



Negotiating Preemption

Strategies and Questions to Consider

Businesses and other special interests often push for preemption in public health proposals to limit state or local regulation. This fact sheet is designed to help advocates and policymakers negotiate preemption as new policies are drafted and make their way through the legislative process.

What is Preemption?

Preemption is a legal doctrine that provides that a higher level of government may limit, or even eliminate, the power of a lower level of government to regulate a certain subject area. Federal laws can preempt state and local laws, and state laws can preempt local laws. Preemption usually occurs when Congress, or a state legislature, passes a law in a subject area (a “field”) and wants that law applied uniformly to the whole jurisdiction. To ensure that the lower levels of government follow the law, Congress, or the state legislature, limit or eliminate the authority of local governments to pass laws that regulate that field. This type of preemption is often referred to as “ceiling preemption,” because local governments may not exceed the standards established in the law.

Sometimes, a legislature passes a law that sets a uniform minimum standard, but allows local governments to decide whether to exceed those standards. That type of preemption is referred to as “floor preemption,” because the legislature is setting a base level, which local entities cannot go below, but may choose to exceed.

The most problematic use of preemption is when the higher level of government chooses not to enact regulations in a particular field and then forbids lower levels of governments from doing so, leaving a regulatory void. Some refer to this type of preemption as “null preemption.”¹

This fact sheet is one in a series from NPLAN on how the legal concept of preemption works and why it matters for public health. For other fact sheets in this series, see www.changelabsolutions.org.

Recently, several states have created regulatory voids by enacting laws that preempt cities and counties from passing certain types of laws to address obesity. In 2013, the Mississippi Legislature enacted a law that, in part, prohibits cities and counties from passing any laws that:

- Prohibit a restaurant or food store from using incentives like giving away toys to sell unhealthy food;
- Require restaurants or other food retailers to disclose nutritional information to consumers; or
- Restrict the portion sizes of food or nonalcoholic beverages.²

While the law prohibits cities and counties from regulating these fields, the law sets no statewide standard.³ As a result, no Mississippi community may pass these types of laws to address obesity. A similar law has been adopted by the Wisconsin legislature as an amendment to the biennial budget,⁴ and in Ohio a comparable law was enacted but struck down because it violated the state's constitution.⁵

Evaluate the effect of preemption in a particular proposed law

Public health advocates would generally agree that preemption should only be included in a public health law if it sets a minimum floor of protection. But while avoiding ceiling preemption may be desirable, it's not always possible. Other groups, typically industry or business, often push for ceiling preemption in response to public health law proposals. The business community usually prefers to operate under one set of regulations, so business interests often argue for preemption to impose uniformity of laws or to limit or block new regulation at the state or local level.

While public health advocates are justifiably skeptical of calls for preemption by special interest groups, they should assess the pros and cons on a case-by-case basis. Depending upon the subject of the law and the type of regulation proposed in the law, the level of government in which the law is being considered, and the intensity of opposition, advocates may be willing to accept some level of preemption. If preemption is a possibility in a proposed law, then it can and should be negotiated, just like every part of a proposed law. The purpose of this fact sheet is to help advocates prepare for that negotiation process.

Be Prepared

Preparing in advance to deal with preemption issues is crucial. Typically, preemption comes up late in the legislative process, when emotions are often high and resources may be strained. Moreover, it is often raised in situations where only a handful of the interested parties are present, such as during a hallway conversation or a late-night conference committee meeting. Preparing a strategy for dealing with preemption early on, before the situation becomes more volatile, will result in more informed and thoughtful decisions and lead to better legislative outcomes.

Anticipate arguments in favor of preemption

Anticipating what the other side is likely to want and why is an important part of deciding how to deal with preemption. Advocates should not accept on faith the other side's arguments about why preemption is necessary, nor should they ignore these claims. Understanding why the other side wants preemption can help advocates develop alternatives to address their concerns. Furthermore, the other side's reactions to these alternatives could indicate whether preemption is truly needed or is just a political strategy.

For example, business interests often argue that preemption makes economic sense, and that new local regulations will be costly to business. Advocates should be prepared to challenge that assertion by reviewing industry's economic analyses. Changes in practices that promote healthier outcomes may, in fact, promote sales.⁶ And, assuming the regulations apply uniformly, all businesses within the community will be subject to the same regulations. As a result, no individual business should be at a competitive disadvantage.

Preparing a strategy for dealing with preemption early on will lead to better legislative outcomes.

Prepare language in advance

If some form of preemption is acceptable in certain circumstances, advocates can be prepared to provide language to respond to a demand that preemption be included in a bill. If the other side proposes broad preemptive language, advocates can offer a narrowly drafted provision that addresses the claim that preemption is necessary and provides an alternative. It should have already been vetted for its public health implications so that advocates can use it to respond quickly and effectively to efforts to enact broad preemptive laws.

Another tactic is to prepare an “anti-preemption” clause. Advocates can provide language that expressly states that the proposed law is not preemptive nor should not be construed to impliedly preempt other laws. This language can either be included when the bill is introduced or as an amendment later in the legislative process. Of course, once anti-preemptive language becomes part of a bill, it is subject to editing and revision like any other part of the bill—but that is also true for any preemptive language being advocated for by the other side.

Build a Consensus

Most important, advocates should consider in advance the pros and cons of preemption from a public health perspective. Build as broad a consensus about preemption as possible among stakeholders and coalition members early on, including what is negotiable and what is a deal-breaker. A consensus position should address the following points:

- Will your coalition oppose preemption categorically, and if so, why?
- Is there a form or scope of preemption that would be acceptable in certain circumstances? If so, what would those circumstances be?
- What trade-offs would you be willing to make to keep preemption out of a law?
- What trade-offs would make some form of preemption acceptable if the other side insists on it?
- When would you walk away?

The following types of questions may be helpful to consider as part of working toward consensus:

Assessing the legal and regulatory landscape:

- Is this an area or issue where local or state governments have historically or traditionally had regulatory authority?
- Would preemption be a significant departure from current law?
- Is a one-size-fits-all approach appropriate, or does the problem being regulated vary a lot depending on the local context (e.g., urban vs. rural communities)?
- Who will enforce the law?
- If the enforcement would be done at the federal or state level, is there the capacity at those levels to effectively enforce the law?

Assessing the possible consequences, intended and unintended:

- What would the impact be on communities or states with laws that would be preempted? What would they give up? Would they gain anything in exchange?
- What legal options would be sacrificed?
- Will preemption inhibit innovation? What’s the likelihood that evolving science will provide evidence for a future policy that would be preempted?
- If a preemptive law were to pass, what would the impact be on communities or states that do not have laws addressing the issue? Would they be likely to pass a law of their own, if preemption were not a factor?

Assessing the practicalities:

- Is this an area where regulation is so inherently expensive or otherwise difficult that many or most states and cities are unlikely to take meaningful regulatory action anyway?

- City by city, state by state, legislative battles take time and resources—would avoiding those battles save enough advocacy resources to justify accepting preemption?
- Is some form of preemption necessary to get the bill passed?

Assessing the big picture:

- Does the bill accomplish meaningful protections, even if it does not include everything your coalition hoped for?
- If preemption is necessary to get the bill passed, is the result worth it?

The Bottom Line

These last questions get to the most essential point: What is the group's bottom line, and how will you know when it has been reached? The worst-case scenario would be to end up with a law that is so watered down that the public health protections are mostly cosmetic, yet any further efforts at the state or local level have been preempted. Periodic reality checks are crucial, especially in the most heated moments. If this bill passed, would you and your coalition members believe it was worth the trade-offs?

Additional Resources:

The following companion resources are available online at www.changelabsolutions.org: *Fundamentals of Preemption*, *Preemption by Any Other Name*, *Preemption and Public Health Advocacy*, and *Preemption: What It Is, How It Works, and Why It Matters for Public Health*.

The Association for Nonsmokers' Rights has developed a series of fact sheets and reports to help local tobacco control advocates deal with preemption. These resources can be found online at www.protectlocalcontrol.org/resources.php.

Center for Gun Policy & Research, Johns Hopkins Univ., *Preemption of Local Gun Laws: Questions & Answers* (2002), available at: www.jhsph.edu/gunpolicy/preemption_QA.

Robin Hobart, Tobacco Technical Assistance Consortium, *Preemption: Shifting the Battle to Stronger Ground* (2002), available at: www.ttac.org/resources/assist_pdfs/Advice_Preemption.pdf.

James F. Mosher, American Medical Association, *Alcohol Issues: The Perils of Preemption* (Pamela Glenn ed., 2001), available at: www.alcoholpolicymd.com/pdf/Policy_Perils.pdf.



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¹ See generally Jonathan Remy Nash, Null Preemption, 85 Notre Dame L. Rev. 1015, 1021 (2010)

² 2013 Miss. Laws Ch. 370 (S.B. 2687).

³ *Id.*

⁴ Wis. Stat. §66.0418 (created by Act 20 (2013), the Wisconsin 2013-2015 State Biennial Budget.)

⁵ Ohio Rev. Code Ann. § 3717.53 (2011); Cleveland v. State (Ohio App., 8th Dist., 03-28-2013), --- N.E.2d. ---, 2013, WL 1281900 (2013).

⁶ See, e.g., Cardello, H., Wolfson, J., Yufera-Leitch, M., Warren, L., Spitz, M. *Better-For-You Foods: An Opportunity To Improve Public Health And Increase Food Industry Profits*, Hudson Institute, (March 2013), available at: www.hudson.org/files/publications/better_for_you_combinedFINAL.pdf.