

California Attorney General Continues Fight to Ban Flavored Tobacco Products

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As many in the tobacco industry know, there is a growing trend among state and local governments to prohibit or restrict the sale of flavored tobacco or nicotine products. Some governments are focusing on narrow subsets of flavored tobacco or nicotine products, like vapor products or electronic cigarettes, while others are intent on a broader prohibition or restriction that might include more traditional products like cigarettes, cigars, or smokeless tobacco. At the state level, attorneys general (AGs) have been at the forefront of the ensuing legal battles over this type of legislation.

In 2019, Massachusetts became the first state to impose permanent restrictions on the sale of all flavored tobacco products, including menthol cigarettes and cigars. In 2020, New Jersey, New York, and Rhode Island banned the sale of flavored electronic cigarettes. Then in August 2020, California passed broad legislation that would ban the retail sale of flavored electronic cigarettes, smokeless tobacco, and cigars (except “premium” cigars), set to take effect on January 1, 2021.

Soon after California passed the flavor ban legislation, on October 9, a group of tobacco manufacturers and retailers (Plaintiffs) sued the state in federal court seeking to invalidate the law. In an effort to obtain a [preliminary injunction](#) against the new law’s enforcement, Plaintiffs argued that:

- They are likely to succeed on the merits because the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA) preempts California’s law;
- They will be irreparably harmed because the California law is unconstitutional and will cause them substantial financial losses;
- The balance of equities favors them because they simply request to preserve the status quo; and
- The injunction will be in the public interest because it will prevent violation of constitutional rights, provide consumers choice, and prevent consumers from purchasing on the black market.

On November 12, the California AG responded with a [brief in opposition](#) to Plaintiffs’ request for a preliminary injunction. The AG argued, in part, that:

- There is no likelihood of success on the merits because the TCA broadly preserved state and local authority over sales by distinguishing between sales and manufacturing, and since the California legislation will implement retail sales restrictions, it is not preempted; and
- The balance of equities does not support the extraordinary remedy of issuing a preliminary injunction because, in part, nothing in the new California law prevents Plaintiffs from making or marketing their products in other jurisdictions or from selling non-flavored products, and the state has a strong interest in protecting the public health, especially the health of youth smokers or users.

Requests for, and opposition to, preliminary injunctions naturally preview the parties' substantive arguments because courts must consider plaintiffs' likelihood of success on the merits. Given that we have seen permanent, state-level flavor bans or restrictions in only five states, early litigation in states like California could provide a roadmap for AGs in states that may take similar action in the future.

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