



Massachusetts Department of Public Health

FINAL EMERGENCY REGULATION 105 CMR 665.000: MINIMUM STANDARDS FOR RETAIL SALE OF TOBACCO AND ELECTRONIC NICOTINE DELIVERY SYSTEMS

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Summary of Regulation

105 CMR 665.000, *Minimum Standards for Retail Sale of Tobacco and Electronic Nicotine Delivery Systems:*

- Was promulgated on an emergency basis on December 11, 2019 and sets forth standards for the retail sale of electronic nicotine delivery systems (ENDS) pursuant to sections of An Act Modernizing Tobacco Control that went into effect immediately upon being signed into law on November 27, 2019;
- Restricts the sale and distribution of all flavored ENDS to smoking bars;
- Restricts the sale and distribution of all unflavored ENDS with a nicotine concentration greater than 35 milligrams per milliliter to retail tobacco stores and smoking bars;
- Establishes municipal permit requirements for retail tobacco stores and smoking bars;
- Requires retail establishments, including smoking bars and retail tobacco stores, to conspicuously post signage, in the form developed and made available by the Department;

Summary of Regulation (continued)

- Prohibits retail establishments from advertising tobacco products that they cannot sell, use fraudulent or misleading statements in advertising, or display advertisements with celebrities, cartoons or similar endorsements;
- Establishes identification requirements for each person selling or providing tobacco products to verify age of purchaser and/or for entry into age-restricted establishment;
- Prohibits coupons and other discounts in all establishments, and prohibits free samples except for in retail tobacco stores and smoking bars, prohibits out-of-package sales and cartridge refills and requires liquids or gels containing nicotine be packaged in child-resistant packaging;
- Establishes a fining structure beginning at \$1,000 for a first offense and up to \$5,000 for a third offense and allows for a suspension of sales of tobacco products for any second or subsequent offense; and
- Provides additional authority regarding ENDS that are proven by a regulatory agency to be the cause of an imminent threat to public health

Public Comment and Recommendations

- A public hearing was held on January 17, 2020.
- Six individuals or organizations provided comments during the public comment period.
- The overwhelming majority of comments was supportive, and provided helpful suggestions for clarification or future policy development.
- As a result of the comments received, DPH recommends changes to the regulation. These changes are technical and/or clarifying in nature, or in response to change in federal law.

Change in Federal Law- 105 CMR 665.005:

Minimum Legal Sales Age: Updates to the regulation remove the definition of “minimum legal sales age”. Due to recent changes in federal law setting the minimum sales age for tobacco products at 21 years old, this definition is no longer necessary. Throughout the entire regulation, this term has been replaced with the phrase “21 years of age”.

Post Comment Changes - 105 CMR 665.010:

Tobacco Product: As promulgated in December 2019, the phrase “regardless of nicotine content in the product” was inadvertently excluded from the definition of “tobacco product”. Based on public comments and to ensure alignment with M.G.L. c. 270, § 28, this phrase has been added to the definition of “tobacco product”.

Use of Flavored ENDS in Smoking Bars: Based on public comments, the provision indicating flavored ENDS are for onsite consumption in a smoking bar has been updated to specify these products are for “on-site consumption **only**”.

Post Comment Changes - 105 CMR 665.015: Required Signage

Warning of Secondhand Smoking or Vaping Onsite: Currently, the regulation requires all smoking bars and retail tobacco stores post signs warning smoking and/or vaping may be present on-site; however, not all retail tobacco stores allow for on-site consumption.

In response to public comment, the updated regulation requires only those retail tobacco stores that allow on-site consumption post signage warning of possible smoking, vaping, or tobacco product use onsite.

Signage Fines: Currently, the regulation says unlawful removal of a required sign is subject to a fine of “not more than \$10.00”; however, M.G.L. c. 270, § 7(c) sets the fine at \$10 (instead of up to). The regulation has been updated to require a \$10 fine.

Post Comment Changes - 105 CMR 665.040: Requirements for Retail Establishments and 105 CMR 665.045: Violations

Suspension of Tobacco Sales: Currently, the regulation sets the maximum number of days a tobacco retailer found in violation of the regulation may be suspended from selling tobacco products (e.g., “up to 30 consecutive days”). Public comments from groups representing local jurisdictions noted this “ceiling” may conflict with existing local rules and regulations.

To address this, the regulation now clearly indicates local jurisdiction may enact more stringent suspension periods, consistent with anti-preemption language within M.G.L. c. 111, § 239.

Post Comment Changes - 105 CMR 665.057: Preemption

Currently, the regulation does not specifically acknowledge the ability of a local authority to adopt its own rules and regulations, provided those rules or regulations do not conflict with DPH regulations or federal or state law. However, commenters requested anti-preemption language be added to the regulation.

To address this, DPH has included the anti-preemption language within M.G.L. c. 111, § 239 to reiterate state law for clarity in the regulation and to remove any ambiguity.

Next Steps

- We request approval of the proposed amendments to this regulation.
- Staff will present to Public Health Council at a future date to address portions of the Act Modernizing Tobacco Control that go into effect in June, 2020.

More information on the law and regulation can be found at:

www.mass.gov/newtobaccolaw

Support to Local Boards of Health

- Support municipal boards of health in implementation by providing additional resources and training
- Municipal Tobacco Control Conference – two offerings, March 23 and 25