

# TOBACCO POINT OF SALE PREEMPTION PLAYBOOK 2022



ChangeLab Solutions



**COUNTER  
TOOLS**

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We recognize the important role of ceremonial and traditional uses of tobacco in many Indigenous communities. This resource is intended to address commercial tobacco, not tobacco products used as part of an Indigenous practice or other recognized religious or spiritual ceremonies or practices. All references to tobacco and tobacco products in this resource refer to commercial tobacco.



## INTRODUCTION

Local governments are on the front lines of adopting laws and policies aimed at improving health outcomes and reducing inequities. Local policy change is often more grounded in a deep understanding of the health needs, community goals, and lived experiences of residents, and is therefore more likely to create the kind of lasting change that comes from responding to local priorities. When leaders make public health decisions without considering local contexts, concerns, and contributions, those decisions may miss the mark or even exacerbate health disparities.<sup>1</sup> Moreover, local policy changes can provide case studies, lessons learned, and evidence of success, which can set the stage for state-level or national changes.

Some states, however, use their authority to block local policy innovations. In doing so, they are relying on the legal doctrine of *preemption*, which allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a specific issue. Federal laws can preempt state and local laws, and state laws can preempt local laws.<sup>2</sup> Outside the context of commercial tobacco, preemption has been historically used as a legislative and judicial tool for resolving problems that arise when different levels of government adopt conflicting laws on the same subject. However, preemption increasingly has been used to protect the power and financial interests of established political or commercial entities. This trend is consistent with how preemption always has been used in the tobacco context to protect industry interests by taking away local power.

State preemption can thwart local communities' efforts to adopt laws and policies that protect public health and advance health equity. For example, using preemption, states have blocked localities from adopting laws and policies to raise the minimum wage, require paid sick leave, expand broadband access, protect the environment, strengthen antidiscrimination laws, ensure access to safe, stable, and affordable housing, and address more traditional public health concerns such as the regulation of alcohol and sugary beverages, among other issues.<sup>3</sup> Recently, state preemption has been used to undermine the authority of local public health officials more broadly,<sup>4</sup> including blocking local actions to address the COVID-19 pandemic.<sup>5</sup>

Preemption threatens local governments' ability to be representative of and responsive to the people they represent. When a locality is demographically very different—for example, racially or socioeconomically—from the whole state, the state legislature may not reflect either the makeup or the preferences and beliefs of the locality. By enacting preemptive state-level laws, the state legislature prevents the locality from addressing specific problems in a manner that best serves those most affected. In some of these cases, preemption may be purposefully discriminatory or have an inequitable effect regardless of intent.<sup>6</sup>

Research has documented that the misuse of preemption can have wide-ranging, detrimental effects on public health and equity, with consequences such as lower life expectancy, increased infant mortality, and worse overall health outcomes.<sup>7,8</sup>

## HARMS OF THE MISUSE OF PREEMPTION

**MINIMUM WAGE AND BIRTH OUTCOMES:** A study assessing how preemption affects birth outcomes—a key indicator of population health—found that state preemption of local minimum wage laws accounted for as much as 3.5% of infant deaths, resulting in more than 600 infant deaths in 2018 alone.<sup>9</sup> The same study found that the largest metropolitan counties could reduce the infant mortality rate by 1.5 to 1.8% by increasing the minimum wage by one dollar.<sup>10</sup>

**ZONING AND HEALTH STATUS:** Inclusionary zoning refers to policies intended to ensure new housing development increases the supply of housing units for low- and moderate-income individuals, such as mandating that a certain percentage of units in the development be affordable.<sup>11</sup> A study suggests a relationship between state preemption of local mandatory inclusionary zoning policies and both increased rates of self-reported poor or fair health status and a greater likelihood that Black adults report delaying medical care because of cost.<sup>12</sup>

**PAID LEAVE AND REDUCED DISPARITIES:** Research finds that laws mandating universal paid leave reduce racial disparities, increase economic security, and improve health outcomes, including reduced emergency department use, increased use of preventive care, and fewer occupational injuries.<sup>13</sup> A large portion of those without paid sick leave are low-wage, part-time workers who are disproportionately Latinx, Black Americans, and women, meaning state preemption that prevents local governments from adopting paid leave laws may contribute to racial and socioeconomic inequities.<sup>14</sup>

**LIFE EXPECTANCY:** Between 1980 and 2014, the difference between life expectancy at birth in Mississippi and New York more than tripled from 1.6 years to 5.5 years. Although the causes of this disparity are complex and varied, New York allows local governments to raise the minimum wage, mandate paid sick leave, regulate firearms, and require calorie counts on restaurant menus, whereas Mississippi preempts all four of these policies.<sup>15</sup>

**CHILLING EFFECT:** Even the possibility of preemption can influence local policies aimed at improving community health. A survey found that over 70% of local health officials and 60% of mayors reported abandoning or delaying local policymaking efforts because of the threat of state preemption. Local policies chilled by the threat of preemption included efforts to regulate commercial tobacco, environmental hazards, firearms, minimum wage, safe housing, and transportation, among others.<sup>16</sup>

## PURPOSE

The purpose of this playbook is to equip tobacco prevention and control advocates with the knowledge, context, and resources needed to understand how preemption influences their work, specifically related to point-of-sale tobacco control, in their communities. Although the playbook provides some context on federal preemption, the primary focus of this playbook is addressing state-level preemption.

## POINT OF SALE

The **point of sale** refers to the location where tobacco products are purchased (i.e., the retail environment). This includes both what is happening on the exterior or interior of the store, as well as the presence of a store that sells tobacco products. Decades of research have shown that advertising and availability of tobacco products is an important influence on tobacco use initiation, purchasing behavior, and cessation.



## PREEMPTION IN TOBACCO CONTROL

Preemption poses a host of challenges to tobacco prevention and control efforts.<sup>17</sup> Local governments are uniquely positioned to meet the needs of the people in their communities. Local-level policy making is an effective way to reduce tobacco use through strategies that are aligned with the local community's needs, context, and values. Local tobacco control policies can significantly decrease both the number of people who start smoking and the number of individuals who are protected from tobacco-related harm, including exposure to secondhand smoke. Local-level innovation often also leads to state-level action.

The tobacco industry works tirelessly to limit local control by lobbying for federal and state policy that includes language to prohibit local governments from enacting policies that are more stringent than the policy rules or regulations at the federal or state level. This type of preemption produces problems for staff working on commercial tobacco issues who recognize that state and federal policy may not reflect the specific and unique needs of their community.

Once preemption is in place, it can be difficult to overturn or reverse.<sup>18</sup> Preemption also has led to further health disparities in states where local authorities cannot adopt tobacco control policies.<sup>19</sup> The tobacco industry's successful efforts to preempt local tobacco control laws have compounding negative consequences for public health.

Preemption in tobacco control policy at the state or federal level:

- Can reverse years of public health progress by invalidating local tobacco control policies.
- Harms local government efforts to protect the health and wellbeing of the communities they represent, contributing to higher tobacco-related morbidity and mortality.
- Stifles a community's ability to address health equity. Local tobacco control laws are a critical means for communities who have been targeted by the tobacco industry and disproportionately harmed by tobacco-related disease to combat the harms associated with tobacco use.
- Can cause a chilling effect on public awareness of the dangers of smoking. This happens when local communities and the governments that represent them have fewer opportunities to engage in the public discussions and education that accompany consideration of tobacco control laws.

For more examples on how preemption hurts tobacco prevention and control efforts, see the Public Health Law Center's resource called [Preemption: The Biggest Challenge to Tobacco Control](#).

Preemption in tobacco control is widely recognized as a detriment to public health and health equity. Many public health agencies, including the U.S. Department of Health and Human Services,<sup>20</sup> have recommended repealing state preemption of more protective local tobacco control laws.

## SECTION 2

### PREEMPTION BASICS: WHAT, WHERE, AND HOW

Preemption varies with respect to source, form, and scope. When people think about preemption, they generally imagine a state statute limiting the authority of local governments. This is for good reason—state statutes are the most common source of preemption and the starting point for assessing preemption. In many instances, language preempting local commercial tobacco point-of-sale laws is found near or alongside state statutes regulating the tobacco retail environment, such as state statutes establishing the minimum legal sales age for tobacco products or requiring retailers to obtain and maintain a tobacco retailer license. In other instances, however, the relevant preemption language may be found in other sections of state statutes, such as those addressing municipal authority generally or other types of commercial tobacco laws (e.g., smoke-free air laws).

Other sources of law can also establish and define preemption. This includes judicial decisions and, although less common in the context of commercial tobacco control, state regulations (i.e., rules adopted by a state regulatory agency such as a state health department) and executive orders issued by a governor. Understanding the existence, scope, and applicability of state preemption requires assessing all potential sources of preemption before moving forward with local commercial tobacco point-of-sale laws and policies.

#### SOURCES OF PREEMPTION:

- State constitutions
- State statutes
- State regulations
- Executive orders
- Judicial decisions

This section provides a general overview of the forms and scope of preemptive state laws. A subsequent section on key legal considerations provides additional guidance on how to use this information to assess state preemption of local commercial tobacco point-of-sale laws and policies.



## FORMS OF PREEMPTION

Preemption can occur in several ways. **Express preemption** occurs when a law explicitly states that it preempts lower-level lawmaking authority, whereas **implied preemption** occurs when a law contains no explicit preemption-related language but nevertheless is found to preempt state or local authority. For example, implied preemption may occur when a higher-level law sets forth a comprehensive scheme of regulation on an issue, leaving no room for lower-level governments to regulate. Implied preemption may also be found when a lower-level law poses an obstacle to or frustrates the purpose of a higher-level law.

In addition to being express or implied, there are a few ways preemption can limit the types of actions that lower levels of government can take. For a full description of these types, see page 6 of ChangeLab Solutions’ guide, [Assessing & Addressing Preemption](#). For the purposes of tobacco prevention and control, the most concerning forms of preemption are those that restrict the ability of local governments from engaging in tobacco regulations. Preemption can establish a ceiling, or a cap on the standards that lower levels of government can require. In this case, a lower level of government cannot require anything more stringent<sup>21</sup> or different.<sup>22</sup> Or, a higher level of government may decide to set no standards but still prohibit lower levels of government from enacting any requirements themselves—the higher level of government thus creates a regulatory vacuum related to a particular issue.<sup>23</sup> These two types of preemption have increasingly been used to limit the ability of local governments to protect the health and wellbeing of their residents.

<b>EXPRESS VS. IMPLIED PREEMPTION: COMMERCIAL TOBACCO EXAMPLES</b>	
<b>EXPRESS PREEMPTION</b>	Florida state law provides that “[t]he establishment of the minimum age for purchasing or possessing, and the regulation for the marketing, sale, or delivery of, nicotine products is preempted to the state.” <sup>25</sup>
<b>IMPLIED PREEMPTION</b>	Maryland state law explicitly preempts only local tobacco taxes. <sup>26</sup> However, the Maryland Court of Appeals has interpreted state tobacco laws as impliedly preempting the field of regulating the packaging, sale, and distribution of tobacco products. <sup>27</sup>

### **PUNITIVE PREEMPTION**

States have recently begun to adopt laws that not only preempt local laws on a particular subject but also punish local officials and local governments that attempt to enact or enforce preempted laws.<sup>28</sup> For example, a 2016 Arizona law allows state lawmakers to request that the state attorney general investigate whether “any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town ... violates state law or the Constitution of Arizona.”<sup>29</sup> If the attorney general determines that a local law is preempted, the local government has 30 days to resolve the issue by modifying or repealing the purportedly preempted law,<sup>30</sup> and the locality risks the loss of state funding if they fail to do so.<sup>31</sup> Unlike most other examples of punitive preemption which apply only to certain types of local laws (e.g., laws related to immigration or firearms), the Arizona law applies to any purportedly preempted local law. Arizona’s punitive preemption law has been used to challenge, and, in some cases, undermine local laws ranging from an eviction moratorium in Pima County, regulations on plastic bags, firearm safety laws, and business licensure requirements.<sup>32</sup> Moreover, the law has had a chilling effect on jurisdictions, preventing them from moving forward with policies due to the potential financial repercussions.

## SCOPE OF PREEMPTION

Preemption can also vary in scope (broad or narrow) and applicability. **Field preemption** occurs when a higher-level government prohibits a lower-level government from passing or enforcing *any* laws on an issue, reserving the entire area of regulation to itself. Alternatively, a higher-level government can choose to preempt only lower-level laws affecting *specific components* of an issue.

Preemption laws vary in whether they apply retroactively, meaning the preemptive law invalidates local laws that existed prior to the establishment of preemption, or prospectively, meaning that existing local laws can remain in effect, but localities cannot adopt new laws and/or modify existing laws. Finally, preemption may apply only to certain types of local jurisdictions.<sup>24</sup>

<b>SCOPE OF PREEMPTION: COMMERCIAL TOBACCO EXAMPLES</b>	
<b>FIELD PREEMPTION</b>	South Dakota state law provides that “[f]or the purposes of equitable and uniform regulation and implementation, the Legislature through this chapter is the exclusive regulator of all matters relating to the distribution, marketing, promotion, and sale of tobacco products.” <sup>33</sup>
<b>LIMITED PREEMPTION</b>	Local communities in California generally may adopt local tobacco point-of-sale laws that are more stringent than state law. However, localities are preempted from imposing additional taxes on tobacco products, with state law providing that state tobacco taxes “are in lieu of all other state, county, municipal, or district taxes on the privilege of distributing cigarettes or tobacco products.” <sup>34</sup>
<b>RETROACTIVE PREEMPTION</b>	Indiana state law provides that the “[r]egulation of the sale, distribution, or display of tobacco products may only be authorized by the [state legislature],” <sup>35</sup> and specifies that a local ordinance, bylaw, or rule concerning those matters “is void, regardless of when [the local law was] enacted.” <sup>36</sup>
<b>PROSPECTIVE PREEMPTION</b>	Arkansas state law generally preempts the enactment and enforcement of more restrictive “local regulation of the manufacture, sale, storage, or distribution of tobacco products.” <sup>37</sup> However, more restrictive local regulations that had already been enacted as of September 1, 2019, are not preempted. <sup>38</sup>  Tennessee state law preempts most local laws related to traditional tobacco products that were enacted after March 15, 1994 and most local laws related to electronic smoking devices that were enacted after July 1, 2021. <sup>39</sup>
<b>PREEMPTION OF CERTAIN LOCAL JURISDICTIONS</b>	Prior to 2018, Pennsylvania state law generally preempted most localities from adopting commercial tobacco point-of-sale laws and policies, but allowed cities of the first class (i.e., Philadelphia) to adopt some more stringent local laws related to the sale of tobacco products by state-licensed cigarette retailers. <sup>40</sup> Currently, a city of the first class is permitted to continue enforcing any such laws adopted prior to June 1, 2018, but state law preempts most new or amended commercial tobacco point-of-sale laws. <sup>41</sup>



## SECTION 3

# CASE STUDIES: PREEMPTION AT THE POINT OF SALE

### COLORADO

*Local control can also be limited in ways that don't entirely prohibit local governments from enacting their own commercial tobacco control laws but that effectively make it untenable for them to do so. This was the case in Colorado, where localities were penalized with a loss of funding if they enacted policies that required licensing, fees, or taxes for cigarettes. Learn below how local control was restored in Colorado in 2019 after being stifled for more than 40 years.*

When the tobacco industry struck a deal with the Colorado legislature and local jurisdictions, a fiscal penalty provision was established that had the same effect on local policy change as explicit preemption. The penalty caused communities that enacted a license or fee requirement on retailers selling cigarettes or imposed a tax on cigarettes to lose funding that they relied on to sustain their tobacco prevention and control work. This funding originated from the 20-cent tax on cigarettes collected by the state.

While Colorado law did not include explicit preemption, this penalty provision discouraged local communities from working to protect their youth from the harmful effects of access to tobacco and predatory marketing practices from the tobacco industry, even though Colorado was home to the nation's highest rates of youth e-cigarette use.<sup>42</sup>

Stakeholders in Colorado began their efforts to repeal this preemptive language in 2010 after the Colorado Tobacco Control Program convened a large group including state and local elected officials, tobacco control advocacy organizations, other state agencies, youth representatives, and researchers in tobacco control from University of Colorado. This Youth Smoking Prevention Stakeholder Group reviewed Colorado youth tobacco use and access data and evidence-based policy strategies to reduce youth tobacco initiation and access. The group then identified gaps in existing state laws and rated potential strategies for public health impact and political feasibility. The group produced a report of its final policy recommendations, including four key departmental priorities for reducing the illegal sales of tobacco to minors:

- Require a license for tobacco retailers.
- Increase penalties for violations of the state law prohibiting tobacco sales to minors.
- Update the tobacco-free schools law.
- Remove restrictions on localities that prohibit state tax reimbursement if they license tobacco retailers or tax cigarettes.

Once reversing the preemptive language was identified as a top priority, the Colorado Department of Public Health and Environment worked with local communities to promote tobacco prevention and control best practices. Since the fiscal penalty provision only applied to cigarette retailers, the stakeholder group's recommendations also focused on policy changes that communities could implement immediately and without the risk of losing a share of state revenue.

Through data collection on tobacco retail sales practices, the state health department determined that most retailers who were selling cigarettes were also selling non-cigarette tobacco and nicotine products. They determined it would be beneficial to implement a non-cigarette tobacco retail license. The state tobacco program required grantees that chose to work on youth access work to focus on passing non-cigarette retail licensing so that grantees would not subject their community to losing the fiscal share back but would advance tobacco control best practices where possible.

Local action fueled the momentum for Colorado to repeal the fiscal penalty provision that had the same effect as explicit preemption. By January 2019, eight communities passed strong local ordinances to require licensing of non-cigarette tobacco retailers and four additional communities passed local ordinances to require a license of all tobacco retailers, thereby willingly foregoing their share of the state cigarette tax distribution. Local policy to address the rapid increase in e-cigarette use among youth also caught the attention of state lawmakers. Senator Kevin Priola, who became a champion of e-cigarette policy change after learning of his son's e-cigarette use, sponsored the bill to repeal the preemptive language in the Senate. In March 2019, the Colorado legislature repealed the statewide law that penalized communities for regulating tobacco products. In the wake of this repeal, 14 communities passed tobacco retailer licensing and minimum legal sales age 21 ordinances by the end of 2019. Learn more about this success story from this [Counter Tools webinar](#).

## FLORIDA

*Florida seeks new options for monitoring and regulating the tobacco landscape at the local level after preemptive language was added to their minimum legal sales age legislation.*

In May 2020, Senate Bill 1080 passed in Florida, raising the minimum legal sales age to 21, while also including preemptive language. This law defines tobacco products and nicotine products separately and includes independent preemption clauses relating to each product type. The preemption clauses read as follows:

*(Lines 276–279) “Preemption.—The establishment of the minimum age for purchasing or possessing, and the regulation for the marketing, sale, or delivery of, tobacco [or nicotine, lines 679–682] products is preempted to the state.”*

A tobacco-related Assurance of Voluntary Compliance (AVC) is a legally binding and enforceable agreement between a company (a tobacco retailer) and one or more states (generally acting through state attorneys general) in which the retailer agrees to adhere to certain standards and practices to reflect their commitment to the responsible marketing of tobacco products. Common examples of these standards and practices include limiting the type and location of tobacco advertising permitted, prohibiting the sale of look-a-like products, and prohibiting self-service tobacco displays. Learn more about AVCs from this [Counter Tools webinar](#).

This preemption prevents any policy at the local level that would address the age of sale or “marketing, sale, or delivery of” tobacco and nicotine products. The language does not specifically mention local tobacco retail licensing (TRL); however, if such a license was required in order to sell tobacco or nicotine products in a municipality, that local requirement would be a regulation on sale and therefore would arguably be preempted. The language invalidates existing TRL policies that were already in place in three counties and prevents any future local TRL policies. Zoning is the only point-of-sale option that does not appear to be preempted.

Defining tobacco and nicotine products separately requires nicotine products (primarily vaping products) to be treated as a distinct product type, separating them from the state statutes that regulate and tax traditional tobacco products. These separate preemptive provisions block local governments from passing certain point-of-sale related laws. This separation has enabled Florida to establish a separate licensing framework that requires a permit to sell nicotine products. While there is no licensing fee funding to support additional compliance checks for newly licensed nicotine product dealers, this licensing structure can enable Florida to better account for businesses and make it easier to maintain awareness of where nicotine products are sold.

Despite being preempted, Florida has the opportunity to strengthen tobacco prevention and control efforts by tracking tobacco retailers, conducting tobacco retailer inspections, and doing checks to monitor tobacco Assurances of Voluntary Compliance (AVCs). Change and progress in monitoring the point-of-sale landscape are still possible in Florida and for other states in similar positions under preemption.

## UTAH

*Despite decades of point-of-sale preemption, code language allows Utah to continue tracking and monitoring the retailer landscape through tobacco retailer licensing.*

Utah's preemptive language around the point of sale was first added to state code in 1999. The passage of House Bill 23 during the 2020 Legislative Session repealed the existing preemptive provision in Utah Code 76-10-105.1 and enacted new preemption language, Utah Code 76-10-116, which expanded preemption to cover minimum age of sale and flavoring of tobacco products or electronic cigarette products. The code language states:

*“An ordinance, rule, or regulation adopted by a local area (political subdivision of the state) is superseded if it affects and is not identical to any state statute relating to:*

*the minimum age of sale for a tobacco product, an electronic cigarette product, or tobacco paraphernalia;*

*the provision or sale of a tobacco product, an electronic cigarette product, or tobacco paraphernalia;*

*the flavoring of a tobacco product or an electronic cigarette product;*

*the purchase or possession of a tobacco product, an electronic cigarette product, or tobacco paraphernalia;*

*the placement or display of a tobacco product or an electronic cigarette product.”*

Only in cases authorized by a state statute can a local area adopt an ordinance, rule, or regulation on the above domains. This invalidates all existing and future local tobacco control policies by requiring them to be authorized by state statute. However, the above does not apply to the adoption or enforcement of a land use ordinance by a municipal or county government.

Utah's preemption language is very much aimed at the point of sale. However, under the land use exception, zoning may still be a possible local policy option for limiting tobacco retailer locations in Utah. This code language also does not affect the existing license requirements for tobacco retailers; thus, retailers are still subject to tracking and monitoring at the local level.

Utah is working to find innovative ways that those at the local level can continue to be effective in their tobacco control and prevention efforts even under preemption. Utah will continue to push for change despite the challenges of preemption.

“Working to prevent new and eliminate existing tobacco-related preemption that restricts local health departments and municipalities from implementing strong tobacco control policies is an essential component for the Utah Tobacco Prevention and Control Program's effort to prevent youth nicotine dependence, reduce commercial tobacco product use, and work with priority populations to reduce tobacco related health disparities.” - Christy Cushing, Policy Analyst, Utah Department of Health - Tobacco Prevention and Control Program



## SECTION 4

# LOCAL AUTHORITY FOR POINT-OF-SALE POLICIES: KEY STEPS AND LEGAL CONSIDERATIONS

Understanding the contours of local authority can be difficult for even the most seasoned commercial tobacco prevention professionals. This section outlines key steps and legal considerations for assessing local authority related to commercial tobacco point-of-sale policies, including the existence and scope of state preemption. These steps include:

1. Surveying existing resources and legal analyses
2. Understanding the general scope of local authority
3. Assessing the commercial tobacco point-of-sale preemption landscape

Although staff may be able to complete some or all these steps independently, coordination and consultation with legal experts such as legal technical assistance providers and local government counsel is recommended.



### SURVEY EXISTING RESOURCES AND LEGAL ANALYSES

The first step in assessing local authority to adopt commercial tobacco point-of-sale policies is to survey what resources, research, and analyses already exist. For example, a technical assistance provider like ChangeLab Solutions or the Public Health Law Center may have already completed a legal analysis on local authority and preemption for a particular state and type of local point-of-sale policy, or a state supreme court may have issued a ruling that directly addresses the local policy at issue. In most instances, however, existing resources will provide a starting point, such as explaining municipal authority in a state generally, outlining local authority related to broad categories of policies (e.g., local taxation authority), or providing high-level summaries of state preemption affecting local commercial tobacco control laws. This foundational information can then inform subsequent research and analysis.



## UNDERSTANDING THE GENERAL SCOPE OF LOCAL AUTHORITY

Jurisdictions wishing to adopt a commercial tobacco point-of-sale policy should first seek to understand the general contours of their local authority. Some local governments may exercise only those powers explicitly granted to them by their state legislature, a structure known as **Dillon's Rule**. Other states grant local governments extensive autonomy, known as home rule authority, whereby local governments can directly enact laws without relying on a specific delegation of power by the state legislature. **Home rule** limits the degree of state interference in local affairs but does not eliminate it, and the degree of local home rule authority varies substantially among states. It's critical to understand the general scope of local authority because a local government may lack the authority to adopt a commercial tobacco point-of-sale policy even in the absence of state preemption.

RESOURCE TYPE	DESCRIPTION	POTENTIAL SOURCES
<b>EXISTING LEGAL ANALYSES</b>	Legal technical assistance providers may already have analyzed point-of-sale preemption in specific states. These analyses may directly answer your questions or provide a starting point for further research.	<a href="#">ChangeLab Solutions</a> <a href="#">Public Health Law Center</a>
<b>COMPILATIONS OF STATE TOBACCO LAWS</b>	Many databases of state commercial tobacco laws include information about statutes that expressly preempt local point-of-sale policies.	ALA <a href="#">SLATI Database</a> CDC OSH <a href="#">STATE System</a> <a href="#">State tobacco control programs</a>
<b>LEGAL TREATISES</b>	State legal treatises often include sections addressing the general scope and limitations of municipal authority, including state constitutional provisions, state statutes, and court decisions. Some treatises may also address specific subjects such as tobacco.	Legal research services (e.g., <a href="#">WestLaw</a> , <a href="#">LexisNexis</a> ) Law libraries
<b>STATE ATTORNEY GENERAL OPINIONS</b>	State attorney general opinions offer authoritative (but non-binding) interpretations of state law. This may include opinions specifically addressing local authority related to commercial tobacco policies or local authority more generally.	State attorney general websites Legal databases Law libraries
<b>GUIDANCE FROM MUNICIPAL LEAGUES</b>	Municipal leagues may offer guides and other resources on local government authority and recent events (e.g., new legislation and court decisions) affecting local governments.	<a href="#">National League of Cities</a> <a href="#">National Association of Counties</a> State municipal leagues

For both Dillon’s Rule and home rule states, jurisdictions should also consider any procedural requirements applicable to certain types of policies. For example, some states require voter approval before a local jurisdiction imposes a new or increased tax, and some states extend this requirement to policies imposing new or increased fees. These types of procedural requirements can affect the adoption and implementation of commercial tobacco point-of-sale policies ranging from tobacco excise taxes to tobacco retailer licensing.

The Public Health Law Center’s resource [Dillon’s Rule, Home Rule, & Preemption](#) offers additional insights on Dillon’s Rule and home rule, and the [Local Solutions Support Center](#) offers state-by-state summaries of home rule authority.

KEY CONSIDERATIONS: DILLON’S RULE VS. HOME RULE	
DILLON’S RULE	HOME RULE
<p>The primary consideration is whether the state has delegated sufficient authority to the locality seeking to adopt the point-of-sale policy. This delegated authority can take several forms, including:</p> <ul style="list-style-type: none"> <li>• A state law granting local governments the authority to regulate a particular issue (e.g., tobacco sales) or adopt a particular type of law (e.g., tobacco retailer licensing, zoning laws).</li> <li>• A broad, general grant of authority to local governments (e.g., a state law delegating authority to regulate for the protection of public health).</li> <li>• A state law delegating authority to an individual or type of locality (e.g., delegating authority to a specific city or to cities that exceed a specified population size).</li> <li>• Provisions within a local governing charter granting the locality specific authority (e.g., to regulate businesses that sell tobacco) or broad general authority (e.g., to adopt laws to protect public health).</li> </ul>	<p>The two key considerations are the <b>applicability</b> and <b>scope</b> of home rule authority.</p> <p>Does home rule authority <b>apply to</b>:</p> <ul style="list-style-type: none"> <li>• All local governments?</li> <li>• Specific types of localities (e.g., cities versus counties)?</li> <li>• Localities meeting specified criteria (e.g., population size or adoption of a local home rule charter)?</li> </ul> <p>Is the <b>scope of</b> home rule authority:</p> <ul style="list-style-type: none"> <li>• Coextensive with state authority (i.e., local governments generally may exercise the same powers as the state legislature)?</li> <li>• More confined (e.g., localities may regulate their own internal affairs but have more limited authority to regulate non-governmental actors such as tobacco retailers)?</li> <li>• Variable based on specific characteristics of a locality (e.g., states that classify localities into classes based on population size)?</li> <li>• Variable based on policy type (e.g., some policies such as taxes fall outside the scope of home rule authority)?</li> </ul>

## ASSESS THE COMMERCIAL TOBACCO POINT OF SALE PREEMPTION LANDSCAPE

If a locality has sufficient general authority to regulate the commercial tobacco point of sale and the survey of existing resources and legal analyses has not conclusively answered whether the locality has authority to adopt a particular point-of-sale policy, the next step is to assess the state preemption landscape. This step assesses whether the state has imposed any specific constraints on local authority that would affect a locality’s adoption, implementation, or enforcement of a commercial tobacco point-of-sale policy.



## DOES STATE LAW EXPRESSLY PREEMPT THE LOCAL POINT-OF-SALE POLICY?

Express preemption is when a law explicitly states that it prohibits lower-level lawmaking authority in one or more areas. Express preemption can be identified by reviewing the plain language of state law. Express preemption clauses do not, however, always use the term preemption, meaning laws can use other words or phrases to signify preemptive intent. The table on page 16 includes a non-exhaustive list of common words or phrases that demonstrate preemptive intent, as well as examples from state and federal laws that include such language. These words or phrases can help identify state laws that may preempt local commercial tobacco point-of-sale policies.

## DOES STATE LAW IMPLIEDLY PREEMPT THE LOCAL POINT-OF-SALE POLICY?

Implied preemption is more difficult to identify and interpret than express preemption because the state law does not include any explicit language indicating a preemptive intent—even courts at times have trouble determining whether preemption is present if it is not explicit. Identifying the existence and understanding the scope of implied preemption requires examining other sources such as court decisions and legislative intent. Due to the complex nature of implied preemption, it is wise to consult with legal experts—legal technical assistance providers or local government attorneys, for example—when seeking to identify and understand the scope of implied preemption. Key considerations for assessing implied preemption include:

- Do state courts recognize implied preemption? Some courts do not apply the doctrine of implied preemption, meaning local laws are preempted only if there is express preemption or a local law directly conflicts with state law, but this varies in different states and jurisdictions.
- Do state commercial tobacco laws include language disclaiming preemption or authorizing additional local regulation? Some laws include a provision known as a “savings clause” that explicitly provides that the state law is not intended to preempt local laws. In states that recognize implied preemption, the inclusion of a savings clause is the only guaranteed way to protect against a court finding implied preemption.
- Have courts specifically addressed implied preemption in the context of state commercial tobacco laws? If so, what do those court decisions say about the existence and scope of implied preemption as it relates to local point-of-sale policies?
- How have courts addressed implied preemption in the state outside the commercial tobacco context? What legal test do state courts use to determine whether state law impliedly preempts a local law?
- Has anything changed that would affect the validity of identified court decision(s)? For example, have state commercial tobacco laws been amended in a way that may affect the reasoning of previous court decisions?
- Do sources such as legislative history and state attorney general opinions provide insight on potential implied preemption of local point-of-sale policies? Although these sources are not legally binding, courts often rely on them when assessing implied preemption.

WORD OR PHRASE INDICATING PREEMPTION	EXAMPLE
<b>CONSISTENT WITH</b>	“Any order or ordinance by any political subdivision <b>shall be consistent with</b> and not more restrictive than state law and regulations governing lending or deposit taking entities regulated by the division of finance or the division of credit unions.” <sup>43</sup>
<b>DO NOT EXCEED</b>	“A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of . . . plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and <b>do not exceed</b> [federal] regulations or orders.” <sup>44</sup>
<b>EXCLUSIVE</b>	“The department has <b>exclusive</b> regulatory authority over all hazardous waste generation, transportation, storage, treatment and disposal and other management practices in the state.” <sup>45</sup>
<b>MATTERS OF STATEWIDE CONCERN</b>	“The general assembly further declares that the licensing and regulation of massage parlors are <b>matters of statewide concern</b> .” <sup>46</sup>
<b>NO MORE STRINGENT</b>	“No political subdivision may enact an ordinance . . . that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, . . . unless the ordinance or resolution is the same as or similar to, and <b>no more stringent</b> than, a state statute.” <sup>47</sup>
<b>OCCUPY THE FIELD</b>	“It is the intent of the Legislature to <b>occupy the whole field</b> of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.” <sup>48</sup>
<b>PREEMPT</b>	“This part <b>preempts</b> the laws of any State to the extent that such laws are inconsistent with this part.” <sup>49</sup>
<b>RESTRICTIVE</b>	“Local laws and ordinances that are inconsistent with, <b>more restrictive than</b> , or exceed the requirements of state law shall not be enacted and are preempted and repealed.” <sup>50</sup>
<b>SOLE AUTHORITY</b>	“The Louisiana Wildlife and Fisheries Commission shall have <b>sole authority</b> to control and regulate all aspects of hunting, fishing, and boating in all water conservation districts.” <sup>51</sup>
<b>SUPERSEDE</b>	“The provisions of this act shall <b>supersede</b> any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace.” <sup>52</sup>
<b>UNIFORM</b>	“For the purposes of equitable and <b>uniform</b> regulation and implementation, the Legislature through this chapter is the exclusive regulator of all matters relating to the distribution, marketing, promotion, and sale of tobacco products.” <sup>53</sup>



## WHAT IS THE SCOPE OF STATE PREEMPTION?

The existence of express or implied preemption is not a dead end. To the contrary, preemption laws may be limited in scope or include exemptions that provide a viable path for local point-of-sale policies. Key questions and considerations for understanding the scope of preemption include:

**Does the state law establish a minimum, ceiling, or vacuum?** Laws may set minimums that allow local jurisdictions to establish point-of-sale policies so long as they are above or at those minimums. If preemptive laws establish a ceiling, they may still allow for local laws that mirror state law, which can help support enforcement efforts. In contrast, a state that creates vacuum preemption of point-of-sale policies provides no opportunity for local policymaking in the preempted areas.

**What subject areas does the preemption law cover?** The scope of the relevant preemption law dictates the types of local point-of-sale policies that remain viable. A preemption law applicable only to the minimum legal sales age for tobacco products, for example, leaves ample opportunity for local point-of-sale policies such as tobacco retailer licensing, restrictions on flavored tobacco products, and point-of-sale pricing strategies. Some states limit the scope of preemption to matters addressed by state law, meaning localities remain free to regulate on issues on which state law is silent. In contrast, state preemption laws can use broad language (e.g., policies “related to” the sale of tobacco products), leaving little, if any, room for local point-of-sale policies.

Finally, a preemption law may include qualifying language that could limit its scope. In Michigan, for example, the state tobacco tax law preempts local “requirement[s] or prohibition[s] pertaining to the sale or licensure of tobacco products *for distribution purposes*.”<sup>54</sup> Despite the broad language regarding sales or licensure requirements or prohibitions, the qualifying language “for distribution purposes” may provide room for local governments to adopt point-of-sale policies that address issues other than distribution\*, such as retail sales to consumers.<sup>55</sup>

**How are key terms defined?** How a preemptive law defines key terms can affect the scope of preemption. Consider a state law that preempts local laws regulating the sale of tobacco products. Depending on how the law defines tobacco products, a locality may have authority to adopt point-of-sale policies for non-covered products. For example, if the definition of tobacco products does not include electronic smoking devices, localities may be able to adopt point-of-sale policies specifically aimed at reducing youth access to such devices.

**Does the preemption law apply retroactively?** Preemption laws may specify that they do not affect local laws enacted prior to a specified date. Even if they’re unable to adopt any new point-of-sale policies, localities with legacy policies may be able to take steps to advance public health goals such as through additional compliance efforts.

**Does the preemption law include any exceptions?** State law may include language exempting certain kinds of local policies from the scope of preemption. Utah’s point-of-sale preemption law, for example, includes an exemption allowing local governments to adopt and enforce land use ordinances.<sup>56</sup> Even if a particular type of local policy is exempt from state preemption, it is important to independently assess the potential public health and health equity implications of the policy. For example, Nevada state law broadly preempts local point-of-sale policies but allows counties to adopt ordinances penalizing minors for the purchase, use, or possession of tobacco products (youth PUP laws).<sup>57</sup> Youth PUP laws are ineffective and inequitable, and they should be avoided even if they are among the limited types of local commercial tobacco policy options viable in the state.<sup>58,59</sup>

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\* Michigan courts have held that a different law—the Age of Majority Act—preempts local laws increasing the minimum legal sales age for tobacco products. However, the decision does not address preemption of local point-of-sale policies unrelated to the minimum legal sales age. *RPF Oil Co. v. Genesee Cty.*, 330 Mich. App. 533 (2019).

## WHAT IF THE SCOPE OR APPLICABILITY OF PREEMPTION REMAINS UNCLEAR?

Whether due to convoluted legal structures, poor legislative drafting, or purposeful obfuscation, the language of a preemption law may not clearly indicate the law’s scope or applicability. These ambiguities can have a chilling effect on local jurisdictions’ willingness to pursue a particular point-of-sale policy due to fear of litigation. If the language of a preemption law is unclear, external aids can help understand its effect. Such aids may include court decisions, authoritative interpretations (e.g., opinions from a state attorney general), legislative history, and research on how other state laws with similar language have been interpreted.

It is also possible to assess whether and how to seek additional clarification of existing preemption laws. The first step is to confer with a legal technical assistance provider and, where applicable, local government counsel. Opinions from a state attorney general or other state agencies could provide guidance (e.g., legislative counsel). There are potential benefits and drawbacks of these approaches—for example, the possibility that an opinion might result in a broader, less favorable interpretation of a preemption law.

<b>ASSESSING PREEMPTION RISK FOR LOCAL POINT-OF-SALE POLICIES</b>	
<b>LOWEST RISK</b>	<p>State law explicitly authorizes the local point-of-sale policy.</p> <p>A state appellate or supreme court has upheld similar local point-of-sale policies.</p> <p>All the following conditions are met:</p> <ul style="list-style-type: none"> <li>• A locality has broad home rule authority;</li> <li>• State law does not expressly preempt the local point-of-sale policy; and</li> <li>• There is no indication of implied preemption.</li> </ul>
<b>EXERCISE ADDITIONAL CAUTION</b>	<p>Localities in a Dillon’s Rule state where:</p> <ul style="list-style-type: none"> <li>• The state has delegated general authority—to regulate for the protection of public health, for example—but has not specifically authorized the local point-of-sale policy;</li> <li>• State law does not expressly preempt the local point-of-sale policy; and</li> <li>• There is no indication of implied preemption.</li> </ul> <p>A locality has limited home rule authority, state law does not expressly preempt the local point-of-sale policy, and there is no indication of implied preemption.</p>
<b>STOP AND SEEK ASSISTANCE</b>	<p>Localities in a Dillon’s Rule state that have not been delegated general or specific authority.</p> <p>State law includes express preemption and either:</p> <ul style="list-style-type: none"> <li>• The preemption law clearly applies to the local point-of-sale policy; or</li> <li>• The scope and applicability of the preemption law is unclear.</li> </ul> <p>Evidence suggests that state law may impliedly preempt the local point-of-sale policy.</p>

## SECTION 5

### PROGRESS UNDER PREEMPTION: OPTIONS AT THE POINT OF SALE

Although preemption may eliminate ways to influence the commercial tobacco retail environment, there are still strategies that local jurisdictions can use to make progress. As a first step, it's important to meet with a legal technical assistance provider who can determine or clarify the scope of the preemption and determine where there might be gray areas in interpretation. This is important to ensure that any action taken is on firm legal ground. Local staff should bear in mind alternative next steps for communities concerned about preemption, for example:

- Leverage non-policy point-of-sale activities,
- Consider alternative, non-preempted point-of-sale policies,
- Move forward with the local point-of-sale policy, or
- Analyze and share information about preemption-related barriers to the chosen policy approach.

Deciding which action to take will depend upon the level of certainty about the existence and scope of preemption, whether alternative approaches can achieve similar results, the overall legal and political landscape, the level of acceptable risk, and whether stakeholders are prepared to defend against potential legal challenges.



## LEVERAGE NON-POLICY POINT-OF-SALE ACTIVITIES

When a community decides that tobacco point-of-sale policy interventions aren't the best strategy due to the preemption landscape, other non-policy activities can pave the way for future efforts. These activities can increase the evidence base, awareness, resources, and community support for policy change. Moreover, other tobacco control issues, such as raising excise taxes, securing program funding, or strengthening smoke-free laws, may benefit from these point-of-sale activities, including:

**Engaging communities in store mapping and store assessments** to document what is happening with tobacco sales and marketing at local stores. For example, the data collected on the price of tobacco products could be used to educate stakeholders and decision makers on the need for an increase in statewide tobacco excise taxes. Engaging community members, especially youth, in collecting data or monitoring the retail environment can serve as a catalyst and energize other work in tobacco prevention and control. The data collected can help demonstrate the need for local control to address the diversity of ways tobacco impacts communities across a state, address existing disparities in the tobacco retail environment, and demonstrate to policymakers that “tobacco is not finished” but a prevailing problem that requires addressing.<sup>60</sup>

**Evaluating retailers for compliance** under the Master Settlement Agreement, FDA Inspections, Synar, or tobacco-related Assurances of Voluntary Compliance (AVCs). Compliance checks and inspections are critical to ensuring that tobacco retailers are complying with current federal and state tobacco policies. Gathering information about retailer violations and the number of annual compliance or enforcement visits retailers are receiving each year may help make the case for local level authority to regulate tobacco retailers given that FDA inspections and visits required through the Synar program only cover a small sample of retailers each year. If there are retailers with frequent or repeat violations, that may indicate the need for a more effective penalty structure, which could be handled on a local level.

**Creating retailer incentives or “healthy retail” programs.** Working with retailers on an individual basis to take voluntary steps to reduce the dominance of tobacco in the retail space, such as removing or reducing tobacco advertising or moving tobacco products out of the reach of youth, can help make incremental progress at the point of sale. Incentives may be promotional (e.g., media coverage and public recognition for retailers) or financial. Healthy retail programs provide technical and/or financial assistance to stores to replace tobacco and alcohol with healthy food items or other products and services important to the health and wellbeing of the community.

Even in preempted contexts, these foundational activities can move a community toward point-of-sale policy change when its initial plans have been sidetracked. Another way to move forward is to consider alternative policy solutions.

## CONSIDER ALTERNATIVE, NON-PREEMPTED POINT-OF-SALE POLICIES

If a legal analysis determines that the scope of preemption is narrow enough, alternative strategies may accomplish the same or similar goals. Depending on the scope of preemption, a different point-of-sale policy may present fewer legal risks while still advancing the underlying public health and equity objectives. For example:

**Pricing policies:** If a jurisdiction seeking to address the availability of inexpensive tobacco products to youth determines that state law preempts them from enacting a new or increased tobacco tax, they could explore alternative point-of-sale pricing policies such as establishing minimum floor prices and prohibiting the redemption of tobacco product coupons, discounts, and promotions.

**Retailer location policies:** Localities that are preempted from establishing tobacco retailer licensing requirements can explore alternative policy approaches. For example, local governments preempted from licensing alcohol retail outlets have leveraged other regulatory tools such as land use controls (e.g., conditional use permits and deemed-approved ordinances) to achieve similar public health goals, such as density and location restrictions (e.g., prohibiting retailers from locating near schools, setting a maximum number of retailers in a given geographic area). Similar alternative strategies may be viable for regulating tobacco retailers at the local level.

**Signage policies:** If a locality is preempted from regulating tobacco advertising, content neutral sign ordinances that limit the coverage of all types of advertisements on the exterior of a retailer can still help reduce the presence of tobacco advertisements across communities.

## MOVE FORWARD DESPITE CLEAR OR POTENTIAL PREEMPTION

Some communities may wish to move forward with a particular point-of-sale policy despite likely or potential state preemption of that policy under existing law. By adopting a possibly preempted law, a local government can create an opportunity to challenge the validity of the state preemption law and draw public attention to the consequences of such preemption. In some instances, litigation over whether state law preempts a local policy can spur efforts to address preemption issues through legislative efforts. Several factors can help determine whether and how to move forward despite preemption, including:

**Determine the acceptable level of risk.** Jurisdictions vary on the level of legal risk they are willing to accept. Some may wish to move forward only if they are reasonably sure the policy is on firm legal ground and unlikely to face legal challenges. Other jurisdictions actively seek to push the envelope, adopting new and innovative policies despite, or even in anticipation of, potential litigation. There is no right answer but understanding a jurisdiction's risk tolerance can inform the range of potential options.

**Exercise extra caution with punitive preemption.** A locality that passes a potentially preempted law generally faces the possibility of litigation and invalidation of the law—outcomes that are far from ideal, but which pose few significant long-term consequences. Localities in states with punitive preemption laws, however, can face the loss of state funding, additional financial liability, and even punishment for local officials. Given the possibility for these more severe consequences, communities should exercise extra caution and confer with legal counsel prior to proceeding with potentially preempted point-of-sale policies in states with punitive preemption laws.

**Consider the broader context.** The technical application of preemption is strictly a legal question, but determining whether and how to proceed despite possible preemption requires consideration of the broader context and political landscape. For example, is pushing forward with local action likely to spur additional state preemption or, alternatively, provide momentum to repeal existing preemption? Does the makeup of the state judiciary suggest they are more or less likely to support legal arguments in favor of local public health authority? Who are the allies and opponents in the effort and what resources are available to help?

**Draft policies with litigation in mind.** The possibility of litigation looms whenever a locality moves forward with a point-of-sale policy despite potential preemption. Litigation is not always a bad thing—by successfully defending a lawsuit, a jurisdiction can establish legal precedent for other localities to rely on when pursuing their own point-of-sale policies. Drafting policies with litigation in mind can put a locality in the best possible position to succeed and minimize the potential fallout of an adverse court decision.

**Severability clauses.** A severability clause is a legal provision providing that the invalidation of one portion of a law should not affect the validity of other portions of the law. By including a severability clause, a jurisdiction reduces the likelihood that a court decision finding that state law preempts certain provisions of a local point-of-sale policy will result in the court striking down the entire policy. For example, a single local ordinance may include both a tobacco retailer licensing requirement and a prohibition on the sale of flavored tobacco products. If a court finds that state law preempts only the local flavored tobacco sales prohibition, a severability clause can help ensure the tobacco retailer licensing requirements remain in effect.

**Retroactive exemptions.** Some preemption laws apply only prospectively, meaning that local laws in place prior to a specified date are allowed to remain in effect. Jurisdictions should exercise extra caution before amending these legacy policies. This is to ensure that any legal challenges to the new policy language do not threaten the legacy policy. A jurisdiction could, for example, adopt the new policy as an entirely separate law that is codified in a different section of the municipal code. It could also include language within the new policy indicating that the legacy policy should continue to apply if the new policy is invalidated.

**Incremental policies.** Jurisdictions faced with potential preemption may consider more incremental point-of-sale policies that can be used to build positive case law and lay a foundation for future policy change. For example, given uncertainties about federal preemption, early adopters of flavored tobacco policies opted to limit the scope of the policy (e.g., prohibiting sales only within a specified distance of schools), exempt certain types of retail outlets (e.g., age-restricted stores), or exempt certain product types (e.g., menthol). Once litigation resulted in clear legal precedent supporting local authority, jurisdictions moved forward with more comprehensive flavor policies. Although incremental policies may provide benefits from a *legal* perspective, it is also important to consider the equity implications of pursuing non-comprehensive policies. For example, menthol exemptions in early flavor policies may have been beneficial from a legal perspective but they resulted in the policies failing to address a product responsible for vast health inequities.

## Legal Considerations When Moving Forward Despite Preemption

Local counsel and legal offices may not have expertise regarding how these legal considerations apply in the context of point-of-sale tobacco issues. Expert tobacco prevention attorneys, for example from national organizations engaged in this area, can help determine the implications for different jurisdictions.

- Determine the acceptable level of risk. Exercise extra caution with punitive preemption.
- Consider the broader context.
- Draft policies with litigation in mind, **considering the following:**
  - Severability clauses
  - Retroactive exemptions
  - Incremental policies
- Prepare for legal challenges.

**Prepare for legal challenges.** Once a jurisdiction decides to move forward with a potentially preempted point-of-sale policy, they should proactively prepare for legal challenges to the policy. This includes further coordination with local government counsel, ensuring the availability of adequate funding for legal defense and associated efforts (e.g., media and messaging strategies), and working with advocates that can support the jurisdiction through organizing and indirect legal support (e.g., filing amicus briefs).



## SECTION 6

# PREVENTING AND UNDOING PREEMPTION: OPPORTUNITIES TO ENGAGE

Once the scope of preemption is fully understood, there are several steps that can be taken to work toward regaining local authority. Numerous opportunities exist to engage on preemption and promote local authority to adopt health- and equity-promoting point-of-sale policies even for those who cannot directly lobby for preemption repeal or engage in ballot measure campaigns due to funding constraints, employment by a governmental entity, or other limitations. This section outlines several of these opportunities and provides recommendations for moving forward.

**Learn more about preemption and how it harms public health and equity.** An initial step toward engaging on preemption is learning more about it yourself. This includes understanding the different forms of preemption and ways in which it operates, the current landscape of preemption in commercial tobacco control and other policy areas, the stakeholders supporting and opposing preemption, and the body of research assessing the effects of preemption on public health and health equity.

**Form a coalition of key stakeholders.** The coalition can set goals and determine coordinated strategies for working together on both making progress under preemption in the short-term and restoring local authority in the longer term.

**Engage with communities about preemption and how it has affected them.** Robust community engagement is core to any successful and equity focused commercial tobacco control effort, including efforts to engage on and ultimately reverse preemption of local point-of-sale policies. Many community members may be unaware of what preemption is, why it's important, how it's been misused, and how it takes power and voice away from local communities. Tobacco control professionals can help fill this gap through education and capacity building assistance. At the same time, tobacco control professionals should strive to understand people's lived experience and how preemption has directly affected them and their communities. These stories can create a powerful narrative about the importance of giving power back to communities by reversing preemption.

When engaging communities, tobacco control professionals should remain cognizant that communities that have experienced discrimination and marginalization at the hands of local government may view preemption through a different lens—one in which preemptive state laws, such as civil rights laws, acted as a counterweight to harmful local laws and policies. In these instances, it is critical to distinguish between these limited instances in which state preemption acts to prevent inequities with the much more common use of preemption, including in the commercial tobacco context, to undermine health- and equity-promoting local policies.

**Build the evidence-base and political support for reversing preemption.** Monitoring and documenting youth tobacco use trends as well as retail sales to underage youth violations can help make the case for the need to implement best practices, such as ensuring local authority to adopt more protective tobacco prevention laws. Some communities have also sought to build support for reversing preemption by having local governments adopt resolutions requesting local authority.



**Educate stakeholders and decisionmakers about the harms of preemption and counter preemption myths.** Tobacco prevention and control professionals should adhere to their organization and funders’ requirements regarding if, how, and when to engage in the policy process. For example, CDC funds cannot be used to engage in direct lobbying, including lobbying against legislation proposing new or expanded point-of-sale preemption or for legislation repealing existing point-of-sale preemption.

However, practitioners can still play an important role by developing partnerships, conducting policy analyses, and promoting and implementing evidence-based interventions. For example, when it comes broadly to information about the effects of preemption, local staff can generally share:

- Information with stakeholders and decisionmakers about the importance of preserving local government’s ability to adopt point-of-sale policies tailored to the needs of their community,
- Stories about the real-world effects of preemption on communities,
- Empirical evidence demonstrating the concrete harms that result from state preemption,
- Examples of how state preemption laws stifle progress at the local level that could protect communities from Big Tobacco, and
- Techniques for involving youth in education efforts.

[This toolkit](#) from ChangeLab Solutions and [resource](#) from the Local Solutions Support Center offer bulleted takeaways and talking points about research on the effects of preemption on public health and equity. When educating stakeholders and decisionmakers, it is also important to rebut arguments often made in favor of preemption, such as that preemption is necessary to ensure uniformity and prevent a “patchwork” of costly regulations. Although these arguments may appear convincing at first, they fail to hold up upon closer scrutiny. For example, a study from the Urban Institute examined the “patchwork” argument across ten commonly preempted areas of regulation, including tobacco regulations. The study found that “[l]ittle evidence exists, either in policy debates or academic research, that a patchwork of local laws harms businesses, residents, and consumers.”<sup>61</sup>

**Use evidence-based messaging and frames in efforts to counter preemption.** It’s easy for discussions about preemption to get muddled with policy jargon or be framed in ways that may not resonate with different audiences and communities. Effectively countering and reversing preemption requires tailoring your messaging and framing strategies to align with the values and priorities of the communities in which you’re working and the decisionmakers that will ultimately determine whether preemption is enacted or repealed. Organizations such as Voices for Healthy Kids (American Heart Association) and the Local Solutions Support Center offer preemption messaging guides, toolkits, and other resources that can help create effective anti-preemption campaigns.



For more information about lobbying limitations and alternatives, if you are a CDC funded entity see:

**Guidance on Anti-Lobbying Restrictions for CDC Grantees**, available at [https://www.cdc.gov/grants/documents/anti-lobbying\\_restrictions\\_for\\_cdc\\_grantees\\_july\\_2012.pdf](https://www.cdc.gov/grants/documents/anti-lobbying_restrictions_for_cdc_grantees_july_2012.pdf)

**Guidance on Additional Requirement - 12: Lobbying Restrictions**, available at <https://www.cdc.gov/grants/additional-requirements/ar-12.html>

**Remain vigilant about attempts to enact or expand state preemption.** Supporters of state preemption use a variety of tactics to enact or expand preemption without meaningful public debate. These tactics include adding preemption language to legislative bills at the last minute and using unrelated legislation (e.g., budget bills) as vehicles to preempt local commercial tobacco point-of-sale policies. Tobacco control professionals can help track state legislative efforts, identify attempts to enact or expand state preemption, and convene partners to push back against such attempts.

**Develop strategic partnerships through cross-issue coalitions committed to defending local democracy.** Although preemption has long been an issue for commercial tobacco control, its widespread misuse across numerous policy areas is a more recent phenomenon, beginning in 2010. Today, state preemption affects local governments' ability to adopt policies related to labor standards, civil rights, environmental protection, local taxation, affordable housing, food and nutrition, gun safety, and other public health and safety laws. The broad array of areas now affected by state preemption creates an opportunity for tobacco control professionals to create or join cross-issue coalitions dedicated to preserving local democracy. These cross-issue coalitions can leverage their collective expertise, resources, and political capital more efficiently and effectively by creating a unified front against the misuse of state preemption generally rather than fighting against preemption issue-by-issue. For example, in Maryland, over 25 groups have banded together as Let Our Communities Act Locally (LOCAL Maryland).

**Partner with individuals and organizations who can support efforts to reverse preemption.** Successful efforts to reverse preemption and ensure local authority to enact commercial tobacco point-of-sale policies requires resources, capabilities, and expertise ranging from financial support for a sustained campaign to reverse preemption, communications and media expertise, legal acumen to identify potential litigation opportunities and draft or review proposed legislation, and the ability to lobby. Because few individuals or organizations possess all these resources, capabilities, and expertise themselves, partnerships are critical to any successful effort to reverse preemption.

### EXAMPLE

Enacting local resolutions is a strategy that several localities in North Carolina have attempted. In the face of preemption preventing localities from raising the minimum legal age of sale for tobacco products, county Boards of Health in the state passed resolutions in support of local control. For example, Durham County passed a resolution to “request that the North Carolina General Assembly restore local control over tobacco policies by rescinding preemption; therefore, granting Durham County the legal authority to protect residents from known public health threats by enacting innovative, evidence-based policies such as an increase in the minimum sale age of tobacco products from 18 to 21.” Similar resolutions were passed in Orange, Pitt, Cumberland, Chatham, Rutherford-Polk-McDowell, and Henderson Counties. Those resolutions also called on other Boards of Health around the state to do the same.

The momentum and recognition of the Tobacco 21 movement served as an example of an evidence-based policy that helped prevent youth initiation and provided a tangible step local governments could take if preemption were lifted. However, although the minimum age of sale for tobacco products was raised to 21 at the federal level in 2019, North Carolina has yet to update its state law to match the new federal law, and preemption remains in place. This type of strategy may help build political will and readiness for change at the local level and encourage eventual state level change.

## SECTION 7

# REVERSING PREEMPTION: LEGAL PATHWAYS

History shows that preemption, once enacted, is extraordinarily difficult to change or undo.<sup>62</sup> But difficult does not mean impossible. There are three main legal pathways for undoing existing state preemption of local commercial tobacco point-of-sale policies: legislation, ballot measures, and litigation.\* Efforts to address preemption through one or more of these legal pathways should be supported by robust organizing and engagement (the section *Preventing and Undoing Preemption: Opportunities to Engage* includes additional information and recommendations for organizing and engagement). When seeking to reverse preemption of point-of-sale policies, it's also helpful to consider lessons from other tobacco control strategies. For example, a 2010 [CDC report](#) highlights how the three legal pathways discussed in this section have been successful in reversing state preemption of local smoke-free policies.

**State Legislation.** Existing state preemption of local commercial tobacco point-of-sale policies can be repealed through new state legislation. Importantly, simply repealing a state preemption law will not always provide clear local authority. For example, in Dillon's Rule states, local governments often require an explicitly affirmative grant of authority to act on a particular issue, even if a preemptive law is repealed. As a result, legislation seeking to ensure local authority to adopt commercial tobacco point-of-sale policies should not only repeal any explicit state preemption but also enact provisions within state law that affirmatively authorize additional local regulations.

### Examples: Legislation Reversing Smoke-free Preemption

Iowa, Louisiana, Mississippi, New Jersey, North Carolina, and Oregon were able to rescind preemption as part of new legislation that restricted smoking in specific places. Louisiana and New Jersey included specific language in their legislation explicitly granting communities the authority to adopt their own smoke-free policies, while legislation in Iowa and Oregon removed smoke-free preemption. Rhode Island and Montana presented special cases involving “sunset” clauses where the preemptive law specified a date when the law would expire, and preemption no longer applied after the expiration date.

Read more from the [Local Solutions Support Center](#) about repealing preemption and advancing non-preemptive language in state law.

**Ballot Measures.** In some states, the public may propose a new law (i.e., an initiative) or challenge a recently adopted law (i.e., a referendum) through a ballot measure voted on by the general electorate rather than the state legislature. Where permitted, these ballot measures may offer a pathway for proposing a new law that includes language explicitly preserving local authority or to challenge a recently adopted law that preempts local authority to adopt point-of-sale policies.

\* A fourth potential pathway—structural legal reforms to state and local relations—is beyond the scope of this playbook. [Principles of Home Rule for the 21st Century](#), a resource from the National League of Cities and Local Solutions Support Center, includes information about and a framework for empowering local governments through home rule reform.



### Examples: Addressing Preemption Through Ballot Measures

In 2006, Nevada voters approved the Nevada Clean Indoor Air Act. The ballot measure not only included state law provisions prohibiting smoking in certain public areas, but also included language authorizing local governments to enact stronger smoke-free protections. Ballot measures have also been used to protect local authority outside the commercial tobacco context—in Arizona, for example, a ballot measure establishing paid sick leave and raising the minimum wage included provisions to ensure local governments could adopt more generous paid leave and minimum wage requirements.<sup>63</sup>



**Litigation.** In the context of state preemption of local commercial tobacco point-of-sale policies, litigation most often arises when a locality adopts a policy, and the locality must defend the policy against legal challenges. But litigation can, in some instances, be used more proactively to challenge new or existing preemption laws.<sup>64</sup> A locality may, for example, challenge a state preemption law on the grounds that the law violates the locality's home rule authority under a state constitution, or that the state legislature violated procedural requirements when adopting the preemption law. Similarly, a locality may actively seek to draw a lawsuit by adopting a preempted or potentially preempted point-of-sale policy knowing that the policy is likely to be challenged and use the subsequent litigation to challenge the validity of the preemption law. The Public Health Law Center offers resources about commercial tobacco control litigation generally and its resource [Untangling the Preemption Doctrine in Tobacco Control](#) discusses litigation specifically in the context of state preemption.

### Example: Clarifying Preemption with Litigation

In 2006, the city of Greenville, South Carolina, amended its smoke-free ordinance to cover most enclosed public places, closing gaps and exemptions that had previously existed. Restaurant and bar owners filed a lawsuit against Greenville, arguing that South Carolina state law preempted the city's ordinance. The South Carolina Supreme Court disagreed, ruling that state laws did not preempt local smoking restrictions that are more comprehensive than the state Clean Indoor Air Act.<sup>65</sup> This decision provided local communities with much-needed clarity on their legal authority to enact smoke-free policies.

## SECTION 8

# ADDITIONAL PREEMPTION RESOURCES

### Tobacco Preemption Resources

[Untangling The Preemption Doctrine in Tobacco Control](#)

Public Health Law Center

[Preemption: The Biggest Challenge to Tobacco Control](#)

Public Health Law Center

[Checked at the Check-Out Counter: Preemption at the Tobacco Point of Sale](#)

Public Health Law Center

[Preemption Fact Sheet](#)

CDC State Tobacco Activities Tracking and Evaluation (STATE) System

[State Legislated Actions on Tobacco Issues \(SLATI\)](#)

American Lung Association

[Protect Local Control](#)

Americans for Nonsmokers' Rights

### General Preemption Resources

[Dillon's Rule, Home Rule, and Preemption](#)

Public Health Law Center

[Assessing and Addressing Preemption: A toolkit for local policy campaigns](#)

ChangeLab Solutions

[Understanding Preemption: A Fact Sheet Series](#)

ChangeLab Solutions

[The Consequences of Preemption for Public Health & Equity](#)

ChangeLab Solutions

[Fundamentals of Preemption](#)

ChangeLab Solutions

[Webinar: Preemption, Public Health, and Equity: The Search for Local Solutions](#)

ChangeLab Solutions

[Preemption: What It Is, How It Works, and Why It Matters for Public Health](#)

ChangeLab Solutions

[Preemption and Public Health Facilitator's resources](#)

ChangeLab Solutions

[Preemption & Public Health Training](#)

Public Health Law Academy (ChangeLab Solutions)

[At-A-Glance: Research on Preemption, Public Health, and Equity](#)

ChangeLab Solutions and Local Solutions Support Center

[City Rights in an Era of Preemption: A State-by-State Analysis](#)

National League of Cities Center for City Solutions

[Webinar: Federal and State Preemption Basics:](#)

[What every drafter ought to know](#)

National Council on State Legislatures

[Preemption Watch Tools](#)

Grassroots Change

[Combatting preemption: Myths and facts](#)

Grassroots Change

[Webinar: Municipal Issues in an Era of Preemption](#)

Stateside

[Preemption Creative Toolkit](#)

Voices for Healthy Kids

### Preemption Messaging

[Preemption Case Studies](#)

Voices for Healthy Kids

[Preemption Message Manual](#)

Voices for Healthy Kids

[Preemption Message Wheel](#)

Voices for Healthy Kids

[Preemption Key Messaging](#)

Voices for Healthy Kids

[Message Guide: State Preemption and the Effects of Limiting Local Power](#)

Local Solutions Support Center

[Protecting Local Democracy: A Messaging and Research Toolkit](#)

Local Solutions Support Center

### Legal Technical Assistance Providers

[ChangeLab Solutions](#)

[Public Health Law Center](#)

### Organizations Working on Preemption

[Local Solutions Support Center](#)

[American Heart Association \(AHA\)](#)

[Voices for Healthy Kids \(AHA\)](#)

[National League of Cities](#)

[National Association of Counties](#)

[Local Municipal Leagues](#)

### Commercial Tobacco Control Organizations

[Counter Tools / Counter Tobacco](#)

[ChangeLab Solutions](#)

[The Center for Black Health & Equity](#)

[CDC Office of Smoking and Health \(OSH\)](#)

[CDC OSH National Networks](#)

[Public Health Law Center](#)

[Campaign for Tobacco-Free Kids](#)

[Truth Initiative](#)

[American Heart Association](#)

[American Lung Association](#)

[National Cancer Institute](#)

## ENDNOTES

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