

Jennifer L. Pomeranz, JD, MPH
Director of Legal Initiatives



RUDD CENTER

**FOR FOOD POLICY
& OBESITY**



Yale University

www.YaleRuddCenter.org



Preemption: The Long- and Short- [Term] of It

Using Law, Policy, and Research to Improve the Public's Health

Atlanta, Georgia

September 14, 2010



YALE RUDD CENTER
FOR FOOD POLICY & OBESITY



**Courageous states
(and locales) can serve as
laboratories to try novel
social and economic
policies...**

Justice Brandeis, *New State Ice Co. v. Liebmann* (1932).



YALE RUDD CENTER
FOR FOOD POLICY & OBESITY

From the Family Meal to the Combo Meal



New York City = Courageous!

- Sued by NYSRA
- First Amendment, Preemption
- FDA weighed in
- Success in court



S

6" Sub
Wrap
3.92
3.92
.15
.15
.47
.47



HOT & *fresh* TOASTED

Subs From The Oven!

Cal		6" Sub or Wrap
560	Meatball Marinara	3.92
450	Italian B.M.T.* 	4.15
480	Spicy Italian	4.15
400	Steak & Cheese 	4.47
380	Subway Melt* 	4.42
580	Chicken & Bacon Ranch	4.65

Hungrier? Make it a FOOTLONG! Only 2.81 More Plus Tax



Cal	
330	DOU TURK
420	DOU SUBV
480	DOU Swe Chic

*DOUBLE refers to...

State and Local Menu Labeling

- New York City
- King County, WA
- Philadelphia
- Westchester County, NY
- California (preempting all local laws)
- Massachusetts
- many more...



State Preemption

- GA and UT preempted all local menu labeling laws in 2008, 2009, respectively
 - Both states have “Commonsense Consumption Acts”
- TN preempted non-elected bodies (i.e., boards of health)
 - Nashville/Davidson County
 - February 2010 overrode Governor’s veto



Federal Menu Label Law

- 20 + locations and vending machines
- Calories on: menus, menu boards, drive-thrus, self-service areas, internet menus if used for take-out
- Anchor statement (e.g. ~2000 calories)
- Other nutrition information available
- **Preempts most state and local laws**



Federal Preemption

- Preempts laws “not identical to” federal
- Language from original NLEA
- Opt-in provision
- Any state/local vending machine law
- Freezes progress (i.e., sodium)



Not Preempted

- State/local laws applying to non-chain restaurants (< 20 units)
- Health warnings
- Georgia, Utah, Tennessee preemption provisions intact
- States/locales can petition FDA for an exemption



Federal Government

- Compromise
- FDA pushing opt-in
- August 2010 Guidance
 - Still not clear what is an “identical” law
- Final Guidance expected 12/10



Industry in Favor of Preemption

- Uniformity
- Expensive
- Challenging
- Limits consumer choice
- Obesity: no proven cause/cure
- Inconsistent patchwork cannot solve



Menu Boards Vary by Location, Space and Time

- Breakfast, Lunch/Dinner
- Picture or Text
- Deals (\$ Menu), Regular Menu
- Truck Stop, Airport
- Sit-Down, Drive-Thru
- Fast food executives believe customers want menu changes



Health Codes Vary by State and County

- Employee Hygiene
- Restaurant Inspections
- Facilities and Surfaces Cleaning
- Food Handling, Storage and Preparation
- Equipment and Supplies



Franchising.com

“Pre-emption Of State And Local Menu Labeling Laws Good News For Franchise Restaurants”

March 2010



YALE RUDD CENTER
FOR FOOD POLICY & OBESITY

ONE SIZE DOES NOT FIT ALL



(Los Angeles)



Future Preemption Concerns

- Child Nutrition Reauthorization
- Concentrated Animal Feeding Operations
- Alcohol
- Firearms
- Etc...

In Conclusion

- What are you giving away?
- Freezing progress
 - Society progresses
 - Science evolves
- Deflating grassroots movements



Thank you!

jennifer.pomeranz@yale.edu



YALE RUDD CENTER
FOR FOOD POLICY & OBESITY