

Administrative 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 Administrative 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 29 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 administrative enforcement. The first part of this roadmap (the “roadblocks”) describes barriers to effective administrative enforcement and offers potential solutions. The second section (the “roadmap”) describes administrative enforcement procedures that are most relevant to tobacco control advocates. A foldout graphic roadmap accompanies this part of the narrative.

Note that throughout TALC’s Administrative Enforcement Roadmap the terms *investigating agency* and *hearing agency* or *hearing officer* are used frequently. The terms do not describe a particular agency or person. Rather, *investigating agency* refers to any local agency or department that does—or should—gather

evidence of a violation of a tobacco control law that is enforced through an administrative process. The term *hearing agency* refers to the local agency or department that holds administrative hearings to determine if a tobacco control law that is enforced administratively has been violated. Likewise, *hearing officer* is a generic reference to the person designated by law or the hearing agency to render an impartial decision on behalf of the hearing agency.



The investigating agency and hearing agency may be the same agency. For example, a local health department might gather evidence of a tobacco control law violation and also prosecute the violator through an administrative hearing process.

For example, the City of Sacramento has a local ordinance requiring retailers to get a license from the city in order to sell tobacco products. The ordinance also says that if a tobacco retailer violates any federal, state, or local tobacco control law (e.g., by selling tobacco to minors or selling cigarettes via a self-service display), the retailer's tobacco license will be suspended for 30 days for the first violation. If a City of Sacramento code enforcement officer (one investigating agency in Sacramento is code enforcement) discovers that a retailer is selling cigarettes via a self-service display, the officer delivers a report of the violation to the city manager, which is the department charged with enforcing the licensing penalties (the hearing agency). Based on the violation report, the city manager applies the appropriate penalty and officially "gives notice" (e.g., sends an official letter) to the retailer of (1) the violation, (2) the penalty (e.g., a 30-day suspension), and (3) the retailer's "opportunity to be heard": to disagree with the city manager's conclusion in an administrative hearing. If the retailer attends the hearing to argue against the suspension, the hearing officer will decide whether or not the violation took place and

therefore whether or not the retailer's license should be suspended. If the hearing officer concludes that the city manager's penalty is justified, the retailer can still appeal to the superior court. (The process of applying the appropriate penalty and appealing hearing agency decisions is discussed in the Roadmap section of this booklet.)

I. Administrative Enforcement: Roadblocks

The road to effective administrative enforcement of tobacco control laws involves many stops along the way. Because enforcement requires multiple individuals and sometimes multiple 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 agency is supposed to investigate potential violations; it doesn't require any agency to actually check for violations of the law (e.g., to conduct a certain number of compliance checks per year); or the agency specified is simply unaware of the law.

Investigating Agency The agency charged with investigating violations of the law (e.g., the police or health department) does not make the law a priority, perhaps due to insufficient funding or staffing.

Prosecution The agency charged with conducting administrative hearings (the hearing agency) does not establish a hearing process or does not make prosecuting violations of the law a priority, perhaps due to insufficient funding or staffing.

It is not uncommon for advocates to encounter multiple roadblocks relating to 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. Administrative Enforcement: Roadblock Solutions

A. Roadblock: Language of the Law

Key Players:

- Tobacco Control Advocates
- Investigating Agency
- City Council / Board of Supervisors

At least four possible strategies can increase the enforcement of an existing tobacco control law that is enforced through an administrative process simply by considering what the law says and does not say.

1. Identify the Investigating Agency

The first step is to identify the agency responsible for investigating violations of 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 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://talcalphi.org/talclinks.htm>).

2. Ask Questions

If you still can't discover the proper investigating agency, call local agencies to determine if any of them believe that they are responsible for enforcement. Sometimes the language of a law will not specify an agency, but local custom or practice may. The only way to discover local customs or practices is to ask.

Also consider asking the city or county clerk who is responsible for enforcement. 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).

3. Contact the Agency

Once the appropriate agency is identified, advocates should contact the investigating agency to see if it is aware that it is responsible for investigating

potential violations of the law or monitoring compliance with 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.

4. Advocate for Clear Laws

To avoid confusion, tobacco control laws should clearly designate the primary agency responsible for investigating a law and, at the same time, allow investigation by a wide range of agencies (e.g., designate the health department as the primary investigating agency but provide that any peace officer may also investigate potential violations of 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 amend existing tobacco control laws to add clear enforcement provisions.

It is especially important for local tobacco retailer licensing laws to be drafted clearly because a number of agencies may be involved in administering and enforcing the license. For example, one agency may be responsible for issuing the license (e.g., the county treasurer), a different agency for monitoring compliance with the license (e.g., the sheriff), and yet another agency for conducting the administrative hearings to decide whether or not to suspend or revoke a license (e.g., the health department).

TALC is available to speak with the city attorney, county counsel, or elected officials about how to draft clear enforcement provisions.

B. Roadblock: Investigating Agency

Key Players:

- Tobacco Control Advocates
- Investigating Agency
- City Council / Board of Supervisors

Even the most artfully 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.

Local 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 eight possible solutions can increase the enforcement of an existing tobacco control law that is enforced through an administrative process.

1. Allocate Resources

If funding has been identified as the problem behind inadequate enforcement, an obvious answer is to give the investigating 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 that mandates a mitigation fee (a fee that goes toward reducing the harm caused by a product or activity) sufficient to fund effective investigation. 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 could enable a new part-time or full-time health department 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 investigating 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 agency.

3. Educate the Agency

The agency charged with investigating violations of a tobacco control law that has an administrative enforcement process may be unfamiliar with the role of “enforcer.” For example, employees of a local health department may view

themselves more as educators than as police or judges. Advocates can help agency employees understand their role as investigators through meetings, trainings, and written materials. Once an agency is comfortable with its administrative powers, it is more likely to use them effectively.



4. 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. 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.

5. Partner with the Investigating Agency

Another option is to bring the multiple resources of advocates to the table (e.g., volunteers to assist with investigations, staff time to help organize an enforcement effort, or funding such as Master Settlement Agreement funds). Make it clear that advocates are willing to work with the investigating agency to resolve problems that arise and to provide support, such as trainings, fact sheets, or staffing 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 agency's support. In the end, an ongoing collaboration is the best way to ensure that increased enforcement is maintained.



6. 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 health inspectors might be persuaded 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.

7. Demonstrate Appreciation

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

8. Advocate for Active Investigations

Advocates can educate the city council or board of supervisors about the need for active enforcement and seek legislative directives requiring or encouraging (perhaps through funding incentives) the investigating agency to enforce tobacco control laws. Advocates can also consider amending existing laws to add mandatory or expanded enforcement provisions, such as a certain number of retailer compliance checks per year. Note that legislative power to direct an investigating agency's actions may be limited in some circumstances.

C. Roadblock: Prosecution

Key Players:

- Hearing Agency (Hearing Officer)
- Investigating Agency
- Tobacco Control Advocates
- City Council / Board of Supervisors

Even if you are successful in persuading the investigating agency to gather evidence of tobacco control law violations, if the hearing agency (e.g., the local health department) does not follow through with the administrative hearing, it is possible that no penalty will be imposed. Even when the same agency is responsible for investigations and the hearing, problems can occur because the individuals involved in the investigation may be different from those involved in the hearing. To prevent a result where the evidence of a violation has been gathered but no hearing takes place, there are at least four possible solutions.

1. Charge a Fee

As with funding investigations of violations, a local ordinance could charge a fee that specifically allocates funds to the hearing agency to prosecute tobacco control cases.

2. Create Public Demand

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

3. Encourage Investigating Agency and Hearing Agency Collaboration

Successful enforcement of a tobacco control law with an administrative enforcement process, such as a local tobacco retailer licensing law, requires coordination among all the agencies involved. For example, most local tobacco retailer licensing laws state that a retailer's license may be suspended after a certain number of license violations. In most local licensing laws, if a retailer violates *any* local, state, or federal tobacco control law, that will count as a license violation. However, if the hearing agency doesn't know about the retailer's violation of the tobacco law, the agency will not have the information it needs to suspend the retailer's license.

To avoid these problems, it is important that the hearing agency have a way to learn about retailer violations of tobacco control laws discovered by other agencies. Advocates could encourage the hearing agency to set up a process where information about retailer violations is sent to the hearing agency from each of the investigating agencies responsible for enforcing the underlying tobacco control laws. For example, the police could send evidence of California Penal Code section 308(a) violations (tobacco sales to minors) to the hearing agency so that the agency could take action against the retailer for a license violation.



Even if the investigating agency and the hearing agency are the same (e.g., the health department has the authority to cite retailers for self-service display violations, and it also conducts hearings to determine license suspensions), a formal communication process would streamline prosecutions.

4. Advocate for Active Investigations

Advocates can educate the city council or board of supervisors about the need for active enforcement and seek legislative directives requiring the hearing agency to hold the administrative hearings when evidence has been collected.

D. Conclusion

The process of enforcing a law administratively is often complex and differs from agency to agency. Multiple people 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 in enforcing tobacco control laws through an administrative process. Understanding the big picture of administrative procedure can help advocates identify enforcement roadblocks and negotiate and motivate solutions.

The Road of Administrative Enforcement

This portion of TALC’s Administrative Enforcement Roadmap explains the parts of administrative legal procedure that are most relevant to tobacco control advocates. A foldout graphic roadmap depicting local administrative procedure accompanies this narrative.

Laws with an administrative enforcement process are really a subset of the larger category of civil laws. As described in TALC’s Civil Enforcement Roadmap, laws with civil penalties must be enforced through a lawsuit, and they do not involve the possibility of jail time. 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.

In contrast, laws enforced through an administrative process, such as local tobacco retailer licensing laws, usually do not involve government attorneys (e.g., district attorney, city attorney, or county counsel) and do not initially involve a trial in a court of law. Instead, an administrative agency, on either the local or the state level, is charged with enforcing the law. Once evidence of a violation is collected, the administrative agency will usually begin the enforcement process by sending a letter to the violator notifying him that he has violated the law and indicating the penalty that will be imposed. If the violator disagrees, he is entitled to a hearing before the administrative agency conducted by a hearing officer. This administrative hearing process is a distinct and separate process from a hearing held before a judge in a court of law.

This roadmap first explains the administrative hearing process generally. This general process applies to local administrative hearings such as those held when suspending or revoking a local tobacco retailer license. The roadmap next briefly explains the additional process involved with administrative hearings conducted at the state level. State tobacco law violations that require this added procedure include tobacco tax laws, the state tobacco retailer licensing law, and the Stop Tobacco Access to Kids Enforcement Act (STAKE Act).¹ Finally, the roadmap explains the process of appealing administrative hearing decisions to a local court of law.



I. Administrative Hearing Procedure

In administering a law, an agency such as a health department may have functions that are similar to those of the courts.² The local administrative process most likely relevant to tobacco control is associated with suspending or revoking a local tobacco retailer license. Every community will have its own unique process associated with licensing—including which agency will be charged with conducting the hearings—but certain elements must be present in any administrative hearing, and the avenue for appeal will likely be the same. In addition to local tobacco retailer licensing, the local planning department's administrative hearings could be important in communities using zoning laws as a tobacco control tool (e.g., prohibiting tobacco retailers from operating in certain zones of the community, such as near schools).

Like traditional court proceedings, agency hearings must meet certain fairness standards; these standards are called *due process*. Due process refers to what types of procedures (e.g., notice to the affected person and a hearing) are mandated by fundamental fairness under the state and federal constitutions before the state can deprive a citizen of life, liberty, or property.³

The amount of process due to an individual varies greatly depending on the interest at stake and whether the agency is on the state or local level. California State agency hearing requirements are set by the state's Administrative Procedures Act (APA), which can require almost courtlike formality at hearings.⁴ State administrative procedure is discussed in Section II. On the other hand, a local agency's procedures—such as those of a local planning department—can be fairly informal so long as they respect basic due process and otherwise comply with existing law.⁵

A. Due Process Requirements

Minimum due process requirements are (1) notice and (2) an opportunity for a meaningful hearing.⁶ The type of notice and hearing may vary, so long as it is considered reasonable (which depends on various factors).⁷ For example, in the case of a decision to suspend a tobacco retailer's license, a letter to the retailer containing a clear description of the violation, the proposed penalty, and the time and place to appear at a hearing to argue against the penalty constitutes reasonable notice. The right to a meaningful hearing involves, at the very least, the ability of an individual with a stake in the outcome to present his side of the story at a hearing before an impartial decision maker.⁸

B. Presentation at Hearing

Despite the potential informality of an administrative hearing, the process should be taken seriously. All parties should make a full presentation of their case at the administrative hearing, raising all issues they will want to have reviewed by a court if the hearing officer rules against them. Issues that are not raised at the administrative hearing generally cannot be raised for the first time during an appeal to the courts.⁹

C. Standard and Burden of Proof

Administrative hearings are civil in nature, and therefore the burden of proof required is a preponderance of the evidence, except as otherwise provided by law.¹⁰ That is, the party with more than 50 percent of the proof wins. The law provides a higher standard—clear and convincing evidence—for suspension and revocation of professional licenses, such as a license to practice law.¹¹ Revocation of non-professional licenses, however—such as business licenses (including a local tobacco retailer license)—needs to meet only the preponderance of the evidence standard.¹²

II. State Administrative Hearings

State-level administrative hearings are relevant to tobacco control in at least three areas: youth access to tobacco, tobacco taxes, and state tobacco retailer licensing. It is important for tobacco control advocates to learn about state administrative procedures if they want to follow or understand what actions state agencies will take to enforce these laws.

In the case of youth access, the relevant law is the Stop Tobacco Access to Kids Enforcement Act (STAKE Act),¹³ which prohibits the sale of tobacco to minors and is enforced solely by the Food and Drug Branch (FDB) of the California Department of Health Services. The STAKE Act provides the FDB with the authority to impose civil penalties (fines) on retailers who violate the law and resolve disputes regarding those penalties through an administrative hearing process.

Similarly, the California Board of Equalization can use the administrative hearing process to impose penalties and resolve disputes for tobacco tax and state tobacco licensing violations.

The administrative process of the California Occupational Safety and Health Administration (commonly referred to as Cal/OSHA) may be relevant for repeat violators of California's smoke-free workplaces law, California Labor Code section 6404.5. For example, Cal/OSHA has fined a bar more than \$50,000 for repeatedly violating this law.

The California Administrative Procedure Act (APA) is a state law that establishes uniform procedures for how *state* agencies must conduct administrative hearings for violations of state or federal law.¹⁴ The APA establishes formal trial-type proceedings for agency hearings based on protecting due process.¹⁵ The APA created the Office of Administrative Hearings (staffed by administrative law judges)¹⁶ and allows for formal and informal hearings, alternative dispute resolution, and opportunities for emergency and declaratory decisions (which declare how a law applies in certain circumstances).¹⁷ The state has established a "bill of rights" for state administrative hearings.¹⁸ Hearing officer decisions are reported in writing and include an explanation of the factual and legal basis for the decision.¹⁹

III. Judicial Review

After a local or state hearing decision has been issued, if either party disagrees with the outcome the party may appeal the decision to the California Superior Court.²⁰ The process of judicial review of agency decisions is called *administrative mandamus*. Once the appeals process has begun, the appealing party is referred to as the *petitioner* and the defending party is called the *respondent*.

Judicial review can be an important step toward ultimately enforcing a law. For example, if a city suspends a retailer's tobacco license for violating the local

tobacco retailer licensing law, the retailer may appeal an unfavorable administrative hearing decision to the courts. If the city attorney is unwilling or unable (e.g., due to limited resources) to defend the administrative decision on appeal, the enforcement victory achieved at the administrative level will be lost.

A. Factors for Review

When a court reviews an administrative hearing decision, it looks at three factors: (1) whether the agency acted with proper authority; (2) whether there was a fair hearing; and (3) whether there was any abuse of discretion (see endnote for more detail).²¹ The petitioner bears the burden of proof because it is presumed that the hearing officer performed his duty correctly.²²

B. Reviewing Court and Timing of Appeals²³

Applications for judicial review of agency decisions will generally be heard by a local trial court (the court in which most civil and criminal cases begin).²⁴ Timing is critical in seeking judicial review; different time limits apply depending on the agency involved and what proceedings are being appealed. Petitions for judicial review of local agency decisions must be filed within 90 days of the judgment becoming final.²⁵ Appeals from formal hearings under the APA must be filed within 30 days of delivery or mailing of the decision.²⁶ A particular agency may have its own limitations period specified in its authorizing law. Alternatively, the California Code of Civil Procedure specifies catchall limitations periods for agency decisions not specifically covered elsewhere.²⁷

C. Exhaustion of Administrative Remedies

A party is generally required to seek all available administrative remedies before seeking judicial review (which is called “exhaustion of remedies”).²⁸ For example, if a local tobacco retailer licensing law provides that administrative hearing decisions can be appealed to the city council, then a retailer must first make an appeal to the city council before appealing an unfavorable administrative hearing decision to the courts.

D. The Process of Administrative Mandamus (Administrative Appeals)

Judicial review can begin in two different ways (see endnote for more detail),²⁹ but the essential first step is filing a petition requesting that the court direct the hearing officer to set aside the decision or to reconsider the case.³⁰ This is called a *petition for peremptory writ of mandate*. A writ is essentially an order directing that a person do or not do something.

Once the proper papers have been filed, a hearing date is set and a trial before a judge is conducted (a jury trial is not available).³¹ The hearing generally involves arguments by the parties' lawyers regarding the record of the administrative decisions (which must have been prepared and delivered to the court before the hearing) and the applicable law.³²

As a final judgment, the court either issues or denies the peremptory writ of mandate. If the court issues the writ, it means the court has decided in favor of the appealing party and the hearing officer will be directed to re-decide the case.³³ If the court denies the writ, it means the court has affirmed the administrative hearing decision, and the appealing party loses.

Either party may appeal the trial court's judgment to the California Court of Appeals.³⁴ California has a three-tier court system made up of (1) trial courts; (2) appellate courts, which review trial courts' decisions; and (3) the California Supreme Court, which hears cases on important public matters.

Endnotes

¹ CAL. BUS. & PROF. CODE § 22950 (Deering 2004).

² *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 372 (1989) (“An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief—including certain types of monetary relief—so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency’s primary, legitimate regulatory purposes, and (ii) the “essential” judicial power... remains ultimately in the courts, through review of agency determinations.”).

Government is split into three branches: the legislative (e.g., U.S. Congress, state legislatures, and city councils), executive (e.g., U.S. President, state governors, city mayors), and judicial (e.g., U.S. Supreme Court, state supreme courts, and lower federal and state courts such as federal district courts and superior courts and small claims courts). The legislative branch creates laws, which the executive branch administers and the judicial branch interprets. CAL. CONST. art. III, § 3. Administrative agencies are part of the executive branch (recall, the executive branch “*administers*” laws). They have quasi-legislative and quasi-judicial powers in addition to their administrative powers. *Bixby v. Pierno*, 4 Cal. 3d 130, 142 (1971). This is because the legislature, instead of determining the details of every law, may set out a broad policy goal and authorize the executive branch, through a relevant administrative agency, to fill in the details by promulgating rules and regulations. *Kugler v. Yocum*, 69 Cal. 2d 371, 374-376 (1968) (recognizing that “truly fundamental issues will be resolved by the legislature.”) (internal quotation omitted). For rulemaking sections under the California Administrative Act (APA), see: CAL. GOV’T CODE §§ 11340-11342.2 (general findings and requirements); 11343-11343.6 (filing and publications); 11346-11347.3 (procedure for adoption of regulations); 11349-11349.8 (review of regulations); and 11350-11350.3 (judicial review) (Deering 2004).

³ U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7.

⁴ CAL. GOV’T CODE §§ 11400-11529 (Deering 2004). The APA applies to almost all state agencies (see *id.* § 11405.30: “‘Agency’ means a board, bureau, commission, department, division, office, officer, or other administrative unit...”) but not to local governments unless a local statute makes the APA applicable. *Id.* §§ 11410.20, 11410.30. It does not apply to the legislature, the judiciary or the Governor or the office of the Governor. *Id.* § 11410.20. It does not apply to the University of California. CAL. CONST. art. IX, § 9; see also CAL. EDUC. CODE § 92001 (Deering 2004). Nor does it apply to the California Public Utilities Commission (CAL. PUB. UTIL. CODE § 1701) nor the State Board of Equalization (CAL. GOV’T CODE § 15609.5) (Deering 2004); see also Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 TULSA L.J. 297, 305-07 (1996) (sketching the history of these exemptions). For covered agencies, the APA’s adjudicatory functions are triggered if, “under the federal or state Constitution...an evidentiary hearing for determination of facts is required for formulation and issuance of the decision,” i.e., a hearing is required to satisfy due process. CAL. GOV’T CODE § 11410.10 (Deering 2004).

⁵ It is important to note that California law recognizes freedom from arbitrary adjudicative procedures as a liberty interest. *People v. Ramirez*, 25 Cal. 3d 260, 268 (1979). This means that a ruling cannot be based on capricious reasoning; for example, an application for a driver’s license can be denied because the applicant is an unsafe driver but not because the DMV clerk is in a bad mood.

⁶Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Carstens v. Pillsbury, 172 Cal. 572, 577 (1916) (“The right to be present at a hearing necessarily includes the right to have notice of the hearing in time to attend.”).

⁷Anderson Nat. Bank v. Lueckett, 321 U.S. 233, 246 (1944); *see also* Keenan v. San Francisco Unified Sch. Dist., 34 Cal. 2d 708, 715 (1950) (holding that informal interviews with administrative officers did not constitute a hearing); Universal Consol. Oil Co. v. Byram, 25 Cal. 2d 353, 361 (1944) (holding that a hearing in substance, not just in form, is required).

⁸However, the standard of impartiality in an administrative setting is less exacting than that required in a judicial proceeding. Proof of actual bias, shown by concrete facts, is required to prove that a party has been denied due process. *Gai v. Selma*, 79 Cal. Rptr. 2d 910, 913 (Cal. App. 1998) (finding that actual bias must be proven by concrete facts; an appearance of bias is not sufficient to disqualify an administrative decision maker); *Blinder, Robinson & Co. v. Tom*, 226 Cal. Rptr. 339, 343 (Cal. App. 1986) (“[T]he mere fact that the administrative board is both accuser and judge in no way adversely affects the legal rights of the accused.”) (citation and internal quotation omitted); *see* CAL. GOV'T CODE § 11425.40 (Deering 2004) (the bases for disqualifying the presiding officer). However, a situation that implies a high probability of bias may be more than due process can bear. For example, in *Haas v. County of San Bernardino*, a temporary administrative hearing officer was disqualified on due process grounds because (1) the agency unilaterally (and on an ad hoc basis) selected and paid her; and (2) the officer's income from future adjudicative work depended entirely on the government's goodwill. 27 Cal. 4th 1017 (2002). In addition to notice and a meaningful hearing, due process generally provides for meaningful review of administrative decisions, which may include interim review by a higher administrative authority within an agency, but minimally requires judicial review. Meaningful judicial review requires that an administrative record capable of review be created and preserved, and also requires that an administrative decision specify the basis for decision with sufficient particularity, including findings of fact and a statement of the applicable law, so as to facilitate judicial review. Indeed, if a decision is insufficiently reasoned, that will serve as the basis for vacating an administrative decision, and result in the likelihood of remanding the matter to the agency to issue an adequate decision.

⁹*Walnut Creek v. Contra Costa County*, 162 Cal. Rptr. 224, 228 (Cal. App. 1980) (“It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to the issues appearing in the record of that body as made out by the parties to the proceedings, though additional evidence, in a proper case, may be received.”) (citation omitted in original). In the same vein, objections to agency proceedings should be made at the hearing so that those objections also are preserved for judicial review. *See, e.g., Tennant v. Civil Serv. Comm'n for Los Angeles*, 175 P.2d 568, 573-574 (Cal. App. 1946).

¹⁰CAL. EVID. CODE § 115 (Deering 2004); *Peretto v. DMV*, 1 Cal. Rptr. 2d 392, 400 (Cal. App. 1991) (suspension of driver's license); *Gardner v. Comm'n on Prof. Competence*, 164 Cal. App. 3d 1035, 1040 (1985) (termination of teacher's employment). As in ordinary civil actions, the party commencing the action in an administrative hearing bears the burden of proof. *Southern Cal. Jockey Club, Inc. v. Cal. Horse Racing Bd.*, 36 Cal. 2d 167, 177 (1950). Therefore, when an agency initiates a disciplinary proceeding, the agency bears the burden of proof; when a person seeks to gain a license, she carries the burden of proof. *See Savelli v. Bd. of Med. Exam'rs*, 40 Cal. Rptr. 171, 177 (Cal. App. 1964).

¹¹*See Furman v. State Bar*, 12 Cal. 2d 212, 229 (1938) (disbarment); *Ettinger v. Bd. of Med. Quality Assurance*, 185 Cal. Rptr. 601, 603 (Cal. App. 1982) (suspension or revocation of a physician's

license); *cf.* *Realty Projects, Inc. v. Smith*, 108 Cal Rptr. 71, 76 (Cal. App. 1973) (applying a convincing proof to a reasonable certainty standard in the context of the suspension and revocation of a real estate license).

¹²The different standards result from the different processes necessary to obtain professional and business licenses. Applicants for professional licenses typically engage in extensive education and training and pass a rigorous examination before receiving their licenses. Their substantial investment of time, energy, and money is thought of as increasing their interest in the license. Therefore more process is granted before the license may be suspended or revoked; the tool for granting more process is a higher standard of proof. A business license, on the other hand, requires a much lower investment of time and resources, and therefore its suspension or revocation requires a lower standard of proof. *See San Benito Foods v. Veneman*, 58 Cal. Rptr. 2d 571 (Cal. App. 1996). In *San Benito Foods*, a food processor claimed that the Department of Food and Agriculture could only suspend his food processor's license after meeting a clear and convincing standard. *Id.* The court disagreed, finding that the requirements for obtaining a food processor's license were merely a showing of good character and a sound financial position. *Id.* at 573. Because the food processor's license "can be obtained without meeting any educational, training or skill requirements," the lower preponderance of the evidence standard was appropriate. *Id.*; *see also Mann v. DMV*, 90 Cal. Rptr. 2d 277, 282 (Cal. App. 1999).

¹³CAL. BUS. & PROF. CODE § 22950 (Deering 2004).

¹⁴CAL. GOV'T CODE § 11410.10 (Deering 2004). The APA applies to local agency hearings where required by statute. *Id.* § 11410.30; *see generally id.* §§ 11340-11529 (establishing the California Administrative Procedure Act). Note that some administrative agencies are authorized by their enabling legislation to conduct quasi-judicial proceedings independent of the APA. For example, the Fair Employment and Housing Act authorizes the Fair Employment and Housing Commission to have its own administrative law judges, and the Commission has established its own administrative procedure. As a practical matter, such agencies generally model their procedures on the APA.

¹⁵*See* CAL. GOV'T CODE § 11425.10 (Deering 2004); *see Desert Turf Club v. Bd. of Supervisors*, 296 P.2d 882, 887 (Cal. App. 1956) ("[C]ommon sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts will be determined.").

¹⁶CAL. GOV'T CODE § 11502 (Deering 2004) (designating administrative law judges as the presiding officers over administrative hearings covered by the APA).

¹⁷Pamela J. Keeler, *Review of Selected 1995 California Legislation: Public Entities, Officers, and Employees*, 27 PACIFIC L. J. 941, 944 (1996).

¹⁸The Administrative Adjudication Bill of Rights requires the following protections in all agency hearings covered by the APA: (1) a right to notice and an opportunity to be heard; (2) the right to present and to rebut evidence; (3) the right to obtain a copy of the procedure governing the agency's action; (4) the right to a public hearing; (5) the right to an unbiased presiding officer; (6) the right to a written decision based on the record of evidence and including a statement of the factual and legal bases for the decision; (7) the right to translation assistance if necessary; and (8) a restriction on *ex parte* communications (communications with the hearing officer by one party without opposing parties being present and able to present differing views). CAL. GOV'T CODE §§ 11425.10-.50 (Deering 2004).

¹⁹*Id.* § 11425.50.

²⁰ CAL. CONST. art. VI, § 1 (“The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts...”).

²¹ CAL. GOV'T CODE § 1094.5(b). Abuse of discretion is established if (1) the agency did not proceed in the manner required by law; (2) if the hearing officer's order or decision is not supported by the findings; or (3) the findings are not supported by the evidence. A court establishes “findings not supported by the evidence” either under the substantial evidence test, if no fundamental rights or vested interests are at issue, or under the independent judgment test where such rights or vested interests are implicated. *Id.* § 1094.5(c); *see* Strumsky v. San Diego County Employees Ret. Ass'n, 11 Cal. 3d 28, 32 (1974); *see also* Bixby v. Pierno, 4 Cal. 3d 130, 144 (1971). For example, if one is applying for a new license, one does not have a vested interest, whereas if the proceeding involves the potential loss of an existing license, a vested interest is involved.

Under the “substantial evidence” test, the trial court examines the evidentiary record compiled at the administrative hearing to determine (1) whether the agency committed any errors of law and (2) whether the decision was supported by substantial evidence (essentially, is the decision a *rational* one given the evidence). Bixby, 4 Cal. at 143-44. Under the “independent judgment” test, a trial court (1) examines the administrative record for errors of law and (2) also applies its independent judgment to whether the evidence supports the agency's decision (essentially, is the decision the *correct* one given the evidence). *Id.*

California courts give weak deference to an agency's interpretation of the law. *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal. 4th 1 (1998). An agency's interpretation of a statute is most likely to convince a court where the agency has technical knowledge and expertise in the area of the statute's, e.g. when the statute that is being interpreted is the statute administered by the agency. *Id.*

²² CAL. EVID. CODE § 664 (Deering 2004).

²³ This discussion is not exhaustive; for more on timing relating to judicial review, see California Government Code sections 11519, 11521, 11523, California Civil Procedure Code section 1094.6, as well as the enabling statutes defining the agency's function.

²⁴ CAL. RULES OF COURT 56(a) (Deering 2004); *see* *Adams v. DMV*, 11 Cal. 3d 146, 150 n.7, (1974).

²⁵ CAL. CIV. PROC. CODE § 1094.6 (Deering 2004). A decision is generally considered final when mailed, although if a party seeks agency reconsideration, the decision becomes final when the period for reconsideration expires. Moreover, the ninety-day period only begins running when the agency tells the party of the ninety-day limit imposed by section 1094.6.

²⁶ *Id.* § 11523. Appeals from formal hearings under the APA must be filed within thirty days of the last day on which reconsideration can be ordered. Reconsideration can be ordered within thirty days after the delivery or mailing of a decision to a respondent, although the agency may change this timing rule. *Id.* § 11521.

²⁷ These are either the three-year statute for liabilities created by statute or the four-year period when no other limitation period applies. CAL. CIV. PROC. CODE §§ 338, 343 (Deering 2004). However, these general statute of limitations time periods are, by and large, unreasonably long. Therefore, courts will bar an action based on delay (the legal term is *laches*) if the respondent is able to establish there was an “unreasonable delay” and “prejudice” (harm) due to the delay. Examples of prejudice would be difficulty in locating witnesses or that the witnesses cannot

remember the events in question due to the passage of time. *See, e.g.*, Johnson v. Loma Linda, 24 Cal. 4th 61 (2000) (granting a laches defense where a party waited two years to file the petition for administrative mandate).

²⁸ Abelleira v. Dist. Court of Appeal, 17 Cal. 2d 280 (1941).

²⁹ The two ways are (1) by filing a petition for *peremptory writ of mandate* (the core legal papers of the appeal arguing why the hearing decision is improper) and a request that the court issue an *alternative writ of mandate*, or (2) by simply filing the petition for peremptory writ of mandate and serving (giving) the agency the petition as one would a complaint in a normal civil case.

In the first method, the alternative writ functions essentially like a summons in a civil case. It orders the agency to either (1) issue a different decision (the one requested by the petitioner) within a specified period of time or (2) file a return (an answer or demurrer—or *objection*—to the petition) and otherwise demonstrate why the decision is proper by the time set for hearing on the peremptory writ. In other words, the alternative writ most often serves to set the matter for hearing on the peremptory writ, and to provide a schedule for the filing of the return and opposition to the issuance of the peremptory writ. The courts almost as a matter of course order the issuance of the alternative writ. Indeed, in most cases the agencies will not oppose the issuance of the alternative writ. Generally, such requests are made by the petitioner to the superior court *ex parte*.

Proceeding by the second method, having filed the petition for peremptory writ of mandate and serving the petition, the respondent must serve its *return* (answer). The petitioner then may file a replication (or *traverse*), which is like an answer to the answer and must be done to avoid admitting the factual allegations in the return. Thereafter the petitioner will file a motion with the trial court for issuance of a peremptory writ. At the hearing on the motion the substance of the dispute will be argued and decided. MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 161-62 (West Group 2002).

³⁰ The court cannot replace a penalty imposed by the agency, but it can order the agency to set aside its decision, to reconsider the case “in the light of the court’s opinion and judgment” and to “take such further action as is specially enjoined upon it by law.” CAL. GOV’T CODE § 1094.5(f) (Deering 2004).

³¹ *Id.* § 1094.5(a).

³² The hearing is conducted like a hearing on a motion, since the request for a peremptory writ of mandate is most like a motion for summary judgment in a civil suit.

³³ If a writ is ordered and served on the agency, and the agency does not appeal, it must file a “return” explaining how it has complied with the writ. 2 JOHN P. WAGNER, CONTINUING EDUCATION OF THE BAR OF CALIFORNIA, CALIFORNIA ADMINISTRATIVE MANDAMUS, §§ 15.15-15.17 (3d ed. 2004 supp.). If the agency does not comply with the writ, it faces fines or, in the case of persistent disobedience, prison for the relevant administrator. CAL. CIV. PROC. CODE § 1097 (Deering 2004).

³⁴ *See* 2 ELIZABETH E. BADER, CONTINUING EDUCATION OF THE BAR OF CALIFORNIA, CALIFORNIA ADMINISTRATIVE MANDAMUS, §§ 16.38, 16.39 (3d ed. 2004 supp.).



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, 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

TLAC = *Tobacco Laws Affecting California* booklet and the corresponding section
 BP = under Business and Professions Code Section 17200, I = Infraction, LR = License Revocation,
 M = Misdemeanor, R = Range

Secondhand Smoke (Continued)

Description	Law	Admin.	Criminal	Civil	TLAC
Local Secondhand Smoke Ordinances	California Health and Safety Code Section 118910 Penalties not specified (range available)				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) Penalties not specified, but see entry 14 for penalties for violating the STAKE Act				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 Violators are subject to 30 days imprisonment	✓	✓	✓	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

TLAC = *Tobacco Laws Affecting California* booklet and the corresponding section
 BP = under Business and Professions Code Section 17200, I = Infraction, LR = License Revocation,
 M = Misdemeanor, R = Range

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 Minors who violate these sections are subject to a fine or community service work		✓		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 A court will invalidate a state or local law if it is preempted by federal law				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 Penalties not specified				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

TLAC = *Tobacco Laws Affecting California* booklet and the corresponding section
 BP = under Business and Professions Code Section 17200, I = Infraction, LR = License Revocation,
 M = Misdemeanor, R = Range

Tobacco Advertising (Continued)					
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 Penalties not specified				38

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(i)			✓	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 Professions 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 Violators are subject to one year imprisonment and/or a fine		✓		46

TLAC = Tobacco Laws Affecting California booklet and the corresponding section
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Tobacco Warning Labels

Description	Law	Admin.	Criminal	Civil	TLAC
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 <hr/> Penalties not specified				49
Cigar Warning Labels	California Health and Safety Code Sections 104550–104552			✓	49

Tobacco Tax Law

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 <hr/> 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		✓		51
12 Cents-per-Package Tobacco Tax	California Revenue and Taxation Code Sections 30101, 30102–30111, 30461.6 <hr/> 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		✓		52
Proposition 99 Surtax	California Revenue and Taxation Code Sections 30121–30130 California Health and Safety Code Sections 104350–104480, 104500–104545 <hr/> 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		✓		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

Licensing and Reporting

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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