

105 CMR: DEPARTMENT OF PUBLIC HEALTH

105 CMR 665.000: MINIMUM STANDARDS FOR RETAIL SALE OF TOBACCO AND ELECTRONIC NICOTINE DELIVERY SYSTEMS

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665.005: Definitions

Board of Health means the appropriate and legally designated health authority of the city, town, or other legally constituted governmental unit within the Commonwealth having the usual powers and duties of the board of health of a city or town.

Business Agent means an individual who has been designated by the owner or operator of any tobacco retail store or smoking bar to be the manager or otherwise in charge of said establishment.

Characterizing Flavor means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable before or during consumption of a tobacco product including, but not limited to, a taste or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product.

Child-resistant Packaging means packaging intended to reduce the risk of a child ingesting nicotine and that meets the minimum standards of 16 C.F.R. 1700 *et seq.*, pursuant to 15 U.S.C. 1471 through 1476.

Coupon means any card, paper, note, form, statement, ticket or other communication distributed for commercial or promotional purposes to be later surrendered by the bearer so as to receive an article, service or accommodation without charge or at a discount price.

Department means the Massachusetts Department of Public Health.

Distinguishable means perceivable by either the sense of smell or taste.

Electronic Nicotine Delivery System means an electronic device, whether for one-time use or reusable, that can be used to deliver nicotine or another substance to a person inhaling from the device including, but not limited to, electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, vaping pens, hookah pens and other similar devices that rely on vaporization or aerosolization; provided, however, that "electronic nicotine delivery system" shall also include any noncombustible liquid or gel that is manufactured into a finished product for use in such electronic device; provided further, that "electronic nicotine delivery system" shall also include any component, part, or accessory of a device used during the operation of the device even if the part or accessory was sold separately; provided further, that "electronic nicotine delivery system" shall not include a product that has been approved by the United States Food and Drug Administration for the sale of or use as a tobacco cessation product or for other medical purposes and is marketed and sold or prescribed exclusively for that approved purpose.

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Electronic Nicotine Delivery System Flavor Enhancer means any product designed, manufactured, produced, marketed or sold to produce a characterizing flavor when added to any electronic nicotine delivery system.

Flavored Electronic Nicotine Delivery System means any electronic nicotine delivery system, or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of an electronic nicotine delivery system, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such electronic nicotine delivery system, that such electronic nicotine delivery system has or produces a characterizing flavor shall constitute presumptive evidence that the electronic nicotine delivery system is a Flavored Electronic Nicotine Delivery System.

Liquid Nicotine Container means a package:

- (1) from which nicotine or other substance in a solution or other form is accessible through normal and foreseeable use by a consumer; and
- (2) that is used to hold soluble nicotine or other substance in any concentration; provided however, that "liquid nicotine container" shall not include a sealed, prefilled and disposable container of nicotine or other substance in a solution or other form in which the container is inserted directly into an electronic cigarette, electronic nicotine delivery system or other similar product if the nicotine or other substance in the container is inaccessible through customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion or other contact by children.

Listed or Non-discounted Price means the higher of the price listed for a tobacco product on its package or the price listed on any related shelving, posting, advertising or display at the place where the tobacco product is sold or offered for sale plus all applicable taxes if such taxes are not included in the state price, and before the application of any discounts or coupons.

Person means any individual, firm, fiduciary, partnership, corporation, trust or association, however formed, or a club, trustee, agency or receiver.

Retail Establishment means a physical place of business or a section of a physical place of business in which a tobacco product is offered for sale to consumers.

Retailer means a person that operates a retail establishment.

Retail Tobacco Store means an establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, in which the sale of other products is merely incidental, and in which the entry of persons younger than 21 years old is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the appropriate authority in the city, town, or other legally constituted governmental unit within the Commonwealth where the establishment is located.

Smoking Bar means an establishment that:

- (1) exclusively occupies an enclosed indoor space and is primarily engaged in the retail sale of tobacco products for consumption by customers on the premises;
- (2) derives revenue from the sale of food, alcohol or other beverages that is incidental to the sale of a tobacco product and prohibits entry to a person younger than 21 years old;
- (3) prohibits a food or beverage not sold directly by the establishment from being consumed on the premises;
- (4) maintains a valid permit for the retail sale of a tobacco product as required to be issued by the appropriate authority in the city, town, or other legally constituted governmental unit within the Commonwealth in which the establishment is located; and
- (5) maintains a valid permit issued by the department of revenue to operate as a smoking bar.

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Tobacco Product means a product containing, made or derived from tobacco or nicotine that is intended for human consumption, whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, electronic cigarettes, electronic cigars, electronic pipes, electronic nicotine delivery systems or any other similar products that rely on vaporization or aerosolization regardless of nicotine content in the product; provided, however, that "tobacco product" shall also include any component, part or accessory of a tobacco product; and provided further, that "tobacco product" shall not include a product that has been approved by the United States Food and Drug Administration for the sale of or use as a tobacco cessation product and is marketed and sold exclusively for the approved purpose.

665.010: Sale of Tobacco Products and Electronic Nicotine Delivery Systems

(A) No person shall sell or provide a tobacco product to any individual younger than 21 years old, as verified by said person's valid government-issued photographic identification.

(B) Retail establishments other than retail tobacco stores or smoking bars shall not place any tobacco product on the counter, but shall place all tobacco products for sale behind the counter where retail sales are made in the establishment and out of the reach of consumers.

(C) No person shall sell an electronic nicotine delivery system with nicotine content greater than 35 milligrams per milliliter outside of a retail tobacco store or smoking bar.

Retail establishments, including retail tobacco stores or smoking bars, may sell or provide unflavored electronic nicotine delivery systems with nicotine content less than or equal to 35 milligrams per milliliter. Prior to the sale of such a product in a retail establishment other than a retail tobacco store or smoking bar, the product's manufacturer must submit to the owner, retailer, or other person in charge of any retail establishment that is not a retail tobacco store or smoking bar documentation indicating the nicotine content expressed as milligrams per milliliter for each product to be sold in the retail establishment. The owner, retailer, or other person in charge of the retail establishment must maintain record of the nicotine content submitted by the manufacturer for each electronic nicotine delivery system sold or offered for sale within the retail establishment, and provide such records upon request of any authorized enforcement agent, including Boards of Health or their agents and the Department or its agents.

(D) No person, retail establishment, or manufacturer shall sell, distribute, cause to be sold or distributed, or offer for sale to a consumer located in the Commonwealth a flavored electronic nicotine delivery system or electronic nicotine delivery system flavor enhancer except for a smoking bar for on-site consumption only.

(E) No person, retail establishment, or manufacturer shall sell online, distribute online, or cause to be sold or distributed online to any consumer located in the Commonwealth, an electronic nicotine delivery system, except for a non-flavored electronic nicotine delivery system with nicotine content less than or equal to 35 milligrams per milliliter.

665.013: Permitting Requirements

(A) All retail tobacco stores and smoking bars shall obtain prior to operation and shall maintain during any period of operation a municipal permit allowing the sale or distribution of tobacco products.

(B) Retail tobacco stores and smoking bars in operation prior to December 11, 2019, and compliant with all then existing permitting requirements in the municipality in which they operate shall not be subject to 105 CMR 665.013(A), unless the municipality in which they operate later imposes a municipal permitting requirement applicable to such establishments.

665.015: Required Signage

(A) All retail establishments, including smoking bars and retail tobacco stores, shall conspicuously post signage, in the form developed and made available by the Department. Such signage shall include:

665.015: continued

- (1) a copy of M.G.L. c. 270, §§ 6 and 6A;
- (2) referral information for smoking cessation resources;
- (3) a statement that sale of tobacco products, including e-cigarettes, to someone younger than 21 years old is prohibited;
- (4) health warnings associated with using electronic nicotine delivery systems; and
- (5) except in the case of smoking bars, notice to consumers that the sale of flavored electronic nicotine systems are prohibited at all times. Such signage shall be posted conspicuously in the retail establishment or other place in such a manner so that it may be readily seen by a person standing at or approaching the cash register. The notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than four feet or greater than nine feet from the floor.

(B) In addition to the signage required by 105 CMR 665.015(A), smoking bars and retail tobacco stores shall post signage, in the form developed and made available by the Department, on the exterior of the door providing entrance to the tobacco retail store or smoking bar and such sign shall not be obstructed from view or placed at a height of less than four feet or greater than nine feet from the bottom of the door. Such signage shall: state that "No person younger than 21 years old is permitted on the premises at any time."

(C) In addition to the signage required by 105 CMR 665.015(A) and (B), all smoking bars and those retail tobacco stores that allow for onsite consumption of tobacco products shall post signage, in the form developed and made available by the Department, on the exterior of the door providing entrance to the tobacco retail store or smoking bar and such sign shall not be obstructed from view or placed at a height of less than four feet or greater than nine feet from the bottom of the door. Such signage shall warn persons entering that smoking and vaping may be present on the premises, and provide information concerning the health risks associated with second hand smoke and the use of tobacco products, including electronic nicotine delivery systems.

(D) The owner, retailer, or other person in charge of a retail establishment shall conspicuously post any additional signs required by the Department in a form and manner as required by the Department.

(E) Any person who violates 105 CMR 665.015 shall be subject to the provisions of 105 CMR 665.045; provided that any retail establishment who violates 105 CMR 665.015(A)(1) or 105 CMR 665.015(A)(2) shall additionally be subject to a fine of not more than \$50. Any person found to have unlawfully removed a copy of the postings required by 105 CMR 665.015(A)(1) or 105 CMR 665.015(A)(2) shall be punished by a fine of \$10.00.

665.017: Advertising

No person or retail establishment shall:

(A) Market or advertise the proposed sale or distribution of any tobacco product prohibited for sale or distribution within the retail establishment or by such person;

(B) Use fraudulent or misleading statements in advertisements for tobacco products, including the use of any safety or efficacy claims that have not been approved by the United States Food and Drug Administration; or

(C) Use or display tobacco product advertisements that depict celebrities, mascots, sponsorships, cartoons, or any other similar endorsements.

665.020: Identification Requirements

(A) Unless otherwise specified in 105 CMR 665.000, each person selling or providing tobacco products shall verify the age of the purchaser by means of a valid government-issued photographic identification containing the bearer's date of birth that the purchaser is 21 years of age or older, as verified by said person's proof of identification.

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(B) In addition to the requirements of 105 CMR 665.020(A), an employee of a retail tobacco store or smoking bar must inspect the individual's valid government-issued photographic identification and determine the individual's age prior to said individual entering said tobacco retail store or smoking bar. An individual shall not be admitted to the tobacco retail store or smoking bar unless the employee has verified that the individual is 21 years of age or older as verified by said person's proof of identification.

(C) Mail-order or internet sales shall require verification that the purchaser is 21 years of age or older. Verification of age through the mail or internet shall consist of, at a minimum:

- (1) verification that the purchaser is 21 years of old or older through a commercially available database, or aggregate of databases, that is regularly used by government and business for the purpose of age and identity verification; and
- (2) use of a method of mailing, shipping, or delivery that requires signature of a person who is 21 years of age or older before the shipping package is released.
- (3) Any information required to complete the age verification process must be requested on a form separate from that used to collect payment information, shall not include personal information as defined by M.G.L. c. 93H, and shall not be used for any purposes other than age verification.

665.025: Prohibition on Coupons and Other Discounts

No person shall accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco product without charge or for less than the listed or non-discounted price. No retail establishment that is not a retail tobacco store or smoking bar, or any other establishment shall distribute or cause to be distributed a free sample of a tobacco product.

665.030: Out-of-package Sales

(A) The sale of tobacco products, as defined in 105 CMR 665.000, in any form other than an original factory wrapped package is prohibited, including the repackaging or dispensing of any tobacco product for retail sale.

(B) No person shall refill a cartridge that is prefilled and sealed by the manufacturer and not intended to be opened by the consumer or retailer.

665.035: Liquid Nicotine Container Packaging

No person shall knowingly sell or provide:

- (A) A liquid or gel substance containing nicotine unless the substance is contained in child-resistant packaging; or
- (B) A liquid nicotine container unless the container includes child-resistant packaging as part of its design.

665.040: Requirements for Retail Establishments

A retail establishment operating on or after December 11, 2019, must meet the following requirements:

(A) Only establishments with a permanent, non-mobile location are eligible to operate.

(B) Operation of a retail establishment shall be conditioned on the retailer's or retail establishment owner's consent to unannounced, periodic inspections of his or her retail establishment and tobacco products to ensure compliance with 105 CMR 665.000 and any applicable local regulations, orders, or ordinances.

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(C) A retail establishment shall be prohibited from selling tobacco products if the retailer or owner of the retail establishment has failed to pay all fines issued and the time period to appeal the fines has expired and/or the retail establishment has not satisfied any outstanding orders issued pursuant to 105 CMR 665.000.

(D) Sale of a tobacco product by a retail establishment to a person younger than 21 years old shall result in the retail establishment being prohibited from selling tobacco products for up to 30 consecutive business days, or for a longer term as enacted, adopted, or promulgated in a rule, regulation or other measure by the appropriate and legally designated health authority of the city, town, or other legally constituted governmental unit within the Commonwealth.

665.045: Violations

Unless otherwise specified or provided for in 105 CMR 665.000, violations of 105 CMR 665.000 shall be assessed as follows:

(A) It shall be the responsibility of any person to ensure compliance with 105 CMR 665.000. If an inspection pursuant to 105 CMR 665.000 reveals a retail establishment, retailer, and/or his or her business agent does not comply with the provisions of 105 CMR 665.000, the retail establishment shall be ordered to comply with the violated provision of 105 CMR 665.000. In addition to the correction order, the following fines and actions apply against any person who violates 105 CMR 665.000:

(1) In the case of a first violation, a fine of \$1,000 shall be imposed.

(2) In the case of a second violation within a period of 36 months from the first violation, a fine of \$2,000 shall be imposed; and a prohibition on the sale of tobacco products may be imposed for at least one day and up to seven consecutive business days, or for a longer term as enacted, adopted, or promulgated in a rule, regulation or other measure by the appropriate and legally designated health authority of the city, town, or other legally constituted governmental unit within the Commonwealth.

(3) In the case of a third violation within a period of 36 months from the first violation or additional violations during that time period, a fine of \$5,000 shall be imposed; and a prohibition on the sale of tobacco products may be imposed for at least seven consecutive business days and up to 30 consecutive business days, or for a longer term as enacted, adopted, or promulgated in a rule, regulation or other measure by the appropriate and legally designated health authority of the city, town, or other legally constituted governmental unit within the Commonwealth.

(B) Failure to cooperate with inspections pursuant to 105 CMR 665.000 shall result in the prohibition on the sale of tobacco products for up to 30 consecutive business days, or for a longer term as enacted, adopted, or promulgated in a rule, regulation or other measure by the appropriate and legally designated health authority of the city, town, or other legally constituted governmental unit within the Commonwealth.

(C) Consistent with 105 CMR 665.055, a retail establishment shall be provided notice of the intent to prohibit the sale of tobacco products at or by the retail establishment. The notice shall contain the reasons therefor and establish a time and date for a hearing. The retail establishment, retailer or his or her business agent shall have an opportunity to be heard at such hearing and shall be notified of the decision regarding the retail establishment's prohibition from selling tobacco products and the reasons therefor in writing. After a hearing, the retail establishment may be prohibited from selling tobacco products upon a finding that a violation of 105 CMR 665.000 for which such prohibition is applicable occurred. All tobacco products shall be removed from the retail establishment upon an indefinite suspension from operating as a retail establishment. Failure to remove all tobacco products shall constitute a separate violation of 105 CMR 665.000.

(D) Separate Violations. Each day any violation of 105 CMR 665.000 exists shall be deemed to be a separate offense.

665.050: Order to Cease and Desist

(A) An Order to Cease and Desist may be issued by the Department or Board of Health to a person or a business agent of a retail establishment upon the regulatory authority's reasonable belief that:

- (1) A person is conducting sales of tobacco products in violation of the law, regulations, and/or standards applicable to it;
- (2) A person refuses access to the premises and/or records to authorized enforcement agents;
- (3) A person or retail establishment is operating in a manner that may pose an imminent danger to the public health;
- (4) A retail establishment has failed to comply with a correction order within the time specified; or
- (5) A retail establishment is operating in a manner that is unsafe or otherwise below the accepted standards for the type of operation and summary closure is authorized by statute on these grounds.

(B) Service of Orders to Cease and Desist shall be on the person or retail establishment or business agent of the retail establishment by:

- (1) Personal delivery by an agent of the regulatory agency;
- (2) Posting in a conspicuous place at the retail establishment;
- (3) Simultaneously mailing, by first class and certified mail return receipt requested; or
- (4) By any officer of the Commonwealth authorized to make service.

Notice is deemed to be served if the person or retail establishment or business agent of the retail establishment has actual notice of the Order to Cease and Desist.

665.055: Enforcement

(A) Local Enforcement.

(1) General Procedures. Unless otherwise expressly provided in any general law to the contrary, each board of health may enforce 105 CMR 665.000, or otherwise at law or in equity in the same manner that local rules and regulations are enforced.

(2) Emergency Procedures.

(a) Whenever an emergency related to tobacco products exists in which the interest of protecting the public health requires that ordinary procedures be dispensed with, the board of health or its authorized agent, acting in accordance with the provisions of M.G.L. c. 111, § 30, may, without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to meet the emergency. Any person to whom such order is directed shall comply therewith within the time specified in the order. Each day's failure to comply with the order shall constitute a separate offense. Upon compliance with the order and within seven days after the day the order has been served, he or she may file a written petition in the office of the board of health requesting a hearing. He or she shall be granted a hearing as soon as possible, but not later than ten days after the filing of the petition. The procedures for such hearing shall otherwise conform with the hearing requirements which would have existed had the order been issued under non-emergency circumstances.

(b) No provision of 105 CMR 665.055(A)(2) shall be construed as a limitation on the emergency powers of the Department of Public Health of the Commonwealth or its Commissioner.

(B) Complaints. Any person who desires to register a complaint pursuant to 105 CMR 665.000 may do so by contacting the Board of Health or its designated agent(s) in the city, town, or other legally constituted governmental unit within the Commonwealth where the retail establishment is located.

(C) State Enforcement.

(1) Whenever any Board of Health has failed after a reasonable length of time to enforce 105 CMR 665.000 the Commissioner of Public Health of the Commonwealth or his or her designated representative may act for the Commonwealth in any way that the local board of health is authorized to act to effect compliance.

665.055: continued

(2) Upon the determination by the federal Food and Drug Administration or the federal Centers for Disease Control and Prevention or other regulatory authority that an electronic nicotine delivery system has been shown by substantial epidemiologic, laboratory, or other evidence to be the cause of an imminent danger to public health, the Commissioner of Public Health may place a ban or restriction on the sale of such electronic nicotine delivery system.

(D) Service of Orders.

(1) Unless otherwise stated in 105 CMR 665.000, orders issued under the provisions of 105 CMR 665.000 shall be served on all persons responsible for the violation.

(2) These orders shall be served in the following manner:

(a) personally, by any person authorized to serve civil process;

(b) by any person authorized to serve civil process by leaving a copy of the order at his or her last and usual place of abode;

(c) by sending him a copy of the order by registered or certified mail, return receipt requested, if he is within the Commonwealth; or

(d) if his or her last and usual place of abode is unknown or outside the Commonwealth, by posting a copy of the order in a conspicuous place on or about the premises and by advertising it for at least three out of five consecutive days in one or more newspapers of general circulation within the municipality wherein the building or premises affected is situated.

(E) Hearings.

(1) Procedure for Requesting and Holding Hearing. Unless otherwise specified herein, the person or persons to whom any order has been served pursuant to any section of 105 CMR 665.000 may request a hearing before the Board of Health or the Department, as applicable, by filing with the Board of Health or the Department, as applicable, within seven days after the day the order was served, a written petition requesting a hearing on the matter. Upon receipt of such petition, the Board of Health or the Department, as applicable, shall set a time and place for such hearing and shall inform the petitioner thereof in writing. The hearing shall be commenced not later than 30 days after the day on which the order was served. The Board of Health or the Department, as applicable, upon application of the petitioner, may postpone the date of hearing for a reasonable time beyond such 30-day period if in the judgment of the Board of Health or the Department, as applicable, the petitioner has submitted a good and sufficient reason for such postponement.

(2) Hearing of Petitioner. At the hearing the petitioner shall be given an opportunity to be heard and to show why the order should be modified or withdrawn.

(3) Procedure by the Board after Hearing. After the hearing the Board of Health or the Department, as applicable, shall sustain, modify, or withdraw the order and shall inform the petitioner in writing of its decision. If the Board of Health or the Department, as applicable, sustains or modifies the order, it shall be carried out within the time period allotted in the original order or in the modification.

(4) Public Record. Every notice, order, or other record prepared by the Board of Health or the Department, as applicable, connection with the hearing shall be entered as a matter of public record in the office of the clerk of the city, town, other legally constituted governmental unit within the Commonwealth, or in the office of the Board of Health or the Department, as applicable.

(5) Hearing Petition not Submitted or Sustaining of Order. If a written petition for a hearing is not filed with the board of health within seven days after the day an order has been served or if after a hearing the order has been sustained in any part, each day's failure to comply with the order as issued or modified shall constitute an additional offense.

(F) Judicial Appeals. Any person aggrieved by the final decision of the Board of Health or the Department, as applicable, with respect to any order or other action taken with respect to 105 CMR 665.000 may seek relief therefrom in any court of competent jurisdiction, as provided by the laws of this Commonwealth.

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665.057: Preemption

The provisions of 105 CMR 665.000 shall not limit the right of an appropriate authority in a city or town to adopt rules and regulations as may be necessary; provided, however, that such a rule or regulation shall not conflict with regulations promulgated by the department or state or federal law.

665.060: Severability

If any provision of 105 CMR 665.000 is declared invalid or unenforceable, the other provisions shall not be affected thereby, but shall continue in full force and effect.

REGULATORY AUTHORITY

105 CMR 665.000: St. 2018, c. 157, §§ 17 through 19; M.G.L. c. 111, § 239; and M.G.L. c. 270, §§ 6, 7, and 27 through 29.