



Episode Details:

Date of Publication: August 29, 2022

Title: Episode 30: Tobacco Point of Sale Preemption

Description: In this episode, we're talking all about preemption. Earlier this year, along with our partners at ChangeLab Solutions, we published a resource on this topic called the Tobacco Point of Sale Preemption Playbook. It equips tobacco prevention staff and their partners with the knowledge, context, and resources needed to understand how preemption influences their work. In this episode, we talk through some of the basics of what preemption means, the different forms it can take, how to determine what your community's local authority to pass policy actually is, and ways that communities across the country are making progress despite being preempted.

Transcription:

You're listening to the Counter Tobacco Podcast. I'm your host for today, CounterTobacco.org Managing Editor Mollie Mayfield. On this podcast, we aim to highlight the role the tobacco industry's influence at the point of sale plays in tobacco use and tobacco-related harm and what's being done to reduce that influence and to improve community health and health equity. Today, we're talking about preemption.

Earlier this year, along with our fabulous partners at ChangeLab Solutions, we published a resource on this topic called the Tobacco Point of Sale Preemption Playbook. It equips tobacco prevention staff and their partners with the knowledge, context, and resources needed to understand how preemption influences their work. Today, we're going to talk through some of the basics of what preemption means, the different forms it can take, how to determine what your community's local authority to pass policy actually is, and ways that communities across the country are making progress despite being preempted. For much more detail on all of this, please check out the guide, which we'll link to in the show notes.

To start off, let's define it: What is preemption?

Preemption is when a higher level of government limits or eliminates the power of a lower level of government to regulate or create laws around a specific issue.

And why is preemption a problem when it comes to tobacco control?

Well, first of all, local communities best know the unique needs, values, and experiences of their residents and the environment where they live, and are best able to respond to them. When they are preempted, they lose this power to be responsive to the people they represent. Local tobacco laws also matter for health equity, providing a really 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.

Second, local government is where innovative tobacco control policy that improves public health and health equity starts. Without the ability for local communities to innovate and try out promising strategies and showcase their success, state governments may be less likely to adopt them. Think about the Tobacco 21 movement – that started at the local level with a small community in Massachusetts and over the course of about 15 years, spread to hundreds of other localities and 19 states before being adopted federally.

Third, preemption concentrates power at the state level, which is where the tobacco industry has more influence. The industry uses this influence to weaken tobacco control legislation or prevent it from passing in the first place. They also use their influence to lobby for state preemption. And once preemption is in place, it can be really hard to get rid of and can stifle public health progress for years or even decades.

So, one of the first questions you might have is how to know if your work is affected by preemption. If you're unsure or a bit confused on the status of preemption in your state – you are not alone! It is a complex legal issue, which is why we recommend contacting a legal technical assistance center like ChangeLab Solutions or the Public Health Law Center to help you sort it out.

Here's Sara Bartel, Senior Attorney at ChangeLab Solutions, describing how to understand your local authority or lack thereof, and how our Tobacco Point of Sale Preemption Playbooks walks you through it:

“This is where we're talking about the overarching structure in your state dividing authority between state level government actors and local government actors.

So if you're in a Dillon's Rule state, you've got local authority only if its granted to you by the state, and in a Home Rule state, usually you've got more local autonomy, though it's a wide scale, and it looks pretty different depending on how the health and public health departments are structured in that state.

Next up, you're going to be thinking about the laws that affect your work, and if you are preempted, you'll have different types of preemption that you're looking for. Some preemption

is just straight up – they say they’re preempting the field, and other times it’s implied with other sorts of language that is often interpreted by a court to preempt local activity.

And then you’ve got the scope. You’ve got field preemption, where the entire area is regulated by the state, or you’ve got limited scope, where it only applies to a subsection of that or certain activities. It can also apply to specific subject areas based on how the definitions might differ in the different legislative documents or there could be exceptions to the preemptive rules that you might find. So, there we’re talking about types of preemption and scope.

Lastly, you’re going to think about how preemption will affect your work. One effect is the timing – is it affecting all the laws that will ever and have ever existed about a subject area, or is it just prospective, where it’s going to limit the future laws that can be created in a space. And then you’re going to think about the effect of preemption. Some preemption will set a minimum or a floor or it’ll cap what you can do in local law, and other times preemption will create a total vacuum where local actors are not allowed to regulate in this space at all.”

In the playbook, we provide a chart with examples of language from state statute that indicate preemption as well as examples of state statute representing the different types of scope of preemption.

For example, in states with express preemption, the law might actually use the word “preempt” or might use something like “exclusive” or “sole authority;” whereas in states with implied preemption there might be state laws that talk about “uniform regulation” or something like that.

Many resources exist to help you determine what your authority is, including existing legal analyses, databases of state tobacco laws, legal treatises, opinions from state attorneys general, and guidance from municipal leagues like the National League of Cities or the National Association of Counties. But again, we recommend contacting a legal TA center if you have any questions about your authority – because it can be confusing and because a lack of clarity can also have a chilling effect on the willingness of local governments to pursue policy.

So what happens if you are preempted? What can you do?

We cover this extensively in the Playbook, but here’s Sara again on the basics:

“These are your four options if you find that you’re preempted: One is you can hold on policy and you can keep your non-policy actions moving instead. Keep those assessments up. Develop those relationships. Build up that coalition. Build that trust. Get your stakeholders engaged and informed about what’s happening.

Your next option is to Pivot. There are some policy options that will get close to what you’re trying to do without being preempted. There are alternative policy options. So, my favorite example here is if you are preempted from doing tobacco retailer licensing, for example, but you would like to influence where tobacco retailers can be located in your community, you

want to do setbacks, you want them to be a certain distance from schools, there are alternative, local ways that you can make that happen without using tobacco retailer licensing. So, look for options. Pivot.”

As Sara mentioned, alternatives exist! Using zoning policies or other land-use controls to regulate location of tobacco retailers is one alternative to licensing. Thinking about other types of point of sale tobacco policies, if localities are preempted from raising the price of tobacco products through a new or increased tax, they could explore alternatives like minimum floor prices and prohibiting the redemption of coupons, discounts, and other price promotions for tobacco products instead. If a locality is preempted from regulating tobacco advertising, they could pivot to using a content neutral sign ordinance that limits the coverage of all types of advertisements on the exterior of a retailer to reduce the presence of tobacco ads across communities instead.

As another example that we cover in the guide, while localities in Florida are unfortunately newly preempted from regulating the marketing, sale, or delivery of tobacco or nicotine products, they are both holding and pivoting. While they can explore options like zoning, they are also focusing on what they can control and have been increasing their efforts at monitoring retailers for compliance with tobacco-related assurances of voluntary compliance (or AVCs) – which we covered in the last episode.

This next option for what you can do under preemption that Sara’s going to talk about should be done in close partnership with your attorney.

“The third option is to go for it. This is the option where you’re preempted, and you’re going to go for the policy anyways. You’re going to push the issue, you’re going to bring it to a head, and it’s going to be an avenue for challenging the preemptive status of whatever policy you’re trying to do in the state. You need to have a strong relationship with your attorney for this case. This is likely gonna lead to a lawsuit, or at least the possibility of it is certainly on the table even if its unlikely where you are given political will or whatever. So that’s the other option.

And the final option is sort of to take a step back, analyze and share information about what preemption is doing in the policy space.”

That last option is really about education and engaging with community. I know many of you listening to this podcast face limitations related to lobbying due to your funding. We link to the CDC’s guidance around that in the guide, and I’ll link to it in the show notes as well. But educating stakeholders and decisionmakers about the harms of preemption and also working to counter myths or misunderstandings that they may have about preemptions is really important.

Let’s talk now about reversing preemption.

As I mentioned earlier, once preemption is on the books, it can be tough to get rid of – but it is possible. That can happen through new legislation that repeals existing preemption and enacts

provisions within state law that clearly authorize additional local authority. This has happened in a number of states with smokefree air laws, for example. Reversing preemption can also be done through ballot measures that either propose a new law granting local authority or challenge a recently adopted preemptive law. And preemption can also be reversed through litigation. This happens most commonly when a locality passes a policy, is sued, and must defend it. For example, In 2006, the city of Greenville, South Carolina, amended its smoke-free air ordinance to cover most enclosed public places, closing gaps and exemptions that had previously existed. Restaurant and bar owners then filed a lawsuit against Greenville, arguing that South Carolina state law preempted the city's ordinance. But, 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. So, this decision provided local communities with much-needed clarity on their legal authority to enact smoke-free policies. However, litigation can be used more proactively to challenge preemptive law as well.

When trying to reverse preemption – to try and work towards legislation that repeals it, for example, or when you are not currently preempted and are trying to keep it that way – trying to prevent preemptive bills that are proposed from becoming law, there are a few key strategies to consider.

In addition to learning more about preemption yourself, it can be helpful to form a coalition of key stakeholders that can set goals and determine strategies for working together on making progress under preemption in the short-term and restoring local control in the longer term.

It can also be helpful to engage community members about what preemption is and how it has affected them. 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 from local communities. At the same time, understanding people's lived experiences and how preemption has directly affected them and their communities is also really important and these stories can create a powerful narrative about the importance of giving power back to communities by reversing preemption.

You can also work on building 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.

It's also important in your work to educate stakeholders to use evidence-based message and framing for countering preemption. For example, I know this we've been talking this whole episode using the word "preemption" but that's not a term that's widely known or understood. Voices for Healthy Kids, a project of the American Heart Association and the Robert Wood Johnson Foundation, recommends instead talking about states blocking communities from passing their own laws or state interference - that may be something that's a bit less jargony. They have a great messaging guide with additional recommendations that is included in the extensive resource section of the Playbook, and we'll also link to it in the show notes.

Building partnerships is also really key. 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.

These partnerships can also be with groups working on defending local democracy across other issues as well. Tobacco is not the only area issue impacted by preemption – increasingly, policies related to labor standards, civil rights, environmental protection, local taxation, affordable housing, food and nutrition, gun safety, and other public health and safety issues are facing preemption threats as well. Cross-issue coalitions can leverage 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 (or LOCAL Maryland).

Finally, vigilantly monitoring state legislation for attempts to enact or expand state preemption is important, especially because sometimes preemptive language is added to bills at the last minute or tacked on to unrelated bills – sneaky, right? But the more folks that are watching for these attempts and ready to speak out, the easier it is to push back against them.

We'll end today on a positive note: an example of how a state was able to successfully reverse preemption related to the point of sale. So, another thing to know is that 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 for more than 40 years in Colorado, where localities were penalized with a loss of funding if they enacted policies that required licensing, fees, or taxes for cigarettes. However, in 2010, a group of stakeholders convened by the Colorado Tobacco Control Program, including state and local elected officials, tobacco control advocacy organizations, other state agencies, youth, and tobacco control researchers identified removing these punitive restrictions as a top priority. Then, the Colorado Department of Public Health and Environment worked with local communities to promote tobacco prevention and control best practices, and they pivoted. 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. So, 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, and by January 2019, eight communities passed strong local ordinances to require licensing of non-cigarette tobacco retailers and four additional communities actually passed local ordinances to require a license of all tobacco retailers, thereby willingly foregoing their share of the state cigarette tax distribution. At the same time, 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. And in March 2019, the Colorado legislature repealed the statewide law that penalized communities for regulating tobacco products. Following this repeal, by the end of 2019, 14 communities had passed tobacco retailer licensing ordinances and raised the minimum legal sales age for tobacco to 21.

You can learn more about this success story from a webinar we hosted on the topic (I'll link to it in the show notes).

As I mentioned at the outset, all of the topics we talked about today are covered in greater depth in the Tobacco Point of Sale Playbook, and it also includes an extensive resource section where you can find even more information.

Counter Tools also hosted a webinar on The Effects of Preemption and Opportunities for Action in Preemption States, which the clips of Sara Bartel speaking today were from. That webinar also includes a case study from Indiana, with both a state-level and local-level perspective on how they are navigating preemption at the point of sale. We'll link to that webinar in the show notes as well.

That's all for today. Thanks for listening, and I look forward to you joining us again next time!

The Counter Tobacco podcast is a project of Counter Tools and is supported by the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention or the Department of Health and Human Services.