

940 CMR 22.00: Sales And Distribution Of Cigars In Massachusetts

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22.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 22.00 relating to cigar manufacturers and retailers pursuant to his or her authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 22.00 is to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts whereby:

(1) Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts; and

(2) the incidence of cigar use by children under the Minimum Legal Sales Age is addressed by imposing requirements and restrictions on the sale and distribution of cigars in Massachusetts in order to prevent access to such products by underage consumers.

22.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 22.00. 940 CMR 22.00 is designed to supplement existing regulations.

940 CMR 22.00 shall apply to any person who manufactures, packages, imports for sale, distributes, or sells within Massachusetts cigars and little cigars as defined in these regulations.

940 CMR 22.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of any tobacco product other than cigars and little cigars as defined in 940 CMR 22.00.

22.03: Definitions

Adult-Only Retail Facility means a facility where the retailer ensures that no person younger than the Minimum Legal Sales Age is present or permitted to enter at any time.

Brand Name means a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigars, or little cigars.

Cigar means any roll of tobacco wrapped in either leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*), and as to which 1,000 units weigh more than three pounds.

Distributor means any person who furthers the distribution of, cigars, or little cigars, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Hand rolled cigar means any cigar which is not a manufactured cigar.

Little cigar means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*) and as to which one thousand units weigh not more than three pounds.

Manufactured cigar means any cigar wrapped by machine.

Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigar, or little cigar.

Minimum Legal Sales Age means the age an individual must be before that individual can be sold cigars or little cigars as established by statute, regulation, by-law or local ordinance which in no instance shall be less than 18 years of age.

Package means a pack, box, carton, container or individual wrapping of any kind in which cigars, or little cigars are offered for sale, sold, or otherwise distributed to consumers.

Point of sale means any location at which a consumer can purchase or otherwise obtain cigars, or little cigars for personal consumption.

Retailer means any person who sells cigars, or little cigars to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Sale or distribution shall be defined to include the exchange of cigars or little cigars for money and the sampling or any other distribution of cigars, or little cigars, not for sale.

Secret shopper program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure the outlet's employees compliance with laws and/or local ordinances prohibiting the sale of cigars, or little cigars to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

22.04: Labeling Requirements

(1) General Rule.

It shall be an unfair or deceptive act or practice for any person to distribute, or offer for sale within Massachusetts any manufactured cigar or manufactured little cigar the package of which does not bear, in accordance with the requirements of 940 CMR 22.04(2), one of the following labels:

WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug.

WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products.

(2) Label Format.

It shall be an unfair or deceptive act or practice for any person to distribute or offer for sale within Massachusetts any manufactured cigar or little cigar the package of which fails to contain the warning statement required by 940 CMR 22.04(1) in the following format:

(a) On the front or top of the package, whichever surface area is larger, in a clear and conspicuous format, comprising at least 25% of the front or top panel of the package, with the warning statement capitalized as indicated in 940 CMR 22.04(1), with letters that are either

white against a black background or black against a white background, and are in contrast with all other printed material on the package;

(b) The labels may either be printed directly on the package or preprinted, provided that any preprinted label is firmly attached to the package in such a way that the surface of the label is destroyed before the label can be removed from the package;

(c) If other warnings are required by any other Federal, State, or local governmental entity, the total area of all required warnings need not exceed 25% of the front or top of the package, provided that the warnings required by 940 CMR 22.04 remain clear and conspicuous.

(d) **Label Rotation.** It shall be an unfair or deceptive act or practice for any person to distribute or offer for sale within Massachusetts any brand of manufactured cigar or little cigar unless the label statements required in 940 CMR 22.04(1) are rotated regularly in alternating sequence on the packages of each brand of manufactured cigars or little cigars.

22.05: Point of Sale Restrictions

(1) Retail Sales Practices.

Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars;

(b) breaking or otherwise opening any little cigar package to sell or distribute individual little cigars or a number of unpackaged or repackaged little cigars;

(c) distributing cigars or little cigars through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 22.00; or

(d) selling or distributing cigars or little cigars where apparel or merchandise (other than cigars or little cigars) bears a brand name and is offered in consideration of the purchase of cigars or little cigars.

(2) Retail Outlet Sales Practices.

Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

(a) Selling cigars or little cigars in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 22.00;

(b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigars or little cigars is the Minimum Legal Sales Age or older. No such verification is required for any person who appears 27 years of age or older.

(c) Using self-service displays of cigars or little cigars;

d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to retail outlet personnel; or

(e) As to any retailer who sells hand rolled cigars, or who displays for purchase manufactured cigars outside of their original package, failing to display a sign containing one of the warning statements required by 940 CMR 22.04 in a clear and conspicuous format, a minimum of 50 square inches in size, and in a location readily visible to the consumer.

(3) Retail Outlet Prevention Measures.

It shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to sell cigars or little cigars to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigars or little cigars to consumers younger than the Minimum Legal Sales Age. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

(a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR 22.06(3)(b). A retailer who receives during any calendar year official written notification from a state or local governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check; or

(b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigars or little cigars regarding compliance with laws prohibiting the sale of cigars or little cigars to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General.

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices:

The following retail sales and retail sales outlet practices are not unfair or deceptive:

(a) Mail-order or internet sales that are subject to verification that the purchaser is at least the Minimum Legal Sales Age. Verification of age through the mail or internet shall consist of, at a minimum, (i) verification that the purchaser is of the Minimum Legal Sales Age 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 (ii) use of a method of mailing, shipping, or delivery that requires signature of a person who is of the Minimum Legal Sales Age before the shipping package is released to the purchaser. 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 G.L. c. 93H, and shall not be used for any purposes other than age verification. Mail order or internet sales are subject to the sales practices described in 940 CMR 22.05(1)(a) and (b);

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(b) Vending machines that are located in an Adult-Only Retail Facility licensed under M.G.L. c. 138, s. 12, to serve alcoholic beverages for consumption on the premises, if the vending machine:

i. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine and must be out of the reach of all consumers and in a location accessible only to outlet personnel; and

ii. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are observable by the outlet employee(s) controlling the lock-out device; and

iii. is posted with a sign stating that those below the Minimum Legal Sales Age are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.

(c) Self-service displays that are located within Adult Only Retail Facilities.

22.06: Relation To Other Laws

Nothing in 940 CMR 22.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 22.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of cigars or little cigars, or which regulates the sale, use, or distribution of cigars or little cigars. Nothing in 940 CMR 22.00 shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of cigars or little cigars, or which regulates the sale, use, or distribution of cigars or little cigars. Without limiting the generality of the foregoing, nothing in 940 CMR 22.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 22.00, it shall control to the extent of any inconsistency with 940 CMR 22.00.

22.07: Severability

If any provisions of 940 CMR 22.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 22.00 and the applicability of such provision to other persons or circumstances shall not be affected.

REGULATORY AUTHORITY

940 CMR 22.00: M.G.L. c. 93A, § 2(c).