A Quick Refresher: Passing Laws at the Federal, State, and Local Level

PUBLIC HEALTH LAW CENTER
at Mitchell Hamline School of Law

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PRESENTERS

Natasha Phelps
Staff Attorney
Public Health Law Center

Mike Freiberg
Senior Staff Attorney
Public Health Law Center

Molly Moilanen
Director of Public Affairs
ClearWay Minnesota
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Any legal information provided in this presentation does not constitute legal advice or legal representation.
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development, Implementation, Defense
- Publications
- Trainings
- **Direct Representation**
- **Lobby**
AGENDA

1. Overview of government powers
2. Preemption
3. Local Government
4. Law and policy: what is it and how do you make it?
5. Tips from the field
6. Q & A
Equity considerations will be weaved in throughout the day. When we talk public health, we talk equity.
OVERVIEW OF GOVERNMENT POWERS
SUMMARY: PRESUMPTION OF THE GOVERNMENT
SUMMARY:
REALITY OF THE GOVERNMENT
TOBACCO CONTROL: DIFFERENT JURISDICTIONS

- Tribes
- Federal
- State
- Local
SEPARATION OF POWERS

• U.S. Constitution
  – Legislative
    • Create laws
    • Allocates resources
  – Executive
    • Enforce laws
    • Can set policy
  – Judicial
    • Interpret laws
FEDERALISM

• The US Constitution attempts to allocate powers among the levels of government, federal and state - federalism
• The federal government has powers limited to the Constitution, including the power to enact laws in areas which the federal government has jurisdiction
• Supremacy Clause: federal laws and regulations override conflicting state laws.
  – 10th Amendment: reserves states’ sovereign police power to regulate matters affecting the health, safety, and general welfare of the public.
PREEMPTION
Preemption

- “Higher” level of government:
  - By legislative or regulatory action
  - Eliminates or reduces the authority of a “lower” level of government
  - Express or implied
A law explicitly preempts state or local authority.
EXAMPLE OF EXPRESS

Florida Statutes, Section 386.209:

“This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject; however, school districts may further restrict smoking by persons on school district property.”
A law preempts state or local authority by implication.

- Can take several different forms
- Sometimes requires an understanding of the lawmakers’ intent
- Determined by the courts
EXAMPLE OF IMPLIED PREEMPTION LANGUAGE

Wisconsin Statutes, Section 139.43:

“Sections [related to cigarette taxes] shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of the sale of cigarettes.”

U.S. Oil, Inc. v. City of Fond Du Lac:

The legislature meant to declare “all aspects of tobacco distribution” a matter of statewide concern. Thus, Fond du Lac’s ordinance regarding self-service access to cigarettes was preempted.
IS PREEMPTION THAT IMPORTANT? YES!

• “State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.” Pres. Obama, 2009

• “[A]ll public health is local – it’s got to start and be sustained at the local level.” Howard Koh, Asst. Secretary for HHS, July 2009

• “Eliminate State laws that preempt stronger local tobacco control laws.” Tobacco Use Objective 16, Healthy People 2020 Initiative
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*

“the … 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*
PREVENT PREEMPTION
TIPS FROM THE FIELD

“NEVER AGREE TO PREEMPTION. If you are working on a law at the state or county level, the opposition may try to add a preemption provision to your language. Preemption is unacceptable and should be avoided at all costs.” ACS, AHA, ALA, APHA, ANR et al. Fundamentals of Smokefree Workplace Laws, 2009.

“The AHA opposes federal preemption of state and local statutes and state preemption of local statutes..”

“Based on solid research findings, state attorneys general and other experts have recommended that any effort to reduce youth access to tobacco products include the following key elements: … No preemption of local ordinances.” CTFK
PREVENT PREEMPTION
WHERE TO LOOK

• Public health bills/amendments
  - Introduced by industries
  - Introduced by health groups

• Bills related to local government funding/powers
PREVENT PREEMPTION
LANGUAGE TO WATCH FOR

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

Add explicit, non-preemptive language to ensure no preemption.
PREVENT PREEMPTION SAVINGS CLAUSE

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

grassrootschange.net

PUBLIC HEALTH LAW CENTER
Tobacco Control Legal Consortium

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OVERVIEW OF PREEMPTION IN THE TOBACCO CONTROL ACT

Preservation Clause preserves the authority of state and local governments to regulate the sale of tobacco products.

Preemption Clause prohibits state and local governments from adopting tobacco product standards.

Savings Clause reiterates that state and local governments can adopt regulations relating to the sale of tobacco products.
LOCAL GOVERNMENT

- Closest to the “people”
- Not mentioned in the U.S. Constitution
A DIFFERENT COUNTRY: UNITED STATES - 1790

• United States
  – Population – 4 Million

• Largest State
  – Virginia
  – Population – 750,000
  – Largest City
    • Richmond
    • Population – 3,800

• Largest U.S. City
  – Philadelphia
  – Population – 40,000
LOCAL GOVERNMENTS ALSO BECOMING MORE COMPLEX

“Over the years, local governments in Minnesota have become increasingly complex—changing from simple service centers for a largely agricultural society to extended urban areas that serve as hubs for industry, commerce, and recreation.”

League of Minnesota Cities, Handbook for Minnesota Cities, Chapter 1
LOCAL GOVERNMENTS

• Created through state constitutions and laws
  - Also provides and restricts authority

• Variety in form and function, even within a state
DILLON’S RULE

- Local Governments are:
  - Creatures of the state
  - Limited to powers specifically granted by state laws/state constitutions
- Disputes must be resolved against the local government unit
HOME RULE

- Concept of local control
- Provides for local self-government while retaining state sovereignty
- Citizens manage their own affairs locally with minimal interference
- Home Rule Charters
- Charter Authority
STATE AND LOCAL PUBLIC HEALTH POWER

“According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”

Jacobson v. Massachusetts, 197 U.S. 11 (1905)
STATE AND LOCAL PUBLIC HEALTH POWER

• State legislature and other state leg bodies: create policies and law, distribute funds
  – Local level: ordinances

• Executive branch: issue rules and regulations based on the authority delegated by the state legislature through statutes
  – Governor- state
    • Mayor, county executive- local
    • Agencies like departments of health

• Judicial branch: resolve disputes and interpret laws
TYPES OF LOCAL GOVERNMENTS

• Counties
• Cities
• Townships
• Special Purpose Districts
LAW AND POLICY:
WHAT IS IT AND HOW DO YOU MAKE IT?
The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society.

*Black’s Law Dictionary*

- Ordinance or statute
**POLICY**

**policy** (14c) 1. A standard course of action that has been officially established by an organization, business, political party, etc. See PUBLIC POLICY.

**public policy** (16c) 1. The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.

*Black’s Law Dictionary (10th ed. 2014)*
POLICY

Any **written** plan or course of action designed to **influence** and determine decisions.
What is an effective law or policy?

- Addresses a proven issue
- Easy to understand and follow
- Easy to enforce
- Accomplishes goals
- General authority
LAWS AND POLICIES

• Legal issues to consider
  – General authority
  – Preemption
  – Constitutional issues
  – Other

• Practical issues
  – Enforcement
  – Capacity and costs of implementation & defense
  – How will you evaluate it?
  – Unintended consequences?
LAWS AND POLICIES: ELEMENTS

Essential elements of a law or policy:
- Findings
- Purpose
- Definitions
- Restrictions / Requirements
- Exemptions
- Implementation
- Enforcement
- Severability
DRAFTING LAW AND POLICY: TIPS

- Be clear and specific
  - Include and use definitions appropriately
  - Avoid assumptions: make your meaning and intentions clear

- Be concise
  - Make every word count: eliminate unnecessary words
  - Keep language as simple as possible

- Be consistent
  - Use language that is consistent with the policy’s objectives

- Avoid unnecessary exemptions, which can undermine the effectiveness, make enforcement harder, and encourage lawsuits

- Be practical
  - Consider the ability to achieve the purpose (cost, effective dates)

- Do your homework
  - Identify all stakeholders and involve them in the process
  - Seek legal technical assistance, both about process and substance
  - Carefully review example policies
    - Your policy will exist within a framework of other laws and policies, and may reflect local, national, or international trends. Draw on information from these other sources to inform the development of your policy.
Potential Proponents

- Governmental Staff / Departments
- In-House Lawyer / Tribal Attorney
- Enforcement Agencies
- Advocates / Coalitions / Health Professionals
- Community based organizations

Potential Opponents

- Business Owners and Interested Industries
  - Be Prepared to Counter Typical Arguments: Lost profits, Constitutional issues
TIPS FROM THE FIELD

Molly Moilanen
ClearWay Minnesota
Molly’s Top 10 List
ClearWay Minnesota

- 1998
- Nonprofit
- $202 million
- 25 years
- Reduce harm of tobacco
Policy Priorities

1. Keeping the price of tobacco high
2. Fully funding tobacco prevention & cessation
3. Raising the tobacco age to 21
4. Restricting the sale of flavored tobacco products
1. Be mindful of the cycle

- Where are you on the cyclical continuum?

- How do you move to “action” faster?

- When is it ripe for action?
2. Strategic Planning

- Define goals – long view
- Short, middle, long
- Assess resources
- Create action plan
- Focused yet nimble
- Fosters teamwork
- Builds buy-in
- Focus on important jobs
Planning to pass a tax increase

2009 – Federal tobacco tax increase

2010 – Tobacco Modernization Act

2011 – GOP introduces tobacco tax increase

2012 – Democrats win control / We’re ready

2013 – Pass largest tobacco tax increase in MN history
3. Build a strong, diverse coalition

- Define terms
- Rules of engagement
- Develop lines in the sand together
- Leadership approach
Examples
4. Champions are GOLD

- Cultivate them
- Support them
- Thank them
- Strategic
- Dems / GOP
- Rural / Metro
5. Message / Messengers
Moving the Governor
6. Know the rules and you will control the game

- Rules are impartial
- Local, State, Federal
- Committee process
- Conference committees
- Policy Bills vs Finance Bills
- Vote Counts
Just six weeks into 2017 and tobacco legislation proposals continue to dominate local and state agendas across the country.

"Local ordinances are probably the greatest threat to the industry." In fact, each year, the number of proposed ordinances and the severity of those ordinances increase, he noted.

... much of the legislative activity swirling around local municipalities is concentrated in three states — California, Massachusetts and Minnesota...

The push for flavor bans has picked up steam at the local level in Massachusetts, California, Minnesota, New York, New Jersey and Rhode Island.

In addition to taking aim at flavors, local lawmakers are targeting minimum package size for cigars...

The Tobacco 21 push... is gaining traction in many local communities, too.

7. Study the opposition
thril4Life
Tobacco Harm Reduction 4 Life

SAVE YOUR NEIGHBORHOOD STORE

Citizens for Tobacco Rights
Sponsored

Adults should be free to purchase the legal products they choose. When the government is making choices for you, your rights are under attack – it’s as simple as that.
Help CTR put a stop to the ban on menthol cigarettes in St. Paul by taking action today.

DON'T BAN THE SALE OF LEGAL PRODUCTS TO ADULTS.

Menthol Ban in St. Paul?
Take just 30 seconds today to email your St. Paul City Council Member!

Enough is Enough STP @Enough_STP · Aug 22
Like and Share if you think Minneapolis adults should be able to make their own choices! #NOMentholBan

Enough is Enough STP @Enough_STP · Aug 22
MN continues to struggle w/ inequity Let's not add a tobaccoban to the growing list of concerns #focusonwhatmatters
NATIONAL ACTION NETWORK PRESENTS:

Community Leadership Luncheon
Topic: Decriminalizing The Black Community
Banning Of Menthol Cigarettes
January 25, 2017 12-2PM
Location: Greater New Friendship MBC
2900 E. 38th Street
Minneapolis, MN 55408

Panelists Includes:

Maj. Neill Franklin
Ex. Director/Former Narcotics Agent
Maryland State Police

Chief John I. Dixon III
President, Noble

Former Congressman Kendrick Meek
Former Captain
Florida State Highway Patrol

Art Way Esq
Sr. Drug Policy Manager/Colorado DPA (Drug Policy Alliance)

For More Information, Please call Rev. DeVinne Tom 646-981-5972
nanfieldassistant@yahoo.com
Greater New Friendship MBC 612-827-7928
info@greaterfriend.org

Host
Pastor Billy G. Russell
Pastor of Greater Friendship MBC
President of Minnesota State Baptist Convention

Join us for a Panel Examining the Criminal Justice System on Decriminalizing the Black Community
Special Community Town Hall Meeting
with Rev. Al Sharpton

Tuesday October 11 2016
Community Town Hall Meeting 6:30pm
Location: Beebe Memorial Cathedral 3900
Telegraph Oakland CA 94609

Participating Panalist:
Former Congressman Kendrick Meek
President NOBLE: Chief John I Dixon III
LEAP (Law Enforcement Against Prohibition): Major Neill Franklin

Community Leaders can RSVP: info@nanaoakland.org
or call (510) 829.4383

Sponsored by National Action Network & RAI
8. Learn at the local level

Bloomington should follow Edina’s lead on tobacco

To the editor:
As a parent of two young children, I was excited to see Edina take such an important step to prevent kids from becoming addicted to tobacco products.

By increasing the tobacco age to 21, Edina is putting their kids and the health of their community first. Bloomington can continue to be a public health leader by passing its own policy to increase the tobacco age to 21.

Tobacco 21 movement gathers momentum in Minnesota

By Sarah Brandt | 08/23/17

Welcome!

Tobacco 21: The Surge in State Tobacco Age Bias

Detroit Lakes nixes ordinance to raise tobacco sales age to 21

Attempts to raise the tobacco sales age from 18 to 21 have so far failed to take off outside the Twin Cities.

By Kelly Smith | Star Tribune | September 16, 2017 - 4:33PM

In Edina and St. Louis Park — the latter not until Oct. 1 — the age to buy tobacco has been raised from 18 to 21 in an effort to keep tobacco out of teens' hands.

Attempts to raise the tobacco sales age from 18 to 21 have so far failed to take off outside the Twin Cities after one city recently stamped out the idea.

Edina became the first Minnesota city to raise the sales age earlier this summer, and Detroit Lakes was poised to be the first outside the metro area to follow suit. But in a 4-1 vote last week, the City Council nixed the proposal, with some City leaders expressing concern about how it would
9. Caution before compromise

• What do you gain?

• What do you lose?

• Who is the decider?
10. After you win...you are not done!

- Celebration
- Implementation
- Enforcement
- Evaluation
- Apply learnings
- Demonstrate success
- Disseminate
  - Case studies
  - Findings
  - Mentors
QUESTIONS & ANSWERS

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THANK YOU!