



# Fundamentals of Preemption

*Preemption is a powerful legal doctrine with sweeping consequences for public health. This fact sheet explains how preemption works and how to spot preemption in a proposed law, so that advocates can participate in policy discussions when preemption is on the table.*

## What Is Preemption?

Preemption is a legal doctrine that provides that a higher level of government may limit, or even eliminate, the power of a lower level of government to regulate a certain issue. Under the U.S. Constitution's "Supremacy Clause," federal law governs over state or local law. So, if a state or local law conflicts with a federal law, the federal law trumps the lower-level law. Similarly, if a city council, local board of health, or other local government entity passes a law that conflicts with a state law, the state law generally prevails.<sup>1</sup>

For example, imagine that a state has a law requiring motorcycle riders to wear helmets. Could a town in that state pass an ordinance that prohibits the wearing of motorcycle helmets? Theoretically it could, but the ordinance would not be enforceable because motorcyclists would not be able to comply with both laws at the same time. The state law would prevail over, or preempt, the local law. But what if a town passed a law requiring motorcyclists to wear not only helmets, but also specially constructed leather jackets to protect their spines in case of an accident? Would this law be preempted by the state law? The answer likely depends on at least two things: 1) the relationship between local and state governments under that state's constitution, and 2) the wording of the state law, including the presence or absence of an explicit preemption clause.

*This fact sheet is one in a series from NPLAN on how the legal concept of preemption works and why it matters for public health. For other fact sheets in this series, see [www.changelabsolutions.org](http://www.changelabsolutions.org).*

## Types of Preemption

There are several forms of preemption, but at its most basic preemption is either *express* or *implied*.<sup>2</sup>

### Express Preemption: When Preemptive Intent Is Stated Outright

“Express preemption” occurs when a law explicitly states whether it is meant to preempt a lower-level lawmaking authority. Preemptive intent can be phrased in a variety of ways, and the way it is worded can have a significant impact on a law’s scope and effect. For example, the hypothetical state helmet law described earlier would expressly preempt the town’s authority to regulate motorcyclists’ safety gear (including specially padded leather jackets) if it contained the following language:

No unit of local government shall impose requirements on motorcyclists to wear safety gear.

If, however, the phrase “that conflict with state law” were added after the word “requirements,” then the impact of the law could be quite different. Much would depend on how a court interpreted the word “conflict.” Some judges might hold that the added phrase preserves local authority at least to pass laws that are *identical* or *nearly identical* to state law. (Why would that matter if there’s already a state law? Because local governments can *enforce* local laws.) But a local law that is quite different from the state law – like one requiring motorcyclists to wear padded leather jackets – would still be preempted.

In other courts, however, the new phrase might permit local governments to impose regulations that *go beyond* state law, as long as motorcyclists could comply with both the state and local laws at the same time.<sup>3</sup> In these courts, the local law requiring motorcyclists to wear padded leather jackets would *not* be preempted.

The most problematic form of preemption is when the higher level of government chooses not to enact any regulations in a particular field but still forbids lower levels of governments from doing so, leaving a regulatory void. Some refer to this type of preemption as “null preemption.”<sup>4</sup>

Recently, several states have created regulatory voids by enacting laws that preempt cities and counties from passing certain types of laws to address obesity, often in direct response to innovative public health initiatives adopted elsewhere in the United States. For example, in 2013, the Mississippi Legislature enacted a law that, in part, prohibits cities and counties from passing any laws that:

- Prohibit a restaurant or food store from using incentives like giving away toys to sell unhealthy food;
- Require restaurants or other food retailers to disclose nutritional information to consumers; or
- Restrict the portion sizes of food or nonalcoholic beverages.<sup>5</sup>

While the law prohibits cities and counties from regulating these fields, the law sets no statewide standard.<sup>6</sup> As a result, no Mississippi community may pass these types of laws to address obesity. A similar law has been adopted by the Wisconsin legislature as an amendment to the biennial budget,<sup>7</sup> and in Ohio a comparable law was enacted but struck down because it violated the state’s constitution.<sup>8</sup>

To understand the full impact of a law or proposed law, it is essential to review the law’s language thoroughly to determine if it includes an expressly preemptive provision and, if it does, how that particular state’s courts are likely to interpret the provision.

### Implied Preemption: When Preemptive Intent Is Implied by Context

In some cases, a federal or state law may be found to invalidate other, lower-level laws even though it does not include any explicit preemptive language. This kind of preemption is called *implied preemption*. Implied preemption can be hard to spot in advance. Even courts frequently have trouble deciding whether implied preemption is present in a particular law.

In determining whether a law impliedly preempts another law, courts generally consider the following kinds of questions: Does the lower-level law interfere with the goal of the higher-level law? Does the lower-level law prohibit something that the higher-level law expressly permits, or permit something that the higher-level law prohibits? Does the higher-level law so comprehensively regulate the issue that there is nothing left for a lower level of government to regulate?

If a proposed state or federal law could be interpreted to impliedly preempt local authority, advocates might seek to have a “no implied preemption” clause inserted into the proposed law. This is a clause that states that the law should not be interpreted to impliedly preempt other laws and that any preemptive intent must be expressly articulated.

In general, it is important to understand the legal landscape the proposed law fits into. Armed with this knowledge, advocates can more effectively influence how a law is drafted and take measures to minimize the likelihood that a court will find that there is preemption.

## Degrees of Preemption

Preemption can be broad or narrow, depending on how a law is worded. For example, state or local governments may be preempted from passing or enforcing *any* laws or regulations on an issue, or just laws affecting *some parts* of an issue. They may be preempted from passing laws that are *not identical* to the higher level of law, or only from passing laws that are *less protective* than the higher level of law.

### Floor Preemption

The mildest form of preemption—“floor preemption”—is arguably not preemption at all. Floor preemption refers to a situation where the higher level of government passes a law that establishes a minimum set of requirements and expressly allows lower levels of government to pass or enforce laws that impose more rigorous requirements. A state agency rule relating to childcare licensing that includes the language “these rules do not preempt more stringent local regulation or requirements”<sup>9</sup> is an example of floor preemption.

For local public health advocates, floor preemption is often desirable because it establishes a minimum statewide or federal standard and still leaves local governments free to pursue even better public health protections. On the other hand, if a law doesn’t clearly permit further regulation by lower levels of government, is silent about preemption, or uses ambiguous language, there is a risk that the law could imply state or federal preemption of local regulation.

The statement about not preempting more stringent local laws needs to be explicit. For example, a common tobacco industry tactic for challenging local smokefree workplace laws has been to argue that these laws are impliedly preempted by state tobacco-related laws. If laws like state indoor clean air laws or laws that prohibit youth access to tobacco products do not include explicit language allowing for more stringent regulations, tobacco companies often claim they preempt local smokefree workplace laws, simply because these laws also deal with tobacco products.<sup>10</sup>

### Ceiling Preemption

The form of preemption that causes the most concern for state officials and advocates working on public health and consumer protection issues is “ceiling” preemption. This is what most people mean when they talk about preemption.<sup>11</sup> Ceiling preemption prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires. For example, the federal law setting warning labels on cigarette packages expressly prohibits states from imposing additional warnings.<sup>12</sup> It is ceiling preemption that has hobbled the nation’s state and local public health authority and can result in the type of regulatory vacuum described earlier.

## Conclusion

Preemption is a powerful doctrine that can have sweeping and long-term consequences. Advocates need to know how preemption works and to be able to spot potential preemption in a proposed law so they can determine how to respond in a way that will further public health.

*“Floor” preemption establishes a minimum standard.*

*“Ceiling” preemption prohibits local governments from requiring anything more or different.*

## Additional Resources:

The following companion resources are available at [www.changelabsolutions.org](http://www.changelabsolutions.org):

- *The Consequences of Preemption for Public Health Advocacy*
- *Preemption by Any Other Name*
- *Negotiating Preemption: Strategies and Questions to Consider*
- *Preemption: What It Is, How It Works, and Why It Matters for Public Health.*

Mermin SE and Graff SK. *A Legal Primer for the Obesity Prevention Movement. American Journal of Public Health*, 99(1799): 2009.

Pomeranz JL and Brownell KD. *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws. American Journal of Public Health*, 98(1578): 2008.

Rutkow L et al. *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act. Journal of Law Medicine & Ethics*, 36(772): 2008.

Diller P. *Intrastate Preemption*. 87 Boston University Law Review, 1113, 1124-25 (2007).

Mosher JF. "Alcohol Issues: The Perils of Preemption." *American Medical Association (Pamela Glenn ed.)* 2001. Available at: [www.alcoholpolicy.md.com/pdf/Policy\\_Perils.pdf](http://www.alcoholpolicy.md.com/pdf/Policy_Perils.pdf).

Center for Gun Policy & Research, Johns Hopkins University. *Preemption of Local Gun Laws: Questions & Answers*. 2002. Available at: [www.jhsph.edu/gunpolicy/preemption\\_QA](http://www.jhsph.edu/gunpolicy/preemption_QA).

Hobart R. "Preemption: Taking the Local Out of Tobacco Control." *American Medical Association (Elva Yanez ed.)* 2003. Available at: [www.rwjf.org/newsroom/SLSPreemption2003.pdf](http://www.rwjf.org/newsroom/SLSPreemption2003.pdf).



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<sup>1</sup> In rare circumstances, in jurisdictions where local government authority is based on what is commonly referred to as the "imperio home rule" system, state law may not trump certain kinds of local government laws. *E.g., City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003). For a fuller explanation of the interplay between systems of local government authority and preemption issues, see, Paul Diller, *Intrastate Preemption*, Diller P. *Intrastate Preemption*. 87 Boston University Law Review, 1113, 1124-25 (2007).

<sup>2</sup> For a fuller explanation of the different types of preemption, including express and implied preemption, see National Policy & Legal Analysis Network to Prevent Childhood Obesity. *Preemption: What It Is, How It Works, and Why It Matters for Public Health*. 2009. Available at: [www.nplan.org](http://www.nplan.org). [hereinafter "NPLAN Preemption Paper"].

<sup>3</sup> This type of phrase may be referred to as a "savings clause" because it "saves," or preserves, some amount of local authority—e.g., the authority to pass local laws as long as they do not "conflict" with the state law. Savings clauses, including examples, are discussed more fully in the NPLAN Preemption Paper, at 12.

<sup>4</sup> See generally Jonathan Remy Nash, *Null Preemption*, 85 Notre Dame L. Rev. 1015, 1021 (2010)

<sup>5</sup> 2013 Miss. Laws Ch. 370 (S.B. 2687).

<sup>6</sup> *Id.*

<sup>7</sup> Wis. Stat. §66.0418 (created by Act 20 (2013), the Wisconsin 2013-2015 State Biennial Budget.)

<sup>8</sup> Ohio Rev. Code Ann. § 3717.53 (2011); *Cleveland v. State* (Ohio App., 8th Dist., 03-28-2013), --- N.E.2d. ---, 2013, WL 1281900 (2013).

<sup>9</sup> Idaho Admin. Code r. 16.06.02.300 (2008) (Rules Governing Standards for Child Care Licensing). This type of language is another example of a savings clause.

<sup>10</sup> See, e.g., *Michigan Rest. Ass'n v. City of Marquette*, 626 N.W.2d 418 (Mich. Ct. App. 2001) (holding that city ordinance requiring restaurants to be smoke-free was impliedly preempted by state law that capped percentage of seats in restaurants that could be designated as "smoking" seats); but see *Foothills Brewing Concern v. City of Greenville*, 660 S.E. 2d 264 (S.C. 2008) (holding that city's smoke free workplaces law was not impliedly preempted by state indoor clean air act or state youth access law).

<sup>11</sup> See, e.g., National Association of Attorneys General, Interim Briefing Paper Presented by NAAG to President-Elect Obama and the Transition Team (2009) (listing federal preemption of state laws as a top issue of concern); Preemption Monitor – July 14, 2009, Vol. V Issue II (Nat'l Conference of State Legislatures, Denver, Colo. & Washington, D.C.) (noting that pressure for Congressional and White House support for "federal usurpation of state authority" "continues to mount"). Available at: [www.ncsl.org/default.aspx?tabid=18108](http://www.ncsl.org/default.aspx?tabid=18108).

<sup>12</sup> 15 U.S.C. § 1334.