

Federal Preemption & HR 4040

Allyson Zipp, AAG Ecology Division

Today's Topics

- **Overview of federal preemption**
- **Preemption framework of HR 4040**

What Is “Preemption”?

- U.S. Constitution’s Supremacy Clause
- Federalism: balance of federal/state power

“Federal preemption”

federal law prevents a state from enacting or enforcing a state law or rule that conflicts with the operation of a federal law or rule.

Legal Analysis of Preemption

- What did **Congress intend?**
- Preemption can be **express** or **implied**
 - **Express:** Congress explicitly states the federal law shall be controlling over state laws
 - **Implied:** court decides federal law is controlling over state laws, although Congress did not say so explicitly

Implied Preemption

- Two categories:
 - **Conflict preemption:** court determines federal and state laws “actually conflict”
 - **Field preemption:** court determines Congress intended federal action to comprehensively “occupy a field” of law

Federal Preemption

- Federal law prevents a state from enacting or enforcing a state law or rule that conflicts with the operation of federal law or rule.
- **Types** of preemption:
 - **Express** preemption
 - **Implied** preemption (**Conflict** or **Field**)

Today's Topics

- Overview of federal preemption
- **Preemption framework of HR 4040**

Federal Statutory Structure

**Consumer Product Safety Act
(CPSA)**

**Consumer Product Safety
Improvement Act of 2008
(CPSIA)**

**Federal Hazardous
Substances Act
(FHSA)**

Explicit Preemption Language

CPSA
Explicit
Preemption
Language

CPSIA
Explicit
Preemption
Language

FHSA
Explicit
Preemption
Language

Express Preemption Framework

Whenever a **federal standard** is **in effect and applies to a risk** of injury associated with a product or substance, **no State may establish or continue in effect any safety standard** designed to deal with the same risk of injury **unless** it is **identical to the federal standard**.

Express Preemption Framework

IF Federal standard is:

in effect *and*

applies to a particular risk of injury

AND State standard **deals with same risk**

THEN State standard is **preempted**

UNLESS **identical** to federal standard

Exemption from Preemption

Upon application of a State, the Consumer Product Safety Commission may **exempt from preemption** a State safety standard designed to deal with the same risk of injury as a federal standard **if** the State standard provides a **significantly higher degree of protection** from the risk, and **does not unduly burden interstate commerce**.

Exemption from Preemption

State standard may receive exemption from preemption

IF

Provides **significantly higher degree of protection,**

AND

Does not unduly burden interstate commerce.

Standard-Specific Savings Clauses

Cadmium Savings Clause

State standard that deals with same risk of injury as section 106 standard is **not preempted**

IF

state standard was **in effect** before HR 4040 was enacted (August 14, 2008).

Standard-Specific Savings Clauses

Phthalates Savings Clause

State may regulate **any phthalate alternative not specifically regulated** in a federal standard.

A “phthalate alternative” means:

- any common substitute to a phthalate,
- alternative material to a phthalate, or
- alternative plasticizer.

Express Preemption Framework

IF Federal standard is:

- **in effect** *and*
- **applies to a particular risk of injury**

AND State standard **deals with same risk**

THEN State standard is **preempted**

UNLESS **identical** to federal standard

Implied Preemption

Two categories:

- **Conflict preemption:** court determines federal and state laws “actually conflict”
- **Field preemption:** court determines Congress intended federal action to comprehensively “occupy a field” of law

Questions?