



Center Updates

We wanted to make you aware of some staff transitions that have taken place recently.

Center administrator Matt Fuerst left our Center at the end of February. With a change in duties and title, the Center hired **Kerry Snyder** as the Center's staff attorney. Kerry comes to the position with a tremendous amount of legislative and policy experience. Prior to joining the Center, she served as associate counsel with the New Jersey Office of Legislative Services, where she provided legal advice and drafted legislation for the members of the New Jersey Legislature. Her previous experience includes working as an associate with the law firm of Sidney L. Gold & Associates, P.C., and as the legislative director and chief of staff in the office of Massachusetts State Senator Steven Tolman.

Assistant director Marlo Miura left the Center at the end of May to relocate to Madison, Wisconsin. Marlo enjoyed the opportunity to work with the New York tobacco control community and we know that many of you benefited from her counsel and assistance. In her place, we have hired **Ilana Knopf**. Ilana previously worked for four years as counsel in the Tobacco Project of the National Association of Attorneys General (NAAG). At NAAG, she assisted states in enforcing the Master Settlement Agreement and tobacco-related laws. Prior to joining NAAG, she was a trial attorney at the U.S. Department of Justice.

Finally, Micah Berman will be taking a leave from teaching during the coming academic year and will be moving to D.C. for a one-year stint as a visiting policy expert at the FDA's Center for Tobacco Products. Though Micah will be physically located in D.C., he will remain actively engaged as the director of the Center.

While it is clear the Center is going through a lot of transitions, the bottom line remains the same – we are available to assist you with legal and policy questions and we have a tremendous team in place with the legal knowledge and experience to assist you and your communities. Please do not hesitate to get in touch and let us know how we can help.

Center Welcomes Summer Law Clerks

The Center welcomed five full-time and three part-time student interns at the start of June. Seven of the students, **Alaina Anderson, Aviva Berlin, Nikolas Frye, Morgan Harris, Anthony Heck, Adelina Janiak, and Ashley Montiero**, are law students at New England Law|Boston, and one, **Tiffany Mason**, is pursuing a master's degree in public health at the University of Michigan. We are very excited to have this highly motivated group with us and anticipate a productive summer.

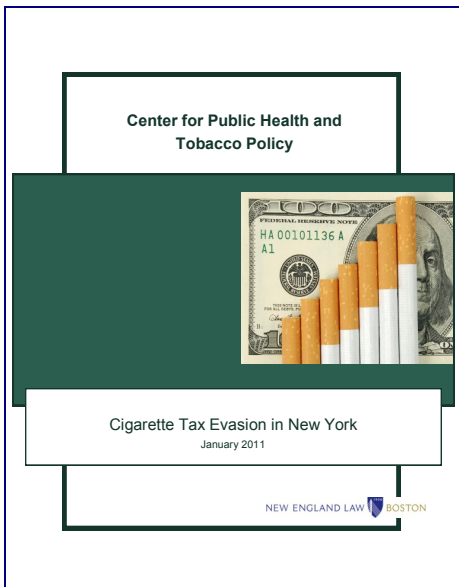
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Back row (from left to right): Adelina Janiak, Morgan Harris, Nikolas Frye, Anthony Heck and Ashley Montiero. Front row: (from left to right): Tiffany Morgan, Aviva Berlin and Alaina Anderson.

Cigarette Tax Evasion in New York



CPHTP's technical report on [Cigarette Tax Evasion in New York](#) was completed and published in January. The key messages of the report are:

- Cigarette and other tobacco taxes generate revenue and benefit public health by raising the price of those products and deterring consumption.
- These benefits are undermined by tax evasion.
- Additionally, tax evasion:
 - Enables youth access to tobacco products;
 - Creates imbalanced and unfair business competition; and
 - Funds organized crime and terrorist groups.
- Sales by Native American retailers are the largest source of untaxed cigarettes in NY.
- Taxes are also evaded through the sale of untaxed tobacco products online.
- Smuggling and counterfeiting of cigarettes are growing problems throughout the U.S.
- Recommendations:
 - Enforce requirements that Native American retailers collect state cigarette taxes from non-Native American purchasers;
 - Aggressively enforce federal law provisions for taxation of online tobacco sales;
 - Adopt measures to control the production and distribution of cigarettes; and
 - Engage community members in developing and executing solutions.

Tobacco Registration Fee Rolled Back

In late March, the New York Senate and Assembly, as part of its 2011-12 state budget, approved a [new registration fee for tobacco retailers](#). The registration fee to sell tobacco products at the retail level is now \$300.

The registration fee amount was the subject of [litigation](#) because of a 2009 fee change. The previous fee change was from \$100 to a

sliding scale of \$1,000 to \$5,000, depending on the retailer's gross sales. A group of retail trade associations filed a lawsuit challenging the fee increase. The trial court dismissed the lawsuit, but the retail trade associations filed an appeal. On April 19, 2011, the Appellate Division dismissed the appeal as a result of the new legislation included in the state budget.

The \$300 fee is retroactive to 2010, meaning that any retailer that paid a \$100 registration fee for 2010 or 2011 will owe an extra \$200 for each year. Beginning September 2011, the \$300 fee will be collected for 2012 tobacco retailer registrations.

NYC Parks Go Smoke-Free

On May 23, 2011, New York City's smoke-free outdoor areas law went into effect. The law, which was passed by the New York City Council and approved by Mayor Bloomberg in February, prohibits smoking in the city's 1,700 parks and fourteen miles of public beaches. Smoking is no longer allowed in Central Park, on the Coney Island boardwalk, or within any of the 29,000 acres of parkland the city parks department maintains. The law also applies to pedestrian malls and plazas such as those in Times Square. The Department of Parks and Recreation will be responsible for enforcing the law and violators may be subject to fines of \$50.

While the local news outlets reported that some smokers criticized the new law, they

also reported that nonsmokers were grateful for the opportunity to enjoy the city's parks and beaches without the intrusion of secondhand smoke. Only one group, Citizens Lobbying Against Smoker Harassment (C.L.A.S.H.), has been vocal in its opposition to the law. The group staged a "smoke-in" at Brighton Beach over the Memorial Day holiday weekend. According to the organization, the event was attended by only 25 smokers.

Two weeks after the law became effective, the city had issued one citation and given 302 warnings, according to Parks Department officials. The Parks Department expects the law will largely be self-enforcing.



Court Finds Landlords Must Enforce Smoke-Free Lease Provision

An early 2011 unpublished court decision, [Upper Lease Associates, LLC v. Cannon](#), found that a tenant was entitled to a rent discount and early termination of her lease because of an uncorrected secondhand smoke problem.

Danielle Cannon lived in an apartment in Nassau County and suffered from smoke incursion coming from a downstairs neighbor's apartment. Ms. Cannon complained to building management about secondhand smoke filtering into her apartment. Both Ms. Cannon and her downstairs neighbor had signed leases in which they agreed to prevent secondhand smoke incursion into neighboring units because it "may constitute a nuisance and health hazard and be a material infringement on the quiet enjoyment of other tenants" The building management initially

tried solving the problem by caulking and sealing around vents that may have carried the cigarette smoke from below. Negotiations to move to a different apartment were unsuccessful. When it continued to appear that no further action would be taken to remedy the situation, Ms. Cannon did not pay two months of rent and then vacated the premises. Upper East Lease Associates subsequently sought monetary damages for

breach of her lease.

The Nassau County District Court Judge Michael Ciaffa wrote that "[w]hen a tenant's smoking results in an intrusion of secondhand smoke into another tenant's apartment, and that tenant complains repeatedly, the landlord runs a financial risk if it fails to

"In modern high-rise apartment settings, a tenant's home is *not* the tenant's castle. Landlords of such dwellings have a corresponding duty to prevent one tenant's habits from materially interfering with another tenant's right to quiet enjoyment. . . . [T]he landlord's failure to take appropriate action, over a period of several months, to rectify a second-hand smoke nuisance, justifies a rent abatement, and excuses the tenant from any obligation to pay rent after her constructive eviction." - **Judge Michael A. Ciaffa**

take appropriate action." The court noted that the parties in this case were governed by the state law requiring landlords to provide habitable housing as well as the language in the lease.

Referencing another recent New York case, *Poyck v. Bryant*, the court found that pervasive cigarette smoke can constitute "constructive eviction," which occurs when

living conditions are no longer habitable, forcing the tenants to leave as though they had been evicted. The court emphasized that pervasiveness of the problem and examining the specific facts of the case are key to making such a finding.

The court determined that the failure of the landlord to either successfully alleviate the problem or relocate Ms. Cannon resulted in her departure, making the departure a constructive eviction rather than an abandonment of the lease. Therefore, Upper East Lease Association lost the right to pursue a claim for lost rent that accrued after Ms. Cannon's departure.

The court also found Ms. Cannon should receive a percentage reduction in rent for the period of time she lived in the apartment and endured her neighbor's secondhand smoke. The judge determined that the rent abatement owed to Ms. Cannon, combined with her forfeited security deposit, cancelled out the rent owed that was unpaid for January and February. This finding meant neither party owed the other monetary damages.

CPHTP Joins in Amicus Brief in NYC Health Warning Law Appeal

The Center recently joined with the Tobacco Control Legal Consortium in filing an [amicus curiae brief](#) in the Second Circuit Court of Appeals urging the court to reverse the decision issued against the New York City Health Warning Law. At issue in the case is whether the Federal Cigarette Labeling and Advertising Act's preemption provision applies to health warnings displayed in retail establishments.

In December 2010, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York struck down a New York City law which required tobacco retailers to display pictorial warning signs illustrating the health effects of tobacco use and information about quitting the use of tobacco products at the

point-of-sale. The judge ruled that because point-of-sale displays constitute "promotion," the New York City regulation requiring warning signs to be placed near those displays was related to the promotion of cigarettes and therefore preempted by the federal law. The City disagreed with the judge's interpretation of the federal law, and insisted the signs portray factual messages about the dangers of smoking and are not preempted.

On April 15, 2011, the Tobacco Control Legal Consortium joined with other partners and filed an amicus curiae brief with the U.S. Court of Appeals for the Second Circuit in support of New York City's health warnings law. The brief, authored by **Micah Berman**, Director of the Center for Public Health and

Tobacco Policy, argues that the Federal Cigarette Labeling and Advertising Act, which was amended in 2009 by the Family Smoking Prevention and Tobacco Control Act, does not preempt, nor prohibit, the City from requiring the display of graphic health warnings at the point of sale. Joining the Consortium on this brief were Action on Smoking and Health, the American Cancer Society, the American Lung Association in New York, the American Thoracic Society, Americans for Nonsmokers' Rights, The Campaign for Tobacco-free Kids, the Framework Convention Alliance, the National Association of County and City Health Officials, and the National Association of Local Boards of Health.

FDA Issues Report and Recommendations for Menthol Cigarettes

When the Family Smoking Prevention and Tobacco Control Act prohibited sales of flavored cigarettes, it created an exception for menthol cigarettes. Instead, Congress required the Food and Drug Administration's Tobacco Products Scientific Advisory Committee (TPSAC) to prepare a report and make recommendations about "the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics and other racial and ethnic minorities." On March 18, 2011, TPSAC delivered its report to the Department of Health and Human Services, concluding that removing menthol from cigarettes would benefit public health.

Based on its review of current, prevailing scientific study on the topic of menthol as an ingredient in cigarettes, TPSAC reports that menthol use affects certain populations

more than others. The report confirms that adolescents smoke menthol at a higher rate than the general populace, helping TPSAC to conclude that menthol flavoring is more likely than not to increase the chances of addiction and encourage experimentation and regular smoking in children. Furthermore, menthol use in minority communities is strikingly high; almost 55 percent of established middle-school smokers, those who have smoked for at least one year, smoke menthol cigarettes, and that number jumps to 80 percent with regards to African-American middle school smokers. The report also found that menthol cigarettes are marketed with strategies that emphasize "healthy/medicinal claims, taste sensation (e.g., fresh, refreshing, cool, clean, crisp), youthfulness, and ethnic awareness." TPSAC determined that it is more likely than not that this targeted menthol cigarette marketing in-

creases prevalence of smoking for youth and African Americans. Examining all the evidence available, the report concluded, among other things, that the availability of menthol cigarettes increases the numbers of people who initiate smoking and leads to premature death from smoking-caused diseases.

The report will now undergo review by experts within the Food and Drug Administration's Center for Tobacco Products. They will examine the recommendations made by TPSAC and decide what, if any, regulatory actions should be taken.

An overview of the report can be found [here](#).

The full report can be accessed [here](#).

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News from some Community Partners: Community Partners and the Center for Public Health & Tobacco Policy recently finalized the New York Landlord Smoke-Free Housing Toolkit. The toolkit includes implementation and enforcement tips as well as sample surveys, tenant communications and lease addendums. While partners may be using similar materials to assist landlords, the documents in this toolkit have been tailored to NY State through detailed review by the Policy Center.

Thanks goes to Marlo Miura of the Policy Center for her meticulous editing and to Joey Koldare, former director of the NYC Coalition for a Smoke Free City, Sharon Fischer of Tobacco Free Broome and Tioga and Jeanie Orr of the Capital District Tobacco-Free Coalition for creating this useful tool.

The toolkit has been disseminated to all community partners and will be available through www.SmokeFreeHousingNY.org in the near future. Contact Jeanie Orr at jorr@setonhealth.org for more information.



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The Center for Public Health and Tobacco Policy (Center) is a resource for the New York tobacco control community. The Center is funded by the New York State Department of Health and will be working with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

The Center is located at New England Law | Boston and is project of the Center for Law and Social Responsibility. The Center is also affiliated with the Tobacco Control Legal Consortium.

The Center will work with tobacco control advocates in New York to support the adoption of evidence-based policies that reduce the availability of tobacco products, protect non-smokers from secondhand smoke, and minimize tobacco advertising and promotion.

Please Note: The Center is funded to provide assistance to the New York State Tobacco Control Program and its contractors. At this time, the Center is unable to provide assistance to individuals or groups who are not funded by the New York State Tobacco Control Program.