

Assessing & Addressing Preemption: A Toolkit for Local Policy Campaigns

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Introduction & Background



Public health movements often start at the local level, where cities and counties function as laboratories for policy change, testing new and innovative policies. Local governments frequently serve as a locus for policy innovations with the potential to improve health outcomes and reduce health inequities. These innovations include traditional public health policies such as those that regulate tobacco and alcohol sales, promote healthy eating, and restrict access to firearms. They also include policies focused on the social determinants of health such as increased minimum wage, guaranteed paid employment leave, improved housing safety and affordability, and expanded antidiscrimination protections.

Local policy change (as opposed to state or federal policy) is often more grounded in a deep understanding of the health needs, community goals, and lived experiences of residents and therefore more likely to create the kind of lasting change that comes from responding to local priorities. When leaders make public health decisions without considering local contexts, concerns, or contributions, those decisions may miss the mark or even exacerbate health disparities. Moreover, local policy changes can provide case studies and evidence of success, which can set the stage for state-level or national changes in the future.

However, some state legislatures are using their authority to block local policy innovations. In doing so, they are relying on the legal doctrine called *preemption*, which allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a certain issue. When misused, state preemption can threaten the ability of local communities to adopt health- and equity-promoting laws and policies.

This toolkit is intended to help policymakers and advocates understand the key questions and considerations for assessing preemption in the context of public health policy. Although both federal and state law can preempt local government authority, this toolkit focuses primarily on *state* preemption because much of the preemption of local laws results from state law and because federal preemption can raise complicated legal considerations that are beyond the scope of this resource.

This toolkit begins with an overview of preemption and its relationship to health equity. The preliminary section **Understanding & Assessing the Equity Landscape** can help local policy campaigns assess the equity considerations of a specific preemption law. If this assessment determines that the preemptive law is likely to harm health and equity, stakeholders in a policy campaign can then apply the material in the rest of the toolkit. The toolkit outlines the contours of local authority generally and then considers preemption as an actual or potential barrier or threat to a local policy campaign in three scenarios:

Scenario 1: No direct preemption exists that would interfere with the local policy campaign.

Scenario 2: Preemption is an immediate threat to the local policy campaign.

Scenario 3: Preemptive laws that could interfere with the local policy campaign already exist.

For each scenario, the toolkit identifies key questions and considerations and provides resources to help assess those questions and considerations.

Appendix A provides a glossary of important terms; **Appendix B** lists words and phrases that may indicate preemption; and **Appendix C** is a comprehensive list of resources.

Who Should Use This Toolkit?

This toolkit is aimed primarily at local policy campaigns. For the purposes of this toolkit, a *local policy campaign* is defined as a group of stakeholders – for example, community members, grassroots advocates, policy experts, and others – working at the city or county level to advance a public health policy that promotes health equity. The toolkit may also be useful for those exploring the role of preemption in policy campaigns more generally and those working to address preemption at the state level.

Power & Preemption: The Importance of Inclusive & Equitable Decisionmaking

Regardless of the specific focus, context, or stage of a local policy campaign, it is critical that the campaign establish inclusive and equitable governance and decisionmaking structures, both generally and with respect to decisions about preemption and actions to address it. Because some unintended inequitable impacts may be unavoidable if a campaign prioritizes certain goals, making decisions about whether, when, and how the campaign should move forward with respect to preemption requires having a nuanced understanding of the issue at hand, who will be affected, and which trade-offs are acceptable to the community. Indeed, when affected communities – especially those who are often excluded from the political process – are not leading or involved in a policy campaign's decisionmaking, the resulting outcomes may be a poor fit for the community. Community members are experts on their own local conditions, and while outside advocacy groups may have the best intentions, incomplete information or unfounded assumptions may result in decisions that do not properly address the community's concerns.

It is also important that policy campaigns involve a representative cross section of the community. You and your partners should aim to generate meaningful participation in the policy campaign and motivate many types of people to contribute to community problem solving. Ultimately, the goal is to lift up the needs and perspectives of people in your community who are experiencing a disproportionate burden of health inequities and give them more say over what happens in their lives and their communities. Inclusive and equitable decisionmaking can also instill a sense of ownership of the policy campaign in participating community members, contributing to greater political support and buy-in for the campaign's goals.

Here are some questions to help determine whether a policy campaign's governance and decisionmaking structures related to preemption are inclusive and equitable:

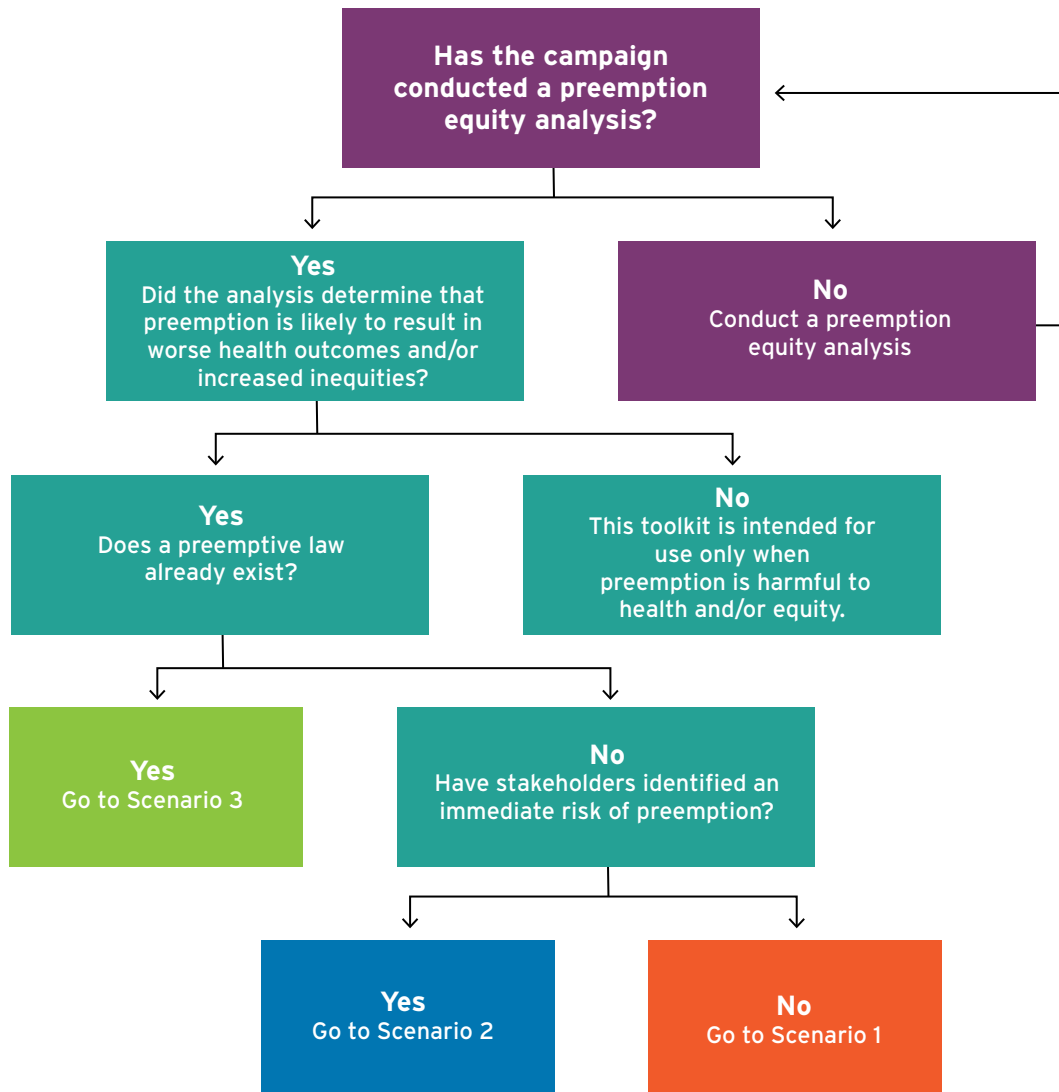
- Are there already organizations embedded in the community that can play a leading role in the policy campaign?
- Do community members who may benefit from or be harmed by the goals of the policy campaign have an opportunity to weigh in on the campaign's decisions?
- How are community members selected? Is the process open, inclusive, and fair? Is the process structured in a manner that ensures that the campaign and its decisionmakers are hearing from a truly representative cross section of the community?
- Are there systems in place to ensure that the policy campaign and its decisionmakers are informed about the priorities, needs, and historical treatment of different communities that will be affected?

How to Use This Toolkit

The toolkit is modular. Although users can read the toolkit from start to finish, most policy campaigns will use only portions of it. Figure 1 explains how to use the toolkit’s various elements. Any campaign should start with a preemption equity analysis – a determination of whether preemption would advance or hinder health equity under the specific circumstances. The section **Understanding & Assessing the Equity Landscape** later in this document explains the varying effects of preemption on health equity and offers a series of guiding questions to help assess the potential equity impact of a specific preemption law.

If a campaign’s equity analysis concludes that preemption is likely to result in worse health outcomes and/or increased inequities, the campaign should proceed to Scenario 1, 2, or 3 (see Figure 1). It is important to note that these three scenarios do not apply if a campaign determines that preemption may not be harmful to health or equity. Following each set of questions is a list of resources relevant to answering or addressing those specific questions. For a full list of resources, see **Appendix C**.

Figure 1. How a Public Health Campaign Can Use This Toolkit to Address Preemption



What Is Preemption?

Preemption is a legal doctrine that allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a certain issue. Under the Supremacy Clause of the US Constitution, federal law takes precedence over state and local 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 takes precedence. In some instances, preemption may also limit local actions beyond the adoption and enforcement of local laws – for example, adoption of procurement guidelines by local government entities.

Governments enact several types of preemption. **Floor preemption** occurs when a higher level of government enacts a minimum set of standards but allows lower levels of government to enact more rigorous requirements.ⁱ **Ceiling preemption** occurs when a higher level of government enacts standards and prohibits lower levels of government from requiring anything more stringent or different. Finally, **vacuum preemption** results when a higher level of government prohibits lower levels of government from enacting requirements in a particular area without setting any standards of its own.

Preemption can take several forms. **Express preemption** occurs when the preemptive intent of a law is stated outright. **Implied preemption** means that a law contains no explicit preemption-related language but nonetheless may be found to preempt local authority. For example, preemption may be implied because state law sets forth a comprehensive scheme of regulation on a particular issue, leaving no room for lower-level governments to regulate. It is not always clear whether implied preemption is present in a particular law; even courts at times have trouble deciding whether preemption is present in cases where it is not explicit. For more information on how to spot preemption, see **Appendix B**.

Preemption can also be broad or narrow. **Field preemption** occurs when a higher-level government prohibits lower-level governments from passing or enforcing *any* laws on an issue, reserving the entire area of regulation (the field) for itself. In contrast, a higher-level government can choose to preempt only lower-level policies affecting *specific components* of an issue.



For more information about the basics of preemption and how it operates, please see ChangeLab Solutions’ fact sheet [Fundamentals of Preemption](#). To learn more about how preemptive policies can affect health and equity, see the companion fact sheet [Consequences of Preemption](#).

ⁱ In the context of public health, floor preemption generally means that lower-level governments are allowed to adopt laws that are more protective of health and equity than the laws of a higher-level government. However, stakeholders should remain mindful that laws framed as establishing minimum standards may in fact contradict public health and equity goals. Those opposed to local firearm safety regulations, for example, might frame state preemption as establishing minimum standards for the protection of individuals’ right to bear arms. Similarly, groups opposed to the development of affordable housing might frame state preemption of local equitable housing policies as setting baseline protections for existing property owners.

Who Is Behind the Misuse of State Preemption?

Often propelled by trade association and business lobbying, many preemptive state laws are aimed not at coordinating state and local regulation but at preventing any regulation at all.¹ Many of these preemptive state laws are part of a long-term strategy by corporate interests to consolidate power at the state level and end local authority over a variety of issues. Businesses are generally concerned with profit, which reflects revenues, costs, inventories, marketing, and legal compliance, among other things. New regulations can affect all of these things. Accordingly, business and industry have increasingly used preemption to protect their financial interests and thwart local efforts to enact policies aimed at advancing health equity.² Much of this effort has been orchestrated by the American Legislative Exchange Council (ALEC), an industry-funded organization that has written and distributed model bills to its members, which include lobbyists and a quarter of all state lawmakers. These models have served as the basis for many of the increasing number of state laws that misuse preemption.³

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Understanding & Assessing the Equity Landscape

This section summarizes how preemption relates to health equity and offers questions to guide assessment of the likely impact of a specific preemption law on equity.

Preemption can have a profound effect on public health policy, and central to any consideration of preemption is determining how it affects equity. Local governments across the country continue to develop innovative solutions to advance health equity and improve the health and well-being of every community member, but preemption stands as looming threat to their ability to do so. At the same time, preemption remains an important tool for rectifying local laws that impede health equity or have discriminatory effects. This tension and the varying effects of preemption on health and health inequities underscore the need to evaluate the equity implications of preemption on a case-by-case basis.

Preemption Most Frequently Impedes Health Equity

In the context of public health policy, preemption has most often been an impediment to positive change. The history of the tobacco control movement, for example, is rife with examples of industry's use of state-level preemption to thwart local efforts to expand smokefree protections and reduce youth access to tobacco products. Other industries also have increasingly turned to preemption as a strategy to stop local regulatory efforts to protect public health. As a result of these fights against industry-backed preemption, public health professionals often frame preemption as generally negative or rely exclusively on the distinction between floor preemption, which they find beneficial, and vacuum or ceiling preemption, which they find problematic.

Numerous state legislatures have misused preemption to prevent local governments from enacting upstream interventions with the potential to undo [fundamental drivers of health inequities](#). In some cases, states use preemption in an overtly or even purposefully discriminatory manner. In other instances, state preemption has unintended discriminatory or inequitable effects.

Even apart from the specific substantive issue at hand, preemption as a legal tool can sometimes be problematic for structural reasons. Local governments may be more representative of and more responsive to the needs and desires of the local population. When a locality is demographically very different – for example, racially, socioeconomically, or even politically – from the state as a whole, the state legislature may not reflect either the makeup or the political preferences of that locality. By enacting state-level laws that are preemptive, the legislature may be thwarting the ability of the locality to address specific problems in a way that is most helpful to the people experiencing those problems daily.

Targeted Preemption May Reduce Health Inequities

Despite the widespread and still-increasing misuse of preemption to undermine local democracy, preemption is not inherently adversarial to public health, equity, or good governance. Ample evidence shows that health inequities can result from decisions made at all levels of government, including local government. Indeed, some local governments continue to “perpetuat[e] and exacerbat[e] segregation and racial disparities in housing, education, employment, and criminal justice.”⁴ Like law and policy in general, preemption has both created and alleviated health inequities.⁵

Some states have at times used preemption to respond to local laws that, although not always overtly racist or discriminatory, perpetuate health and economic inequities. For instance, chronic nuisance laws, which exist in thousands of localities, are intended to keep communities safe by curbing public health and safety risks. However, many of these laws classify repeated 911 calls as a nuisance regardless of whether the calls are for legitimate purposes such as requesting protection from domestic violence or seeking medical assistance.^{6,7,8} Individuals or property owners who receive citations for repeated 911 calls face penalties that can be as extreme as eviction. Moreover, the inequitable enforcement of these laws disproportionately harms people of color and persons with physical and mental health conditions.^{9,10,11} In response to these inequities, several states, including California and Pennsylvania, have preempted these types of local “911 nuisance” laws.^{12,13}

States also have used preemption to reduce or eliminate other forms of local authority in order to protect health and health equity. For example, in 2017, California enacted legislation stripping local governments’ authority to regulate and ultimately deny certain multiunit housing developments.¹⁴ The state took this drastic action to ensure that local governments could no longer avoid responsibility for a severe and worsening housing crisis.¹⁵ Although the law significantly limits the power of California municipalities in regard to housing, it is expected to ultimately promote health equity by facilitating the creation of more affordable units in places that need them, and it may reduce displacement in underserved communities. Other states have taken similar steps; for example, Oregon has preempted all local ordinances requiring single-family zoning.¹⁶



For more information:

To learn more about the varying effects of preemption on health, equity, and social justice, please see the following resources:

- [Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health](#), by Derek Carr, Sabrina Adler, Benjamin D. Winig, and Jennifer Karas Montez
- [The Political Process of Preemption](#), by Paul A. Diller
- [The Dilemma of Localism in an Era of Polarization](#), by Nestor M. Davidson

Assessing the Equity Impact of Preemption

Preemption is not an inherently positive or negative tool. Policy campaigns should assess which level of government is both best situated and more likely to adopt a particular equity-promoting law or policy.ⁱⁱ The ultimate goal, then, is to frame a policy campaign around the advancement of health equity and assess how preemption factors into accomplishing that goal.

Understanding the implications of preemption for any given policy campaign requires a case-by-case assessment of whether preemption is likely to worsen health inequities or whether it is an appropriate response to address existing inequities. The evidence base on the effects of preemption on health and health equity is still evolving; consideration of the following questions can nevertheless offer important insight.

What are the power dynamics among and between stakeholders?

1. Who in the policy campaign has the power to make decisions about how to proceed with respect to preemption?
2. Is preemption threatening local laws intended to remedy current or historical inequities? Does preemption benefit or harm politically disenfranchised or other structurally marginalized groups?
3. Does the racial and socioeconomic makeup of those pursuing a local policy change substantially differ from those pursuing preemption of that policy? For example, is a majority white state legislature seeking to preempt local policies advanced primarily by communities of color?
4. How can campaign stakeholders ensure that those most affected by actual or potential inequities are part of the analysis and decisionmaking process?

Communities of color, low-income communities, people with a low level of education, and other underserved groups are often disproportionately harmed by laws and policies.¹⁷ As a result, these communities experience dramatically poorer health than communities with more political and economic power. Families and individuals with little political power find it difficult to make their problems and needs visible to government and institutional decisionmakers. This problem is exacerbated by voting laws that create barriers to democratic participation and support elected officials whose race and socioeconomic experiences are often not representative of the neighborhoods they serve.

Without representative government and meaningful input from people at the bottom of the sociopolitical ladder, laws and policies will continue to disproportionately benefit stakeholders who have greater power to participate in and influence legal and political processes. Involving people in the policy process empowers them by affording them more control over their lives, especially if they have historically been targeted by discrimination or otherwise left out of policymaking processes.

ⁱⁱ Health insurance is one example of an area in which regulation by a higher level of government (eg, a state) is more likely to advance health equity than regulation adopted by a lower level of government (eg, a local government). This is true because the widespread availability of affordable health insurance requires a large and varied “risk pool” that allows revenue from healthy individuals (ie, those who require relatively minimal medical care) to offset the health care costs of those with greater medical needs (eg, individuals with chronic health conditions). Without a robust risk pool, health insurance would be even less affordable for many who need it most, and the overwhelming majority of local jurisdictions lack the population size necessary to create such a risk pool. As a result, regulating health insurance at the state level, with a larger and more diverse population, can reduce the overall cost of health insurance policies and increase the availability and affordability of such policies for the populations facing the greatest health challenges.

Given current and historical inequities in political power and in meaningful participation in governance, assessing the power dynamics among and between stakeholders is critical to evaluating whether an instance of preemption will advance or impede health equity. If decisions about preemption are being made without meaningful input from those most likely to be harmed by preemption of policies, a policy campaign should stop and assess how best to obtain such input. Similarly, additional scrutiny is warranted when state legislatures that do not reflect the diversity of local communities enact, expand, or repeal preemption laws. In contrast, when used to protect the rights of underserved, politically disenfranchised communities, preemption may reduce disparities in political power and increase meaningful participation in governance.



Case Studies

Source-of-income discrimination in housing. Austin, Texas, sought to address racial and socioeconomic discrimination in rental housing by prohibiting landlords from rejecting otherwise qualified tenants based solely on their source of income (eg, federal housing assistance). The state legislature responded by nullifying Austin’s ordinance and preempting municipalities from enacting similar antidiscrimination laws, despite the absence of any statewide protections for recipients of housing assistance and despite clear evidence that source-of-income discrimination disproportionately harms people of color.

Antidiscrimination laws. North Carolina adopted its now-infamous “bathroom bill,” House Bill 2 (HB2), in direct response to a Charlotte ordinance prohibiting discrimination based on sexual orientation and gender identity. Although media coverage largely focused on HB2’s bathroom access provisions, the law also preempted local communities from enacting antidiscrimination ordinances or regulating employment compensation and benefits. Tennessee likewise preempts local antidiscrimination protections, and the Arkansas Supreme Court upheld a state law that invalidated an antidiscrimination ordinance in the city of Fayetteville.

Immigration enforcement. Several states, including California and Oregon, have adopted state laws restricting local law enforcement officials from cooperating with federal immigration enforcement. Although these laws impose substantial limits on local authority, they nevertheless serve to protect structurally marginalized people who may otherwise lack the political power necessary to secure similar protections at the local level. In contrast, other states have preempted local laws and policies that seek to protect immigrant populations even though no such protections exist at the state level. In these scenarios, those most affected by the preemption (ie, immigrant populations) are generally not part of the decisionmaking process, and the preemption blocks local laws with the potential to undo fundamental drivers of health inequities.

What are the drawbacks or benefits of a uniform standard?

1. Is there a reason why having one standard enacted at a higher level of government would advance the campaign's goal? If so, would enacting the standard as a floor be an option, or would having different standards create additional problems such that a ceiling would be preferable?
2. What are the equity implications of establishing a uniform standard?
3. Could it be preferable to ensure that everyone has access to at least some minimum set of protections or benefits?
4. What if the trade-off is limiting the ability of jurisdictions with the political will to enact further protections or health-promoting practices? What are the longer-term consequences of this trade-off?

Corporate interests often prioritize the establishment of uniform standards, arguing that uniformity and predictability are key to reducing costs and preventing inadvertent violations. A uniform state or national standard makes sense in some instances – for example, in an area like airline safety, where differing state and local standards would create chaotic conditions in which different rules apply any time an aircraft crosses into another state. Additionally, uniform national or statewide standards may be preferable from an equity perspective if they ensure a level of protection for underserved communities that would never have benefited from a policy were it not enacted at the state level. Importantly, preemption has the potential to advance equity in this scenario only if preemption occurs as a result of a comprehensive statewide or national policy and is no broader than the subjects addressed in that state or federal law.

In most instances, however, the benefits of allowing local variation and innovation outweigh the costs of a lack of uniformity. Additionally, arguments favoring uniformity are often in service of a broader deregulatory agenda and opposition to specific local measures rather than a response to any demonstrated need for uniform regulation.^{18,19}



Case Study

Paid sick leave. Several states, including Maryland and Oregon, have adopted laws that require employers to provide paid sick leave and preempt local governments from enacting additional paid sick leave requirements. Other states with statewide paid sick leave laws, such as Washington State, do not preempt additional local regulations. Accepting preemption in exchange for a strong statewide policy may nevertheless advance equity by ensuring that all workers can access the benefit, even those who live in a local jurisdiction that would never adopt a paid leave law on its own. However, states that create a vacuum by preempting local paid leave laws without establishing any statewide protections (eg, Iowa) will invariably harm public health and equity, as will sweeping state preemption that applies beyond the specific context of paid leave (eg, a state paid leave law that preempts all local authority to regulate employment practices such as minimum wage).

Is preemption being used to counter inequitable laws and policies?

1. Does the policy involve stigmatized issues or the provision of health- and equity-promoting resources to stigmatized populations?
2. Is preemption being used as a blunt deregulatory tool, or is preemption a reasonable response to well-identified local policies that have created or exacerbated inequities due to inequitable enforcement or the nature of the policy itself?
3. If the preemption is in response to local policies that have resulted in inequities, is the preemption narrowly tailored to address those inequities, or does the preemption law impose broad restrictions on local authority?
4. Is the presence of additional local regulation likely to harm health and equity? For example, does the preemption seek to address a problem in which local interests are likely to impede health and equity?

Present-day gaps in health and prosperity are rooted in historical injustice and systemic inequity. Whether deliberately or unintentionally, laws and policies have enabled, sustained, and exacerbated unequal treatment. These unjust laws exist at all levels of government, including local government.

Additionally, those with greater political power often use law and policy to undermine health-promoting resources for stigmatized populations such as people who use drugs and people without permanent housing. When local laws and policies contribute to health inequities, targeted preemption laws seeking to advance health equity can provide a critical counterbalance.

Although preemption can counter inequitable local laws, it is critical that any such preemption be narrowly tailored to limit local authority only to the extent necessary to address those specific inequities. For example, many local governments require licenses to engage in a variety of professions that range from haircutting to interior design. These local regulations often duplicate existing state licensing laws and impose burdensome fees, qualifications, and training requirements. Such burdensome requirements can limit economic opportunity and mobility, especially for low-income populations, without furthering any substantial public health or safety purpose.²⁰

Targeted state preemption laws that prohibit local governments from duplicating state occupational licensing requirements have the potential to advance equity. However, some states have preempted not only local occupational licensing laws but also local authority to require employment practices that protect public health and advance health equity – such as business licensing, increased minimum wage, and paid leave.²¹ Such sweeping preemption is not a proportional response to unnecessarily burdensome local occupational licensing laws and is likely to further entrench inequities.



Case Studies

Drug treatment and harm reduction facilities. As the overdose crisis has swept across the country, many public health, health care, and community-based organizations have sought to increase access to evidence-based public health interventions such as methadone treatment facilities and programs that provide access to sterile syringes. In some jurisdictions, however, local opposition rooted in stigmatization of people who use drugs has impeded establishment and operation of these interventions. For example, Orange County, California, forced closure of its local syringe access program by declaring it a nuisance.²² Cities also have a long history of using zoning and other land use controls to block methadone treatment facilities. When stigma drives local opposition to provision of health-promoting resources to underserved populations, targeted state preemption can help advance health equity by ensuring timely access to evidence-based care.

911 nuisance laws and exclusionary zoning. See the earlier section **Targeted Preemption May Reduce Health Inequities.**

What other equity considerations should a policy campaign assess?

1. Who are the stakeholders supporting and opposing preemption? For example, do organizations that advance corporate interests, such as the American Legislative Exchange Council, support the preemption law? Is the preemption law supported or opposed by grassroots health and social justice organizations?
2. Is the preemption law punitive? Does the preemption law impose penalties on local governments and/or local officials who propose or enact preempted laws?
3. Does the preemption law seek to overturn the results of a voter-approved initiative or referendum?
4. Does the preemption law seek to reduce the inequitable enforcement of local laws?

Supporters and opposition. Stakeholder interests are not dispositive in determining whether preemption is likely to advance or inhibit health equity in any individual case (eg, health advocates and commercial real estate developers may both support preemption of exclusionary zoning). Nevertheless, an understanding of who supports and opposes a preemption law might be a jumping-off point for a more thorough examination.

Punitive preemption. Regardless of the policy being assessed, punitive preemption laws that penalize local governments and government officials are always harmful because they chill policymaking, stifle public discourse, and undermine democratic values. When state or federal law is found to preempt a local law, the only consequence should be invalidation of the local law, without imposition of any punitive measures against local governments or their officials.

Voter initiatives and referendums. Additional scrutiny is warranted when state lawmakers act in a manner contrary to the expressed view of their constituents. However, preemption laws that overturn an initiative or referendum are not categorically problematic from an equity perspective; some initiatives and referendums explicitly target marginalized communities in harmful ways.ⁱⁱⁱ

Equitable enforcement.^{iv} People of color, residents with low income, and other structurally marginalized populations are disproportionately affected by civil penalties such as fines and by criminal penalties such as incarceration.^{23,24} Difficulties with paying fines can affect credit scores, plunge families into debt, result in loss of a driver's license, or lead to incarceration²⁵ – all outcomes that negatively affect health.^{26,27,28} When enforcement of local laws results in disproportionate harms to underserved communities, targeted state preemption seeking to limit such enforcement can help counter those inequities. For example, state laws can require local governments to adopt sliding-scale or proportional fines.

ⁱⁱⁱ For additional information on the benefits and drawbacks of voter initiatives and referendums, see Diller PA. The political process of preemption. *Univ Richmond Law R.* 2020;54:343-404. lawreview.richmond.edu/2020/02/08/the-political-process-of-preemption.

^{iv} For additional information on enforcement practices and how equity-informed enforcement of public health laws can help break the cycles of injustice and inequitable health outcomes experienced by underserved communities, see *Equitable Enforcement to Achieve Health Equity: An Introductory Guide for Policymakers and Practitioners*. Oakland, CA: ChangeLab Solutions; 2020. changelabsolutions.org/product/equitable-enforcement-achieve-health-equity.



Case Studies

Overturing election results. In November 2014, voters in Denton, Texas, approved an ordinance prohibiting hydraulic fracturing (fracking) within city limits. However, by May 2015, the Texas state legislature had enacted legislation that overturned the Denton ordinance and preempted municipalities throughout the state from enacting almost any regulation on oil or gas production.

Punitive preemption. In 2011, Florida amended their firearm preemption statute to impose fines and other penalties on local governments and officials who enact local ordinances subject to state preemption. These penalties include levying personal fines on government officials, removing local government officials from office, and exposing local governments to civil liability. Similarly, in 2016, Arizona enacted a law requiring the state treasurer to withhold state funding from any municipality that is determined by the state's attorney general to have enacted a preempted local law, unless and until the local government repeals the purportedly preempted law.

As noted earlier, Scenarios 1, 2, and 3 of this toolkit assume that an equity assessment like the one outlined in this section has been undertaken and that preemption constitutes a barrier to equity and the achievement of a particular public health goal.

Strategies to Address Preemption

Strategies to address preemption will depend on the status of any potential or existing preemptive law that might interfere with the goals of a local policy campaign. For example, the questions to ask, resources to consult, and activities to undertake will differ if no existing preemptive law exists compared with if a clearly applicable preemptive law already exists. Accordingly, this toolkit organizes information as follows:

Scenario 1

No preemption exists, nor is there a known immediate risk of preemption. However, stakeholders are concerned that the campaign may trigger some form of preemptive pushback.

Scenario 2

Although no preemption currently exists, stakeholders have identified an immediate risk of preemption that would interfere with the policy campaign's goals.

Scenario 3

A preemptive law already exists, and stakeholders must assess which is the best way forward for the policy campaign in light of that law.

In addition to the questions and considerations outlined in this toolkit, local policy campaigns should evaluate lessons learned from other campaigns that have faced similar issues. A single policy campaign may progress through each of these scenarios sequentially, or, depending on the specific issue and the state's policy landscape, the policy campaign may jump straight to Scenario 2 or 3.

Assessing the Local Legal Landscape

As an initial step, a local policy campaign must understand the contours of local authority in its jurisdiction, as granted by the state's constitution and statutes. The campaign should be familiar with local regulatory authority generally as well as local authority related to the specific issue(s) that are the focus of the campaign.

The degree to which local governments have authority to enact policies varies greatly by state. In some states, local governments may exercise only those powers explicitly granted to them by their state legislature. This structure is known as Dillon's Rule. Other states grant local governments extensive autonomy, known as home rule authority. In those states, local governments can directly enact laws without relying on a specific delegation of power by the state legislature. Home rule limits the degree of state interference in local affairs but does not eliminate it.

Even when local governments have the general authority to act, a policy campaign must then assess and understand the preemption landscape, including whether and how existing preemptive laws may affect the policy strategies being pursued. The preemption landscape with respect to a given topic may be straightforward; state law may include a provision that explicitly preempts local laws on a given topic. At other times, it may not be so obvious, and even substantial legal research may not alleviate uncertainty. For example, state law may be silent on local regulation, but it may still be unclear whether preemption is implied or whether the state has "occupied the field" (ie, preempted policies in an entire subject area). If legal implications are uncertain, the campaign must determine how much risk it is willing to take and whether it has the resources to proceed in the face of that risk.

Unless the answer is obvious, policy campaigns should consult with attorneys who understand the regulatory environment with respect to the relevant topic. Likewise, policy campaigns should carefully track state legislative developments because lawmakers can insert preemption language into bills at the last minute or in less transparent ways (see **Appendix B: Preemption by Any Other Name**).



For more information:

The following resources can help you assess the legal landscape – for example, general local regulatory authority and existing preemption – as well as help you identify when to seek additional guidance.

- [Summary of Home Rule Doctrines](#) (Local Solutions Support Center)
- [State Preemption of Local Equitable Housing Policies](#) (Local Solutions Support Center)
- [Preemption Map](#) (Grassroots Change)^v
- [Mapping State Interference](#) (Partnership for Working Families)
- [State Preemption Laws Dataset](#) (LawAtlas)
- [Worker Rights Preemption in the U.S.](#) (Economic Policy Institute)
- [Preemption and Public Health Law Training](#) (ChangeLab Solutions)
- [Principles of Home Rule for the Twenty-First Century](#) (National League of Cities & Local Solutions Support Center)

Municipal Leagues

- [National League of Cities](#)
- [National Association of Counties](#)
- [Local Municipal Leagues](#)

Legal and Policy Technical Assistance Providers

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)

Local Government Attorneys (eg, city attorney and county counsel offices)

^v Grassroots Change's Preemption Watch map no longer receives active updates. While information from the Preemption Watch map may still provide a useful starting point, users of this toolkit should verify that the information reflects currently applicable law.

Scenario 1: No Preemption

Preemption will likely affect at least some aspect of any multifaceted local policy campaign. Scenario 1 outlines questions, considerations, and resources for when stakeholders are pursuing a specific policy strategy for which preemption is not an immediate barrier but could ultimately become a barrier to the campaign's goals.

How concerned should the campaign be about preemption?

Preemptive laws cover a wide variety of topics. Although states grant local governments varying degrees of authority, a state generally has the ability to restrict or eliminate such authority absent applicable state constitutional protections for local governments. Therefore, preemption is a potential threat to almost all local policy campaigns.

Policymakers and advocates working at the local level must remain vigilant for preemption regardless of the subject of the policy campaign. However, preemption is more likely to arise or act as a barrier in particular scenarios, and campaigns should plan in advance to address preemption issues. For example, preemption often arises late in the legislative process, when emotions are high and resources may be strained. Moreover, discussions of preemption often occur in situations where only a handful of interested stakeholders are present, such as late-night legislative committee meetings. Early strategic planning for how to address preemption will result in more informed, thoughtful decisions and help ensure better legislative outcomes.

Relevant questions in determining how concerned a policy campaign should be about the risk of preemption include the following:

What is the political context of the policy campaign?

1. Is the issue controversial (eg, a political wedge or a social, moral, or economic issue)?
2. Are corporate interests at stake?
3. Is there a divide between urban and rural communities on the issue?
4. Does public opinion on the issue in your local jurisdiction differ greatly from public opinion in the state as a whole?
5. Is there alignment between the state legislature and the governor on the issue?
6. Is there already a lot of local activity on the subject? Is increased local activity likely to spur industry or state lawmakers to put forward preemptive legislation?
7. Is the issue preempted in another state? Have entities such as the [American Legislative Exchange Council](#) developed model preemption laws on the issue?

Legal briefs and court opinions about preemption are routinely filled with elaborate and complicated analyses of preemption issues. But outside the courtroom, preemption is primarily a question of policy and political judgment. Consequently, the risk of preemption may increase for more controversial issues or policies on which stakeholders have strongly held but divergent viewpoints. For example, state preemption often results after an urban jurisdiction with more progressive politics than the state as a whole adopts a disfavored policy, such as taxing sugary drinks. The risk of preemption may also increase if multiple localities are seeking to act or have already taken action on the issue.

Procedural aspects related to the political environment can also affect the risk of preemption. If a governor and state legislature hold different views on an issue, the governor may be able to use their

veto authority to block preemptive laws. And a governor who wishes to preempt a specific local action ordinarily cannot do so without the support of the state legislature.

The risk of preemption also increases when local policies negatively affect the interests of corporations or industries that wield substantial influence over state policy. In particular, widespread and rapid adoption of preemption laws often occurs when pro-business, anti-regulatory organizations such as the [American Legislative Exchange Council](#) release preemptive model legislation. States also look to each other for policy ideas, which means that adoption of a preemptive law on a given topic in one state can increase the likelihood that a preemptive law on that same topic will be introduced in other states.



For more information:

- [National League of Cities](#)
 - [City Rights in an Era of Preemption](#)
 - [Restoring City Rights in an Era of Preemption](#)
- [Local Solutions Support Center](#)
 - [The Growing Shadow of State Interference](#)

What is the equity context of the policy campaign?

1. Whom does the issue affect?
2. Does the issue involve advancement of health, racial, economic, or social equity?
3. Which communities have historically supported the issue? Which communities are likely to support the issue now?

Whether the focus of a policy campaign has substantial equity implications does not necessarily have any direct effect on the *likelihood* of preemption. However, because the *negative impact* of preemption will likely be greater when the issue has a strong equity component, campaigns working to advance equity through policy should exercise additional vigilance to guard against the threat of preemption.



For more information:

- [ChangeLab Solutions](#)
 - [A Blueprint for Changemakers: Achieving Health Equity Through Law & Policy](#)

How ready are campaign stakeholders to address preemption?

Combatting preemption can be a difficult undertaking. Advocates working at the local level may not be familiar with the inner workings and major players of state government. Conversely, stakeholders opposing progressive policies often have greater political power at the state level than they do at the local level. And it can be difficult to educate the public and stakeholders about preemption, which can make it hard to engage them should preemption arise. Key questions and considerations for assessing readiness to address preemption relate largely to resources available to the policy campaign.

What is the key stakeholder landscape?

1. Who are the key players for and against the campaign's issue?
2. Are there local, state, and/or national organizations working on the specific policy issue? Are these organizations active in the jurisdiction, working together, and equipped to work on preemption?
3. Are there organized coalitions working on the campaign's issue?
4. Is there a network of people and organizations that might not work on this specific issue but could be mobilized to counter preemption?
5. Are campaign stakeholders permitted to lobby?

As an initial step in assessing their readiness to address preemption, policymakers and advocates should seek to understand the stakeholder landscape, including both those who might support efforts to combat preemption and those who might be actively supporting preemption efforts.

Key players may include large voluntary organizations such as the American Heart Association and American Lung Association, which often have advocacy staff on the ground and can be engaged quickly on preemption issues; local, regional, or national nonprofits working on a specific issue; groups working in the state on an issue that has also been affected by or threatened with preemption; groups interested in preemption and local democracy more generally; local governments and municipal leagues; and industry actors.

Advocates should also assess whether they or their partners are permitted to lobby. The inability to lobby can reduce readiness by limiting advocates' ability to directly influence legislation (eg, by asking policymakers to remove proposed preemption and/or include language to affirmatively protect local authority). Whether and to what extent advocates or their partners can lobby depends on several factors, including an entity's legal status (eg, whether it is registered as a 501(c)(3) nonprofit); conditions attached to funding; and organizational policies.



For more information:

- [Bolder Advocacy's Lobbying Resources](#)
- [Local Solutions Support Center](#)
- [Voices for Healthy Kids, American Heart Association](#)

What resources are available?

1. Does the local jurisdiction have sufficient financial capacity and expertise to fight preemption? If not, can the local jurisdiction obtain funding from outside organizations (eg, philanthropic foundations)?
2. Do advocates have sufficient financial capacity and expertise to fight preemption (eg, to counter industry-funded efforts to support preemption)? If not, can the advocates obtain additional funding or in-kind support?
3. Where can campaign stakeholders seek education and training on preemption issues?
4. How can campaign stakeholders learn about the possibility of preemption on a specific issue in a particular state?
5. Is anyone tracking preemption of the campaign's issue?
6. What is happening in other jurisdictions with respect to the campaign's issue, and are there any applicable lessons from those places?
7. What data are available on the campaign's issue and in what form (eg, maps, research databases, known impacts on people and communities)?

Combatting the threat of preemption can require substantial investments of time, money, and other resources. It also requires leveraging existing capacity or building new capacity to organize opposition, educate stakeholders, engage with policymakers, and more.

Moreover, understanding the potential risk of preemption requires resources and expertise to, for example, track legislative trends and monitor for the insertion of preemption language in pending legislation. If campaigns do not proactively address these resource needs, there is an increased risk that preemption will be enacted before stakeholders can organize and respond.



For more information:

Resources

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [National League of Cities](#)
- [Network for Public Health Law](#)
- [Public Health Law Academy](#)
- [Public Health Law Center](#)
- [Voices for Healthy Kids Grant Opportunities](#)

Mapping

- [Economic Policy Institute Workers Rights Preemption Map](#)
- [Grassroots Change Preemption Map^{vi}](#)
- [LawAtlas State Preemption Map](#)
- [Partnership for Working Families State Interference Map](#)

^{vi} Grassroots Change's Preemption Watch map no longer receives active updates. While information from the Preemption Watch map may still provide a useful starting point, users of this toolkit should verify that the information reflects currently applicable law.

How ready are campaign stakeholders to defend policy successes?

1. Is the jurisdiction prepared to engage in litigation to defend the local law against a preemption challenge?
2. Are advocates prepared to litigate or assist with litigation?
3. Are campaign stakeholders permitted to lobby?

The ability and willingness to defend an adopted local policy does not increase or decrease the likelihood that the state will seek to preempt that policy, but it is still an important factor for campaigns to consider. If neither the local jurisdiction nor advocates are able to defend a policy for which there is a substantial threat of preemption, the campaign will need to weigh the risk of preemption against alternative approaches that do not face such threats. Additionally, the ability of campaign stakeholders to lobby can affect their ability to intervene in the policy process to counter the threat of preemption.



For more information:

- [Bolder Advocacy Lobbying Resources](#)
- [Local Solutions Support Center Legal Resources](#)
- [Public Rights Project](#)
- [Voices for Healthy Kids Grant Opportunities](#)

Should the campaign proactively address preemption?

Policy campaigns may consider taking proactive steps even if there is no immediate risk of preemption. Understanding the objectives and motivations of opposing stakeholders is an important consideration when deciding how to address preemption. Advocates should neither uncritically accept arguments about why preemption is necessary nor ignore such arguments. Instead, understanding what opposing stakeholders want and why can inform alternative approaches to address their concerns, as well as provide insight on whether there are legitimate arguments in favor of preemption or whether calls for preemption are merely a political strategy. For example, corporate actors often argue that preemption is economically beneficial because new local regulations increase business costs. Advocates should be prepared to challenge these assertions by reviewing the industry's economic analysis. They can point to, for example, the fact that policy changes that improve health outcomes may, in fact, increase business activity.²⁹

Advocates can also seek to proactively address preemption by preparing narrow preemption or anti-preemption language in advance. If there are circumstances in which a policy campaign is willing to accept some form or scope of preemption, advocates can prepare legislative language to have ready in case a demand to include preemption arises. If opposing stakeholders propose broad preemptive language, advocates can counter with this pre-drafted, more narrowly tailored language that has already been vetted for its public health implications.

Advocates can prepare language that affirmatively disclaims preemption, often referred to as an *anti-preemption, preservation, or savings clause*. For example, if courts could interpret a proposed state law as implying preemption of local authority, advocates could seek to insert a “no implied preemption” clause into the proposed law. A “no implied preemption” clause does not, however, guarantee local authority (eg, a locality in a Dillon’s Rule state may lack explicit delegated authority to enact a particular type of regulation even if a proposed state law does not specifically preempt such regulation). To guarantee local authority, advocates should instead seek to insert language that affirmatively authorizes more stringent local regulation.

Proactively pursuing anti-preemption language has benefits and drawbacks. For example, raising the issue of preemption may draw the awareness of an industry that favors preemption but did not previously focus on the issue. However, depending on the specific legal context in a state, failing to proactively include anti-preemption language may increase the risk of a court finding that a state law implies preemption of local regulations.

Should policy campaign stakeholders engage in state-level advocacy to enact anti-preemption language?

1. What is the legal landscape?
2. What are the equity implications of maintaining the status quo compared with proactively seeking to enact anti-preemption language?
3. Rather than pursue explicit anti-preemption language, are there other local strategies the campaign could pursue to soften the ground and build public support?
4. How have other jurisdictions approached this issue, and what were the results?
5. If your campaign's local policy goal has a high risk of spurring state preemption, has the campaign considered alternative approaches that present a lower risk of preemptive backlash?
6. If a state enacts a preemption law, what other tactics could the campaign use to achieve its goals? Is the campaign prepared to switch tactics mid-course?

Several factors can influence the potential benefits and drawbacks of proactively seeking to enact anti-preemption language in state legislation. In some states, for example, courts are more likely to find local laws preempted when the state has enacted extensive regulations on a particular issue, even if the state legislature has not explicitly preempted local laws (ie, implied preemption). Proactively pursuing anti-preemption language is more important in these states than it might be in states where implied preemption is less frequently in play.

Other factors favoring a more proactive approach include the following:

- The campaign is working in a state without strong local home rule.
- Court decisions on similar issues suggest a higher likelihood that courts would also find the campaign's policy objective preempted.
- Alternative tactics are unavailable or insufficient to achieve the campaign's goals.
- Preemption would have a substantial negative effect on health equity.



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [Voices for Healthy Kids, American Heart Association](#)

Scenario 2: Preemption Is an Immediate Risk

Policy campaigns often face an immediate preemption threat due to introduction of a preemptive state-level bill on their issue or increased organization by business interests to try to thwart their campaign at the state level. Scenario 2 outlines questions, considerations, and resources that are useful when stakeholders are pursuing a specific policy strategy for which preemption is an immediate risk that threatens the campaign's goals.

How do campaign stakeholders know if preemption is an immediate risk?

The often fast-paced and unpredictable nature of legislative action means that campaigns must stay alert for potential preemption threats. State legislative processes – for example, when bills can be introduced and amended, as well as the possibility of inserting preemption language in unrelated legislation – should inform a campaign's preemption risk analysis. Additionally, understanding where state and local governments' positions on an issue diverge can help identify areas where preemption threats are more immediate.

Is the campaign well positioned to respond to preemption threats?

1. How quickly can the campaign react to the threat of preemption?
2. Does the campaign have decisionmaking processes in place so that it can react quickly to any threat of preemption?
3. Can the campaign track preemption on its issue?
4. Is addressing preemption included as part of the campaign's overall substantive strategy?
5. Are campaign stakeholders permitted to lobby?
6. What is the campaign's funding situation?
7. What legal resources are available?
8. Does the campaign have a legislative champion?
9. Does the campaign have a communications strategy and access to messaging research?
10. Is the campaign connected to all the key players?
11. Can campaign stakeholders activate a network of interested parties, even across substantive issue areas?
12. How can campaign stakeholders educate advocates, policymakers, and the public about the importance of preemption to the campaign's issue?
13. Can the campaign use data to counter business arguments in favor of preemption?
14. Are there legal arguments against preemption? If so, can campaign stakeholders use potential future legal challenges to push back against the proposed preemption now?
15. Can the campaign change tactics so the proposed preemption is not an issue?

A variety of factors can influence a campaign's ability to quickly and effectively respond to an immediate threat of preemption. For example, a campaign's funding may carry certain restrictions (eg, prohibition on lobbying or engaging in litigation), and campaigns will vary as to whether they have access to a regular revenue stream to support efforts to counter preemption. Other factors are whether there are active coalitions on an issue and the decisionmaking structures of those coalitions, both of which can affect a campaign's response time when a preemption threat arises.

To ensure capacity for a rapid response, campaigns should proactively assess whether and how their existing funding can be used to support anti-preemption efforts and identify potential sources for rapid-response grants. They should also collaborate with partners to set up any necessary advocacy infrastructure (eg, develop regional coalitions on the topic) and create a united front against preemption. The campaign will then be able to leverage these structures, using facts, data, and messaging tools to organize public opposition to preemption. For example, the campaign and its partners could demonstrate how certain policies that promote public health and equity can positively affect individual businesses and the broader economy – for instance, by reducing health care costs.

Depending on the campaign's or the campaign's allies' ability to lobby, they may also be able to directly influence the proposed state preemption. For example, a campaign can try to clarify or limit the scope of preemption, weaken the preemption language, or even delete the preemption language entirely. Campaigns can also assess whether to try to substitute an explicit anti-preemption clause in place of the preemption language.

Finally, campaigns should assess any potential legal arguments against the proposed preemption. For example, does the proposed preemption violate home rule protections granted by the state constitution? Are there procedural requirements that the state legislature must follow to enact preemptive legislation? Campaigns can use these arguments both to push back against proposed preemption and to seek to invalidate it should the legislation pass.



For more information:

- [International Municipal Lawyers Association](#)
- [Local Municipal Leagues](#)
- [Local Solutions Support Center](#)
 - [Organizing, Education, and Outreach](#)
 - [Communications Resources](#)
- [National Association of Counties](#)
- [National League of Cities](#)
- [Voices for Healthy Kids, American Heart Association](#)

What should campaign stakeholders do about a proposed preemptive measure?

In the context of public health and equity, preemptive state laws that establish minimum standards (ie, floor preemption) are generally preferable to those establishing maximum standards (ie, ceiling preemption) or no standards (ie, vacuum preemption). Although public health advocates are justifiably skeptical of calls for ceiling or vacuum preemption, they should nevertheless assess the benefits and drawbacks of any particular preemption law as its own case. Advocates may also be able to negotiate key aspects of a proposed preemptive provision, depending on the subject and type of proposed law, the level of government considering the law, and the intensity of opposition.

What is the scope of the proposed preemption?

1. What does the proposed state law say about preemption?
2. Is the preemption language narrowly tailored, or does it impose broad restrictions on local authority?
3. If the proposed preemption law is unclear, who can help campaign stakeholders understand its potential scope and impact?

Preemption laws can vary significantly in scope. Narrow preemption laws may preempt only specific types of policies such as raising the minimum wage or imposing rent control. Broader preemption laws may foreclose local regulation on entire subjects – for example, all local laws relating to employment practices or all laws regulating landlord-tenant relations. Although preemption laws can impede public health and equity regardless of scope, broadly sweeping preemption is often particularly problematic.

However, whether due to convoluted legal structures, poor legislative drafting, or purposeful obfuscation, the language of a proposed preemption law may not clearly indicate the likely scope or effect of the law. If the proposed law is unclear, the policy campaign can request guidance from technical assistance providers; research whether other state laws have used similar language and, if so, how that language has been interpreted; seek an opinion from a persuasive authority such as counsel for a state legislature; or ask state legislators to clarify the language.



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)

What are the possible consequences of the proposed preemption?

1. How would the measure affect localities with existing laws that fall within the scope of the proposed preemption?
2. What are the immediate and long-term equity implications of the proposed preemption law?
3. Will preemption inhibit policy innovation?
4. What legal options would be sacrificed?
5. What data exist to support or negate the campaign's position?
6. What are the consequences of moving forward with the campaign if preemption goes into effect?

Understanding the likely impact of a proposed preemption law can help inform a campaign's response, including how vigorously to oppose the proposal. Perhaps most important, the campaign should assess whether and how the proposed preemption would affect health equity. For example, proposed preemption might curtail the ability of local communities to remedy current and historical injustices, especially if it nullifies existing policies (eg, minimum wage increases or tenant protections) that are intended to address such inequities.

Preemption can be particularly harmful when it could prevent policy experimentation and future innovation in response to evolving circumstances and scientific evidence. Smokefree air laws offer a

helpful example of this concept. During early efforts to establish statewide protections against exposure to secondhand smoke, tobacco control advocates accepted varying degrees of state preemption of stronger local laws in exchange for the tobacco industry's support for state-level legislation. However, over time, these preemption laws prevented local governments from responding to the introduction of new types of products, such as e-cigarettes, and from acting on scientific advances that provided new insight on the most effective policy approaches.

The consequences if preemption goes into effect and a jurisdiction still moves forward with its policy are also a relevant factor in determining how to proceed. For example, proposed punitive preemption laws that threaten municipal funding or impose penalties for local officials have more severe consequences and thus may warrant stronger opposition.



For more information:

- [ChangeLab Solutions](#)
 - [Understanding Preemption](#)
- [Local Solutions Support Center](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)

When, if ever, should campaign stakeholders agree to some form of preemption?

1. Is a one-size-fits-all approach appropriate, or does the problem targeted by the law vary a lot depending on the local context (eg, urban vs. rural communities)?
2. Is some form of preemption necessary to enact a good statewide bill?
3. What would be gained in exchange for preemption? Does the law contain strong, substantive protections? Are these protections sufficient to warrant accepting preemption?
4. Is this an area or issue that local governments have traditionally regulated?
5. If preemption were not a factor, how likely are local governments to adopt laws addressing the issue?
6. Would avoiding city-by-city legislative battles preserve sufficient advocacy resources to justify accepting preemption?
7. Are there other stakeholders or campaigns with whom you should coordinate before agreeing to any form of preemption?

Business interests routinely call for ceiling preemption or even vacuum preemption to promote uniformity, and advocates should be skeptical about whether preemption is truly needed or is just a political strategy. Carefully assessing arguments for and against preemption is particularly important because preemption can have a profound effect not just on local regulatory policy but also on how public health policies develop and progress at all levels of government. Preemptive laws, once passed, can be difficult to change or repeal, and the lack of local innovation may impede future state-level reforms.

Nevertheless, campaigns are often faced with decisions about whether and when to agree to some form of preemption. Costly and time-consuming fights against preemption can be an ineffective use of limited resources in areas of regulation that are so resource-intensive or otherwise difficult that most local

governments are unable or unlikely to take meaningful regulatory action. For example, regulating health insurers and providers is impracticable for all but the largest of jurisdictions; therefore, preemption might be acceptable in that area.

In other instances, the enactment of strong statewide legislation may hinge on a campaign accepting some form of preemption. Campaigns must weigh the aggregate public health and equity benefits of establishing relatively strong, substantive protections for all residents in a state against allowing for even stronger local policies but knowing that not all residents will live in jurisdictions that adopt such policies.

The process of deciding whether to agree to preemption can be as important as the decision itself. In some circumstances, a policy campaign may need to coordinate with other organizations, campaigns, or stakeholders who have similar goals before agreeing to any form of preemption. Those most affected by the underlying policy and any potential preemption should play a central role in deciding how best to proceed.



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)
- [Voices for Healthy Kids, American Heart Association](#)

Scenario 3: Preemption Already Exists

A local policy campaign may choose to focus on an issue on which local regulation has already been preempted. The existence of preemption is not necessarily a death knell to a campaign, although it makes achieving the policy goal more challenging. For example, a campaign may be able to bypass or even overturn preemption. Campaigns must also carefully consider any potential consequences of proceeding in light of existing preemption, especially in states with punitive preemption laws. When existing preemption affects their policy goals, local policy campaigns should assess the considerations raised in this section as they determine whether and how to move forward.

What is the scope and clarity of existing preemption?

1. Is the language on preemption clear?
2. How is the law being interpreted? Is it possible that it's being interpreted as more or less preemptive than it actually is?
3. Who else (whether allies or opponents) is likely to have an interest in whether the language is clear?

In many cases, a preemption law's language may not clearly indicate the law's scope and applicability. Such ambiguities can have a chilling effect on local jurisdictions' willingness to pursue particular policies, due to fear of litigation.

If the language of a preemption law is unclear, a policy campaign can use existing external aids to help elucidate its effect. Such aids might include court decisions, authoritative interpretations (eg, opinions from a state attorney general), or legislative history.

Policy campaigns should also assess whether and how to seek additional clarification of existing preemption laws. For example, the campaign could seek an opinion from a state attorney general or other state agencies that provide persuasive guidance (eg, legislative counsel). It is important to weigh the potential benefits and drawbacks of these approaches – for example, the possibility that an opinion might result in a broader, less favorable interpretation of a preemption law.



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [State Attorneys General](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)

Should the policy campaign push current boundaries on this issue? If so, how?

1. Can a local ordinance be enacted as a means to challenge a preemptive law?
2. Is enacting a local law that might be preempted or is likely be challenged a good way to bring the issue in front of a court? Could a court ruling spur anti-preemptive legislative action?
3. What are the consequences of taking action in light of existing preemption?
4. What are the equity implications of the preempted laws?

Policy campaigns may wish to move forward with a particular policy in spite of likely state preemption of that policy under existing law. By adopting a possibly preempted law, a local government can create an opportunity to challenge the validity of the state preemption law and draw public attention to the consequences of such preemption.

In some instances, litigation over whether state law preempts a local policy can spur efforts to address preemption issues through legislative efforts. For example, in Maryland, litigation related to preemption of local tobacco ordinances and environmental regulations prompted organized efforts to pass state legislation limiting courts' ability to declare local laws preempted unless the state legislature explicitly enacted such preemption (ie, abolishing implied preemption).³⁰

Campaigns should consider several factors when assessing whether to push boundaries despite the possibility of preemption under existing law. For instance, state preemption of local policies that have the potential to reduce inequity (such as local minimum wage or antidiscrimination laws) weighs in favor of a more aggressive approach to pushing local policy change in spite of preemption.

In contrast, campaigns and local governments may wish to avoid pushing boundaries in states with punitive preemption, where the adoption of a possibly preempted local law could result in loss of vital state funding for a local government or penalization of elected officials (eg, personal liability for an official or removal of an official from office).



For more information:

- [Fundamentals of Preemption](#)
- [Punitive Preemption: An Unprecedented Attack on Local Democracy](#)

Can the goal of the campaign be achieved through alternative approaches?..

1. Can campaign stakeholders accomplish their goal – or take steps toward the goal – by switching tactics so that the campaign's approach is not preempted?
2. Should the campaign work with local jurisdictions to adopt resolutions that support local authority?

When faced with preemption, policy campaigns should weigh the resources necessary to fight the preemption law against the availability of alternative approaches to achieving the campaign's underlying goal.

For example, a campaign's ultimate goal might be to reduce tobacco use by increasing the cost of tobacco products. The campaign may initially seek to enact a local excise tax on tobacco products but find that their state, like many, preempts local tobacco taxes. Rather than seeking to overturn such preemption, the campaign could consider alternative policies that would achieve their objective, such as enactment of a minimum price for tobacco products and prohibiting the use of discounts and coupons to lower their price.

Campaigns might also consider asking local governments to adopt resolutions that support local authority to enact a specific policy or advance public health and equity more generally. Although these resolutions do not have any legal effect, they can serve as a political tool and lay the groundwork for future efforts to reform state preemption.



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
- [Network for Public Health Law](#)
- [Public Health Law Center](#)
- [Voices for Healthy Kids, American Heart Association](#)

Should the campaign advocate for repeal of existing state preemption?

1. Does the campaign have resources to advocate for legislative change at the state level?
2. Can the campaign coordinate with other groups that might share an interest in repeal?
3. Are campaign stakeholders permitted to lobby?
4. Does the campaign have a legislative champion that supports repeal?
5. Has the makeup of the legislature changed since the preemptive law was put in place?
6. Would other local jurisdictions in the state support repeal? Can those jurisdictions enact resolutions in favor of repeal?
7. Can campaign stakeholders combine repeal of preemption with enactment of substantive state-level standards on their issue?
8. Can campaign stakeholders pursue the repeal of preemption through a ballot initiative or referendum?
9. Does the campaign need to couple repeal of the preemptive law with enactment of a law affirmatively authorizing local regulation?

A campaign stymied by existing preemption can seek to repeal the preemptive state law. The feasibility of this approach depends on several factors, such as the issue involved, the specifics of the preemptive state law, the makeup of the state legislature, and the interests of affected industries or other parties. Based on these and related factors, repeal may be relatively straightforward, or it may require substantial time and resources.

In some states, campaigns can also consider pursuing a ballot initiative or referendum to overturn the preemptive state law if it is not feasible to pursue repeal through the state legislature. For example, in 2018, advocates in California placed an initiative on the ballot to repeal state laws that preempted certain local rent control regulations. (The initiative, Proposition 10 in 2018, was ultimately unsuccessful.)³¹ Importantly, however, successful ballot initiative or referendum campaigns generally require more financial resources than pursuing change through a state legislature.

Successful preemption repeal efforts have most often occurred in the context of enacting substantive standards at the state level. Several states, for example, repealed preemption of and, in some cases,

affirmatively authorized local smokefree laws when enacting a statewide smokefree law. Of course, it is possible to repeal preemption without enacting state-level standards. Recent legislation in Colorado, for example, repealed both a state minimum wage preemption law and a preemption law related to certain local regulations on tobacco products without enacting any substantive statewide standards.³² Nevertheless, a strategy combining preemption repeal with enactment of substantive state standards remains the more likely pathway to restoring local authority. This approach can also help ensure that a minimum standard applies across all jurisdictions in a state, even those that would not address an issue on their own.

It is also important to note that simply repealing state preemption laws will not always provide clear local authority on a particular issue. For example, in Dillon's Rule states, local governments often require an explicitly affirmative grant of authority to act on a particular issue, even if a preemptive law is repealed. As a result, **advocates seeking to ensure local authority should push not only to repeal any explicit state preemption but also to enact provisions within state law that affirmatively authorize additional local regulation.**



For more information:

- [ChangeLab Solutions](#)
- [Local Solutions Support Center](#)
 - [Repealing Preemption and Advancing Non-Preemption Language in State Law: Examples](#)
- [National League of Cities](#)
 - [Restoring City Rights in an Era of Preemption](#)
- [Voices for Healthy Kids, American Heart Association](#)

Is litigation an option for the campaign?

1. Could litigation provide clarity on the scope and application of an ambiguous preemption law?
2. Is a clear judicial opinion on the scope and application of a preemption law preferable to existing ambiguity?
3. Who can bring the legal challenge, and what are the prerequisites, if any, for such a challenge?
4. Would litigation buy the campaign time to switch gears, build political will, or negotiate at the state level?
5. If the campaign itself pursues litigation, are outside resources available to support such efforts?
6. If the campaign opts against bringing a lawsuit itself, can the campaign support others who are litigating preemption issues (eg, government attorneys)?

If alternative approaches to achieving the campaign's goals are unavailable or inadequate, litigation might provide an opportunity to challenge preemption or clarify its scope. Having litigation as an option is also critical from an equity perspective because the populations most affected by the misuse of preemption might lack the resources or power to effect change through political processes such as legislation and administrative rulemaking.

Prior to engaging in litigation, a policy campaign should carefully assess the legal, practical, and political benefits, drawbacks, and risks of bringing a legal challenge. For example, an unfavorable court decision

might solidify the applicability of a preemption law that is otherwise ambiguous in scope. Litigation can result in substantial attorneys' fees, subpoenas that require time and resources to address, and political blowback from opposing interests. However, litigation can also be a powerful tool for uncovering industry misconduct such as the deceptive business practices and misleading health claims revealed by internal tobacco industry documents obtained through state litigation against tobacco manufacturers.

Policy campaigns must also understand whether, when, and how they can bring legal challenges. For example, a campaign should assess whether stakeholders can proactively seek guidance from courts on the general scope and applicability of a preemption law without the need for formal litigation or whether stakeholders can directly challenge a preemption law based on violations of the state constitution or procedural requirements. If obtaining proactive guidance or bringing a direct challenge is not feasible, local governments may need to consider enacting a possibly preempted law and waiting for opponents to file a legal challenge.

Finally, policy campaigns should evaluate what resources are available if the campaign itself pursues litigation or what resources the campaign can provide if litigation is led by other parties. For example, policy campaigns can seek and provide technical assistance on the issues underlying the litigation; file or seek amicus briefs to help courts understand the legal context or health implications of a lawsuit; or support public relations and organizing campaigns for the litigation efforts...



For more information:

- [Public Rights Project](#)
- [Local Solutions Support Center Legal Resources](#)
- [ChangeLab Solutions](#)
- [Public Health Law Center Information on Amicus Briefs](#)

Conclusion

Preemption's impact on public health outcomes and health equity depends on how it is wielded. Although preemptive laws can provide important protections that reach many people, the current environment of state-level preemption poses a substantial threat to local policymaking and public health. It is critical to ensure that cities and counties remain places of innovation where local governments – and the people they represent – have the power to pass their own laws to effect positive change. It is equally important to structure any state or local policy intervention around the advancement of health equity and subsequently assess how preemption factors into accomplishing that goal. Policymakers and advocates can use this toolkit to understand the key questions and considerations to weigh when they assess how preemption affects policies related to public health and health equity, and how best to respond to threatened, proposed, or enacted preemption laws.

Appendix A: Glossary

American Legislative Exchange Council (ALEC): An industry-funded organization that writes and distributes model bills to its members, which include lobbyists and a quarter of all state lawmakers.

Blanket preemption: When a higher-level government wholesale removes local authority to act across broad issue areas. For example, preemption in the employment context may traditionally have applied to only a single area (eg, health insurance benefits). More recently, however, several states have enacted legislation prohibiting local governments from regulating almost all aspects of the employer-employee relationship, including wages, benefits, scheduling, and paid leave.

Ceiling preemption: When a higher-level government prohibits lower-level governments from requiring anything more than or different from what the higher-level law requires.

Dillon's Rule: A principle governing the interaction between state and local governments in which local governments may act only within the powers expressly granted to them by the state legislature.

Express preemption: When a law explicitly states that it prohibits lower-level lawmaking authority in one or more areas.

Field preemption: When a higher-level government prohibits lower-level governments from passing or enforcing any laws on an issue, reserving the entire area (the field) of regulation to itself.

Floor preemption: When a higher-level government passes a law that establishes a minimum set of requirements and allows lower-level governments to pass and enforce laws that impose more rigorous requirements.

Home rule: A principle governing the interaction between state and local governments in which local governments can directly enact laws that affect the general public without a specific delegation of power from the state legislature. Home rule generally limits the degree of state interference in local affairs but does not eliminate it.

Implied preemption: When a law contains no explicit preemption-related language but is nevertheless found to preempt state or local authority.

Initiative: A proposed law or constitutional provision subject to a vote of the electorate. Depending on the state and locality, initiatives can be submitted by members of the general public and/or placed on the ballot by a governing body (eg, a state legislature or city council).

Preemption: A legal doctrine that allows a higher-level government to limit or even eliminate the power of a lower-level government to regulate a certain issue.

Punitive preemption: When a higher-level government not only prohibits local laws on a specific subject but also punishes local officials and local governments that attempt to enact or enforce such prohibited laws. For local officials, punitive measures can include criminal penalties, civil action, and/or removal from office. For local governments, punishment most often takes the form of ineligibility for state funds or revenue sharing.

Referendum: When an electorate votes to approve or reject a law or constitutional provision enacted by a governing body (eg, a state legislature or city council).

Vacuum preemption: When a higher-level government chooses not to enact any substantive regulations on a topic and forbids lower-level governments from doing so, creating a regulatory vacuum.

Appendix B: Preemption by Any Other Name: Words & Phrases Indicating Preemptive Intent

Preemption is a legal doctrine that allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a certain issue. Federal laws can preempt state and local laws, and state laws can preempt local laws.

Laws can use different words to signify preemption. It is important for public health advocates to be able to spot preemptive intent in proposed laws. This appendix is designed to help advocates spot preemptive intent so that they can address it as new policies are negotiated. Here are some common words or phrases that demonstrate preemptive intent, as well as examples from laws that include that language:

Consistent with

“Any order or ordinance by any political subdivision **shall be consistent with** and not more restrictive than state law and regulations governing lending or deposit taking entities regulated by the division of finance or the division of credit unions.”³³

Do not exceed

“A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of . . . plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and **do not exceed** [federal] regulations or orders.”³⁴

Exclusive

“The department has **exclusive** regulatory authority over all hazardous waste generation, transportation, storage, treatment and disposal and other management practices in the state.”³⁵

Matter(s) of statewide concern

“The general assembly further declares that the licensing and regulation of massage parlors are **matters of statewide concern**.”³⁶

No more stringent

“No political subdivision may enact an ordinance . . . that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, . . . unless the ordinance or resolution is the same as or similar to, and **no more stringent** than, a state statute.”³⁷

Occupy the field

“It is the intent of the Legislature to **occupy the whole field** of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.”³⁸

Preempt (and variations thereof)

“This part **preempts** the laws of any State to the extent that such laws are inconsistent with this part.”³⁹

Restrictive

“Local laws and ordinances that are inconsistent with, **more restrictive than**, or exceed the requirements of state law shall not be enacted and are preempted and repealed.”⁴⁰

Sole authority

“The Louisiana Wildlife and Fisheries Commission shall have **sole authority** to control and regulate all aspects of hunting, fishing, and boating in all water conservation districts.”⁴¹

Supersede

“The provisions of this act shall **supersede** any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace.”⁴²

Uniform

“For the purposes of equitable and **uniform** regulation and implementation, the Legislature through this chapter is the exclusive regulator of all matters relating to the distribution, marketing, promotion, and sale of tobacco products.”⁴³

Appendix C: Resources

Organizations

American Heart Association

heart.org

ChangeLab Solutions

changelabsolutions.org

International Municipal Lawyers Association

imla.org

Local Municipal Leagues

nlc.org/state-municipal-leagues

Local Solutions Support Center

supportdemocracy.org

National Association of Counties

naco.org

National League of Cities

nlc.org

Network for Public Health Law

networkforphl.org

Public Health Law Center

publichealthlawcenter.org

Public Rights Project

publicrightsproject.org

Voices for Healthy Kids, American Heart Association

voicesforhealthykids.org

voicesforhealthykids.org/campaign-resources/grants

State Preemption Maps

Mapping State Interference

Partnership for Working Families

forworkingfamilies.org/preemptionmap

Preemption Map

Grassroots Change (This resource is not regularly updated and thus may not reflect currently applicable law.)

grassrootschange.net/preemption-watch/#/map

State Preemption Laws Dataset

LawAtlas

lawatlas.org/datasets/preemption-project

State Preemption of Local Equitable Housing Policies

Local Solutions Support Center

supportdemocracy.org/equitablehousing

Worker Rights Preemption in the U.S.

Economic Policy Institute

epi.org/preemption-map

Reports & Fact Sheets

City Rights in an Era of Preemption: A State-by-State Analysis

National League of Cities

nlc.org/resource/city-rights-in-an-era-of-preemption-a-state-by-state-analysis

Communications Resources

Local Solutions Support Center

supportdemocracy.org/communications

Consequences of Preemption

ChangeLab Solutions

changelabsolutions.org/product/understanding-preemption

Fundamentals of Preemption

ChangeLab Solutions

changelabsolutions.org/product/understanding-preemption

The Growing Shadow of State Interference

Local Solutions Support Center

static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/5d66a3c36044f700019a7efd/1567007722604/LSSCSiXReportAugust2019.pdf

Legal Resources

Local Solutions Support Center

supportdemocracy.org/legal-assistance

Organizing, Education, and Outreach Resources

Local Solutions Support Center

supportdemocracy.org/organizing-education-and-outreach

Principles of Home Rule for the Twenty-First Century

National League of Cities & Local Solutions Support Center

nlc.org/resource/new-principles-of-home-rule

Public Health Amicus Briefs

Public Health Law Center

publichealthlawcenter.org/amicus-briefs

Punitive Preemption: An Unprecedented Attack on Local Democracy

Richard Briffault

abetterbalance.org/resources/punitive-preemption-white-paper

Restoring City Rights in an Era of Preemption

National League of Cities

nlc.org/resource/new-guide-restoring-city-rights-in-an-era-of-preemption

Summary of Home Rule Doctrines

Local Solutions Support Center

supportdemocracy.org/the-latest/home-rule-in-the-50-states-memos-examine-the-nature-and-scope-of-local-authority

Additional Resources & Academic Publications

A Blueprint for Changemakers: Achieving Health Equity Through Law & Policy

ChangeLab Solutions

changelabsolutions.org/product/blueprint-changemakers

The Dilemma of Localism in an Era of Polarization

Nestor M. Davidson

digitalcommons.law.yale.edu/ylj/vol128/iss4/2/

Equitable Enforcement to Achieve Health Equity

ChangeLab Solutions

changelabsolutions.org/product/equitable-enforcement-achieve-health-equity

Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health

Derek Carr, Sabrina Adler, Benjamin D. Winig,

Jennifer Karas Montez

changelabsolutions.org/product/equity-first-approach-assessing-preemption

Lobbying Resources

Bolder Advocacy

bolderadvocacy.org/resource-library/?fwp_blog_topics=2760

The Political Process of Preemption

Paul A. Diller

lawreview.richmond.edu/2020/02/08/the-political-process-of-preemption

Preemption and Public Health (training)

ChangeLab Solutions

changelabsolutions.org/product/preemption-public-health

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