PREEMPTION
WHY IT’S A BIG DEAL FOR PUBLIC HEALTH

JANUARY 31, 2018
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PRESENTERS

• **Cathy Callaway**, Director, State and Local Campaigns, American Cancer Society Cancer Action Network, Inc.

• **Mark Meaney**, Lead Senior Staff Attorney for Technical Assistance, Tobacco Control Legal Consortium

• **Julie Ralston Aoki**, Director, Healthy Eating/Active Living team, Public Health Law Center

• **Andrew Twinamatsiko**, Staff Attorney, Tobacco Control Legal Consortium
ACS CAN, the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem.
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development
- Publications
- Trainings
- Direct Representation
- Lobby

Tobacco Control Legal Consortium
WHAT IS PREEMPTION?

• Supremacy Clause of U.S. Constitution

• “Higher” level of government
  – Legislative or regulatory action
  – Eliminates or reduces authority of a “lower” level of government

grassrootschange.net
WHY PREEMPTION MATTERS:
IT SHUTS DOWN THE LABORATORIES

• “...[S]erve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.“ New State Ice Co. v. Liebmann

• “State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.” Pres. Obama, May 2009
“[A]ll public health is local—it’s got to start and be sustained at the local level.”

Howard Koh
Assistant Secretary for Health and Human Services
July 28, 2009
WHY PREEMPTION MATTERS: CAN ENTRENCH INEQUITIES
WHY DO INDUSTRY GROUPS CARE?

“While we’re not married to any particular form of pre-emption language, we’re dead serious about achieving pre-emption in all 50 states.”

Tina Walls, Philip Morris

“[T]he … tobacco companies’ first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can’t do that, at least on the state level, because the health advocates can’t compete with me on a state level.”

Victor Crawford, former TI lobbyist
EXPRESS PREEMPTION


“A municipality may not regulate the dissemination of nutritional information or the content required to be placed on a menu…or food tag by a restaurant, eating establishment, or other food facility.” (Utah Code Ann. § 10-8-44.5).
RECENT PREEMPTION BILL LANGUAGE

New Mexico

“Unless otherwise provided by law, no municipality may impose:…”
“…excise taxes on any incident relating to: [(a)] 1) tobacco; [(b)] 2) liquor; [(c)] 3) food or beverages; 4) motor fuels; and [(d)] 5) motor vehicles.”

Illinois (pending bill)

“…no home rule county may impose, pursuant to its home rule authority, a tax on sweetened beverages”
“Alternative nicotine products and vapor products shall only be sold to persons eighteen years of age or older, shall be subject to local and state sales tax, but shall not be otherwise taxed or regulated as tobacco products.”

Missouri Statutes Section 407.926.1
PREEMPTION
EXISTING LAWS REINTERPRETED

Genesee County, MI

– Age of Majority Law
IMPLIED PREEMPTION
NOT SO CLEAR

Often requires judicial interpretation
• Occupy the field?
• Uncertain scope is problematic
IMPLIED PREEMPTION
HOW BROAD IS TOO BROAD

Fond du Lac Ordinance:
Self-service display

State Preemption:
Cigarette taxes
Purchase by minors
Sales to minors

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HOW IT STARTED

FLORIDA

“This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.”
THE (FIRST) GOLDEN AGE OF PREEMPTION

During the 1990s:

- States with smoke-free preemption increased from 7 to 17
- States with youth access/point-of-sale preemption increased from 1 to 22

Why Preemption Matters

- Stalls momentum
- Results in weaker laws
- Trading future progress for short-term gain
- Difficult to roll back
- Tobacco-free movement had a rule--never accept preemption

Photo credit: Star Tribune
Responsibility [personal, parental]
• “it’s a personal choice”
• “Nanny state”
• “food police”
“We prefer to take our chance with cholera and the rest than be bullied into health. There is nothing a man hates so much as being cleansed against his will, or having his floors swept, his walls whitewashed, his pet dung heaps cleared away.”

--1849 editorial in the London Times (courtesy Simon Chapman)
WHY MENU LABELING?

- U.S. consumers eat out a lot
  - about half of our food budget
  - about 1/3 of our calories
- Association between frequent eating out and increased weight is well-documented
  - Children eat 1.8x more calories when eating out
  - Adults who regularly eat fast food consume 205 more calories/day
- Consumers often underestimate calories in food
EARLY LOCAL MENU LABELING PROGRESS

- NYC Health Code Section 81.50 (2006 and 2008)
- Challenges brought by the New York State Restaurant Association
- Legal arguments
  - Preempted by Nutrition Labeling and Education Act (NLEA)
  - Violated First Amendment
PREEMPTION ARGUMENTS

- **NYRSA I**—held that NYC menu labeling law was preempted by federal law (Nutrition Labeling & Education Act), because labeling requirement was triggered by *voluntary* claims.

- **NYSRA II**—NYC amended the law so that it applied to *all* chain restaurants (with 15 or more locations nationwide), so no preemption.
State and Local Menu Labeling Policies

- Implemented
- Passed
- Introduced 2009
- Introduced 2003-2008

*Superceded by state law.
**TN Legislature retracted county regulations.

April 2011

https://cspinet.org/resource/state-and-menu-labeling-policies
FEDERAL MENU LABELING LAW

• Includes preemption

• Exceptions:
  o Can request a waiver from FDA
  o State/local laws with “identical” requirements
  o Requirements related to warnings about safety
Philadelphia Waiver Request

CITY OF PHILADELPHIA

OFFICE OF HEALTH AND OPPORTUNITY
Municipal Services Building
1401 JFK Boulevard, Room 100
Philadelphia, Pennsylvania 19102
Tel: (215) 686-4009

August 23, 2011

VIA UPS NEXT DAY AIR SAVER

Division of Dockets Management
Food and Drug Administration
Department of Health and Human Services
5630 Fessers Lane, Room # 1061
Rockville, MD 20852

Re: Petition Requesting Exemption from Preemption for State Requirement

The undersigned submits this petition under section 403A(b) of the Federal Food, Drug, and Cosmetic Act (the “Act”) to request that the Food and Drug Administration (“FDA”) exempt a local (City of Philadelphia, a political subdivision of the Commonwealth of Pennsylvania) requirement from preemption.

The undersigned has authority to act for, or on behalf of, the City of Philadelphia (the “City”), Department of Public Health (the “Department”) because § 5-300 of The Philadelphia Home Rule Charter grants the Department the power and duty to “administer and enforce statutes, ordinances and regulations relating to public health” and § 3-101 of The Philadelphia Home Rule Charter grants the Health Commissioner the power to “perform the duties vested in and imposed upon the [Department].”

INTRODUCTION

The Department is seeking to exempt Philadelphia Ordinance 080167-A, codified in §§ 6-102 and 6-308 of The Philadelphia Code (the “Menu Labeling Ordinance”) from preemption under § 403A of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.S. § 343-4). The Menu Labeling Ordinance, enacted on November 19, 2008, requires chain restaurants and retail food establishments to make available certain nutrition information for food and beverage items offered for sale. The Menu Labeling Ordinance meets the following three requirements specified in section § 403A(b) of the Act: (1) the Menu Labeling Ordinance was designed to address a particular local need for information which need is not met by the requirements of 21 U.S.C.S. § 343(f)(1)(A) (the “Federal Menu Labeling Requirement”); (2) exempting the Menu Labeling Ordinance from preemption would not unduly burden interstate commerce; and (3) exempting

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“IDENTICAL” REQUIREMENTS?

http://www.nacsonline.com/Media/Daily/Pages/ND0522173.aspx#.WicyolWnGM9

FDA enforcement date: May 7, 2018
"IDENTICAL" REQUIREMENTS?

Convenience, Grocery and Restaurant Industries File Suit to Block New York City From Overriding FDA Calorie Labeling on Menus

July 14, 2017

Today, the Restaurant Law Center (RLC), Food Marketing Institute (FMI), National Association of Convenience Stores (NACS), and the New York Association of Convenience Stores (NYACS) filed suit in the U.S. District Court for the Southern District of New York to stop New York City from prematurely enforcing rules requiring calorie and nutrient information prior to a May 2018 compliance date established by the FDA. The lawsuit claims that New York’s premature enforcement is preempted by federal law.

http://www.restaurant.org/Pressroom/Press-Releases/Convenience,-Grocery-and-Restaurant-Industries-Fil
“IDENTICAL” REQUIREMENTS?

F.D.A. Urges Court to Block New York City’s Calorie Count Law

By WILLIAM NEUMAN  AUG. 15, 2017

“IDENTICAL” REQUIREMENTS?

How Many Calories in That? New York City Delays Enforcing Labeling Rules

By WILLIAM NEUMAN  AUG. 25, 2017

NYC SODIUM WARNING LABEL LAW

- Identifies high sodium items (containing ≥ 2,300 mg of sodium)
- Warning statement at point of purchase
  - Warning: 
    indicates that sodium (salt) content of this item is higher that the total daily recommended limit (2,300 mg.). High sodium intake can increase blood pressure and risk of heart disease and stroke.
- Affects chain food service establishments (≥15 locations nationwide)
  - 1/3 of all restaurant traffic in NYC
WARNINGS ABOUT SAFETY?


- NRA challenged based on First Amendment and preemption by menu labeling law
- Trial court rejected NRA’s arguments and appellate court affirmed
PERPETUATION OF FOOD-BASED HEALTH DISPARITIES???

• Local governments may not:

“condition any license, permit or regulatory approval for a food service operation upon the existence or nonexistence of food-based health disparities;”

or

“where food service operations are permitted to operate, ban, prohibit or otherwise restrict a food service operation based upon the existence or nonexistence of food-based health disparities as recognized by the department of health, the institute of health or the centers for disease control”
THE NEXT PHASE
UPPING THE STAKES
AND WHERE ELSE?

• Anti-discrimination (North Carolina, Tennessee, Arkansas)
• Punitive laws (Arizona)
• Climate change (Arizona)
• Paid sick leave, minimum wages (25 states)
• Plastic bags (Idaho, Iowa, Arizona)
• Gun control (most states)
• Alcohol control (some preemption, most states)

Sources: Grassroots Change and National Employment Law Program; Mosher 2013
MARIJUANA

- Whether regulating use or point of sale, be on the lookout for language that could
  - Limit authority of local jurisdictions
  - Force local regulations to a vote of the people
PREEMPTION
UNINTENDED, OR
INTENDED BUT HIDDEN,
CONSEQUENCES?

• Prohibits “adopt[ing]…an ordinance…providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to but not limited to a minimum or living wage rate…or other terms or condition of employment.”

• Setting “standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law.”

Iowa HF 295
A new law in Iowa has been signed that provide protections for “consumer merchandise” and cigars and tobacco products are included. The bill, H.F. 295, prevents any city or county in Iowa from passing laws that would restrict the sale or marketing of these “consumer merchandise.” In short, this bill would make it illegal for cities and counties in Iowa to pass laws regarding tobacco products that are more restrictive to state laws. This include a city trying to raise the minimum age to purchase tobacco beyond the state law, currently 18, or other restrictions on flavored tobacco.

It’s not the main purpose of the bill, which deals with employment restrictions such as minimum wage increases and unions.

The bill passed without receiving a single no vote, though two senators abstained and four members of the House did not vote. It was signed into law by Gov. Kim Reynolds.

http://halfwheel.com/cigars-tobacco-products-receive-protections-iowa
WHAT CAN WE DO?
LOOK EVERYWHERE. SERIOUSLY.

- Tobacco control bills and amendments
- Food service operation/retail food establishment bills and amendments
- Public health bills
- Bills related to local government powers or funding
- Appropriations bills
WHAT CAN WE DO?
LOOK OUT FOR KEY WORDS

- “Preemption”
- “Supersede”
- “Shall be consistent” with state law
- “Uniform” state standard
- “Exclusive”
- “Occupy the field”
West Virginia

(c) The county board of health is required to submit any potential health policy to the county commission sixty days prior to the anticipated enforcement and enactment date of the policy. The county commission may by a majority vote of its members enter an order either approving, modifying or disapproving any county-wide health policy which the county board of health wishes to implement. If the county commission enters an order which disapproves the policy, the county board of health may not enact or enforce the policy.
These issues can only be regulated by the state:
- The regulation of “consumer incentive items,”
- Nutrition labeling for food and nonalcoholic beverages and
- How food service operations are “characterized.”

Local political subdivisions cannot to the following:
- Enact or enforce any local law or ordinance pertaining to the availability of food nutrition information; related to “consumer incentive items” given away with food;
- Restrict retail food establishments
- Restrict the sale of foods and nonalcoholic beverages
- Restrict the growing or raising of livestock or crops
WHAT CAN WE DO?
USE SAVINGS CLAUSES

“Nothing in this law preempts more restrictive state or local regulation or requirements.”
DEFENDING AGAINST PREEMPTION

• Pass local ordinances!
• Make friends with non-traditional partners
• Educate your base early
• Mobilize your base early
IF YOU’RE ALREADY PREEMPTED

• Work to repeal it
• Not an excuse for extending the preemption to include other products or provisions
• Make friends with non-traditional partners
• Build and educate your local base
MESSAGING IS IMPORTANT

• States still have responsibility to protect the health of its residents
• Local authority should allow jurisdictions to go above and beyond state law as opposed to allowing them to opt out of state laws
KNOW YOUR RESOURCES
WHO CAN HELP?

- Public Health Law Center
- ACS CAN
- Grassroots Change
- Americans for Nonsmokers’ Rights
- CDC
- RWJF
- AHA, ACS, ALA
- Many others
CONTACT US

651.290.7506

Julie.ralstonaoiki@mitchellhamline.edu

Mark.meaney@mitchellhamline.edu

www.publichealthlawcenter.org

cathy.callaway@cancer.org