WHY STATE PREEMPTION AND LOCAL AUTHORITY MATTER

TCN and PHLC Tobacco Preemption Virtual Series

April 30, 2019
Today’s Agenda

• Background on Tobacco Preemption from the Public Health Law Center

• Local Preemption Case Study: Philadelphia

• State Preemption Case Study: Oregon

• Moderated Q&A
To improve the public’s health by providing education and state-based expertise for tobacco prevention and control at the state/territory and national levels.
THE PUBLIC HEALTH LAW CENTER
(HEALTH THROUGH THE POWER OF LAW & POLICY)
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development, Implementation, Defense
- Publications
- Trainings
- Direct Representation
- Lobby
FOCUS ON HEALTH EQUITY

Equality

Equity
• Policy experimentation and innovation
• Community inclusion in shaping health outcomes
• Civic participation and public accountability
• Tailored policies and tackling health disparities
LOCAL AUTHORITY

• No inherent local authority (creatures of state)

• Varied levels of local authority
  – Limited local authority — Dillon’s Rule
  – Local autonomy — Home Rule

• Preemption
DILLON’S RULE

• Dillon’s Rule
  – Powers expressly granted
  – Powers necessarily and fairly implied from express powers
  – Powers essential to the accomplishment of the declared objects and purposes of the locality

*Any doubt concerning the existence of a power is resolved against the locality
HOME RULE AUTHORITY

• Local autonomy — broad powers to act

• Home rule localities can adopt measures without specific grant of authority
  – Imperium in imperio model (initiative + immunity)
  – National League of Cities (initiative but not immunity)

• Localities can adopt measures but states can preempt
PREEMPTION

- U.S. Const. supremacy clause

- Higher governmental level
  - Legislative or regulatory action
  - Eliminates or restricts the authority of a lower governmental level
TYPES OF PREEMPTION

Express Preemption

Implied Preemption

- Not clear and typically requires judicial interpretation
  - Conflict preemption
  - Obstacle preemption
  - Occupy the field
PREEMPTION — AN INDUSTRY TACTIC

“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 (1994)

“[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
The company’s 80-plus lobbyists in 50 states are fighting proposals to ban flavored e-cigarette pods, which are big draws for teenagers; pushing legislation that includes provisions denying local governments the right to adopt strict vaping controls.
THE NEW PREEMPTION: HOW IT ALL STARTED

This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.”
~ Fla. Stat. § 386.209

• 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

PREEMPTION TODAY

• Arkansas Act 580 (2019)

This subchapter and the rules and other actions of the board shall preempt the enactment and enforcement of any county, municipal, or other local regulation of the manufacture, sale, storage, or distribution of tobacco products that is more restrictive than this subchapter[.]”


All local ordinances or regulations that regulate the sale of cigarettes, tobacco products, and electronic smoking devices are preempted, and existing local laws and regulations conflicting with this chapter are null and void.
PREEMPTION TODAY

**Blanket Preemption — Iowa** (Iowa Code § 364.3(3)(C)(2018))

A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any state law.

“Consumer merchandise” means merchandise offered for sale or lease, or provided with a sale or lease, primarily but not exclusively for personal, family, or household purposes, and includes any container used for consuming, carrying, or transporting such merchandise.

**Punitive Preemption — Arizona**


“Violations of state law by counties, cities and towns; attorney general investigation; report; withholding of state shared revenues”
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
Pre-Emption in Philadelphia

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Tobacco Policy and Control Program Manager

Philadelphia Department of Public Health
Columnist | Jenice Armstrong

Let’s ban all candy-flavored tobacco products | Jenice Armstrong

Updated: OCTOBER 11, 2017 — 4:03 PM EDT

Philly’s No. 1 killer isn’t guns or opioids - but it can be stopped | Commentary

Updated: OCTOBER 31, 2017 — 3:55 PM EDT
Bittersweet
FY 19 Budget pre-emption language

- Section 232-A. Preemption.--(a) All powers and jurisdiction over dealers licensed under this article, and regarding or affecting the sale of tobacco products by dealers licensed under this article, shall reside in the Commonwealth unless any such power or jurisdiction is specifically granted to a political subdivision.

- (b) This section shall [*not* apply to a city of the first class*].

- (1) Except as set forth in paragraph (2), on and after the June 1, 2018, subsection (a) shall apply to a city of the first class.

- (2) Paragraph (1) does not apply to ordinances or regulations of a city of the first class in effect prior to June 1, 2018. Ordinances or regulations of the city of the first class regarding or affecting the sale of tobacco products by dealers licensed under this article shall remain in full force and effect until revoked, vacated or modified by the city of the first class.

- (c) As used in this section, the term "tobacco product" shall have the same meaning as defined in 18 Pa.C.S. § 6305(k) (relating to sale of tobacco).
• Preemption language was inserted into the FY19 PA fiscal code without public discussion
• Pre-empted Philadelphia’s local autonomy to pass legislation focused on tobacco retail sales in the city
• Legislation passed before 6/1/18 will be grandfathered, including Philadelphia’s tobacco retail regulations
The Board of Health regulates tobacco retailers

Philadelphia Code § 9-631(2)(C)(.7) empowers Board of Health to impose any requirement on issuance & renewal of a tobacco retailer permit, as long as requirement is “appropriate for the public health.”
1. Tobacco Retailer Density Cap
2. Tobacco-Free School Zones
3. Increased permit fee to fund compliance checks
4. Tobacco Cease Sales Order for Repeated Youth Sales Violations
This is about parity and equality

A child walking to school in North Philadelphia passes 16 tobacco retailers
This is about parity and equality

A child walking to school in Chestnut Hill passes 1 tobacco retailer.
This is about our children
9.8% reduction in the total number of permits issued in the first year after implementation of the regulations
Bill 180522

- This bill would allow retailers who purchase a store that had a 2016 permit to obtain a permit regardless of proximity to schools or neighborhood tobacco density.

- Philadelphia’s tobacco retail regulations decrease the number of permits in school zones and overly dense neighborhoods via attrition; existing retailers were grandfathered.

- Bill 180522 would dramatically slow that process of attrition.

- *Increased tobacco retailer density is associated with more youth smoking initiation and less success when attempting to quit smoking.*
Next Steps

• Preserve, evaluate and publish on tobacco retail regulations to ascertain public health impact

• Pursue local tobacco control policy in pre-emption environment

• Educate legislators about pre-emption
Thank you!

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Goodbye Preemption, Hello Local Policies:

Oregon’s Indoor Clean Air Act

Karen Girard
April 30, 2019
Local preemption in Oregon tobacco laws

1. Taxes

2. Vending machines

But, there used to be one more...
History of Oregon’s ICAA:
a series of ups and downs

1998-2001: 12 Oregon communities pass smoke-free workplace laws

2001: Statewide law passed, including preemption

A local government may not prohibit smoking in any areas listed in ORS 433.850 (2) unless the local government prohibition was passed before July 1, 2001.
For six years...
History of Oregon’s ICAA: a series of ups and downs

2007*: Expansion of statewide law, preemption language removed!
*in effect January 1, 2009

2015: Inhalant delivery systems (e-cigarettes) and cannabis included in the ICAA.
Since preemption was removed
Since preemption was removed

Smoke-free laws expanded in a few incorporated cities
Lessons

1. Adaptability
2. Readiness
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Questions and Answers

Submit your questions through the chat box on your screen.
PHLC Preemption Resources

- Untangling the Preemption Doctrine in Tobacco Control

- Checked at the Check-Out Counter: Preemption at the Tobacco Point-of-Sale

- Preemption: The Biggest Challenge to Tobacco Control

- Why Preemption is Bad for Tobacco Control
Visit the TCN Website!

www.tobaccocontrolnetwork.org/
New to the TCN Website

• New TCN state tobacco policy scans

• Full materials from TCN’s three-part workforce development virtual series on tobacco industry tactics

• Opioids and tobacco summary presentation

• Any TCN inquiries can be directed to tcn@astho.org
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THANK YOU!