Savings Clause: Express Protection Against Preemption

WHAT IS A SAVINGS CLAUSE?

A savings clause is an explicit statement in a state or federal law that allows lower levels of government to enact stronger protections than those set by a higher level of government. When a savings clause is clearly written, it leaves no question that the legislature intended to allow for stronger local laws. This leaves room for progress at the local level and also helps guard against lawsuits challenging local authority.

IMPORTANCE TO STATE AND LOCAL PUBLIC HEALTH

In 2011, the Institute of Medicine released a report on the role of law and policy to advance public health, including the statement that “States and localities play a vital and historic role in safeguarding the public’s health and safety,” and the recommendation that “unless there are compelling reasons to the contrary, the federal government ought not preempt state and local authority in advancing the public’s health...”¹ Federal and state laws can be written to advance public health by requiring minimum standards (floor preemption) and including a savings clause.

STRATEGY FOR FEDERAL AND STATE PUBLIC HEALTH ADVOCATES

Including well-drafted savings clauses, also referred to as “non-preemption” clauses, in all state and federal public health legislation is an essential strategy for policy stakeholders. While advocating for passage of public health laws at the federal and state levels, advocates and policymakers should insist on minimum public health standards (i.e., floor standards rather than ceiling) and the inclusion of a savings clause to preserve local control. This strategy is vital to future public health progress.

NOTE: Effective savings clauses do not carve-out exceptions preempting some issue areas and not others, an industry strategy referred to as “preempt and exempt.” For example, state legislation that broadly preempts local control but provides an exception for a minor topic or includes a “grandfather clause” excluding pre-existing local laws from preemption is generally not beneficial to public health in the long run.

The following sections include examples of savings clauses that can be used as models for future legislative language.
**FEDERAL SAVINGS CLAUSE EXAMPLES**

The *National School Lunch Program* provides minimum nutrition requirements for state and local education agencies to get reimbursed and includes a savings clause that states:

“State agencies and/or local educational agencies may impose additional restrictions on competitive foods, provided that they are not inconsistent with the requirements of this part.”

**Reasonable Break Time for Nursing Mothers.** “The Federal law does not preempt ‘a State law that provides greater protections to employees...’” 29 U.S.C. 207(r)(4)

**STATE SAVINGS CLAUSE EXAMPLES**

Many state tobacco control laws provide for minimum requirements with savings clauses; a few examples follow that can be used as models in other states and for diverse topics:

“Nothing in this chapter shall be construed to restrict the power of any county, city, town, village, or other subdivision of the state to adopt local laws, ordinances, and regulations that are more stringent than this chapter.” (New Hampshire)

“Nothing in this chapter shall be construed to supersede or in any manner affect a municipal smoking ordinance, provided that the provisions of such ordinance are at least as protective of the rights of nonsmokers as the provisions of this chapter.” (Vermont)

“Nothing in this chapter shall be construed to supersede or in any manner affect a county smoking ordinance; provided that the ordinance is at least as protective of the rights of nonsmokers as this chapter. Nothing in this chapter shall prohibit a county from enacting ordinances more stringent than this chapter.” (Hawaii)

“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.” (Louisiana)

State savings clauses in other contexts are more rare, but the following is an example from a state alcohol licensing law:

“In its discretion, the local licensing authority may impose additional requirements necessary for the approval of the [alcohol beverage license] application.” (Colorado)
SAVINGS CLAUSES MUST BE CLEARLY WRITTEN: CASE STUDY

The following case study shows why it is important that savings clauses be written clearly.

Kentucky enacted a statewide program for the prevention, screening, diagnosis, and treatment of lead poisoning, which included the following clause: “Local boards of health may, by the adoption of local regulations, establish programs for the prevention, screening, diagnosis, and treatment of lead poisoning; provided that such regulations are the same as the provisions of [state law].”

Because the state law allows only local laws that are “the same as the provisions” of state law, it is not a true savings clause and does not guard against preemption of stronger protections. A local board of health enacted a regulation regarding lead poisoning and was sued in court. In 1984, the Supreme Court of Kentucky upheld the local regulation as not preempted because it did not conflict with the state laws on the same subject. However, a court in another state or at another time might have found otherwise.

In fact, in 2014, the Kentucky Supreme Court found the opposite when it analyzed another Kentucky law with the following clause: “County, city-county, and district boards of health shall: ... Adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health.” A local regulation prohibiting smoking in public places was challenged as preempted. In this case, the Kentucky Supreme Court held that the state law was not an effective savings clause and the local law was preempted.

In conclusion, the benefits of local protections are lost when a local government is preempted from acting or is dissuaded from acting due to an unclear savings clause, or the lack of a savings clause. A poorly drafted savings clause or the absence of a savings clause can have a “chilling effect” on local government policymaking. Additionally, poorly drafted savings clauses open up the local jurisdiction to litigation.

REFERENCES

1 Committee on Public Health Strategies to Improve Health, National Research Council (June 21, 2011).
4 Vermont, Smoking in Public Places, Municipal Ordinances: 18 V.S.A. § 1746.
7 Colorado, Alcohol Beverages, State and Local Licensing: C.R.S. 12-47-309.
8 Kentucky: KRS § 211.901(6).
10 KRS § 212.230(1)(c).
11 Bullitt Fiscal Court v. Bullitt County Bd. of Health, 434 S.W.3d 29 (KY. 2014).