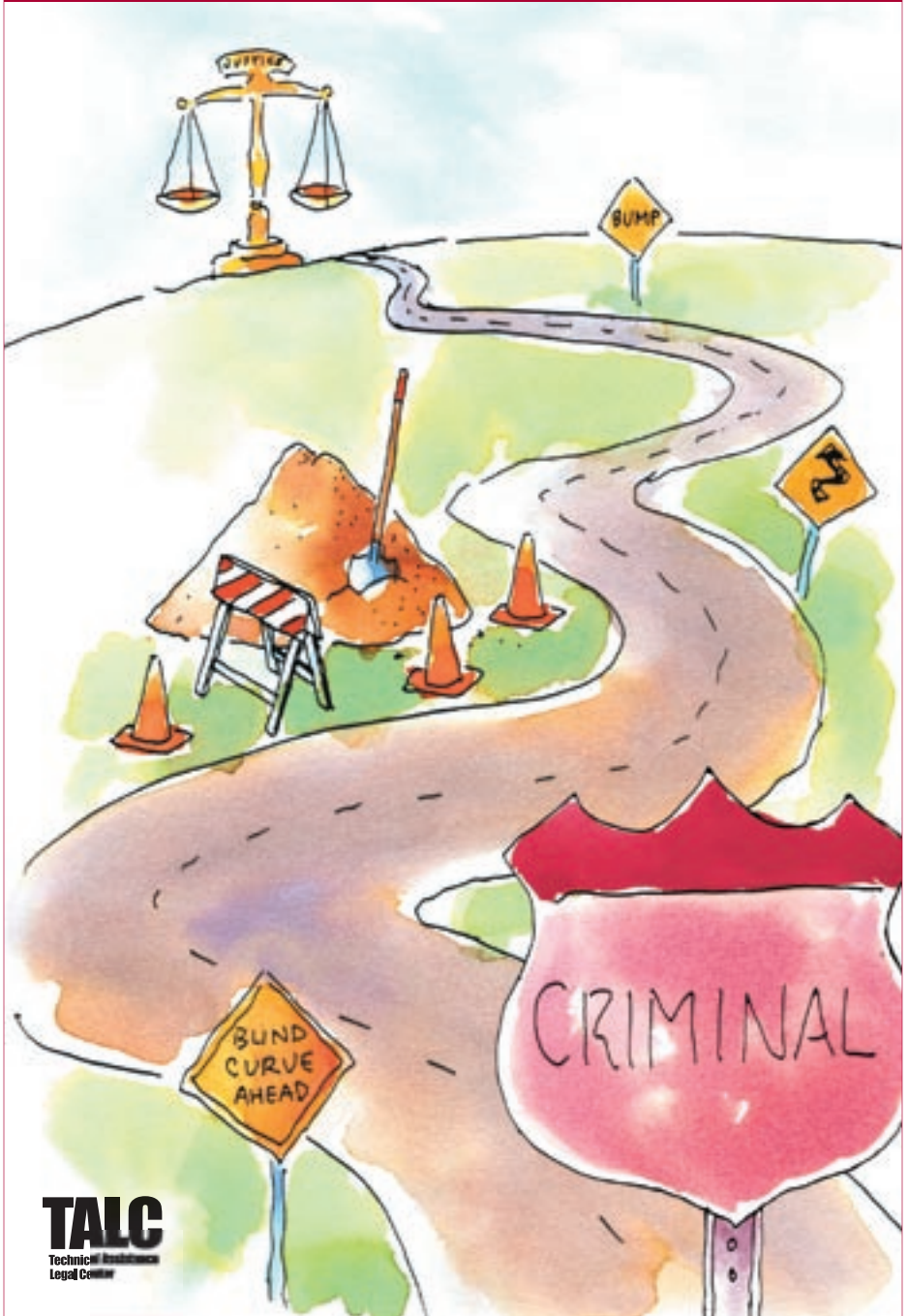


# Criminal Enforcement Roadmap



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# Criminal Enforcement Roadmap

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# About TALC's Enforcement Roadmaps

A concern frequently voiced by tobacco control advocates is that existing tobacco control laws are not properly enforced. The best way to increase enforcement of tobacco laws is to eliminate the barriers that may be impeding active local enforcement; but without an overall sense of how enforcement is designed to occur, ways around the barriers may be difficult to find.

TALC has created a series of three Enforcement Roadmaps to help tobacco control advocates identify potential enforcement roadblocks and see the context in which these barriers exist. The three different enforcement pathways are *criminal enforcement*, *civil enforcement*, and *administrative enforcement*. Each roadmap package consists of two main parts:

- A narrative description, which explains the process and suggests potential solutions to overcome enforcement roadblocks
- A flowchart of the roadmap, illustrating the process involved in criminal, civil, or administrative enforcement on a foldout poster

Each narrative description—the booklet you're now reading—is broken down into four sections:

**Roadblocks** The first section of this booklet explores the most common ways in which civil, criminal, or administrative enforcement fails to be effective and offers potential solutions.

**The Road** The second section explains the parts of the legal procedure involved in criminal, civil, or administrative enforcement that are most relevant to tobacco control advocates. It begins with general background information and then explains the steps involved. The foldout map accompanying this booklet depicts the steps described in this section.

**Glossary** The glossary gives readers a better sense of who's who in tobacco law enforcement, identifying the various players in the enforcement process.

**Appendix** To help readers determine which of TALC's three Enforcement Roadmaps to consult, this appendix provides information about the types of penalties—criminal, civil, or administrative—that apply to each of the tobacco control laws affecting California.

# The Roadblocks of Criminal Enforcement

There are three fundamentally different enforcement pathways: **criminal** enforcement, **civil** enforcement, and **administrative** enforcement.



## Criminal

An example of a criminal tobacco control law is California Penal Code section 308(a), prohibiting tobacco sales to minors. Violations of this law are usually prosecuted as misdemeanors in criminal court.



## Civil

An example of a civil tobacco control law is California Business and Professions Code section 22960, prohibiting self-service displays of cigarettes. Enforcement of this law requires that a civil lawsuit be filed in civil court.



## Administrative

An example of a tobacco control law enforced administratively is a local tobacco retailer licensing law. A hearing to determine if a tobacco license should be suspended or revoked would be held by a government agency, such as the health department, and not by a civil court.

See the Appendix on page 30 for a complete list of California tobacco control laws and the procedures used to enforce them.

TALC has developed a separate roadmap for each of the three enforcement pathways. This roadmap describes the criminal enforcement process. The first part of this roadmap (the “roadblocks”) describes barriers to effective criminal enforcement and offers potential solutions. The second section (the “roadmap”) describes the criminal enforcement process. A foldout graphic roadmap accompanies this part of the narrative.



## I. Criminal Enforcement: Roadblocks

The road to effective enforcement of criminal tobacco control laws involves many stops along the way. Because enforcement requires multiple individuals and agencies, the process can break down at several points. The three most common roadblocks follow:

- **Language of the Law** The law doesn't specify what law enforcement agency is supposed to investigate potential violations; it doesn't require any law enforcement agency to actually check for violations of the law (e.g., to conduct a certain number of compliance checks per year); or the law enforcement agency specified is simply unaware of the law.
- **Law Enforcement Agency** The law enforcement agency that is supposed to investigate potential violations (e.g., police or code enforcement) does not make the law a priority, perhaps due to insufficient funding or staffing.
- **Prosecution** The prosecuting attorney (e.g., the district attorney) does not make prosecuting violations of the law a priority, perhaps due to insufficient funding or staffing, or perhaps due to lack of evidence because no law enforcement agency is charged with collecting it.

It is not uncommon for advocates to encounter multiple roadblocks for a given law. Although there are no easy shortcuts around these enforcement roadblocks, potential solutions exist at every step. These solutions are discussed in the next section.

## II. Criminal Enforcement: Roadblock Solutions

### A. Roadblock: Language of The Law

#### Key Players:

- Tobacco Control Advocates
- Law Enforcement Agency
- City Council / Board of Supervisors

At least five possible strategies can increase the enforcement of an existing criminal tobacco control law simply by considering what the law says and does not say.

#### 1. Identify the Designated Law Enforcement Agency

The first step is to identify the agency responsible for enforcing the law. For state laws, consult TALC's booklet *Tobacco Laws Affecting California*. For local laws, the law itself must be examined. Many municipal codes (local laws) are available via the Internet, often through a city or county's official website. Alternatively, TALC's website contains links to lists of available municipal codes (<http://talc.pho.org/talclinks.htm>).

#### 2. Identify a Capable Law Enforcement Agency

If the law does not designate an agency, generic enforcement powers may still exist to enforce the law. For state laws, California Penal Code section 830.1 provides that any peace officer (e.g., police and sheriffs) may enforce a state law categorized as an infraction, misdemeanor, or felony. So, even if no enforcement agency is specified, the fact that a law has a designated criminal category means that any peace officer can be called upon to enforce the law. Likewise, most local codes provide that any violation of the code is a misdemeanor unless otherwise specified and that any of a number of local law enforcement officers can enforce such a law (e.g., police and sheriffs). Such provisions usually appear near the beginning of a municipal code. TALC's website contains links to lists of available municipal codes (<http://talc.pho.org/talclinks.htm>).

### 3. Ask Questions

If you still can't discover the proper enforcement agency, call local agencies to determine if any of those agencies believe that they are responsible for enforcement. Also consider asking the city or county clerk. As a last resort, consider asking the city council or board of supervisors which agency should be responsible for enforcement, perhaps by writing a letter to the elected officials or speaking during a meeting's public comment period.

### 4. Contact the Agency

Once the appropriate agency is identified, advocates should contact the enforcing agency to see if it is aware that it is the agency responsible for the law and ask whether any enforcement has occurred. Most tobacco control laws are complaint-driven, so identifying and sending complaints to the proper agency is a key first step toward achieving enforcement. For an agency previously unaware of its role for a particular law, complaints may be all that it takes to stimulate enforcement.

### 5. Advocate for Clear Laws

To avoid confusion, tobacco control laws should clearly designate the primary agency responsible for enforcement and, at the same time, permit enforcement by a wide range of agencies (e.g., designate the police department as the primary enforcement agency but provide that any peace officer may enforce the law). Advocates can educate members of the city council or board of supervisors about this need when a new law is being drafted or considered. Advocates can also seek to have existing tobacco control laws amended to add clear enforcement provisions. TALC is available to speak with the city attorney, county counsel, or elected officials about how to draft clear enforcement provisions.

## B. Roadblock: Law Enforcement

Key Players:
<ul style="list-style-type: none"><li>▪ Tobacco Control Advocates</li><li>▪ Law Enforcement Agency</li><li>▪ City Council / Board of Supervisors</li></ul>



Even the most well-crafted tobacco control law will be meaningless without enforcement. When a well-written law goes unenforced, it is because the resources required outweigh the motive to expend them.

Law enforcement agencies must make tobacco control laws a priority before full enforcement can occur. The priority of tobacco control laws is influenced in part by the availability of funding and staffing. If an agency does not have sufficient resources, it must choose which laws to enforce and which to ignore. Public demand can play an important role in this decision.

At least six possible strategies can increase the enforcement of an existing criminal tobacco control law.

### **1. Allocate Resources**

If funding has been identified as the problem behind inadequate enforcement, an obvious answer is to give the enforcing agency more money dedicated to tobacco control. Beyond the politically difficult solution of tapping a community's general fund, consider requesting that the local city council or board of supervisors allocate Master Settlement Agreement money for additional enforcement.

### **2. Charge a Fee**

A more comprehensive approach is to convince the community to pass a local tobacco retailer licensing or similar law mandating a mitigation fee sufficient to fund effective enforcement of tobacco control laws that affect retailers. In particular, the fee structure or fine of a local ordinance can specifically cover the cost of employing additional personnel—even if only in a part-time position. For example, setting the fees for a licensing ordinance at a rate sufficient to fund enforcement would enable a new part-time or full-time law enforcement officer to be hired, or sufficient overtime to be paid, thereby eliminating staffing concerns as a barrier to effective enforcement.

This strategy may be more successful if the designated law enforcement agency is willing to support the fee before the city council or board of supervisors. Providing funding for additional staff (or staff overtime pay) may hold great appeal for an understaffed law enforcement agency.

### **3. Create Public Demand**

In most communities, effective enforcement is driven by citizen complaints, media attention, or concern from an elected official. Tobacco control advocates, therefore, should educate and involve the community in efforts to stimulate enforcement, as it is so often a result of community pressure. For example, advocates could set up a complaint hotline or start a postcard campaign to report potential violations of a tobacco law to the enforcing agency. Including coalition members and community leaders can be an effective way to stimulate interest in and increase enforcement of tobacco control laws. Keep in mind that media outreach is often essential to increasing community support.

### **4. Partner with Law Enforcement**

Another option is to bring the multiple resources of advocates to the table, (e.g., volunteers to assist with enforcement, staff time to help organize an enforcement effort, or funding such as Master Settlement Agreement funds). Advocates can help law enforcement conduct youth tobacco stings to see if retailers are selling tobacco to minors, for example, by providing youth decoys. Make it clear that advocates are willing to work with enforcers to resolve problems that arise and to provide support, such as trainings (including continuing education credits if possible), fact sheets, data collection, or staff for a complaint hotline. Remember that offering assistance instead of criticism is often the best approach. Dedication and willingness to participate in developing solutions for enforcement concerns can be extremely effective in gaining an enforcer's support. In the end, an ongoing collaboration is the best way to ensure that increased enforcement is maintained.

### **5. Economize Enforcement**

Other possible solutions include finding ways to economize existing enforcement measures so that tobacco control laws can be included at little or no cost. For example, local code enforcers might be convinced to include some tobacco control tracking measures on their survey when they make their routine retailer compliance checks. This would allow them to make more thorough compliance checks with fewer staff and less expense.

## 6. Demonstrate Appreciation

Once advocates have been successful in encouraging enforcement of tobacco control laws, they are in a good position to thank cooperative law enforcement agencies, giving them public recognition and improving the agencies' reputation in the community.



## C. Roadblock: Prosecution

### Key Players:

- District Attorney / City Prosecutor
- Tobacco Control Advocates
- Law Enforcement Agency
- City Council / Board of Supervisors

Even if you are successful in convincing law enforcement to arrest or cite people who violate tobacco control laws, if the prosecutor (e.g., the district attorney) does not pursue the case, it is possible that no penalty will be imposed. Further, even the most enthusiastic law enforcement agencies will soon stop enforcing tobacco control laws if their efforts never lead to prosecutions. To prevent this result there are at least four possible strategies:

## **1. Charge a Fee**

As with law enforcement, a local ordinance could charge a fee that specifically allocates funds to the local prosecutor to prosecute tobacco control cases.

## **2. Encourage Partnerships Between Law Enforcement and Prosecutors**

If local law enforcement is willing to cite people for violating tobacco control laws, it will help streamline the process if law enforcement meets with the prosecution in advance regarding what types of cases might be forwarded to them. This gives prosecutors time to become educated about tobacco control laws and, in turn, provide tips to law enforcement regarding what evidence might be helpful to win the case in court and how to collect it (e.g., a district attorney should preapprove a police compliance check protocol).

## **3. Educate Prosecutors Directly**

Advocates can provide information to a district attorney or city prosecutor directly on local tobacco control laws and why the laws are important in the local community. Advocates could offer trainings to prosecutors on tobacco control laws; such trainings could provide continuing education credits if possible. Often, convincing even a single prosecutor of the importance of tobacco control can lead to dramatic results.

## **4. Create Public Demand**

As with law enforcement, prosecutors may be influenced by demonstrated public demand for enforcement of a particular tobacco control law.

## **D. Conclusion**

The criminal law enforcement process is complex. Multiple enforcers are involved in seeing that process through to the end. These individuals have detailed and practical knowledge of how things get done on the local level, and they are essential participants for enforcing criminal tobacco control laws. Understanding the big picture of criminal procedure can help advocates identify enforcement roadblocks and negotiate and motivate solutions.

# The Road of Criminal Enforcement

This portion of TALC’s Criminal Enforcement Roadmap explains the parts of criminal legal procedure that are most relevant to tobacco control advocates. The roadmap begins with general background, then explains what happens from the point of arrest to judgment, and finally briefly addresses appeals. A foldout graphic roadmap depicting these steps accompanies this narrative.

Note that criminal laws and civil laws differ in important ways:

- Civil penalties usually involve paying money or stopping illegal behavior, whereas criminal penalties can also include sending a violator to jail
- Unlike laws with criminal penalties, laws with civil penalties often do not involve the police or the sheriff’s department

For example, a retailer who violates California’s self-service display ban for cigarettes (California Business and Professions Code section 22960) must be sued in civil court, usually by a city attorney, and risks no more than a \$300 fine. A clerk who sells cigarettes to a minor in violation of California Penal Code section 308(a) will usually be cited by law enforcement, then prosecuted by the district attorney, and risks not only a fine but also up to six months in jail.

Administrative laws or laws enforced through administrative hearings are a special type of civil law. TALC has created a separate Administrative Enforcement Roadmap for administrative enforcement procedures.

## I. Criminal Law: Background

### A. Types of Crimes

In violating a criminal law one risks a fine, imprisonment, and, in the most serious cases, even death. However, fundamental fairness dictates that a person receive due process before the state deprives her of life, liberty, or property.<sup>1</sup> The minimum amount of process due (meaning the types of procedures the accused is entitled to before being convicted of a crime) depends on the nature and severity of the potential penalty.

A crime is classified as an infraction (petty crime), a misdemeanor (minor crime), or a felony (serious crime).<sup>2</sup> The classification is based upon

the associated potential penalty. An infraction results in the least severe punishments and accordingly involves the fewest procedures. A felony results in the most serious punishments and so requires the most procedural steps. A misdemeanor falls in between.

Examples of tobacco control laws classified as infractions include California's smoke-free workplaces law (California Labor Code section 6404.5, also referred to as "AB 13") and the tot-lot smoking ban (California Health and Safety Code section 104495). Examples of tobacco control laws classified as misdemeanors include California's prohibition against tobacco sales to minors (California Penal Code section 308(a)) and the prohibition against selling single cigarettes (California Penal Code 308.2). The classification of every California state tobacco control law can be found in TALC's booklet *Tobacco Laws Affecting California*.

The only tobacco control felony in California is for tax evasion amounting to \$25,000 or more in one tax year.<sup>3</sup> As a result, felony procedures generally are not relevant to tobacco control advocates in California, and procedures unique to felonies have been omitted from this roadmap.

## **B. Penalties**

The penalty for violating a specific law generally will be written into the law that makes the act illegal.<sup>4</sup> However, California has default punishments for categories of crimes with no specified penalties. For an infraction, the default punishment is a fine up to \$250.<sup>5</sup> Prison is not a possibility for infractions.<sup>6</sup> The default punishment for a misdemeanor is a fine up to \$1,000, confinement in the county jail for up to six months, or both.<sup>7</sup> In general, felonies can be punished by anything from fines to the death sentence. A criminal conviction can also be grounds for denial, suspension, or revocation of a professional or business license (e.g., a tobacco retailer license) if the conviction is substantially related to the professional or business duties.<sup>8</sup>

## **C. Rights and Privileges**

Rights in criminal cases include the right to trial by jury (except for infractions),<sup>9</sup> the right to a speedy trial, the right to legal counsel, the right to confront and cross-examine witnesses, the right to produce evidence on one's own behalf, and the privilege against self-incrimination.<sup>10</sup>



## D. Standard and Burden of Proof

Because criminal penalties involve the sanction of the community,<sup>11</sup> criminal trials carry certain unique procedural safeguards. One safeguard is that the defendant is considered innocent until proven guilty.<sup>12</sup> Another is the high standard of proof—“beyond a reasonable doubt”<sup>13</sup>—the highest standard the law recognizes. A third is that the prosecution (the government) bears the burden of proof.<sup>14</sup> That is, the prosecution must prove beyond a reasonable doubt that the defendant committed each element of the crime to win its case.<sup>15</sup> Technically, the defendant need not prove anything. A fourth safeguard is that criminal jury verdicts must be unanimous to find guilt.<sup>16</sup>

## E. Evidence

Evidence is used throughout the criminal process; it is needed to justify arrest and to convince a jury to convict or acquit (reach a “not guilty” verdict).<sup>17</sup> Evidence can take many forms: testimony, writings, material objects, or other things that are offered to prove the existence or nonexistence of a fact.<sup>18</sup>

Only relevant evidence is admissible at trial. *Relevant evidence* is that which has a tendency to prove or disprove a disputed fact that is of consequence to the outcome of the case (e.g., a fact related to an element of a crime).<sup>19</sup> All relevant evidence is admissible, be it direct evidence or circumstantial evidence,<sup>20</sup> unless otherwise provided by law.<sup>21</sup>

For example, while present at the scene of a crime, an officer will gather evidence to support a citation, which may involve nothing more than taking mental notes of what happened, which she later writes into a police report.

When potential evidence is not readily at hand, an officer may obtain a search warrant from a judge authorizing the search of specified places and things and to seize specified evidence.<sup>22</sup> A judge will only issue a search warrant if there is probable cause to believe evidence of a crime will be discovered. Probable cause is a relatively low threshold;<sup>23</sup> the goal is to allow police to gather evidence of guilt, evidence that may or may not ultimately help prove that a crime was in fact committed.



## II. Criminal Law: From Arrest to Sentencing

### A. Arrest and Citation

Criminal procedure usually begins with an arrest (often following a citizen complaint).<sup>24</sup> Arrests are made with and without arrest warrants.<sup>25</sup> The main way tobacco control arrests will be made is when an officer has probable cause to believe that the person committed a crime in the officer's presence (e.g., a clerk sells cigarettes to a youth decoy supervised by law enforcement).<sup>26</sup> Probable cause exists "when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime."<sup>27</sup> For example, if an officer notices customers approaching a sales counter empty-handed but leaving holding single cigarettes, probable cause exists to believe that the law prohibiting single-cigarette sales is being violated.

In a misdemeanor or infraction arrest,<sup>28</sup> an officer generally will release a person who signs a promise to appear (a citation).<sup>29</sup> In a felony case, the arrestee will almost always be taken into custody.<sup>30</sup> If the arrestee is taken into custody, the U.S. Constitution requires that a judge review the arrest for probable cause without unnecessary delay (usually within 48 hours<sup>31</sup> of arrest).<sup>32</sup>



Note that the decision about whom to cite can strongly influence the effect of a law. For example, if a store is illegally selling bidis but only the clerk is cited, the store owner may have little incentive to stop stocking bidis.

Before the arrestee appears in court for the arraignment (see next section),<sup>33</sup> the arresting officer files a duplicate copy of the notice to appear with the prosecuting attorney or with the magistrate judge.<sup>34</sup> The prosecuting attorney (e.g., the district attorney) decides whether or not to begin a criminal prosecution on the charge.<sup>35</sup> Note that the decision of whether to prosecute the case greatly impacts the incentive within a community to comply with tobacco control laws.

If no charges are to be filed, the prosecuting attorney will send notice to the person cited and drop the case.<sup>36</sup> If charges are to be pressed, the prosecutor files with the court either a complaint<sup>37</sup> or a duplicate of the notice to appear.<sup>38</sup>

## **B. Arraignment Before a Magistrate**

Persons accused of an infraction, misdemeanor, or a felony charged by complaint make their first court appearance before a magistrate judge.<sup>39</sup> For some infractions, the accused can simply plead guilty by paying the appropriate fine and never appear in court (e.g., paying a traffic ticket). The purpose of this first appearance, called an arraignment, is to inform the accused of the charges against her and to give her a fair opportunity to plead to them (e.g., plead guilty or not guilty).<sup>40</sup> At the arraignment the magistrate reads the charges against the defendant and tells the defendant her rights, such as the right to legal counsel, the right to a speedy trial, the privilege against self-incrimination, the right to produce evidence on her own behalf, and the right to confront and cross-examine witnesses.<sup>41</sup> A defendant who appears with a lawyer usually waives (voluntarily forgoes) formal arraignment. Defendants without a lawyer are commonly arraigned in a group once a day.

At the arraignment the defendant can make a plea, or another appearance may be set so that the defendant can meet with legal counsel before pleading.<sup>42</sup> If the defendant pleads guilty, the court proceeds with judgment and sentencing according to the penalties established by the law violated (see section F). If the defendant pleads not guilty, a misdemeanor or infraction case is set for trial while a felony case is set for a preliminary hearing. Infraction cases are set for a bench trial (trial before a judge with no jury),<sup>43</sup> and misdemeanor cases can be set for either a jury trial or a bench trial.<sup>44</sup> A misdemeanor or infraction

case is set for trial no sooner than five days and no more than 45 days after the arraignment (30 days if the defendant is in custody),<sup>45</sup> unless the defendant has waived these timing rights or the prosecution shows good cause for delay.<sup>46</sup> Additional procedures apply if the alleged crime is a felony.

## C. Misdemeanor Diversion

Misdemeanor diversion programs divert relatively minor lawbreakers into community programs for education, treatment, or rehabilitation.<sup>47</sup> Diversion is available at any point in the judicial process from charging to judgment<sup>48</sup> for defendants who meet the criteria.<sup>49</sup> If the defendant performs satisfactorily in the diversion program, at the end of the program the criminal charges are dismissed<sup>50</sup> and, except for the purposes of law enforcement inquiries, it shall be as if the arrest never occurred.<sup>51</sup> If the defendant performs unsatisfactorily, criminal proceedings are reinstated and the defendant must pick up again wherever the prosecution left off.<sup>52</sup> An example of a possible diversion program would be for a youth caught possessing tobacco in violation of California Penal Code section 308(b) to be diverted to a smoking education class.

## D. Pretrial Activity

Fewer than 5 percent of criminal cases reach trial.<sup>53</sup> Most criminal defendants enter a guilty plea before trial, often as a result of a plea agreement.<sup>54</sup> Plea agreements trade a defendant's waiver of her right to trial for a less serious charge (charge bargaining)<sup>55</sup> or a more lenient sentence (sentence bargaining). Charge bargaining requires the agreement of the prosecuting attorney. Sentence bargaining requires only the agreement of the judge but, depending on local practice, may involve the participation of the prosecuting attorney.<sup>56</sup> Plea negotiation may happen on an ongoing basis throughout the litigation process.<sup>57</sup> An example of a possible plea agreement would be for a clerk guilty of selling tobacco to a minor to agree to accept a \$200 fine and no jail time. Although most cases will settle, both sides prepare for trial.

In preparing for trial, both sides share information through the discovery process.<sup>58</sup> The discovery process usually involves exchanging documents and depositions (formal interviews of witnesses or parties) and serves multiple purposes.<sup>59</sup> Each side is required to disclose the names and addresses of people who will be called as witnesses at trial and to disclose any other relevant evidence it intends to offer at trial.<sup>60</sup> The prosecution must also release

statements made by the defendant, proof of relevant felony convictions (e.g., those of witnesses the prosecution will call), and any exculpatory evidence (evidence disproving guilt).<sup>61</sup>

Typical pretrial motions include an application to suppress evidence or a motion to force one side to reveal information that it withheld during discovery. In general, pretrial motions are little used in misdemeanor and infraction cases.



## E. Trial

If negotiations for a plea agreement fail, the parties go to trial. At trial, both sides may present evidence and their arguments.<sup>62</sup> Technically, the defendant need not present evidence because, to win a conviction, it is the prosecution who must prove beyond a reasonable doubt that the defendant committed each element of a crime.<sup>63</sup> Nevertheless, defendants almost always present evidence designed to raise a reasonable doubt as to their guilt. For example, a clerk on trial for selling tobacco to a minor might present his coworker as a witness to testify that she observed the undercover transaction and that the decoy appeared to her to be 18 years of age or older.

At the end of a jury trial, a unanimous jury announces its verdict—that is, it finds the defendant either guilty or not guilty. A not-guilty verdict indicates that the evidence was insufficient to establish a defendant's guilt and is not a statement of innocence. If the jury is deadlocked and cannot form a unanimous verdict of either guilty or not guilty, the prosecuting attorney may elect to retry the case. Among the considerations that a prosecuting attorney will evaluate in deciding whether to retry the case will be the number of jurors who disagreed with a guilty verdict.

If the trial was a bench trial in front of a judge, at the end of the trial the judge issues the court's findings on the defendant's guilt or the insufficiency of the evidence to establish the defendant's guilt.<sup>64</sup>

After a verdict (jury trial) or finding (bench trial) of not guilty, the court will acquit the defendant. Note that a finding of not guilty cannot be used by a defendant to prohibit a subsequent civil lawsuit against the defendant (e.g., a subsequent civil lawsuit is *not* "double jeopardy").

## **F. Judgment and Sentencing**

Most laws carry a range of punishments, and it is the judge's task to determine what punishment fits this particular offender.<sup>65</sup> For example, a first-time offender of California's smoke-free workplace law may receive a lesser fine than an habitual offender.

## **III. Criminal Law: Appeals**

There must be a final judgment before a party may appeal.<sup>66</sup> Generally, it is the defendant's choice to appeal a guilty verdict. The government typically may not appeal from a judgment acquitting the defendant of the crime.<sup>67</sup>

An appellate court may reverse, affirm, or modify a judgment or order.<sup>68</sup> An affirmation of judgment means that the original judgment must be enforced.<sup>69</sup> The reversal of a conviction is generally deemed an order for a new trial.<sup>70</sup> A court will not overturn a conviction unless the error harmed the defendant in some way.<sup>71</sup> In determining whether an error was harmful or not, courts apply varying standards.

In infraction or misdemeanor cases, an appeal may be taken to the appellate division of the superior court of the county involved.<sup>72</sup> At the first level of appeal, the appellate court must accept and hear the appeal.<sup>73</sup> Further appeals from the decision of the appellate court may be accepted or rejected.<sup>74</sup> In general, a defendant may not appeal from a conviction based on a guilty plea unless the grounds for appeal go to the legality of the proceedings (the way the hearing was conducted).<sup>75</sup>

# Endnotes

<sup>1</sup> U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7. Due process requires a balancing of interests. *See, e.g., Loder v. City of Glendale*, 14 Cal. 4th 846, 867 (1997) (“The permissibility of a particular practice ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”) (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989)).

<sup>2</sup> CAL. PENAL CODE § 16 (Deering 2004).

<sup>3</sup> CAL. REV. & TAX. CODE §§ 30101-30481 (Deering 2004); *See* TALC, *Tobacco Laws Affecting California*, 54-57 (2004).

<sup>4</sup> For specific tobacco control laws and penalties, contact TALC for a copy of *Tobacco Laws Affecting California*.

<sup>5</sup> CAL. PENAL CODE § 19.8 (Deering 2004). Note that a specific law may allow a larger fine as punishment for an infraction. *See also id.* § 1209.5 (if a judgment on an infraction charge creates financial hardship, the judgment may be satisfied through performance of community service).

<sup>6</sup> CAL. PENAL CODE § 19.6 (Deering 2004).

<sup>7</sup> *Id.* § 19. A crime is a misdemeanor unless it is classified as an infraction or is punishable by death or imprisonment in the state prison. *Id.* § 17. If death or confinement to prison are punishments, the crime is a felony. *Id.*

<sup>8</sup> CAL. BUS. & PROF. CODE §§ 475(a)(2), 475(b), 480(a)(1), 490 (Deering 2004); *Brewer v. DMV*, 155 Cal. Rptr. 643, 688 (Cal. App. 1979) (“[B]efore a criminal... may be denied a license to engage in gainful work because of a standard requiring good moral character there must be a substantial or rational connection between the committed offense and the particular occupation.”).

<sup>9</sup> CAL. CONST. art. I, § 16. There is no right to jury trial in infraction cases. CAL. PENAL CODE § 19.6 (Deering 2004).

<sup>10</sup> There is a reduced right to appointed counsel in infraction cases. CAL. PENAL CODE § 19.6 (Deering 2004). The California Constitution guarantees “[t]he defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant’s behalf, to have the assistance of counsel for the defendant’s defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant’s counsel. Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.” CAL. CONST. art. I, § 15.

<sup>11</sup> Think of how job applications ask about criminal convictions but not about civil or other wrongs.

<sup>12</sup> CAL. PENAL CODE § 1096 (Deering 2004) (“A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt.”); *People v. Adams*, 14 Cal. 2d 154, 167 (1939), *overruled on other grounds by People v. Burton*, 55 Cal. 2d 328 (1961).

- <sup>13</sup> *In re Winship*, 397 U.S. 358, 361 (1970); *Bunnell v. Super. Ct.*, 13 Cal. 3d 592, 603 (1975) (explaining that the prosecution must overcome the presumption of innocence by evidence beyond a reasonable doubt); *People v. Miller*, 171 Cal. 649, 652 (1916); *People v. Torres*, 51 Cal. Rptr. 2d 77, 79 (Cal. App. 1996); *see also* *People v. Ralph*, 24 Cal. 2d 575, 581 (1944) (“[T]he defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.”).
- <sup>14</sup> CAL. EVID. CODE § 520 (Deering 2004); *see also* *People v. Alvarez*, 27 Cal. 4th 1161, 1164-65 (2002) (“To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator.”).
- <sup>15</sup> *People v. Rabalet*, 28 Cal. App. 2d 480, 487 (1938) (“It is a fundamental rule of criminal procedure that in the trial of an action wherein the defendant is charged with the commission of a crime the prosecution is required to prove every material element of the offense beyond a reasonable doubt.”).
- <sup>16</sup> CAL. CONST. art. I, §16; *see* *People v. Engelman*, 28 Cal. 4th 436 (2002). Compare with civil cases, in which 3/4ths of the jury may reach a verdict. CAL. CONST. art. I, § 16.
- <sup>17</sup> The evidence required to hold someone to answer a criminal charge is slight; the evidence required to convict is evidence establishing guilt beyond a reasonable doubt. *People v. O'Brien*, 100 P.2d 367, 369-70 (Cal. App. 1940).
- <sup>18</sup> CAL. EVID. CODE § 140 (Deering 2004).
- <sup>19</sup> *Id.* § 210 (Deering 2004).
- <sup>20</sup> Direct evidence is evidence that directly proves a fact without the need for inference or support. *Id.* § 410 (Deering 2004). Circumstantial evidence is based on facts from which deductions are drawn, that indirectly shows the facts that are sought to be proved. *See* *People v. Ryan*, 171 Cal. Rptr. 854, 858 (Cal. App. 1981). For example, eyewitness testimony that a person was smoking in a bar is direct evidence of a smoke-free workplace law violation. Whereas, ashtrays filled with used cigarettes found in the bar are circumstantial evidence of such a violation.
- <sup>21</sup> CAL. EVID. CODE § 351 (Deering 2004).
- <sup>22</sup> U.S. CONST. amend. IV; CAL. CONST. art. I, § 13; CAL. PENAL CODE §§ 1523-1542 (Deering 2004). Section 1538.5 authorizes a defendant to move for suppression of any evidence that was the product of an illegal search or seizure.
- <sup>23</sup> *See* *People v. Spears*, 278 Cal. Rptr. 506 (Cal. App. 1991) (finding probable cause to search defendant’s residence after murder/robbery of store manager existed because evidence established that defendant was close to place of employment on a day off near the time of death, exclaimed cause of death despite it not being readily apparent, gave conflicting statements, spent large amounts of money on cocaine habit, smoked the same kind of cigarettes found at the scene of the crime, and there were no signs of forced entry); *People v. Super. Ct.*, 186 Cal. Rptr. 734 (Cal. App. 1982) (explaining that the extreme unlikelihood that a gang member left the real party, met other gang members, drove to the scene of the shooting and committed the homicide, then rejoined the real party all in ten minutes cast grave doubts on the credibility of real party’s exculpatory statements, which placed real party in gang member’s company some ten minutes prior to the shooting and, since he admitted to knowing of incident had taken place, would have warranted his arrest at time of statement if probable cause had not existed earlier).

<sup>24</sup> An arrest results from a variety of paths, including police witnessing of illegal behavior, police investigation based on a citizen complaint, or a sting that brought illegal behavior into the open (e.g., youth buy stings). Advocates can assist in tobacco enforcement by documenting illegal activities and making citizen complaints, organizing youth for youth buy stings, and building relationships with and between law enforcement agencies.

If your police department enforces tobacco control laws, let them know you appreciate their efforts. Consider such steps as writing a letter or thanks or taking out an ad in the local paper that publicizes positive results from their enforcement activities.

<sup>25</sup> CAL. PENAL CODE § 836 (Deering 2004). For more information about warrants, see *id.* §§ 813 et seq.

<sup>26</sup> See *id.* § 836 for when an officer may arrest without a warrant; *People v. Mower*, 28 Cal. 4th 457, 468 (2002) (“[L]aw enforcement officers must have probable cause before they lawfully may arrest a person for any crime.”).

<sup>27</sup> *People v. Price*, 1 Cal. 4th 324, 410 (1991), *superseded by statute on unrelated issue*. See also *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975) (“[A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime...”); *Taylor v. Fine*, 115 F. Supp. 68, 72 n.2 (C.D. Cal. 1958) (“California courts are very liberal in assaying the acts which constitute probable cause...the reasonable ground...which justifies an arrested without a warranted [are] a state of facts which would lead a man of ordinary care and prudence to believe...that the person is guilty of an offense.”); *People v. Gomez*, 133 Cal. Rptr. 731, 733 (Cal. App. 1976) (“Probable cause...exists if the facts and circumstances known to the arresting officer would cause [a person] of ordinary care and prudence to believe...that an offense has been committed and that the accused is guilty thereof.”).

<sup>28</sup> Infraction cases follow the misdemeanor model except that a person charged with an infraction is not entitled to a jury trial, is not entitled to appointed counsel unless s/he is arrested and remains in custody, and as otherwise specifically provided for by law. CAL. PENAL CODE §§ 19.6, 19.7 (Deering 2004).

<sup>29</sup> *Id.* §§ 853.6(a) (misdemeanor), 827.1 (misdemeanor release after arrest on a warrant), 853.5 (infraction) (Deering 2004). However, an officer will not release a person cited with a misdemeanor who appears to present a risk to health or safety, a flight risk, or who demands to be taken before a magistrate judge for an immediate review of the arrest. *Id.* § 853.6(i).

<sup>30</sup> *But see* CAL. CONST. art I, § 12; CAL. PENAL CODE § 1270(a) (Deering 2004) (allowing for release on bail or on one’s own recognizance).

<sup>31</sup> See CAL. PENAL CODE § 825 (Deering 2004); *People v. Cook*, 185 Cal. Rptr. 576, 580 (Cal. App. 1982) (finding that because the circumstances at issue were relatively simple and because all the relevant evidence was in the Sheriff’s office, a forty-five hour delay for was unreasonable). See also CAL. GOV’T CODE § 68115(c) (formerly SB 600, chaptered Feb. 2003) (Deering 2004), which extends the amount of time provided in section 825 to up to seven days after proclamation of a state of emergency by the President or Governor.

<sup>32</sup> CAL. PENAL CODE §§ 825, 847, 849 (Deering 2004); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”); *In re Walters*, 15 Cal. 3d 738, 747 (1975) (holding that in misdemeanor cases in which a defendant is detained before trial, a judicial determination of probable cause is required unless waived).

- <sup>33</sup>The probable cause hearing may be lumped together with the arraignment. *See In re Walters*, 15 Cal. 3d 738 (1975).
- <sup>34</sup>CAL. PENAL CODE § 853.6(e)(1)-(2) (Deering 2004) (police file misdemeanor cases with the prosecutor and infraction cases with the court). The police can at any point release any arrestee for whom they have insufficient evidence to hold, *id.* § 849, or can recommend dismissal in the interest of justice. *Id.* § 853.6(j).
- <sup>35</sup>*Id.* § 853.6(e)(3). A criminal charge begins with the filing of a complaint or simply the duplicate notice to appear in court, which must be done within twenty-five days on a misdemeanor charge. *Id.* § 853.6(e). However, failure to file within twenty-five days does not bar prosecution unless the delay was unreasonable and was prejudicial to the defendant. *People v. Valenzuela*, 150 Cal. Rptr. 314 (Cal. App. 1978).
- <sup>36</sup>CAL. PENAL CODE § 853.6(e)(3) (Deering 2004).
- <sup>37</sup>Felony prosecutions may be charged by complaint, information, or indictment. *Id.* § 949.
- <sup>38</sup>*Id.* § 853.6(e)(3).
- <sup>39</sup>*See id.* §§ 740, 806, 1462.2. The magistrate is a judge sitting with limited powers conferred by statute, such as the power to issue warrants. *See id.* §§ 807, 808. Those accused on the basis of an accusation or indictment make their first appearance before a judge of the superior court. *Id.* §§ 949, 976. Note that the arrested person is booked before any court proceedings occur. *Id.* § 853.6(g).
- <sup>40</sup>CAL. PENAL CODE § 988 (Deering 2004); *see also In re Mitchell*, 56 Cal. 2d 667 (1961); CAL. PENAL CODE § 1016 (Deering 2004) (more information about possible pleadings).
- <sup>41</sup>CAL. CONST. art I, § 15 (right to counsel); *see also* CAL. PENAL CODE §§ 858, 859, 987(a) (Deering 2004); *but see id.* § 858 (there is no right to appointed counsel in infraction cases, although the defendant may hire counsel). *See also* CAL. CONST. art. I, § 15 (right to a speedy trial); CAL. PENAL CODE § 1382(a)(3) (right to speedy trial generally for a misdemeanor or infraction). The court may collectively advise misdemeanor defendants of their rights. *Mills v. San Diego Mun. Ct.*, 10 Cal. 3d 288, 307 (1973). Felony defendants must be individually advised of their rights. *In re Tahl*, 1 Cal. 3d 122, 132 (1969), *overruled on other grounds by Mills v. San Diego Mun. Ct.*, 10 Cal. 3d 288 (1973).
- <sup>42</sup>For timing of plea, *see* CAL. PENAL CODE § 990 (Deering 2004) (felony defendants given at least one day to answer; defendants charged with misdemeanors or infractions receive no more than seven days).
- <sup>43</sup>*Id.* § 1042.
- <sup>44</sup>CAL. CONST. art. I, § 16; CAL. PENAL CODE §§ 689, 1042 (Deering 2004). *See, e.g., Tracy v. Glendale Mun. Ct.*, 22 Cal. 3d 760 (1978) (holding that a misdemeanor defendant was entitled to trial by jury even though the offense was punishable only by a \$100 fine). A criminal defendant may only waive her right to trial by jury by an express waiver. *People v. Ernst*, 8 Cal. 4th 441, 444-45 (1994).
- <sup>45</sup>CAL. PENAL CODE § 1382(a)(3) (Deering 2004).
- <sup>46</sup>*Id.* §§ 1049, 1382(a)(3).



- <sup>47</sup> For diversion programs generally, *see id.* §§ 1001-1001.90. For misdemeanor diversion specifically, *see id.* §§ 1001.50-1001.55. Diversion is also available for certain drug crimes (§§ 1001.10-1001.15), mentally retarded defendants (§§ 1001.20-1001.34), traffic violators (§ 1001.40), writers of bad checks (§§ 1001.60-1001.68), and in certain family law matters (§§ 1001.70-1001.75).
- <sup>48</sup> *Id.* § 1001.1.
- <sup>49</sup> Diversion is available to a misdemeanor defendant who: 1) has never broken probation or parole, 2) has not been diverted within five years, and 3) has not been convicted of a felony within five years, who has consented to the program and waived her right to a speedy trial, and who the probation department finds would benefit from education, treatment, or rehabilitation. *Id.* §§ 1001.51, 1001.52.
- <sup>50</sup> CAL. PENAL CODE § 1001.7 (Deering 2004).
- <sup>51</sup> *Id.* § 1001.9.
- <sup>52</sup> *Id.* § 1001.54.
- <sup>53</sup> *See* Judicial Council of California, 2003 Court Statistics Report: Caseload Trends 1992–1993 Through 2001–2002, p. 107, Table 8 (2003), *available at* [www.courtinfo.ca.gov/reference/3\\_stats.htm](http://www.courtinfo.ca.gov/reference/3_stats.htm) (last visited May 27, 2004). In 2001–02, 96% of California’s criminal cases were disposed of before trial (74% by conviction/guilty plea and 22% by acquittal or dismissal), 1% went to bench trial, and 3% went to jury trial.
- <sup>54</sup> *Id.*
- <sup>55</sup> CAL. PENAL CODE §§ 1192.1-1192.4 and 1192.6-1192.7 (Deering 2004).
- <sup>56</sup> *Id.* § 1192.5.
- <sup>57</sup> Settling the case before trial by a plea bargain saves the courts and the prosecution time and money by eliminating hearings. The defendant receives a reduced charge, a more lenient sentence, or both.
- <sup>58</sup> CAL. CONST. art. I, § 30; CAL. PENAL CODE §§ 1054-1054.8 (Deering 2004).
- <sup>59</sup> The goals of discovery are: to discover the truth; to accord defendants due process of law; to save the court’s time by facilitating the sharing of what facts the other side is using to build its case; and to protect victims and witnesses from danger, harassment and delay. CAL. PENAL CODE § 1054 (Deering 2004); *see In re Littlefield*, 5 Cal. 4th 122, 131 (1993) (“[T]imely pretrial disclosure of all relevant and reasonably accessible information...facilitates...the ascertainment of the facts.”) (internal quotation omitted).
- <sup>60</sup> CAL. PENAL CODE §§ 1054.1, 1054.3 (Deering 2004).
- <sup>61</sup> *Id.* § 1054.1.
- <sup>62</sup> For more about the steps of trial, *see id.* § 1093.
- <sup>63</sup> *People v. Alvarez*, 27 Cal. 4th 1161, 1164-65 (2002).
- <sup>64</sup> In a bench trial, the court need not make written fact findings supporting its judgment. *People v. Esposti*, 185 P.2d 866 (Cal. App. 1947).

- <sup>65</sup> CAL. PENAL CODE § 13 (Deering 2004). *See, e.g., In re Finn*, 54 Cal. 2d 807, 813-14 (1960) (Defendant was stopped for three separate violations: (1) having one headlight out, (2) vehicle registration not properly displayed, and (3) no illumination of the license plate. California Vehicle Code provides for a *maximum* penalty of \$50 fine or imprisonment of five days for first-time violations of the first two offenses, and a fine not exceeding \$500 and imprisonment not exceeding 6 months for the last offense. The judge sentenced the defendant to five days in the city jail on each of the three counts, the sentences to run consecutively. On appeal, the California Supreme Court found that while the penalties imposed in the instant case may be more severe than usually imposed for similar violations, the trial court properly considered that the defendant in this case sought and obtained a jury trial and then submitted no evidence relating to his guilt or innocence of the offenses charged. Further, the trial court properly considered that defendant sought and obtained numerous continuances, the matter was in litigation in the trial court for almost two years, the defendant failed to appear on at least two occasions, and warrants were issued for his arrest on those occasions. The court held that it was not an abuse of discretion that on two of the counts the maximum sentence was imposed and the sentences ordered to run consecutively.). *But see* CAL. PENAL CODE § 1170 (Deering 2004) (determinate sentencing).
- <sup>66</sup> *See* CAL. PENAL CODE §§ 1466 (misdemeanor/infraction), 1238 (felony, appeal by people), 1237 (felony, appeal by defendant) (Deering 2004).
- <sup>67</sup> *See id.* §§ 1238, 1466.
- <sup>68</sup> *Id.* § 1469. *See, e.g., McQuillan v. App. Dep't of Super. Ct.*, 139 Cal. Rptr. 514, 515 (Cal. App. 1977). A trial court's findings of *fact* are subject to review for substantial evidence (e.g., clearly erroneous). However, the judgment of the trial court on matters of *law* is subjected to independent review. *See, e.g., People v. Mickey*, 54 Cal. 3d 612, 649 (1991) (“On appeal, the conclusion of a trial court on a pure question of law is subject to independent review, whereas its finding on a pure question of fact is subject to review for substantial evidence—which, for present purposes, is equivalent to federal ‘clearly erroneous’ scrutiny.”).
- <sup>69</sup> CAL. PENAL CODE § 1263 (Deering 2004).
- <sup>70</sup> *Id.* § 1262; *People v. Johnson*, 113 Cal. Rptr. 303 (Cal. App. 1974).
- <sup>71</sup> *See People v. Rivera*, 207 Cal. Rptr. 756 (Cal. App. 1984) (holding that the essential question in analyzing an error is whether error resulted in a miscarriage of justice); *People v. Lopez*, 43 Cal. App. 2d Supp. 854, 863 (1941). An appellate court must give judgment on the merits and without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties. CAL. PENAL CODE § 1258 (Deering 2004). Appeal may be taken by defendant on a matter of law that affected a substantive right of a defendant. *Id.* §§ 1259, 1469.
- <sup>72</sup> CAL. PENAL CODE § 1466 (Deering 2004). An appeal in a felony case is to the court of appeal or, in the case of a death penalty, directly to the California Supreme Court. *Id.* § 1235(b).
- <sup>73</sup> LAURIE L. LEVENSON, *LEVENSON ON CALIFORNIA CRIMINAL PROCEDURE*, 1206 (2003).
- <sup>74</sup> *Id.*
- <sup>75</sup> CAL. PENAL CODE § 1237.5 (Deering 2004).



## Glossary

# Who's Who in Enforcement

## Local Law Enforcement

Police and sheriff departments are the primary enforcers of criminal tobacco laws, but they may also play a role in gathering evidence for civil lawsuits or administrative hearings brought by the government. These agencies have a strict hierarchical command structure based upon well-established internal policies and protocols. The allocation of existing resources (i.e., personnel and funding) within these agencies depends upon the agency's internal priorities. Priorities are influenced by legislative or executive directives, political pressure, and the agency's own perception of community needs. Such needs are assessed in part based on history (i.e., what the department has done in the past) and in part through contact with the community (e.g., complaints and public hearings).

## Local Code Enforcement (or Other Government Agency Officials)

Many important regulations such as local building codes and health codes are enforced not by police but by code enforcers. Compared to law enforcement, local code enforcers are fewer in number, operate within a more relaxed command structure, and may be only a small part of an administrative department, such as an environmental health department. Code enforcers can and do issue citations, but in most cases the person responsible for a code violation is given an opportunity to voluntarily comply with the law and

correct the situation (e.g., a week to remove a self-service display of smokeless tobacco). Like law enforcement, code enforcers can also play an important role in gathering evidence for civil lawsuits or administrative hearings brought by the government.

## **Investigating Agency**

The role of the investigating agency is to collect enough evidence to justify imposing a civil penalty. If the penalty is opposed by the person who is alleged to have violated a law or regulation, the evidence will be needed to prove the violation during prosecution—either through a civil lawsuit brought by a city attorney or other prosecutor, or at an administrative hearing held by a local government agency. An investigating agency could be local law or code enforcement or some other agency such as a local health department. A law may specify an investigating agency, or, if one is not specified, local custom may dictate an appropriate agency. Evidence of violations that are prosecuted through a civil lawsuit is usually collected by local law enforcement or by the prosecuting attorney directly. For administrative hearings, the agency that collects evidence of violations is most often also the agency that conducts the administrative hearing (an exception might be a case in which a licensing suspension hearing is based upon a California Penal Code section 308(a) violation, because the police or sheriff's department usually must be involved in the youth decoy aspect of collecting evidence).

## **Local Prosecuting Attorney (City Prosecutor or District Attorney)**

A prosecuting attorney prosecutes criminal violations on behalf of the people of California and is usually an officer of the county (i.e., the district attorney). A prosecuting attorney may have some authority to bring civil lawsuits but usually defers such actions to the city attorney or county counsel. The prosecuting attorney may employ many deputies or may have none at all. The prosecuting attorney has broad discretion as to what crimes to prosecute. This discretion can either help or hinder the enforcement of tobacco control laws. The vast majority of lawsuits brought by a prosecuting attorney are based upon evidence gathered by local law enforcement or code enforcers. However, a prosecuting attorney also may initiate a prosecution based on evidence gathered by private citizens or by the prosecuting attorney directly. The prosecuting attorney's allocation of resources is still influenced

by municipal politics and, if the prosecuting attorney is elected, by the politics of the community. The barriers to a prosecuting attorney pursuing tobacco control laws are a lack of resources, the attorney's discretion, and local law enforcement's willingness to monitor tobacco control law compliance.

## **Local City Attorney (or County Counsel)**

A city attorney is the primary force behind civil lawsuits brought by a local government. The city attorney's duties fall into four main categories: writing new laws for the city; defending the city against lawsuits when the city is being sued; suing on behalf of the city when the city is the plaintiff (for example, suing a business for violating a tobacco control law); and advising elected officials and city departments on the legality of certain actions. A city attorney is the lawyer for the city itself, not the individual city council members or other city officials. Large cities may employ dozens of deputy city attorneys. Small cities may not have even one full-time city attorney but may hire private legal help as needed. Although a city attorney can file a wide variety of civil actions on behalf of the city, the city attorney is rarely involved in criminal enforcement. A city attorney's discretion is an important source of power, and it can either help or hinder the enforcement of tobacco control laws. The priority that a city attorney gives tobacco control laws will be influenced by the politics of the city officials and, if the city attorney is elected, by the politics of the community. The only true barriers to a city attorney pursuing tobacco control are the political allocation of resources and the exercise of the attorney's discretion. A county counsel performs the same functions for a county that the city attorney does for a city.

## **Local Superior Court Judges**

Judges, of course, play an essential role once a case is brought to court. In general, judges oversee disputes between the two sides regarding the law, procedure, and the admissibility of evidence. However, a judge assumes an added responsibility when she is called upon to weigh the evidence presented during a bench trial (a trial without a jury) and when she must impose a civil or criminal penalty or decide the amount of damages to be awarded a plaintiff. Perhaps most important to tobacco control advocates is the judge's discretion regarding the penalty imposed. A judge will be fair and impartial to the best of her ability, but if a judge is unaware of the importance of tobacco control to public health, she may view tobacco laws as fairly insignificant and impose a

relatively small penalty. Advocates should work with the prosecuting attorney to ensure that the judge has access to information documenting the serious harm caused by tobacco law violations.



## Administrative Hearing Officers

An administrative hearing officer can be almost any unbiased person. However, often the hearing officer is an employee of the agency conducting the hearing but is otherwise not associated with the investigation. Other times, persons from outside the agency are brought in to conduct the hearings, such as the county counsel or an attorney or other professional from the community. Because the range of possible candidates for hearing officer is wide, so too is the range of legal expertise possessed by the hearing officer.

## Local Citizens/Advocates

Citizens and tobacco control advocates can play a key role in many stages of enforcement of civil and criminal tobacco control laws, including those with administrative enforcement procedures. Citizens can complain to the investigating agency or appropriate government attorney if they see violations of the law: for example, smoking in a bar or a retailer selling bidis. Law enforcement is more likely to respond to complaints than to make random inspections of retailers and workplaces. Additionally, advocates can work with law enforcement to set up a complaint hotline if there is none and can work with the media to publicize it. Advocates also can appeal directly to the city council or board of supervisors for funding of tobacco control and clear enforcement mechanisms in all existing and new laws. Advocates can help identify the agency responsible for enforcement if the law is not clear.

## **Local City Council/Board of Supervisors**

These elected bodies are responsible for passing new local tobacco control laws or amending existing laws. The city council and board of supervisors can play a key role in ensuring that tobacco control laws clearly designate (1) the primary agency responsible for enforcement; (2) a minimum level of enforcement (e.g., a certain number of youth access compliance checks per year); (3) a means to fund enforcement (e.g., a fee); and (4) a private right of action so citizens can sue tobacco control law violators directly if the city or county can not act. These elected bodies also can amend existing tobacco control laws to add any missing enforcement provisions.

## **State Attorney General (State of California)**

California's Attorney General is the lawyer for the State of California and directs numerous deputy attorneys. The Attorney General has broad authority to bring both civil and criminal actions on behalf of the State, including actions based on California's tobacco control laws. Only the Attorney General may enforce the Master Settlement Agreement (MSA), and violations of the MSA should be reported to the Attorney General's Tobacco Litigation and Enforcement Section's complaint line at (916) 565-6486. As a practical matter, the Attorney General is not the primary enforcer of tobacco control laws at the local level.

## **Food and Drug Branch of the California Department of Health Services**

The Stop Tobacco Access to Kids Enforcement Act (STAKE Act) is a state law that regulates selling tobacco to minors, checking for identification, posting signs, and selling or displaying cigarettes through a self-service display. Currently, only state STAKE Act investigators from the Food and Drug Branch of the California Department of Health Services can enforce these laws. STAKE Act investigators work full time on tobacco control, operating in regional teams throughout California. The investigators conduct random compliance checks and employ underage youth to attempt tobacco purchases. STAKE Act investigators also may inspect retailers in response to public complaints (1-800-5-ASK-4-ID) and at sites with previous violations. Issues such as funding and enforcement priorities are addressed at the state level. The only practical option to stimulate direct enforcement of the STAKE Act is to make a complaint to the hotline.

**APPENDIX****Enforcement Procedures for California Tobacco Control Laws**

This appendix provides information about the types of penalties that apply to tobacco control laws affecting California. In particular, each entry states whether the penalty for violating the law is criminal, civil, or administrative. Readers can thereby tell which of TALC's three Enforcement Roadmaps to consult for more detailed information on the procedures that apply to criminal, civil, and administrative penalties.



Formatted to match the TALC booklet *Tobacco Laws Affecting California* (2004), the appendix is divided into topic areas (e.g., Secondhand Smoke, Tobacco Sales), which contain numbered entries for each law that is relevant to the topic area. For example, the first entry in the category of Secondhand Smoke is “Workplaces.” This refers to California’s smoke-free workplaces law and provides a citation for the law: Labor Code section 6404.5.

For purposes of this appendix, three kinds of penalties apply to a tobacco control law: administrative, civil, and/or criminal.





Administrative penalties, like the suspension or revocation of a state-issued license, are generally enforced by the administrating agency. (Administrative penalties are really a subset of the larger category of civil penalties, but they are listed separately for purposes of this appendix.)



Civil penalties can be enforced through a lawsuit, usually by public enforcement agencies, and include a variety of penalties ranging from an injunction (a court order to stop illegal activity) to a fine.



Criminal penalties are enforced by law enforcement entities such as the Attorney General or local law enforcement, and can include infractions, misdemeanors, and felony charges. Violators of a law with a criminal penalty may be subject to fines and/or imprisonment.

Note that some laws do not specify a penalty. In those cases, advocates may need to contact the local or state agency responsible for enforcing the law to determine the penalty. For information on the enforcing agency and a thorough overview of tobacco laws that affect California, please see TALC's *Tobacco Laws Affecting California*. To order copies, contact TALC at (510) 444-8252 or [talc@phi.org](mailto:talc@phi.org), or download the booklet from TALC's website at <http://talc.phi.org>.

## Secondhand Smoke

Description	Law	Admin.	Criminal	Civil	TLAC
Workplaces	California Labor Code Sections 6404.5, 2698–2699	✓	✓ (I)	✓	1
Apartment Complexes and Multi-Unit Residences	California Labor Code Sections 6404.5, 2698–2699	✓	✓ (I)	✓	2
State, County, and City Buildings	California Government Code Sections 7596–7598 <i>Penalties not specified</i>				3
Tot Lots and Playgrounds	California Health and Safety Code Section 104495		✓ (I)		4
Schools	California Education Code Section 48901 <i>Penalties not specified</i>				5
Schools	California Education Code Sections 48900(h), 48900(r)	✓			5
Schools	California Health and Safety Code Section 104420(p)	✓			5
Schools	20 U.S.C. Sections 6083(a), 6083(f)(1)	✓		✓	5
Day Care Facilities Under California Law	California Health and Safety Code Sections 1596.795, 1596.890		✓ (M)		6
Day Care and Health Care Facilities Under Federal Law	20 U.S.C. Sections 6083(b), 6083(f)	✓		✓	7
Restaurants and Bars: Food Handling	California Health and Safety Code Sections 114020(d), 113935		✓ (M)		8
Public Transportation	California Health and Safety Code Sections 118925–118945		✓ (I)		9
Public Transportation	California Penal Code Section 640		✓ (I)		9
Buses for Youth/ Paratransit Vehicles	California Vehicle Code Sections 336, 12523(d)(2), 12523.5(d)(2), 13369(b)(4)	✓			10
Airline Flights	49 U.S.C. Section 41706 <i>Penalties not specified</i>				11

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## Secondhand Smoke (Continued)

Description	Law	Admin.	Criminal	Civil	TLAC
Local Secondhand Smoke Ordinances	California Health and Safety Code Section 118910  <i>Penalties not specified (range available)</i>				12

## Tobacco Sales

Selling/Giving Tobacco Products to Minors Under Penal Code Section 308	California Penal Code Sections 308(a), 308(d), 308(e), 308(f), 830.1		✓ (M)	✓	13
Selling/Giving Tobacco Products to Minors Under the STAKE Act	California Business and Professions Code Sections 22958, 22952(f), 22957 (STAKE Act)	✓		✓	14
Compliance Checks for Sales to Minors	California Business and Professions Code Section 22952 (STAKE Act)  California Code of Regulations, Title 17, Section 6901	✓		✓	15
The Synar Amendment	42 U.S.C. Section 300x-26 45 C.F.R. Section 96.130	✓			16
ID Check Requirements for Retailers	California Business and Professions Code Sections 22956, 22957 (STAKE Act)  California Code of Regulations, Title 17, Section 6902(b)  <i>Penalties not specified, but see entry 14 for penalties for violating the STAKE Act</i>				17
Sign Posting Requirement for Retailers	California Business and Professions Code Sections 22952, 22957 (STAKE Act)  California Code of Regulations, Title 17, Section 6902(a)  California Penal Code Sections 308(c), 830.1  <i>Violators are subject to 30 days imprisonment</i>	✓	✓	✓	18
Self-Service Sales of Cigarettes	California Business and Professions Code Sections 22962, 22960 (STAKE Act)	✓		✓	19
Bidis	California Penal Code Sections 308.1, 830.1		✓ (M)	✓	20

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## Tobacco Sales (Continued)

Description	Law	Admin.	Criminal	Civil	TLAC
Single Cigarette Sales	California Penal Code Sections 308.2, 830.1		✓ (I)		21
Minimum Pack Size	California Penal Code Sections 308.3, 830.1		✓ (I)	✓	22
Vending Machines	California Business and Professions Code Sections 22960, 22958(b), 22957 (STAKE Act)	✓		✓	23
Mail Order/Internet Tobacco Sales	California Business and Professions Code Section 22963 (STAKE Act)			✓	24
Home Delivery of Unsolicited Tobacco Products	California Penal Code Sections 308b, 830.1		✓ (M)		25
Purchase/Possession of Tobacco Products by Minors	California Penal Code Sections 308(b), 308(e), 308(f), 830.1  <i>Minors who violate these sections are subject to a fine or community service work</i>		✓		26

## Tobacco Advertising

Outdoor Advertising	Master Settlement Agreement Sections II(ii), III(c), III(d)			✓	27
Federal Preemption	15 U.S.C. Sections 1331–1341  <i>A court will invalidate a state or local law if it is preempted by federal law</i>				28
Billboards	California Business and Professions Code Sections 22961, 22958(c) (STAKE Act)			✓	29
Storefront Advertising	California Business and Professions Code Sections 25612.5(c)(7), 25617		✓ (M)		30
State Building Advertising	California Government Code Section 19994.35  <i>Penalties not specified</i>				31
Transit Advertising on Public and Private Vehicles	Master Settlement Agreement Sections II(xx), III(d), III(c)(3)(E)			✓	32
Cartoon Characters	Master Settlement Agreement Sections II(l), III(b)			✓	33

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## Tobacco Advertising

Description	Law	Admin.	Criminal	Civil	TLAC
Youth Targeting	Master Settlement Agreement Section III(a)			✓	34
Video Games	California Penal Code Sections 308.5, 830.1		✓ (M)		35
Television/Radio Cigarette Advertising	15 U.S.C. Sections 1335, 1338, 1339		✓ (M)		36
Television/Radio Smokeless Tobacco Advertising	15 U.S.C. Sections 4402(e)–(f), 4404, 4405		✓ (M)		37
Fish and Game Department Materials	California Fish and Game Code Section 211				38
	Penalties not specified				

## Tobacco Sponsorship and Promotion

Sponsorship	Master Settlement Agreement Sections II(j), III(c)(1)–III(c)(6)			✓	39
Brand Name Merchandise	Master Settlement Agreement Sections III(f), III(c)(3)(C)			✓	40
Tobacco Brand Names	Master Settlement Agreement Section III(j)			✓	41
Product Placement	Master Settlement Agreement Section III(e)			✓	42

## Tobacco Samples, Coupons, and Gifts

Samples and Coupons: Cigarettes and Smokeless Tobacco	California Health and Safety Code Section 118950; Board of Equalization Regulation 4081			✓	43
Samples and Coupons: Cigarettes and Smokeless Tobacco	Master Settlement Agreement Section III(g)			✓	43
Samples and Promotional Offers: Smokeless Tobacco	California Business and Profes- sions Code Sections 17537.3, 17207, 17534, 17535 Board of Equalization Regulation 4081		✓ (M)		44
Proof of Purchase Gifts	Master Settlement Agreement Section III(h)			✓	45
Lottery	26 U.S.C. Sections 5723(c), 5762		✓		46
	Violators are subject to one year imprisonment and/or a fine				

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<b>Tobacco Warning Labels</b>					
<b>Description</b>	<b>Law</b>	<b>Admin.</b>	<b>Criminal</b>	<b>Civil</b>	<b>TLAC</b>
Cigarette Warning Labels	15 U.S.C. Sections 1333, 1338, 1339		✓ (M)		47
Smokeless Tobacco Warning Labels	15 U.S.C. Sections 4402, 4404, 4405		✓ (M)		48
Cigar Warning Labels	FTC Agreements, File Numbers 0023199–0023205 <i>Penalties not specified</i>				49
Cigar Warning Labels	California Health and Safety Code Sections 104550–104552			✓	49

<b>Tobacco Tax Law</b>					
Federal Tobacco Tax	26 U.S.C. Sections 5701–5704, 5761–5763		✓ (R)	✓ (R)	50
Overview of California State Tobacco Taxes	California Revenue and Taxation Code Sections 30001–30481 <i>Misdemeanor if tax liability is less than \$25,000 in any one-year period and felony if tax liability is \$25,000 or more in any one-year period</i>		✓		51
12 Cents-per-Package Tobacco Tax	California Revenue and Taxation Code Sections 30101, 30102–30111, 30461.6 <i>Misdemeanor if tax liability is less than \$25,000 in any one-year period and felony if tax liability is \$25,000 or more in any one-year period</i>		✓		52
Proposition 99 Surtax	California Revenue and Taxation Code Sections 30121–30130 California Health and Safety Code Sections 104350–104480, 104500–104545 <i>Misdemeanor if tax liability is less than \$25,000 in any one-year period and felony if tax liability is \$25,000 or more in any one-year period</i>		✓		53

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**Tobacco Tax Law (Continued)**

Description	Law	Admin.	Criminal	Civil	TLAC
Proposition 10 Surtax	California Revenue and Taxation Code Sections 30131–30131.6  California Health and Safety Code Sections 130100–130155  <i>Misdemeanor if tax liability is less than \$25,000 in any one-year period and felony if tax liability is \$25,000 or more in any one-year period</i>		✓		54
Tax Stamps/Meter Impressions	California Revenue and Taxation Code Sections 30161–30165  Board of Equalization Regulations 4048, 4054, 4081	✓ (LR)	✓ (M)	✓ (BP)	55
Black Market Cigarettes	California Revenue and Taxation Code Sections 30474, 30474.5		✓ (M)		56
Seizure and Sale upon Delinquency	California Revenue and Taxation Code Sections 30355–30358  <i>The Board of Equalization is authorized to seize and sell property subject to lien of unpaid tobacco taxes</i>	✓		✓	57
Possession or Sale of False Stamps	California Revenue and Taxation Code Section 30473.5		✓ (M)		58
Possession or Sale of Counterfeit Products	California Revenue and Taxation Code Section 30474.1		✓ (M)		59
Mail Order/Internet Cigarette Taxation	California Revenue and Taxation Code Section 30101.7  15 U.S.C. Sections 375–378			✓	60
<b>Licensing and Reporting</b>					
Overview of the Cigarette and Tobacco Products Licensing Act of 2003	California Business and Professions Code Sections 22970–22995	✓	✓	✓	61

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## Licensing and Reporting (Continued)

Description	Law	Admin.	Criminal	Civil	TLAC
Disposition of Funds	California Business and Professions Code Section 22990 <hr/> Penalties not applicable				62
Tobacco Retailer License Requirement	California Business and Professions Code Sections 22972–22973.1	✓			63
Local Retailer Licensing Laws	California Business and Professions Code Section 22971.3 <hr/> Penalties not specified (note: a local licensing law could impose a range of penalties for license violations, including suspension, revocation, an injunction, a fine, and imprisonment)				64
Retailer Display of License	California Business and Professions Code Sections 22972, 22974.5	✓	✓ (M)	✓	65
Retailer STAKE Act and Penal Code Section 308 Violations	California Business and Professions Code Section 22974.8	✓			66
Distributor and Wholesaler License Requirements	California Business and Professions Code Sections 22975–22977.2	✓			67
Distributor and Wholesaler License Requirements	California Revenue and Taxation Code Sections 30140–30149	✓	✓ (M)		67
Distributor and Wholesaler License Requirements	California Revenue and Taxation Code Sections 30155–30159	✓	✓ (M)		67
Distributor and Wholesaler Reporting Requirements	California Business and Professions Code Sections 22954, 22957 (STAKE Act) <hr/> Penalties not specified				68
Possession or Sale of Unstamped Packages by Retailers, Distributors, or Wholesalers	California Business and Professions Code Sections 22974.3(a), 22978.2(a)	✓	✓ (M)	✓	69

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**Licensing and Reporting (Continued)**

Description	Law	Admin.	Criminal	Civil	TLAC
Possession or Sale of Tobacco Products on Which Tax Is Due by Retailers, Distributors, or Wholesalers	California Business and Professions Code Sections 22974.3(b), 22978.2(b)	✓	✓ (M)	✓	70
Revocations for Tax Law Violations by Retailers, Distributors, or Wholesalers	California Business and Professions Code Sections 22974.4, 22978.6	✓			71
Manufacturer and Importer License Requirement	California Business and Professions Code Section 22979	✓			72
Manufacturer and Importer Administrative Fee	California Business and Professions Code Section 22979.2	✓	✓ (M)	✓	73
Record Retention by All Licensees	California Business and Professions Code Sections 22974, 22978.1, 22979.4	✓	✓ (M)	✓	74
Transactions with Other Entities Subject to the Licensing Act	California Business and Professions Code Section 22980.1	✓	✓ (M)	✓	75
Sales by an Unlicensed Entity	California Business and Professions Code Section 22980.2	✓	✓ (M)	✓	76
Penalties Applicable to All Licensees	California Business and Professions Code Section 22981		✓ (M)		77
Penalties Applicable to All Licensees	California Business and Professions Code Sections 22974.7, 22978.7, 22979.7	✓		✓	77
Penalties Applicable to All Licensees	California Business and Professions Code Section 22980.3	✓			77
Board of Equalization Licensing Database	California Business and Professions Code Sections 22973.2, 22978, 22979.3  Penalties not applicable				78
Inspections	California Business and Professions Code Section 22980	✓	✓ (M)	✓	79

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## Licensing and Reporting (Continued)

Description	Law	Admin.	Criminal	Civil	TLAC
Inspections	California Revenue and Taxation Code Sections 30435–30436, 30471		✓ (possible M)	✓	79
Tax Consequences of Distributing Without a License	California Revenue and Taxation Code Sections 30210–30216			✓	80
Manufacturer Certification	California Revenue and Taxation Code Sections 30165.1(b), 30165.1(c)(5)		✓ (M)		81
Attorney General Directory of Compliant Manufacturers	California Revenue and Taxation Code Section 30165.1(c)–(l)	✓	✓ (M)	✓	82

## Master Settlement Agreement (MSA) Funds

MSA Payments	Master Settlement Agreement Sections IX, XI; Exhibit A			✓	83
MSA Bonds	California Government Code Sections 63049–63049.5 <i>Penalties not applicable</i>				84
Appeal Bonds	California Health and Safety Code Section 104558 <i>Penalties not applicable</i>				85

## Related Laws

Americans with Disabilities Act (ADA)	42 U.S.C. Sections 12101–12213			✓	86
Fair Employment and Housing Act – California (FEHA)	California Government Code Sections 12900–12996			✓	87
Proposition 65	California Health and Safety Code Sections 25249.5–25249.13			✓	88
Unfair Competition Law	California Business and Professions Code Sections 17200–17209			✓	89

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