



# Fundamentals of Preemption

*Preemption is a powerful tool with sweeping consequences for public health. This fact sheet explains what the legal concept of preemption means and how to spot it in a proposed law, so that advocates can participate fully in policy discussions when preemption is on the table.*

## What Is Preemption?

Preemption is a legal concept where a higher level of government has the authority to limit, or even eliminate, the power of a lower level of government to regulate a certain issue. This means that if a state or local law conflicts with a federal law, the federal law trumps the lower-level law. Similarly, if a city council, local board of health, or other local government entity passes a law that conflicts with a state law, the state law generally prevails.<sup>1</sup>

For example, imagine that a state has a law requiring motorcycle riders to wear helmets. Could a town in that state pass an ordinance that prohibits the wearing of motorcycle helmets? Theoretically it could, but the ordinance would not be enforceable because motorcyclists would not be able to comply with both laws at the same time. The state law would prevail over, or preempt, the local law. But what if the town passed a law requiring motorcyclists to wear not only helmets, but also specially constructed leather jackets to protect their spines in case of an accident? Would this law be preempted by the state law? The answer likely depends on at least two things: 1) whether the state law includes a preemption clause, and if so, how this clause is worded, and/or 2) how a court interprets the state law.

*This fact sheet is one in a series from NPLAN on how the legal concept of preemption works and why it matters for public health. For other fact sheets in this series, see [www.nplan.org](http://www.nplan.org).*

## Types of Preemption

There are several forms of preemption, but at its most basic it is either *express* or *implied*.<sup>2</sup>

### Express Preemption: When Preemptive Intent Is Stated

*Express preemption* occurs when the law explicitly states whether it is meant to preempt a lower-level lawmaking authority. Preemptive intent can be phrased in a variety of ways, and the way it is worded can have a significant impact on its scope and effect. For example, if the hypothetical state helmet law described above included the following language, it would be an example of the state expressly preempting the town's authority to regulate motorcyclists' safety gear (presumably including specially padded leather jackets):

No unit of local government shall impose requirements on motorcyclists to wear safety gear.

If the phrase “that conflict with state law” were added to this sentence, the effect could be quite different, depending on how courts in that state interpret the word “conflict.”

In some states, this phrase could preserve local government's authority only to pass laws that are *identical* or *nearly identical* to state law. (Because these would be local laws, local governments would have the ability to enforce them.) In these states, the hypothetical local law requiring motorcyclists to wear padded leather jackets still would be preempted.

In other states, however, this phrase could permit local governments to impose regulations that *go beyond* state law, as long as motorcyclists could comply with both the state and local laws at the same time.<sup>3</sup> In these states, the hypothetical local law requiring motorcyclists to wear padded leather jackets would *not* be preempted.

To understand the full impact of a law or legislative proposal, it is essential to thoroughly review its language to determine if it includes a preemptive provision. If the proposal does include preemptive language, then legal research into how a particular state's courts are likely to interpret it will be necessary to understand its potential effects.

### Implied Preemption: When Preemptive Intent Is Implied by Context

In some cases, a federal or state law may be found to invalidate other, lower-level laws even though it does not include any explicit preemptive language. This kind of preemption is called *implied preemption*. Implied preemption can be hard to spot in advance because whether or not it exists is decided by a court.

In determining whether a law impliedly preempts another law, courts generally consider the following kinds of questions: Does the lower-level law interfere with the goal of the higher-level law? Does it prohibit something that the higher-level law expressly permits, or permit something that the higher-level law prohibits? Does the higher level of law so comprehensively regulate the issue that there is nothing left for a lower level of government to regulate? If the answers to these questions indicate that a proposed state or federal law could impliedly preempt local authority, advocates could seek to have a “no implied preemption” clause inserted into the proposed law. This is a clause that states that the law should not be interpreted to impliedly preempt other laws, and any preemptive intent must be expressly articulated.

It is important to understand the legal landscape the proposed law fits into. Armed with this knowledge, advocates can more effectively influence how a law is drafted and take measures to minimize the likelihood that a court will find that there is preemption.

## Degrees of Preemption

Preemption can be broad or narrow, depending on how a law is worded. For example, state or local governments may be preempted from passing or enforcing *any* laws or regulations on an issue, or just *some parts* of an issue. They may be preempted from passing laws that are *not identical* to the higher level of law, or only from passing laws that are *less protective* than the higher level of law.

### Floor Preemption

The mildest form of preemption—“floor preemption”—is arguably not preemption at all. Floor preemption refers to a situation where the higher level of government passes a law that establishes a minimum set of requirements, and expressly allows lower levels of government to pass or enforce laws that impose more rigorous requirements. An example of floor preemption is a state agency rule relating to child-care licensing that includes the language: “These rules do not preempt more stringent local regulation or requirements.”<sup>4</sup>

For local public health advocates, floor preemption could be desirable if it truly establishes a minimum statewide or federal standard and still leaves local governments free to pursue even better public health protections. If the law doesn’t clearly permit further regulation by lower levels of government, is silent about preemption, or uses ambiguous language, the risk is that the law could imply state or federal preemption of local regulation.

A common tobacco industry tactic for challenging local smokefree workplace laws is to argue that these laws are impliedly preempted by other state tobacco-related laws. If laws like state indoor clean air laws or laws that prohibit youth access to tobacco products do not include explicit language allowing for more stringent regulations, tobacco companies often claim they preempt local smokefree workplace laws, simply because these laws also deal with tobacco products.<sup>5</sup>

### Ceiling Preemption

The form of preemption that causes the most concern for state officials and advocates working on public health and consumer protection issues is “ceiling” preemption. This is what most people mean when they talk about preemption.<sup>6</sup> Ceiling preemption prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires. Ceiling preemption can also completely prohibit lower-level governments from passing any kind of law regulating the topic or area in question. This can result in a regulatory vacuum if there is no state or federal regulation in place at all.

For example, the Georgia General Assembly modified its state law relating to standards, labeling, and adulteration of food to include a ceiling preemption provision that prohibits local governments and county health boards from enacting menu-labeling laws, even though Georgia has no state menu-labeling law:

“[N]o county board of health or political subdivision of this state shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments. As used in this subsection, the term “political subdivision” means any municipality, county, local government authority, board, or commission.”<sup>7</sup>

### Conclusion

Preemption is a powerful tool that can have sweeping and long-term consequences. Advocates need to know what it is and be able to spot it in a proposed law so they can determine how to respond in a way that will further public health advocacy efforts.

*“Floor” preemption establishes a minimum standard.*

*“Ceiling” preemption prohibits local governments from requiring anything more or different.*

## Additional Resources:

The following companion resources are available at [www.nplan.org](http://www.nplan.org):

- *The Consequences of Preemption for Public Health Advocacy*
- *Preemption by Any Other Name*
- *Negotiating Preemption: Strategies and Questions to Consider*
- *Preemption: What It Is, How It Works, and Why It Matters for Public Health*

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<sup>1</sup> In rare circumstances, in jurisdictions where local government authority is based on what is commonly referred to as the “imperio home rule” system, state law may not trump certain kinds of local government laws. *E.g.*, *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003). For a fuller explanation of the interplay between systems of local government authority and preemption issues, Diller P. “Intrastate Preemption.” *Boston University Law Review*. 87: 1113, 1124-25, 2007.

<sup>2</sup> For a fuller explanation of the different types of preemption, including express and implied preemption, see National Policy & Legal Analysis Network to Prevent Childhood Obesity. *Preemption: What It Is, How It Works, and Why It Matters for Public Health*. 2009. Available at: [www.nplan.org](http://www.nplan.org). [Hereinafter “NPLAN Preemption Paper.”]

<sup>3</sup> This type of phrase may be referred to as a “savings clause” because it “saves”—or preserves—some amount of local authority—e.g., authority to pass local laws as long as they do not “conflict” with the state law. Savings clauses, including examples of additional kinds of savings clauses, are discussed more fully in the NPLAN Preemption Paper, *id.* at 12.

<sup>4</sup> Idaho Admin. Code r. 16.06.02.300 (2008) (Rules Governing Standards for Child Care Licensing). This type of language is another example of a savings clause.

<sup>5</sup> See, e.g., *Foothills Brewing Concern v. City of Greenville*, 660 S.E. 2d 264 (S.C. 2008) (holding that city’s smokefree workplaces law was not impliedly preempted by state indoor clean air act or state youth access law). Cf. *Michigan Rest. Ass’n v. City of Marquette*, 626 N.W.2d 418 (Mich. Ct. App. 2001) (holding that city ordinance requiring restaurants to be smokefree was impliedly preempted by state law that capped percentage of seats in restaurants that could be designated as “smoking” seats).

<sup>6</sup> See, e.g., National Association of Attorneys General, Interim Briefing Paper Presented by NAAG to President-Elect Obama and the Transition Team (2009) (listing federal preemption of state laws as a top issue of concern); *Preemption Monitor*: V(II): July 14, 2009. (Nat’l Conference of State Legislatures, Denver, Colo. & Washington, D.C.) (noting that pressure for Congressional and White House support for “federal usurpation of state authority” “continues to mount”). Available at: [www.ncsl.org/default.aspx?tabid=18108](http://www.ncsl.org/default.aspx?tabid=18108).

<sup>7</sup> Ga. Code Ann. § 26-2-373(a) (2009).