

Hot Topics: Smoking Regulations

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Smoking Bans/Tobacco Regulations



Hotter Topics

- Rollback of Federal Preemption & Local Tobacco Regulation of:
 - Sales
 - Promotions
 - Locations of Advertising

Federal Tobacco Legislation & Preemption



Federal Tobacco Legislation & Preemption



- 1964 Report of the Surgeon General's Advisory Committee on Smoking and Health

Federal Tobacco Legislation & Preemption

- Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA)



Federal Tobacco Legislation & Preemption

- If packages complied with the Act, no other messages based on smoking or health could be required under state or local law.
- Preempted state or local regulations “*based on smoking and health*” concerning “the advertising or promotion of any cigarettes” that complied with law.
- Content and location of advertising preempted, local sales and use regulations not. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404 (2001).

Federal Tobacco Legislation & Preemption

- Comprehensive Smokeless Tobacco Health Education Act of 1986
 - Narrower preemption of local regulation of information “*on any package*” and “*in any advertisement.*”
 - Courts suggest local regulation of location of advertising permitted. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520, 112 S. Ct. 2608, 2619 (1992) (plurality).

Federal Tobacco Legislation & Preemption

- In 1994, Food and Drug Administration declared nicotine a drug and asserted control over tobacco products as drug delivery devices.
- In 2000, Supreme Court disagreed. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000).

Federal Tobacco Legislation & Preemption

- Family Smoking Prevention and Tobacco Control Act of 2009
 - Amended FCLAA to allow local regulation of promotion and time, place and manner of advertising if enacted after June 22, 2009.
 - Give FDA authority over cigarettes and tobacco products.

Federal Tobacco Legislation & Preemption

- Family Smoking Prevention and Tobacco Control Act of 2009
 - Allows local regulations prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of or use of tobacco products by individuals of any age.
 - Essentially, except for content, packaging and labeling of products and content of advertising, local governments have regained broad authority.

Family Smoking Prevention and Tobacco Control Act of 2009: WHY?

- Think of the Children!!!



Sales Restrictions

- Pending case: *U.S. Smokeless Tobacco Manufacturing Co., L.L.C. v. City of New York*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010)
 - New York enacted a ban on sales of flavored tobacco, except in certain limited tobacco stores.
 - Manufacturer argued preemption because regulation of flavored tobacco was regulation of content.
 - Court held preemption provision in Tobacco Control Act carved out local sales or distribution regulations.
 - Preliminary injunction ruling, motions for summary judgment pending.

Sales Restrictions

- School proximity sales bans.
- San Francisco's ban of tobacco sales at pharmacies.
- *Phillip Morris USA v. City and County of San Francisco*, No. C 08-04482 CW, 2008 WL 5130460 (N.D. Cal. 2008).

Free Sample Distribution

- *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010).
 - Challenge to FDA regulations.
 - “Act’s ban on free samples clearly regulates the distribution of a product, not speech.”
 - No First Amendment implications for free sample bans?
 - Unsettled

Free Sample Distribution



- The Sirens of Snus

Advertising Issues

- *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404 (2001).
 - State ban of outdoor cigarette advertising within 1,000 feet of schools and playgrounds.
 - Court held no narrow tailoring because state-wide ban could not consider disparate effects of bans in urban areas.

Questions?

