Preemption in 2016 & Beyond: 

Emerging Issues and Best Practices

January 28, 2016
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WEBINAR: Preemption in 2016 & Beyond
Emerging Issues & Best Practices

Preemption today: Overview and update

Mark Pertschuk, JD
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Grassroots Change & Preemption Watch
Oakland, California

Thursday, January 28, 2016
2:00-3:30 PM Eastern Time/11:00AM-12:30 PM Pacific Time
Prevention Institute & Grassroots Change

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**Preemption**

**Preemption:** When a higher level of government eliminates or limits the authority of a lower level.

**Federal: Supremacy Clause.**

“[T]he Laws of the United States... shall be the supreme Law of the Land...
any Thing in the...
Laws of any State to the contrary notwithstanding.”

- US Constitution, Article VI

**State:** Generally have the same broad preemption powers, but state constitutions trump state statutes, and state legislatures must follow their own procedural requirements (e.g. single subject rules).
Express & Implied Preemption

- **Express preemption**: When a law contains a preemption clause or other preemptive language.

- **Implied preemption**: When a court finds that a law is preemptive even in the absence of an express preemption clause.

- **Savings Clause is Essential.** “Nothing in this law preempts more restrictive state or local regulation or requirements.”
Preemption in Tobacco Control

• “NEVER AGREE TO PREEMPTION... Preemption is unacceptable and should be avoided at all costs.”

• “The AHA opposes federal preemption of state and local statutes and state preemption of local statutes.”

• “Preemption locks in the status quo... But as time passes, standards change, and measures that once seemed out of the question become politically possible.” Am Med Assn. Preemption: Taking the Local Out of Tobacco Control (2003).
Preemption: In Their Own Words

“We could never win at the local level.... So the Tobacco Institute and tobacco companies’ first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can’t do that, at least on the state level.”

- Victor L. Crawford, Former Tobacco Institute Lobbyist

“We’re not married to any particular form of pre-emption language, we’re dead serious about achieving pre-emption in all 50 states.”

- Tina Walls, Philip Morris internal document, Bates No.: 2041183751/3790, 1994
Different Issues = Identical Tactics

“But our issue is different”
The Institute of Medicine weighs in

“States and localities play a vital and historic role in safeguarding the public’s health and safety... Consequently, unless there are compelling reasons to the contrary, the federal government ought not preempt state and local authority...”

“[W]hen the federal government regulates state authority, and the states regulate local authority in... public health, [they] should set minimum standards (floor preemption) allowing states and localities to further protect the health and safety of their inhabitants.”

For the Public's Health: Revitalizing Law and Policy to Meet New Challenges, Committee on Public Health Strategies to Improve Health, National Research Council, Institute of Medicine. June 21, 2011
<table>
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<tr>
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<th>Tobacco</th>
<th>Big Food</th>
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<td>Front Groups</td>
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<td>Buying Friends</td>
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Preemption is Good News ...

Franchising.com, March 24, 2010:

“Pre-emption Of State And Local Menu Labeling Laws Good News For Franchise Restaurants”

"While the IFA lobbied strongly in opposition to the health care reform package, the one bright spot of the bill is [PREEMPTION].”

“Federal government preemption of state and local menu labeling ... will provide more regulatory certainty... Franchise restaurants... will no longer face a patchwork of state and local menu labeling mandates under this provision”
When Preemption is Appropriate

- Preemption in public health can be appropriate in the rare case of a comprehensive national or international regulatory infrastructure that by its essential nature is national or international in scope.

- Example: the Airline Smoking Ban.
  - Aircraft pass rapidly from one jurisdiction to another, so differing laws in states could subject commercial flights to laws that change several times an hour.
  - High political incentives to adopt effective safety rules.
  - A strong, comprehensive system of federal rules makes sense.
  - No “Pro-Crash” lobby – The industry profits from safety.
The Take-Away

- **Success:** Although preemption was introduced in more than 30 states, on more than 20 issues in 2015, dozens of preemptive proposals died due to sophisticated opposition from groups like FV@W, League of Cities, ANR, AHA, ACS, and many others.

- **We’ve been down this road before:** Preemption in 2016 is following a pattern perfected by the tobacco industry 30 years ago.

- **The threat is evolving:**
  - New opponents working on multiple issues (The Other NRA = Nutrition + PSD + MW ++)
  - Opposition is aggressive and fast
  - Any well-intentioned state or federal health or safety bill can be amended, often in the final stages of legislative action
Countering Preemption

- Study and expose the opposition. (CMD)
- Educate our “friends.” They still support preemption in many cases. Officials and advocates across issues need to understand the full Impact of preemption.
- Media Advocacy and Messaging are critical, and we have massaging research and tools from RFF, AHA, ANR, and others. The glare of media and public attention has often stopped state and federal preemption in its tracks. Educate the media to shine a bright light on preemption and it’s supporters.
- Resist trading preemption for health and safety protections: It can have a devastating impact on future progress, especially the ability to build effective grassroots movements.
State Interference in Local Control

Ellen Bravo, Family Values @ Work
Grassroots Change and Prevention Institute Webinar
January 28, 2016
Protecting Families and the Public Health

**PAID SICK DAYS WINS: 2006 - 2016**

- **2016**
  - 1 WIN
  - Spokane WA

- **2015**
  - 9 WINS
  - Tacoma WA, Philadelphia PA, Bloomfield NJ, Emeryville CA, Montgomery County MD, OREGON, Pittsburgh PA, Elizabeth NJ, New Brunswick, NJ

- **2014**
  - 11 WINS
  - Newark NJ, Eugene OR, CALIFORNIA, Irvington NJ, East Orange NJ, Passaic NJ, Paterson NJ, Oakland CA, Montclair NJ, Trenton NJ, MASSACHUSETTS

- **2013**
  - 3 WINS
  - Portland OR, New York City*, Jersey City NJ

- **2011**
  - 2 WINS
  - CONNECTICUT, Seattle WA

- **2008**
  - 1 WIN
  - Washington DC

- **2006**
  - 1 WIN
  - San Francisco CA

*Paid Sick Days laws expanded in subsequent years.
Why Milwaukee’s Not on the List
Who’s Behind This

American Legislative Exchange Council
ALEC
A Legislator for Every Corporation

One of the nation’s most powerful lobbies
Has nearly 52,000 members, one of the world’s largest food trade groups
Has a budget of over $65 million and employs 40 lobbyists
 Joined forces with the public relations firm Berman and Co., famous for opposing sensible public interest and safety laws
The leaders are Fortune 500 corporations
<table>
<thead>
<tr>
<th>Year</th>
<th>States that Preempted Paid Sick Days</th>
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<tbody>
<tr>
<td>2014/15</td>
<td>Oklahoma, Tennessee, Michigan, Missouri</td>
</tr>
<tr>
<td>2013</td>
<td>Arizona, Florida, Indiana, Kansas, Mississippi, North Carolina</td>
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<tr>
<td>2012</td>
<td>Louisiana</td>
</tr>
<tr>
<td>2011</td>
<td>Wisconsin</td>
</tr>
<tr>
<td>Mid-2000s</td>
<td>Georgia</td>
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Places We Stopped Preemption  2015

STOPPED FOR NOW
• Alabama
• Minnesota
• New Jersey
• New Mexico
• Pennsylvania
• South Carolina

PASSED BUT VETOED
• MT
• VA
How They Operate
What They’re Up To...
What They Say...

We can’t have a hodgepodge of local laws. It will stifle job creation. We need a uniform state standard.

It’s not fair to treat Boston, Springfield and Worchester the same. It will stifle job creation.
What They Mean...

We need one size fits all – and that size shall be ZERO!
Suppress who can vote – and what they can vote for
Putting Idea in the Water
In the Water

* Stops progress
* Sets harmful precedent
* Obscures ALEC agenda
What They’re Up To…

divide & CONQUER!

No
What We’re Up To…

"Really? — my people always say multiply and conquer."
Family Values at Work

- Web: familyvaluesatwork.com
- Twitter: @fmlyvalueswork
- Facebook: /familyvaluesatwork

Ellen Bravo

bravo@familyvaluesatwork.org

T: @ellen_bravo
Protect and Restore
Local Control

Bronson Frick
Americans for Nonsmokers ‘ Rights
ProtectLocalControl.org
No-Smoke.org
Today we want to discuss one of PM USA's most important priorities for 1994 and 1995 -- accommodation/pre-emption. Our goal, simply stated, is to see some form of accommodation/pre-emption legislation passed in all 50 states.

The achievement of universal accommodation/pre-emption is imperative because the right of smokers to smoke where they work, play -- and even where they live -- is under attack as it has never been before.

The immediate implications for our business are clear: if our consumers have fewer opportunities to enjoy our products, they will use them less frequently and the result will be an adverse impact on our bottom line.
The Power of Local Control: Smoking Control Laws* as of 10/2/2015
American Nonsmokers' Rights Foundation

Note: some laws shown are not yet in effect.

Note: American Indian and Alaska Native sovereign tribal laws are not reflected on this map.

* Laws shown are those that restrict smoking to any extent. To see a map of 100% smokefree laws, please see United States 100% Smokefree Laws at www.no-smoke.org/pdf/100Map.pdf.
Timeline of State Preemption of Smokefree Air Laws

- Florida
- Oklahoma
- Pennsylvania
- Illinois
- Virginia
- Iowa
- Connecticut
- North
- Nevada
- Louisiana
- Tennessee
- Kentucky
- Delaware
- Utah
- South Dakota
- South
- New Jersey
- Michigan
- Oregon
- Washington
- New
- Montana
- Rhode Island
- Nebraska
- Wisconsin

Years: 1985 to 2015
Words to watch for... Preemptive language

- **Preempt:** “This legislation expressly *preempts* regulation of smoking to the state...” FL STAT. ANN. 386-201 et seq.
- **More restrictive or stringent than**
- **Uniform:** “… *uniform statewide regulation* of smoking in public places, bars, restaurants, and workplaces.” CA, Prop 188 (the Philip Morris initiative), defeated 1994.
- **Consistent with [state law]**
- **Supersede**
- **Occupy the field:** “Accordingly, it is the intent of the Legislation to *occupy the field* of tobacco products regulation...” AZ, SB 1384, defeated 1996.
Big Tobacco Tricks

* **Claim Preemption in Court**
  * Industry argues there is *implied preemption*.
  * Most often occurs when first jurisdiction in state begins to consider a strong law on issue.

* **Third Parties and Front Groups**
  * Industry knows it lacks public credibility, so it gets third parties to hide behind.
  * In most cases, local business and/or state trade associations file lawsuits.
  * Lawyers and law firms representing these clients often have ties to the tobacco industry.
action. RD's are also in constant touch with Ellen, Ted and me via telephone and powerbook computer so that we're unanimous on our course of action. (EXAMPLE?)

The action taken by the legislature -- by the grasstops people we want to influence -- is the bottom line of our effort. A bill can be passed as proposed, passed in a form more acceptable to us, defeated in a floor vote, tabled until

Second, we try to keep Philip Morris out of the media on issues like taxation, smoking bans and marketing restrictions. Instead, we try to provide the media with statements in support of our positions from third party sources, which carry more credibility than our company and have no apparent vested interest. (EXAMPLE?)

Third, we create coalitions of third party sources to

Non-Preemption Clauses

“Sec. 1746. Municipal Ordinances. Nothing in this chapter shall be construed to supersede or in any manner affect a municipal smoking ordinance provided that the provisions of such ordinance are at least as protective of the rights of the nonsmokers as the provisions of this chapter.” Vermont, V.S.A. Chapter 37. Smoking in Public Places.
“The American Lung Association/American Thoracic Society opposes all forms of preemption of state and local tobacco control authority. The ability of any government entity to enact tobacco control legislation is a cornerstone of an effective tobacco control policy. *There is no trade-off worth the price of preempting a state or community’s right to pass tobacco legislation.*” American Lung Association, Policy Principle on Tobacco, April 1999.

“Target: ‘Eliminate laws that preempt stronger tobacco control laws... Retain year 2000 target’ to ‘*reduce the number of States that have clean indoor air laws preempting stronger clean indoor air laws on the local level.*’” U.S. Department of Health and Human Services, Healthy People 2010 Objectives, November 2000.
Conservative Principle? Put THAT in Your Pipe and Smoke It...

LOCAL CONTROL
STATE BAN ON CITY TOBACCO BANS

AZ. LEG.
Restoring Local Control Approaches

1) Stand-alone legislation to restore local control

2) Anti-preemption language embedded in issue legislation (both at legislature and ballot).

Tip: Consider two-pronged approach
Local Control Resolution Projects
“Easy as 1-2-3”

- Key part of strategy
- Toolkits developed in numerous states
- Instructions for coalitions; template resolution

Passing a Local Resolution Is as Easy as 1-2-3

Local control is at the heart of the broader goal of educating the public about the health effects caused by secondhand smoke and changing attitudes regarding smoking in ways that harm other people. With few exceptions, local control measures to protect the public from secondhand smoke are more effective, accomplished by greater community education and support and compliance and are better enforced than statewide legislation. There is much work to be done across the state in order for the tobacco control community to successfully advance local control legislation. Supporters of this initiative believe that the right to pass smoking laws to protect the health of their residents lies in their hands.

One of the most important steps to move local control forward with Iowa legislators is to demonstrate support for this issue in their district. Passage of local resolutions is key and exhibits broad support from cities and counties throughout the state. Local resolutions validate support of a diverse group of organizations and agencies for restoring local control.

Here is what you can do to help us make smoke-free policies a reality in Iowa:

1. Get buy-in from your supporters.
   Review the sample resolution with your coalition(s). Make sure they understand what you are asking the local city council, board of health or county to pass. Please remember resolutions are non-binding; however, they are

http://protectlocalcontrol.org/docs/Iowa%20RLC%20Easy%20as%20123%20instructions.pdf

http://protectlocalcontrol.org/docs/Iowa%20sample%20RLC%20resolution.pdf
National version

- Make it easy for partners to educate others
- Tobacco Industry quotes
- Public health statements
- Language to watch for
- Sample media, letters, resolutions, etc

Preemption of Smokefree Air Laws in the U.S.

Setting up a Preemption Strike Force

Goals of a Preemption Strike Force?
- Constant communication and quick mobilization:
  - A strike force makes communication easy by getting a message out to a large number of people by only talking to a few.
  - Because a strike force allows for quick communication, it is easier to plan a rally or get advocates to the capitol on short notice.
- Role delineation:
  - Many people, not just tobacco advocates, support local control.
  - A strike force will assign roles so that efforts to defeat preemption are not being duplicated and so that everyone is working together, as a team.

Who Should be a Part of a Strike Force?
- Coalition members from around the state who can rally advocates.
- Coalition lobbyists.
- Lobbyists from the American Heart Association, Lung Association and Cancer Society.
- Lobbyists from organizations like municipal leagues and other groups that care about protecting local control.
- Partners from organizations that support public health and may also face preemption threats, such as menu labeling and nutrition.
- Elected officials who are known champions of smokefree air and local control.

What Does a Strike Force do?
- Proactive planning and rapid response.
- Transforms new partners and new strategies for defeating preemption.
- Collect resolutions on protecting local control from municipalities and from organizations.
- Assign lobbying targets based on districts from around the state.
- Educate the media.
- Help bring people to the capitol for citizen lobby days and critical hearings.

Resources on Protecting Local Control
- Visit www.protectlocalcontrol.org
- Visit http://proposalswatch.net
- Contact ANR for more information and to answer any questions, at (510) 841-3032.

Preemption Watch Bill Tracking Summary

September 15, 2014

As you work to protect local control from preemption threats to additional public health issues, take a look at the helpful bill tracking section of the Preemption Watch, which highlights key issues.

Legislative sessions have ended in Massachusetts, Michigan, New Jersey.

Please email ANR with any new smokefree bills—or anticipated bills that we should keep our eyes open for—or preemption attempts in your state and we will be sure to add them to Preemption Watch.

In 2014, we expect to see attempts at preemptive legislation that not just in tobacco control but in areas public health issues, including nutrition and anti-obesity efforts. Of particular concern are bills that could preempt multiple health issues including tobacco control. As you prepare for your 2014 legislative sessions, check out a disease-specific preemption fact sheet from Grassroots Change.

ANR tracks pending legislation relating to states’ smokefree air policies as part of the continued fight to protect preemptive legislation before it can be passed and to overturn preemption in states where it is already in place. Since even a strong bill can become preemptive at any point in the legislative process, it is very important to track even the best bills throughout the entire legislative session and keep a watchful eye out for all attempts to remove local control.

Below is a listing of state bills that have been introduced in state legislatures thus far. Please visit the www.protectlocalcontrol.org and click on the state of your choice to view the summary, text, and status of pending bills.

The new and pending legislative bills are classified below into eight categories to clearly delineate which bills will protect public health and should be supported from those that should be opposed because they do not effectively protect public health. Weaken a strong law, or intend to preempt local control. New bills and changes in bill status since the last update appear in bold.

New bills and changes in bill status since the last update appear in bold.

Strong: Bill includes 100% smokefree non-hospitality workplaces and/or restaurants and/or bars; strengthens existing smokefree laws; or repeals preemption.

Weak: Bill contains ventilation, smoking rooms, or other key exemptions.

Weakens: Bill weakens a current strong 100% smokefree law.

Preemptive: Bill contains preeminent language that removes the right to local control.

Outdoor: Bill primarily addresses smoking in outdoor locations.

Housing: Bill addresses smoking in multi-unit housing.

E-cigarettes: Bill addresses where e-cigarettes can be used.

Other: Bills contain other provisions and should be watched.
Help partners celebrate defeating preemption attempts, including otherwise good bills.

Use awards to celebrate LOCAL policy momentum.

There is a lot of support for local control.

Not a partisan issue.
Emerging Trends in Preemption

Michael G. Bare, MPH
Program Manager/Policy Analyst
Preemption Watch

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Preemption Threats 2016

Federal

- GMO Labeling
  - Emerging evidence regarding overreliance on herbicides, especially glyphosate, as a result of prolific adoption of “Roundup-ready” crops.

- Toxic Chemical Regulation
  - TSCA “Reform”

- Municipal Broadband

- Firearms
  - National Right-to-Carry Reciprocity Act
Preemption Threats 2016

State

- Fracking (Hydraulic Fracturing) & Frac Sand Mining
- Firearm Super-Preemption
- E-cigarettes
- Paid Sick Days
- Factory Farms
- Civil Rights
- Blanket Preemption
Oil & Gas 2015
Residential Fire Sprinklers 2015

O&G Adopted: TX, OK
RFS Adopted: NV, TN
Guns & Ammunition
Super-Preemption 2015

Adopted: NV, NC
Filed: NE, AZ, TX, IA, MI

Grassroots Change connecting for better health
Other Emerging Issues

- Civil Rights
- Local Fees & Taxes (e.g. SSB taxes & firearms)
- (Disposable) Plastic Bag Ordinances
- Affordable Housing
- Multi-issue Preemption Bills
- OTHER: Knives, Transportation, Small-dollar Loans (Payday Lending)
Other Issues at Risk

Alcohol marketing
Billboards
Climate change
Distracted driving (cell phones)
Employee benefits
Environmental justice
Excise taxes
  - Marijuana
  - SSB (Soda)
  - Tobacco (including e-cigs)
Food policy
O & G injection wells
GMO labeling
GMO seeds

Marijuana marketing & sales
Minimum wage
Municipal broadband
Noise pollution
Paid sick days
Pay day/small-dollar lending
Preservation – Nature/Wilderness
Residential Fire Sprinklers
Single-use plastic bags
Sustainability
Tobacco - Smokefree
Toxic chemicals
Youth access (tobacco and e-cig)
Grassroots Change empowers grassroots leaders to build and sustain effective public health movements at the local, state and national levels.

Connect with us:

Grassroots Change
@GCPublicHealth

www.grassrootschange.net
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To ask questions: Remember, your line is muted. To ask questions, use the chat box to the right of the screen.
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