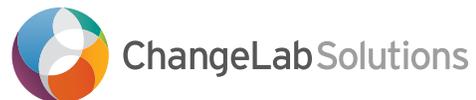


Preemption & Public Health

Facilitator's Guide



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Contents

| | |
|--|-----------|
| Training Overview | 3 |
| About This Training. | 3 |
| Target Audience. | 3 |
| Learning Objectives. | 3 |
| Materials. | 3 |
| Equipment. | 3 |
| Instructions for Facilitators | 4 |
| Prepare for the Presentation. | 4 |
| Before Starting the Presentation. | 4 |
| During the Presentation. | 4 |
| After the Presentation. | 5 |
| Training Agenda | 6 |
| Additional Resources | 9 |
| Organizations. | 9 |
| Background Reading & References | 10 |
| Relevant Cases | 11 |
| Welcome Activity: The Q&A Handout | 12 |
| Pre- and Post-Training Surveys | 16 |

Who Should Use Our Facilitator’s Guides?

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

Training Overview

About this Training

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

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

Using practical examples and tips for practitioners, this training seeks to (1) provide the audience with a basic understanding of the legal concept of preemption and (2) explain how individuals in nonlegal professions can anticipate, identify, and respond to preemption.

Target Audience

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

Learning Objectives

- Define basic constitutional concepts that frame the everyday practice of public health.
- Describe public health agency authority and limits on that authority.
- Identify legal tools and enforcement procedures available to address day-to-day (nonemergency) public health issues.
- Distinguish public health agency powers from those of other agencies, legislatures, and the courts.

Materials

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

Equipment

- Computer
- Projector

Instructions for Facilitators

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

Prepare for the Presentation

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

Before Starting the Presentation

We suggest that you have participants complete the following:

- *The Q&A handout found on p. 13 of this guide.* This handout will help participants assess their knowledge before and after the training. An answer key is provided on pp. 14–15.
- *The pre-training survey included in this guide on p. 17.* The pre-training survey will provide information to help you evaluate the overall quality of the session.

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

During the Presentation

You'll want to decide how to use the Q&A handout to engage participants in the training, depending on the length of your presentation. Two options are outlined here. These approaches not only reemphasize key points but also create a more interactive experience for participants.

- *Option 1: Poll the Room*
One approach is to weave the questions throughout the presentation. You can stop after each question and ask the audience to answer it before moving to the next slide. The slide deck is set up to support this option.
- *Option 2: Discussion Activity*
You can move all the question-and-answer slides to the end of the presentation and create an opportunity for a longer discussion after you've covered all of the content. Depending on the number of people attending your training, this discussion activity can be done as a full group or in small groups. The Training Agenda item "Q&A Discussion" provides additional details on when to include this activity if you select this option.

Finally, our sample agenda suggests allowing 10 minutes at the end of the presentation for final remarks, acknowledgments, and general questions. Of course, this time can be adjusted to suit the needs of the presentation setting and your audience.

After the Presentation

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

We are interested in your experience with using this curriculum. Please let us know at PHLAcademy@changelabsolutions.org if you have any questions or feedback on how to improve these materials.

Training Agenda

Pre-Training Survey and Q&A Handout

10 minutes*

Objectives

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

Resources

- Pre-training survey (p. 17 in this guide)
- Q&A handout (p. 13 in this guide)

Public Health Law Competency Addressed

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

Introduction & Presentation Overview

5 minutes*

Objectives

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

Resources

- Slide presentation (slides 1–4)

Public Health Law Competency Addressed

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

Preemption and Health Equity

10 minutes*

Objectives

- Define health equity.
- Discuss how preemption can affect health equity and public health.

Resources

- Slide presentation (slides 5–20)

Public Health Law Competency Addressed

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

Sources of authority

10 minutes*

Objectives

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

Resources

- Slide presentation (slides 21–36)

Public Health Law Competency Addressed

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

Types of preemption

15 minutes*

Objectives

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

Resources

- Slide presentation (slides 37–62)

Public Health Law Competency Addressed

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

Spotting preemption

10 minutes*

Objectives

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

Resources

- Slide presentation (slides 63–77)

Public Health Law Competency Addressed

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

Navigating Preemption

10 minutes*

Objectives

- Explore how to approach preemption in the everyday practice of public health and strategies for navigating preemption.

Resources

- Slide presentation (slides 78–87)

Public Health Law Competency Addressed

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

Q&A Discussion (optional)

20 minutes*

Objectives

- If you chose not to weave the questions from the Q&A handout throughout the presentation, have participants discuss the answers to the questions as a full group or in small groups.
- Provide the answers to the Q&A handout.

Resource

- Q&A handout answer key (pp. 14–15 in this guide)

Public Health Law Competency Addressed

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

Final Takeaways & Acknowledgments

10 minutes*

Objectives

- Summarize the topics discussed and provide concluding remarks.
- Direct participants to more resources should they wish to delve more deeply into the legal issues covered in the training.
- Allow participants to ask general questions.
- Have participants complete the post-training survey.

Resources

- Slide presentation (slides 88–92)
- Post-training survey (pp. 18–19 of this guide)

**All times are approximate; total training time is about 2 hours, including time for Q&A and discussion.*

Additional Resources

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

Organizations

CDC, Public Health Law Program

www.cdc.gov/phlp

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

ChangeLab Solutions

www.changelabsolutions.org

ChangeLab Solutions is a national organization whose mission is to create healthier communities through equitable laws and policies. Their multidisciplinary team of public health lawyers, policy analysts, planners, and other professionals works with state, tribal, local, and territorial health departments; other government agencies; public health organizations; and anchor institutions to create thriving communities.

National League of Cities

www.nlc.org

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

Local Solutions Support Center

www.supportdemocracy.org/about

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

Background Reading

For additional information on the concepts discussed in this training, see the following resources:

- American Public Health Association. Impact of preemptive laws on public health. November 3, 2015. www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/11/11/08/impact-of-preemptive-laws-on-public-health.
- Briffault R, Davidson N, Reynolds L. *The New Preemption Reader: Legislation, Cases, and Commentary on State and Local Government Law (Selected Statutes)*. West Academic Publishing; 2019.
- Carr D, Adler S, Winig B, Montez J. Equity first: Conceptualizing a normative framework to assess the role of preemption in public health. *Milbank Q*. 2020;98(1):131–149. doi.org/10.1111/1468-0009.12444.
- CDC STATE system preemption fact sheet. www.cdc.gov/statesystem/factsheets/preemption/Preemption.html.
- ChangeLab Solutions. *Assessing & Addressing Preemption: A Toolkit for Local Policy Campaigns*. 2020. www.changelabsolutions.org/product/assessing-addressing-preemption.
- ChangeLab Solutions. *A Blueprint for Changemakers: Achieving Health Equity Through Law & Policy*. 2019. changelabsolutions.org/product/blueprint-changemakers.
- ChangeLab Solutions. *Consequences of Preemption for Public Health & Equity*. 2020 www.changelabsolutions.org/product/understanding-preemption.
- ChangeLab Solutions. *Fundamentals of Preemption*. 2019. www.changelabsolutions.org/product/understanding-preemption.
- Dillon's Rule, Home Rule, and Preemption. Public Health Law Center; November 2020. publichealthlawcenter.org/sites/default/files/resources/Dillons-Rule-Home-Rule-Preemption.pdf.
- Hodge JG Jr., Corbett A. Legal preemption and the prevention of chronic conditions. *Prev Chronic Dis*. 2016;13. www.cdc.gov/pcd/issues/2016/16_0121.htm.
- Institute of Medicine. *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*. National Academies Press; 2011.
- Mowery PD, Babb S, Hobart R, Tworek C, MacNeil A. The impact of state preemption of local smoking restrictions on public health protections and changes in social norms. *J Environ Public Health*. 2012:632629. doi.org/10.1155/2012/632629.
- Pertschuk M, Pomeranz JL, Aoki JR, Larkin MA, Paloma M. Assessing the impact of federal and state preemption in public health: A framework for decision makers. *J Public Health Manag Pract*. 2013;19(3):213–219. doi.org/10.1097/phh.0b013e3182582a57.
- Pierce M, Belanger K. This Policy Tool Can Advance – or Impede – Racial and Health Equity. Robert Wood Johnson Foundation. April 14, 2022. www.rwjf.org/en/insights/blog/2022/04/this-policy-tool-can-advance-or-impede-racial-and-health-equity.html.
- Rutkow L, McGinty M, Wetter S, Vernick J. 2019: Local public health policymakers' views on state preemption: Results of a national survey. *American J Public Health*. 2018;109, 1107–1110. doi.org/10.2105/AJPH.2019.305140.
- Treskon M, Ramakrishnan K, Greene S, Marotta J, Shroyer A, Rajasekaran P. *Do the Effects of a Regulatory Patchwork Justify State Preemption of Local Laws? An Examination of the Merits of the Patchwork Argument*. Urban Institute; 2021.

Relevant Cases

SAVINGS CLAUSE

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

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

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

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

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

CHALLENGING PREEMPTION

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

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

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

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

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

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

Welcome Activity: Q&A Handout

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

Instructions for Facilitators

- Welcome the participants and introduce yourself.
- Explain housekeeping items, such as estimated length of the training, break times, and restroom locations.
- Ask participants to complete the Q&A handout.
- Remind participants that they are not expected to know all of the answers.
- Encourage participants to do their best and explain that the answers to some of the questions will be addressed throughout the presentation.
- Where applicable, the answer key (found on pp. 14–15) references the slides in the presentation where relevant concepts are expressly addressed or implied.
- Review answers to the questions in the Q&A handout by either
 - Weaving the questions throughout the presentation (this is how the slide deck is currently structured) and stopping after each question to ask the audience for the answer before moving to the next slide; or
 - Moving all the questions in the slide deck to the end of the presentation and holding time then to have participants discuss the questions as a full group or in small groups.

Preemption & Public Health

Q&A Handout

Instructions: As an individual, answer the following questions.

1. **TRUE or FALSE?** Health equity focuses on fairness and the opportunity for all people to reach their full health potential regardless of their race, gender, sexual identity, class, or other markers.
2. **TRUE or FALSE?** Preemption always negatively affects health equity.
3. **TRUE or FALSE?** The federal government has total control over state and local laws.
4. **TRUE or FALSE?** Local governments have authority to enact laws regardless of what state law says.
5. Which of the following are reasons for ceiling preemption?
 - A. Efficiency
 - B. Equity
 - C. Uniformity
 - D. A and C
 - E. A, B, and C
6. Which of the following is an example of vacuum preemption?
 - A. A state law preempting local governments from passing ordinances to protect tenants from housing discrimination and not having any protections in state law
 - B. A state law requiring a minimum set of protections for tenants against housing discrimination
7. Based on what you've just learned, which of the following must you consider when determining whether a higher-level law preempts an issue?
 - A. The plain language of the law
 - B. Legislative intent
 - C. Case law
 - D. A and B
 - E. A, B, and C

Preemption & Public Health

Q&A Handout

ANSWER KEY

1. **TRUE or FALSE?** Health equity focuses on fairness and the opportunity for all people to reach their full health potential regardless of their race, gender, sexual identity, class, or other markers.

Answer: True. While you might not use the term “health equity,” the main goal is that we share the same basic understanding of its core principles, which include fairness and opportunity to reach one’s full health potential regardless of any demographic marker.

➤ This question and answer are discussed on slide 18.

2. **TRUE or FALSE?** Preemption always negatively affects health equity.

Answer: False. Preemption is not inherently good or bad. How it affects health equity depends on how it is used.

➤ This question and answer are discussed on slide 20.

3. **TRUE or FALSE?** The federal government has total control over state and local laws.

Answer: False. The US Constitution divides control between the federal and state governments. Remember that states have the primary authority to regulate the general health, safety, and welfare of their citizens – the police power.

➤ This question and answer are discussed on slides 22-27.

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

Answer: False. Local governments generally act within the authority delegated to them by states.

While some states grant local governments extensive authority (that is, home rule authority) to act independently, others greatly limit local governments’ powers (called Dillon’s Rule). The extent of this authority is typically outlined in state constitutions.

➤ This question and answer are discussed on slides 28-30.

5. Which of the following are reasons for ceiling preemption?

A. Efficiency

B. Equity

C. Uniformity

D. A and C – CORRECT ANSWER

E. A, B, and C

Answer: Efficiency and uniformity are two reasons for ceiling preemption. This preemption ensures that everyone is held to the same standard, which is equality and not equity, which is why answer choices B and E are incorrect.

➤ This question and answer are discussed on slide 39.

6. Which of the following is an example of vacuum preemption?

- A. **A state law preempting local governments from passing ordinances to protect tenants from housing discrimination and not having any protections in state law – CORRECT ANSWER**
- B. A state law requiring a minimum set of protections for tenants against housing discrimination

Answer: A state law that preempts local action on a topic without enacting any regulations at the state level leaves a vacuum of regulation on that topic. Recall the example from the Texas law that prohibits local governments from passing ordinances that prohibit landlords from rejecting tenants based solely on a person's source of income.

If a state passes a law requiring a minimum standard but allows local governments to add requirements, that is floor preemption. That is what is described in choice B.

➤ See slide 55 for discussion and examples of vacuum preemption.

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

- A. The plain language of the law
- B. Legislative intent
- C. Case law
- D. A and B

E. A, B, and C – CORRECT ANSWER

Answer: E is correct. The plain language of the law (answer A) will indicate whether something is expressly preempted. Legislative intent (answer B) and case law (answer C) can help you find implied preemption. So, all three will help you determine whether there's preemption.

➤ See slides 64-75 for discussion of how to determine preemption.

Pre- and Post-Training Surveys

Instructions for Facilitators

- Pages 17–19 contain two sample surveys (pre- and post-training evaluation tools) that you can use to gather feedback on the content and quality of your presentation.*
- Depending on the format of your presentation (in person or online), you can provide hard copies of the surveys at the presentation or make the surveys available electronically.

** Before asking participants to complete the pre- and post-training surveys, please note that the Paperwork Reduction Act has specific requirements for federal agencies in regard to collection and housing of data. You may need permission from the Office of Management and Budget if you are collecting information from 10 or more members of the public.*

Preemption & Public Health

PRE-TRAINING SURVEY

Thank you for completing the following survey!

Learning Objectives

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

1. I can define basic constitutional concepts that frame the everyday practice of public health.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

2. I can describe public health agency authority and limits on that authority.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

3. I can identify legal tools and enforcement procedures available to address day-to-day (nonemergency) public health issues.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

4. I can distinguish public health agency powers from those of other agencies, legislatures, and the courts.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

Additional Feedback

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

Thank you for your feedback!

Preemption & Public Health

POST-TRAINING SURVEY

Thank you for completing the following survey!

Learning Objectives

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

1. I can define basic constitutional concepts that frame the everyday practice of public health.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

2. I can describe public health agency authority and limits on that authority.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

3. I can identify legal tools and enforcement procedures available to address day-to-day (nonemergency) public health issues.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

4. I can distinguish public health agency powers from those of other agencies, legislatures, and the courts.
 - a. Not confident
 - b. Somewhat confident
 - c. Confident
 - d. Very confident

Overall Impression

Please rate your level of agreement with the following statements regarding the session [Preemption & Public Health](#).

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

6. I would recommend this session to others.

- a. Disagree
- b. Somewhat disagree
- c. Neither agree nor disagree
- d. Somewhat agree
- e. Agree

Additional Feedback

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

8. How could this session be improved?

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

Thank you for your feedback!