



Public Health Law Program

OFFICE FOR STATE, TRIBAL, LOCAL AND TERRITORIAL SUPPORT

Preemption of Local Public Health Laws

In a 1932 dissent, Justice Brandeis stated, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹ Local public health ordinances are often the catalyst for new public health policy directions. Smoking bans in bars and restaurants, for example, were initially enacted by local governments and only later passed at state levels. Local governments have used a variety of methods to enact ordinances they believe will protect the public’s health and address state preemption challenges.

Understanding preemption

- **Preemption:** “The simultaneous expansion in power of a higher level of government and reduction in power of a lower level of government.”²
- **Floor preemption:** Allows local governments to enact ordinances that are more stringent than state law, so long as the added ordinances do not go below the “floor,” or minimum level, of standards set by the state law. Floor preemption state laws may include “savings clause” language that permits more stringent ordinances by local governments.
- **Ceiling preemption:** Prevents local governments from establishing more stringent ordinances than those established by state law. Public health advocates advise that including savings clause language in state law is essential to prevent ceiling preemption of local ordinances.³

Preemption as strategy

Recognizing that ceiling preemption inhibits the ability of local governments to enact ordinances different from state rules, ceiling preemption at the state level has become “almost routine in legislative and rule-making processes in recent years, particularly when health and consumer protection are involved.”⁴ For example:

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

² Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 468 (1999).

³ Mark Pertschuk, Jennifer L. Pomeranz, Julie Ralston Aoki, Michelle A. Larkin & Marjorie Paloma, *Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers*, J. PUB. HEALTH MGMT. & PRAC., May–June 2013, 19(3):217.

⁴ *The Consequences of Preemption for Public Health Advocacy*, NPLAN and Public Health Law Center 1-2 (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>.

- Georgia passed a law in 2008 that prevents local governments from requiring restaurant menu-labeling, even though Georgia has no state menu-labeling law.
- Florida and Arizona state laws preempted local efforts to enact fast food meal toy bans.
- Arizona passed a bill that prohibits cities from mandating fire sprinklers in new single-family homes. The bill passed while Chandler, Arizona, was considering an amendment to its building code to include a fire sprinkler requirement.

Methods for local governments to address preemption

Local governments have used a range of methods to address preemption questions while enacting public health measures in their communities:

- **Savings clause:** The city of Alexandria, Louisiana took advantage of a savings clause provision in Louisiana’s Smokefree Air Act to pass a municipal smoke-free air ordinance that prohibited smoking in bars, an activity previously permitted in the city under the state law.
- **Distinguishable purposes:** A local ordinance may survive a preemption challenge if its language expresses a different purpose than the state law. For example, a Los Angeles ordinance that required alcohol retailers to post signs warning that alcohol consumption during pregnancy could cause birth defects was intended as a health warning and therefore not preempted by a state signage law meant to prohibit offensive advertising matter.
- **Home rule rights:** The Cleveland City Council successfully argued in litigation against its trans-fat ban that its home rule rights had been infringed by a state provision that limited local governments’ ability to regulate restaurants.
- **“Mirror image theory”:** A recent federal case suggested that a lower level government may be able to impose additional regulation, such as its own enforcement scheme, without risking preemption by closely tracking the statutory language of a law passed by the higher level of government. The Supreme Court held that an Arizona law that suspended or revoked business licenses for companies that hire undocumented workers did not conflict with, and was therefore not preempted by, federal immigration law, in part because the state law closely tracked provisions of the federal law.

For an expanded memo or further information on this issue, email phlawprogram@cdc.gov.

This document was developed by Lisa Caucci, JD, MA, ORISE Fellow and Matthew Penn, Director, JD, MLIS with the Public Health Law Program (PHLP) within the Centers for Disease Control and Prevention’s Office for State, Tribal, Local and Territorial Support. PHLP provides technical assistance and public health law resources to advance the use of law as a public health tool. PHLP cannot provide legal advice on any issue and cannot represent any individual or entity in any matter. PHLP recommends seeking the advice of an attorney or other qualified professional with questions about the application of law to a specific circumstance.