

PORTION SIZE LIMITS AND BEYOND

Regulating Retail Sales of Sugar-Sweetened Beverages



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NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY

Local policymakers are considering a variety of strategies to reduce the consumption of sugar-sweetened beverages (SSBs) in their communities to directly regulate how beverages are sold and offered by retailers. This fact sheet outlines some innovative approaches that can complement other strategies to address sugary drink consumption.

Directly Regulating Product Sales

Sales of harmful consumer products are often subject to various regulations, regardless of the type of retailer. For example, in every state, tobacco and alcohol cannot legally be sold to minors, and to prevent shoplifting, most tobacco products cannot be stocked in areas of a store that are openly accessible to the public. For both products, laws requiring a special license for retail sales are common (see “Implementation and Enforcement” section for more information.)

Innovative strategies for reducing the amount of SSBs sold in retail venues could be based on similar strategies used for tobacco or alcohol, or new strategies specific to SSBs might be appropriate. For example:

- Establishing maximum portion sizes for SSBs sold in sealed containers or as fountain drinks
- Setting direct pricing regulations, such as proportional pricing (establishing a per-ounce price that applies to all beverages sold, regardless of container size) to reduce or eliminate volume discounts, or establishing a minimum price
- Limiting the overall amount of SSBs that a store can carry relative to healthier beverages such as water
- Requiring businesses that sell fountain drinks to provide water in comparable (“equally appealing”) sizes and containers
- Requiring that default beverages included with kids’ meals cannot be an SSB
- Limiting hours of the day, or days of the week, when sales can occur

Each of these restrictions addresses how a product is sold (e.g., in what quantities, for what price, when), so the First Amendment and other constitutional issues are less likely to be implicated than they would be for a

policy that restricts advertising or promotion. For more information about each of these policies, please visit www.changelabsolutions.org/childhood-obesity/SSB-regulation.

NYC Portion Size Cap

In September 2012, the New York City Board of Health (BOH) adopted a regulation establishing maximum portion sizes for sugary drinks sold in food service establishments under the BOH’s jurisdiction. Under the regulation, no sugary drink or self-service cup could exceed 16 ounces; a consumer could purchase more than one drink, and refills were not prohibited.

A coalition of industry trade groups, including the American Beverage Association, brought a lawsuit challenging the law. In March 2013, on the day before the regulation was scheduled to take effect, a New York trial court struck down the regulation, ruling that the BOH exceed its authority in adopting the regulation, and that certain exemptions in the regulation (for some types of establishments and beverages) rendered the regulation “arbitrary and capricious.” New York City immediately appealed the court’s ruling. Regardless how the appeal turns out, the issues cited by the trial court can all be addressed in future laws restricting portion sizes for SSBs.

Legal Authority

The strategies discussed in this fact sheet stem from the government’s “police power,” which is essentially the government’s authority to enact laws to protect public health, safety, and welfare. For these purposes, state governments have very broad authority; local authority is delegated from the state. Most states follow some form of a “home rule” system, under which the state grants local government bodies the authority to enact these kinds of laws at the local level.

It is important that all these strategies regulate *sales* of a product, as opposed to advertising or promotion. If challenged in court, many laws addressing sales of sugary drinks would be reviewed under what’s known as the “rational basis” test– the lawmaking body must merely state a rational need for the law.

An integrated approach

Many stores, but especially small corner or convenience stores, carry primarily alcohol, tobacco, and foods and beverages that are high in sugar, salt, and fat. Addressing only one of these issues will not improve the public health impact of these stores.

One strategy to reduce the number of unhealthy products sold by food retailers is to require or to incentivize retailers to carry more healthy items, such as fresh produce, whole grains, lean proteins and lowfat dairy products. Not only are these products necessary for a healthy diet, but the more healthy products a store stocks and is able to sell, the less reliant the store will be on sugary drinks and other unhealthy products. There are many programs throughout the United States working with corner stores on conversions and healthier business models. To learn more about this approach, see www.changelabsolutions.org/publications/healthy-corner-stores.

Implementation and Enforcement

Several different legal tools can be used to implement and enforce these types of regulations. The ones you choose will depend on both your community goals and the existing regulatory framework.

Licensing

Many jurisdictions already require retailers to obtain a business license to operate, and in many cases an existing license can be amended to include additional conditions of operation. A business license generally applies to the individual running the business (as opposed to zoning requirements, which usually “run with the land”), and may be nontransferable and subject to periodic renewal. A strong licensing law can impose strict limits on eligibility for a license, and through those eligibility limits a community can control the location and density of retailers. Licensing systems also can provide an efficient mechanism for enforcement.

Zoning and Conditional Use Permits

A **Conditional Use Permit (CUP)**, which is part of a zoning code, can be required for SSB retailers. Through a CUP a local government can not only regulate the location and density of retailers but also impose additional conditions to regulate the sales of SSBs. The CUP process usually requires a public hearing



and a case-by-case determination of suitability for the proposed business. For more information and a comparison between zoning and licensing, see www.changelabsolutions.org/publications/licensing-zoning.

Direct Regulation

A local government can adopt a stand-alone law that is not part of a zoning code or business licensing system. Direct regulations can be very effective, but they should include enforcement mechanisms and dedicated staff for implementation.

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