2</sup> products.<sup>3</sup> The 2009 Family Smoking Prevention and Tobacco Control Act specifically preserves the authority of state, local or Tribal authorities to exercise their rights to adopt sales-related policies, which would include nicotine-free generation policies.<sup>4</sup>

The 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*.”<sup>5</sup> Enacting age requirements — regardless of whether these requirements are fixed or adjusted — is within the purview of state, Tribal, and local authorities.

## Nicotine-Free Generation Policies in California

In response to efforts to pass and implement nicotine-free generation policies in other countries as well as in towns like Brookline, Massachusetts, a statewide bill was introduced, but did not advance, in California in 2023.<sup>6</sup> If such a proposal were to become law, it could change the tobacco sales environment for millions of California residents, with possible ripple effects beyond the state.

Regardless of any changes at the state level, cities and counties in the state have the authority to adopt nicotine-free generation policies at the local level. A general concern for localities passing any commercial tobacco control policy is whether the state has preempted their local authority to enact a particular measure that is more restrictive than the state’s law (or lack of law) on the subject. Fortunately, under California law, localities have the authority to adopt such policies.

Under California’s Stop Tobacco Access to Kids Enforcement (STAKE) Act, local governments can exceed state law as long as the local law does not conflict with the state’s law.<sup>7</sup> Indeed, various



sections of the STAKE Act allow local ordinances to surpass state law minimums and restrict preemption. The STAKE Act:

...sets forth minimum state restrictions with respect to the legal age to purchase or possess tobacco products and *does not preempt or otherwise prohibit the adoption of a local standard that imposes a more restrictive legal age to purchase or possess tobacco products*. A local standard that imposes a more restrictive legal age to purchase or possess tobacco products shall control in the event of any inconsistency between this division and a local standard.<sup>8</sup>

Still, California state law does have preemption language in its penal code with respect to the unlawful sale of tobacco products to minors. The law states that “It is the Legislature’s intent to regulate the subject matter of this section. As a result, a city, county, or city and county shall not adopt any ordinance or regulation inconsistent with this section.”<sup>9</sup>

Because the STAKE ACT and California’s penal code could potentially conflict, local jurisdictions as well as courts in California would look to relevant case law. The most pertinent case for such a review is *Prime Gas v. City of Sacramento* (2010).<sup>10</sup>

In *Prime Gas*, a tobacco product retailer sued Sacramento claiming the city’s tobacco retail licensing ordinance, which prohibited the sale of tobacco products to minors and suspended or revoked the local tobacco sales licenses of retailers who violated this law, was preempted by state law that also prohibited tobacco sales to minors. The likely analogy in litigation about a local nicotine-free generation ordinance would look similar, especially in the absence of state law.

The appellate court ruled that state law did not preempt the city's tobacco retail licensing ordinance. The court stated (1) that preemption can only occur if otherwise valid local legislation conflicts with state law, and (2) that a conflict only exists if the local legislation duplicates, contradicts, or enters an area fully occupied by state law, either expressly or by implication. This created a three-part "test" for California courts to apply, with the following components:

- **Duplication:** where state law and local law have the same requirements and penalty structures applied to the same matter.
- **Contradiction:** where state law and local law oppose each other or local law frustrates the purpose and implementation of state law.
- **Field Fully Occupied:** where through express language or implication, the state law is such that it leaves no room for local measures.

The court found no conflict between the two laws. It pointed out that Sacramento's ordinance did not violate state law because the ordinance applied to local licensing, not the state's license, and so was not duplicating the state's license. The court also pointed out that the ordinance did not impose criminal penalties for violations, and so did not duplicate the penal code.

The court looked at the language in the STAKE Act and found the Sacramento ordinance complemented the state tobacco law and did not contradict it, since both worked together in the shared purpose of promoting tobacco control.

"Field Fully Occupied" was the area where the court in *Prime Gas* most carefully examined the California penal code and the terms of the STAKE Act. In its analysis, the court considered the preemption language in the penal code to be restricted to criminal penalties, while the Sacramento ordinance related to the manner in which commercial tobacco products were sold (requiring a license to do so, and so requiring compliance with terms of the license). The local license did not otherwise expand state law or penalties for violating state law. Moreover, the court recognized that under the STAKE Act, local jurisdictions can exceed state law for their local tobacco retail licensing requirements. With such express language *discounting* preemption, the court found in favor of Sacramento — while providing guidance for how any California city could adopt a tobacco retailer license.

Since 2010, when *Prime Gas* was decided, the STAKE Act has been amended to include a section clearly stating that state law sets "minimum state restrictions" and that a local measure that is more restrictive than state law is controlling.<sup>11</sup> California caselaw favors local tobacco control lawmaking, particularly with respect to tobacco retail licensing, and this includes allowing local governments to prohibit the sale of tobacco products altogether.



## Conclusion

Localities may be interested in pursuing nicotine-free generation policies in their own communities. Under federal and California state law, there is legal support for pursuing these policies. However, communities must also weigh important political and equity considerations whenever pursuing such policies.

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This publication was prepared by the Law and Policy Partnership to End the Commercial Tobacco Epidemic. The Partnership does not provide legal representation or advice. The information in this document should not be considered legal advice. This publication was made possible by funds received from Grant Number 19-10229 with the California Department of Public Health, California Tobacco Control Program, and the American Lung Association in California.

## Endnotes

- 1 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>.
- 2 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.itcni.org>.
- 3 Hudson Kingston, *There Is No Constitutional Right to Smoke or Toke*, Public Health Law Center (2019), <https://publichealthlawcenter.org/sites/default/files/resources/No-Constitutional-Right-Smoke-Toke-2019.pdf>.
- 4 21 U.S.C. § 387p(a) (2009).
- 5 *Id.*
- 6 Assembly Bill 935, Cal. Leg., 2023–2024 Sess. (2023), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240AB935](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB935).
- 7 Cal. Bus. & Prof. Code § 22964 (2021).
- 8 *Id.* (emphasis added).
- 9 Cal. Penal Code § 308(d) (2018).
- 10 *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.
- 11 Cal. Bus. & Prof. Code § 22964 (2021).