

Preemption Repeal

Art 37 NM Tobacco Products Act



PREVENTING TOBACCO ADDICTION FOUNDATION

TOBACCO
~~eighteen~~ twenty-one

N M A C T

New Mexico Allied Council on Tobacco

2022 New Mexico Allied
Council on Tobacco



2022 New Mexico Allied Council on Tobacco

[24/7 New Mexico](#)

[American Heart Association](#)

[Ben Archer Health Centers](#)

[Children in Need of Services \(CHINS\)](#)

[Evolverment \(youth program\)](#)

[Keres Consulting, Inc.](#)

[NM Asian Family Center](#)

[No Minor Sale](#)

[Nuestra Salud](#)

[Poston & Associates](#)

[San Juan County Partnership](#)

[Southwest Tribal Epidemiology Center](#)

[UNM Office of Substance Use](#)

[New Mexico School Based Health Centers](#)

[New Mexico African American Tobacco Prevention](#)

[Network](#)

[American Cancer Society](#)

[American Lung Association](#)

[Cancer Support Now](#)

[CHINS Tobacco Prevention Specialist](#)

[Concilio CDS](#)

[Disability Advisory Group About Tobacco](#)

[Transgender Resource Center of NM](#)

[New Mexico Cancer Center](#)

[NM Public Health Association](#)

[Office of Substance Abuse Prevention/FDA](#)

[Pueblo of Acoma](#)

[Santa Fe Public Schools](#)

[Transgender Resource Center of NM](#)

[UNM Prevention Research Center / UNM HEART](#)

[Umoja Behavioral Health PC](#)

[YMCA of El Paso](#)

[American Cancer Society Cancer Action Network](#)

[American Nonsmokers' Rights Foundation](#)

[Carlsbad Community Anti-Drug/Gang Coalition](#)

[Chronic Disease Prevention Council](#)

[COSAP Program at UNM](#)

[DOH/Comprehensive Cancer Program](#)

[HealthInsight New Mexico](#)

[Heal+NM \(Health Equity Alliance for LGBTQ+ New Mexicans\)](#)

[New Mexico State University](#)

[NMDOH/TUPAC](#)

[Oso Vista Ranch Project](#)

[Preventing Tobacco Addiction Foundation / Tobacco 21](#)

[Rescue](#)

[Santa Fe Recovery](#)

[University of Wyoming](#)

[Youth Development Inc.](#)

PREEMPTION AND TOBACCO CONTROL POLICIES

In 2011, the Institute of Medicine asserted federal & state gov should avoid preempting public health policies with “ceiling” preemption. (Restricting local authority to act beyond the state law.) ¹



Feds and states should set minimum requirements (“floor preemption”) to allow localities to provide additional health protections.



- Local governments address health and social disparities caused by inequities not present or obvious at state level.
- Positive health / financial outcomes for state and local governments
- Collaborative state and local efforts to effectuate mutual health outcome objectives; policy change; social norm development

NEW MEXICO NM Stat § 61-37-4 (2021) ARTICLE 37 Tobacco Products Act



ARTICLE 37 Tobacco Products Act

§ 61-37-24. Preemption.

When a municipality or county, including a home rule municipality or an urban county, adopts an ordinance, charter amendment or regulation pertaining to the sales of tobacco products, the ordinance, charter amendment or regulation shall be consistent with the provisions of the Tobacco Products Act.

NEW MEXICO NM Stat § 61-37-4 (2021)
ARTICLE 37 Tobacco Products Act

Section 61-37-4

Division; license issuance; manufacture, distribution or sale of tobacco products

**A license shall not be issued, retained, transferred or renewed if:
....{relevant sections provided below}:**

- 1. the location for the license or license transfer is within three hundred feet of a school; provided that this restriction does not apply to a location at which tobacco products have been lawfully manufactured, distributed or sold prior to July 1, 2020; or**
- 2. the location for the license would result in a violation of a zoning or other ordinance of a governing body in which the proposed location would exist.**

Evidence-Based Point-of-Sale Policies to Reduce Youth Tobacco Use

POTENTIAL LOCAL TOBACCO CONTROL ORDINANCES

1. Raising the MLSA to 21 (Local T21) / Youth Access Restrictions
2. Local Tobacco Retail Licensing (TRL)
3. Tobacco Retailer Density
 - number of retailers per specific pop density or
 - distance from one tobacco retailer to one another)
 - Reg number of tobacco retail licenses issued; cap or reduction over time
4. Proximity of tobacco retailers to schools (>300ft) / Buffer zones residential areas, other youth oriented facilities.
5. Marketing Regulations
6. Pricing / Tax Provisions

LOCAL T21 ORDINANCES

TOBACCO
~~eighteen~~ twenty-one

- T21 laws associated with lower likelihood of smoking participation (16 -17yr), lower probabilities of smoking intentions among students (11–18), lower likelihood of daily smoking (18 to 20yrs).
- Associated with decreases in cigarette sales, particularly for brands disproportionately used by those under 21.
- Associated with lower likelihoods of youth purchasing tobacco,
- ❖ T21 laws might not only reduce youth smoking, but have shown potential to decrease smoking disparities, and thus downstream health disparities, with respect to SES and race/ethnicity.
- State and local T21 policies provide state agencies assistance with enforcement to maintain Sonar compliance.

SAMHSA
Substance Abuse and Mental Health
Services Administration

LOCAL TOBACCO RETAIL LICENSING (TRL)



- State and local TRL policies provide state agencies with greater control over enforcement activities to maintain compliance with Synar provisions. (\$\$\$)
- Provides record of number of active tobacco retailers
- Supplements state compliance efforts – effectuates mutual health policy objective and creates distribution of resources. (Compliance/Enforcement Sustainable Funding)
- Tobacco Retailer Density and Proximity to Schools/Youth-Oriented Facilities

POINT OF SALE FOR TOBACCO POLICIES MARKETING



MARKETING

- Exposure to tobacco advertising and promotions the POS associated with increased youth tobacco use.
- Among adolescents who do not smoke, increased exposure to tobacco industry advertising and price promotions is associated with increased susceptibility to smoking during adolescence and increased smoking behavior later in life.
- The tobacco industry targets advertising and promotional efforts toward historically marginalized groups.



POINT OF SALE FOR TOBACCO POLICIES

PRICING REGULATIONS



PRICING REGULATIONS

Examples:

- 1. Providence, RI:** Restricted discounting of tobacco products & banned multipack offers (e.g., “buy-one get-one”)
- 2. New York:** Barred tobacco retailers from offering or redeeming price discounts for tobacco /vapor products & prohibited exterior tobacco advertisements within 1500 feet of schools (500 feet in NYC).
- 3. St. Paul, MN:** comprehensive prohibition on price discounting on all tobacco products, including vape products

PREEMPTION REPEAL UNDER THE TPA

Clarification

(§61-37-24)

When a municipalityadopts an ordinance...pertaining to the sales of tobacco products, the ordinance, ...shall be consistent with the provisions of the Tobacco Products Act. (§61-37-24)

(§61-37-4)

A license shall not be issued, retained, transferred or renewed if:

1. the location for the license or license transfer is within three hundred feet of a school; provided that this restriction does not apply to a location at which tobacco products have been lawfully manufactured, distributed or sold prior to July 1, 2020; or
2. the location for the license would result in a violation of a zoning or other ordinance of a governing body in which the proposed location would exist

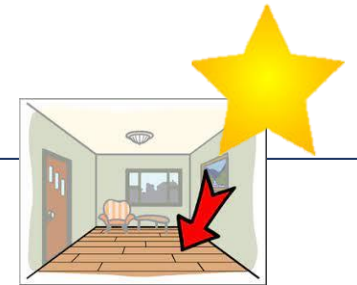
What is the THRESHOLD?

- NM Statutes and caselaw is silent
- No prior or existing challenge from the state against a local municipality under the TPA
 - Clarification/resolution can come from Judiciary or Legislature

PREEMPTION REPEAL UNDER THE TPA OPTIONS

EXPLICIT NONPREEMPTION / PRESERVATION OF LOCAL AUTHORITY:

Nothing in state law shall be construed to limit a local jurisdiction from licensing tobacco retail establishments or regulating tobacco products or more stringently than state law. Notwithstanding any other law to the contrary, a local jurisdiction may adopt and enforce ordinances and regulations related to tobacco retail establishments and tobacco products if the ordinance or regulation is at least as stringent as those of the Tobacco Products Act.



PREEMPTION REPEAL UNDER THE TPA OPTIONS



ENUMERATION OF LOCAL AUTHORITY

Nothing in state law shall be construed to limit a local jurisdiction from licensing tobacco retail establishments or regulating tobacco products or more stringently than state law, with the following exceptions:

- Ex: Raising the MLSA above 21; enacting local taxes

Challenges to Enumeration of Local Restrictions/Allowances under Preemption:

- Difficult to enumerate all potential local authority allowances
- Lists, can be interpreted as prescriptive; unintentionally stratifying or creating ambiguity for local authorities

Possible Resolution:

- Broad construction of preemption repeal (floor preemption)
- Legislature produce a guidance document / committee note accompanying amendment to the TPA



Tobacco companies and retailers use price promotions to negate the impact of small tax increases. These effects tend to cancel out any public health benefits from the tax increase.

While a small increase in tobacco taxes will generate some revenue for the state, it will have a minimal impact on reducing smoking.

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