

Law and the Public's Health

Research documents that curbing tobacco sales to adolescents through “under 21” laws represents an effective deterrent to smoking in adulthood. Despite the evidence, enacting such laws is complex and challenging, as this installment of *Law and the Public's Health* discusses. This article was published on January 14, 2016, at www.publichealthreports.org.

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RAISING THE TOBACCO SALES AGE TO 21: SURVEYING THE LEGAL LANDSCAPE

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Increasing the minimum tobacco sales age to 21 is quickly emerging as a promising approach for reducing tobacco use among young people.^{1,2} Since 2013, more than 100 U.S. cities and towns have passed laws setting 21 as the minimum age for purchasing tobacco products (“Tobacco 21” laws).³ As then-Mayor Michael Bloomberg explained when he signed New York City’s Tobacco 21 law in 2013, these laws are effective because they “prevent young people from experimenting with tobacco when they are most likely to become addicted.”⁴

In 2015, the Institute of Medicine published a report concluding that raising the minimum tobacco sales age to 21 nationwide would reduce smoking initiation by 25% among 15- to 17-year-olds and by 15% among 18- to 20-year-olds. This reduction in smoking initiation would lead to nearly 250,000 fewer premature deaths among those born from 2000 to 2019.⁵ Other models have similarly predicted that Tobacco 21 laws would significantly increase overall life expectancy while simultaneously reducing health-care costs.^{6,7}

Despite the potential public health benefits of Tobacco 21 laws, communities must examine several legal considerations before adopting such a law. This column briefly provides some background on Tobacco 21 laws before surveying the relevant legal landscape and offering some policy recommendations.

PUBLIC HEALTH IMPACT OF TOBACCO 21 LAWS

In 2005, the Boston, Massachusetts, suburb of Needham became the first community in the United States to increase the minimum age for tobacco purchases from 18 to 21. The results were dramatic. As reported by Kessel

Schneider and colleagues in 2015, the rate of smoking among high school students in Needham decreased by nearly 50% from 2006 to 2010 (from 13% to 7%). By contrast, in the surrounding communities that did not raise the minimum purchase age, tobacco use declined by a much smaller percentage (from 15% to 12%).²

What accounts for these remarkable results? Opponents of Tobacco 21 laws have argued that most teens do not purchase their cigarettes from stores; as such, increasing the purchase age would have little effect. However, this argument misses a key point: the minority of adolescents who *do* purchase cigarettes from stores then serve as the primary source of tobacco for other young people.⁸ Most middle- and high school smokers either get cigarettes from a peer or give someone money to purchase cigarettes for them.⁹ Tobacco 21 laws put legal purchasers outside the social circle of most high school students. The laws also make it more difficult for 16- and 17-year-olds to pass as legal purchasers and then serve as social suppliers to their friends. Kessel Schneider and colleagues suggest that these effects likely account for the results seen in Needham. They found that the law in Needham both reduced underage purchases and disrupted the “social availability” of cigarettes to young people who might otherwise have experimented with tobacco use.²

Tobacco 21 laws are also important because adolescents are particularly vulnerable to long-term neurological harm from nicotine use. As the Surgeon General has explained, when a still-developing brain is exposed to nicotine, it is reshaped “in a way that introduces long-lasting vulnerability of addiction to nicotine and other substances of abuse.”¹⁰ Consequently, adolescent tobacco use leads to heavier daily consumption, stronger nicotine addiction, and more difficulty quitting tobacco use later in life.^{11,12} By contrast, if smoking initiation can be delayed beyond the adolescent years, it is far less likely to ever occur.¹³ An internal tobacco industry document from the 1980s

summarized, “If a man has never smoked by age 18, the odds are three-to-one he never will. By age 21, the odds are twenty-to-one.”¹⁴

THE LEGAL LANDSCAPE FOR TOBACCO 21 LAWS

Although tobacco retail organizations have been vocally opposed to Tobacco 21 laws, no lawsuits to date have been filed to challenge any such laws. Few, if any, federal legal grounds are available upon which the tobacco industry or its allies could support a lawsuit. The relevant federal statute, the Family Smoking Prevention and Tobacco Control Act, clearly provides that state and local governments can regulate tobacco sales, including by increasing the minimum age of purchase. Thus, although the law prohibits the U.S. Food and Drug Administration from setting a national minimum sales age higher than 18, it does not limit the ability of state and local authorities to raise the minimum age in their own jurisdictions.¹⁵

Additionally, Tobacco 21 laws do not raise any potential First Amendment issues, unlike laws restricting tobacco advertising or marketing. The First Amendment has become a favored legal tool of the tobacco industry, and numerous tobacco-related laws have been struck down on First Amendment grounds.¹⁶ However, because Tobacco 21 laws regulate commercial transactions and not advertising or other communicative conduct that could be classified as speech, they are not vulnerable to First Amendment challenges.

Several potential legal barriers exist, however, of which state-level preemption is probably the most important. Preemption is the legal doctrine by which “higher” levels of government can block “lower” levels of government from enacting more stringent measures (i.e., the federal government can preempt state and local laws, and state governments can preempt local laws).¹⁷ Because local jurisdictions derive their powers from state law, state governments possess the ability to limit the legal authority of local jurisdictions.

My colleagues and I surveyed the law in all 50 U.S. states in the summer of 2014 to determine whether each state’s code expressly preempted local Tobacco 21 ordinances. “Express preemption” refers to an explicit statement in state law denying local governments the authority to regulate in a particular area. Our survey found 19 states in which Tobacco 21 laws appear to be expressly preempted by state law. In eight other states, local laws more stringent than the state laws are expressly permitted (“express non-preemption”). The remaining 23 states did not have any statement about preemption in their code (Table).

Table. State law preemption of local Tobacco 21 ordinances, 2014

State	Express preemption ^a	Expressly not preempted ^b	No apparent preemption
Alabama			X
Alaska			X
Arizona			X
Arkansas			X
California	X		
Colorado		X	
Connecticut			X
Delaware	X		
Florida			X
Georgia			X
Hawaii ^b			X
Idaho		X	
Illinois			X
Indiana	X		
Iowa	X		
Kansas			X
Kentucky	X		
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Michigan			X
Minnesota		X	
Mississippi	X		
Missouri		X	
Montana	X		
Nebraska			X
Nevada	X		
New Hampshire		X	
New Jersey			X
New Mexico	X		
New York			X
North Carolina	X		
North Dakota		X	
Ohio			X
Oklahoma	X		
Oregon			X
Pennsylvania	X		
Rhode Island			X
South Carolina	X		
South Dakota	X		
Tennessee	X		
Texas		X	
Utah			X
Vermont			X
Virginia			X
Washington	X		
West Virginia			X
Wisconsin	X		
Wyoming	X		

^a“Express preemption” refers to an explicit statement in the state code denying local governments the authority to enact ordinances raising the minimum tobacco sales age higher than the age set by state law. “Expressly non-preempted” refers to an explicit statement in the state code permitting local governments to enact ordinances restricting tobacco sales that are more stringent than state law.

^bHawaii is the only state with a statewide Tobacco 21 law. The law prohibits tobacco sales, including e-cigarette sales, to anyone younger than 21 years of age, and took effect on January 1, 2016.

These results suggest that state-level preemption may pose a barrier to Tobacco 21 policies in numerous states. However, the results should be interpreted with caution because state statutes are not always clear and may be subject to multiple interpretations. For example, California's penal code, which prohibits tobacco sales to people younger than 18 years of age, states that "a city [or] county . . . shall not adopt any ordinance or regulation inconsistent with this statute."¹⁸ Although we identified California as expressly preempted, it is debatable whether or not a higher local age limit is in fact inconsistent with a law setting 18 as the minimum age for tobacco sales. One could argue that Tobacco 21 laws are consistent with the state's law because they further its purpose of reducing tobacco use in young people. Additionally, whether or not the preemption section of the penal code applies only to penal laws is ambiguous. Some case law supports the argument that a higher minimum sales age could be incorporated into a licensing law that includes only civil penalties for violations.¹⁹

Therefore, one should not assume that enactment of Tobacco 21 laws is impossible in the 19 states we identified as expressly preempted. However, public health advocates in these states should realize that state-level preemption may well pose a barrier, and they should consult with attorneys who are knowledgeable about their home state's tobacco laws before launching any Tobacco 21 advocacy efforts.

If a state is not listed as expressly preempted, it is far more likely that Tobacco 21 ordinances can be enacted at the local level. Our survey of state code provisions, however, was limited to an analysis of express preemption provisions and did not consider two other legal issues that might come into play.

First, the doctrine of "implied preemption" provides that if a state comprehensively regulates a subject area, it may be said to "occupy the field" and leave no room for local regulation on the same subject, even without an express statement of preemption.^{20,21} For example, a 2013 decision by Maryland's highest court found that a local law setting a minimum package size for cigars was preempted because the state legislature had "occupie[d] the field of regulating the packaging and sale of tobacco products."²² Second, a number of states apply "Dillon's Rule," under which local governments are limited to those powers expressly provided in state law.²³ (Most states apply the opposite rule: local government can regulate on any subject unless prohibited by state law.) In a state such as Vermont that applies Dillon's Rule, local governments may not possess the authority to enact Tobacco 21 ordinances. Thus, even in a state not identified as expressly preempted,

consultation with an attorney familiar with state law should be a first step in any Tobacco 21 advocacy efforts.

MOVING FORWARD: ADDRESSING THE CHALLENGE OF STATE-LEVEL PREEMPTION

As with most tobacco control efforts, Tobacco 21 advocacy has been bottom-up, prioritizing policy change at the local level before building toward statewide laws. The reason for this strategy is simple: the tobacco industry and its allies tend to have far more sway with state legislators than they do with local elected officials. As Givel and Glantz summarized, "This insider political power [means] that the tobacco lobby prefers to lobby at the state level, rather than the local level where it loses many political battles. Local venues are often better for public health, because it is much harder for the tobacco lobby to [mobilize] and defeat a myriad of geographically diverse local anti-smoking campaigns."²⁴

Accordingly, preserving and expanding local authority should be an important priority for advocates interested in supporting Tobacco 21 efforts. Because the tobacco industry knows that its influence is greater at the state level, it has often sought to slip preemptive language into state legislation.²⁵ Identifying these efforts and preventing the enactment of new preemptive laws should remain a key policy objective. In states where local Tobacco 21 efforts are currently preempted, advocates should work with state legislators to introduce laws to overturn that preemption. Advocates are currently pursuing this strategy in California, where the California Medical Association is leading the effort to remove preemptive language from the state code and clarify the authority of municipalities to enact Tobacco 21 laws.²⁶

The complex legal landscape outlined in this article also highlights the need for well-informed and well-funded public health attorneys who can help communities identify potential legal barriers to Tobacco 21 laws, draft ordinances that stand the best chance of withstanding legal review, and provide legal assistance if Tobacco 21 laws are challenged in court. The Network for Public Health Law (<https://www.networkforphl.org>) and the Public Health Law Center (<http://www.publichealthlawcenter.org>) are available to provide some such support, but more resources are needed, particularly to provide litigation support. Bloomberg Philanthropies and the Bill & Melinda Gates Foundation recently joined forces to fund an Anti-Tobacco Trade Litigation Fund that will help other countries defend tobacco control laws against international trade challenges brought by the tobacco industry.²⁷ A similar public health litigation fund is needed in the

United States to help smaller localities fend off legal challenges from the tobacco industry and other industries that oppose public health regulations. Although Tobacco 21 laws have not yet been challenged in court, it is only a matter of time before that occurs. Retail organizations with connections to the tobacco industry have begun to threaten lawsuits, and these threats have led at least one small city to suspend enforcement of its Tobacco 21 law rather than face the unaffordable costs of litigation.²⁸

CONCLUSION

Tobacco 21 laws been referred to as the next logical step for tobacco control, and the evidence supporting this policy intervention is expanding rapidly.¹ Local Tobacco 21 laws are not preempted by federal law, but local policy makers and advocates need to examine issues of state-law preemption when considering how to enact Tobacco 21 laws. Communities interested in pursuing these lifesaving policies should seek legal support to clarify the authority of local governments in their state before moving forward.

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