MOVING FORWARD WHEN TOBACCO PREEMPTION IS IN EFFECT

TCN and PHLC Tobacco Preemption Virtual Series

July 25, 2019
Webinar Logistics

• This webinar is being recorded

• Full webinar materials will be made available via email and will be posted on the TCN and PHLC websites

• Submit discussion questions for today’s speakers through the Zoom chat feature
Today’s Agenda

• Background on from the Public Health Law Center

• State Preemption Case Study: North Carolina

• State Preemption Case Study: Oklahoma

• 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
PREEMPTION: THE WORK CONTINUES
WHY DO WE CARE?
A QUICK RECAP

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

“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

Source: grassrootschange.net
REPEAL IS IDEAL
BUT NOT ALWAYS POSSIBLE
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.
WHERE THERE IS PREEMPTION
LITIGATION WILL FOLLOW
U.S. OIL V. CITY OF FOND DU LAC

City Ordinance:
Self-service display.

State Preemption:
Cigarette taxes.
Purchase by minors.
Sales to minors.
EVEN VICTORIES HAVE A COST
FOOTHILLS BREWING CONCERN, INC. V. CITY OF GREENVILLE

City Ordinance:

Amended smoke-free law.

State Preemption:

Youth access section of state code says:

“All laws, ordinances, or rules enacted pertaining to tobacco products [or alternative nicotine products] may not supersede state law or regulation.”

S.C. Code Ann. § 16-17-504(A)
MORE POSITIVE NEWS
SIGNIFICANT COSTS REMAIN
• “…[A] municipality has the right to legislate…local police powers even though there are state laws on the subject uniformly applicable to all municipalities.” *Blevins v. Hiebert*, 247 Kan. 1 (1990).

• “…[W]here an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition…there is no conflict.” *Junction City v. Lee*, 216 Kan. 495 (1975).

• Supreme Court decision June 28, 2019.
May 9, 2018

BY OVERNIGHT MAIL AND E-MAIL

Mayor Peter Lindstrom
City Hall
2077 Larpenteur Avenue West
Falcon Heights, MN 55113
peter.lindstrom@falconheights.org

Dear Mayor Lindstrom:

I am a partner at Jones Day, which represents R.J. Reynolds Tobacco Company, American Snuff Company, LLC, Santa Fe Natural Tobacco Company, Inc., and R.J. Reynolds
cigarettes with characterizing flavors, it expressly chose not to ban menthol cigarettes; instead, it directed the Secretary of the U.S. Department of Health and Human Services to refer this subject to the Tobacco Products Scientific Advisory Committee. See id. § 387g(e)(1). In addition, the U.S. Food and Drug Administration (“FDA”) has not banned additional types of flavored tobacco products at this time.\footnote{1} And recently, FDA issued an advance notice of proposed rulemaking regarding potential regulatory actions that it might take with respect to flavored tobacco products.\footnote{2}

Falcon Heights’s proposed ordinance ignores these provisions of the Tobacco Control Act. If the Council bans the sale of all flavored tobacco products except in adult-only tobacco stores, it would do what the Tobacco Control Act prohibits—establish what amounts to a tobacco product standard that is “in addition to” existing federal standards. The proposed ordinance is therefore preempted by the Tobacco Control Act.

Moreover, the Council cannot dispute that its proposed ordinance effects a \textit{de facto} ban on flavored tobacco products. Although the Council has framed its proposed ordinance so that it does not apply to adult-only tobacco stores, the ordinance has the practical effect of flatly
KNOW YOUR RESOURCES
WHO CAN HELP?

UNTANGLING THE PREEMPTION DOCTRINE IN TOBACCO CONTROL

What is Preemption?

Preemption refers to the legal doctrine that establishes a general framework through which the laws of different levels of government interact. Due to the hierarchical structure of government, the laws of lower government units have to yield to higher government laws when there is conflict. Thus, federal laws can preempt conflicting state laws, and likewise, state law can preempt the laws of lower state political subdivisions, such as counties, cities, and towns. When a law is preempted, it is invalid and has no effect. In a local tobacco control context, preemption removes decision-making authority from local governments and centralizes it in the federal and state governments.

Preemption may be express or implied. Express preemption refers to those instances in which a legislature has explicitly indicated its intention to preempt certain types of laws made by lower government units. The Federal Cigarette Labeling and Advertising Act (FCLAA), for example, contains a provision expressly preempting state governments from regulating cigarette advertising. Implied preemption, on the other hand, arises when the legislature's intent is implicitly contained in a legislature's structure and purpose. Courts have generally recognized two types of implied preemption: (1) field preemption, where a law so thoroughly occupies a legislative field that it would be reasonable to infer that the legislature left no room for the lower government to supplement.
CONTACT US

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publichealthlawcenter@mitchellhamline.edu

www.publichealthlawcenter.org

@phealthlawctr

facebook.com/publichealthlawcenter
Preemption

a cautionary tale and

Lessons Learned

Sally Herndon, MPH
North Carolina Tobacco Prevention and Control Branch
North Carolina’s “Dirty Air Law”

In 1993, the NC General Assembly passed H957, which stated that 20% of space of government buildings should be set aside for smoking, as was *practicable*, and that local governments could not pass anything stronger.
Strategy

Make progress where you can...

Without closing doors on future progress.
20 years of Chipping Away at Preemption: Smoke-free Regulations in NC

• Preemptive legislation in 1993: “the dirty air law”
• Floor of House of Representatives goes smoke-free, 2003
• Floor of Senate goes smoke-free, 2005
• Entire General Assembly goes smoke-free, 2006
• State Government Buildings and Vehicles go smoke-free; local government authority expanded to government buildings and vehicles, 2007
• Smoke-free Restaurants and Bar Law, 2009
  • local government authority under G.S.130A-498 further expanded to government grounds and enclosed public places
• Legislator challenges local authority to ban smoking on government grounds and fails to win support, 2013
Chipping Away: Smoking Restrictions in Other Government Workplaces in North Carolina

**Long-term Care Facilities**
State law prohibits smoking in all long-term care facilities; including nursing homes, adult care homes, and rest homes. The law authorizes DHHS to impose fines upon facilities that fail to implement and enforce the prohibition.

The law also requires home care agencies to prohibit their employees from smoking in a patient’s home.

**Prisons**
State law prohibits any person from using tobacco products inside or on the grounds of a state correctional facility. There may be an exception for authorized religious purposes.

**UNC University System**
State law authorizes the sixteen campuses of the UNC system to prohibit smoking on their grounds--within 100 linear feet of a building:
UNC and ECU Medical Care Facilities authorized to prohibit smoking on all grounds.

**Community Colleges**
Community Colleges may prohibit smoking and all tobacco product use in their buildings and on their grounds.

**Public Schools K-12**
State law requires local boards of education to adopt policies prohibiting the use of tobacco at all times:
• In school buildings,
• In school facilities,
• On school campuses,
• In or on any other property owned by the local school administrative unit, and
• At school-sponsored events at other locations when in the presence of students or school personnel.
Chipping Away:
NC Legislative Champions wrote these express anti-preemption clauses

North Carolina Tobacco Free Schools law:
• Nothing in this section, G.S. 143-595 through G.S. 143-601, or any other section prohibits a local board of education from adopting and enforcing a more restrictive policy on the use of tobacco in school buildings, in school facilities, on school campuses, or at school-related or school-sponsored events, and in or on other school property.

NC law that gives clear authority for Tobacco Free Community Colleges:
• Nothing in G.S. 130A-498, G.S. 143-595 through G.S. 143-601, or any other section prohibits a local community college board of trustees from adopting and enforcing a more restrictive policy on the use of tobacco in community college buildings, in community college facilities, on community college campuses, or at community college-related or community college-sponsored events, and in or on other community college property.
NC Alliance for Health: 
A Strategic Coalition

2007-2009 Priority:
Comprehensive Smokefree Workplaces Law

Primary bill sponsors could not get the votes for comprehensive law.

NC Restaurants and Lodging Association wanted a “level playing field”

Compromise was 2009 Smoke-free Restaurant and Bars Law with considerable return of local authority.
NC Governor signs and Bipartisan Bill Sponsors Celebrate Passage of NC Smoke-free Restaurants and Bars Law, 2009
Local authority is granted in NC for most instances (repealing most of the preemptive language)

- "§ 130A-498. Local governments may restrict smoking in public places. ....and enforce ordinances, board of health rules, and policies restricting or prohibiting smoking that are more restrictive than State law and that apply in local government buildings, on local government grounds, in local vehicles, or in public places."
Strategy:
First: Take A Full Year to Fully and Successfully Implement the Smoke-free Restaurants and Bars Law.
Local Government Authority to Regulate Smoking

A local government may adopt and enforce ordinances, board of health rules, and policies restricting or prohibiting smoking that are more restrictive than state law and that apply to:

• Local Government Buildings
• Local Government Grounds
• Local Government Vehicles
• Enclosed Public Places

NCGS § 130A-498
Smoke-free and Tobacco-Free Maps and Dashboards are a key factor in success

https://tobaccopreventionandcontrol.ncdhhs.gov/maps/maps.htm
North Carolina
Counties and Municipalities Reporting 100% Smoke-Free or Tobacco-Free Government Buildings

Legend
- No Documented Protection (Written Regulation or Less than 100% Written Regulation)
- Smoke Free
  - Counties
  - Municipalities
- Tobacco Free
  - Counties
  - Municipalities
  - NCALHD* Regions
  - County Boundaries

NOTE: Information provided here is from ongoing reporting. Policies presented here are reported to the NC Tobacco Prevention and Control Branch (NC TPCB). If your government entity has a 100% smoke-free or tobacco-free policy which is not reported here, please contact NC TPCB at 919-707-5400.

*North Carolina Association of Local Health Directors
North Carolina
Counties and Municipalities Reporting 100% Smoke-Free or Tobacco-Free on Government Grounds

Legend
- No Documented Protection (Written Regulation or Less than 100% Written Regulation)

Smoke Free
- Counties
- Municipalities

Tobacco Free
- Counties
- Municipalities

NCALHD* Regions
- County Boundaries

NOTE: Information provided here is from ongoing reporting. Policies presented here are reported to the NC Tobacco Prevention and Control Branch (NC TPCB). If your government entity has a 100% smoke-free or tobacco-free policy which is not reported here, please contact NC TPCB at 919-707-5400.

*North Carolina Association of Local Health Directors
North Carolina NCALHD* Region 9
Counties and Municipalities Reporting 100%
Smoke-Free or Tobacco-Free in Government Buildings

Legend
- No Documented Protection (Written Regulation or Less than 100% Written Regulation)
- Smoke Free
  - Counties
  - Municipalities
- Tobacco Free
  - Counties
  - Municipalities
- NCALHD* Regions
- County Boundaries

NOTE: Information provided here is from ongoing reporting. Policies presented here are reported to the NC Tobacco Prevention and Control Branch (NC TPCB). If your government entity has a 100% smoke free or tobacco free policy which is not reported here, please contact NC TPCB at 919-707-5400.
*North Carolina Association of Local Health Directors
North Carolina NCALHD* Region 4 Counties and Municipalities Reporting 100% Smoke-Free or Tobacco-Free in Government Owned Parks

Legend
- No Documented Protection (Written Regulation or Less than 100% Written Regulation)
- Smoke Free
  - Counties
  - Municipalities
- Tobacco Free
  - Counties
  - Municipalities
- NCALHD* Regions
- County Boundaries

NOTE: Information provided here is from ongoing reporting. Policies presented here are reported to the NC Tobacco Prevention and Control Branch (NC TPCB). If your government entity has a 100% smoke free or tobacco free policy which is not reported here, please contact NC TPCB at 919-733-5400.

*North Carolina Association of Local Health Directors
Local Data – New County Dashboards Can Be Customized for “Peer Counties” or Geographic Regions

<table>
<thead>
<tr>
<th>Local Health Dept. Region</th>
<th>Government Buildings</th>
<th>Government Vehicles</th>
<th>Government Grounds</th>
<th>Gov’t-Owned Parks Only</th>
<th>Recreation Areas</th>
<th>Public Places</th>
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</table>

**TOTAL # OF POLICIES STATEWIDE**

| Total | 80 | 51 | 14 | 22 | 26 | 2 |
Wake County Uses TPCB Data Dashboards to Inspire Tobacco-Free Policy Change

Before November 16, 2015

As of November 16, 2015
### Dashboards are also available for Municipalities

**NORTH CAROLINA MUNICIPALITY 100% TOBACCO-FREE OR SMOKE-FREE WRITTEN REGULATIONS**

<table>
<thead>
<tr>
<th>County</th>
<th>Local Health dep. Region</th>
<th>Gov't Buildings</th>
<th>Gov't Vehicles</th>
<th>Gov't Grounds</th>
<th>Gov't-Owned Parks only</th>
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</table>

**LEGEND:**
- ✓: 100% Tobacco Free Policy
- ✔: 100% Smoke Free Policy
- X: No Written Regulation or Less than 100% Written Regulation

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**Tobacco Prevention and Control Branch**

---
Local governments can prohibit the use of e-cigarettes and smokeless tobacco

- The legislature has never passed legislation pre-empting local governments from regulating the use of e-cigarettes (or smokeless forms of tobacco), which are not lighted.
- Therefore, local governments can pass such regulations under their basic authority to pass regulations to protect the health and welfare of the community.
- If a regulation for government buildings and/or grounds covers all “tobacco products”, then our interpretation is that e-cigarettes are included within that definition.

Guidance from the UNC School of Government, [http://canons.sog.unc.edu/?p=7788](http://canons.sog.unc.edu/?p=7788)
## NC Counties and Municipalities that Specifically Prohibit Use of E-Cigarettes

<table>
<thead>
<tr>
<th>Counties (39)</th>
<th>Municipalities (46)</th>
<th>Counties (39)</th>
<th>Municipalities (46)</th>
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March Forth for Healthy Air

Smoke-Free/Tobacco-Free parks are healthier for kids, pets and wildlife.

LET'S DO IT BY MARCH 4TH, 2020!

March Forth for Healthy Air:

Tobacco use (including e-cigarettes) is dangerous indoors. Let’s make our government buildings tobacco-free by March 4th, 2020!
Resources

Sally Herndon, MPH
N.C. Department of Health and Human Services
Head, Tobacco Prevention and Control Branch
Direct Line: 919-707-5401
Main Line: 919-707-5400
sally.herndon@dhhs.nc.gov

www.tobaccopreventionandcontrol.ncdhhhs.gov

Jim Martin, MS
Director of Policy and Programs
N.C. Tobacco Prevention and Control Branch N.C. Division of Public Health
919-707-5404 office
Jim.martin@dhhs.nc.gov

“NINE QUESTIONS”
A Strategy Planning Tool
ADVOCACY INSTITUTE
WASHINGTON, D.C.
Stuck with Preemption?

Oklahoma’s 30+ Year Experience
1987 Oklahoma Smoking in Public Places Act
(§63-1-1527)

“The State Legislature by adopting this act intends to **preempt** any other regulation promulgated to control smoking in public places and to **standardize laws** that governmental subdivisions may adopt to control smoking. Cities and towns may enact and enforce laws prohibiting and penalizing conduct under provisions of this act, but the provisions of such laws **shall be the same** as provided in this act and the enforcement provisions under such laws **shall not be more stringent than those of this act...**
1994 Oklahoma Prevention of Youth Access to Tobacco Act (§37-600.10)

No agency or other political subdivision of the state, including, but not limited to, municipalities, counties or any agency thereof, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, distribution, advertising, sampling, promotion, display, possession, licensing, or taxation of tobacco products...
# Coalition Focus

## Community Sectors
- City governments
- Schools, Colleges, Career Techs
- Businesses
- Faith organizations
- Early Childhood Centers
- Parks and recreational venues
- Hospitals and Health Systems

## Support Provided
- Education and skill building
- Consultation and sample policies
- Signage
- Demonstrated public support
- Testimonials
Why Restore Local Rights?

Local Leaders are Closest to the People

- Oklahoma is one of only two states in the nation that prohibit communities from adopting any ordinance on tobacco that’s stronger than state law.
- The national trend is to return lawmaker power to the local level. It’s time to get government back in the hands of the elected officials who are closest to the people.
- Communities need the right to address critical matters of public health and safety.
- A powerful change process unfolds as a community is allowed to consider meaningful policies founded on research and public support.

Oklahoma’s Health Ranking is 49th Out of 50 States!

- Smoking is Oklahoma’s leading cause of preventable death, costing over 6,000 Oklahoma lives and nearly $2.9 billion each year.
- Exposure to secondhand smoke causes heart disease, lung cancer and other serious illnesses among non-smokers. No Oklahomans should have to put their health at risk in order to earn a paycheck.
- In any given year, three out five Oklahoma adult smokers make at least one serious attempt to quit.
- Most smokers become addicted as young people. If current trends continue, an estimated 87,000 children now living in Oklahoma will ultimately die prematurely from smoking.

Healthy Communities = Healthy Businesses

- Oklahoma communities need the right to improve the health of their citizens, compete for new businesses and new residents, and create a healthier workforce.
- There’s overwhelming evidence that improving the physical health of workers results in better fiscal health for employers. A healthier workforce is a vital component for continuing competitive growth.
- Reducing tobacco use among workers generates financial returns from reduced health care costs, increased on-the-job productivity, reduced life and health insurance costs, and reduced absenteeism.

Visit our Smoke Free Oklahoma website: www.smokefreeoklahoma.com
Executive Orders as a Lever

- 2012 – Governor’s Executive Order making all state property tobacco-free
  - 2015 – State law making all schools tobacco-free
  - 2017 – State law making all state property tobacco-free

- 2013 – Governor’s Executive Order making all state property vapor-free
  - 2019 – State law making all schools vapor-free
WREAKING HAVOC ON SMOKING

SOCIAL BRANDING TO REACH YOUNG ADULT PARTIERS IN OKLAHOMA

PUBLISHED
Make It Your Business

Health and Wellness Symposium

May 9, 2019 | 8:30am–2:00pm
OU-Tulsa | Founders Hall
4502 E 41st St | Tulsa, OK 74135

Brain, Body, and Business
with Keynote Speaker
Gerard Clancy, M.D.

Make it Your Business aims to provide employers the resources, materials and strategies for developing healthy cultures at their organizations.

Register online at
www.tulsa-health.org/MIYB

For more information contact
918.595.4224 or
dbryant@tulsa-health.org
We all know....

• Local people spot issues first and they can act swiftly to address them.
• Many innovative approaches have begun at the local level and then spread to the state or federal level
• Preemption maintains health disparities and is a barrier to economic development
• We can never know what the future may hold, and preemption tries to ensure that we will not be prepared to act.
“If a tobacco-related law was written or influenced by a tobacco company or a tobacco company lobbyist, what do you think lawmakers should do?”

General U.S. Population (n = 1,006)
- Leave the law as it is: 31.4%
- Revise the law: 36.3%
- Remove the law and start over: 27.5%
- Not sure: 6.0%

State & Local U.S. Lawmakers (n = 436)
- Leave the law as it is: 41.3%
- Revise the law: 20.0%
- Remove the law and start over: 32.7%
- Not sure: 6.0%
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
On the TCN Website

• Tobacco industry marketing and sales tactics summary brief and supplementary presentation

• Coming up:
  – TCN 2019-22 Strategic Map
  – Elections for the 2019-2020 Executive Committee

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