



Checked at the Check-Out Counter: Preemption at the Tobacco Point-of-Sale

Tobacco control advocates have long understood the hazards and challenges of state and federal laws that preempt local control. Local control is so instrumental to the tobacco control field that the tobacco industry and its allies have adopted a deliberate strategy of pushing for laws and bringing lawsuits to preempt local authority to pass smoke-free laws, youth access restrictions, and other tobacco control measures.¹ While the impact of preemption in the smoke-free context is widely recognized, its bearing on point-of-sale issues has received less attention, even though preemptive laws impacting the tobacco retail environment exist in many states. Communities considering promising policy options for addressing tobacco point-of-sale practices² should be aware of the potential challenges that preemption might pose for current and future policy efforts. This fact sheet explains preemption and how it can apply to the point-of-sale context.



Because preemption questions can be complicated and specific to a jurisdiction and situation, please consult with local legal counsel with questions about how preemption could impact tobacco control policy development in your area.³ For more information about preemption and how it can affect state and local tobacco control efforts, please contact the Tobacco Control Legal Consortium.

Q: What is preemption?

A: Preemption refers to a situation where one level of government limits, or even eliminates, the power of a lower level of government to regulate a certain issue. Federal preemption can come from an act of Congress, an agency regulation, an executive order, or even a treaty. These federal laws and policies can preempt state and local laws, including lawsuits based on state or local laws. Similarly, state laws and policies can preempt local laws, including ordinances, board of health rules, zoning codes, and other types of local law. If a law is preempted, that means it has no force or effect. The parent organization for the Tobacco Control Legal Consortium, the [Public Health Law Center](#),

has a [webpage](#) dedicated to preemption, which includes links to several publications explaining preemption and how it impacts tobacco control and other public health efforts.

Q: Why does preemption matter to tobacco point-of-sale efforts?

A: Preemption matters because many promising point-of-sale policies are pioneering and have yet to be widely implemented. They are a classic example of the kinds of innovative public policy that local governments are more likely to adopt in their historical roles as the “laboratories of democracy,”⁴ and which have been shown to lead to development of strong policies at the state and even federal levels. As the Centers for Disease Control and Prevention (“CDC”) has noted, point-of-sale policies such as restrictions on self-service displays and vending machines were first implemented at the local level before becoming widely adopted by states and then finally by the federal government.⁵ Preemptive state laws “can impede this diffusion of successful policy interventions.”⁶

In addition, regulation of tobacco retailers is well-suited for local control—different communities are likely to have different needs or challenges in addressing the prevalence of tobacco use and availability, depending on whether they are urban or rural communities, the age and/or racial or ethnic make-up of their residents, and other socio-economic factors. Finally, working on point-of-sale issues presents an opportunity to grow and strengthen grassroots alliances both within tobacco control and with other public health advocates working on healthy corner store initiatives and similar projects. When local authority over tobacco point-of-sale practices is stripped away or limited by preemption, an important opportunity for tobacco control progress is diminished.

Q: What is an example of a law that preempts other laws or regulatory authority?

A: Here are two examples of preemptive state tobacco control laws:

“The provisions of this act shall supersede any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace. . . .”⁷

“For the purposes of equitable and uniform regulation and implementation, the Legislature through this chapter is the exclusive regulator of all matters relating to the distribution, marketing, promotion, and sale of tobacco products.”⁸

Q: How can you know if local (or state) authority has been preempted?

A: With preemption, the key question is whether the federal or state law reflects an intent to preempt other laws. The intent to preempt can be stated expressly, meaning that a law includes words or phrases that declare the intent to preempt, or trump, laws passed by lower levels of government. Examples of words and phrases that can signal preemptive intent include (among others): “occupy the field,” “sole authority,”

“uniform,” “statewide,” “exclusive,” “supersede,” “inconsistent,” “[no] more stringent” and of course, “preempt.”

In other cases, however, it may not be as clear. In many cases, the validity of a state or local tobacco control law has been challenged based on arguments that it has been *impliedly* preempted by another law. Essentially, the argument is that an intent to preempt should be inferred from the fact that a federal or state law comprehensively regulates the area and does not seem to leave room for local regulation, or that it would be impossible for someone to comply with both levels of law at the same time. Because implied preemption usually comes up in lawsuits, courts decide whether implied preemption exists. This means that implied preemption can be difficult to spot in advance.

But even with express preemption, courts play an important role because they can decide the *scope* of expressly preemptive language. For example, in a South Carolina case, one of the arguments made by challengers to a pioneering local smoke-free law was that expressly preemptive language in the state’s youth access law also preempted local smoke-free laws. Although the trial court agreed with the challengers, the South Carolina Supreme Court was not persuaded and upheld the local law; but the case demonstrates the important role of courts in interpreting preemptive language, and the potential power of preemption.⁹

Q: Does federal law preempt state or local authority to regulate tobacco point-of-sale practices?

A: Yes and no. Federal law preempts some state and local authority relevant to tobacco point-of sale practices, but also expressly authorizes state and local governments to go beyond federal law in several ways.

The Family Smoking Prevention and Tobacco Control Act (“TCA”)¹⁰ preempts state and local authority over the warning labels required on tobacco product packaging and advertising.¹¹ It also largely preempts state and local authority over tobacco product standards, except for laws relating to fire-safe cigarettes.¹² Finally, the TCA narrowed broad preemptive language in the Federal Cigarette Labeling and Advertising Act (“FCLAA”),¹³ so as to allow state and local governments to regulate (consistent with the First Amendment) the time, place and manner of cigarette advertising or promotions based on concerns about smoking or health, as long as the regulations do not directly affect the *content* of advertising or promotional messages from cigarette manufacturers.¹⁴

The TCA does *not* preempt – and in fact, expressly preserves – state or local government authority to go beyond federal law in regulating key areas relating to tobacco point-of-sale practices, including minimum age of purchase; distribution practices such as product shelving or storage, providing free samples, sales by vending machines, and minimum pack sizes; restrictions on free non-tobacco gifts in exchange for product purchases;¹⁵ and restrictions on flavored non-cigarette tobacco products.¹⁶ For more on how the TCA

impacts the retail environment, please see the Consortium's publication [Federal Regulation of Tobacco and Its Impact on the Retail Environment](#).

Even if federal preemption is not a factor, however, whether a state statute or state case law might preempt local authority should be assessed.

Q: What types of state laws might preempt local authority to address concerns about tobacco point-of-sale practices?

A: The CDC's State Tobacco Activities Tracking and Evaluation ("STATE") System has developed a database which includes information about state tobacco control laws that have been codified, or written in statute books (i.e., it does not include case law, or court opinions). This database identifies express preemptive statutory language that could impact local efforts to address tobacco point-of-sale practices in the laws of nearly two dozen states.¹⁷ Preemptive language may be found in different parts of a state's written laws, and sometimes in more than one place. In some states, it may be included in the section of laws regulating underage access to tobacco products.¹⁸ In other states, it may be found in sections dealing with tobacco taxes and licensing,¹⁹ or in state smoke-free laws,²⁰ or in sections dealing with municipal powers in general,²¹ or in a combination of these places. For example, a Wisconsin court held that a local ordinance prohibiting self-service sales of single cigarette packages was preempted by language in both the state's youth access and cigarette tax laws.²²

A recent analysis by the CDC of state preemption of local tobacco control laws found that although significant progress was made from 2000 to 2010 in rolling back the number of states with laws that preempt local smoke-free laws, similar progress has not been made in the point-of-sale context. In fact, the CDC found that *no progress* had been made during that time in reducing the number of states that preempted local authority over some or all tobacco marketing and distribution practices.²³

It is also important to remember that just looking at a state's statutes will not necessarily provide an accurate understanding of whether local authority has been preempted, or to what extent. Additional legal research to see if there are any court opinions, or case law, explaining how the law is to be interpreted or whether there is *implied* preemption (i.e., preemption that is not spelled out in statutes), is critical.

Q: I see some language in a state tobacco control law that looks preemptive—what can I do?

A: Ask an attorney to do some legal research. The importance of legal research in this area cannot be overstated. Other statutes and case law (court opinions) could play a critical role in helping to predict what types of regulations may or may not be preempted. In other words, a law may not in fact mean what it seems to mean at first glance. Often, a jurisdiction's tobacco-related statutes must be read in context with each other, and in light of relevant court decisions, to fully understand the legal landscape.

For example, one part of Nevada's tobacco control laws includes this preemptive language:

an agency, board, commission or political subdivision of this state . . . shall not impose more stringent restrictions on the smoking, use, sale, distribution, marketing, display or promotion of tobacco or products made from tobacco than are provided by [Nev. Rev. Stat. Ann. §§ 202.2491-202.2492 (relating to smoke-free restrictions) and 202.2493-202.2494 (relating to youth access restrictions)].²⁴

After this law was passed, however, the Nevada Clean Indoor Air Act was enacted. It includes the following language:

Nothing in state law shall be construed to restrict local control or otherwise prohibit a county, city or town from adopting and enforcing local tobacco control measures that meet or exceed the minimum applicable standards set forth in this section.²⁵

So, the more recent law seems to significantly limit the preemptive effect of the older law. This would be an important factor to consider in assessing whether a local government in Nevada had the authority to pass certain kinds of tobacco control laws relating to the point-of-sale.

In another example, the section of the California Penal Code that makes selling or providing tobacco to minors under 18 years old a crime includes the following language:

It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section.²⁶

California courts have held that this language did not preempt local authority to prohibit cigarette sales by vending machine²⁷ or to pass a local tobacco licensing ordinance.²⁸

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Notes

¹ See, e.g., Robin Hobart, Am. Med. Ass'n, PREEMPTION: TAKING THE LOCAL OUT OF TOBACCO CONTROL (Elva Yanez ed., 2003), available at <http://www.rwjf.org/newsroom/SLSPreemption2003.pdf>; Michael Siegel et al., *Preemption in Tobacco Control, Review of an Emerging Public Health Problem*, 278 J. AM. MED. ASS'N, 858 (1997).

² For more information about tobacco point-of-sale policy options, including [sales restrictions](#), [licensing](#) laws, and other options, please visit the [Public Health Law Center](#) website.

³ The information contained in this document is not intended to constitute or replace legal advice.

⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁵ Ctrs. for Disease Control and Prevention, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access — United States, 2000–2010*, 60 MORBIDITY AND MORTALITY WEEKLY REPORT 1124, 1125 (2011) [hereinafter, “MMWR”].

⁶ *Id.*

⁷ N.J. STAT. ANN. § 26:3D-63 (West 2006).

⁸ S.D. CODIFIED LAWS § 34-46-6 (1994).

⁹ *Foothills Brewing Concern, Inc. v. City of Greenville*, 660 S.E.2d 264 (S.C. 2008) (finding no express or implied preemption of local smoke-free laws).

¹⁰ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C. and 21 U.S.C. (2009)).

¹¹ 21 U.S.C.A. § 387p (a)(2)(A).

¹² *Id.* §387p (a) (1) and (2)(B).

¹³ 15 U.S.C.A. § 1334(b).

¹⁴ *Id.* § 1334(c). 23-34 94th St. Grocery Corp. et al. v. New York City Bd of Health, --F.3d -- (2nd Cir. 2012) (holding that city board of health regulation requiring tobacco retailers to display warning signs adjacent to cigarette displays was preempted by FCLAA). At time of publication, the appeal period for this case was still running.

¹⁵ In a March 2012 opinion, the U.S. Court of Appeals for the Sixth Circuit held that the TCA’s prohibition on free non-tobacco gifts for proofs-of-purchase or other so-called “continuity programs” violated the First Amendment, and so is invalid. *Discount Tobacco City & Lottery, Inc., et al. v. U.S. et al.*, 674 F.3d. 509, 543-44 (6th Cir. 2012). At time of publication, this decision was being appealed.

¹⁶ 21 U.S.C.A. §387(p).

¹⁷ Centers for Disease Control and Prevention, State Tobacco Activities Tracking and Evaluation (STATE) System, available at <http://www.cdc.gov/tobacco/statesystem> (last visited on June 21, 2012). See also MMWR, *supra* note 5.

¹⁸ See, e.g., MONT. CODE ANN. § 16-11-311 (from Montana’s “Youth Access to Tobacco Products Control Act”); OKLA. STAT. ANN. TIT. 37, § 600.10 (from Oklahoma’s “Prevention of Youth Access to Tobacco Act”); and KY. REV. STAT. ANN. § 438.300 (from Kentucky’s “Sale and Distribution of Tobacco Products” subchapter).

¹⁹ See, e.g., IOWA CODE ANN. § 453A.56 (in Chapter 453A, “Cigarette and Tobacco Taxes”); MICH. COMP. LAWS ANN. § 205.434 (14) (from Michigan’s “Tobacco Products Tax Act”); and WIS. STAT. ANN. § 139.43 (from subchapter “Cigarette Taxes”).

²⁰ See, e.g., NEV. REV. STAT. ANN. § 202.249 subsec. 4. *But see* discussion above regarding Nevada law.

²¹ *E.g.*, 53 PA. CONS. STAT. ANN. § 301 (Pennsylvania).

²² U.S. Oil, Inc. v. City of Fond Du Lac, 544 N.W.2d 589 (Wis. Ct. App. 1996).

²³ MMWR, *supra* note 5.

²⁴ NEV. REV. STAT. ANN. § 202.249 subsec. 4.

²⁵ *Id.* § 202.2483 § 8.

²⁶ CAL. PENAL CODE § 308(e).

²⁷ Bravo Vending v. City of Rancho Mirage, 16 Cal.App.4th 383 (1993).

²⁸ Prime Gas, Inc. v. Sacramento, 184 Cal. App. 4th 697, 702-11 (2010), *rhg. denied, rev. denied.*