Preemption & Public Health

Full Script

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Today we're going to talk about the legal concept of preemption, meaning when the law of a higher level of government invalidates or supersedes the law of a lower level of government.

We'll start with an overview of the origins of government powers, or the **sources of authority**. Then we'll talk about the different **types of preemption** and their implications. We'll next talk about how to **spot preemption** in practice. And finally, we'll conclude with a few examples of **preemption in action**, to illustrate why preemption matters for public health and how it might affect your work.

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In order to understand preemption, it's important to first understand the sources of government authority … What provides different levels of government with the power to create and enforce laws that affect the public's health? And what are the limitations on that power?

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Government authority in the United States – including all authority related to public health – is divided between the federal, state, and local levels.

The primary source of this authority is, of course, the US Constitution …

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As you probably know, the Constitution is the "Supreme law of the land" in this country. It defines the power of the federal government and distributes power between the federal and state governments. States can then chose to delegate some, all, or none of that power to local governments. We'll talk more about that delegation to local governments shortly.

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Under the Constitution's "Supremacy Clause," federal law takes precedence over lower-level laws. It states that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the s**upreme law of the land**; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

So, if a state or local law conflicts with federal law, federal law – the "supreme law of the land" – supersedes the lower-level law.

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Though federal laws are supreme, the federal government has "limited powers." That means it only has those powers enumerated by the Constitution. This includes the power to tax, spend, and regulate interstate commerce. The federal government also has the power to make all laws that are deemed necessary and proper to execute the powers specifically listed in the Constitution.

It is through these powers that the federal government can make and enforce laws relating to public health.

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However, it's really states and local governments that have the most leeway to enact laws to protect the public's health.

Under the Tenth Amendment to the Constitution: "The powers **not** delegated to the United States by the Constitution, nor prohibited by it to the States, are **reserved to the States** respectively, or to the people."

In other words, states have all of the powers not delegated specifically to the federal government.

One of these powers is what is known as the police power.

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In spite of its name, the police power extends beyond law enforcement. It encompasses the power of states – and by delegation, local governments – to promote the public health, safety, and general wellbeing of the community. In fact, protecting the public's health is one of the core purposes of state and local government.

Courts generally give states and local governments wide latitude to exercise their police power, as long as it is for the purpose of promoting the general health and well-being of the community and no other constitutional provisions are being violated. Bike safety laws are a good illustration of a valid exercise of the police power. In accordance with their police powers, many states have enacted laws requiring bicyclists below a certain age (typically 16) to wear a helmet for their safety.

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The police power is a plenary power of the states – meaning that states can choose how much, if any, of this power they will share with local governments. While the Constitution is the source of states' police powers, local governments must rely on the states for this authority. The degree to which local governments have autonomous powers varies greatly by state.

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Some states – like Florida and Illinois – give local governments extensive police power authority, known as "home rule authority." In those states, local governments can directly enact laws that affect the general public, without relying on a specific delegation of power from the state legislature.

Home rule limits the degree of state interference in local affairs but does not eliminate it. For example, even though Florida has explicit home rule, the state legislature still has the ability to preempt – or preclude – local action in some areas, such as regulating exposure to secondhand smoke. Florida preempts local governments from passing smokefree air laws. Only the state can pass laws that regulate where smoking can occur.

California is another example of a state that has its own nuance to home rule powers. The quotation on this slide comes from the California state constitution, which grants ***some*** of its local governments broad police powers. Under the California constitution: "A county or city may **make** and **enforce** within its limits a**ll local, police, sanitary, and other ordinances and regulations** not in conflict with general laws." We won't spend time discussing the distinction here, but what is worth noting is that even though some cities in California have broad home rule powers, others – those that follow the "general laws" of the state – are bound by what is called Dillon's Rule ….

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On the other end of the spectrum are states that follow Dillon's Rule, which limits the ability of local governments to exercise their police power. In those states, local governments may only act within the powers specifically granted to them by the state legislature.

For example, local governments in Virginia have only those powers that are:

- Expressly delegated to them by the Virginia General Assembly OR clearly implied from a specific grant of authority, AND
- Essential to the purposes of government – that is, considered "indispensable," not just useful or convenient.

In other words, if there is any doubt as to whether a Dillon's Rule state, like Virginia, has delegated its power to a local government, then the power has not been shared.

Because the amount of authority that states share with local governments varies so greatly by state, it is important to know how the delegation of power to local governments works in your state!

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Let's review with a couple of questions. The first question: The federal government can control all aspects of state and local laws. True or False?

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The answer is: False. The Constitution divides control between the federal and state governments. Remember that states have the primary authority to regulate the general health, safety, and welfare of their citizens – which, as you might recall, is known as the police power.

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The second question is: Local governments have authority to enact laws regardless of what state law says. True or False?

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The answer again is: False. Local governments generally act within the authority delegated to them by states. While some states grant local governments extensive authority (that is, "home rule authority") to act independently, others greatly limit local governments' powers (which is called Dillon's Rule). The extent of this authority is typically outlined in state constitutions.

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Regardless of how much police power authority a state or local government might have, its ability to enact a public health law or regulation might be affected by the laws of higher levels of government.

This is referred to as "preemption," which, as we'll discuss shortly, can take different forms and has a wide range of implications.

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Let's start with a basic question, and the question that is central to the rest of this training: What is preemption? We touched on this in the beginning, but at its core, preemption is when the law of a higher jurisdiction invalidates the law of a lower jurisdiction.

Generally, a government cannot do anything that *conflicts* with a higher level of government's law. Depending on the type of preemption, lower levels of government might be prevented from passing ***any*** laws on a certain issue or they might be prevented from passing certain types of laws affecting that issue.

Now let's dive a little bit deeper into the forms preemption can take and what they mean.

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The type of preemption that prevents lower levels of government from passing or enforcing ***any*** laws or regulations on an issue is known as **CEILING PREEMPTION**. With ceiling preemption, the whole room is filled up by the law of a higher level of government, so there is no space for the lower level of government to act. We'll talk through a few examples shortly, but one example of this is in the minimum wage context. A number of states have passed laws prohibiting cities from raising local minimum wage rates. This is an example of ceiling preemption, because in those states, there is no room for local governments to act.

Sometimes, however, a lower level of government may regulate ***some*** parts of an issue, even when a higher level of government has a law in that area. This is known as **FLOOR PREEMPTION**. The law of the higher level of government sets a minimum standard, but there is still room for a lower level of government to add additional requirements. Again, using minimum wage as an example, federal law sets minimum wage rates in the U.S. But federal law acts as a "floor," that is, it preempts state and local governments from adopting laws that set a *lower* minimum wage. But states and cities can still set higher minimum wages, unless a city is located in a state that has ceiling preemption in this area.

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Let's take a closer look at ceiling preemption. What effects does it have?

- The first is uniformity. For example, federal airline safety regulations create one uniform set of national standards, preempting states from passing laws that vary from that federal standard.
- Uniform standards can also lead to efficiency. This efficiency can be particularly beneficial in fields where having a single regulator can lead to significant cost savings.
- And finally, ceiling preemption guarantees equality. The idea here is that ceiling preemption eliminates disparities in the protection afforded to people based solely on where they live. This is particularly true for consumer protection laws. A law with ceiling preemption might not set the highest possible standards, but at the very least it ensures that everyone is held to the same standard, and that no one is left behind.

Let's look at a few examples where there might be a need for uniformity and where ceiling preemption therefore is in effect. This can happen on the federal ***and*** state level, but for the next few examples, we're going focus on ***federal*** ceiling preemption.

Where might it make sense for the federal government to enact one law that applies across the country, instead of the potential for having fifty different standards in the fifty states?

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As mentioned earlier, one example of ceiling preemption is airline safety regulations: Because we don't want pilots worrying about what standards and regulations might apply as they cross state lines in the air, it seems most logical and efficient to regulate airline safety on the federal level, and not to allow states to enact different laws. And that's what we do – airline safety is regulated by the federal government and states and localities are preempted from enacting laws in this area.

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Another example is nuclear power plant safety. Nuclear safety issues related to the construction and operation of nuclear power plants in the US are governed by federal regulations issued by the Nuclear Regulatory Commission. Because the regulation of nuclear power plants requires a great deal of technical expertise, extensive staffing, and large capital investment and infrastructure, having a single regulator – here, the Nuclear Regulatory Commission – streamlines the regulatory process and is therefore cost efficient.

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A third example is the development of military or foreign relations policies. Again, it makes sense that the United States would want national uniformity when negotiating with other countries and engaging in global affairs. As a result, the federal government completely occupies this space.

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A final example is the regulation of Supplemental Nutrition Assistance Program – or SNAP – benefits. Only the federal government may regulate what SNAP recipients may purchase with their food stamps.

Ceiling preemption in this context has caused some controversy, particularly among state and local public health officials and advocates who want to limit the types of foods SNAP recipients can buy with their federal benefits – for example, by prohibiting recipients from using food stamps to purchase chips, cookies, or sugary beverages.

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While there are times where uniformity makes sense, there also can be benefits to local control.

- For example, local control allows the flexibility to tailor policies to fit a community's needs.
- Local control can also foster innovation. State and local governments are sometimes called "the laboratories of democracy" because they can test or refine policy ideas. Local control creates an environment that allows the development of innovative policies by testing them on a smaller scale.
- And with innovative policies comes the opportunity to drive policy change more broadly and encourage progress in areas that are unsettled because the science is still evolving or policymakers are still learning what works.

The type of preemption that least limits local control is floor preemption. With floor preemption, the higher level of government passes a law that establishes a minimum set of requirements, onto which lower levels of government may add additional or more rigorous requirements.

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In June 2011, the Institute of Medicine – which has since been renamed the Health and Medicine Division of the National Academies of Science, Engineering, and Medicine – weighed in on the issue of preemption and the roles of the various levels of government when it comes to public health.

As you can see from this slide, its report highlights floor preemption, stating:

> The committee recommends that when the federal government regulates state authority, and the states regulate local authority in the area of public health, their actions, wherever appropriate, should **set minimum standards (floor preemption), allowing states and localities to further protect the health and safety of their inhabitants.** Preemption should **avoid** language that hinders public health action.

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Now that you know the basics of floor preemption, let's look at a few examples …

School nutrition standards are one. Federal law sets minimum standards for foods sold at schools participating in the National School Lunch Program, but it allows state agencies and local school districts to impose more rigorous and/or additional nutrition requirements.

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Civil rights laws are another area where states may go beyond what is required by federal law.

For example, title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination on (among other things) the basis of gender, including discrimination on the basis of pregnancy. Some states, like California, have gone further and require employers to provide greater pregnancy benefits than what is required by federal law. In a case challenging the California statute requiring employers to grant leave for pregnant employees, the California Court of Appeals explained that Congress intended to quote unquote "construct a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise."

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Another illustration of floor preemption is in the implementation of federal environmental laws. The Clean Water Act is a good example of the combined effort that the federal government and states play in ensuring water safety. Under the Clean Water Act, discharging any pollutant into the water without a specific permit is illegal. Although this is a federal law, each state must establish the threshold amount of pollutants that facilities may lawfully discharge into the water.

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In addition to floor and ceiling preemption, there is a third type of preemption, called vacuum or null preemption. This occurs when legislators chose **not** to enact regulations in a particular field but then actively forbid lower levels of governments from doing so. This typically happens on the state level, and therefore most often affects local government authority.

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The result of vacuum or null preemption is regulatory gaps in certain areas. This type of preemption is a growing trend in the public health world right now, especially when it comes to food and nutrition laws, such as those regulating the provision of nutrition information and portion sizes.

It is often easier for cities and counties to enact their own laws protecting the health of their communities; however, as more do so, an increasing number of industries and their lobbies – who may disagree with these laws – are responding by using state preemption to stop local action.

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Many states have laws preempting local policies related to food and nutrition. As of May 2018, these states include: Arizona, Utah, Kansas, Michigan, Wisconsin, Ohio, North Carolina, Mississippi, Alabama, Georgia, and Florida.

Depending on the state, local governments may be preempted from regulating menu labeling, nutrition information, portion sizes, and/or toy giveaways in children's meals.

While these states have laws that prohibit cities and counties from regulating any of these issues, they have set no statewide standard, thus creating a void.

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This is an excerpt from one of Mississippi's statutes. It expressly prohibits local governments from passing any laws that:

- Enact, adopt or continue in effect local legislation relating to the provision or nonprovision of ***food nutrition information or consumer incentive items*** at food service operations;
- Condition any license, permit or regulatory approval for a food service operation upon the ***existence or nonexistence of food-based health disparities;***
- Where food service operations are permitted to operate, ban, prohibit, or otherwise restrict a food service operation based upon the existence or nonexistence of food-based health disparities as recognized by the department of health, the institute of health, or the centers for disease control.
- Restrict the sale, distribution, growing, raising or serving of foods and nonalcoholic beverages that are approved for sale by the USDA or other federal or state government agencies.

As a result, no city or county in Mississippi may regulate any of these issues, even though the state has not enacted standards in any of these areas other than to prohibit local governments from doing so.

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In this context, null preemption can have detrimental effects on public health efforts. Not only does it limit local efforts to address public health issues, like chronic disease prevention, but it creates a regulatory vacuum by not establishing a statewide standard.

As a result, it can prevent some innovations without adding to uniformity. There's also the risk that it will have unintended consequences – for example, if the preemptive language is so broad that it precludes future laws that state lawmakers may not have initially intended to preempt.

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Sometimes the higher level of government will go one step further to ensure that there is a regulatory void by penalizing lower levels of government that legislate in certain areas. This may be referred to as punitive preemption, or super preemption.

For example, a state could remove funding from a local jurisdiction that enacts laws in the preempted area. Other punitive measures may include fines for elected officials who legislate in the preempted area; giving corporations or individuals the right to sue local governments or elected officials for violation of preemptive laws; or removal from office if an elected official violates such a law.

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Now that we've covered the basics of preemption, let's talk about how to know whether something is preempted.

To spot preemption, there are two main questions to ask yourself …

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The first question relates to identifying the higher-level of government's laws that might have preemptive effect. If you work at the state level, you will need to look to federal law to determine if there is preemption. If you work at the city or county level, you will need to look to both federal AND state law. A state can, through its laws, tell a city or county or school district that a particular topic is going to be regulated only at the state level, thus preempting local government efforts.

And the federal government, through its laws, can tell states AND localities that, sorry, you don't get to regulate in a given area any more – if you try, any laws you pass will be preempted.

So it is important for any city, county, or school district looking to enact a new regulation to check for preemption by both federal AND state law.

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Second, preemption can be either express or implied.

With express preemption, the preemptive law includes explicit preemption language. It might say something like: "All local laws on this subject are preempted," or include similar language to that effect.

With implied preemption, the higher-level law does not mention preemption explicitly, but there is something about the law that makes it clear that the legislature *intended* to regulate the entire field. It's not always obvious when there is implied preemption, and sometimes courts have to decide whether a certain law is intended to preempt lower-level laws. We'll talk more about how to spot this type of preemption in a minute.

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Here's an example of express preemption from Oklahoma. Its Prevention of Youth Access to Tobacco Act contains a preemption provision that expressly states:

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

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Determining whether something is impliedly preempted is a bit trickier. Let's look at an actual case: one involving the city of West Hollywood in California. Here's language from the ordinance that the city passed, which banned, within the city limits, the sale of any handgun which the city classified as a "Saturday Night Special."

The question before the court in this case was whether the California state legislature had completely preempted the field of regulating handgun sales – in other words, whether the legislature had taken away the city's constitutional power to regulate the sale of handguns.

To answer this question, the court looked at:

- 3 different state statutes governing firearms,
- The judicial rulings interpreting the statutes, and
- The legislative responses to the judicial rulings.

It concluded that the state only regulated part of the field. For example, the state regulated the permitting and licensing of firearms, and the sale of "imitation firearms," but not the sale of real firearms. As a result, the legislature's adoption of numerous gun regulations had not impliedly preempted ALL AREAS of gun regulation. Since the legislature had avoided preemption of all local regulation of handgun sales, the city had a constitutional right to regulate this area.

This is a very nuanced type of law. The practice tip here is to know it's a possibility and to contact a lawyer if you think a law might be impliedly preempted by a higher-level of government's law!

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To recap: With express preemption, lower levels of government can immediately know their limitations by reading the plain language of the law. This type of preemption could create a regulatory vacuum, but lower levels of government would not be able to regulate in that area nonetheless.

Implied preemption can be hard to spot in advance – even courts can have trouble determining whether a particular law is preemptive. An attorney can help determine whether preemptive intent is implied by the context of the law, but often the final decisions about implied preemption are left up to courts.

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Based on what you've just learned, which of the following must you consider when determining whether a higher-level law preempts an issue?

A. The plain language of the law

B. Legislative intent

C. Case law

D. A and B, or

E. A, B, and C ?

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If you picked E – you're correct! The plain language of the law – answer choice "A" – will indicate whether something is expressly preempted. Legislative intent ("B") and case law ("C") can help you find implied preemption. So all 3 will help you determine whether there's preemption.

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And that brings us to our last segment: how to approach preemption in the everyday practice of public health.

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There are 3 key elements for tracking preemption:

1. Knowing your authority
2. Looking for a savings clause, and
3. Being alert

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Let's first talk about the importance of knowing your authority. How do you know whether you can enter a certain field to pass a law without being preempted?

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Remember back to the two key questions we talked about earlier. To determine whether your law is preempted, first identify the higher-level of government that might preempt you. So, if you're a state, look to federal law. If you're a city or county, look to the relevant federal AND state laws.

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And second, examine the language of the law: does the higher-level of government's law expressly preempt you? If it's not immediately clear, consider the legislature's intent – does it impliedly preempt you?

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Next, it's important to check whether the laws of the higher level of government have a savings clause that preserves state or local authority. As their name suggests, these are provisions that 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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To see what a savings clause looks like in practice, let's look at the Family Smoking Prevention and Tobacco Control Act.

There are LOTS of provisions within the Tobacco Control Act, and the preemption provisions are quite complex. For purposes of today's discussion, we're only going to focus on two clauses.

The first, shown here, is the preemption clause, which says:

> *"No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement . . . relating to* ***tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.****"*

So, the precise preemptive intent is stated outright. Here, it is saying that while state or local governments can regulate ***some*** aspects of the tobacco industry, it cannot pass laws that are broader or more stringent – or even just different – in those areas explicitly listed in the preemption clause.

This is really technical, complicated stuff, but bear with us! It's helpful to understanding how preemption plays out in practice and knowing how to spot and approach preemption in your everyday work.

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The second clause is a savings clause, which carves out an exception to preemption. It explains that the preemption clause "does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products."

So what DOES this all mean? Are states preempted then from regulating tobacco?

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The U.S. Court of Appeals for the 2nd Circuit tackled this issue in 2013. There, the question was whether the Federal Tobacco Control Act preempted a New York City Ordinance governing the sale of flavored tobacco products.

The 2nd Circuit found in favor of the city, saying the "yes" – the city *did* have the authority to regulate the sale of flavored tobacco products.

First, the court explained that the ordinance regulated the *sale* (and not the manufacturing) of tobacco products; therefore, it would not fall under the Tobacco Control Act's preemption clause, which only restricts states from regulating the *manufacturing* of cigarettes. And even if the ordinance had triggered the preemption provision, it would not be preempted because it also falls within that section's savings clause. Remember back to the previous slide – the savings clause excepts from preemption local laws that establish "requirements relating to the sale … of … tobacco products." Here, New York City's regulation limits the businesses where flavored tobacco may be sold – a requirement "relating to the sale … of … tobacco products" within the plain meaning of the savings clause.

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The New York case had to do with federal preemption, but what about state preemption of tobacco laws?

Twenty-seven states have enacted laws that explicitly allow cities and counties to adopt smoking restrictions that are more stringent than or differ from the state standard.

Here's an example from the California Labor Code. This is an over-simplification of its provisions, but the main takeaways to note are its preemption clause (which essentially prohibits local governments from passing restrictions on smoking in the workplace) and its savings clause (which allows local governments to pass regulations restricting smoking in all areas ***outside*** of the workplace).

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The final important step to tracking preemption is simply to stay alert. A lot of preemption provisions are (sometimes intentionally) included in legislation at the last minute. So it's important to keep an eye out for legislation on subjects of interest and to be prepared to respond quickly.

To see a real-life example of this in practice, let's go to Ohio …

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In April 2011, the Cleveland City Council passed an initiative banning the sale of artificial trans fat-containing foods from local grocery stores and restaurants.

Two months later (in June 2011), the Ohio Senate used an amendment in the state budget bill (a bill completely unrelated to food and nutrition) to block the city's ability to regulate ingredients used in the city to prepare foods.

In response, the city of Cleveland sued the state for its attempt to block the proposed ban. The city argued that the state of Ohio's actions to control how Cleveland regulates food within its borders amounted to an unconstitutional attempt to preempt an action that should have been permissible under its home rule powers.

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The court ruled in favor of the city, determining that Cleveland had acted within its authority when it banned the sale of foods containing artificial trans fats.

The court explained that the state's amendments were an unconstitutional attempt to preempt the city from exercising its home rule powers. The amendments were tucked away in the state's appropriations act – which the *Cleveland Plain Dealer* newspaper had compared to a "junk drawer" – quote unquote "a place to stow … odds and ends that you just don't know what else to do with."

Further, the amendments were not vetted by the usual committee process. There were no hearings on the amendments in any of the House or Senate Committees. And although the amendments would affect the health of Ohio citizens, there was no testimony to any legislative committees from any nutritionist, dietician, or any other health care professional explaining the health effects of trans fats.

This is another example of how preemption can at times be tricky and complicated, so it's important to stay alert – and, when in doubt, to seek the help of legal counsel.

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This brings us to the end of our training. Before we conclude, here are a few takeaways to keep in mind when trying to avoid preemption:

- Identify preemption as early as possible,
- Understand the scope of the preemption,
- Determine a strategy to address preemption, and
- Consider proactive legislation to prevent situations like the Ohio example – where preemption provisions are added in last minute or tucked away in a "junk drawer" bill.

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