

State Preemption of Commercial Tobacco Regulations: Impact in Washington State

LOCAL CONTROL + PREEMPTION

The CDC and the greater public health community recommend that state law serve as a minimum standard for commercial tobacco regulation,* permitting localities to implement more protective regulations as appropriate for their communities.¹

- Preemption limits local governments' ability to enact local policies to protect the health of their residents. Washington state currently preempts most local government action to prevent and control use of commercial tobacco.
- Progress in commercial tobacco prevention and control has consistently relied on the groundwork laid by local efforts. Best-practice policies adopted by the state have frequently originated at the local level.
- Including a "savings clause" in policy language avoids issues of implied preemption and ensures that the state law is the floor for commercial tobacco control regulations, rather than the ceiling.¹

THE FACTS ABOUT LOCAL CONTROL

Washington is one of only two states in the country with preemption in four main policy areas of commercial tobacco control (advertising, licensure, smoke-free indoor air, and youth access).² This has prevented localities from adopting local policies to address pervasive and emerging commercial tobacco related issues plaguing their communities, such as the dramatic rise in nicotine use and addiction among youth from highly concentrated e-cigarettes.

Federal laws and courts have consistently stated that lower levels of government have the authority to regulate most areas of commercial tobacco control and to impose more stringent requirements.³ Over half of US states have enacted laws explicitly allowing cities and counties to adopt commercial tobacco laws more protective than the state's minimum standards.⁴

**Commercial tobacco includes any product that contains tobacco and/or nicotine, such as cigarettes, cigars, electronic cigarettes, hookah, pipes, smokeless tobacco, heated tobacco, and other oral nicotine products. Commercial tobacco does not include FDA-approved nicotine replacement therapies.*

To request this document in another format, call 1-800-525-0127. Deaf or hard of hearing customers, please call 711 (Washington Relay) or email civil.rights@doh.wa.gov.

IMPACT ON YOUTH + VULNERABLE COMMUNITIES

Continuing to restrict local policymaking through state-level preemption will further the health disparities that have emerged these past decades, as well as lead to increased nicotine addiction among our state's youth. With nearly one in three high school students using e-cigarettes, there is a youth addiction crisis in Washington. Certain communities suffer even greater adverse impacts when state-level preemption policies are in place, as commercial tobacco-related health impacts disproportionately burden lower-income, rural, LGBTQ+, and communities of color.

HOLES IN FEDERAL + STATE EFFORTS

The Federal 2009 Family Smoking Prevention and Tobacco Control Act only banned characterizing flavors in cigarettes.⁵ The act exempted menthol from all flavor restrictions, and it did not restrict flavors in other tobacco products or e-cigarettes.^{6,7} Furthermore, the FDA's recent prioritized enforcement efforts pertain only to certain types of flavored e-cigarettes. As a result, and without state regulations enacted to restrict the sale of flavored e-cigarettes, the commercial tobacco industry continues to target Washington youth and other vulnerable populations with menthol and other flavored e-cigarettes, little cigars, hookah, cigarillos, heated tobacco products, and other emerging products.

WHAT OTHER STATES AND LOCALITIES ARE DOING

California, Massachusetts, New Jersey, Rhode Island, New York, and more than 300 localities including San Francisco, Chicago, Boston, Minneapolis, and New York City have already passed restrictions on the sale of flavored tobacco and/or e-cigarettes.⁸

More than 110 of these localities restrict the sale of menthol cigarettes, in addition to other flavored tobacco products. Additional policies that localities are adopting include:

- Local licensing of commercial tobacco retailers
- Restricting commercial tobacco retailers from operating near schools
- Prohibiting commercial tobacco sales in pharmacies, as commercial tobacco is antithetical to promoting health
- Closing the loophole of discount tactics (coupons, price promotions) that undercut public health interventions
- Establishing the selling of minimum pack sizes for cigars, little cigars, and cigarillos

WHAT CAN BE DONE IN WASHINGTON STATE

The following actions would ensure that state regulations serve as the minimum standard, permitting localities to adopt more protective policies as appropriate for their communities:

- Repeal explicit state-level preemption in certain policy areas to allow for appropriate local regulation of commercial tobacco.
- Expressly enable the passage of local policies to address commercial tobacco issues facing their communities, while maintaining a statewide minimum standard.

RESTRICTING LOCAL POLICYMAKING THROUGH STATE-LEVEL PREEMPTION PERPETUATES HEALTH DISPARITIES AND LEADS TO INCREASED NICOTINE ADDICTION AMONG WASHINGTON'S YOUTH.

references:

1. <https://chronicdata.cdc.gov/Legislation/STATE-System-Preemption-Fact-Sheet/uu8y-j6ga>; <https://www.publichealthlawcenter.org/sites/default/files/resources/Untangling-the-Preemption-Doctrine-in-Tobacco-Control-2018.pdf>
2. <https://chronicdata.cdc.gov/Legislation/STATE-System-Preemption-Fact-Sheet/uu8y-j6ga>
3. <https://www.cdph.ca.gov/Programs/CCDPPP/DCDIC/CTCB/CDPH%20Document%20Library/Policy/FlavoredTobaccoAndMenthol/FinalWellingtonFocusOnFlavors.pdf>, <https://publichealthlawcenter.org/sites/default/files/resources/tclc-fda-impact.pdf>
4. <https://www.changelabsolutions.org/product/preemption-public-health>
5. <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-deemingreg-state-and-local-regulation-2016.pdf>
6. https://www.tobaccofreekids.org/media/2020/2020_01_15_what-isnt-covered
7. <https://www.fda.gov/news-events/press-announcements/fda-notifies-companies-including-puff-bar-remove-flavored-disposable-e-cigarettes-and-youth>
8. <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>