

Preemption & Movement Building in Public Health

Checklist for Advocates & Other Decision Makers

When public health legislation is on the table, preemption almost always comes up. The following is a checklist and questions to consider before the public health community agrees to federal or state preemption.

Be prepared

- Expect preemption to become part of any proposed public health legislation at the federal or state levels even if it's not in the original bill -- it may be added later to compromise with opponents and avoid public debate and scrutiny.
- Know your bottom line in advance. Preemption could be the single most important part of a new piece of legislation, with the greatest long-term consequences. All major stakeholders, including community groups, state organizations, and grassroots advocates, should be fully informed about proposed preemption and agree on a position before entering the political process.
- Before supporting federal or state legislation, make sure that it includes a "savings clause" that explicitly declares that lower jurisdictions have the authority to adopt stronger health protections. Then ensure that this anti-preemption clause is not removed or weakened during the legislative process.

Who is at the table?

Federal preemption impacts the work of state and local organizations, agencies and grassroots advocates. State preemption impacts a wide range of local and regional organizations and community members. Make sure that all of these stakeholders are fully informed and consulted about proposed preemption, including:

- Parents, young people and others who are advocating for local public health policies.
- Local or state officials who support policies that would be preempted by proposed legislation.
- Community-based organizations that are engaged in public health advocacy.
- Community foundations and other funders who support state or local prevention campaigns.

Know your opposition

- Make sure to identify the supporters of preemption in order to accurately assess why they want to take away state or local power.
- Because preemption can be unpopular, its proponents may operate behind the scenes. Be prepared to "shine a light" on the lobbyists and vested interests who are the primary supporters of preemption.
- Learn from observing the lobbyists for industries that support preemption. They often have closer relationships with politicians than do public health advocates, so they may have access to more accurate and timely information about amendments and the legislative process.



If vested interests oppose any legislation unless it includes preemption, ask: Why do they want preemption so badly?

- What are the short- and long-term benefits of preempting stronger state or local laws to these vested interests?
- If the supporters of preemption represent an industry that profits from weak health or safety regulations, what do they hope to gain by stopping progress at the local or state levels?
- The supporters of preemption take the long view, so carefully consider the long-term opportunities for progress that may be lost if preemption passes.
- Are the supporters of preemption trying to stop a grassroots movement that has formed or is beginning to form around the issue?

Will preemption hinder a grassroots movement?

- Has legislation on the same topic been adopted at lower levels of government?
- Is legislation on the same topic under consideration in lower jurisdictions?
- Have local, regional, or state organizations promoted policy changes on the same or related issues?
- Have community members promoted policy change around the same issue in schools, neighborhoods or other community environments?
- Have grassroots advocates been fully informed about negotiations for proposed state or federal preemption?
- Have all major stakeholders, especially those at the state or local levels, agreed on a position before accepting federal or state preemption?

Consider both the short- and long-term consequences of preemption

- Is a one-size-fits-all standard best for public health, or is flexibility needed to effectively address the issue depending on local or state needs?
- Will preemption interfere with innovation?
- What is the likelihood that science and social norms will evolve in the future?
- Will preemption have a negative impact on current or future grassroots movements?
- How will preemption impact the social norms change and other benefits that accompany grassroots movement building?
- Who will ensure compliance with the law? If a state or federal law is preemptive, is there the capacity and will at those levels to enforce the law?

Negotiating preemption

- Have all key stakeholders, including those at the community level, been fully informed about and agreed to preemption ahead of time?
- Do those who are negotiating for preemption on the public health side have the experience and expertise to understand the full extent of what is being bargained away, including the impact of preemption on public health movements?
- When considering accepting preemption, always remember the big picture: Will preemption be good for the public's health, today and in the future?

In public health, the term "preemption" usually refers to ceiling preemption, which occurs when a higher level of government takes away the power of lower levels to pass stronger laws. Instead of preempting stronger state or local laws, Congress or the states have the option of setting minimum standards. This so-called "floor preemption" is rarely controversial among public health supporters.