TOBACCO INDUSTRY TACTICS FOR PASSING PREEMPTION LEGISLATION

TCN and PHLC Tobacco Preemption Virtual Series

June 10, 2019
Today’s Agenda

• Background on from the Public Health Law Center and the American Cancer Society Cancer Action Network

• State case studies from Hawaii and Florida

• Moderated Q&A
TCN Mission

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.
TCN 2016-19 Strategic Map

Strengthen the Relevance and Sustainability of the Tobacco Control Movement

A
- Improve the Effectiveness of S/T Tobacco Prevention and Control
  - Implement Strategies that Advance Health Equity
  - Foster Support for TCN Policy Recommendations
  - Create Opportunities for Sharing Success "How To's"
  - Establish a Peer-to-Peer Mentoring Model

B
- Establish a National Voice for S/T Tobacco Control Programs
  - Diversity TCN Partnerships to Advance Health Equity
  - Develop Relationships with National Partners & Stakeholders
  - Disseminate the Policy Recommendations Nationally
  - Establish a Bank of State-Specific Program Highlights
  - Enhance Communication Channels

C
- Engage Members in the Future of TCN
  - Demonstrate the Value and Contributions of TCN
  - Implement a Member Recognition Program
  - Expand Systematic Member Engagement
  - Represent S/T in Responding to Public Comment Requests
  - Annually Assess and Respond to Member Needs

D
- Secure Sustainable Funding
  - Increase Funding for Health Equity
  - Identify Channels to Express Support for State and Federal Funding
  - Communicate Messages About the Value & Cost Effectiveness of Tobacco Control Funding
  - Leverage Partnerships that Mobilize Members and Support Sustainability

Track 1:
- Engage members in the future of TCN

Track 2:
- Support tobacco funding with national partners

Track 3:
- Keep pace with environmental changes

Overarching principle:
- Incorporate health equity throughout the work of TCN

Strengthen the Connections Between Tobacco Control Practice and Research
Preemption
The industry’s favorite tool
THE PUBLIC HEALTH LAW CENTER
WHY DO WE CARE?
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
WHY IS PREEMPTION SO INSIDIOUS?
WHERE THERE IS PREEMPTION
LITIGATION WILL FOLLOW
LOOK FOR...

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

AND look EVERYWHERE!
DON’T LEAVE IT TO CHANCE
ANTI-PREEMPTION LANGUAGE

Nothing in this statute shall be construed to limit a local jurisdiction from regulating tobacco products.
KNOW YOUR RESOURCES
WHO CAN HELP?

- ACS CAN, ASTHO, TCN
- Grassroots Change
- Americans for Nonsmokers’ Rights
- CDC
- RWJF
- AHA, ACS, and ALA
- Many others
CONTACT US

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Tobacco Industry Influence on State Preemption Policy
In their own words...

• “We could never win at the local level.... So the Tobacco Institute and 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.” --- Victor L. Crawford, Former Tobacco Institute Lobbyist, Journal of the American Medical Association, 7/19/95
In their own words...

• “Industry leaders have recognized that state laws which preempt local anti-tobacco ordinances are the most effective means to counter local challenges.” Kurt Malmgren, R.J. Reynolds Tobacco Company, Bates No.: 513331953, 1992
“Accept minimum federal standard of 18 years of age in return for maintaining federal preemption of health warning labels or avoiding other onerous proposals.”
In their own words...

“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. We owe it both to our business and our consumers.”
Three Types of Preemption

1. Express
   - A statute which explicitly asserts the state’s (or Congress’) intent to occupy the field in a given subject area.

2. Implicit
   - The court interprets a statutory scheme to be so comprehensive as to implicitly “occupy the field” and preclude local (or state) control.

3. Practical
   - Bureaucratic hurdles, referendums, restrictions of authority.

Industry strategies and language change over the years, but their goal remains the same.
Express Preemption:

SC H. 3274

SECTION 1. Chapter 95, Title 44 of the 1976 Code is amended by adding:

"Section 44-95-45. Political subdivisions of this State may not enact any laws, ordinances, or rules pertaining to ingredients, flavors, or licensing of cigarettes, electronic cigarettes, tobacco products, or alternative nicotine products."
(2) PREEMPTION.--The establishment of the minimum age for the sale and delivery of tobacco products, nicotine products, or nicotine dispensing devices, and the regulation of the marketing of such products, is preempted to the state.
More restrictive or stringent than:

AR ACT 580

“(2)(A) 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 or the rules promulgated by the board.”
Uniform:
Iowa – 453A.56
“Uniform application. Enforcement of this chapter shall be implemented in an equitable manner throughout the state.”
Supersede:

5 S.C. Code § 16-17-504

“Any laws, ordinances, or rules enacted pertaining to tobacco products or alternative nicotine products may not supersede state law or regulation.”
Matter of statewide concern:

AZ 36-798.09. State preemption
2 A. THE REGULATION OF THE SALE AND MARKETING OF TOBACCO PRODUCTS, 3 E-LIQUIDS, VAPOR PRODUCTS AND ALTERNATIVE NICOTINE PRODUCTS IS A MATTER OF 4 STATEWIDE CONCERN AND IS NOT SUBJECT TO FURTHER REGULATION BY A CITY, TOWN TOWN 5 OR COUNTY IN THIS STATE, EXCEPT AS PROVIDED IN SUBSECTION B OF THIS 6 SECTION. THIS ARTICLE PREEMPTS ANY RULE, REGULATION, CODE OR ORDINANCE 7 ADOPTED OR MODIFIED TO BE MORE RESTRICTIVE AFTER MAY 1, 2019 BY ANY CITY, 8 TOWN OR COUNTY IN THIS STATE REGARDING THE SALE OR MARKETING OF TOBACCO 9 PRODUCTS, E-LIQUIDS, VAPOR PRODUCTS OR ALTERNATIVE NICOTINE PRODUCTS.
Where to look...

• Everywhere!
• Public Health Bills
  • Introduced by them
  • Introduced by you ... Monitor them **ALL!**
• Recent Trends
  • E-cigarettes, Tobacco 21, Marijuana, Fracking, Minimum Wage, Paid Sick Days, Discrimination, Agriculture, Nutrition, etc.
Recent Trends

• Business activity – TX HB3899
  “a municipality may not adopt or enforce an ordinance, rule, or regulation that imposes a restriction, condition, or regulation on commercial activity. The prohibited action under this subsection impairs the free flow of commerce across the state and is inconsistent with the general law of this state.”

• Consumer goods – IA 331.301
  “c. (1) A county 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”
Third Parties and Fronts

Third Parties and Fronts

unanimous on our course of action. (EXAMPLE?)

The action taken by the legislature -- by the grasstoppers we want to influence -- is the bottom line of our effort. A bill can be passed as proposed, passed in a form more acceptable to us, defeated in a floor vote, tabled until the next legislative session or passed and then vetoed by the governor.

(PAUSE)

Now that I've told you what we do and how we do it, let me give you a basic idea of the basic strategies that make the influence wheel go around.

(SLIDE: BASIC POLITICAL STRATEGY)

First, the nature of our issues demands that our focus be on all 50 states. At the same time, all politics is local. Our SDs retain lobbyists, pollsters, public relations firms and other professionals who know the local issues and have contacts among the operative people in government and the media to help us. (EXAMPLE?)

Second, we try to keep Philip Morris out of the media on issues like taxation, smoking bans and marketing restrictions. Instead, we try to provide the media with statements in support of our positions from third party sources, which carry more credibility than our company and have no apparent vested interest. (EXAMPLE?)

Third, we create coalitions of third party sources to

Second, we try to keep Philip Morris out of the media on issues like taxation, smoking bans and marketing restrictions. Instead, we try to provide the media with statements in support of our positions from third party sources, which carry more credibility than our company and have no apparent vested interest. (EXAMPLE?)

Rep. John Allen, R-Scottsdale, said Friday he doesn’t have the votes for his legislation that would raise the age. And there is no other pending measure to do the same.

But Allen told Capitol Media Services that the issue of how old someone has to be to use products that have tobacco or nicotine is not his prime focus for pushing SB 1147.

Instead, he was offering up the carrot of a higher age as an inducement to health groups to get them to accept what he wants: Pre-empting cities and counties from enacting and enforcing their own laws on the marketing and sale of both tobacco and vaping products. And Allen said he saw no reason to simply offer the carrot.

7 Principles on Preemption

- We believe as laboratories of democracy, state capitols are where political philosophy is debated and enacted into law. Local government is where those laws are applied.
- We believe the top priorities of federal, state, and local officials are to protect individual liberties and uphold equal justice under the law for our constituents.
- We believe preemption of local governments is a prudent response only in instances where localities overstep their Constitutional duties.
- We support efforts on the state or local level to end regulatory/predatory taxation on our constituents as taxpayers.
- We believe the term “local control” has become politicized and in part has become more about controlling constituents instead of protecting the freedoms of constituents.
- We support efforts on the federal, state or local level to end burdensome regulations on our constituents.
- We support efforts on the federal, state or local level to secure a true free market economy for local business owners.

https://www.acce.us/model-policy/7-statements-of-principle-on-preemption/
If You’re Already Preempted

- Not an excuse for not repealing it or extending the preemption to include other products or provisions
- Work to repeal it
- Pass local control resolutions
- Make friends with non-traditional partners
- Build and educate your local base
Defending Against Preemption

- Pass local ordinances!
- Make friends with non-traditional partners
- Educate your base early
- Mobilize your base early
- Research tobacco campaign contributions to your state legislators.
- Research who is a member of ALEC in your state
- Research who is registered in support of legislation
We are here to help!

- cathy.callaway@cancer.org
- 515-255-4074
PREEMPTION

We never saw it coming...

“Tobacco Industry Tactics for Passing Preemption Legislation”
Hawaii Case Study      June 10, 2019
20 YEARS OF SMOKING POLICIES

- **1997**: Cigarette excise tax ($1/pack) (HRS §245-3)
- **2001**: Smoking banned on all public school properties and at school functions (HRS §302A-102)
- **2003**: Hawai‘i Tobacco Settlement Special Fund (TSSF) (HRS §328L)
- **2005**: Hawai‘i County bans smoking in bars & restaurants
- **2007**: Clean Air Law (HRS §328J-2-5)
- **2009**: Hawai‘i County bans smoking in parks, beaches
- **2011**: Cigarette excise tax ($3.20/pack) (HRS §245-3)
- **2013**: Smoking prohibited at state public housing, elder/elderly household, or low-income housing projects (HRS §356D-6.5)
- **2015**: ESDs included in Clean Air Law (HRS §328J-1)
- **2017**: Tobacco-Free State Parks (HRS §184-4.5)
- **2018**: Age 21 Law (HRS §328J-1)

**Hawai‘i County bans smoking in cars w/minors**

**Kaua‘i County bans smoking in cars w/minors**

**Honolulu County Age 21 ordinance + ESDs**

**Kaua‘i County bans smoking in cars w/minors**

**Hawaii County age 21 ordinance + ESDs**

**Maui County bans smoking in cars w/minors**

**SOURCE:** Hawaii State Department of Health, Behavioral Risk Factor Surveillance System, 1997-2017
PERHAPS, THERE’S A PRICE FOR SUCCESS..

Congratulations, Hawai’i!
It’s the first state to raise the tobacco sale age to 21.
State of Hawaii
Current E-cigarette Users

16% middle school youth currently smoke e-cigarettes
26% high school youth currently smoke e-cigarettes
4% adults currently smoke e-cigarettes

(HS National Average: 13%)

SOURCE: Hawaii State Department of Health, BRFSS 2017, YRBS 2017
URGENT NEED TO REGULATE ELECTRONIC SMOKING DEVICES (ESDs)
MANY BILLS FOCUSED ON YOUTH PREVENTION AND PROTECTION (2017 - 2018)

• Buffer Zones
• ESD Regulations
• ESD Online Sales
• Cigarette Tax/ Cigar Tax
• Tobacco-Free Univ Hawaii
• Smoke-free cars

• Multiple referrals and hearings
• Deferred or moved ahead

• Last stop is the House Finance Committee
THE TALE OF TWO BILLS

SENATE BILL 2654
RELATING TO CHAPTER 245, HRS

• Required wholesale license and retail permit fees and increase cost of fees
• Taxed E-liquids (with/without nicotine)
• Prohibited shipment/transport of tobacco products to consumers – safeguard for online sales
  • Amended by House Health and Finance Committee
• Passed all committees – CPH, WAM, HHS, CPC, and FIN
• Died last day of conference –

HOUSE BILL 1895
RELATING TO HEALTH

• Established and funded 3 positions in DOH to inspect dialysis centers.
• added new language to
• Establish unfunded ESD Retailer Registration Unit within the AG’s Office
• Change delivery sales
• Seizure and forfeiture clause

• PREEMPT COUNTIES FROM REGULATING TOBACCO SALES

• This version of the bill passed...
  • Was signed by the governor [Act 206]
“STATEWIDE CONCERN”
deceptive language

• “Sales of cigarettes, tobacco products, and ESDs are a statewide concern.

• It is the intent of the legislature to regulate the sale of cigarettes, tobacco products, and ESDs in a uniform and exclusive manner.

• All local ordinances or regulations that regulate the sale of cigarettes, tobacco products, and ESDs are preempted, and existing local laws and regulations conflicting with this chapter are null and void.”
SO, WHAT DID IT FEEL LIKE?

SUCKER PUNCH

“A sucker punch (American English) is a punch made without warning or while the recipient is distracted, allowing no time for preparation or defense on the part of the recipient.”

HAWAII STATE DEPARTMENT OF HEALTH: TOBACCO PREVENTION & EDUCATION PROGRAM
2019 LEGISLATIVE SESSION

Courtesy of Marvel Avenger Action Figures
https://www.youtube.com/watch?v=Z1dzjldN4rw
# 2019 Preemption Bills

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- passed deadline; - did not pass deadline, bill is dead

Hawaii State Department of Health: Tobacco Prevention & Education Program
STILL HAVE PREEMPTION
MAHALO

Lila Johnson
Hawaii State Department of Health
Tobacco Prevention & Education Program

lila.johnson@doh.Hawaii.gov
Preemption in Florida
Déjà vu All Over Again

Ron Davis
State and Community Interventions Supervisor
Bureau of Tobacco Free Florida

Tobacco Control Network & Public Health Law Center
Tobacco Preemption Series

July 10, 2019
Preemption Pioneered in FL

The tobacco industry uses state preemption to protect its interests

Florida - early test case for Tobacco Industry’s preemption strategy

Overturned local clean air ordinances
Florida Clean Indoor Air Act - originally proposed and supported by the ALA, ACS, and AHA

Pro-tobacco opposition led by Tobacco Institute – a tobacco industry funded lobbying group

Implemented in 1985 with weakened restrictions, and included the addition of preemption
FCIAA history

Attempts to strengthen the act legislatively failed

Smoke-free for Health – 2002 citizens initiative

Amendment 6 passed by 71%

Added to the existing FCIAA containing preemption

“Single issue” prohibited repeal of preemption
FCIAA Summary

A person may not smoke in an enclosed indoor workplace (s. 386.204, F.S.) – with specific exemptions

Punishable by a fine of not more than $100 for the first violation and not more than $500 for each subsequent violation

Smoking is prohibited for <18 in, on, or within 1,000 feet of an elementary, middle, or secondary school between 6:00 a.m. and midnight.
FCIAA – preemption clause

386.209 Regulation of smoking preempted to state

“This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.”

- Preempts the act of smoking ONLY
- Not sales, possession, marketing, etc.
- Not smokeless tobacco, e-cigarettes or any other non-smoked tobacco product
Interpreting Preemption

Letter of the law

Legislative intent – up to interpretation

Previous cases related to the law

Attorney General opinions

AG opinion is not law, but carries weight
November 21, 2005 - City of Margate

City wanted to have a smoke-free parks ordinance

Preemption extends to outdoor air.

Legislative intent – school provision
AG Opinion - AGO 2010-53

December 29, 2010 – Palm Beach Schools
School district wanted to pass a smoking policy for their properties

Preemption extends to policy of school boards not just municipality ordinances.

“I am constrained to conclude that under the current statutory restrictions, legislative authorization would be required in order for the school district to implement such a policy.”
FCIAA Amended - Schools

Amended preemption clause in 2011
Legislature amended FCIAA to give school boards authority

“…however, school districts may further restrict smoking by persons on school district property.”

Double edged sword – helped school boards, but clarified the issue regarding policy versus local ordinance
July 21, 2011
St. John’s Water Management District

Wanted to have a smoke-free policy on all of their property – special district

Special district would not be allowed to pass a policy without specific legislative change

Referenced school board amendment as evidence of this prohibition
Policy Implications

“the state” is not “the legislature”

• State University System
• DOC / Prison System
• State Parks
Policy Implications - Parks

City/County smoking ordinance for parks is considered to be preempted

- Resolution and signage approach
Policy

City/County smoking ordinance for parks is considered to be preempted.

- Resolution and signage approach

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PLEASE KEEP THIS PARK TOBACCO FREE

THANK YOU FOR BEING CONSIDERATE OF OTHERS.
Preemption Rears its Head Again

Tobacco 21 bill
  • tobacco marketing preemption

General preemption of local control
  • preemption local retail licensing
Thank You
References


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

• Newly updated: TCN interactive state policy map

• New TCN state tobacco policy scans

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

• Any TCN inquiries can be directed to tcn@astho.org
publichealthlawcenter@mitchellhamline.edu
https://publichealthlawcenter.org/
tcn@astho.org
www.tobaccocontrolnetwork.org/

THANK YOU!