

preemption | watch

Best Practices: Tracking and Countering Preemption

Be prepared

- ✓ Expect preemption to become part of *any* proposed public health legislation at the federal or state levels even if it's not part of the original bill. Never assume that a bill is safe or that sponsor(s) can control its progress.
- ✓ Know your bottom line in advance. All major stakeholders should understand preemption and agree on a firm position before entering the legislative process.

Know (and learn from) the opposition

- ✓ Identify the supporters of preemption to understand why they want to eliminate state or local authority. Be prepared to “shine a light” on industry lobbyists who are the most common supporters of preemption.
- ✓ Learn from observing lobbyists for industries that support preemption. They may have closer relationships with legislators and staff than public health advocates, and therefore more accurate and timely information about amendments and process.
- ✓ Supporters of preemption take the long view, so carefully consider the long-term opportunities for progress that may be lost due to preemption, including potential damage to grassroots momentum.

Understand the opposition's tactics

- ✓ Preemptive legislation may be introduced at the outset, but preemption rarely follows normal legislative procedure.
- ✓ Preemption is often added to public health legislation very late in the process. That means supporters of a good bill must quickly change their position to “oppose” and communicate that change to colleagues and the media.

In the Midnight Hour

In 2008, California was part of a national movement for restaurant menu labeling. Local communities, including San Francisco, passed strong laws requiring restaurants to disclose nutrition information. They also supported statewide menu labeling legislation, but without preemption. In the final week of the legislative session, preemption was added to the state bill, but many of the bill's supporters weren't even told about the change. While the American Heart Association was able to change its position to “oppose,” many groups outside of Sacramento didn't know about the change until it was too late.

The Old Switcheroo

In 2009, the Texas House of Representatives, at the instigation of the homebuilding industry, considered a bill to preempt local residential fire sprinkler ordinances. Although that bill died in committee, a preemption clause was added to an unrelated bill (on licensing plumbers) that had already passed the Senate. The preemptive amendment was adopted during the second reading in the House, thus avoiding the committee process, so no time remained for fire prevention advocates to organize in opposition to preemption.

- ✓ Lobbyists for industry often try to “divide and conquer” in order to pass preemption. Typically, this means industry lobbyists work with one or more pro-health group(s) they consider “weak links” that will continue to support legislation even with preemptive language.
- ✓ Another industry tactic is amending preemption in one area into a bill on an unrelated topic. Because the supporters of the original legislation (e.g. a plumbers’ trade association) are primarily invested in their own issue, they are usually unwilling to oppose their own bill to stop preemption in another policy arena (e.g. fire prevention).

Negotiation

- ✓ Make sure that all major stakeholders, including those at the state and local levels, agree on a position regarding preemption *before* legislative negotiations.
- ✓ Negotiators on behalf of public health must have the expertise to appreciate the full impact of preemption, including potential damage to grassroots momentum.
- ✓ All proposed federal or state legislation should include a well drafted “savings clause” that preserves the authority of lower jurisdictions to adopt stronger health protections. Then ensure that this anti-preemption language is not removed or weakened.

The Weak Link

By 2010, there was a growing national movement for strong local and state restaurant menu labeling laws. Not surprisingly, the National Restaurant Association’s highest priority was preemption. A coalition of health groups supported federal menu labeling legislation, but opposed preemption. However, one key group in Washington agreed to accept preemption and lobbied others to drop their opposition. As a result, the federal menu labeling law, passed as part of health care reform legislation in 2010, preempts stronger state or local menu labeling laws.

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