



STATE System

State Tobacco Activities Tracking & Evaluation

State Preemption Fact Sheet

Preemption can impede local tobacco protection efforts

Background

Tobacco use is the cause of one in five deaths annually in the United States—more deaths than HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined.^{1,2} More than 126 million nonsmoking Americans are exposed to the dangers of secondhand smoke in their homes, workplaces, and public places. Nonsmoking adults who are exposed to secondhand smoke increase their risk of heart disease by 25% to 30%, and their risk of lung cancer by 20% to 30%.³ The U.S. Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure.

States are using various legislative tools to reduce smoking rates and to protect the public from the adverse health effects of smoking. To limit exposure to smoke, states are enacting laws prohibiting or restricting smoking in enclosed places, such as government work-sites, private worksites, and restaurants. To reduce tobacco use, states are raising excise taxes on tobacco products and enacting statutes that limit advertising (by restricting the display of tobacco products, tobacco product promotion, or tobacco product samples) and youth access to tobacco (by prohibiting the sale or distribution of tobacco

to youth and restricting access to tobacco product vending machines). At the local level, cities and counties have also responded to public health concerns related to smoking and tobacco use by enacting ordinances limiting the access to or use of tobacco. Local ordinances can be more stringent or more comprehensive than state statutes, and the debate over local laws can help educate communities about the health effects of tobacco use and contribute to changes in social norms about smoking.^{3,4}

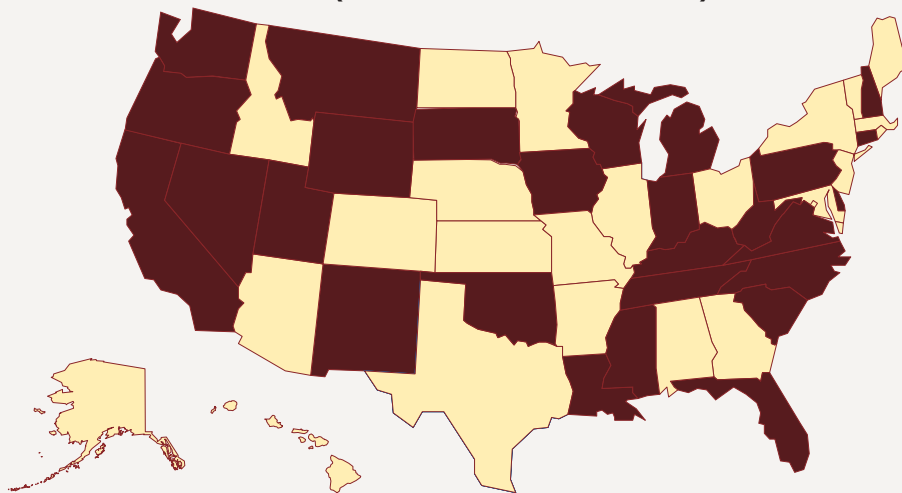
What is preemption?

Some states, however, *preempt*, or prevent local communities from enacting local ordinances that are more stringent than or differ from a state's tobacco control policies related to advertising, smoke-free indoor air, and youth access. A state may preempt local tobacco control laws in all or only in some categories. The tobacco industry has historically supported state preemption laws as a way to reverse existing local tobacco control ordinances and prevent future enactment of such ordinances.^{4,5,6} In an effort to protect nonsmokers by allowing local communities to pass comprehensive tobacco control measures, a Healthy People 2010 objective calls for eliminating state laws that preempt stronger local tobacco control laws, including local smoke-free ordinances.⁷

State Preemption of Any Local Tobacco Control Ordinances

Advertising, Smoke-free Indoor Air, or Youth Access

(n=51; as of December 31, 2007)



■ State law preempts local regulation of tobacco advertising, smoke-free indoor air, or youth access to tobacco (n=27)

■ State law is silent or enables local regulation of tobacco advertising, smoke-free indoor air, or youth access to tobacco (n=24)

¹ CDC. Annual smoking-attributable mortality, years of potential life lost, and productivity losses—United States, 1997–2001. *MMWR* 2005;54(25):625–628.

² Mokdad AH, Marks JS, Stroup DF, Gerberding JL. Actual causes of death in the United States, 2000. *JAMA* 2004; 291: 1238–1245.

³ Siegel M, Carol J, Jordan J, Hobart R, Schoenmarlin S, DuMelle F, Fisher P. Preemption of tobacco control: Review of an emerging health problem. *JAMA* 1997;278(10):858–63.

⁴ Nixon M, Mahmoud L, Glantz S. Tobacco industry litigation to deter local public health ordinances: The industry usually loses in court. *Tobacco Control* 2004;13:65–73.

⁵ Bayer R. Science, politics, and ideology in the campaign against environmental tobacco smoke. *Am J Public Health* 2002;92(6):949–54.

⁶ Hobart R. Preemption: Taking the local out of tobacco control. Chicago (IL): American Medical Association; 2003.

⁷ CDC. Healthy People 2010 Objective 27-19: Eliminate laws that preempt stronger tobacco control laws. Accessed Mar 19 2008 from: <http://healthypeople.gov/document/html/objectives/27-19.htm>



STATE System

State Tobacco Activities Tracking & Evaluation

State Preemption Summary in effect as of December 31, 2007

State	Smoke-free Indoor Air Preemption			Youth Access Preemption			Advertising Preemption				Any Preemption
	Gov't Worksites	Private Worksites	Restaurants	Sales to Youth	Distribution	Vending Machines	Display	Preemption Generally	Promotion	Sampling	
Alabama	E	E	E								
Alaska											
Arizona	E	E	E								
Arkansas	E	E	E								
California	*	*	*	P	P						YES
Colorado	E	E	E								
Connecticut	P	P	P								YES
Delaware				P	P	P				P	YES
District of Columbia											
Florida	P	P	P								YES
Georgia	E	E	E								
Hawaii	E	E	E							E	
Idaho	E	E	E	E	E	E	E			E	
Illinois	E	E	E								
Indiana	E	E	E	P	P		P	P	P	P	YES
Iowa	P	P	P	P	P	P					YES
Kansas	E	E	E								
Kentucky				P	P	P	P	P	P	P	YES
Louisiana	E	E	E	P	P	P			P	P	YES
Maine							E	E	E	E	
Maryland											
Massachusetts	E	E	E								
Michigan			P	P			P	P			YES
Minnesota	E	E	E								
Mississippi	E			P	P	P	P		P	P	YES
Missouri	E	E	E								
Montana	P	P	P	P	P	P		P		P	YES
Nebraska											
Nevada	E	E	E	P	P	P	P	P	P		YES
New Hampshire			P†								YES
New Jersey	E	E	E								
New Mexico	E	E	E	P	P	P				P	YES
New York											
North Carolina	P	P	P	P	P		P		P	P	YES
North Dakota	E	E	E								
Ohio											
Oklahoma	P	P	P	P	P	P	P	P	P	P	YES
Oregon	P	P	P			P					YES
Pennsylvania	P	P	P	P	P	P					YES
Rhode Island	E	E	E								
South Carolina	P	P	P	P	P		P	P	P	P	YES
South Dakota	P	P	P	P	P	P		P	P		YES
Tennessee	P	P	P	P	P	P	P	P	P	P	YES
Texas				E	E	E	E		E	E	
Utah	P	P	P			P	P	P	P	P	YES
Vermont	E	E	E								
Virginia	P	P	P								YES
Washington	P‡		P‡	P	P	P			P	P	YES
West Virginia							P				YES
Wisconsin				P	P	P	P	P	P	P	YES
Wyoming				P	P	P					YES

* Case law decisions overruled smoke-free indoor air preemption statutes in CA.

† Case law decisions found implied preemption for smoke-free indoor air statutes related to restaurants in NH.

‡ Case law decisions found implied preemption for smoke-free indoor air statutes related to government worksites and restaurants in WA.

P: Preemption

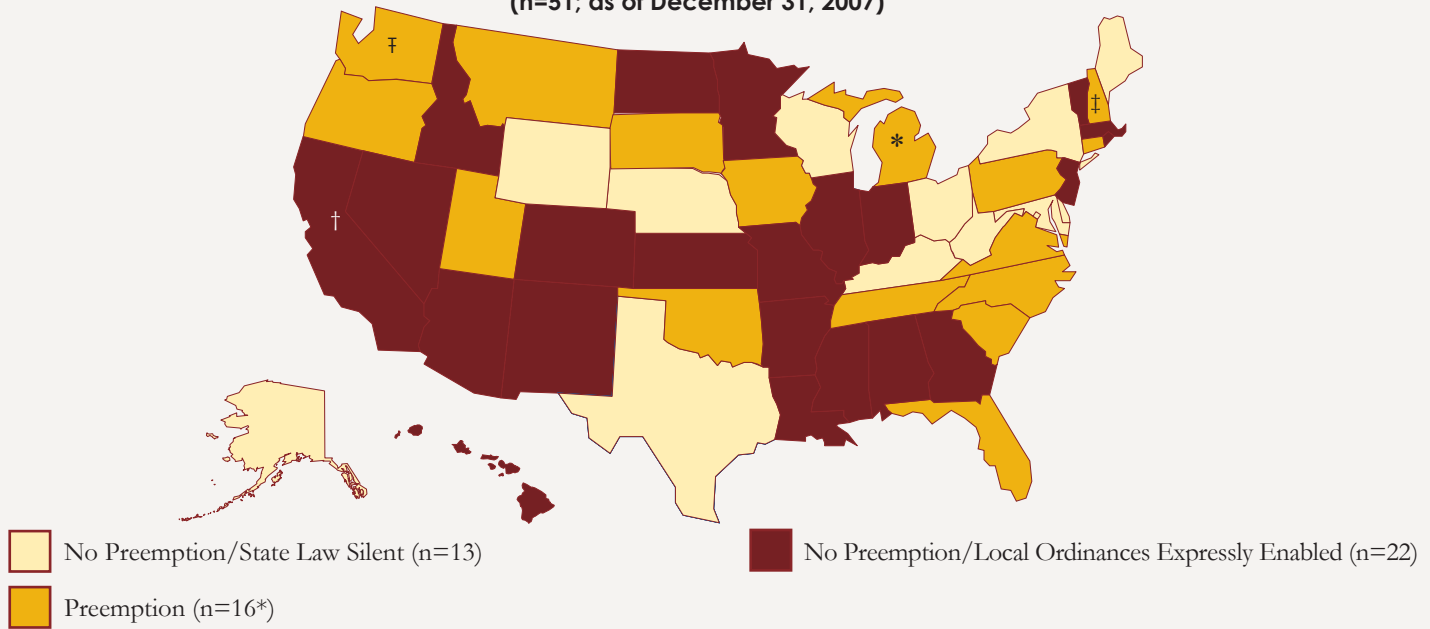
Blank: State silent on Preemption or Enabling

E: Enabling

State Tobacco Activities Tracking and Evaluation (STATE) System
<http://www.cdc.gov/tobacco/statesystem>

Centers for Disease Control and Prevention
 National Center for Chronic Disease Prevention
 and Health Promotion

Preemption of Local Smoke-free Indoor Air Ordinances in Government Worksites, Private Worksites, and Restaurants (n=51; as of December 31, 2007)



* Michigan's preemption law only applies to smoke-free indoor air ordinances in restaurants
 † A California court overruled the state's preemption provisions

‡ A New Hampshire court found implied preemption for smoking restrictions in restaurants
 † A Washington court found implied preemption for smoking restrictions in government worksites and restaurants

Court decisions can determine preemption

Even if a state does not have “express preemption” (in which state law contains explicit preemptive language), a state court may find that the state has “implied preemption”.⁸ If a local ordinance is legally challenged, the court is responsible for interpreting state statutes, as well as the state legislature’s intent when the law was debated and passed. For this reason, statutes must be considered together with case law decisions to get a full understanding of a state’s preemption status. In particular, court decisions related to smoke-free indoor air have determined whether a state preempts the enactment of local ordinances restricting smoking.

In several states, courts have decisively influenced interpretations of whether states preempt local smoking restrictions. For example, a court in California ruled that the state’s 1995 smoke-free indoor air law did not preempt local ordinances from making enclosed public places and places of employment smoke-free. The court ruled that the state law explicitly disclaimed any intent to preempt local governments from regulating smoking and, in fact, expressly authorized local governments to prohibit smoking in any manner not consistent with the state law.⁹ Similarly, courts in New Hampshire and Washington ruled that state laws establishing smoking restrictions preempted local smoking restrictions in certain settings, even though the statutes in question did not contain explicit preemption language.¹⁰

Enabling local communities to pass tobacco control measures

The only way for states to ensure that local tobacco control ordinances are not preempted is to include *enabling clauses* in state laws. These clauses explicitly allow local jurisdictions to enact ordinances that differ from the state law. This can have the effect of making the state law the floor for tobacco control regulations, rather than preemption provisions that establish state law as the ceiling.

State efforts to restore or preserve local smoke-free indoor air control since 2004

Once enacted, state preemptive laws have traditionally proven difficult to repeal. However, since 2004, seven states have repealed provisions that preempted local smoking restrictions in some or all settings. The seven states that have repealed smoke-free indoor air preemption are Illinois, Louisiana, Mississippi, Nevada, New Jersey, North Dakota, and Oregon (although the Oregon repeal does not take effect until January 2009). In addition, there appears to be a trend for states that enact new smoking restrictions to include explicit enabling language, even if the previous state smoking restrictions had not been explicitly preemptive.

⁸ *Entertainment Industry Coalition v Tacoma-Pierce County Health Department and the Tacoma-Pierce County Board of Health*, WL 310431 (Wash.)(2005), where the court held that a local ordinance banning smoking in all enclosed public places irreconcilably conflicts with certain state statutory provisions providing that smoking areas may be designated in a public place by the owner of the space, and the local ordinance is therefore preempted.

⁹ CAL. LAB. CODE § 6404.5 and *City of San Jose v Department of Health Services*, 66 Cal. App. 4th 35, 77 Cal. Rptr. 2d 609 (1998)

¹⁰ *JTR Colebrook, Inc. v Town of Colebrook*, 149 N.H. 767, 829 A.2d 1089 (2003) and *Entertainment Industry Coalition v Tacoma-Pierce County Health Department and the Tacoma-Pierce County Board of Health*, 2005 WL 310431 (Wash.)(2005).



STATE

State Tobacco Activities Tracking & Evaluation System

Current status of state preemption related to smoke-free indoor air

As of December 31, 2007, 16 states have laws or court decisions in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, and/or restaurants. Thirteen of these states preempt local action in all three of these settings, while two states (Michigan and New Hampshire) preempt local smoking restrictions in restaurants but not in the other two settings, and one state (Washington) preempts local smoking restrictions in government worksites and restaurants but not in private worksites.

Twenty-one states have enacted laws that explicitly enable local communities to adopt smoking restrictions that are more stringent than or differ from the state standard. Twelve states and the District of Columbia (excluding the court-decided preemption status in New Hampshire and Washington) do not have any explicit language in their statutes regarding the presence or absence of preemption of local smoking restrictions in government worksites, private worksites, and restaurants (Michigan is also silent regarding preemption in government and private worksites).

Some states have enacted changes to their preemption status that had not yet taken effect as of December 31, 2007. Maryland statutes were previously silent on preemption, but language in a new state smoke-free law that went into effect on February 1, 2008 explicitly allows city and county governments to adopt smoking restrictions that are more stringent than or differ from the state standard. Similarly, the preemption status of Montana will change when a preemption provision in a 2005 state law expires on October 1, 2009. On January 1, 2008, a North Carolina law preempting local ordinances related to smoking in government worksites expires and a law enabling local smoking restrictions goes into effect. However, North Carolina's preemption law pertaining to smoking in private worksites and restaurants remains in effect. Finally, an Oregon preemption law preempting smoking restrictions in government worksites, private worksites, and restaurants will expire on January 1, 2009.

Current status of state preemption related to other tobacco control efforts

As of December 31, 2007, 22 states have laws preempting local ordinances related to youth access to tobacco: 20 states preempt local restrictions on selling tobacco products to youth and 19 states preempt local restriction on distributing tobacco products to youth. Seventeen states have laws that preempt local ordinances related to restrictions on tobacco product vending machines.

Eighteen states have laws preempting localities from enacting laws related to the advertisement of tobacco products. Within the four types of tobacco advertising laws (laws that restrict tobacco advertising in general, laws that restrict the display of tobacco products, laws that restrict the promotion of tobacco, and laws that restrict the distribution of tobacco product samples), three states have preemption laws for only one type. Five states have preemption statutes for two types of advertising laws and three states have preemption for three types of advertising. Seven states preempt all types of local tobacco advertising restrictions.

Remaining gaps in secondhand smoke protection

Over half the states preempt local jurisdictions from enacting local smoking restrictions in workplaces and restaurants or do not clearly permit local restrictions through enabling language in the state's statutes.

Only two states have enabling provisions that allow localities to enact more stringent youth access laws, and only four states enable localities to more strictly restrict the advertisement of tobacco products, limiting the expressed ability of localities to restrict the promotion of tobacco use in their city, county, or town.

Despite recent state progress, preemption continues to pose a major barrier to local efforts to protect nonsmokers from secondhand smoke. The only way for states to meet the CDC's Healthy People 2010 objective of eliminating preemption is to enact enabling statutes explicitly granting local jurisdictions the authority to enact smoking restrictions and other tobacco control measures.

Preemption Glossary

General terms:

Preemption: State prevents local jurisdictions from enacting laws that differ from and/or are more stringent than state law.

Enabling: State expressly allows local jurisdictions to enact laws that differ from and are more stringent than state law.

State: The 50 states and District of Columbia.

Smoke-free indoor air terms:

Government worksites: Preemption of local ordinances related to the restriction of smoking in places of work that are owned, leased, or operated by state or local governments.

Private worksites: Preemption of local ordinances related to the restriction of smoking in places of work other than those that are owned, leased, or operated by governments.

Restaurants: Preemption of local ordinances related to the restriction of smoking in establishments that serve food for consumption on the premises.

Youth access terms:

Distribution: Preemption of local ordinances related to the distribution of tobacco products to minors.

Sales to youth: Preemption of local ordinances related to the restriction of the retail sale of tobacco products to minors.

Vending machines: Preemption of local ordinances related to the sale of tobacco products through vending machines.

Advertising terms:

Advertising (generally): Preemption of local ordinances related to the broad advertising of tobacco products (i.e., promotion, sampling, or display).

Display: Preemption of local ordinances related to the retail advertising and display of tobacco products in stores.

Promotion: Preemption of local ordinances related to retail promotions, coupons, and discounts for the sale of tobacco products.

Sampling: Preemption of local ordinances related to the distribution of tobacco product samples to the public for free or at a nominal cost.