


Multnomah County
HEALTH DEPARTMENT



Policy and Procedures

Division: Environmental Health Services		
SUBJECT: Tobacco Retail License Program		
PRE-APPROVAL: Bernadette Nunley Assistant County Attorney Jae P. Douglas Environmental Health Services Director May 31, 2016	EFFECTIVE DATE: 07-1-2016	APPROVAL: Joanne Fuller Multnomah County Health Department Director Signature:  Date: June 3, 2016

- I. **POLICY:**
Multnomah County has determined that it is necessary to regulate Tobacco Retailers to assure activities necessary for the preservation of health or prevention of disease in Multnomah County.

Reviewed by: Office of Multnomah County Attorney, Bernadette Nunley, Assistant County Attorney
- II. **CONTACT:**
Kari McFarlan, Supervisor, Tobacco Control and Prevention Program
Multnomah County Health Department, Environmental Health Services
- III. **PERSONS AFFECTED:**
Tobacco Retailers and Department staff
- IV. **CROSS REFERENCES:**
Multnomah County Code Chapter 21
Multnomah County Board of Health Policy Order 2015-011
- V. **DEFINITIONS:**
 - A. "Arm's Length Transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, none of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this chapter is not an Arm's Length Transaction.
 - B. "Board" means the Multnomah County Board of County Commissioners.
 - C. "Department" means Multnomah County Health Department.
 - D. "Inhalant Delivery System" means any device or component of a device meeting the definition of "inhalant delivery system" in MCC § 21.510.

- E. "Person" means person or entity, as defined in ORS 60.001.
- F. "Retail Sale" means any transfer, conditional or otherwise, of title or possession of Tobacco Products.
- G. "Tobacco Paraphernalia" means any item designed for the consumption, use, or preparation of Tobacco Products.
- H. "Tobacco Product" means:
 - 1. Any substance containing, made or derived from tobacco that is intended for human consumption by any means including but not limited to cigarettes, cigars, little cigars, pipe tobacco, shisha, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and
 - 2. Electronic cigarettes or any inhalant delivery systems containing or delivering nicotine.
 - 3. Vape juice or e-liquid defined as any aerosol or liquid solution that vaporizes when heated to make a smoke-like vapor and that contains nicotine or any nicotine containing product, in any amount or concentration, including tobacco plant extract, tobacco dust, or synthetic nicotine in any amount, concentration or strength, in any form including but not limited to bottled, pre-filled cartridges, or as part of a kit.
 - 4. This definition excludes any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for any other therapeutic purpose, if the product is marketed and sold solely for such an approved purpose.
- I. "Tobacco Retailer" means any person or entity, as defined in ORS 60.001, that owns a business that sells, offers for retail sale, exchanges or offers to exchange, Tobacco Products, including inhalant delivery systems retailers as defined in MCC § 21.510, or that distributes free or low cost samples of Tobacco Products. This definition is without regard to the quantity of Tobacco Products sold, offered for retail sale, exchanged, offered for exchange, or distributed.

VI. **PURPOSE:**

The purpose of licensing Tobacco Retailers is to promote compliance with federal, state and local laws relating to the retail sale of Tobacco Products and discourage violations of tobacco-related laws, particularly those which relate to minors.

It is the intent of the Department to provide education and assistance to Tobacco Retailers to help them comply with the ordinance and to enforce penalties in accordance with the Rules. The Department will work with Tobacco Retailers in order to remedy violations found during inspections.

VII. **PROCEDURES:**

A. Requirements and Prohibitions

- 1. A Tobacco Retail license is required for each address at which Tobacco Products are available from a Tobacco Retailer.
- 2. A Tobacco Retailer must acquire a Tobacco Retail license prior to making Tobacco Products available.

- a. A Tobacco Retailer is ineligible for a Tobacco Retail license if the Tobacco Retailer has outstanding penalties for previous violations of these Rules.
3. A Tobacco Retailer may only make Tobacco Products available from a licensed, fixed location.
4. A Tobacco Retailer may only make Tobacco Products available within original packaging containing health warnings satisfying the requirements of federal, state, and local law.
 - a. A Tobacco Retailer may make Tobacco Products available only to Persons who are at least the minimum age for sales and possession, as set forth in federal, state, and local law.
 - i. MC Code Chapter 21.563 makes it a violation to make available Tobacco Products to a person who appears to be under the age of 27 years without first examining the recipient's identification to confirm that the recipient is at least the minimum age under federal, state and local laws to purchase and possess Tobacco Products.
 - ii. Whenever a Tobacco Retailer verifies age, he or she must verify it as MC Code Chapter 21.563 requires.
 - iii. The Department will sanction a Tobacco Retailer who does not verify the age of a recipient who appears to be under the age of 27 only if the person is actually younger than the minimum age under federal, state, and local laws to purchase and possess Tobacco Products.
5. The Tobacco Retail license will be displayed in a way that is clearly visible to any person entering the premises at each licensed location.
6. It will be a violation for a Tobacco Retail licensee, authorized agent, designee or employee to violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retail sales.
7. A Tobacco Retailer without a valid Tobacco Retail license or with a suspended or revoked license must keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision will constitute operating without a Tobacco Retail license.

B. License Nontransferable

1. A Tobacco Retail license may not be transferred from one Person to another or from one location to another.
2. Prior violations at a location will continue to be counted against a location, and license ineligibility and suspension periods will continue to apply to a location, unless 100 percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners. The new owner must provide the Department with clear and convincing evidence, including an affidavit and updated registration with the Oregon Secretary of State Corporation Division, that the business has been acquired in an Arm's Length Transaction within ten calendar days of a change.
3. Prior violations may be considered in subsequent enforcement actions and applications for additional Tobacco Retail licenses.

C. Annual License Application.

1. An annual application for a Tobacco Retail license will be submitted in the name of each Business Owner, authorized agent or designee proposing to conduct or conducting retail tobacco and inhalant delivery system sales and will be signed by each Business Owner, authorized agent or designee.
2. It is the responsibility of each Tobacco Retailer to be informed regarding all laws applicable to the Tobacco Retail license, including those laws affecting the issuance of a Tobacco Retail license. No Tobacco Retailer may rely on the issuance of a license as a determination by Multnomah County that the Tobacco Retailer has complied with all laws applicable to the Tobacco Retail license.
3. A license issued contrary to these Rules, contrary to any other law, or on the basis of false or misleading information supplied by a Tobacco Retailer will be revoked in accordance with Section L, *License Suspension or Revocation*, of these Rules. Nothing in these Rules will be construed to vest in any Person obtaining and maintaining a Tobacco Retail license any status or right to act as a Tobacco Retailer in contravention of any provision of law.
4. All applications will be submitted on a form supplied by the Department and will contain the following information:
 - a. The name, address, email address and telephone number of each Business Owner or authorized agent seeking a license.
 - b. The business name, address, telephone number and normal operating hours of each fixed location for which a license is sought.
 - c. A single name, mailing address, email address and telephone number authorized by each Business Owner or authorized agent to receive all communications and notices ("Authorized Address") required by, authorized by, or convenient to the enforcement of these Rules. If an Authorized Address is not supplied, each Business Owner will be understood to consent to the provision of notice at the business address specified in Section C(4)(b).
 - d. Types of Tobacco Products sold.
 - e. Whether or not any Business Owner, authorized agent or designee has admitted violating or has been found to have violated these Rules or other federal, state or local tobacco retail laws and, if so, the dates and locations of all such violations within the previous five years.
 - f. A signed affirmation by each Business Owner that he or she is informed of the laws affecting the Tobacco Retail license and will train all employees and retail associates who sell tobacco products on these laws.
 - g. Such other information as the Department deems necessary for the administration or enforcement of these Rules as specified on the application form required by this section.
5. A licensed Tobacco Retailer will inform the Department in writing of any change in the facility or applicant information submitted on an application within ten calendar days of a change.
6. Each license application will include payment of the annual license fee required by Board Resolution.

7. Applications are subject to disclosure in accordance with Oregon Public Records Law or any other applicable law.

D. Issuance of License.

1. The Department will issue a license when it receives a completed application for a Tobacco Retail license and the annual license fee, unless one or more of the following reasons for denial exist:
 - a. The information presented in the application is inaccurate, misleading or false. Intentionally supplying inaccurate, misleading or false information will be a violation of these Rules.
 - b. The application seeks a license for a Tobacco Retailer for whom these Rules prohibit a license.
 - c. The application seeks a license for activities that are prohibited pursuant to these Rules.
2. As set forth in Section L, *License Suspension or Revocation*, a Tobacco Retail License may be suspended or revoked by the Department prior to its expiration date for cause.

E. License Renewal and Expiration.

1. A Tobacco Retail license is invalid if the license fee has not been timely paid in full or the term of the license has expired. The term of a Tobacco Retail license is one year. Each Tobacco Retailer will apply for license renewal and submit the license fee no later than thirty days prior to expiration of the term. Late fees may be applicable as determined by Board Resolution
2. A Tobacco Retail license that is not timely renewed will expire at the end of its term. To renew a license not timely renewed as described above, the Tobacco Retailer must:
 - a. Submit the application renewal form and license fee, and
 - b. Submit a signed and notarized affidavit affirming that the Tobacco Retailer has not sold and will not sell any Tobacco Products after the license expiration date and before the license is renewed.

F. License Fee.

1. Each annual application for a new or renewed Tobacco Retail License will be accompanied by a license fee as determined by Board Resolution.
2. Starting two years after the effective date of these Rules, the Department may, on an annual basis, modify the fee required pursuant to Section F(1). The fee will be calculated to recover the cost of administration and enforcement of these Rules, but will not exceed the cost of the regulatory program authorized by these Rules. All fees and interest upon proceeds of fees will be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.
3. Any fee increase will be determined with community input and approved by the Board.

G. Education and Outreach.

1. As part of program administration, the Department will provide educational resources to Tobacco Retailers to support compliance with license requirements.
 - a. Educational materials will be made available in a Tobacco Retailer's preferred language upon request.
 - b. The Department may offer an annual, free, culturally responsive training on local, state and federal tobacco retail laws to support clerks, managers and owners in meeting the requirements of the law.
 - c. The Department may update educational resources when new local, state or federal tobacco related laws are enacted and make available materials to Tobacco Retailers in a timely manner.

H. Annual Compliance Inspections.

1. Compliance with these Rules will be monitored by the Department. In addition, any peace officer may enforce the penal provisions of these Rules. The Department may designate any number of additional Persons to monitor compliance with these Rules.
2. The Department will inspect each Tobacco Retailer at least one time per twelve-month period with an unannounced site visit during regular retailer business hours.
 - a. The Tobacco Retailer must permit the Department access to the business during regular retailer business hours, in order to determine compliance with these Rules. Failure to permit the Department access is a violation and may result in the imposition of a civil penalty, license suspension or revocation.
 - b. Remediation Plan:
 - i. If, during a site visit, the Department finds violations of these rules, the Tobacco Retailer, or his or her designee, must cooperate with the Department to develop a remediation plan to correct violations. Compliance with the remediation plan must be completed within 15 calendar days of the site visit.
 - ii. Post-remediation plan follow-up site visit:
 - a) The Department will make a follow-up visit within 30 calendar days of the remediation plan completion date to confirm violations have been corrected.
 - b) If a violation of these rules is found during the follow-up site visit the Department may impose a civil penalty, license suspension or revocation.
 - iii. Post-remediation plan violations:
 - a) If additional violations are observed within five years of the date the remediation plan was entered into, the Department may impose a civil penalty, license suspension or revocation.

I. Minimum Legal Sale Age Inspections.

1. The Department will conduct annual unannounced inspections of Tobacco Retailers to ensure compliance with federal, state, and local minimum legal sale age laws for Tobacco Products. These inspections will occur in coordination with the Oregon Health Authority's existing minimum legal sale age inspections.

2. Inspections may take place:
 - a. Only in areas open to the public;
 - b. Only during hours that Tobacco Products are sold or distributed; and
 - c. No more frequently than once a month in any Tobacco Retailer unless a compliance problem exists or is suspected.
 - d. Using minors shall be at the discretion of the Department.
3. If a Tobacco Retailer illegally sells a Tobacco Product during a minimum sale age inspection, the Department may impose a civil penalty, license suspension or revocation.

J. Complaint Inspections.

1. The Department may respond to complaints received against Tobacco Retailers or Persons to ensure compliance with these Rules.
2. When the Department receives a first complaint about a Tobacco Retailer or Person selling Tobacco Products:
 - a. The Department will determine the following about the Tobacco Retailer or Person:
 - i. The Tobacco Retailer or Person is selling or offering Tobacco Products in Multnomah County;
 - ii. The Tobacco Retailer or Person is required to have a Tobacco Retail License according to these Rules; and
 - iii. The conduct described in the complaint is a violation of these Rules.
 - b. If the Department determines that the Tobacco Retailer or Person is covered by these Rules, the Department will send a letter to the Tobacco Retailer or Person named in the complaint within 10 calendar days after receipt of the complaint of violation. The letter will contain:
 - i. Notification that the Tobacco Retailer was reported as being in violation of these rules;
 - ii. Educational materials about the requirement for a Tobacco Retail license; and
 - iii. Information on who to contact for further information and help with compliance.
3. If the Department receives a second or subsequent complaint that meets the criteria set out in Section J(2)(a) of these rules for the same Tobacco Retailer more than five calendar days but less than five years after the Initial Response Letter was sent:
 - a. A representative of the Department will make an unannounced site visit during regular retailer business hours within 30 calendar days of receiving the complaint to determine whether the Tobacco Retailer or Person is in violation of these Rules.
 - b. The Tobacco Retailer must permit the Department access to the business in order to determine compliance with these Rules. Failure to permit the Department access is a violation and may result in the imposition of a civil penalty, license suspension or revocation.
 - c. If, during a site visit, the Department observes violations of these rules, the Tobacco Retailer, authorized agent or designee must cooperate with the Department to develop a remediation plan to correct

violations. Compliance with the remediation plan must be completed within 15 calendar days of the site visit.

- i. Post-remediation plan follow-up site visit:
 - a) The Department will make a follow-up visit within 30 calendar days of the remediation plan completion date to confirm violations have been corrected.
 - b) If a violation of these Rules is found during the follow-up site visit the Department may impose a civil penalty, license suspension or revocation.
- d. Post-remediation plan complaints:
 - i. If an additional complaint is received within five years of the date the remediation plan was entered into, the Department will make an unannounced site visit within 30 calendar days of complaint receipt. If a violation is found, the Department may impose a civil penalty, license suspension or revocation.
 - ii. If an additional complaint is received more than five years of the date the remediation plan was entered into and there is no evidence of violations in that five-year period, the Department will make an unannounced site visit and must follow the procedures in Section J(3) of this Rule.

K. Operating without Tobacco Retail License.

1. If a Tobacco Retailer is found to be operating without a license, the Tobacco Retailer will have 30 calendar days to apply for a license.
2. If the unlicensed Tobacco Retailer does not apply for license within 30 calendar days, the Tobacco Retailer will be considered in violation of the rules and be subject to civil penalties and ineligible for a license for an additional 30 calendar days.
3. If a Tobacco Retailer continues to operate without a license after the 60 calendar day period, the Department may impose penalties. Each day an unlicensed Tobacco Retailer engages in selling or offering Tobacco Products may be considered a separate violation.

L. License Suspension or Revocation.

1. In addition to any other remedy authorized by law, a license may be suspended or revoked as provided in this section if any of the following occurred:
 - a. The licensee, licensee's authorized agent or designee has violated any provision of these Rules. Violation by a licensee at one location will not be construed as a violation at another location of the same licensee.
 - b. The original or renewal application contained deliberately false or misleading information.
 - c. One or more of the reasons for license denial listed in Section D, *Issuance of License*, existed at the time the license was issued.
 - d. A licensee is found in violation of any federal, state, or local tobacco law or regulation relating to the retail sales of Tobacco Products, including any provision of these rules.

2. The following activities are required when a Tobacco Retailer has a license suspended:
 - a. On the date a license suspension goes into effect, and until the suspension is completed, the Tobacco Retailer must ensure that a suspension notice sign is posted on each entrance or exit to the licensed premises.
 - b. The suspension notice sign must be posted in a way that is clearly visible to any person entering the premises to read it. The Tobacco Retailer must use the suspension notice sign provided by the Department. The sign will state that the license has been suspended by order of the Department due to violations of tobacco retail laws.
 - c. During the period of license suspension, the Tobacco Retailer is responsible for ensuring:
 - i. Compliance with all applicable laws and rules;
 - ii. No Tobacco Products are sold or offered;
 - iii. The suspension notice sign is not removed, altered, or covered; and
 - iv. Removal of all tobacco products and inhalant delivery systems from public view, unless an appeal is pending.
 - d. Failure to comply with Sections L(2)(c)i-iv may be considered a subsequent violation.
3. If a Tobacco Retailer has a license revoked, the Tobacco Retailer may reapply for the license two years following revocation, as determined at the sole discretion of the Department Director, or designee.
 - a. To reapply post revocation, the Tobacco Retailer must:
 - i. Submit the application renewal form and license fee; and
 - ii. Submit a signed and notarized affidavit affirming that the Tobacco Retailer has not sold any Tobacco Products during the time that the license was revoked.

M. Administrative Penalties.

1. Any Tobacco Retailer or Person found to be in violation of these Rules may be liable for civil penalties as set by Board Resolution.
2. Each day on which a violation occurs may be considered a separate violation.
3. Failure to pay civil penalties may result in license suspension or revocation.

N. Enforcement of Notice of Penalty.

1. If a violation is not remedied as determined upon a follow-up visit post remediation, the Department will provide a Notice of Penalty to the Tobacco Retailer.
 - a. The Notice of Penalty will be sent by email, regular and certified mail, specifying the penalty. The Notice to the owner, authorized agent or designee for corrective action will include a copy of the Right to Appeal the Civil Penalty.
2. Notice of Penalty must include each of the following:
 - a. The party's right to file an appeal within seven calendar days of the date of the Notice, in writing, directed to the Department;

- b. A statement of the hearing process;
- c. The specific nature of the violation and the law or rule involved;
- d. A short and plain statement of the basis for the Civil Penalty;
- e. A statement that failure to request a hearing within seven calendar days of receipt of the Notice will result in a final order imposing the penalty; and
- f. Name and mailing address of the Tobacco Retailer.

O. Appeals and Hearings.

- 1. Procedure upon receipt of Request for Hearing:
 - a. The Hearings Officer will schedule and oversee the hearing and issue a ruling within 20 calendar days of the hearing's conclusion. The Hearings Officer ruling will be final.
 - b. If the Hearings Officer finds the violation to exist, the ruling will set a date for remedy of the violation to be accomplished by the Tobacco Retailer, authorized agent or designee.
 - c. If the Hearings Officer determines that the violation was issued in error, the ruling may order the Department to vacate any penalties and take other necessary and appropriate actions to remedy the situation.
- 2. If the Tobacco Retailer, authorized agent or designee for corrective action fails to pay imposed penalties, the Director may initiate collection action allowed by law.
- 3. If any provision of these rules or its application to any person or circumstance is held invalid, the application of the remainder of these rules is not affected.
- 4. Access to an appeal and hearing as described in these Rules does not create or enhance any other legal process or remedy allowed by law.

P. License Conveys a Limited, Conditional Privilege.

- 1. Nothing in these rules will be construed to grant any Person obtaining and maintaining a Tobacco Retail license any status or right other than the limited, conditional privilege to act as a Tobacco Retailer at the location identified on the face of the license. For example, nothing in these rules will be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of the Multnomah County Code, or any condition or limitation on smoking pursuant to the Oregon Indoor Clean Air Act (ORS 433.835-433.990).

Q. Department Review.

- 1. The Department may review these Rules as needed to provide recommendations to the Board to amend rules, regulations, standards, guidelines, or conditions to implement and enforce these Rules.

VIII. **EXHIBITS:**