State Preemption Checklist for Local Officials and Advocates
What Should Localities Look For When States Take Steps to Preempt Local, Progressive Laws?

Local governments and advocates are critically important to enacting progressive, innovative, and problem solving laws. Yet states are increasingly interfering with the power that localities have used traditionally to legislate across an incredibly broad range of issues.

Cities and counties may have legal options to counter this growing reality of state interference, even though it can be difficult in many situations to challenge state preemption. The Legal Effort to Address Preemption (LEAP) Project has conducted research on various approaches that could be used by local officials and advocates—depending on the circumstances—to challenge preemption.

To begin identifying potential legal strategies, the questions in this “checklist” should be considered.

Questions to Ask When the State Acts to Preempt Local Laws

Understanding the Landscape of Home Rule

What does local power look like in this particular state? Is this a “Home Rule” state or a “Dillon’s Rule” state?

*Home rule—or the power delegated to localities to engage in policymaking—is widespread. At least 40 states delegate some significant, presumptive authority to their cities and/or counties to enact policies without prior authorization from the state. In a “Dillon’s Rule” state, however, localities only have limited authority and must receive specific legislative authorization from the state to adopt a particular policy.*

What is the source of home rule? Is home rule rooted in the state’s constitution, its statutes, or a hybrid of the two?

*When home rule is enshrined in a state constitution, the state is likely to be more limited in its ability to preempt local enactments on certain subjects. Given the trend toward more sweeping and punitive state preemption measures, localities may have more opportunities to resist preemption through state home rule provisions—with constitutional home rule providing the strongest (but not only) foundation for challenges.*

What is the form of home rule? Are there specific areas where localities have stronger authority, or actual “immunity,” against state preemption, such as:

- Matters relating to the locality’s own government (structural issues)?
- Matters relating to the locality’s own employees (personnel issues)?
- Matters relating to the locality’s activities to raise revenue, borrow money, and spend it (fiscal issues)?
• Matters relating to the locality’s contracting arrangements and efforts to regulate contractors (proprietary issues)?
• A subset of matters that relate to the health, safety, and welfare of the community (zoning, liquor regulation, etc.)?

The structure and form of home rule vary significantly from state to state. If state law provides more authority—or immunity—for certain types of local enactments, localities may be able to use such provisions to challenge state preemption laws on those matters. In addition to the areas described above, a few states provide that “local matters” are immune from state preemption. In these states, however, it is important to determine how courts have interpreted what constitutes a “local” matter, since many courts have adopted limited views of what is truly “local” for these purposes.

The LEAP Project has prepared state-by-state analyses of local authority that can help to answer some of these questions. The fact sheets will be made available at http://www.urbanlaw.org/leap.

Understanding “Special Law” and Related Provisions that Can Limit Preemption and Procedural Requirements for State Legislation

Is the preemption bill or law a “special law” that singles out a specific locality, either explicitly (by name) or functionally (as the bill/law is applied)?
• Does the bill or law operate uniformly and treat home rule localities equally?
• Are there arbitrary classes of localities targeted by the bill or law?

More than two-thirds of states provide some legal barrier against legislation singling out of particular local governments, an increasing issue as preemption becomes more focused. Even though courts often provide deference to state legislatures in challenges based on these “special law” and related provisions, some courts have stepped in where they believe specific cities have been targeted.

How was the preemption bill packaged and what legislative procedures were followed when it was enacted?
• Did the bill have a clear title (clearly stating and reflecting the bill’s subject)?
• Could the bill violate any state “single subject” or “logrolling” requirements that prevent the legislature from grouping otherwise distinct measures together?
• Was there adequate time according to state law for the bill to be heard? Were proper notice procedures followed?

Since preemption laws are often politically unpopular, state legislatures have taken steps in many cases to rush or obscure their passage, potentially violating the types of procedural requirements flagged above.

Understanding and Responding to the Threat of Punitive Preemption

Does the preemption bill or law seek to punish local governments or local officials?
• Does the bill/law include provisions to hold local officials liable—either civilly or criminally—if they take steps deemed in conflict with its measures?
• Does the preemption bill or law threaten local funding or open local governments to private lawsuits?

  **Punitive laws that threaten civil or criminal liability are a relatively new—and troubling—development in preemption and could potentially be challenged on a range of grounds, such as free speech, legislative immunity, due process, as well as possibly the structure of home rule in states that have established local autonomy in their constitutions.**

  **There could be grounds to challenge state preemption laws that threaten to eliminate or withhold certain state funds if localities pursue a particular course of action or adopt certain local laws. Depending on the state and specific statutory language/requirements at issue, localities should research whether this type of conditional spending preemption could be unduly coercive under state law or violate home rule.**

**Understanding Federal Constitutional and Antidiscrimination Law Constraints on Preemption**

**Does the bill or law explicitly—on its face—contain a classification based on sexual orientation, race, gender, national origin, or other suspect classifications? If not, was the bill or law motivated by animus or discrimination against a specified group or class of individuals?**

  **Constitutional equal protection and antidiscrimination law challenges can be considered in these circumstances.**

  **Was the bill or law based upon religious preferences—whether explicitly through the legislative record or implicitly through its provisions and effect?**

  **When there is an applicable fact pattern and sufficient legislative or similar record to surface religious motivation, a challenge based on the federal Constitution’s Establishment Clause (which prohibits laws “respecting an establishment of religion”) should be considered.**

**A Note on Federal Preemption**

Local, progressive laws face an increasing threat of federal preemption as well. Although federal preemption differs in important ways from state preemption, some of the same legal questions arise in both contexts.

**More Information**

For more information regarding the research and resources described in this memorandum, please contact A Better Balance’s Defending Local Democracy Project at jmake@abetterbalance.org

*Please note that the information in this checklist does not constitute legal advice. Legal questions and issues will vary significantly depending upon the specific state and bill at issue.*