

What is Preempted and Not Preempted under the Frank R. Lautenberg Chemical Safety for the 21st Century Act

General

Preemption of state authority applies only on a chemical-specific basis; that is, only when EPA is acting on a specific chemical is there any preemptive effect, and the preemption is limited to that chemical.

All state actions taken before April 22 of this year are preserved, as well as past and future actions taken under laws in effect on August 31, 2003, an indirect way of preserving California's Proposition 65 warning/labeling law and Massachusetts' Toxics Use Reduction Act.

Final actions on a chemical by EPA generally preempt states' restrictions on that same chemical, including both when EPA finds that a chemical "does not present an unreasonable risk" and when it finds such risk and issues a regulation imposing restrictions.

These final actions preempt both past state actions (unless grandfathered-in) and future state actions, unless the action taken by the state:

- is identical to the Federal requirement;
- is adopted under the authority of a federal law; or
- is adopted under a state air or water quality or waste treatment or disposal law.

Scope

The scope of any preemption is matched to the scope of EPA's action on a chemical, leaving states free to act on uses or risks of a chemical that EPA did not consider in its review.

Where there is preemption, it applies only to state restrictions on a chemical, and never to other requirements states might impose, such as reporting, monitoring or disclosure.

Preemption only ensues from EPA actions on chemicals already in use, and never to EPA decisions or actions taken on new chemicals just entering the market. Note that about 700 new chemicals enter the market each year.

Pause Preemption

EPA's initiation of a review of a high-priority chemical generally preempts states from imposing *new* restrictions during the review period except via a waiver (see below), but only if those restrictions apply to uses and risks EPA is considering in its review. This "pause preemption" would start at the point

when EPA has defined the scope of its risk evaluation for that chemical. EPA must provide at least 1 year between when it identifies a chemical for prioritization and when the scope of the associated risk evaluation is published, which provides a window during which states could still act to restrict that chemical, before the pause begins.

This pause preemption lifts once EPA issues its final risk evaluation or misses its deadline for doing so. The pause period is a maximum of 2.5 – 3.5 years. In addition, the first 10 chemicals EPA selects for risk evaluations, and any chemical a company requests EPA to review, are not subject to pause preemption.

Once EPA issues its final risk evaluation: If EPA finds the chemical does not present an unreasonable risk, final preemption would apply; or if EPA finds the chemical does present an unreasonable risk, states could again impose new restrictions while EPA develops its requisite regulation.

Waivers during pause

States can readily get a waiver to act during the pause, subject to meeting conditions that are largely those [dictated by the U.S. Constitution](#). In addition, administrative actions to restrict a chemical that a state had initiated prior to the pause can be completed and enforced during the pause pursuant to a waiver.

Any action a state takes to restrict a chemical during the pause would be preempted once EPA takes final action at most a few years later. This means that the number of such actions taken is likely to be limited, but the waivers provide states with the ability to act if they believe they need to.

If EPA misses its deadline for deciding on a state waiver application, the waiver is automatically approved.

Waivers after final EPA action

More stringent conditions apply to EPA's granting of a waiver to a state to restrict a chemical following final EPA action on that chemical than were the case under current TSCA. In contrast to current TSCA, however, there is a mandate and a deadline for EPA to decide on any waiver request. If EPA misses the deadline, a state or any other person can challenge EPA in court for its failure to perform a mandatory duty. If EPA denies a waiver, the state can sue EPA to try to get the denial overturned. If EPA grants a waiver, any person could challenge the decision to try to get the granting of the waiver overturned.