Foundation for a Healthy Kentucky’s Mission:

To address the unmet health needs of Kentuckians
Investing in communities. Informing health policy.

By...
- Developing and influencing policy
- Improving access to care
- Reducing health risks and disparities
- Promoting health equity

Foundation for a Healthy Kentucky
Investing in Communities. Informing Health Policy.

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www.kentuckyhealthfacts.org
https://www.healthy-ky.org/events/health-for-a-change

- Dec 5 Working with the media workshop in Paducah
- Planning now for 2019!
- What topics are you interested in for the year ahead?
And a special THANK YOU to the Coalition for a Smoke-Free Tomorrow for suggesting this webinar topic and connecting us with this experienced panel of presenters.
Senate Bill 93

Link to the Legislation:

http://www.lrc.ky.gov/record/18RS/SB93.htm

SB 93 (BR 1126) - J. Adams, R. Alvarado, A. Kerr

AN ACT relating to the sale of tobacco products.
Create a new section of KRS Chapter 438 to allow a city or county government to regulate the use, display, sale, or distribution of tobacco products or vapor products; repeal KRS 438.300.

Jan 18, 2018 - introduced in Senate
Jan 19, 2018 - to State & Local Government (S)

HISTORY OF PREEMPTION IN KENTUCKY

Ellen J. Hahn, PhD, RN, FAAN
Professor & Director, KCSP
Health for a Change Webinar
Preemption and Health Advocacy
November 28, 2018
Preemption

Preemption is a dirty opposition tactic that removes communities’ right to enact local public health laws.

“By introducing pre-emptive statewide legislation we can shift the battle away from the community level back to the state legislatures where we are on stronger ground.”


Preemption Doctrine in KY

- When a state passes a law, counties and cities may not enact a conflicting ordinance.
- Kentucky codified this principle as to Counties in KRS 67.083 (3), which provides:

  Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds, and employ personnel in performance of the following public functions . . .

  ...very broad delegation of power that permits fiscal courts to “exercise all rights, powers, franchises, and privileges not in conflict with the constitution and statutes.”
Kentucky’s Home Rule for Municipalities

- Kentucky’s Home Rule for municipalities provides, "[a] city may exercise any power and perform any function within its boundaries . . . that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute." Ky. Rev. Stat. § 82.082(1).

Explicit Preemption: Manufacture, Sale, and Distribution of Tobacco Products (KRS 438.305-438.340)

- "...for the purpose of equitable and uniform enforcement, the provisions ....shall supersede any subsequently enacted local law, ordinance, or regulation which relates to the use, display, sale, or distribution of tobacco products."
- Originally enacted in 1994
- Expresses an intent to ‘occupy the field’
- Amended to include the sale of alternative nicotine products or vapor products to persons under age 18
Local Smoke-free Ordinances are NOT Preempted

- The Kentucky Supreme Court ruled that KRS 438.305 to 438.340 deal almost exclusively with prohibiting the sale, distribution and use of tobacco products to or by persons under the age of 18 (Lexington Fayette County Food & Beverage Ass'n. v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 756 Ky.2004).
- The KRS does not preempt the use of a local ordinance which serves to prohibit the use of tobacco products in public places by anyone.
- Kentucky courts also have affirmed the “more stringent” rule with regard to city ordinances that are stricter than a general ordinance passed by a county fiscal court. KRS 67.083(7).

“Our record in defeating state smoking restrictions has been reasonably good. Unfortunately, our record with respect to local measures...has been somewhat less encouraging...Over time, we can lose the battle over smoking restrictions just as decisively in bits and pieces-at the local level-as with state or federal measures.”

Implicit Preemption: Proposed Bill to Prohibit Use of MSA $ if Local Smoke-free Ordinance Enacted

- 2004 Kentucky legislative session
- Underhanded tobacco industry tactic
- The bill died through the help of sharp-eyed tobacco control advocates

Local Advocacy for Tobacco Control in Kentucky

- Focus on local 100% smoke-free ordinances
- Flavor restrictions preempted
- Age of sale ('Tobacco 21') likely preempted
Kentucky Center for Smoke-free Policy

www.breathe.uky.edu

Get our Partner e-Newsletter: kcsp00@lsv.uky.edu

ejhahn00@email.uky.edu

(859) 257-2358

@kysmokefree

College of Nursing

Protecting & Restoring Local Control for Smokefree Air

www.protectlocalcontrol.org
What is Preemption?

A provision in state (or federal) law that **eliminates the power** of lower levels of government to regulate an issue. May prohibit existing and/or future laws.

**Preemption is (still) tobacco industry’s #1 strategy**

> “While we’re not married to any particular form of pre-emption language, we’re dead serious about achieving pre-emption in all 50 states.”
> 
> - Tina Walls, Phillip Morris, July 8, 1994

<table>
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<th>What is Preemption?</th>
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<td><strong>1. Express preemption:</strong> Law contains language that specifically prohibits local laws.</td>
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<td><strong>2. Implied preemption:</strong> Doesn’t specifically prohibit local laws, but court may rule law is preemptive. Uncertainty may intimidate &amp; discourage local laws.</td>
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**To avoid preemption**, laws should contain explicit **anti-preemption clause** that allows local control.
Power of Local Control

- Respond to community desires
- Meaningful local community change
  - Education & discussion → understanding → support
- Easier to enact strong & effective laws
  - Opportunity for innovation
  - Less industry interference
- Easier to achieve compliance
  - More understanding & respect for law
  - Enforcement agencies more accessible & responsive

Local leads the way!
How Preemption is Enacted

Preemption language may appear:

1. In bills specifically intended to remove local control
2. In weak smokefree bills sponsored by the tobacco industry or its allies
3. In an amendment to strong smokefree bills
4. In bill not even related to tobacco control
5. Added to bills at last minute before passage

Preemption is ALWAYS a deal-breaker!

Common Smokefree Preemption Tactics

• Exempt & Preempt
• Venue-Specific Preemption
• Barrier to Local Control
• Multi-Issue Preemption

New York’s A04316: exempt & preempt bill
Big Picture: Local Control is Under Attack

- Activity nationwide to eliminate local control & innovation
- Blue cities/red states conflict
- Corporate interests > local needs
- ALEC driving legislation
- Using tobacco industry tactics

Upsides:
- Renewed awareness & interest
- Media attention
- New partners & collaborations
- Actively defending local control

✓ Tobacco control
✓ Gun control
✓ Nutrition/Menu labeling
✓ Minimum wage
✓ Paid sick leave
✓ LGBTQ/non-discrimination
✓ Plastic bags
✓ Fracking
✓ Rent control
✓ Municipal broadband
✓ Ride-sharing
✓ Home-sharing
✓ and more...

Resources

www.protectlocalcontrol.org
Questions?
Contact Us:
Traci Kennedy, MPA
traciharr@gmail.com

www.protectlocalcontrol.org

Webinar: Preemption and Health Advocacy

Preemption Watch Action Model

Mark Pertschuk
Director
Grassroots Change & the Preemption Watch project
Former President & Executive Director, Americans for Nonsmokers’ Rights
Foundation for a Healthy Kentucky
November 28, 2018, 1:00 PM – 2:00 PM ET

www.GrassrootsChange.net
Grassroots Change: Connecting for Better Health

- Grassroots Change: Connecting for Better Health (2009 – present)
  - Preemption Watch; Preemption & Movement Building in Public Health
- RWJF Key Informant Interviews 2010: Advocates, researchers, organizers, public officials, working on:
  - Obesity prevention
  - School food
  - Food safety
  - Gun violence
  - Alcohol
  - Tobacco
  - Reproductive health
  - Health access
  - Environmental justice


Different Issues = Identical Tactics
Combatting Preemption Strategic Action Model

The Evolving Threat: New (and Old) Style Preemption

- Preemption clause: Express preemption (Kansas 2016; California 2018)
- Amendments (often on unrelated topics)
- Fiscal mechanisms (de facto preemption) (Arizona 2016)
- Preemption of, or barriers to, local taxation authority
- Limits on direct democracy (local ballot measures)
- Blanket preemption (Arizona 2016; Texas - proposed 2015, 2017)
- Savings Clause = Must Have!
  - “Nothing in this law preempts more restrictive local requirements.”
Anticipate and Monitor

- Prepare in advance! Never wait for bills or amendments...
- Know and learn from the opposition
- In the Midnight Hour: Last minute amendments (California, 2008 & 2018)
- Budget amendments
- Don’t expect litigation or lawyers to undo preemption after it’s passed.
- Except in the case of smokefree laws, state preemption in public health has never been repealed

Unifying Allies

- What discussions need to happen with elected officials, public health organizations, grassroots groups, other advocates?
- How can you ensure everyone is in agreement? (Applies to state and federal legislation)
- How can we hold each other accountable?
Grassroots Engagement & Leadership

- Build the grassroots & put network in place before it’s needed
- Translating passion into meaningful goals
- New blood + grassroots experience & expertise
- Assess current strengths: Build & broaden coalitions
- Grassroots Leadership
  - Experience in movement building, & communications
  - TRUST: The internal movement dialogue
  - Volunteers + Paid

Media Advocacy

- “The strategic use of mass media to advance policy or social change.”
- Educate the media BEFORE you need them.
- Who are your media contacts?
- Messaging. Nonpartisan = Framing for conservative, progressive, neutral, and all audiences.
- Messengers who are convincing, local, diverse and unexpected (e.g. business owners and conservatives)
Grassroots Change: Connecting for Better Health

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GrassrootsChange

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OUR MISSION: TO ADDRESS THE UNMET HEALTH NEEDS OF KENTUCKIANS BY DEVELOPING AND INFLUENCING POLICY, IMPROVING ACCESS TO CARE.
Post-event Survey

- Give your feedback
- Suggest future topics
- Only 3 minutes

Contact

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