

**Understanding Preemption**  
 What It Is, How It Works, and  
 How To Respond

**ChangeLab Solutions**  
 Law & policy innovation for the common good.

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**Housekeeping**

- The slides and the link to the archived webinar will be shared via email.
- Feel free to ask questions via the chat box.
  - Unanswered questions will be addressed via email.

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**Agenda & Presenters**

**Preemption 101**  
**Derek Carr**  
 Staff Attorney  
 ChangeLab Solutions

**Recent Preemption Losses and How To Prepare**  
**Lindsey Freltas**  
 Senior Director, Advocacy  
 American Lung Association in California Center for  
 Tobacco Policy and Organizing

**Q&A**  
**Pratima Musburger**  
 Program Director and Senior Staff Attorney  
 ChangeLab Solutions

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Healthy communities for all through better laws & policies





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## ChangeLab Solutions Disclaimer

The information provided in this discussion is for informational purposes only, and does not constitute legal advice. ChangeLab Solutions does not enter into attorney-client relationships.

ChangeLab Solutions is a non-partisan, nonprofit organization that educates and informs the public through objective, non-partisan analysis, study, and/or research. The primary purpose of this discussion is to address legal and/or policy options to improve public health. There is no intent to reflect a view on specific legislation.

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## Preemption 101

Derek Carr  
Staff Attorney  
ChangeLab Solutions




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**What we'll DISCUSS:**

-  Refresh: Federal, State & Local Authority
-  What is Preemption?
-  Types of Preemption  
Costs and Benefits
-  Preemption & Tobacco Control

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**Federalism & Police Power**



**FEDERAL**      **STATE**      **LOCAL**

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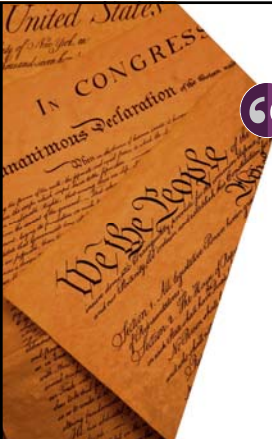
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**The Constitution: Supremacy Clause**  
Article VI, Clause 2

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

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**“ Delegation of power: 10th Amendment**

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

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**State Plenary Powers**

Distribute power between the state government and local governments

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**History of local control**

A path forward to improve health and equity

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Local governments can and should be effective partners in addressing community priorities




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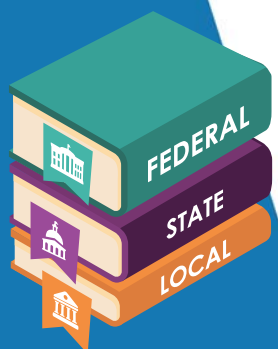
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**What is preemption?**  
When the law of a higher level of government invalidates the law of a lower level of government

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**Preemption Comes in Many Forms**

- ✓ **Ceiling Preemption**
  - i.e. "Maximum Standards"
- ✓ **Floor Preemption**
  - i.e. "Minimum Standards"
- ✓ **Vacuum or Null Preemption**
  - i.e. "No Standards"

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**Ceiling  
PREEMPTION:**

-  Uniform Standards
-  Efficiency
-  Limited Flexibility and Innovation

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 *Benefit: Airline Safety*

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 *Barrier: Minimum Wage Laws*

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**Floor  
PREEMPTION**  
(i.e. Minimum  
Standards)

 Flexibility

 Innovation

 Progress

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 *School Nutrition Standards*

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 *Civil Rights Laws*

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FOR THE PUBLIC'S HEALTH  
Revitalizing Law and Policy to Meet  
New Challenges

INSTITUTE OF MEDICINE  
OF THE NATIONAL ACADEMIES

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

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### Vacuum or Null Preemption

- A higher level of government chooses **not** to enact regulations in a particular field but then **actively forbids** lower levels of government from regulating that field.
- Creates a "regulatory void" in certain areas

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For example, laws that preempt local policies related to **food and nutrition**

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**MISSISSIPPI CODE ANN. §75-29-901**

(3) No political subdivision shall do any of the following:

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




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**What are the consequences?**

- Creating a regulatory vacuum, limiting local control
- Preventing some innovations without adding to uniformity





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**Identify & Track PREEMPTION**

-  Identify key words and phrases
-  Include a savings clause
-  Be alert

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## Spotting Preemption

- *Preempts*
- Shall be *consistent with*
- Shall be *identical to*
- *Uniform* regulation
- *Exclusive* authority
- Matter of *statewide concern*
- *Occupy the field*
- *No more stringent than*
- *No more restrictive than*
- *Do not exceed*
- Shall have *sole authority*
- Shall *supersede*

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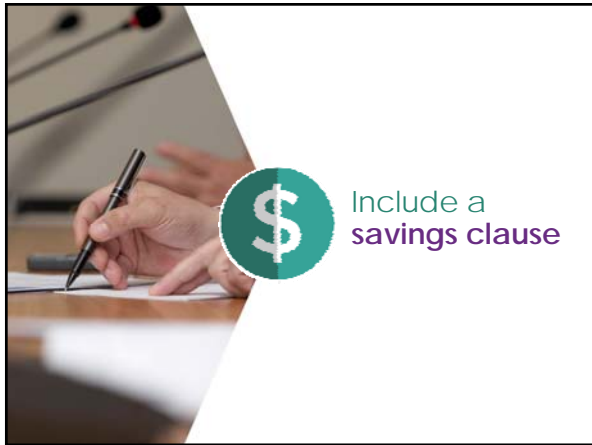
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## Include a savings clause

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## Preemption in Tobacco Control

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“We could never win at the local level. The reason is, all the health advocates ... may live next door to the mayor, or the city councilman, and they say ‘Who’s this big-time lobbyist coming here to tell us what to do?’... So the Tobacco Institute and tobacco companies’ first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can’t do that, at least on the state level, because the health advocates can’t compete with me on a state level.”

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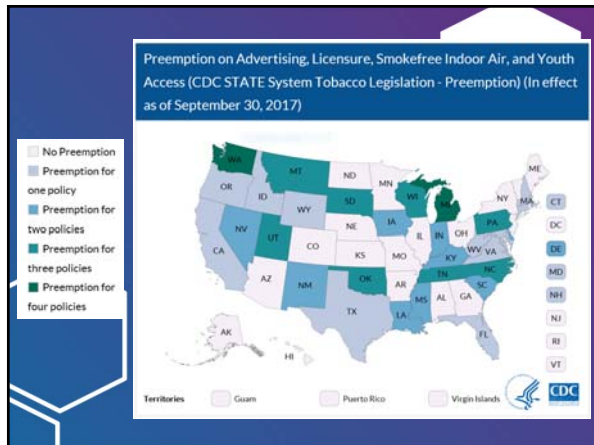
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**Minimum Legal Sales Age for Tobacco Products**

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- The federal Family Smoking Prevention and Tobacco Control Act sets **minimum standards** by prohibiting the sale of tobacco products to a person under the age of 18.
- State and local governments may **not** enact **less stringent** requirements (e.g. allowing a 16-year-old to buy cigarettes)
- States and (some) local governments may enact **more stringent** requirements, such as Tobacco 21 laws.
  - California, Hawaii, Maine, Massachusetts, New Jersey, Oregon, and 350+ localities have adopted Tobacco 21.

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**Preemption Clause (21 U.S.C. § 387p(a)(2)(A)):**

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

**Saving Clause (21 U.S.C. § 387p(a)(2)(B)):**

*"[The Preemption Clause] does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products."*




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**California Preemption**  
Smokefree Work Places & Taxes



-  **Labor Code Preemption Clause:** Prohibits local governments from enacting workplace smoking restrictions.
-  **Labor Code Saving Clause:** Allows local regulation of smoking in "any area not defined as a "place of employment.""
-  **Tax Preemption:** "The taxes imposed by this part are in lieu of all other state, county, municipal, or district taxes on the privilege of distributing cigarettes or tobacco products."

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**Example:**  
**South Dakota**

“ 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.

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Preemption represents an opportunity for different fields to come together to protect equitable local innovation

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AMERICAN LUNG ASSOCIATION. THE CENTER for Tobacco Policy & Organizing

**THE CENTER FOR TOBACCO POLICY AND ORGANIZING**

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Pennsylvania THE CENTER for Tobacco Policy & Organizing

**We're smoking mad that Harrisburg won't let Philly govern**  
 Editorial

**New PA budget strips Philadelphia of power to regulate cigarette sales**

AMERICAN LUNG ASSOCIATION.

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**Hawaii**

**THE CENTER**  
for Tobacco Policy & Organization



Hawaii Health Measure Includes Last-Minute Provision Benefiting Big Tobacco; Legislature Should Revisit Measure and Repair the Damage

AMERICAN LUNG ASSOCIATION.

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**California**

**THE CENTER**  
for Tobacco Policy & Organization



Special interests win as lawmakers cut last-minute deals to pull initiatives off your ballot

How Big Soda Strong-Armed California Into Banning Soda Taxes

AMERICAN LUNG ASSOCIATION.

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**THE CENTER**  
for Tobacco Policy & Organization

**WHAT CAN YOU DO?**

-  • Be ready to act.
-  • Prep your coalitions and community members.
-  • Send letters to your representatives and educate them on the issue.
-  • Call your decision makers

AMERICAN LUNG ASSOCIATION.

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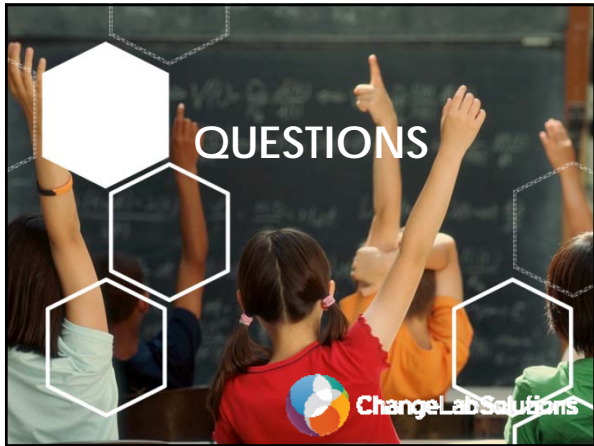
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Thank you!



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