Preemption and Public Health

Full Script

This script was published in July 2024.

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Welcome to the Public Health Law Academy's training on Preemption and Public Health. This training is brought to you by ChangeLab Solutions and the CDC's Public Health Law Program.

Laws and policies have a crucial role in shaping health outcomes. For example, they can determine who lives and works in safe environments, who has access to healthy foods and recreational space, who can use social programs, and more. These differences have resulted in health disparities across populations such as in life expectancy, susceptibility to physical and mental illnesses, and other measures of well-being. However, just as laws and policies have created these disparities across race, gender, class, immigration status, and other lines, they can also be used to promote health and rectify inequities. Many state and local health departments have begun doing so, yet some find their efforts frustrated by the legal concept of preemption. In simple terms, preemption occurs when a higher level of government limits or even eliminates the power of a lower level of government to regulate a certain issue. Issues that can be affected by preemption can include minimum wage requirements, environmental regulations, tobacco control, and nearly everything else that state and local governments can regulate. This training covers what preemption is, why it is important, how it works, and how to respond to it.

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Building on the basic public health law concepts introduced in the Public Health Law Academy's "Public Health Law: Past & Present" training, this module focuses on preemption, one of the main limitations on state, territorial, local, and tribal health departments' public health powers. Some state legislatures have increasingly used preemption to prevent local communities from taking actions that can reduce inequities caused by the legacy of racist and discriminatory laws. Recent scholarship has documented the rise in state preemption since around 2010 and warned of its potential to undermine local efforts to protect public health and widen inequities.

Today we'll:

- Discuss how preemption and health equity relate to each other and what we mean by equity.
- Provide an overview of sources of authority that ground a government's ability to pass laws and preempt others from passing laws.
- Examine the different types of preemption and their implications.
- Discuss how to spot preemption in practice.
- Look at examples of preemption in action to explore how it might affect your work and how you might navigate through it.

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Throughout this module, we encourage you to think about how to ensure that health equity is centered in your work. As we go through the training, you'll see an equity icon that designates equity practice tips, like the one on the left side of this slide. We use it to highlight opportunities to apply equity-promoting strategies in your day-to-day work. We also encourage you to think of examples from your own experience.

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Let's dive in by defining what we mean by health equity and introduce a framework to achieve it. Then we will discuss how preemption can affect health equity and public health.

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Before we begin discussing how preemption affects health equity, let's start with a foundational question: What is health equity? Dr. Paula Braveman, one of the nation's leading experts on health equity and health disparities, put it very simply when she said, "Health equity means that everyone has a fair and just opportunity to be as healthy as possible. This requires removing obstacles to health such as poverty, discrimination, and their consequences, including powerlessness and lack of access to good jobs with fair pay, quality education and housing, safe environments, and health care." It means everyone has access to the resources and opportunities they need to thrive, regardless of characteristics like race, ethnicity, gender, or sexual identity. At the core of equity is a focus on fairness, justice, and opportunity.

Having a shared understanding of health equity is critical. We can't improve health for everyone without taking an equity approach. How organizations and teams talk about inequities will shape the approaches they use to advance health equity. A project explicitly focused on improving health equity might take a very different direction from one that's focused more generally on improving health for everyone.

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To move toward true equity, we must understand the difference between equity and equality.

This illustration, based on the Robert Wood Johnson Foundation's "Visualizing health equity: One size does not fit all infographic," shows the difference. The top section illustrates equality. An intervention focused on equality would apply the same one-size-fits-all solution to everyone, regardless of need. Here this idea is illustrated by giving four individuals the same bicycle. That sounds pretty good so far. But let's examine the situation more closely. The bicycle may be a good fit for the two people in the middle, but what about the person in the wheelchair on the left? And how about the child on the right who struggles to reach the pedals? This illustration shows how an equal approach – even a well-intentioned one – doesn't necessarily benefit everyone equally. The two individuals in the middle might be well on their way, while those on either side are left behind.

The bottom section illustrates equity. An equitable approach means that we're focused on ensuring that people have what they need to thrive. And beyond that, it acknowledges the reality that not everyone starts at the same place. What one person or population needs might be different from what another needs.

When we fail to design projects or interventions with equity in mind, there is potential for our efforts – again, even well-intentioned ones – to not only maintain inequities but actually widen them. Providing the same bike to everyone will give the two individuals in the middle the means to ride off, while those on either side are left even farther behind.

Furthermore, this example – which suggests that giving each person a bike suited to their individual needs achieves equity – has some significant limitations. First, while bicycles can be built for some people who use wheelchairs, for many other people with disabilities, even modified bicycles are not an inclusive or accessible form of transportation. A more equitable intervention would allow each person to choose from an array of vehicles and determine the one that works best for their needs. Additionally, this example has left out the broader structural conditions within which each individual is traveling. Do they have access to a bike lane? Does their neighborhood have a lot of car traffic? What about air pollution? And how far do they have to travel to get where they need to go? Equitable interventions must address these questions, that is, not just providing an accessible vehicle but aiming to change the conditions that make it unsafe or more difficult for some people to get on a bike or travel in the first place.

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Achieving health equity requires eliminating the drivers of health inequities – like structural discrimination (especially structural racism), income inequality and poverty, disparities in opportunity, disparities in political power, and governance that limits meaningful participation.

We have a lot more ground to cover in today's training, so I won't go into depth on each of the five drivers, but the key takeaway here is that although law and policy have been central to creating today's health disparities, the very same law and policy tools can also be used to create positive change by addressing these drivers.

If you are interested in learning more about this framework and how it can be applied to achieve health equity, we encourage you to check out ChangeLab Solutions' Blueprint for Changemakers.

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What is preemption? We touched on the definition at the outset of this training, but at its core, preemption is when the law of a higher jurisdiction invalidates the law of a lower jurisdiction.

Generally, a government cannot do anything that conflicts with a higher level of government's law. Depending on the type of preemption, lower levels of government might be prevented from passing any laws on a certain issue or they might be prevented from passing certain types of laws affecting that issue.

These limitations on local authority have implications for each of the drivers of inequity. Preemption can affect health equity positively or negatively by limiting the authority of local governments to enact certain policies. For example, a state could reduce income inequality by raising the minimum wage and preempting local governments from setting wages below the state minimum wage. A greater minimum wage can reduce poverty, which is associated with positive health outcomes, such as greater life expectancy and lower rates of chronic illness. But preemption can also worsen income inequality if a state prohibits local governments from enacting a wage higher than the state minimum.

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Since around the 2010s, there has been a trend of state legislatures preempting local governments from enacting policies that can undo the fundamental drivers of health inequities. In some cases, states use preemption in an overtly or even purposefully discriminatory manner by taking away communities' ability to adopt policies related to pay equity, employment, and housing discrimination, among other policies. In other instances, state preemption could still be discriminatory and inequitable even if it is not overt. For example, there has been state legislation preempting local governments from passing their own minimum wage increases, paid sick ordinances, rent control, and affordable housing ordinances, pandemic response regulations, and environmental regulations, among other areas. We expand on some of these examples later in the training.

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Who is behind this trend, and why? Often propelled by trade associations and business lobbying, many preemptive state laws are aimed at preventing any regulation at all. Many of these preemptive state laws are part of a long-term strategy by corporate interests to end local authority over a variety of issues. Businesses are generally concerned with profit, which reflects revenues, costs, inventories, marketing, and legal compliance, for example. New regulations can affect all of these things. Accordingly, businesses and industries have increasingly used preemption to protect their financial interests and thwart local efforts to enact policies aimed at advancing health equity. Much of this effort has been orchestrated by the American Legislative Exchange Council, or ALEC, an industry-funded organization that has written and distributed model bills to its members, which include lobbyists and about a quarter of all state lawmakers. These models have served as the basis for many of the increasing number of state laws that misuse preemption and exacerbate health inequities.

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Again, it should be reiterated that preemption is not inherently good or bad. What really matters is how it is used. For example, as the civil rights movement took hold in the 1950s and 1960s, the federal government responded to discriminatory state and local policies with preemptive federal laws such as the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. In a modern context, preemption has also been used to reduce or eliminate other forms of local authority with the goal of protecting health and health equity. In 2017, California enacted legislation stripping local governments' authority to regulate and ultimately deny certain multiunit housing developments. The state took this drastic action to ensure that local governments could no longer avoid responsibility for a severe and worsening housing crisis.

Understanding the implications of preemption for any given policy requires a case-by-case assessment of whether preemption is likely to worsen health inequities or whether it is an appropriate response to address existing inequities.

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Now I'm going to introduce a hypothetical scenario that we'll return to several times throughout this training.

Meet Omari, a local health department official in the county of Innovation. The county recently identified paid sick leave as a priority health need for several reasons. First, the county is experiencing high rates of presenteeism – worker productivity loss when individuals work while sick. In addition, workers have low rates of preventive medical visits, and survey data have indicated that lack of protected and paid sick leave is a major impediment to seeking medical care. Omari has been tasked with drafting a policy paper exploring the health effects and possibility of adopting a paid sick leave ordinance in the county. In researching this topic, he learns that access to paid sick leave is not distributed equally among all workers. According to one survey, while 94% of workers in the top quarter of wage earners have access to paid leave, only 55% of workers in the bottom quarter have access. Moreover, 86% of full-time workers have paid leave compared to 51% of part-time workers. Omari also finds that inequities exist by gender, race, and industry.

Through his research, Omari also finds that some local governments in neighboring states have been blocked from passing these laws.

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How can Omari determine whether the county can pass and implement a paid sick leave ordinance? And if so, what legal considerations must it be aware of?

To help answer these questions, we'll spend the next segment discussing the sources that give governments authority to pass and preempt laws.

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Before moving on to the next section, let's pause for two questions.

The first is: True or false? Health equity focuses on fairness and the opportunity for all people to reach their full health potential regardless of their race, gender, sexual identity, class, or other markers.

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If you picked "True," that's correct! Remember that although we may not all use the term "health equity" to describe this, our goal can be to share the same basic understanding of its core principles, which include fairness and opportunity to reach one's full health potential regardless of any demographic marker.

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Here is the second question.

True or false? Preemption always negatively affects health equity.

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If you said "False," you are correct. Preemption is not inherently good or bad. How it affects health equity depends on how it is used.

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In order to understand preemption, it's important to first be clear about the sources of government authority. What provides different levels of government with the power to create and enforce laws that affect the public's health? And what are the limitations on that power?

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Government authority in the United States – including all authority related to public health – is divided among the federal, state, and local levels.

The primary source of this authority is the US Constitution.

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The Constitution defines the power of the federal government and distributes power between the federal and state governments. States can then choose to delegate all, some, or none of that power to local governments. We'll talk more about that delegation to local governments shortly.

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Under the Constitution's Supremacy Clause, federal law takes precedence over lower-level laws. The clause states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

So, if a state or local law conflicts with federal law, federal law – the "supreme law of the land" – supersedes the lower-level law.

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Though federal laws are supreme, the federal government has limited powers. That means it only has those powers enumerated by the Constitution. This includes the power to tax, spend, and regulate interstate commerce. The federal government also has the power to make all laws that are deemed necessary and proper to execute the powers specifically listed in the Constitution.

It is through these powers that the federal government can make and enforce laws relating to public health.

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However, it's really states and local governments that have the most leeway to enact laws to protect the public's health.

Under the Tenth Amendment to the Constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, states have all of the powers not delegated specifically to the federal government.

One of these powers is what is known as the police power.

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In spite of its name, the police power extends beyond law enforcement. It encompasses the power of states – and, by delegation, local governments – to promote the public health, safety, and general well-being of the community. In fact, protecting the public's health is one of the core purposes of state and local governments.

Courts have generally been deferential to the exercise of this power as long as the interventions are rationally related to promoting the public health, safety, or general welfare and carefully designed to ensure that no other constitutional or legal provisions are being violated.

Bike safety laws are a good illustration of a valid exercise of the police power. In accordance with their police powers, many states have enacted laws requiring bicyclists below a certain age (typically 16) to wear a helmet for their safety.

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The police power is a plenary power of the states – meaning that states can choose how much, if any, of this power they will give to local governments. While the Constitution is the source of states' police powers, local governments must rely on the states for their authority. The degree to which local governments have autonomous powers varies greatly by state.

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Some states – Florida and Illinois among them – give local governments extensive police power authority, known as "home rule authority." In those states, local governments can directly enact laws that affect the general public without relying on a specific delegation of power from the state legislature.

Home rule limits the degree of state interference in local affairs but does not eliminate it. For example, even though Florida grants broad home rule powers to cities and counties, the state legislature still has the ability to preempt – or preclude – local action in some areas, like passing smokefree air laws. Only the state can regulate where smoking can occur.

California is another example of a state that grants some of its local governments broad police powers. Under the California constitution home rule counties and cities may make and enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with [state law]." Other California jurisdictions, known as "general law" cities and counties, have more limited authority, with their government structure and powers being defined in state law.

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Dillon's Rule states are on the other end of the spectrum, limiting the ability of local governments to exercise police power. In states following Dillon's Rule, local governments may act only within the powers specifically granted to them by the state legislature.

For example, local governments in Virginia have only the powers that are

- Expressly delegated to them by the Virginia General Assembly OR clearly implied from a specific grant of authority, AND
- Essential to the purposes of government – that is, considered "indispensable," not just useful or convenient.

In other words, if there is any doubt as to whether a Dillon's Rule state like Virginia has delegated its power to local government, then the power has not been given.

Because the amount of authority that states give local governments varies so greatly by state, it is important to know how the delegation of power to local governments works in your state.

Whether a jurisdiction falls under Dillon's Rule or home rule is distinct from preemption. The first step in determining authority is to review the amount of authority the state has given to a local government to pass laws and policies. The second step is determining if any preemption exists. Preemption, if it exists in that state, then curtails the local government's general authority by outlining the subject areas the local government cannot regulate or the specific types of laws and policies that it cannot pass.

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Let's return to Omari. As Omari and his county continue to consider a paid sick leave law, they must determine whether the county has the authority to pass such a law. The state in which the county of Innovation lies is a Dillon's Rule state. This means that before passing any new law, the county must be able to reference language in a state statute that gives it authority to do so. Omari works with the county attorney's office to check the state statute and finds a section that reads, "A local government within the state may enact ordinances requiring employers within its jurisdiction to provide the following: parental leave, paid sick leave time, and bereavement leave." Because the statute explicitly authorizes paid sick leave laws, the county can proceed. However, not all authorizing language is as clear. Some state laws may broadly describe what paid sick leave does without explicitly naming it as "paid sick leave," and others may confer ambiguous authority that may or may not include paid sick leave. An attorney should be consulted when the statutory language is not entirely clear. If instead the county of Innovation was located in a home rule state, this analysis would be more straightforward. Remember that in home rule states, local governments retain broad authority to pass and implement laws within their jurisdiction. So absent any state legislation that preempts paid sick leave, the county would likely be able to pass a paid sick leave law.

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Let's review with a couple more questions.

First: The federal government has total control over state and local laws. True or false?

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The answer is "False." The US Constitution divides control between the federal and state governments. Remember that states have the primary authority to regulate the general health, safety, and welfare of their citizens – the police power.

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The second question is, Local governments have authority to enact laws regardless of what state law says.

True or false?

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The answer again is "False." Local governments generally act within the authority delegated to them by states. While some states grant local governments extensive authority (that is, home rule authority) to act independently, others greatly limit local governments' powers (called Dillon's Rule). The extent of this authority is typically outlined in state constitutions.

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Remember that local authority generally is a concept that is distinct from, though related to, preemption. You must first determine whether your jurisdiction has the general power to pass a law or policy based on how much and what kind of authority local governments within your state have. Are you in a home rule state with broad local authority? Or are you in a Dillon's Rule state, and if so, is there enabling legislation that allows you to pass the law or policy you are exploring?

If your local government does have the authority to pass a law, then you must determine if there are preemptive state laws that curtail that authority.

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Different types of preemption exist. In this section, we'll talk about these different types and the wide range of implications they can have.

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Ceiling preemption occurs when a higher level of government prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires. One example is in the minimum wage context. A number of states have passed laws establishing a state-level minimum wage that prohibit cities from establishing a minimum wage higher than the one set by state law. This is an example of ceiling preemption, because in those states, there is no room for local governments to act above and beyond state law.

Sometimes, however, a lower level of government may regulate some parts of an issue, even when a higher level of government has a law in that area. This is known as floor preemption. The law of the higher level of government may set a minimum standard, but still allow room for a lower level of government to add requirements. Again, using minimum wage as an example, federal law sets minimum wage rates in the United States. But federal law acts as a floor, that is, it preempts state and local governments from adopting laws that set a lower minimum wage. States and local governments can still set higher minimum wages unless a local government is located in a state that has ceiling preemption in this area.

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Let's take a closer look at ceiling preemption. What effects does it have?

- The first effect is uniformity. For example, federal airline safety regulations create one uniform set of national standards, preempting states from passing laws that vary from that federal standard.
- Uniform standards can also lead to efficiency. This efficiency can be particularly beneficial in fields where having a single regulator can lead to significant cost savings. Nuclear power plant safety, is one example, which we'll touch on more in a moment. It is worth noting, however, that in some instances, the efficiency argument is used to generally oppose local regulatory authority even when the evidence does not support claims of efficiency. For example, to return to paid sick leave, many legislators oppose paid sick leave on the grounds that it stifles businesses by imposing undue costs. If different local governments within a state can enact different local paid sick leave ordinances, businesses often argue that it becomes increasingly complicated to administer different paid sick leave benefits across jurisdictions. To the contrary, research has generally found that implementation of paid sick leave has not been overly burdensome for employers and that it reduces employee turnover and presenteeism and increases employee productivity.
- And finally, ceiling preemption guarantees equality. The idea here is that ceiling preemption eliminates disparities in the protections afforded to people based solely on where they live. A law with ceiling preemption might not set the highest possible standards, but at the very least, it ensures that everyone is held to the same standard and that no one is left without any standard. Equality treats everyone the same. It is important to remember that equality is different from equity. As we discussed earlier, equity ensures that people have what they need to thrive, and it acknowledges what one person or population needs might be different from what another needs. If the goal is to achieve equity in a certain area, that is difficult with ceiling preemption.

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Let's look at a few examples where uniformity might have benefits that outweigh its drawbacks and where ceiling preemption therefore is in effect. This can happen on the federal and state levels, but for the next few examples, we're going to focus on federal ceiling preemption.

Where might it make sense for the federal government to enact one law that applies across the country instead of the potential for having fifty different standards in the fifty states?

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One example of ceiling preemption is airline safety regulations. Because we don't want pilots worrying about what standards and regulations might apply as they cross state lines in the air, it seems most logical and efficient to regulate airline safety on the federal level and not to allow states to enact different laws. And that's what we do: airline safety is regulated by the federal government, and state and local governing bodies are preempted from enacting laws in this area.

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Another example is nuclear power plant safety. Nuclear safety issues related to the construction and operation of nuclear power plants in the United States are governed by federal regulations issued by the Nuclear Regulatory Commission. Because the regulation of nuclear power plants requires a great deal of technical expertise, extensive staffing, and large capital investment and infrastructure, having a single regulator – here, the Nuclear Regulatory Commission – streamlines the regulatory process and is therefore cost efficient.

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A third example is the development of military or foreign relations policies. Again, it makes sense that the United States would want national uniformity when negotiating with other countries and engaging in global affairs. As a result, the federal government completely occupies this space.

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Let's pause for a quick question. Which of the following are reasons for ceiling preemption?

A. Efficiency

B. Equity

C. Uniformity

D. A and C

E. A, B, and C

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If you picked D, for answers A and C, you are correct. Efficiency and uniformity are two reasons for ceiling preemption. This preemption ensures that everyone is held to the same standard, which is equality and not equity, which is why answer choices B and E are incorrect.

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With floor preemption, the higher level of government passes a law that establishes a minimum set of requirements. Lower levels of government can add more or more rigorous requirements. As we showed with several examples of ceiling preemption, there are times when uniformity makes sense. However, there are also benefits to local control:

- Local control allows the flexibility to tailor policies to fit a community's needs.
- Local control can also foster innovation. State and local governments are sometimes called "the laboratories of democracy" because they can test or refine policy ideas. Local control creates an environment that allows the development of innovative policies by testing them on a smaller scale.
- And with innovative policies comes the opportunity to drive policy change more broadly and encourage progress in areas that are unsettled because the science is still evolving or policymakers are still learning what works.

Yet history also cautions against unchecked local control. For example, in some jurisdictions, local control over zoning and housing development has resulted in residents' opposing new development in their communities, thereby constraining housing supply and potentially causing a regional housing shortage. Floor preemption is one safeguard against unchecked local authority.

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In June 2011, the Institute of Medicine – which has since been renamed the Health and Medicine Division of the National Academies of Science, Engineering, and Medicine – weighed in on the issue of preemption and the roles of the various levels of government in a report about using law to address public health challenges.

In its report, it highlighted floor preemption and recommended that:

"when the federal government regulates state authority, and the states regulate local authority in the area of public health, their actions, wherever appropriate, should set minimum standards [floor preemption], allowing states and localities to further protect the health and safety of their inhabitants. Preemption should avoid language that hinders public health action."

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Now that you know the basics of floor preemption, let's look at a few examples, again on the federal level.

Civil rights laws are one area where states may go beyond what is required by federal law. For example, Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination on (among other things) the basis of gender, including discrimination on the basis of pregnancy. Some states, including California, have gone further and require employers to provide greater pregnancy benefits than what is required by federal law. In a case challenging the California statute requiring employers to grant leave for pregnant employees, the California Court of Appeals explained that Congress intended to "construct a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise."

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Another illustration of floor preemption is in the implementation of federal environmental laws. The Clean Water Act is a good example of the combined effort that the federal government and states play in ensuring water safety. Under the Clean Water Act, discharging any pollutant into the water without a specific permit is illegal. Although this is a federal law, each state must establish the threshold amount of pollutants that facilities may lawfully discharge into the water.

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A final example are school nutrition standards. Federal law sets minimum standards for foods sold at schools participating in the National School Lunch Program, but it allows state agencies and local school districts to impose more rigorous and/or additional nutrition requirements.

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Back in the county of Innovation, Omari learns that his state does not have a paid sick leave law, but state legislators are in the process of drafting one. State policymakers will need to decide how that law will sit relative to local paid sick leave laws. Will the state law act as a floor, guaranteeing a minimum number of paid sick leave days and setting other minimum standards? If so, this means that other local governments within the state, such as Omari's, could pass even stronger paid sick leave laws on top of the existing state law. Or will the state law act as a ceiling, in which case, the state law preempts any local law.

Whatever the state decides, it will affect the paid sick leave laws that localities such as the county of Innovation can pass.

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In addition to floor and ceiling preemption, there is a third type of preemption, called vacuum (or sometimes null) preemption. This occurs when legislators choose not to enact regulations in a particular field and actively forbid lower levels of governments from doing so, creating a regulatory void. This typically happens on the state level and therefore most often affects local government authority.

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Vacuum preemption is a growing trend in the public health world right now, especially when it comes to labor and wage laws, such as those regulating the provision of paid sick leave days.

It is often easier for cities and counties to enact their own laws reflecting their needs and desires of and protecting the health of their communities; however, as more do so, an increasing number of industries and their lobbies may disagree with these laws and are responding by using state-level vacuum preemption to stop all local action.

This is a map of the states – highlighted in red – that as of February 2024 have laws preempting local paid sick leave ordinances. The vast majority of these states preempt local paid sick leave ordinances yet have no statewide standard, creating a regulatory void. This is vacuum preemption. A few states, such as Oregon and Maine, have state-level paid sick leave laws but preempt local paid sick leave; these are examples of ceiling preemption rather than vacuum preemption.

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Indiana is one of the states that creates a regulatory vacuum regarding employee benefits and leave. The excerpt on the slide from one of Indiana's statutes expressly prohibits local governments, defined by Indiana as a "unit," from passing any law that:

- Requires employers to provide employee benefits, such as health or disability insurance
- Requires employers to have a leave policy, such as paid sick or maternal/paternal leave

As a result, no city or county in Indiana may regulate any of these issues, even if the state has not enacted its own substantive standards in these areas. While individual employers can choose to provide these benefits, all workers throughout the state will be entitled to these benefits and types of leave only if Indiana or the federal government creates floor requirements.

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Additional areas where states have used vacuum preemption include local minimum wage laws and food labeling laws. For example, in 2016, Alabama passed the Uniform Minimum Wage and Right-to-Work Act, which expressly preempted local governments from establishing minimum wage laws but did not create a state-level minimum wage. This law effectively created a regulatory vacuum at the state and local levels, leaving only the federal minimum wage law in effect in Alabama.

Similarly, Texas enacted a law preempting local governments from passing ordinances that prohibited landlords from rejecting tenants based solely on a person's source of income. Texas passed this law in response to a city of Austin ordinance that provided this protection to tenants, particularly individuals who use housing vouchers – money from the federal government that assists individuals with paying for housing. Texas did not create any requirements in this area, leaving a vacuum.

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Vacuum preemption can have detrimental effects on public health efforts by limiting local efforts to address public health issues and creating a regulatory vacuum, as a result, preventing some innovations without adding to uniformity. Furthermore, vacuum preemption can result in a nonrepresentative political body making decisions that may conflict with the specific needs of the community or exacerbate inequities.

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For example, in 2016, Birmingham, Alabama, a majority Black, working-class city raised its minimum wage from the federal minimum of $7.25 to $10.10. Two days later, the state legislature, predominantly composed of White legislators from other areas of the state, passed a law barring all Alabama localities from raising its minimum wage or requiring other employee benefits. This is an example of how preemption as a legal tool can sometimes be problematic for structural reasons. Local governments may be more representative of and more responsive to the needs and desires of the local population. When a locality is demographically very different – for example, racially, socioeconomically, or politically – as Birmingham is, from the state, the state legislature may not reflect either the makeup or the political preferences of that locality. By enacting state-level laws that are preemptive, the legislature may be thwarting the ability of the local government to address specific problems in a way that is most helpful to the people experiencing those problems daily.

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No type of preemption is inherently bad – it can promote or inhibit public health and equity depending on its use. Despite vacuum preemption commonly being used to constrain local public health authority, it can also be used to advance equity. For example, state vacuum preemption of 911 nuisance laws, or laws that penalize people for repeated 911 calls, can advance equity by ensuring people are not dissuaded from calling 911 for legitimate health and safety purposes.

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Finally, it is worth noting that sometimes the higher level of government will go one step further to ensure that there is a regulatory void by penalizing lower levels of government or local officials who legislate in certain areas. This may be referred to as punitive preemption, or super-preemption.

For example, a state could remove funding from a local jurisdiction that enacts laws in the preempted area. Other punitive measures may include fines for elected officials who legislate in the preempted area; giving corporations or individuals the right to sue local governments or elected officials for violation of preemptive laws; or removal from office if an elected official violates such a law.

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For example, in 2016 Arizona enacted a law requiring the state treasurer to withhold state funding from any local government that is determined by the state's attorney general to have enacted a preempted local law, unless and until the local government repeals the purportedly preempted law. What makes Arizona's punitive preemption even more notable is that it is not limited to specific topic areas, as most other punitive state laws have been. Rather. it applies in a sweeping manner to any local governments with laws that violate – or may violate – any provision of state law or the Arizona Constitution.

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Before moving to the next section, let's pause to check your understanding.

Which of the following is an example of vacuum preemption?

A. A state law preempting local governments from passing ordinances to protect tenants from housing discrimination and not having any protections in state law

B. A state law requiring a minimum set of protections for tenants against housing discrimination

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If you chose A, you are correct. A state law that preempts local action on a topic without enacting any regulations at the state level leaves a vacuum of regulation on that topic. Recall the example from the Texas law that prohibits local governments from passing ordinances that prohibit landlords from rejecting tenants based solely on a person's source of income.

If a state passes a law requiring a minimum standard but allows local governments to add requirements, that is floor preemption. That is what is described in choice B.

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Now that we've covered the basics of preemption, let's talk about how to know whether something is preempted.

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To spot preemption, there are two main questions to ask yourself:

- Are you working for a state or local government?
- What does the language of the law say?

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The first question relates to identifying the higher level of government's laws that might have preemptive effect. If you work at the state level, you will need to look to federal law to determine if there is preemption. If you work at the city or county level, you will need to look to both federal AND state law. A state can, through its laws, tell a city or county that a particular topic is going to be regulated only at the state level, thus preempting local government efforts.

And the federal government, through its laws, can tell state AND local governments, "Sorry; you don't get to regulate in a given area. If you try, any laws you pass will be preempted."

It is important for any city or county trying to enact a new regulation to check for preemption by both federal AND state law.

State and local governments should work with their attorneys to check for preemption in state and federal laws.

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Second, ask what the language of the law says. Preemption can be express or implied.

With express preemption, the preemptive law includes explicit preemption language. It might say something like: "All local laws on this subject are preempted."

With implied preemption, the higher-level law does not mention preemption explicitly, but there is something about the law that makes it clear that the legislature intended to regulate the entire field. It's not always obvious when there is implied preemption, and sometimes courts have to decide whether a certain law is intended to preempt lower-level laws. We'll talk more about how to spot this type of preemption in a minute.

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Here's an example of express preemption from Oklahoma. Its Prevention of Youth Access to Tobacco Act contains a preemption provision that expressly states:

"No agency or other political subdivision of the state, including, but not limited to, municipalities, counties or any agency thereof, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, distribution, advertising, sampling, promotion, display, possession, licensing or taxation of tobacco products, nicotine products or vapor products."

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Determining whether something is impliedly preempted can be tricky. Unlike explicit preemption, it is not always clear whether implied preemption is present in a law. Consider, for example, another tobacco case, this time in Maryland.

The Maryland Court of Appeals found that even though state law does not expressly prohibit local regulation of tobacco product sales, it "comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts [local regulation of] this field."

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To recap: With express preemption, lower levels of government can immediately know their limitations on enacting a law on a topic by reading the plain language of the law. This type of preemption could create a regulatory vacuum if the higher level of government does not have any regulations on that topic.

Implied preemption, which does not mention preemption explicitly, can be hard to spot. Even courts can have trouble determining whether a particular law was intended to prevent a lower level regulating a particular issue. An attorney can help determine whether preemptive intent is implied by the context of the law, but often the final decisions about implied preemption are left up to courts.

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In addition to looking for preemption in the text of the law, it's also important to check whether the laws of the higher level of government have a savings clause that preserves state or local authority. As the name suggests, savings clauses are provisions that carve out exceptions and "save" state or local authority that otherwise would have been preempted by the rest of the law.

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To see what a savings clause looks like in practice, the federal Family Smoking Prevention and Tobacco Control Act is a good example.

There are lots of provisions within the act, and the preemption provisions are quite complex. For purposes of today's discussion, we're going to focus on only two clauses.

The first clause is the preemption clause, which says:

"No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement . . . relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products."

So, the precise preemptive intent is stated outright. This is an example of express preemption. Here, it is saying that while state or local governments can regulate some aspects of the tobacco industry, it cannot pass laws that are broader or more stringent – or even just different – in the areas explicitly listed in the preemption clause.

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The second clause is a savings clause, which carves out an exception to preemption. It explains that the preemption clause "does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products."

So, what does this all mean? Are states preempted from regulating tobacco?

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The US Court of Appeals for the Second Circuit tackled this issue in 2013. There, the question was whether the Federal Tobacco Control Act preempted a New York City ordinance governing the sale of flavored tobacco products.

The Second Circuit ruled in favor of the city, saying that, no, the Federal Tobacco Control Act did not preempt the New York City ordinance and that the city did have the authority to regulate the sale of flavored tobacco products.

First, the court explained that the ordinance regulated the sale (and not the manufacturing) of tobacco products; therefore, it would not fall under the Tobacco Control Act's preemption clause, which only restricts states from regulating the manufacturing of cigarettes. And even if the ordinance had triggered the preemption provision, it would not be preempted because it also falls within that section's savings clause. Remember back to the previous slide : the savings clause exempts from preemption local laws that establish "requirements relating to the sale … of … tobacco products." Here, New York City's regulation limits the businesses where flavored tobacco may be sold – a requirement "relating to the sale … of … tobacco products" within the plain meaning of the savings clause.

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It is worth noting that in April 2022, the Food and Drug Administration issued a proposed rule to prohibit the manufacture and sale of menthol cigarettes and all flavored cigars. This is an important step toward putting an end to tobacco companies' decades-long efforts to push flavored products to certain social groups.

As Health and Human Services Secretary Xavier Becerra noted: "The proposed rules represent an important step to advance health equity by significantly reducing tobacco-related health disparities." Tobacco companies have long driven unjust racial health inequities by inundating communities of color with menthol advertising and promotions that unfairly exacerbate these harms. Local governments that leveraged their authority to restrict the sale of flavored products – including New York; Chicago (the first US city to do so); San Francisco; Missoula, Montana; Brown County, Minnesota; and over 200 other localities – helped pave the path to this moment.

After an extended notice and comment period, the FDA submitted its final rule prohibiting the sale of menthol cigarettes and flavored cigars to the Office of Management and Budget in October 2023.

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The New York case in the example had to do with federal preemption, but what about state preemption of tobacco laws?

Twenty-seven states have enacted laws that explicitly allow cities and counties to adopt smoking restrictions that are more stringent than or differ from the state standard.

One example is from the California Labor Code. The code has a preemption clause that essentially prohibits local governments from passing restrictions on smoking in the workplace. The code also has a savings clause that allows local governments to pass regulations restricting smoking in all areas outside of the workplace, such as in public parks.

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Based on what you've just learned, which of the following must you consider when determining whether a higher-level law preempts an issue?

A. The plain language of the law

B. Legislative intent

C. Case law

D. A and B

E. A, B, and C?

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If you picked E, you're correct! The plain language of the law – answer choice A – will indicate whether something is expressly preempted. Legislative intent (choice B) and case law (choice C) can help you find implied preemption. So all three will help you determine whether there's preemption.

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And that brings us to our last segment: how to approach preemption in the everyday practice of public health. This section discusses strategies for navigating preemption.

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Before we discuss strategies for navigating or responding to preemption, let's recap what we've learned about approaching preemption.

First, you need to know your authority. How do you know whether you can enter a certain field to pass a law without being preempted? Remember back the two key questions we talked about earlier. To determine whether your law is preempted, first identify the higher level of government that might preempt you. So if you're a state, look to federal law. If you're a city or county, look to the relevant federal AND state laws.

Second, examine the language of the law: Does the higher level of government's law expressly preempt you? If it's not immediately clear, consider the legislature's intent: Is there implied preemption?

Third, check whether the laws of the higher level of government have a savings clause that preserves state or local authority.

A final important step is to stay alert. A lot of preemption provisions are (sometimes intentionally) included in legislation at the last minute. So it's important to keep an eye out for legislation on subjects of interest and to be prepared to respond quickly.

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Now that we've recapped how to spot preemption, let's discuss ways to navigate or respond to it.

Returning back to the county of Innovation, let's imagine that the state midterm elections just happened and changed the composition of the state legislature. A party that is generally opposed to paid sick leave laws has a majority now and has their eyes set on prohibiting paid sick leave requirements in the state.

A legislator presents a bill that will preempt local governments from enacting paid sick leave laws. One of the local policy organizations that Omari and his team have been working with has been tracking state bills to spot potential preemption of its paid sick leave law and alerts the county to the proposed bill. Now the county of Innovation must determine how the bill would affect a local paid sick leave law and how likely it is that the bill will pass. Reading the bill, they discover that the bill expressly preempts all local paid sick leave laws with no savings clause. Furthermore, there is a punitive provision that allows the state to withhold some funding from local governments that attempt to pass paid sick leave laws. The preemptive language in the bill would prevent local governments from tackling unequal access to paid sick leave across the county.

Because there is no statewide paid sick leave law and this bill would impose penalties on local governments that attempt to pass such laws, this is an example of both vacuum and punitive preemption.

Additionally, the county predicts that because of the shift in the political composition of the state legislature, the bill will almost certainly pass. What can the county of Innovation do now?

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In these next few slides, we outline three strategies to respond to imminent or actual preemption that may negatively affect health equity: repeal bills, find ways to work around the preemptive legislation through alternative policy approaches, and engage in litigation challenging the legislation.

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First, repeal bills are pieces of state legislation that repeal state preemption laws and return legal authority to local governments. They can invalidate specific preemptive provisions or even repeal an entire piece of preemptive legislation altogether. As with any legislation, these repeal bills can be stand-alone bills or be part of a larger piece of legislation, and they must go through the usual state legislature. An example comes from Delaware, which had previously preempted local smoke-free regulations in a 1994 statewide tobacco control bill. This preemption language was subsequently repealed as part of a 2002 Delaware Clean Air Act that also expanded the state's smoke-free regulations.

The feasibility of this approach depends on several factors, such as the issue involved, the specifics of the preemptive state law, the makeup of the state legislature, and the interests of affected industries or other parties. Based on these and related factors, repeal may be relatively straightforward, or it may require substantial time and resources.

In Omari's case, if the state passes a law preempting paid sick leave laws, the county could push for a repeal bill in the future if and when a politically favorable climate returns.

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If there is not political consensus to repeal, local governments may try to work around the preemption. For example, a local government's ultimate goal might be to reduce tobacco use by increasing the cost of tobacco products. It may initially seek to enact a local excise tax on tobacco products but find that the state preempts local tobacco taxes. Rather than seeking to overturn this preemption, the local government could consider alternative policies that achieve their objective, such as enacting a minimum price for tobacco products and prohibiting the use of discounts and coupons to lower their price.

In the county of Innovation, local policymakers might be able to work around the preemption bill by exploring other policy levers that achieve similar effects, such as offering incentives to employers who provide paid sick leave or strengthening other leave requirements.

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Finally, litigation challenging the preemption may be a viable strategy. Litigation can nullify preemptive legislation outright, though it comes with costs and risks. First, litigation is time-consuming and expensive. Second, a court's decision is generally not easy to predict. Depending on the previous case law in the state and the judge assigned to the case, any number of results, good or bad, can occur.

As the county of Innovation determines whether it should tackle the preemption bill head-on with litigation, it should consider whether it has the resources for lengthy litigation, the likelihood of success, the possibility of a bad ruling that will forestall future challenges, and even the chance that the state may take retaliatory action against the county because of the lawsuit.

For a real-life example of how litigation can be used to combat preemption, let's go to Ohio.

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In April 2011, the Cleveland City Council passed an initiative banning the sale of artificial trans fat–containing foods from local grocery stores and restaurants.

Two months later, the Ohio Senate used an amendment in the state budget bill (a bill completely unrelated to food and nutrition) to block the city's initiative.

In response, the city of Cleveland sued the state for its attempt to block the proposed ban. The city argued that the state's actions to control how Cleveland regulates food within its borders amounted to an unconstitutional attempt to preempt an action that should have been permissible under its home rule powers.

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The court ruled in favor of the city, determining that Cleveland had acted within its authority when it banned the sale of foods containing artificial trans fats.

The court explained that the state's amendments were an unconstitutional attempt to preempt the city from exercising its home rule powers. Under the Ohio Constitution, municipalities have the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations, as are not in conflict with general laws." In its ruling, the court's decision focused on whether the state law was a general law and applied a four-part test. To be a general law, the law must (1) be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly; (3) set forth police, sanitary, or similar regulations rather than only grant or limit legislative power of a municipal corporation; and (4) prescribe a rule of conduct on citizens generally. The court found the state law did not comply with any of these tests.

Moreover, the court noted the amendments were tucked away in the state's appropriations act, which the Columbus Dispatch newspaper had compared to a "junk drawer" – "a place to stow … odds and ends that you just don't know what else to do with." The legislation was only two pages in a 3,000-page appropriations bill. Furthermore, the amendments had not been vetted by the usual committee process. There were no hearings on the amendments in any of the House or Senate committees. And although the amendments would affect the health of Ohio citizens, there was no testimony to any legislative committees from any nutritionist, dietitian, or other health care professional explaining the health effects of trans fats. Ohio law has a rule in which legislation must have unity of subject matter. Based on the facts of the case, the court found the amendments violated this rule.

This is another example of how preemption can at times be tricky and complicated, so it's important to stay alert – and, when in doubt, seek the help of legal counsel.

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Repeal bills, alternative policies, and litigation are just three of the many strategies that can be employed to challenge preemption that may exacerbate health inequities. However, as with any other strategy that opposes, works around, or otherwise requires interpretation of state preemption law, an attorney should be consulted before proceeding.

To learn more about these preemption strategies and others, refer to ChangeLab Solutions' "Addressing Preemption in a Local Policy Campaign" toolkit.

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This brings us to the end of our training. Here are a few takeaways to keep in mind:

- Because preemption can affect all aspects of what a state or local government can regulate, it can have significant implications for health equity
- Preemption is not inherently good or bad. Its effect on equity depends on how it is used
- To avoid preemption that has negative health equity implications, it is important to identify preemption as early as possible, understand its scope, and determine a strategy to address preemption

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Before we conclude, here's some brief background information on the content providers.

ChangeLab Solutions is a nonpartisan, nonprofit organization that uses the tools of law and policy to advance health equity. They partner with communities across the nation to improve health and opportunity by changing harmful laws, policies, and systems. Their interdisciplinary team works with public health lawyers; state, tribal, local, and territorial health departments; other government agencies; community organizations; and local institutions to design and implement equitable and practical policy solutions to complex health challenges.

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The mission of the CDC's Public Health Law Program – or PHLP – is to advance the use of law as a public health tool.

PHLP advances its mission by creating tools that can be used to influence public health outcomes – for example:

- Legal epidemiology – or legal mapping and evaluation
- Workforce development opportunities, including webinars, trainings, training materials, fellowships, internships, and externships
- Partnerships and outreach

PHLP does all of this to serve CDC programs as well as state, tribal, local, and territorial communities.

To submit a request or to learn more about public health law, visit the program's website at www.cdc.gov/PHLP.

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We also want to connect the content we discussed today with public health competencies.

Individuals who work as public health practitioners, lawyers, and policy experts in state, tribal, local, and territorial health departments need measurable skills to move their careers forward. CDC's Public Health Law Program developed the Public Health Law Competency Model to help guide practitioners in career trajectories. This module of the Public Health Law Academy covered the four competencies listed on this slide to build skills for public health practitioners in public health law. We want to note that these are not the objectives for this course but general public health law competencies suitable for the public health professionals at all levels of their careers, from students to entry-level staff to supervisors and executive-level managers.

There are four competencies:

1. Define basic constitutional concepts that frame the everyday practice of public health.
2. Describe public health agency authority and limits on that authority.
3. Identify legal tools and enforcement procedures available to address day-to-day (nonemergency) public health issues.
4. Distinguish public health agency powers from those of other agencies, legislatures, and the courts.

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This slide acknowledges that this training was made possible in part by a Cooperative Agreement with the CDC and that the views expressed in the training do not represent the official policies of the Department of Health and Human Services.

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Thank you for attending our training!