Federal and State Preemption Basics:
What Every Drafter Ought to Know

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July 12, 2016

Presentation Road Map

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Federal Preemption of State Law

General Rule

When federal law and state law conflict, federal law preempts state law.
The Supremacy Clause (Article VI, Paragraph 2) of the United States Constitution establishes the primacy of federal law over state law.

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

Preemption may occur regardless of whether the conflicting laws come from:
- Constitutions
- Legislatures
- Administrative agencies
- Courts
Preemption Jurisprudence

- Courts decide whether a federal law preempts a state law based on statutory interpretation.

- When determining whether a federal law preempts a state law, courts look to the intent of Congress.

- When the intent of Congress is unclear, courts prefer an interpretation that avoids preemption.

- This “presumption against preemption” is stronger in certain categories of cases:
  - Cases implicating police powers
  - Cases on matters of public health and safety
  - Tort cases with traditional state law remedies
If the intent of Congress is to preempt, courts ascertain the scope of the preemption.

To the extent that a federal law preempts a state law, the state law is invalid unless the federal law is itself invalid.

Types of Preemption

Congress may indicate preemptive intent through a law’s express language. This is express preemption.

Or, Congress may indicate preemptive intent through a law’s purpose and structure. This is implied preemption.
Express Preemption

- If a federal law contains express preemption language, the question of the scope of the preemption remains.

- Express preemption may occur in three ways:
  - In complete preemption, the federal government completely takes over an area of law.
  - In partial preemption, the federal government and the state share power over an area of law.
  - In contingent preemption, the preemptive effect of a federal law is contingent on certain circumstances.

Implied Preemption

- Implied preemption may occur in two ways:
  - In conflict preemption, a state law conflicts with a federal law.
  - In field preemption, the federal regulatory scheme is so pervasive as to “occupy the field” in an area of law.

- Conflict preemption may occur in two ways:
  - In physical impossibility or actual conflict preemption, it is impossible to comply with both a federal law and a state law.
  - In obstacle preemption, a state law is an obstacle to the accomplishment of Congress’s purposes.
Handling Legislative Draft Requests Involving Federal Preemption

Process Overview

- Prologue: Anticipate on what subjects and in what contexts you may receive draft requests involving federal preemption.

- Step One: Handle the request with political sensitivity.

- Step Two: Determine the requestor's intent vis-à-vis federal law.

- Step Three: Inform the requestor about the potential preemption.

- Step Four: Be prepared for the requestor to want to move forward with the draft as requested.

- Step Five: Be prepared to offer “fixes” to address the potential preemption and include agreed upon provisions in the draft.
Anticipate on what subjects and in what contexts you may receive draft requests involving federal preemption.

Familiarize yourself with the major federal constitutional provisions, statutes, and regulations that may preempt state action in the areas in which you draft.
Some subject areas significantly affected by preemption:
- Transportation (Airlines, Railroads, Etc.)
- Banking, Lending, and Securities
- Consumer Products
- Labor
- Atomic Energy
- Pesticides and Insecticides
- Insurance
- Environment
- Voting and Elections
- Arbitration

Some federal constitutional provisions that preempt state action:
- The Commerce Clause
- Congress’s power to establish uniform naturalization laws
- Congress’s power to establish uniform bankruptcy laws
- The Contract Clause
- Prohibition against states entering treaties
- Prohibition against states coining money
- Prohibition against states imposing tariffs
Some federal statutes that preempt state action:
- Federal Railroad Safety Act
- Dodd-Frank Wall Street Reform and Consumer Protection Act
- Federal Food, Drug, and Cosmetic Act
- Consumer Product Safety Act
- National Labor Relations Act
- Atomic Energy Act
- Federal Insecticide, Fungicide, and Rodenticide Act
- Employee Retirement Income Security Act (ERISA)
- Clean Air Act
- Voting Rights Act
- Federal Arbitration Act

Express preemption language varies among federal statutes.

For example, ERISA establishes exclusive federal jurisdiction over employee pension, health, and other benefit plans offered by private-sector employers.

The statute contains a general "preemption clause":
- "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." (29 U.S.C. Sec. 1144(a))

But, it also contains a "savings clause" with regard to certain categories of state laws:
- "Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." (29 U.S.C. Sec. 1144(b)(2)(A))
Prologue

- For another example, the Federal Food, Drug, and Cosmetic Act gives the FDA authority to oversee the safety of food, drugs, and cosmetics.

- While the statute has been interpreted to preempt some state regulation of those products, it does not contain express preemption language.

- However, the Medical Device Amendments of 1976 contain a "preemption clause" with regard to medical devices:
  - "Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement — (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act." (21 U.S.C. Sec. 360k(a))

Prologue

- Express preemption language in federal regulations is favored.

- On May 20, 2009, President Obama issued a Presidential Memorandum Regarding Preemption to the heads of executive departments and agencies.

- The memo declared the Administration’s general policy that “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”
Prologue

The memo instructs executive departments and agencies to:

- not include preemption statements in regulatory preambles unless they are also included in codified regulations
- not include preemption provisions in codified regulations unless they are justified under legal principles governing preemption
- review regulations issued within the past 10 years that contain statements in regulatory preambles or codified regulations intended to preempt state law, in order to decide whether they are justified under legal principles governing preemption

Prologue

Stay updated about current developments in preemption jurisprudence relating to those constitutional provisions, statutes, and regulations.
Preemption standards may be amended.

For example, the Dodd–Frank Wall Street Reform and Consumer Protection Act changed the preemption standards for state laws affecting national banks and federal thrifts (or savings associations).

The statute eliminated federal preemption of state laws affecting operating subsidiaries of national banks and federal thrifts.

It applied the same preemption standard to federal thrifts as to national banks (conflict instead of field).

And, it narrowed the preemption standard so that state consumer financial laws are only preempted if they:
- have a discriminatory effect on national banks;
- prevent or significantly interfere with a national bank’s exercise of its powers, as determined on a case-by-case basis; or
- are preempted by another federal law.
Preemption standards are continually subject to interpretation by the courts.

There are generally two types of preemption cases:
- Some cases present questions about legislation and whether a state has the authority to act in an area governed by federal law.
- Others present questions about litigation and whether federal law prevents plaintiffs from bringing state law claims.

Be aware of state statutes and regulatory schemes that are limited by preemption in the areas in which you draft.
Step One

Handle the request with political sensitivity.

Step One

› Discussions of preemption may raise questions or invite opinions about federalism and the balance between federal and state power.

› Support for preemption may vary according to the state action to be preempted.
Step Two

Determine the requestor’s intent vis-à-vis the federal law.

Step Two

- Is the request in conflict with federal law?
- The same as federal law?
- Stricter than federal law?
- More lenient than federal law?
- Related to but different from federal law?
Step Two

- The Massachusetts General Court Legislative Research and Drafting Manual includes some of these questions in their Legislative Research Checklist:
  - Would the bill violate any provisions of the Constitution (e.g., encroach on the enumerated powers of the federal government, contract clause, etc.)?
  - Would the legislation address issues already addressed by an existing federal statute/regulation? If so, would it conflict with the federal statute/regulation?
  - Would the legislation in any other way affect any existing federal statute/regulation (e.g., duplicate or expand upon an existing federal statute/regulation, etc.)?

Step Three

Inform the requestor about the potential preemption.
Step Four

Be prepared for the requestor to want to move forward with the draft as requested.

Step Four

- The requestor may want to make a political statement.
- The requestor may believe that the federal law is invalid.
- The requestor may believe that the preemptive effect of the federal law is unsettled or in flux.
- There may be an enforcement issue.
Step Four

- The DOJ has provided guidance to federal prosecutors on marijuana enforcement.

- See October 19, 2009, Memorandum for Selected United States Attorneys From David W. Ogden, Deputy Attorney General; Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana:
  - "The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. . . . The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources."
  - "As a general matter, [United States Attorneys] should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."

- See also August 29, 2013, Memorandum for All United States Attorneys From James M. Cole, Deputy Attorney General; Subject: Guidance Regarding Marijuana Enforcement:
  - "In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana . . . consistent with the traditional allocation of federal–state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana–related activity."
Be prepared to offer “fixes” to address the potential preemption and include agreed upon provisions in the draft.

Step Five

- Consider offering to include language in the draft that acknowledges state action is limited by federal preemption.
The Texas Statutes contain many examples of such language:

- Sec. 9.109, Business & Commerce Code: “(c) This chapter does not apply to the extent that: (1) a statute, regulation, or treaty of the United States preempts this chapter; . . .”
- Sec. 60.202, Utilities Code: “A provision of this subchapter applies only to the extent the provision has not been preempted by federal law or a rule, regulation, or order of the Federal Communications Commission.”
- Sec. 796.016, Health and Safety Code: “On and after the date that a federal reduced cigarette ignition propensity standard that preempts this chapter is adopted and becomes effective, this chapter has no effect.”

Consider offering to include in the draft a severability clause or ensure that one applies to the draft.
The Texas Code Construction Act contains a severability provision that applies to all of the codified statutes:

- Sec. 311.032, Government Code. “(a) If any statute contains a provision for severability, that provision prevails in interpreting that statute.
- (b) If any statute contains a provision for nonseverability, that provision prevails in interpreting that statute.
- (c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”

Consider offering to draft a request to Congress to amend federal law.

Step Five
Step Five

- In Texas, concurrent resolutions may be used to request action from Congress. They must be approved by both chambers and require approval by the Governor.

- And, in Texas, joint resolutions may be used to request a convention to consider amendments to the U.S. Constitution. They must be approved by both chambers but do not require approval by the Governor.

Aside: “Effective Preemption”

- There are some federal laws that do not preempt state action but that condition the receipt of such large amounts of federal funding on state compliance with certain requirements that state noncompliance is effectively preempted.

- Some subject areas significantly affected by “effective preemption” are:
  - Transportation
  - Education
  - Health and Human Services
Aside: “Effective Preemption”

- When handling legislative draft requests involving “effective preemption,” advise the requestor of the potential loss of federal funding.

- And, if appropriate, consider offering to include “waiver” language that directs the state to seek a waiver of the federal requirements before implementing the legislation.

Aside: “Effective Preemption”

- The Wisconsin Bill Drafting Manual discusses these requests:
  - (3) Other Conflicts. Many federal laws and the regulations implementing them establish federal–state programs in which state participation is voluntary. When dealing with those laws and regulations, make clear to the requester that a conflict does not create a constitutional issue but explain the consequences of nonconformity, for example, possible loss of federal funding.
Aside: “Effective Preemption”

- And, in Texas, standard waiver language exists for such drafts:
  - “If before implementing any provision of this Act a state agency determines that a waiver or authorization from a federal agency is necessary for implementation of that provision, the agency affected by the provision shall request the waiver or authorization and may delay implementing that provision until the waiver or authorization is granted.”
General Rule

When state law and local law conflict, state law preempt local law.

- This general rule is derived from the Tenth Amendment to the United States Constitution.

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
Local governments are not mentioned in the Constitution.

They do not have any federal constitutional authority.

Their only powers are those granted or delegated by the states.

“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.” Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).
Variations in Local Authority

While all local governments derive their powers from the states, the extent of their authority varies from state to state.

Dillon’s Rule States

- In a Dillon’s Rule state, local governments generally have narrower authority.

- A Dillon’s Rule local government can only exercise powers specifically granted to it by the state.
Home Rule States

- In a Home Rule state, local governments generally have broader authority.

- A Home Rule local government is delegated powers by the state and may exercise those powers subject only to limitations imposed by the state.

Combination States

- In a combination state, Dillon’s Rule applies to those local governments and matters not accounted for in Home Rule constitutional or statutory provisions.
Handling Legislative Draft Requests Involving State Preemption

Process Overview

- Prologue (Part I): Understand the relationship between your state and local governments in your state.

- Prologue (Part II): Anticipate on what subjects and in what contexts you may receive draft requests involving state preemption.

- Determine if you are in Situation A (Express Preemption) or Situation B (Implied Preemption).
Process Overview: Situation A

- Step One: Handle the request with political sensitivity.

- Step Two: If applicable, inform the requestor about any state constitutional provisions that may affect the preemption of local authority on the matter.

- Step Three: If helpful, provide the requestor with representative local ordinances or rules that may be affected by the legislation.

- Step Four: Determine the requestor’s intent with regard to the scope and specificity of the matter to be preempted.

- Step Five: If applicable, consult any drafting guidelines for drafting express preemption language. Or, find models from state statutes or previous drafts.

- Step Six: Determine the requestor’s intent with regard to the preservation of any local authority over the matter and include the appropriate language in the draft.

Process Overview: Situation B

- Step One: Handle the request with political sensitivity.

- Step Two: Inform the requestor about the potential preemption.

- Step Three: If appropriate, provide the requestor with representative local ordinances or rules that may be affected by the legislation.

- Step Four: Determine the requestor’s opinion of the potential preemption, and prepare the draft accordingly.
Prologue (Part I)

Understand the relationship between your state and local governments in your state.

- Does your state apply Dillon’s Rule? Is it a Home Rule state? A combination state? Or, does it have its own unique jurisprudence for allocating authority to local governments?
Prologue (Part I)

- For example, Texas applies Dillon's Rule, and most local governments are governed by general law.

- But, the vast majority of people live in Home Rule cities because the Texas Constitution allows cities with more than 5,000 inhabitants to adopt and amend their own charters:
  - Article 11, Section 5: "(a) Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. . . . The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . ."

- And, our Education Code allows a traditional school district to adopt a charter so that the entire district can operate under a home-rule school district charter (However, a home-rule school district charter has yet to be formed):
  - Section 12.011, Education Code: "(a) In accordance with this subchapter, a school district may adopt a home-rule school district charter under which the district will operate."

Prologue (Part I)

- Pay special attention to state constitutional provisions expressly prohibiting the state from enacting certain laws affecting local governments.
Prologue (Part I)

For example, the Texas Constitution generally prohibits local laws, those that are limited to a specific local government or geographic area, and special laws, those that are limited to a specific person or narrow class of persons:

- Article III, Section 56: “(a) The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing . . . (b) In addition to those laws described by Subsection (a) of this section in all other cases where a general law can be made applicable, no local or special law shall be enacted . . .”

Prologue (Part I)

Pay special attention to state constitutional provisions expressly granting or delegating powers to local governments.
For example, the Ohio Constitution delegates certain authority to municipalities that exists outside powers granted to them by the state’s Revised Code:

- Article XVIII, Section 3: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Also, pay special attention to state constitutional provisions that have been interpreted as conferring certain powers or duties on local governments.
For example, the Pennsylvania Constitution contains an “Environmental Rights Amendment”:

- Article I, Section 27: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

In Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d 901 (Pa. 2013), the Pennsylvania Supreme Court struck down a state statute that provided for the state to occupy the field of oil and gas regulation. The court held that the statute was unconstitutional because the Environmental Rights Amendment confers certain powers and duties on local governments as trustees of the state’s public natural resources. By shutting local governments completely out of oil and gas regulation, the statute impermissibly interfered with local governments’ obligations as trustees.

Anticipate on what subjects and in what contexts you may receive draft requests involving state preemption.
Prologue (Part II)

- Be aware of previously introduced state legislation that contained preemption provisions.

- Look out for legislation passed by other states that expressly preempts or has been interpreted to preempt local law.

- Stay updated about “hot topics” in local politics in your state and nationwide.

Prologue (Part II)

- Some “Hot Topics” in Local Politics:
  - Oil and gas operations
  - Fracking
  - Smoking in public places
  - Texting while driving
  - Landlord–tenant relations
  - Payday lending
  - Public restrooms
  - Plastic bags
  - Knives
  - Tree–cutting
Situation A: Express Preemption

The requestor wants to expressly preempt local law on some matter.

Step One

Handle the request with political sensitivity.
Step One

- Support for preemption of a particular matter may vary among:
  - Republicans and Democrats
  - Urban and rural districts
  - Geographic regions of the state

Step Two

If applicable, inform the requestor about any state constitutional provisions that may affect the preemption of local authority on the matter.
Step Three

If helpful, provide the requestor with representative local ordinances or rules that may be affected by the legislation.

Step Four

Determine the requestor’s intent with regard to the scope and specificity of the matter to be preempted.
Does the requestor want to preempt local authority more narrowly or more broadly?

Does the requestor want to be more general or more specific?

The Texas Statutes contain examples of “general” language:
- Sec. 352.008, Finance Code: “This chapter preempts a local ordinance or rule regulating refund anticipation loans.”

And “specific” language:
- Sec. 63.007, Agriculture Code: “This chapter preempts and supersedes any ordinance, order, or rule adopted by a political subdivision of this state relating to the regulation, registration, packaging, labeling, sale, distribution, use, or application of commercial fertilizer.

Handle with special care requests for the preemption of a whole class of local activity.
- For example, requests requiring all local ballot initiatives to be approved by the state or prohibiting all local ordinances that are more stringent than state statutes.
- There may be unintended consequences to such requests.
If applicable, consult any drafting guidelines for drafting express preemption language. Or, find models from state statutes or previous drafts.

Step Five

- The Arizona Legislative Bill Drafting Manual contains specific guidance for drafting preemption provisions:
  - The following is an example of language the drafter should use if the drafter is asked to provide for state preemption. Note that "; state preemption" is included in the section heading:
    3-243. Seed labeling regulation; state preemption
    THE REGULATION AND USE OF SEEDS ARE OF STATEWIDE CONCERN. THE REGULATION OF SEEDS PURSUANT TO THIS ARTICLE AND THEIR USE IS NOT SUBJECT TO FURTHER REGULATION BY A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE.
Step Five

- Does the requestor prefer “positive” language or “negative” language?

- The Texas Statutes contain examples of “positive” language:
  - Sec. 174.005, Local Government Code: “This chapter preempts all contrary local ordinances, executive orders, legislation, or rules adopted by the state or by a political subdivision or agent of the state, including a personnel board, civil service commission, or home-rule municipality.”

- And “negative” language:
  - Sec. 796.015, Health and Safety Code: “A political subdivision of this state may not adopt or enforce any ordinance or other regulation conflicting with, or preempted by, any provision of this chapter or with any policy of this state expressed by this chapter, whether that policy be expressed by inclusion of a provision in the chapter or by exclusion of that subject from the chapter.”

Step Six

Determine the requestor's intent with regard to the preservation of any local authority over the matter and include appropriate language in the draft.
Step Six

- Does the requestor want to prohibit any local regulation of the matter?

- Does the requestor want to allow local regulation of the matter that is more stringent than what is required statewide?

- Does the requestor want to expressly except certain powers of local governments from being preempted or clarify that certain authority of local governments is unaffected by the preemption?

- Does the requestor want to preserve any local ordinances or rules on the matter already in existence?

This was the case with H.B. 2440, which was introduced during the 2015 Texas legislative session. That bill would have given the state exclusive control over the regulation of transportation network companies like Uber and Lyft.
Step Six

- The introduced bill contained the following language:
  - “Notwithstanding any other provision of law, transportation network companies and transportation network drivers are governed exclusively by this chapter and any rules adopted by the department under this chapter. A municipality or other local entity may not:
    1. impose a tax on, or require a license for, a transportation network company or a transportation network driver; or
    2. subject a transportation network company or transportation network driver to the municipality’s or other local entity’s rate, entry, operational, or other requirements.”

Step Six

- Does the requestor want to allow local regulation of the matter that is more stringent than what is required statewide?

- That was the case with S.B. 87, which was introduced during the 2015 Texas legislative session. That bill would have prohibited smoking in certain workplaces and public places and prohibited local regulation relating to smoking. But, it carved out an exception for local laws that prohibit or limit smoking to a greater degree.
Step Six

- The introduced bill contained the following language:
  - “(a) Except as provided by Subsection (b), this chapter preempts and supersedes a local ordinance, rule, or regulation adopted by any political subdivision of this state relating to smoking.
  - (b) To the extent that a local ordinance, rule, or regulation adopted by a political subdivision of this state prohibits or restricts smoking to a greater degree than this chapter, the ordinance, rule, or regulation is not preempted or superseded by this chapter.”

Step Six

- Does the requestor want to expressly except certain powers of local governments from being preempted or clarify that certain authority of local governments is unaffected by the preemption?

- That was the case with H.B. 40, which passed during the 2015 Texas legislative session. That bill gives the state exclusive jurisdiction over the regulation of oil and gas operations. However, it explicitly excepts from the preemption some powers of local governments relating to oil and gas operations.
The enrolled bill contains the following language:

- "(c) The authority of a municipality or other political subdivision to regulate an oil and gas operation is expressly preempted, except that a municipality may enact, amend, or enforce an ordinance or other measure that:
  1. regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements;
  2. is commercially reasonable;
  3. does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and
  4. is not otherwise preempted by state or federal law."

That was also the case with S.B. 267, which passed during the 2015 Texas legislative session. That bill prohibits local laws that prohibit a person from refusing to lease or rent housing to a person whose sources of income include federal housing assistance funding.
Step Six

The enrolled bill contains the following language:

- (c) This section does not affect any authority of a municipality or county or decree to create or implement an incentive, contract commitment, density bonus, or other voluntary program designed to encourage the acceptance of a housing voucher directly or indirectly funded by the federal government, including a federal housing choice voucher.

Does the requestor want to preserve any local ordinances or rules on the matter already in existence?

That was the case with an offered amendment to S.B. 267. When the Texas legislature was considering that bill, Austin was the only city with an ordinance that prohibited a person from refusing to lease or rent housing to a person whose sources of income include federal housing assistance funding.
Step Six

- An amendment was added to the bill to preserve or “grandfather in” this ordinance:
  - “This section does not affect an ordinance or regulation adopted before January 1, 2015.”

- However, the amendment was later removed from the final version of the bill.

Situation B: Implied Preemption

The request regulates a matter so extensively that preemption of local law on the matter may be implied.
Step One

Again, handle the request with political sensitivity.

Step Two

Inform the requestor about the potential preemption.
Step Three

As in Situation A, if appropriate, provide the requestor with representative local ordinances or rules that may be affected by the legislation.

Step Four

Determine the requestor’s opinion of the potential preemption, and prepare the draft accordingly.
Step Four

- If the requestor is concerned about the preemptive effect of the legislation, offer to include “does not preempt” language in the draft.

- The Texas Statutes contain many examples of such language:
  - Sec. 1804.002, Occupations Code: “This chapter does not preempt a municipal ordinance applicable to a veterans organization or a veterans organization solicitor.”
  - Sec. 25.004, Transportation Code: “This chapter does not preempt a local ordinance regulating a wireless communication facility.”

- If the requestor wants to clarify the preemptive effect of the legislation, offer to include express preemption language in the draft.

Questions?

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