

Fact Sheet: Preemption

WHAT IS PREEMPTION?

Preemption occurs when higher levels of government (federal or state) eliminate or limit the authority of lower levels. *Express* preemption occurs when a law contains preemptive language (a “preemption clause”). *Implied* preemption happens when a court finds that a law is preemptive even in the absence of an explicit preemption clause.

Federal preemption of state and local authority stems from the **Supremacy Clause** of the United States Constitution and states have similar powers to both grant and take away local authority. In a few states, local jurisdictions have authority over matters of “purely local concern,” but as a practical matter, if there is a conflict between a higher level law and a lower level law, the higher level will prevail.

States grant various authorities to local governments. **Home Rule states** grant more authority to local governments to control their own affairs. **Dillon’s Rule states** grant little general authority to local governments, but most states employ a mix of the two. Local governments should consult an attorney knowledgeable about their own state’s law, but should never rely on a litigation solution alone to prevent the adoption of or to invalidate preemption.

DIFFERENT TYPES OF PREEMPTION

In public health, the term “preemption” usually refers to **ceiling preemption**, by which a higher level of government takes away the power of lower jurisdictions to adopt **stronger** laws.

Congress and the state legislatures have the option of setting **minimum standards**, known as **floor preemption**, without invalidating stronger state or local laws.

“**Super-preemption**” is a punitive measure so far found exclusively in firearms policy. State super-preemption laws provide statutory standing to membership organizations, including pro-gun groups, authorizing them to sue local governments and officials for adopting or enforcing local gun control policies. Super-preemption may also include enhanced fines or penalties for local agencies or officials, attorney's fees, litigation costs to a prevailing pro-gun plaintiff, and a provision banning the use of public funds to defend an individual official who is sued under a state preemption statute.

“**Blanket preemption**” refers to a law that interferes with all local authority to adopt policies to address a wide range of health, safety, and other problems. As of August 2018, Arizona is the only state to have adopted blanket preemption across so wide a range of issues, but other states have proposed similar bills. Arizona’s blanket preemption is a form of *de facto* preemption because it uses the threat of losing essential local funding transferred from the state to local communities to discourage the adoption and enforcement of local laws.

THE IMPACT OF PREEMPTION

Preemption has a negative impact on grassroots health and safety movements. Preemption eliminates the opportunity to promote state or local policies -- a key reason that grassroots advocates join together to take action. Concerns about the negative impacts of preemption are nearly universal in public health, having been raised in **alcohol policy, nutrition, tobacco control, chemical safety, agriculture, firearm policy, housing, fracking, paid leave, civil rights,** and even **fire prevention.**

Preemption is often supported by an industry that believes it will benefit from the elimination of state or local authority. That is because industry lobbyists are generally more powerful in Washington DC and the state capitols than at the local level.

In June 2011, the **Institute of Medicine** published a groundbreaking report that addressed preemption as a crosscutting issue in public health. The IOM recommended that federal and state policy makers “should set minimum standards” and “avoid language that hinders public health action.”

Federal or state preemption can be appropriate in some cases, such as the Airline Smoking Ban. Because aircraft pass rapidly from one jurisdiction to another, airline safety and health are best regulated at the federal level. However, in public health such examples are rare. The IOM concluded that (ceiling) preemption is appropriate only in **“situations where national uniformity is absolutely necessary and only after the impact on public health and enforceability has been thoroughly assessed and mitigated.”**

To ensure that a federal or state law is not preemptive, legislation and regulation must include a [savings clause](#) which preserves the authority of lower jurisdictions to protect those who elected them, for example: **“Nothing in this law preempts more restrictive local regulations or requirements.”**

REFERENCES

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