Frequently Asked Questions (FAQ) on Tobacco Stores and Vape Shops as Non-Essential Businesses in California
As of May 6, 2020

In response to the COVID-19 epidemic, on March 19, 2020, Governor Gavin Newsom issued Executive Order N-33-20 (EO) directing all California residents to stay at home unless they are designated as an “essential critical infrastructure worker.” These types of workers are considered critical to protect the health and well-being of all Californians. To help clarify which types of workers and businesses are considered “essential,” the Governor’s Office also issued an Essential Workforce document on March 19, 2020 (most recently updated on April 28, 2020) which specifically outlines which types of workers and businesses may remain open to the public during this time. This FAQ document has been prepared to answer questions from businesses, local health departments, and local law enforcement agencies.

FAQ 1: Are tobacco stores or vape shops “essential critical infrastructure” under Governor Gavin Newsom’s March 19, 2020 Executive Order N-33-20?

A. No. Tobacco stores and vapes shops are not listed in the initial March 19, 2020 or updated April 28, 2020 Essential Workforce document. Additionally, no listed essential retail category is included that would encompass stores that sell tobacco products for recreational use. The Essential Workforce document and EO default in this situation to any unlisted business remaining closed and the workers supplying that business staying home. This serves the overall public health imperative of staying home unless your work is both: 1. deemed essential; and 2. cannot be done from home.

FAQ 2: Can tobacco stores or vapes shops remain open “by appointment” or for curbside pickup?

A. No. The analysis is the same as in the previous answer. These stores are to remain closed because of the EO’s default order to stay home. Curbside delivery and carry-out is only allowed for food businesses in the Essential Workforce document (April 28, 2020). The California Department of Public Health’s (CDPH) additional guidance allowing for drive-through and pick-up/delivery is similarly only applicable to food service venues.

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1 “I as State Public Health Officer and Director of the California Department of Public Health order all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” EO at 1.
2 See California Department of Public Health guidance to Retail Food, Beverage, and other Related Service Venues, on the subject of Coronavirus Disease 2019 (COVID-19) and Retail Food, Beverage, and Other Related Service Venues (March 16, 2020),
retailers that seek to stay open “by appointment” or with a limited number of socially-distanced customers in the store are in violation of the EO’s general prohibition on nonessential business operations.

FAQ 3: Are tobacco shops that have begun selling snacks or other food items during this public health emergency “essential critical infrastructure” under the EO?

A. Likely no. Although the Essential Workforce document (April 28, 2020) includes “Workers supporting groceries, pharmacies, convenience stores, and other retail that sells food or beverage products, and animal/pet food . . . .” merely selling food for the first time during a public health crisis does not appear to make what was once a tobacco shop into a grocery store. For one thing, California law requires all food facilities to obtain a permit from a local environmental health regulatory agency. Food facilities that have not obtained this permit are in violation of state law, and should not be able to use a legal violation to leverage an exception to the EO. Furthermore, small amounts of food sales do not make a store whose primary purpose is to sell tobacco products into the equivalent of a grocery or convenience store. Following the public health emergency and the end of the EO’s applicability, tobacco stores will be free to change their business models and even shift their business to selling food, including obtaining necessary permits to be a food facility. But for the time being it appears that the EO requires their closure unless they already were operating as a permitted food facility.

If they are already operating as a food facility, additional CDPH guidance cited in the Essential Workforce document forbids “events/marketing that target individuals that CDPH has identified as higher risk of serious illness for COVID-19,” which includes individuals with lung disease or

https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/RetailFoodBeverageandOtherRelatedServiceVenues.aspx.


4 See California Department of Public Health guidance to Retail Food, Beverage, and other Related Service Venues, on the subject of Coronavirus Disease 2019 (COVID-19) and Retail Food, Beverage, and Other Related Service Venues (March 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/RetailFoodBeverageandOtherRelatedServiceVenues.aspx.
compromised immune systems, both common medical issues of people who smoke. Therefore, even a business that does operate as a food facility could violate the EO by targeting at-risk customers with marketing or events that promote tobacco products in-store.

FAQ 4: Do tobacco shops that sell some other products like toilet paper or hand sanitizer fall under an essential category?

A. Likely no. Other than the above food facility exception, the Essential Workforce document (April 28, 2020) also includes: “Workers in hardware and building materials stores, consumer electronics, technology and appliances retail, and related merchant retailers, wholesalers and distributors that support essential workforce functions where sales and operations cannot be conducted online.” Although some tobacco products include consumer electronics/technology (i.e. e-cigarettes), these are ultimately defined under state law as tobacco products and not merely electronics. Allowing a tobacco store to remain open to sell a few incidental electronics (e.g. chargers and spare batteries) along with the full menu of tobacco products would be counter to the EO’s default position that a store that is not demonstrably essential should remain closed. Additionally, tobacco product sales can be conducted online if they are consistent with California law on delivery sales (see FAQ 7), and other nonperishable goods that some tobacco stores have started selling post-EO are also widely available for online sales. As a result, although this language in the Essential Workforce document appears to leave open the possibility that some retail stores may open if they serve “Industrial, Commercial, Residential, and Sheltering Facilities and Services,” tobacco stores generally will not fall under this category.

FAQ 5: Do tobacco shops that sell cannabidiol (CBD) products or smoking paraphernalia fall under an essential category?

A. No. The Essential Workforce document (April 28, 2020) includes an exception to the default for: “Employees of companies engaged in the production, storage, transport, and distribution of . . . medicines, including cannabis.” Cannabis, including medicinal cannabis under California law, can

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only be sold after obtaining a license issued by the Bureau of Cannabis Control. Licensed commercial cannabis facilities are forbidden by state law from selling tobacco products or alcohol. Many vape shops sell CBD products or smoking paraphernalia that could be used with cannabis, but neither of these products makes a tobacco shop into a cannabis business.

CBD normally falls outside of California’s regulation of cannabis because it is assumed to be derived from industrial hemp, which is carved out of the state cannabis regulatory regime. The only reason tobacco stores may sell CBD is that it is not treated as medicinal cannabis in state law. Hence, the Essential Workforce document’s listing of cannabis as an essential sector means licensed and regulated sales of medicinal cannabis, not the unlicensed sale of CBD products at tobacco shops. By selling tobacco these shops are demonstrably not selling cannabis products as envisioned by the Essential Workforce document. Any store that is not a licensed cannabis business cannot become essential by selling CBD or smoking products that might be useable with cannabis.

FAQ 6: Do tobacco shops that sell personal protective equipment (PPE) fall under an essential category?

A. Likely no. The Essential Workforce document lists “Workers in retail facilities specializing in medical goods and supplies.” This should not apply to a tobacco shop selling some masks or disposable gloves because this business does not specialize in the sale of PPE or medical supplies as a whole, and by selling it incidentally (or using it during the production of tobacco products like e-liquids) these businesses are diverting it away from use in medical facilities or by other at-risk groups or professions.

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7 California Cannabis Portal, Apply for a License, Bureau of Cannabis Control – Licensing Information https://cannabis.ca.gov/apply-for-a-license/.
FAQ 7: Can a tobacco shop that is not essential according to the EO and Essential Workforce document nonetheless remain open for phone or online orders for delivery?

A. Not without changing its business practices significantly to comply with California delivery-sales laws. Generally speaking, Californians are still able to work from home, and the U.S. Post Office and other delivery services are essential services that remain open. Therefore, a tobacco business could theoretically continue to do online sales if it had been doing so before the EO came into effect, if it is based out of a home, and if it is complying with all applicable laws. However, businesses set up for retail sales of tobacco products are far less likely to be able to do business in this way. As already discussed, retail tobacco shops cannot remain open to the public for in-person retail sales, which would appear to include curbside pickup and “by appointment” opening, because their staff has been instructed by the EO to remain home to prevent the spread of coronavirus.

Even if this were not the case, for retailers in California delivery sales are governed by the Stop Tobacco Access to Kids Enforcement Act, which was updated by legislation effective January 1, 2020. The law requires compliance by retailers taking online, phone, fax, and mail orders of tobacco products sold directly to consumers and sent by any private or public delivery service. It applies to all kinds of delivery and therefore could also apply to curbside pickup in certain situations. Among the law’s many requirements:

- Retailers must verify customer age using similar databases as those used by banks to verify identities and requires sellers to verify billing addresses in the same identification databases.
- If that identification method fails, then the retailer must get a signed “age-verification kit” and copy of government identification from the customer.

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11 California law requires out-of-state delivery sellers of tobacco products to comply with several reporting and licensing requirements, but for the sake of this analysis it is assumed that all the relevant tobacco shop retailers are located in California and engaged in face-to-face sales prior to the EO.
12 Cal. Business and Professions Code § 22963
13 Cal. Business and Professions Code § 22963(b).
14 The law states it covers sales that are ordered ahead of time (by mail, phone, fax, or the internet) and then sent by private delivery service, so curbside pickup orders made through the mediums listed in the law and delivered outside a tobacco retailer’s store would likely be covered.
15 Cal. Business and Professionals Code § 22963(b)(1)(A) (“The distributor or seller shall attempt to match the name, address, and date of birth provided by the customer to information contained in records in a database of individuals whose age has been verified to be 21 years or older by reference to an appropriate database of government records kept by the distributor, a direct marketing firm, or any other entity.”).
consumer and must match the government identification address to that of the billing address.\textsuperscript{16}

- The law forbids taking cash or money order payment and requires credit card statements to display “tobacco product” on the purchase.\textsuperscript{17}
- Prior to making a shipment the retailer must call the consumer back after 5pm to confirm the purchase and must either talk to someone or leave a message with the purchase confirmation.\textsuperscript{18}
- If the retailer doesn’t verify the billing address consistent with the law, it cannot deliver to any location other than the billing address (such as curbside pickup).\textsuperscript{19}
- A tobacco product must be delivered only in a container that is conspicuously labeled with the words "CONTAINS TOBACCO PRODUCTS: SIGNATURE OF PERSON 21 YEARS OF AGE OR OLDER REQUIRED FOR DELIVERY."\textsuperscript{20}
- Upon delivery at a purchaser’s address, the seller/distributor must obtain a signature from someone aged 21 or older before completing the delivery.\textsuperscript{21}

All of these requirements and any others in the Stop Tobacco Access to Kids Enforcement Act\textsuperscript{22} must be complied with for all purchases subject to the law. Tobacco stores that are making sales for delivery outside their stores without complying with all relevant requirements are open to significant penalties (see FAQ 8 for penalty amounts). Many local ordinances also prohibit mobile tobacco retailing, or retailing on foot, which would also likely apply to sales of tobacco products outside of a licensed retailer.

**FAQ 8: What are the statutory penalties for violating the EO or California’s tobacco product delivery sales laws?**

A. Violations of the EO are crimes and can be punished with fines and prison time. The relevant statute, which authorizes the Governor to issue the EO, explains: “Any person who violates any of the provisions of this chapter or who refuses or willfully neglects to obey any lawful order or regulation

\textsuperscript{17} Cal. Business and Professionals Code § 22963(b)(2).
\textsuperscript{18} Cal. Business and Professionals Code § 22963(b)(3).
\textsuperscript{19} Cal. Business and Professionals Code § 22963(b)(4)(C).
\textsuperscript{20} Cal. Business and Professionals Code § 22963(b)(5).
\textsuperscript{21} Cal. Business and Professionals Code § 22963(b)(6).
\textsuperscript{22} The above FAQ answer falls short of summarizing all provisions of the act and only attempts to describe some of the provisions that might be most relevant to a retailer’s duties when suddenly switching to online or phone sales after being set up for face-to-face sales. For the full requirements of the law see the above link in n.6.
promulgated or issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment.”

Furthermore, violations of the delivery sales law addressed in FAQ 7 are subject to increasing fines for every violation. The law states:

A district attorney, city attorney, or the Attorney General may assess civil penalties against any person, firm, corporation, or other entity that violates this section, according to the following schedule:

(1) A civil penalty of not less than one thousand dollars ($1,000) and not more than two thousand dollars ($2,000) for the first violation.

(2) A civil penalty of not less than two thousand five hundred dollars ($2,500) and not more than three thousand five hundred dollars ($3,500) for the second violation.

(3) A civil penalty of not less than four thousand dollars ($4,000) and not more than five thousand dollars ($5,000) for the third violation within a five-year period.

(4) A civil penalty of not less than five thousand five hundred dollars ($5,500) and not more than six thousand five hundred dollars ($6,500) for the fourth violation within a five-year period.

(5) A civil penalty of ten thousand dollars ($10,000) for a fifth or subsequent violation within a five-year period.

FAQ 9: Is the EO preemptive of local control?

A. The EO is a statewide order enacted under the Governor's authority in the California Government Code and state constitution, so it sets a statewide
minimum protective standard beyond which local jurisdictions cannot fall. Local jurisdictions may not authorize nonessential workplaces to open in defiance of the order, and if they do so they would potentially be subject to the criminal penalty described above. By contrast, the EO does not contain language that preempts stronger local controls restricting nonessential businesses further to promote public health. Local jurisdictions may enact tougher emergency measures consistent with their police powers.

FAQ 10: What are local governments doing to comply with the EO?

A. Many local governments are communicating with the public and helping businesses to better understand how the EO and local Stay Home orders impact them. Some jurisdictions have been issuing their own emergency declarations, guidance, or resolutions to give more certainty to local businesses. The City of Los Angeles has found it necessary to enforce its emergency order against numerous tobacco stores: first sending them Notice to Comply letters; then sending Notifications to tobacco retailers in violation of the Safer at Home Emergency Order (and giving them an opportunity to explain how they are in compliance); and then filing criminal charges against retailers who fail to close as directed. As of April 28, 2020, the City of Los Angeles had filed criminal charges against 49 nonessential businesses that refused to close, 19 of these being tobacco or vape shops. In addition to criminal sanctions, Los Angeles has the authority to shut off water and power to businesses that violate the city’s emergency order. Other jurisdictions have revoked tobacco retail licenses and taken additional actions under their business ordinances against violators.

Helpful Resources

- The Governor’s EO is available at https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf
- The list of Essential Workforce, as updated April 28, 2020, is available at https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf
- Additional California guidance on the EO is available at https://covid19.ca.gov/stay-home-except-for-essential-needs/

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26 See EO at 2 (”The California Department of Public Health looks to establish consistency across the state in order to ensure that we mitigate the impact of COVID-19.”).
27 Consistent with Los Angeles Administrative Code Section 8.77 - Violation of an Emergency Order.