Reducing Youth Exposure to Tobacco Product Advertisements

Introduction

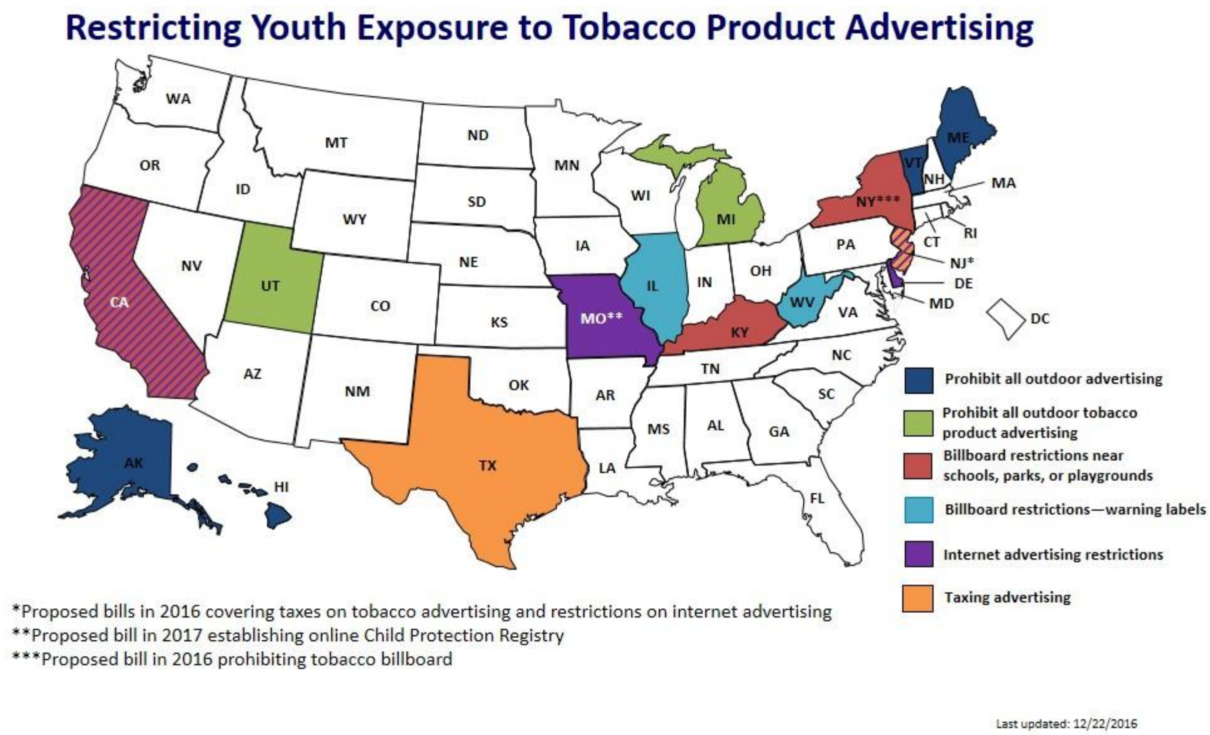
The U.S. Department of Health and Human Services estimates that smoking-related illnesses cost the nation $300 billion per year in direct medical care and lost productivity.[1] In a study assessing the public health implications of raising the minimum age of tobacco use to 21, the National Academies of Sciences, Engineering, and Medicine found that 90 percent of daily smokers reported using cigarettes before age 19.[2] From a public health perspective, preventing tobacco use initiation among young adults will dramatically decrease the prevalence of tobacco use in the long-term and reduce or eliminate the associated direct medical costs.

Concerted state action resulting in the Master Settlement Agreement (MSA) and federal efforts have restricted some advertising practices. The MSA included key prohibitions on advertising practices, such as the use of cartoon characters, outdoor advertising restrictions, and product placements in media.[3] Additionally, the 2009 Family Smoking Prevention and Tobacco Control Act restricted tobacco advertising within 1,000 feet of schools, provided such restrictions did not unduly interfere with free speech under the First Amendment, but final rules implementing this provision have not been issued.

Despite these efforts, tobacco companies spent $8.49 billion in advertising in 2014 to encourage individuals to initiate and continue tobacco use.[4] This number is particularly alarming given the evidence that tobacco manufacturers use their advertising budgets to target youth and young adults by placing advertisements near schools and designing product packages to appeal to a young market.[5] Additionally, tobacco companies have often challenged state and federal efforts to restrict advertising or require specified warnings, citing encroachment on the right to free speech.[6][7]

State Approaches to Restrict Youth Exposure to Tobacco Product Advertising

States have employed a variety of strategies to reduce youth exposure to tobacco product advertising. Key approaches include increasing regulation for outdoor advertisements, such as billboards, protecting minors from advertising on new media platforms, and taxing advertising of tobacco products. This is an area garnering ongoing attention as legal challenges and new types of tobacco products require laws and regulations to evolve.



State Approaches to Regulate Outdoor Advertisements of Tobacco Products

Broad Prohibitions on Outdoor Advertisements and Tobacco Product Advertisements

Alaska, Hawaii, Maine, and Vermont have longstanding laws that broadly restrict outdoor advertising.[8,9,10,11] While the primary focus of these laws is to protect the natural beauty of the state, an unintended benefit is that tobacco products cannot be advertised on billboards.

Restricting Outdoor Advertisements for Tobacco Products

California and Kentucky prohibit outdoor tobacco advertisements in certain locations. In California, billboards cannot be placed within 1,000 feet of a public or private school or playground.[12] Additionally, the law protects local communities' rights to adopt stricter standards.[13] Kentucky prohibits cigarette or tobacco product advertising on billboards with a display space larger than 50 square feet within 500 feet of a school building or school-owned property.[14]

Michigan and Utah have broader prohibitions on tobacco advertising. Michigan's law prohibits tobacco products from being advertised on billboards.[15] Utah has also restricted outdoor advertising with a law that makes advertising tobacco products on billboards, transit signs, and "object[s] or place[s] of display" a misdemeanor.[16]

These types of restrictions are increasingly subject to litigation on First Amendment grounds. The Supreme Court's commercial speech doctrine has protected truthful advertising of legal products. As applied to tobacco products, the Supreme Court ruled in 2001 that a Massachusetts law prohibiting billboards within 1,000 feet of schools and playgrounds was unconstitutional.[17] Specifically, the court found that the restriction was overly broad and could, in the case of urban areas with a high density of schools and playgrounds, result in a complete ban of cigarette advertising.[18] Although the outcome of this case resulted in the court overturning the law, it recognized the state's interest in restricting youth exposure to tobacco products.[19] Thus, states can still advance these kinds of policies.[20] State health agencies have an opportunity to build an evidence base to support and justify targeted advertising restrictions.

Requiring Outdoor Advertising to Include Warning Labels

Illinois and West Virginia have retained laws requiring outdoor advertisements for smokeless tobacco products to contain warnings.[21,22] With the passage of the Family Smoking Prevention and Tobacco Control Act, the federal government mandated a national requirement for warnings on smokeless tobacco product labels and advertisements.[23] Although federal laws and regulations have established a nationwide standard for many product and advertising warnings, state action remains essential to enforce existing laws and respond to new tobacco products entering the market.

State Approaches to Reduce Youth Exposure to Online Advertising of Tobacco Products

California and Delaware have consumer protection laws aimed at preventing minors from being exposed to inappropriate advertising online. California enacted Privacy Rights for California Minors in the Digital World in 2013, and the law became effective Jan. 1, 2015.[24] Under the law, operators of websites or mobile applications that are geared towards children may not advertise or market a specified list of products or services, including tobacco products.[25] Delaware enacted a similar law in 2015, which became effective Jan. 1, 2016.[26] A bill has also been introduced in New Jersey with similar provisions.[27] States often experience challenges enforcing these types of bills. In California and Delaware, enforcement is driven by individual complaints. Thus, for the law to be effective, individuals must know the law exists, identify when a violation has occurred, and take the time to file a complaint. To date, neither California nor Delaware has taken action to enforce these laws. State health departments and tobacco control offices may be able to raise awareness of the law and facilitate complaint processes, but the reactive nature of the enforcement may undermine the law's effectiveness.

A bill introduced for the 2017 session in Missouri outlines a more proactive approach. The bill creates the Missouri Child Protection Registry, which is voluntarily populated with online "contact points" that belong to or are accessible by minors.[28] Contact points can be registered by parents, guardians, individuals, schools and other entities primarily serving minor children.[29] The bill also includes a list of products or services that cannot be sent to contact points in the registry, including tobacco and vapor products.[30] Any individual that would like to send a message advertising restricted products or services would be required to verify that the message would not be sent to any registry contact and would pay a fee to the registry in order to access the list of contact points.[31] The fees would then be used to fund the operating costs of the registry, as well as some costs for investigating and enforcing the law.[32] Although this law has not been enacted and likely presents implementation challenges, it provides an example of a proactive way to prevent minors from being exposed to tobacco product advertisements online.

State Taxes on Advertising

Texas enacted a law that applied a 10 percent tax on the gross sales price of outdoor advertisements for cigarettes and tobacco products in 1997.[33] The law directed tax revenues to be used to enforce state laws relating to cigarettes and tobacco products and to support a public awareness campaign to reduce the use of tobacco products by minors.[34] While the law has never been enforced, largely because of the MSA restrictions on tobacco billboard advertisements, a 2013 Attorney General Opinion reviewed the provisions at the request of the state legislature to determine their enforceability and constitutionality under the First Amendment.[35] The attorney general's office concluded that the Federal Cigarette Labeling and Advertising Act may preempt Texas's law with regard to taxing cigarette advertisements, but that the law could still be enforced as applied to tobacco products.[36] Regarding the issue of constitutionality, the Opinion deferred answering, citing the need for a court to adjudicate the facts presented by all parties.[37]

In addition to Texas, a bill introduced in the New Jersey legislature would apply a 25 percent tax on advertisements for cigarettes, tobacco products, or electronic smoking devices.[38] The bill dedicates tax revenues to support activities to prevent the use of tobacco and electronic smoking devices in the state, and to promote awareness of the associated health conditions.[39] Although not enacted, this bill indicates that taxing advertising remains a strategy that some policymakers are willing to consider.

Conclusion

The United States has seen an impressive decline in the number of youth who use tobacco products, but the decline stalled between 2014 and 2015.[40] State policies that limit youth exposure to tobacco product advertising are important strategies to reduce smoking rates in this population. While there are litigation risks, states can advance policies that restrict outdoor advertising in areas where youth and young adults are likely to be exposed, prohibit advertisements for tobacco products from targeting or reaching youth, and advance tax policies to reduce tobacco advertisements.

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[8] Alaska Statutes § 19.25.090 (2016).
[9] Hawaii Revised Statues § 445-112 (2016).
[10] Maine Revised Statutes § 1908 (2016).
[11] 10 Vermont Statutes § 488 (2016).
[12] Cal. Bus. & Prof. Code § 22961 (a) (West, 2016).
[13] Cal. Bus. & Prof. Code § 22961 (b) (West, 2016).
[14] Ky. Rev. Stat. Ann. § 438-047 (West, 2016).
[15] Mich. Comp. Laws. Ann. § 252.318a (1)(West, 2016).
[16] Utah Code Ann. § 76A 10-102 (West, 2016).
[17] 533 US 525 (2001).
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[23] 15 U.S.C. § 4402.
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[27] *An Act Concerning Internet Websites and Minors.* New Jersey Assembly Bill 3419, 217th Leg. (2016).
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