

Repealing Preemption and Advancing Non-Preemption Language in State Law: Examples

Advocates across the country have multiple avenues for resisting statewide efforts to block—or “preempt”—local, progressive laws. This fact sheet details two straightforward approaches that can be pursued through ballot initiatives or statewide legislation. The first approach is to pass a statewide law with respect to a specific issue that includes explicit non-preemption language—allowing localities to exceed the minimum standards of the state law with a more inclusive or protective law. The second approach is to repeal preemption language that was previously included in specific state laws.

There are two key considerations with these strategies:

- **The context:** The language used to repeal preemption or advance non-preemption language will look different depending on the context—such as the specific issue, whether it’s a ballot initiative or statute, state initiative requirements, state-specific legislative procedures, etc.
- **Single subject requirements:** Advocates and bill/ballot initiative drafters should be aware that states typically have “single subject” requirements, which say that state bills and/or initiatives can only address one issue. If language repealing preemption is inserted into a larger bill or initiative that regulates or addresses the same matter, this approach will likely satisfy single subject requirements. If a state strictly or narrowly interprets single subject requirements, this issue should be examined more closely. Advocates, officials, and bill/initiative drafters should exercise care and research single subject requirements if repeal language is included in a bill that addresses other issues.

I. EXAMPLES OF EXPLICIT NON-PREEMPTION LANGUAGE ADDED TO STATE STATUTES¹

Arizona Minimum Wage and Paid Sick Time Example

In 1997, the Arizona State Legislature passed a law to preempt municipalities from passing a local wage ordinance that exceeded the federal minimum wage. In 2006, however, Arizona voters established a higher state minimum wage and reversed the preemption law—explicitly allowing localities to set a higher minimum wage or regulate benefits by ordinance. In 2016, voters approved another ballot measure raising Arizona’s minimum wage and establishing the opportunity to earn paid sick time; the 2016 initiative preserved the non-preemption language in the statute.² The language reads as follows:

A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries but may not provide for a minimum wage lower than that prescribed in this article This article shall be liberally construed in favor of its purposes and shall not limit the authority of the legislature or any other body to adopt any law or policy that requires payment of higher or supplemental wages or benefits, or that extends such protections to employers or employees not covered by this article.³

The Arizona law sets a statewide floor for wages and paid sick time, but it allows cities to go above that floor. The non-preemption language is also followed by language stating that the law should be interpreted in favor of the law’s pro-worker purposes and is not intended to limit future laws or policies that would *increase*—or enhance employee protections concerning—wages or benefits.

Smoke-Free Regulations Example

Many states have passed smoke-free standards that explicitly include non-preemption language.⁴ For example, the 2006 Louisiana Smokefree Air Act, which prohibited smoking in certain workplaces

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and public spaces, provides an example of a law that repealed preemption, established a statewide standard, and provided explicit non-preemption language to preserve local authority on the issue. The law contains a subsection that states:

Nothing in this Part shall be construed to restrict the power of any parish, city, town, or village to adopt and enforce additional local laws, ordinances, or regulations that comply with at least the minimum applicable standards to establish smokefree public places as set forth in this Part.⁵

The Kansas Indoor Clean Air Act uses similar language and also states clearly that, in the event of a conflict between the state law and a more stringent local smoking law, the local ordinance applies:

Nothing in this act shall prevent any city or county from regulating smoking within its boundaries, so long as such regulation is at least as stringent as that imposed by this act. In such cases the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act.⁶

II. EXAMPLES OF BILL LANGUAGE TO REPEAL PREEMPTION

Another way to overcome preemption is to repeal an existing preemption law, either through a statute or, where available, a ballot initiative. There are advantages and disadvantages to this approach. The major advantage is that drafting a simple repeal provision, which strikes specific preemption language, can be relatively straightforward. The major disadvantage is that this approach is not as clear or protective of local control as using *explicit non-preemption language*, as described in the previous section. In some states, there is a presumption of “field preemption” when the state has extensive regulations on a subject; in such cases, the extensive state laws on the matter may be interpreted as *impliedly* preempting existing and future local ordinances on the subject. In states with strong “field preemption” presumptions, explicit non-preemption would be a safer approach.

Connecticut and Delaware Smoke-Free Regulations Examples

When state statutes contain explicit preemption language, attempts to repeal such language take the form of amending state law to delete the language entirely. In Connecticut, a bill was introduced in 2017 that would remove language preempting municipal ordinances related to smoking restrictions.⁷ At present, Connecticut’s smoke-free law contains the following subsection: “The provisions of this section shall supersede and preempt the provisions of any municipal law or ordinance relative to smoking effective prior to, on or after October 1, 1993.”⁸ The proposed bill would strike this language completely with the purpose of allowing municipalities to increase smoking regulations.⁹

A similar repeal strategy occurred in Delaware, which had previously preempted local smokefree regulations in a 1994 statewide tobacco control bill. The Delaware law stated: “The provisions of this Chapter shall preempt and supersede any provisions of any municipal or county ordinance or regulation on the subject of this Chapter enacted or adopted after the effective date of this Chapter.”¹⁰ This preemption language was subsequently repealed in a 2002 Delaware Clean Air Act that also expanded the state’s smoke-free regulations.

**For more information about the approaches or examples detailed here, contact
A Better Balance’s Defending Local Democracy Project at jmake@abetterbalance.org.**

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¹ The examples in this fact sheet—both in this section and the next one—may not be workable in different contexts and states, and this information does not constitute legal advice. A lawyer with knowledge of bill or initiative drafting in your state should be consulted.

² Despite voters' will and the protected status of Arizona ballot initiatives, the Legislature passed a bill in 2013 purporting to preempt local laws on compensation and benefits (Ariz. Rev Stat. § 23.204). The Attorney General settled a case conceding that the State could not preempt local wage laws; the parallel issue of paid sick time is currently being litigated.

³ ARIZ. REV. STAT. ANN. § 23-364(I) (2016).

⁴ See, e.g., Americans for Nonsmokers' Rights, "History of Preemption of Smokefree Air by State," 2016, available at: www.protectlocalcontrol.org/docs/HistoryofPreemption.pdf.

⁵ LA REV. STAT. ANN. § 40:1291.11(D) (2015).

⁶ KAN. STAT. ANN. § 21-6114 (1987).

⁷ Conn. Raised B. No. 7089 (January Session, 2017), <https://www.cga.ct.gov/2017/TOB/h/2017HB-07089-R00-HB.htm>.

⁸ CONN. GEN. STAT. § 19a-342(g) (2016).

⁹ Conn. Raised B. No. 7089.

¹⁰ See 1994 Delaware Clean Air Act, available at: <http://delcode.delaware.gov/sessionlaws/ga137/chp287.shtml>.