

## Preemption & Public Health

### Facilitator's Guide



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## Who Should Use Our Facilitator's Guides?

Our facilitator's guides are intended for anyone who needs to provide training to public health practitioners about our legal system and its role in improving population outcomes. Public health practitioners may include health department staff, public health lawyers, public health nurses, public health educators, public health advocates, and public health faculty and students in graduate and undergraduate programs. To access facilitator's guides for our other trainings, visit [www.publichealthlawacademy.org](http://www.publichealthlawacademy.org).

## Training Overview

### About This Training

Preemption is a legal doctrine by which a higher level of government may limit, or even eliminate, the power of a lower level of government to regulate a certain issue. In its 2011 report, [For the Public's Health: Revitalizing Law and Policy to Meet New Challenges](#), the National Academies of Sciences, Engineering, and Medicine (NASEM) identified the stifling effect preemption can have on public health policies.

Preemption has important implications for health care delivery and public health, yet this rule of law is not part of most medical, nursing, or public health training. As discussed in the NASEM report, preemption can sometimes hinder the achievement of population health objectives.

By providing practical examples and tips for practitioners, this training seeks to a) provide the audience with a basic understanding of the legal concept of preemption and b) explain how individuals in nonlegal professions can anticipate, identify, and respond to preemption.

### Target Audience

This training has been developed with state and local mid-tier public health professionals in mind. No legal background is necessary.

### Learning Objectives

- Name the primary sources of authority for a) federal, b) state, and c) local public health actions.
- Identify one example of ceiling preemption.
- Identify one example of floor preemption.
- Name the three key elements for tracking preemption.

### Materials

- Facilitator's Guide – This document can be adapted to provide a training that is customized for your community.
- Slide Presentation and Script – Separate files, the slides and script can be modified to reflect your audience, training content, and speakers.
- Facilitator's Checklist – This is a separate file that will prepare you to deliver any training offered by the [Public Health Law Academy](#).

### Equipment

- Laptop
- Projector

## Instructions for Facilitators

Before starting, we recommend that you download the [Facilitator's Checklist](#), which is intended to prepare you to deliver any training offered by the [Public Health Law Academy](#). Below we have identified options for tailoring this training, [Preemption & Public Health](#), for your audience and venue.

### Prepare for the presentation

As the facilitator, you should first go through the materials to familiarize yourself with the content. We recommend that you watch the entire [Preemption & Public Health](#) video. Once you are familiar with it, you can modify the content and length to suit your audience, available time, and venue.

### Before starting the presentation

We suggest that you have participants complete the following:

- *The Q&A Handout found on page 13 of this guide.* The Q&A Handout will help participants assess their knowledge before and after the training. An answer key for the Q&A is also provided (pp. 14-15).
- *The Pre-Training Survey, included in this guide on page 17.* The Pre-Training Survey will provide information about the quality of the session.

If you are not giving the presentation in person, you could distribute these handouts electronically prior to the training (and distribute the answer sheet electronically after the training).

### During the presentation

Depending on the length of your presentation, you'll want to decide how to engage participants using the Q&A Handout. Below is a summary of two options. These approaches not only re-emphasize key points but also create a more interactive experience.

- *Option 1: Poll the Room*  
One approach is to weave the questions throughout the presentation. You can stop after each question and ask the audience to answer it before moving to the next appropriate slide.
- *Option 2: Discussion Activity*  
You can save all the answers for a longer discussion at the end of the presentation. This can either be done as a full group or in small groups.

Similarly, depending on the length and format of the presentation, you should determine whether to allow the audience to ask questions during the training or save them until the end. Our sample agenda suggests allowing 10 minutes at the end of the presentation for closing remarks and general questions. However, this time can be adjusted to suit the needs of the presentation setting and your audience.

### After the presentation

When the presentation is complete, participants should fill out the post-training survey (pp. 18-19).

Finally, we are interested in your experience using this curriculum. Please let us know if you have any questions or feedback on how to improve these materials at [PHLAcademy@changelabsolutions.org](mailto:PHLAcademy@changelabsolutions.org).

## Training Agenda

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### PRE-TRAINING SURVEY AND Q&A ACTIVITY

10 MIN\*

#### OBJECTIVES

- Have participants complete the pre-training survey and answer the questions in the Q&A Handout.

#### RESOURCES

- Pre-training survey (p. 17 of this guide)
- Q&A Handout (p. 13 of this guide)

#### LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED

- [Public Health Law Competency Model](#) 1:1, 1:2, and 2:3

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### INTRODUCTION AND PRESENTATION OVERVIEW

10 MIN\*

#### OBJECTIVES

- Describe the goals for the session and road map.
- Provide any additional high-level introductory comments.

#### RESOURCES

- Slide presentation (slides 1–4)

#### LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED

- [Public Health Law Competency Model](#) Domains 1 and 2

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### SOURCES OF AUTHORITY

10 MIN\*

#### OBJECTIVES

- Describe the constitutional basis for the federal, state, and local governments' public health authority and discuss the limits on that authority.

#### RESOURCES

- Slide presentation (slides 5–18)

#### LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED

- [Public Health Law Competency Model](#) 1:1 and 2:3

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**TYPES OF PREEMPTION****10 MIN\*****OBJECTIVES**

- Define preemption.
- Explain the different forms of preemption (floor, ceiling, vacuum/null, and punitive preemption) and their implications, highlighting examples of each type.

**RESOURCES**

- Slide presentation (slides 19–37)

**LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED**

- [Public Health Law Competency Model](#) 1:1, 1:2, and 2:3

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**SPOTTING PREEMPTION****10 MIN\*****OBJECTIVES**

- Discuss how to determine whether something is preempted.
- Explain the differences between express and implied preemption.

**RESOURCES**

- Slide presentation (slides 38–45)

**LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED**

- [Public Health Law Competency Model](#) 1:1, 1:2, and 2:2

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**PREEMPTION IN ACTION****10 MIN\*****OBJECTIVES**

- Explore how to approach preemption in the everyday practice of public health.

**RESOURCES**

- Slide presentation (slides 46–58)

**LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED**

- [Public Health Law Competency Model](#) 1.2 and 2:3

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**OPTIONAL: Q&A DISCUSSION****20 MIN\*****OBJECTIVES**

- Have participants discuss as a full group or in small groups answers to the questions in the Q&A Handout.
- Provide answers to the Q&A Handout.

**RESOURCES**

- Q&A Answer Key (pp. 14-15 of this guide)

**LEGAL COMPETENCIES FOR PUBLIC HEALTH PRACTITIONERS ADDRESSED**

- [Public Health Law Competency Model](#) 1:1, 1:2, and 2:3

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**WRAP-UP AND QUESTIONS****10 MIN\*****OBJECTIVES**

- Allow participants to ask general questions.
- Provide concluding remarks and have participants complete the post-training survey.

**RESOURCES**

- Slide presentation (slides 59–61)
- Post-training survey (pp. 18–19 of this guide)

*\*All times are approximate; total training time is about 90 minutes.*

## Additional Resources

As you prepare to tailor content from [Preemption & Public Health](#), we recommend familiarizing yourself with the following list of resources. These resources informed the development of the content found in this training. They can provide additional background information as you prepare to tailor content for your presentation. Finally, as questions arise from the audience during and after the training, you can refer audience members to these resources for additional information.

### ORGANIZATIONS

#### CDC, Public Health Law Program

[www.cdc.gov/phlp](http://www.cdc.gov/phlp)

The Public Health Law Program (PHLP) – part of the CDC’s Center for State, Tribal, Local and Territorial Support – works to improve the health of the public by developing law-related tools and providing legal technical assistance to public health practitioners and policymakers.

#### ChangeLab Solutions

[www.changelabsolutions.org](http://www.changelabsolutions.org)

ChangeLab Solutions works across the nation to advance equitable laws and policies that ensure healthy lives for all. Their interdisciplinary team of lawyers, planners, policy analysts, and more, works with neighborhoods, cities, and states to create thriving communities. ChangeLab has a robust catalog of tools and resources, including tools specific to preemption such as a fact sheet on the fundamentals of preemption and resources specific to the relationship between preemption, public health, and health equity.

#### Grassroots Change

[www.grassrootschange.net](http://www.grassrootschange.net)

Grassroots Change empowers grassroots leaders to successfully build and sustain movements that improve health and safety at the community, state, and national levels. Its [Preemption Watch Project](#) offers a variety of resources (including case studies, tools, presentations, and research); its [Preemption Map](#) tracks state preemptive laws on a variety of issues, such as e-cigarettes, nutrition, and paid sick days; and it publishes a newsletter.

#### The National League of Cities

[www.nlc.org](http://www.nlc.org)

Founded in 1924, the National League of Cities (NLC) is the nation’s oldest and largest advocacy group serving more than 19,000 cities, villages, and towns. NLC provides training, support, and education programs to local leaders, holds national meetings, and engages in federal advocacy on issues affecting local governments and communities. It also has a report, [City Rights in an Era of Preemption](#), as well as other resources on preemption.



### The Local Solutions Support Center

[www.supportdemocracy.org/about](http://www.supportdemocracy.org/about)

The Local Solutions Support Center (LSSC) is a national hub, housed inside the Rockefeller Family Fund and created to reframe and respond to preemption as a threat to the advancement of local policies that promote economic, social and public health equity, and justice. To meet that goal, the LSSC is developing, supporting, and implementing nonpartisan strategies and tactics designed to educate the public and policymakers on negative preemption efforts, repeal existing laws that stifle local innovation and equity promotion, inoculate local officials and government against attack, and, where possible and appropriate, affirm and strengthen home rule.

### BACKGROUND READING AND REFERENCES

For facilitators who seek additional information or wish to learn more about the legal issues discussed in this training, see the list of resources below.

- American Public Health Association. Impact of Preemptive Laws on Public Health. November 3, 2015. [www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/11/11/08/impact-of-preemptive-laws-on-public-health](http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/11/11/08/impact-of-preemptive-laws-on-public-health).
- Briffault R, Davidson N, Reynolds L. *The New Preemption Reader: Legislation, Cases, and Commentary on State and Local Government Law (Selected Statutes) 1st Edition*. West Academic Publishing. January 3, 2019.
- Diller P. Intrastate preemption. *Boston University Law Review* 2007;87(5):1113–1176. [www.bu.edu/law/journals-archive/bulr/volume87n5/documents/DILLER\\_v2.pdf](http://www.bu.edu/law/journals-archive/bulr/volume87n5/documents/DILLER_v2.pdf).
- Gorovitz E, Mosher J, Pertschuk M. Preemption or prevention? Lessons from efforts to control firearms, alcohol, and tobacco. *Journal of Public Health Policy* 1998;19(1):36–50.
- Institute of Medicine. *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*. Washington, DC: The National Academies Press. 2011.
- Hodge JG Jr., Corbett A. Legal preemption and the prevention of chronic conditions. *Preventing Chronic Disease* 2016;13. [www.cdc.gov/pcd/issues/2016/16\\_0121.htm](http://www.cdc.gov/pcd/issues/2016/16_0121.htm).
- Rutkow L, McGinty M, Wetter S, Vernick J. 2019: Local Public Health Policymakers' Views on State Preemption: Results of a National Survey, *2018 American Journal of Public Health* 109, 1107–1110. <https://doi.org/10.2105/AJPH.2019.305140>.
- Mowery PD, Babb S, Hobart R, Tworek C, MacNeil A. The impact of state preemption of local smoking restrictions on public health protections and changes in social norms. *Journal of Environmental and Public Health* 2012;2012:632629. doi: 10.1155/2012632629.
- Pertschuk M, Pomeranz JL, Aoki JR, Larkin MA, Paloma M. Assessing the impact of federal and state preemption in public health: a framework for decision makers. *Journal of Public Health Management and Practice* 2013;19(3):213–219. doi: 10.1097/PHH.0b013e3182582a57.
- Pomeranz JL, Teret SP, Sugarman SD, Rutkow L, Brownell KD. Innovative legal approaches to address obesity. *Milbank Quarterly* 2009;87(1):185–213.

## RELEVANT CASES

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### IMPLIED PREEMPTION

**California Rifle and Pistol Association, Inc. v. City of West Hollywood, 28 Cal. Rptr. 2d 591 (Cal. 1998)**

**SUMMARY:** The city of West Hollywood passed an ordinance banning the sale of any handgun classified as a “Saturday Night Special” within the city limits.

The question before the court was whether the state legislature preempted, or took away, the city’s power to regulate handgun sales.

The court concluded that the legislature had not preempted all local ordinances regarding handgun sales. The court looked to statutes, judicial rulings interpreting the statutes, and legislative responses to the judicial rulings – as well as to the legislature’s express and implied intent – to find that the city had authority to enact the ordinance.

**TAKEAWAYS:** Implied preemption can be difficult to spot. Determining whether something is impliedly preempted requires interpreting the context of the law a decision that is often left up to courts.

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### SAVINGS CLAUSE

**U.S. Smokeless Tobacco Manufacturing Company LLC v. City of New York, 708 F.3d 428 (2d Cir. 2013)**

**SUMMARY:** In October 2009, New York City passed a law restricting the sale of all flavored non-cigarette tobacco products. U.S. Smokeless Tobacco sued New York City, claiming the Family Smoking Prevention and Tobacco Control Act preempted the New York City ordinance.

The US District Court upheld the city’s law, explaining that local governments are free to create regulations that are stricter than those contained in the Family Smoking Prevention and Tobacco Control Act.

On appeal, the US Court of Appeals for the Second Circuit affirmed the US District Court’s decision, explaining that the New York City law regulates sales, not manufacturing, and represents an exercise of the local police power specifically provided by Congress in the Family Smoking Prevention and Tobacco Control Act.

**TAKEAWAYS:** Savings clauses carve out exceptions and “save” state or local authority that otherwise would have been preempted by the rest of the law.

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## CHALLENGING PREEMPTION

### [City of Cleveland v. State of Ohio, 989 N.E.2d 1072 \(Ohio Ct. App. 2013\)](#)

**SUMMARY:** In April 2011, the city of Cleveland adopted Cleveland Codified Ordinances 241.42, banning local grocery stores and restaurants from selling foods containing artificial trans fat. The Ohio General Assembly then enacted an amendment that blocked the city's ability to regulate food ingredients.

The city sued the state, arguing that the amendment was an “unconstitutional attempt to preempt the city's municipal home rule authority . . . .”

The court agreed with the city, finding that the state's amendments were a violation of the city's home rule authority and that the amendments were “a classic instance of impermissible logrolling.”

The court looked at the Home Rule Amendment of the Ohio constitution and held that the general assembly's amendments were an unconstitutional attempt to preempt the city from exercising its home rule powers.

**TAKEAWAYS:** When a state gives localities extensive police power authority (known as “home rule authority”), the state cannot then use preemption to unjustifiably block local governments from exercising their power.

## Welcome Activity - The Q&A Handout

**Expected time:** 30 minutes total (approximately 10 minutes before the presentation and 20 minutes during or after the presentation)

### INSTRUCTIONS FOR FACILITATORS

#### Key points:

- Welcome the participants and introduce yourself.
- Explain housekeeping items, such as estimated length of the training, break times, and restroom locations.
- Ask participants to complete the **Q&A Handout**. Remind participants that they are not expected to know all of the answers to all of the questions. Encourage them to do their best and explain that some of the answers to the questions will be addressed throughout the presentation.
- Where applicable, the Answer Key (starting on p. 14) references the slide(s) in the presentation where each of these concepts is expressly addressed or implied.
- Review answers to the questions in the **Q&A Handout** by either:
  - Weaving the questions throughout the presentation and stopping after each question to ask the audience for the answer before moving to the next slide.
  - At the end of the presentation, having participants discuss the questions as a group or in small groups.

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## Q&A HANDOUT

Instructions: Individually, answer the following questions.

**True or False?** (Circle the correct answers.)

1. **TRUE or FALSE:** The federal government can control all aspects of state and local laws.
2. **TRUE or FALSE:** Local governments have authority to enact laws regardless of what state law says.

**Multiple Choice** (Select the correct answer choice.)

3. **To determine whether there is preemption, what should you consider?**

- A. Plain language of the law
- B. Legislative intent
- C. Case law
- D. A and B
- E. A, B, and C

**Fill In** (Write in the correct answer.)

4. **What is one example of ceiling preemption (the type of preemption that prevents lower levels of government from passing or enforcing any laws or regulations on a given topic)?**

Answer:

5. **What is one example of floor preemption (the type of preemption in which the law of a higher level of government sets a minimum standard, but there is still room for a lower level of government to add requirements)?**

Answer:

# Preemption & Public Health

## Q&A HANDOUT

### ANSWER KEY

#### TRUE OR FALSE

1. **TRUE or FALSE:** The federal government can control all aspects of state and local laws.

**False.** Local governments generally act within the authority delegated to them by states. Whereas some states grant local governments extensive authority (called “home rule authority”) to act independently, others greatly limit local governments’ powers (called Dillon’s Rule). The extent of this authority is typically outlined in the state’s constitution.

➤ The same question and answer are discussed on slides 15 and 16.

2. **TRUE or FALSE:** Local governments have authority to enact laws regardless of what state law says..

**False.** The US Constitution divides control between the federal and state governments. The federal government may exercise only that authority specifically assigned to it by the constitution. All other powers are reserved for the states (or local governments). For example, states have the primary authority to regulate the general health, safety, and welfare of their citizens – known as their *police power*. They may then share this power with, or delegate it to, local governments.

➤ The same question and answer are discussed on slides 17 and 18.

**Multiple Choice** (Select the correct answer choice.)

3. **To determine whether there is preemption, what should you consider?**

- A. Plain language of the law
- B. Legislative intent
- C. Case law
- D. A and B
- E. A, B, and C

**(E) A, B, and C.** The plain language of the law (A) will indicate whether something is expressly preempted. Legislative intent (B) and case law (C) can help determine whether there is implied preemption. When determining whether preemption exists, looking at all three factors is important.

➤ The same question and answer are discussed on slides 44 and 45.

**Fill In** (Write in the correct answer.)

**4. What is one example of ceiling preemption (the type of preemption that prevents lower levels of government from passing or enforcing any laws or regulations on a given topic)?**

**Answer:** As discussed in the training, examples could include airline safety regulations, nuclear safety issues, military or foreign relations policies, or Supplemental Nutrition Assistance Program (SNAP) funds.

➤ See slides 22–26 for discussion and examples of ceiling preemption.

**5. What is one example of floor preemption (the type of preemption in which the law of a higher level of government sets a minimum standard, but there is still room for a lower level of government to add requirements)?**

**Answer:** As discussed in the training, examples could include federal minimum wage, school nutrition standards, civil rights laws, or environmental protection standards.

➤ See slides 27–31 for discussion and examples of floor preemption.

## Pre- and Post-Training Surveys

### INSTRUCTIONS FOR FACILITATORS

#### Key points:

- Below are two sample surveys (pre- and post-training evaluation tools\*) that you can use to gather feedback on the content and quality of the presentation.
- Depending on the format of your presentation (in person or online), you may provide hard copies at the presentation or make these surveys available electronically.
- Please update the pre- and post-training surveys with the training date and facilitator's organization.

\*Please note before asking participants to complete the pre- and post-training surveys, the Paperwork Reduction Act has specific requirements for federal agencies with regard to the collection and housing of data and may require permission from the Office of Management and Budget before collecting information from 10 or more members of the public.



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## PRE-TRAINING SURVEY

**Thank you for completing the following survey!**

### Learning objectives:

Please indicate your current confidence level for each of the following learning objectives.

1. I can name the primary sources of authority for a) federal, b) state, and c) local public health actions.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
  
2. I can identify one example of ceiling preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
  
3. I can identify one example of floor preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
  
4. I can name the three key elements for tracking preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident

### Additional feedback:

5. What questions do you have about preemption and its implications for public health?

**Thank you for your feedback!**

# Preemption & Public Health

## POST-TRAINING SURVEY

**Thank you for completing the following Survey!**

### Learning objectives:

As a result of attending the session, Preemption & Public Health, please indicate your current confidence level for each of the following course learning objectives:

1. I can name the primary sources of authority for a) federal, b) state, and c) local public health actions.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
2. I can identify one example of ceiling preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
3. I can identify one example of floor preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident
4. I can name the three key elements for tracking preemption.
  - a. Not confident
  - b. Somewhat confident
  - c. Confident
  - d. Very confident

### Overall impression:

Please rate your level of agreement with the following statements regarding the session Preemption & Public Health.

5. How would you rate the overall session?
  - a. Poor
  - b. Fair
  - c. Good
  - d. Very good
  - e. Excellent

6. I would recommend this session to others.
  - a. Disagree
  - b. Somewhat disagree
  - c. Neither agree nor disagree
  - d. Somewhat agree
  - e. Agree

**Additional feedback:**

7. What was the most valuable part of the session?

8. How could this session be improved?

9. What topics would you like to see addressed in future sessions on public health law?

**Thank you for your feedback!**