

Preemption can impede local tobacco protection efforts

Background

Tobacco use is the cause of one in five deaths annually in the United States—more deaths than HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined.^{1,2} Approximately 88 million nonsmoking Americans are exposed to the dangers of secondhand smoke in their homes, workplaces, and public places.³ Nonsmoking adults who are exposed to secondhand smoke increase their risk of heart disease by 25% to 30%, and their risk of lung cancer by 20% to 30%.⁴ The U.S. Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure.⁴

States are using various legislative tools to reduce smoking rates and to protect the public from the adverse health effects of smoking. To limit exposure to smoke, states are enacting laws prohibiting or restricting smoking in enclosed places, such as government worksites, private worksites, and restaurants. To reduce tobacco use, states are raising excise taxes on tobacco products and enacting statutes that limit advertising (by restricting the display of tobacco products, tobacco product promotion, or tobacco product samples) and youth access to tobacco (by prohibiting the sale or distribution of tobacco to youth and restricting access to tobacco product vending machines). At the local level, cities and counties have also responded to public health concerns related to smoking and tobacco use by enacting ordinances limiting the access to or use of tobacco. Local ordinances can be more stringent or more comprehensive than state statutes, and the debate over local laws can help educate communities about the health effects of tobacco use and contribute to changes in social norms about tobacco use.^{5,6}

What is preemption?

Some states, however, preempt, or prevent local communities from enacting local ordinances that are more stringent than or differ from a state's tobacco control policies related to advertising, smoke-free indoor air, and youth access. A state may preempt local tobacco control laws in all or only in some categories. The tobacco industry has historically supported state preemption laws as a way to reverse existing local tobacco control ordinances and prevent future enactment of such ordinances.^{5,6,7} In an effort to protect nonsmokers by allowing local communities to pass comprehensive tobacco control measures, a Healthy People 2020 objective calls for eliminating state laws that preempt stronger local tobacco control laws, including local smoke-free ordinances.⁸

Court decisions can determine preemption

However, even if a state does not have “express preemption” (i.e., even if state law does not contain explicit preemptive language), a state court may find that the state has “implied preemption” (i.e., that state law is implicitly preemptive).⁹ If a local ordinance is legally challenged, a court has the responsibility to interpret state statutes, as well as the state legislature's intent when the law was debated and passed. As a result, statutes must be read together with case law decisions to get a full understanding of a state's preemption status. In particular, court decisions related to smoke-free indoor air have determined whether a state preempts the enactment of local ordinances restricting smoking.

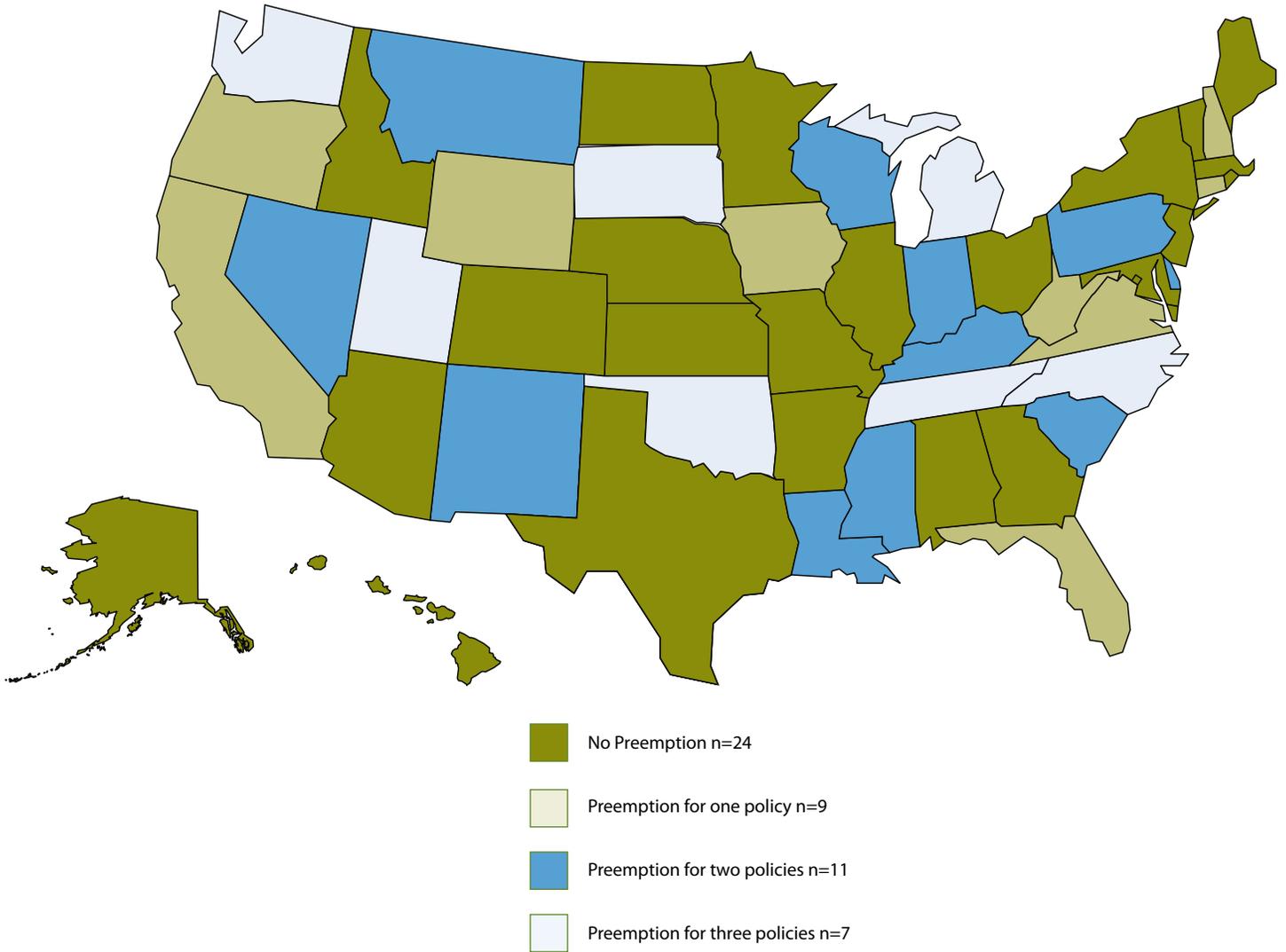
In several states, courts have weighed in and decisively influenced interpretations of whether states preempt local smoking restrictions. For example, a court in California ruled that the 1995 state smoke-free law did not preempt local ordinances from making enclosed public places and places of employment smoke-free. The court ruled that the state law explicitly disclaimed any intent to preempt local governments from regulating smoking, and, in fact, expressly authorized local governments to prohibit smoking in any manner not inconsistent with the state law.¹⁰ In 2008, a South Carolina court found that the state statute, including the Clean Indoor Air Act, did not preempt a city from enacting a local ordinance regulating smoking in public places.¹¹ Also, courts in New Hampshire and in Washington ruled that state laws establishing smoking restrictions preempted local smoking restrictions in certain settings, even though the statutes in question did not contain explicit preemption language.^{9,12}

Enabling local communities to pass tobacco control measures

The only way for states to ensure that local tobacco control ordinances are not preempted is to include enabling clauses in state laws. These clauses explicitly allow local jurisdictions to enact ordinances that differ from the state law. This can have the effect of making the state law the floor for tobacco control regulations, rather than preemption provisions that establish state law as the ceiling.

State Preemption of any Local Tobacco Control Ordinances - Advertising, Smoke-free Indoor Air, or Youth Access

(n=51; law in effect as of June 30, 2011)



The STATE System contains data synthesized from state-level statutory laws. It does not contain state-level regulations; measures implemented by counties, cities, or other localities; opinions of Attorneys General; or relevant case law decisions for tobacco control topics other than preemption; all of which may vary significantly from the laws reported in the database, fact sheets, and publications.

State efforts to restore or preserve local smoke-free indoor air control since 2004

Once enacted, state preemptive laws have traditionally proven difficult to repeal. However, since 2004, seven states have successfully repealed provisions that preempted local smoking restrictions in some or all settings. The seven states that have repealed smoke-free indoor air preemption are Illinois, Louisiana, Mississippi, Montana, Nevada, New Jersey, and Oregon. For example, state smoke-free laws enacted in Oregon in 2007 and Iowa in 2008 removed preemptive language from previous statutes, thus rescinding preemption even in the absence of explicit enabling language.¹³ In addition, there appears to be a trend for states that enact new smoking restrictions to include explicit enabling language. For example state smoke-free laws enacted in 2006 in New Jersey and Louisiana included explicit nonpreemptive language that expressly enables communities to enact local smoke-free ordinances, even if the previous state smoking restrictions had not been explicitly preemptive.¹³

Current status of state preemption related to smoke-free indoor air

As of June 30, 2011, 12 states have laws or court decisions in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, and/or restaurants. Eight of these 12 states preempt local action in all three of these settings. Michigan preempts local smoking restrictions in restaurants but enables restrictions in worksites. New Hampshire also preempts local smoking restrictions in restaurants but has no provision in the other two settings. One state (North Carolina) preempts local smoking restrictions in private worksites and enables local smoke-free indoor air restrictions in government work-sites and restaurants. Washington preempts local smoking restrictions in government worksites and restaurants, but not in private worksites.

Twenty-nine states have enacted laws that explicitly enable local communities to adopt smoking restrictions that are more stringent than or differ from the state standard. Of

these, one state (Mississippi) enables local smoke-free indoor air restrictions in only one location: government worksites.

Nine states and the District of Columbia (excluding the court-decided preemption status in New Hampshire and Washington) do not have any explicit language in their statutes regarding the presence or absence of preemption of local smoking restrictions in government worksites, private worksites, and restaurants.

Current status of state preemption related to other tobacco control efforts

As of June 30, 2011, 22 states have laws preempting local ordinances related to youth access to tobacco; 20 states preempt local restrictions on selling tobacco products to youth and 19 states preempt local restriction on distributing tobacco products to youth. Seventeen states have laws that preempt local ordinances related to restrictions on tobacco product vending machines.

Eighteen states have laws preempting localities from enacting ordinances related to the advertisement of tobacco products. Within the four types of tobacco advertising laws (laws that restrict tobacco advertising in general, laws that restrict the display of tobacco products, laws that restrict the promotion of tobacco, and laws that restrict the distribution of tobacco product samples), three states have preemption laws for only one type. Five states have preemption statutes for two types of advertising laws and three states have preemption for three types of advertising. Seven states preempt all types of local tobacco advertising restrictions.

Preemption Glossary

General terms:

Preemption: State prevents local jurisdictions from enacting laws that differ from and/or are more stringent than state law.

Enabling: State expressly allows local jurisdictions to enact laws that differ from and are more stringent than state law.

State: The 50 states and District of Columbia.

Smoke-free indoor air terms:

Government worksites: Preemption of local ordinances related to the restriction of smoking in places of work that are owned, leased, or operated by state or local governments.

Private worksites: Preemption of local ordinances related to the restriction of smoking in places of work other than those that are owned, leased, or operated by governments.

Restaurants: Preemption of local ordinances related to the restriction of smoking in establishments that serve food for consumption on the premises.

Youth access terms:

Distribution: Preemption of local ordinances related to the distribution of tobacco products to minors.

Sales to youth: Preemption of local ordinances related to the restriction of the retail sale of tobacco products to minors.

Vending machines: Preemption of local ordinances related to the sale of tobacco products through vending machines.

Advertising terms:

Advertising (generally): Preemption of local ordinances related to the broad advertising of tobacco products (i.e., promotion, sampling, or display).

Display: Preemption of local ordinances related to the retail advertising and display of tobacco products in stores.

Promotion: Preemption of local ordinances related to retail promotions, coupons, and discounts for the sale of tobacco products.

Sampling: Preemption of local ordinances related to the distribution of tobacco product samples to the public for free or at a nominal cost.

State Tobacco Activities Tracking and Evaluation (STATE) System

<http://www.cdc.gov/tobacco/statesystem>

Centers for Disease Control and Prevention

National Center for Chronic Disease Prevention and Health Promotion

State Preemption of any Local Tobacco Control Ordinances - Advertising, Smokefree Indoor Air, or Youth Access in effect as of June 30, 2011

State	Preemption Summary	Advertising	Smokefree Indoor Air	Youth Access
Alabama	No Preemption	No	No	No
Alaska	No Preemption	No	No	No
Arizona	No Preemption	No	No	No
Arkansas	No Preemption	No	No	No
California	Preemption for one policy	No	No	Yes
Colorado	No Preemption	No	No	No
Connecticut	Preemption for one policy	No	Yes	No
Delaware	Preemption for two policies	Yes	No	Yes
District of Columbia	No Preemption	No	No	No
Florida	Preemption for one policy	No	Yes	No
Georgia	No Preemption	No	No	No
Hawaii	No Preemption	No	No	No
Idaho	No Preemption	No	No	No
Illinois	No Preemption	No	No	No
Indiana	Preemption for two policies	Yes	No	Yes
Iowa	Preemption for one policy	No	No	Yes
Kansas	No Preemption	No	No	No
Kentucky	Preemption for two policies	Yes	No	Yes
Louisiana	Preemption for two policies	Yes	No	Yes
Maine	No Preemption	No	No	No
Maryland	No Preemption	No	No	No
Massachusetts	No Preemption	No	No	No
Michigan	Preemption for three policies	Yes	Yes	Yes
Minnesota	No Preemption	No	No	No
Mississippi	Preemption for two policies	Yes	No	Yes
Missouri	No Preemption	No	No	No
Montana	Preemption for two policies	Yes	No	Yes
Nebraska	No Preemption	No	No	No
Nevada	Preemption for two policies	Yes	No	Yes
New Hampshire	Preemption for one policy	No	Yes	No
New Jersey	No Preemption	No	No	No
New Mexico	Preemption for two policies	Yes	No	Yes
New York	No Preemption	No	No	No
North Carolina	Preemption for three policies	Yes	Yes	Yes
North Dakota	No Preemption	No	No	No
Ohio	No Preemption	No	No	No
Oklahoma	Preemption for three policies	Yes	Yes	Yes
Oregon	Preemption for one policy	No	No	Yes
Pennsylvania	Preemption for two policies	No	Yes	Yes
Rhode Island	No Preemption	No	No	No
South Carolina	Preemption for two policies	Yes	No	Yes
South Dakota	Preemption for three policies	Yes	Yes	Yes
Tennessee	Preemption for three policies	Yes	Yes	Yes
Texas	No Preemption	No	No	No
Utah	Preemption for three policies	Yes	Yes	Yes
Vermont	No Preemption	No	No	No
Virginia	Preemption for one policy	No	Yes	No
Washington	Preemption for three policies	Yes	Yes	Yes
West Virginia	Preemption for one policy	Yes	No	No
Wisconsin	Preemption for two policies	Yes	No	Yes
Wyoming	Preemption for one policy	No	No	Yes

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10. CAL. LAB. CODE § 6404.5 and City of San Jose v. Department of Health Services, 66 Cal. App. 4th 35, 77 Cal. Rptr. 2d 609(1998).
11. S.C. CODE ANN. § 16-17-504 and Foothills Brewing Concern, Inc. v. City of Greenville, 660 S.E. 2d 264 (2008).
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