



Negotiating Preemption

Strategies and Questions to Consider

Businesses and other special interests often push for preemption in public health proposals to limit state or local regulation. This fact sheet is designed to help advocates and policymakers negotiate preemption as new policies are drafted and make their way through the legislative process.

Evaluating Preemption on a Case-by-Case Basis

Preemption occurs when a higher level of government restricts, or even eliminates, a lower level of government's ability to regulate an issue. Federal laws can preempt state and local laws, and state laws can preempt local laws. Typically, preemptive laws limit the regulatory authority of lower levels of government, at times going so far as to eliminate their authority altogether. This type of preemption is often referred to as "ceiling preemption." A less common type of preemption establishes a minimum level of regulation without limiting the ability of lower levels of government to create tougher regulations. This is called "floor preemption."

Public health advocates would generally agree that preemption should only be included in a public health law if it sets a minimum floor of protection. But while avoiding ceiling preemption may be desirable, it may not always be possible. Businesses and other special interests often push for ceiling preemption in response to public health law proposals as a way to limit or block new regulation at the state or local level and impose unnecessary uniformity.

While public health advocates are justifiably skeptical of calls for preemption by special interest groups, they should assess the pros and cons on a case-by-case basis. There may be times when it is a deal-breaker, and there may be times when it is acceptable in some form. If preemption is a possibility, then it can and should be negotiated, just like every part of a proposed law. The purpose of this fact sheet is to help advocates prepare for that negotiation process.

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.

Preparation is Key

Preparing in advance to deal with preemption issues is crucial. Typically, preemption comes up late in the legislative process, when emotions are often high and resources may be strained. Moreover, it is often raised in situations where only a handful of the interested parties are present, such as during a hallway conversation or a late-night conference committee meeting. Preparing a strategy for dealing with preemption early on, before the situation becomes more volatile, will result in more informed and thoughtful decisions and lead to better legislative outcomes.

Anticipating what the other side is likely to want and why is an important part of deciding how to deal with preemption. Advocates should not accept on faith the other side's arguments about why preemption is necessary, nor should they ignore these claims. Understanding why the other side wants preemption can help advocates develop nonpreemptive alternatives to address their concerns. Furthermore, the other side's reactions to these alternatives could indicate whether preemption is truly needed or is just a political strategy.

If some form of preemption is acceptable in certain circumstances, advocates can prepare language to respond to a demand that preemption be included in a bill. If the other side proposes broad preemptive language, advocates can offer a narrowly drafted provision, or one that addresses the asserted need for preemption in an alternative way. It should have already been vetted for its public health implications so that advocates can use it to respond quickly and effectively to efforts to enact broad preemptive laws.

Another tactic is to prepare an anti-preemptive—or “savings”—clause.¹ This explicitly states that the proposed law will not be preemptive or should not be construed to impliedly preempt other laws. It can either be included in the proposed language or inserted at some point in the legislative process. Of course, once anti-preemptive language becomes part of a bill, it is subject to editing and revision like any other part of the bill—but that is also true for any preemptive language being advocated for by the other side.

Preparing a strategy for dealing with preemption early on will lead to better legislative outcomes.

Building a Consensus

Most important, advocates should consider in advance the pros and cons of preemption from a public health perspective. Build as broad a consensus about preemption as possible among stakeholders and coalition members early on, including what is negotiable and what is a deal-breaker. A consensus position should address the following points:

- Will your coalition oppose preemption categorically, and if so, why?
- Is there a form or scope of preemption that would be acceptable in certain circumstances? If so, what would those circumstances be?
- What trade-offs would you be willing to make to keep preemption out of a law?
- What trade-offs would make some form of preemption acceptable if the other side insists on it?
- When would you walk away?

The following types of questions may be helpful to consider as part of working toward consensus.

Assessing the legal and regulatory landscape:

- Is this an area or issue where local or state governments have historically or traditionally had regulatory authority?
- Would preemption be a significant departure from current law?
- Is a one-size-fits-all approach appropriate, or does the problem being regulated vary a lot depending on the local context (e.g., urban vs. rural communities)?
- Who will enforce the law?
- If the enforcement would be done at the federal or state level, is there the capacity at those levels to effectively enforce the law?

Assessing the possible consequences, intended and unintended:

- What would the impact be on communities or states with laws that would be preempted? What would they give up? Would they gain anything in exchange?
- What legal options would be sacrificed?
- Will preemption inhibit innovation? What's the likelihood that evolving science will provide evidence for a future policy that would be preempted?

- If a preemptive law were to pass, what would the impact be on communities or states that do not have laws addressing the issue? Would they be likely to pass a law of their own, if preemption were not a factor?

Assessing the practicalities:

- Is this an area where regulation is so inherently expensive or otherwise difficult that many or most states and cities are unlikely to take meaningful regulatory action anyway?
- City by city, state by state, legislative battles take time and resources—would avoiding those battles save enough advocacy resources to justify accepting preemption?
- Is some form of preemption necessary to get the bill passed?

Assessing the big picture:

- Does the bill accomplish meaningful protections, even if it does not include everything your coalition hoped for?
- If preemption is necessary to get the bill passed, is the result worth it?

The Bottom Line

These last questions get to the most essential point: What is the group's bottom line, and how will you know when it has been reached? The worst-case scenario would be to end up with a law that is so watered down that the public health protections are mostly cosmetic, yet any further efforts at the state or local level have been preempted. Periodic reality checks are crucial, especially in the most heated moments. If this bill passed, would you and your coalition members believe it was worth the trade-offs?

Additional Resources:

The following companion resources are available at www.nplan.org:

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

The Association for Nonsmokers' Rights has developed a series of fact sheets and reports to help local tobacco control advocates deal with preemption. These resources can be found online at www.protectlocalcontrol.org/resources.php.

Center for Gun Policy & Research, Johns Hopkins University. *Preemption of Local Gun Laws: Questions & Answers*. 2002. Available at: www.jhsph.edu/gunpolicy/preemption_QA.

Hobart R. Tobacco Technical Assistance Consortium. *Preemption: Shifting the Battle to Stronger Ground*. 2002. Available at: www.ttac.org/resources/assist_pdfs/Advice_Preemption.pdf.

Mosher JF. "Alcohol Issues: The Perils of Preemption." *American Medical Association (Pamela Glenn ed.)* 2001. Available at: www.alcoholpolicymd.com/pdf/Policy_Perils.pdf.

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.



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The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of Public Health Law & Policy (PHLP). PHLP is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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¹ For more explanation of savings clauses, 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, p. 12, 14. Available at: www.nplan.org.