

October 22, 2019

ORDINANCE NO. 11703

RELATING TO BUSINESSES REGULATED; REPEALING AND REPLACING CURRENT ARTICLE XIX IN CHAPTER 7 OF THE TUCSON CODE, TO PROHIBIT THE SALE OF TOBACCO AND NICOTINE DELIVERY PRODUCTS TO PERSONS UNDER TWENTY-ONE (21) YEARS OF AGE; ESTABLISHING LICENSING REQUIREMENTS; ESTABLISHING PENALTIES FOR VIOLATIONS; AMENDING THE DEFINITION OF "SMOKING" IN CHAPTER 11, SECTION 89(1) OF THE TUCSON CODE; SETTING AN EFFECTIVE DATE AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA AS FOLLOWS:

SECTION 1. The Tucson Code, Chapter 7, Article XIX (adopted by Ordinance No. 8836 on March 3, 1997), is repealed on and after January 1, 2020.

SECTION 2. The Tucson Code is amended by adding a new Article XIX in Chapter 7, Business Regulated, of the Tucson Code, effective January 1, 2020, to read as follows:

ARTICLE XIX. TOBACCO RETAIL ESTABLISHMENTS

Sec. 7-426. Purpose and intent.

It is the purpose and intent of this article to provide for the regulation of tobacco retail sales, as defined in this article, in order to prevent the illegal sale of cigarettes, e-cigarettes and other tobacco and nicotine-containing products to minors and young adults under the age of 21.

The vast majority of smokers begin smoking in their teens or pre-teens. The health hazards posed by cigarettes and other tobacco products are well documented. Recent studies show that youth use of electronic smoking devices such as e-cigarettes continues to increase and is higher than other forms of tobacco use, which has stymied previous progress in reducing the overall tobacco use rate for youth.

Arizona Revised Statutes prohibit selling, giving or furnishing tobacco products to minors and prohibit minors from buying accepting or receiving tobacco products. However, the present legislative scheme of prohibiting tobacco sales and distribution to

minors, defined therein as persons under eighteen (18) years of age, has proven ineffective in preventing tobacco sales and distribution to minors and preventing minors from buying and obtaining tobacco products.

Licensing of retailers to sell tobacco to adults has been shown in several jurisdictions to prevent tobacco sales to minors when the license is issued under the condition that the licensee will not sell tobacco products to minors. In addition, retail tobacco licensing laws have been shown in several jurisdictions to prevent tobacco product sales to minors when the prohibition against tobacco sales to minors is actively enforced to ensure compliance, and when violators face criminal and/or civil penalties as well as license suspension and revocation for violating the prohibition against selling tobacco products to minors. Licensing tobacco retailers and establishing a minimum sales age of 21 will therefore promote the health, safety and welfare of the residents of Tucson under twenty-one (21) years of age.

Therefore, the mayor and council find it in the public interest to license tobacco retailers as provided in this Article as a reasonable, proven method of preventing sales of tobacco products to minors and young adults under the age of 21. The mayor and council further find it is within its police powers and other express Charter authority to prevent disease and protect health and safety to implement and enforce the provisions of this ordinance.

Sec. 7-427. Definitions.

A. "Electronic smoking device" means a device that can be used to deliver aerosolized or vaporized nicotine to a person who inhales from the device, including an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah, and any component, part, or accessory of such a device, whether or not sold separately.

B. "License" means a license required for operating a tobacco retail establishment under Section 7-428(A) of this code.

C. "Tobacco product" means:

1. any product made or derived from tobacco or that contains nicotine and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by any other means, including cigarettes, cigars, pipe tobacco, chewing tobacco, shisha, snuff, snus, and liquid nicotine solution; and

2. any component, accessory, instrument, or paraphernalia that is used in the consumption of a tobacco product or that is solely designed for the smoking or ingesting of tobacco or shisha, including a hookah, water pipe, filter, rolling papers, pipe, or electronic smoking device; except that:

3. the term "tobacco product" does not include drugs, devices, or combination products, as those terms are defined in the Federal Food, Drug and Cosmetic Act, that are authorized for sale by the United States Food and Drug Administration.

- D. "Tobacco retailer" means any person, partnership, joint venture, society, club, trustee, trust, organization, association, or corporation who owns, operates, or manages any tobacco retail establishment. Tobacco retailer does not mean the non-management employees of any tobacco retail establishment.
- E. "Tobacco retail establishment" means any place of business where tobacco products are available for sale directly to consumers. The term includes, but is not limited to grocery stores, tobacco product shops, kiosks, convenience stores, gasoline service stations, and other businesses where tobacco products are sold directly to customers.
- F. "Department" means any department of the City of Tucson that the City Manager designates as responsible for the administration and/or enforcement of this Article, including, but not limited to, the City of Tucson Business Services Department.

Sec. 7-428. Tobacco retailing – Generally.

A. No person may sell, furnish, give, or provide tobacco products directly to consumers within the City of Tucson except on the premises of a tobacco retail establishment with a valid license.

B. It is the responsibility of the tobacco retailer to be informed of all laws applicable to tobacco retailing, including those laws affecting the issuance of a license, and to provide appropriate training to any persons who interact with customers on its premises. The issuance of a license is not a determination by the City of Tucson or the Department that the tobacco retail establishment or tobacco retailer has complied with any laws applicable to tobacco retailing.

C. During any period that a tobacco retail establishment lacks a valid license, that tobacco retail establishment and its tobacco retailer must:

1. Not sell, furnish, give, or provide any tobacco product to consumers at that tobacco retail establishment.
2. Remove all tobacco products from the relevant tobacco retail establishment's retail area.
3. Remove the license from public view.
4. Display signage, provided by the Department, in a conspicuous manner visible to the general public and within a 5 foot radius of any tobacco product point of sale area, indicating that the tobacco retailer does not possess a current license to sell tobacco products. If multiple tobacco product point of sale areas exist in a single tobacco retail establishment, such signage must be displayed in each area.

5. Remove all tobacco advertising that is not permanently affixed to the tobacco retail establishment's structure.

D. It is a violation of this chapter for any employee of a tobacco retail establishment or for any tobacco retailer on its premises to violate any local or state law applicable to tobacco products or tobacco retailing.

Sec. 7-429. Accessibility of tobacco products.

A. All tobacco products at any tobacco retail establishment to which persons under twenty one years old are permitted entry must be maintained:

1. Behind a counter in an area accessible only to employees of the tobacco retail establishment; or
2. In a locked container accessible only to employees of the tobacco retail establishment; or
3. Otherwise out of physical reach of any consumer and only accessible to employees of the tobacco retail establishment.

Sec. 7-430. Minimum legal sales age for tobacco products.

A. A tobacco retailer and/or any employee at a tobacco retail establishment shall not sell, furnish, give, or provide any tobacco product to any person under the age of twenty-one (21).

B. Before selling, furnishing, giving, or providing a tobacco product to any person who appears to be under the age of 30, a tobacco retailer or any employee at a tobacco retail establishment must examine an approved form of identification and verify that the person is at least 21 years of age.

C. For the purposes of this section, the following forms of identification, if valid, unexpired, and including a picture of the person and the person's date of birth, are approved for age verification:

1. A driver license or nonoperating identification card issued by any state or territory of the United States or Canada;
2. A United States Armed Forces identification card;
3. A passport;
4. A resident alien card.

Sec. 7-431. Signage.

A. A tobacco retail establishment must post a clearly visible sign stating "No tobacco products or electronic smoking devices will be sold to persons under the age of 21" at every location where such products are available for purchase. The tobacco retailer for the tobacco retail establishment is responsible for compliance with this requirement.

B. The City of Tucson will provide signs at the time of the license approval or renewal, or upon request.

C. Signs must be no smaller than 4 inches by 6 inches, and include the appropriate department website and phone number.

D. Failure to comply with this section is a violation under section 7-432 only after the tobacco retail establishment or its tobacco retailer has failed to correct any deficiency at the Department's request.

Sec. 7-432. Violation–Penalty.

A. In addition to any other penalties provided under this Article, any person found responsible under this article shall be guilty of a civil infraction and punished in accordance with the mandatory penalties prescribed in minor section 1-8(2) and under the procedures outlined in Chapter 8 of this City Code.

B. If any court of competent jurisdiction determines, or the Department finds, that a tobacco retail establishment with a license, or its tobacco retailer or any of its agents or employees, has violated a local, state, or federal law regulating tobacco sales or does not comply with this Article, the following penalties also apply:

1. For a first violation at a tobacco retail establishment, the Court or the Department will issue the tobacco retailer a fine of \$500.
2. For a second violation at a tobacco retail establishment within 36 months of the first violation, the Court or the Department will assess a fine of \$750 and the tobacco retail establishment's license shall be suspended for a period of seven (7) days, during which time the tobacco retail establishment shall be prohibited from distributing tobacco products.
3. For a third violation at a tobacco retail establishment within 36 months of the first violation, the Court or the Department will assess a fine of \$1000 and the tobacco retail establishment's license shall be suspended for a period of thirty (30) days, during which time the tobacco retail establishment shall be prohibited from distributing tobacco products.
4. For a fourth violation at a tobacco retail establishment within 36 months of the first violation, the Court or the Department will assess a fine of \$1000 and revoke the license for that tobacco retail establishment. The tobacco retail establishment may not apply for a new license within 12 months following the revocation pursuant to this subsection.
5. Any such tobacco retail establishment or its tobacco retailer found in violation will also be charged a \$200 fee for a re-inspection that the Department may conduct within three months of the violation.

C. If any court of competent jurisdiction determines, or the Department finds, that a tobacco retail establishment operating without a valid license, or its tobacco retailer or any of its agents or employees, has violated a local or state law regulating tobacco sales or does not comply with this chapter, the following penalties also apply:

1. For the first violation within a 36-month period, the Court or the Department will assess a fine of \$1000.
2. For a second violation within a 36-month period, the Court or the Department will assess a fine of \$1500. The tobacco retail establishment will be ineligible to apply for a license for six months.
3. For each additional violation within a 36-month period, the Court or the Department will assess a fine of \$2500 and the tobacco retail establishment may not apply for a license for 36 months.
4. Any tobacco retail establishment operating without a valid license must also comply with section 7-428 of this chapter.

D. Multiple violations of this Article, or of any other local or state law applicable to tobacco products or tobacco retailing, identified during a single inspection are counted as a single violation with respect to penalties imposed under this Article.

E. All applicable fees must be paid before a license is issued or renewed.

F. A tobacco retail establishment or its tobacco retailer or any of its employees or agents may appeal the penalties imposed by a court of competent jurisdiction as otherwise provided under Arizona law. A Department-issued suspension of a license for a tobacco retail establishment is subject to Section 7-434 below.

Sec. 7-433. Applicability of Other Laws.

The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity. Nothing in this chapter prohibits the prosecution of criminal offenses under any applicable law. The Department may enforce this chapter in a civil action, including administrative or judicial proceedings, civil code enforcement proceedings, and suits for injunctive relief.

Sec. 7-434. Hearing upon Suspension or Revocation by the Department.

(a) The director of the Department, upon notification that grounds for suspension or revocation of a tobacco retail establishment's license by the Department exist, shall file a written petition for suspension or revocation with the city court, requesting that time and place be set for a hearing and specifying the grounds for suspension or revocation per this Article. Within five (5) days a magistrate, special magistrate or limited special magistrate shall schedule a hearing to be conducted within fifteen (15) days of the receipt of the petition to suspend or revoke. The magistrate, special magistrate or limited special magistrate shall notify the parties in the manner provided in this Article and shall state the grounds relied upon for the proposed suspension or revocation. Should the licensee fail to appear at the hearing, a default judgment of suspension or

revocation shall be entered. A record shall be kept of all proceedings. No license shall be suspended or revoked unless grounds therefore are established by a preponderance of the evidence. The hearing shall be held in an informal manner as to the order of proceeding and presentation of evidence. The Arizona Rules of Evidence shall not apply. Any evidence offered shall be admitted subject to a determination by the magistrate, special magistrate, or limited special magistrate that the offered evidence is relevant and material and has some probative value as to a fact at issue. The magistrate, special magistrate or limited special magistrate shall provide the licensee and other parties written notice of the decision within five (5) days, pursuant to subsection (b) of this section. Suspension or revocation of a license shall be effected by the magistrate, special magistrate or limited special magistrate's signing of the written notice of the decision. A licensee's right to sell tobacco products under authority of the license shall terminate immediately upon giving or mailing to the licensee a copy of the signed decision suspending or revoking the license; except that the suspension or revocation may be stayed by the superior court pending a timely appeal of the decision by special action. Such appeal must be filed within ten (10) days after the decision to suspend or revoke is signed unless the decision is mailed, in which case the appeal must be filed no later than fifteen (15) days after entry of the decision. The appellee shall bear the cost of preparing the record of appeal. If an appeal is not timely made, the suspension or revocation becomes final.

(b) Notices required by this Section shall be served by certified mail to the licensee's attorney or to the licensee at the address as shown on the tobacco retail license, or by personal service.

SECTION 3. Amending Article III, Section 11-89(1) in Chapter 11, Crimes and Offenses, of the Tucson Code, effective January 1, 2020, to read as follows:

ARTICLE III. SMOKING

Sec. 11-89. Smoking prohibited in specified places, exceptions.

* * *

(1) *Smoking* means inhaling, exhaling, burning or carrying any lighted cigar, pipe, cigarette, weed, plant or other combustible substance, or any activated electronic smoking device as defined in Section 7-427(A) of this Code, in any manner or in any form.

SECTION 4. The repeal enacted in Section 1 of this Ordinance does not affect rights, duties and remedies that matured, or punishments or penalties that were incurred or imposed, before the repeal took effect, and also does not affect any suits, prosecutions, or proceedings that were begun before the effective date of this

Ordinance or pending at the time of the repeal. Such rights, duties, remedies, punishments, penalties, suits, prosecutions, and proceedings are expressly saved and, in the case of pending suits, prosecutions, and proceedings, shall continue under the former version of Article XIX in Chapter 7 of the Tucson Code, as if there had been no repeal.

SECTION 5. The various City officers and employees are hereby authorized and directed to perform all acts necessary or desirable to give effect to this Ordinance.

SECTION 6. Whereas, it is necessary for the preservation of the peace, health and safety of the City of Tucson that this Ordinance become immediately effective, an emergency is hereby declared to exist and Ordinance shall be effective immediately upon its passage and adoption.

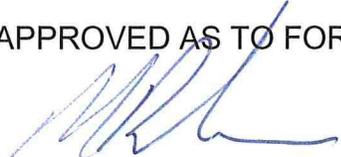
PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, October 22, 2019

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY

REVIEWED BY:

CITY MANAGER

 CA/dg
10/11/19