

Center Updates

Spring was a busy period here at the Center for Public Health and Tobacco Policy (CPHTP). Our spring semester law students completed their work with us in April before their reading period and finals. We congratulated Gerrit Betz and Lige Gu during the graduation festivities and wish them the best of luck. Gerrit is studying here in Boston for the Massachusetts and Pennsylvania bar exams. Lige, who volunteered with us during a busy final semester, returned to New York City to study for the New York bar exam. Perhaps some of you will see her taking practice exams in the Village. While no law students worked with us in May, we were actively closing out responsibilities with past students and preparing for our summer students.

May allowed CPHTP to focus on our point-of-sale (POS) projects. We worked with the Tobacco Control Program (TCP) to help them launch the second phase of the POS initiative for TCP contractors. As many of you are

well-familiar, the state POS goals are to: (1) require tobacco products be kept out of consumer view inside all non-adult-only retail establishments and (2) restrict the number of retail tobacco licenses in the state. Starting with change at the local level, CPHTP drafted separate model local ordinances to regulate the display of tobacco products and to implement a tobacco retail sale licensing system.

TCP hosted a webinar to launch the next phase, held twice on May 24th and May 27th, for Reality Check and Community Partner contractors, TCP staff, and related POS advocates. This provided a great opportunity to share updates on progress and accomplishments so far and to outline next steps. Micah Berman introduced and walked through the model local ordinances as part of the webinar. CPHTP also provided annotated versions of the two model ordinances. TCP provided an array of supporting materials at the webinar and at an in-person POS

meeting on June 3rd. In addition to the annotated model ordinances, CPHTP provided fact sheets about POS tobacco marketing expenditures and commercial speech challenges to tobacco marketing regulations.

This summer, CPHTP's main projects will include POS issues (display and licensing regulations), multi-unit housing, outdoor air, and tax evasion. Our summer law student clerks joined us in early June after an orientation and training. We have three full time clerks, one part-time clerk, and a limited-time volunteer. They are highly motivated and developing great legal and policy research skills by the day. CPHTP looks forward to a productive summer.

Thank you to everyone who sent us local policies. We are very appreciative and have been enjoying working with many of you on projects and technical assistance.

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Update on San Francisco Pharmacy Ban Lawsuit

Our March newsletter included a story about litigation over San Francisco's pharmacy ban ordinance which prohibits the sale of tobacco products in all pharmacies except those located in grocery and big box stores like Costco. The ordinance reflects a public health interest to prohibit the sale of tobacco products in pharmacies, since tobacco products are inherently harmful to human health and pharmacies are generally perceived as retail outlets with a goal of improving the health of their customers.

Walgreens, which operates licensed pharmacies in 52 of its 54 stores in San Francisco, requested a preliminary injunction against the enforcement of the ordinance after it was passed in 2008. The trial court dismissed the company's complaint. On December 23, 2008, Walgreens appealed the decision, claiming that the ordinance was a violation of the equal protection clauses of the federal and California constitutions because it only prohibits tobacco sales in certain retail establishments where a pharmacy is located. The equal protection clause prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

Since our last article, on June 8 the California First District Court of Appeals reversed the trial court's decision, agreeing with Walgreens' argument that the company has an equal protection claim because tobacco sales are still allowed at some establishments containing pharmacies. The appellate court sent the issue back to the trial court. It stated that if Walgreens prevails on its equal protection claim, the lower court will be required to decide whether to invalidate the ordinance all together or change the ordinance to ban the sale of tobacco at all pharmacies in the city. Deputy City Attorney Chhabria noted that this ruling could lead to a broader ban which would be a public health success for the City and County of San Francisco.

Tobacco Companies and Retailers Challenge Point of Sale Health Warning Law in NYC

On September 22, 2009, New York City's Board of Health passed a resolution requiring that "any person in the business of selling tobacco products face-to-face to consumers in New York City shall prominently display tobacco health warnings and smoking cessation signage produced by the (Health) Department." The Health Department has produced three different signs which show either a graphic image of lung cancer, tooth decay, or a brain damaged by stroke, and which bear the message "quit smoking today" followed by the telephone number for the New York Quitline. Any retailer that sells tobacco products must either post the signs within 3 inches of each cash register, or post one large sign near the tobacco product displays.

On June 2nd, two individual convenience stores, the New York Association of Convenience Stores, the New York Association of Service Stations and Repairs Shops, Lorillard Tobacco, Phillip Morris, and RJ Reynolds joined to file a suit against the New York City Department of Health and Mental Hygiene, the New York Department of Consumer Af-

fairs, the Commissioners of both of these Departments, and the New York Board of Health. The suit was filed in the United States District Court for the Southern District of New York. The plaintiffs allege that the resolution violates the 1st Amendment of the United States Constitution by forcing the convenience stores to speak against their will, and that this type of regulation is pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The plaintiffs also allege that the Board exceeded their regulatory authority in passing this resolution.

The convenience store plaintiffs allege that this resolution violates the 1st Amendment's restrictions on "compelled speech," by forcing them to post signs that they would not otherwise post. They contend that the signs will discourage people from purchasing a legal product, and also that the signs take up limited advertising and display space that would otherwise be used to promote tobacco or other non-tobacco products. The City will likely respond that health warnings are clearly the govern-

ment's own messages, not those of the retailers, and thus the "compelled speech" doctrine does not apply here.

Section 1334 of the FCLAA states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of . . . cigarettes . . ." This pre-emption provision was modified by the 2009 Family Smoking Prevention and Tobacco Control Act to allow local governments to regulate the "time, place, and manner, but not content" of cigarette advertising and promotion. The plaintiffs contend that despite the 2009 changes, the health warning requirement is preempted by the FCLAA provision. However, the City will likely respond that the health warning requirement does not regulate the "advertising and promotion" of cigarettes, and thus the FCLAA provision does not apply.

The defendants will file their initial response to the lawsuit in the coming weeks.

NY Communities Continue to Adopt Outdoor Tobacco Policies

In May 2010, the city of Binghamton, NY passed a resolution designating all thirty-three of the city's parks as entirely smoke-free. Citing health concerns and a desire to encourage children not to smoke, Binghamton followed in the footsteps of Maine, NY, a neighboring Broome County town which passed a resolution in the fall of 2009.

The town of Tonawanda, NY also unanimously passed a resolution last month, making all swimming pool areas, playgrounds, playing fields, and town buildings tobacco-free. Analogous to Binghamton's motives, Tonawanda's primary reasons for passing the resolution were to reduce exposure to second-hand smoke, model non-smoking behavior towards youth, and reduce or eliminate the health risks and littering problems created by discarded cigarette butts, which contain toxic chemicals and are not biodegradable. When discarded in public parks

and recreational areas, cigarette butts pose significant health risks due to the strong potential for small children to handle or ingest them.

In addition to Tonawanda, other Erie and Niagara county communities, such as Orchard Park, Alden, Lancaster and Wilson have also recently enacted smoke-free outdoor resolutions. Orchard Park, which made all of its parks, beaches and recreational areas smoke-free as of February 2010, was the first town in these counties to pass a resolution of this kind. The town of Alden's resolution was especially innovative because it declared all town-owned properties to be 100% smoke-free.

Hyde Park in Dutchess County, NY also passed a resolution last month which created tobacco-free zones at the town's two parks. The resolution is aimed at providing

a "safe, smoke-free environment" in areas where children frequently play. The town acknowledged that a negative example would be set for children if adults were smoking in the same vicinity where children were playing ball. Like those communities mentioned above that have taken similar actions, Hyde Park will implement its policy by posting signs at the designated smoke-free areas.

Although these resolutions do not impose penalties on violators, they make it clear that the communities implementing them have no tolerance for the detrimental effects that cigarette and tobacco use have on the health of residents or the negative influence that is inflicted upon youth. These resolutions signify progressive actions taken by communities toward reducing or eliminating the adverse effects that are imposed upon them by tobacco use.

FDA Rule Will Go Into Effect June 22

Although President Obama signed the Family Smoking Prevention and Tobacco Control Act into law back in June 2009, giving the U.S. Food & Drug Administration (FDA) the authority to regulate tobacco, many of the provisions in the new law have yet to be in effect until this month. In March, the FDA issued a final rule containing sweeping measures to reduce youth access to cigarettes and smokeless tobacco, as well as limit their appeal. The FDA rule will go into effect on June 22, 2010.

The rule will prohibit:

- The sale of cigarettes or smokeless tobacco to people under the age of 18;
- The sale of cigarette packages with less than 20 cigarettes;
- The sale of cigarettes and smokeless tobacco in vending machines or self-service displays, except in adult-only environments.
- Free samples of tobacco products, except small samples of smokeless tobacco in very limited circumstances;

-Brand name sponsorship at any athletic, musical or other social or cultural event by any tobacco manufacturer, distributor or retailer;

-Gifts or other items in exchange for buying cigarettes or smokeless tobacco products;

-Audio ads with any music or sound effects; and

-The sale or distribution of items, such as hats and tee shirts, with tobacco brands or logos.

In addition to the above regulations, tobacco companies will no longer be permitted to market, advertise, or label their products using descriptive words like "light" or "mild" which give the impression of reduced harm. Many smokers are under the mistaken impression that using "light" cigarettes reduces the chance of adverse health effects from smoking. Tobacco companies have been preparing for this restriction by branding their "light" cigarettes with certain colors so that tobacco

users can still identify them after the restrictions are in effect. Many tobacco control experts believe that cigarette manufacturers will maintain their ability to effectively market their products as "light" by using light colors, much as soda and snack food manufacturers do.

In preparation for the new regulations to go into effect, The FDA's Center for Tobacco Products (CTP) invited retailers, tobacco control advocates, and tobacco industry representatives to participate in the Conversation on FDA Tobacco Retailer Education Web Dialogue. The dialogue allowed participants to raise questions and provide suggestion regarding CTP's education campaign on the new regulations. For a summary of the events, [click here](#).

Members of the general public can report violations to the FDA's Center for Tobacco Products through their [website](#), by e-mail (AskCTP@fda.hhs.gov), or by phone (1-877-CTP-1373).

Study Examines Dual Use of Cigarettes and Smokeless Tobacco

Until recently, the smokeless tobacco industry and the cigarette industry in the United States were largely separate. This changed in 2006 when Reynolds American, Inc. purchased the Conwood Company and in 2008 when the Altria Group, the parent company of Philip Morris, purchased the U.S. Smokeless Tobacco Company. Prior to the buyout of the Conwood Company and the U.S. Smokeless Tobacco Company, Scott Tomar, Hillel Alpert, and Gregory Connolly collected data for their study *Patterns of Dual Use of Cigarettes and Smokeless Tobacco Among U.S. Males: Findings from National Surveys*, which appears in the most recent edition of Tobacco Control. The purpose of the study "was to examine patterns of concurrent use of [smokeless tobacco] and cigarettes among young people and adults in the USA." One reason this study is important is that it provides a baseline measure of the scope of dual product use before the cigarette manufacturers entered the smokeless tobacco market.

While cigarette smoking in the U.S. is on the

decline, sales of one type of smokeless tobacco have increased, a factor undoubtedly playing a role in the cigarette manufacturers' decision to enter the smokeless tobacco market. Although the sales of chewing tobacco and dry snuff were on the decline in the years preceding the study, the sale of moist snuff jumped from 61.5 million pounds to 77.4 million pounds between 2000 and 2006. Unlike for men who used snuff every day, the study found that the prevalence of smoking was fairly high both for men who use snuff on a "less-than-daily basis" and for men who were "former snuff users." Additionally, there was a considerably higher prevalence of smoking among middle school and high school male students who used smokeless tobacco than among young men who did not use smokeless tobacco.

Another interesting finding of the study is that the non-daily smokeless tobacco users, more than any other group, were likely to be daily smokers. Furthermore, the daily smokers that used smokeless tobacco on a

non-daily basis communicated the greatest interest in quitting smoking in comparison to any other group, yet they were more likely to have tried to quit smoking in the last year and failed. The authors considered two possible meanings of these findings: (1) that non-daily users of smokeless tobacco who smoke cigarettes on a daily basis may be using smokeless tobacco as a partial substitution of smoking and this may prolong dependence; or (2) that daily smokers who have unsuccessfully tried to quit smoking started using smokeless tobacco as a means of quitting smoking.

Knowing that cigarette smoking is on the decline and that cigarette manufacturers now have a financial stake in the success of the smokeless tobacco market, the results of this study may foreshadow more persistent promotion of smokeless tobacco by the tobacco industry and a future increase in the dual use of smoking and smokeless tobacco.

Massachusetts Vote on New Smoking Warning Regulations May Be Delayed by NYC Lawsuit

In an era of drastically reduced budget allocations for state-run tobacco prevention and smoking cessation programs, cost-effective interventions are one of the few remaining ways to counteract over 36 million dollars spent per day on tobacco marketing in the United States.

One such intervention is currently under consideration by the Massachusetts Public Health Council. New regulations will require tobacco retailers to post signs of graphic images near cigarette displays and cash registers which depict the harmful effects of smoking. The signs, similar to those used by a New York City regulatory scheme, may include color images of diseased lungs, dental decay or brain damage due to tobacco-induced stroke.

Such imagery is shown to prevent youth from beginning to use tobacco and, when combined with information on where to access assistance, induces existing smokers to seek help to quit. Similar graphic images in use as warning labels on Canadian cigarette packages resulted in the largest quarterly reduction in cigarette sales in over a decade, and over 40% of smokers surveyed said the images raised their tobacco-related health concerns as well as their motivation to quit.

The Massachusetts signs will differ slightly from those in New York. In addition to the required graphic warning images, separate smoking cessation resource signs will feature testimonials of former smokers along with information on how to obtain cessation resources from the Massachusetts Tobacco Cessation and Prevention Program (MTCP). Signs will be posted at cash registers and adjacent to areas where tobacco products are on display. In an article in the [Boston Globe](#), MTCP policy director Eileen Sullivan stated that signs will be made available to retailers at no charge.

This type of intervention is recommended by the National Academy of Sciences Institute of Medicine report, *The Tobacco Problem: A Blueprint for the Nation*. The report recommends, “retail outlets choosing to carry tobacco products should be required to display and distribute prescribed warnings about the health consequences of tobacco use, (and) information regarding . . . services for cessation.”

Sullivan said, “MTCP’s very limited state-wide budget of \$4.5 million effectively rules out anti-smoking mass media campaigns, but this cost effective intervention may have significant effect by focusing delivery of prevention and cessation messages at

the point of purchase.” The program will be financed by a \$316,000 grant from the Centers for Disease Control and Prevention which enables provision of signs at no cost to the state’s approximately 9,000 tobacco retailers.

Tobacco manufacturers and retailers evidently share the belief that New York and Massachusetts poster programs could seriously lower their sales. Presently, two legal challenges exist to this type of regulation. R.J. Reynolds, Philip Morris and Lorillard claim the New York regulations violate the First Amendment of the U.S. Constitution by forcing retailers to graphically advocate on behalf of the city.

As a result, the vote by the Public Health Council (PHC), which was originally slated for August, is likely to occur later this fall pending the outcome of a lawsuit seeking injunction against the New York City regulations. An injunction in New York may further delay the vote in the Massachusetts legislature pending outcome of the suit. However, because of solid support by PHC members, Sullivan indicates MTCP will continue its preparations for eventual passage of the law by proceeding this July with testing panels to determine the most effective images to deliver the message.

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The Center for Public Health and Tobacco Policy (Center) is a new 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.