LEGAL UPDATES

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Regulatory Consistency Act Would Bring Sweeping Changes for Local Governments in Texas

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The Texas Legislature approved HB 2127, the Texas Regulatory Consistency Act, on May 23, 2023, and the bill is soon expected to be signed into law by Governor Greg Abbott. Upon the Governor's signature, HB 2127 would go into effect on September 1, 2023.

HB 2127 would preempt cities and counties from promulgating an ordinance, order, or rule in a "field of regulation that is occupied by a provision of this code." The law specifically identifies the following state codes as preempting local action:

Agriculture Code

Business and Commerce Code

Finance Code

Insurance Code

Labor Code

Local Government Code

Natural Resources Code

Occupations Code

Property Code

Texas counties may exercise the specific powers delegated to them by the Texas Constitution, and Texas home rule cities may exercise any powers authorized by the city charters, so long as their actions do not violate state or

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federal law. Enactment of HB 2127, however, would mark a sea change to Texas's approach to local governance and its long history of granting extensive autonomy to local governments.

HB 2127 marks a profound shift away from local government authority and towards increasing state control. It follows a nationwide trend of state lawmakers using preemption to address policy issues. In Texas, lawmakers have previously restricted local governments' abilities to ban plastic bags, regulate sub-surface oil and gas operations, adopt a property tax rate without voter approval, and reduce police budgets.

This legislation has broader implications than lawmakers originally envisioned. The initial draft of HB 2127 preempted local authority only with respect to six state Codes, but subsequent amendments added the Business and Commerce, Local Government, and Property Codes to the list. Throughout the process, opponents of local government preemption tried to insert amendments protecting local nondiscrimination ordinances, mandatory water breaks for construction workers, and "fair chance" hiring policies—but each of those amendments failed.

The result is an effective limitation of local authority that is breathtaking in scope and liable to create multiple unanticipated consequences for city and county leaders. The bill's preemption provisions prohibit regulating conduct under the enumerated codes "unless expressly authorized by another statute." Discerning whether a specific provision within a regulatory ordinance or order is authorized by a statute or is subject to preemption may be difficult and potentially lead to legal challenges. HB 2127's broad language implicating the "field of regulation" could have sweeping effects and lead to the reversal or non-enforcement of ordinances such as:

Granting paid sick leave

Protecting employees from discrimination

Restricting water usage during droughts

Combating predatory lending

Combating invasive species

Regulating excessive noise

Responding to environmental disasters

Moreover, the legislation allows any person or trade association harmed by an ordinance that violates HB 2127 to sue the city or county for declaratory and injunctive relief and attorney's fees, and it waives the governmental immunity that typically protects cities from having to defend against

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expensive and time-consuming lawsuits over local decision-making. Accordingly, it is likely that HB 2127 will lead to a sharp increase in lawsuits against local governments.

The legislation does explicitly reserve certain topics for local government regulation. Accordingly, both cities and counties should be able to sustain core functions in multiple areas of local concern, including:

Building and maintaining roads

Levying taxes

Adopting and maintaining rules relating to the "control, care, management, welfare, or health and safety of animals"

Conducting public awareness campaigns

Supervising and regulating local government employees

Nevertheless, the bill's language is so broad as to raise multiple questions regarding its scope.

What this means to you

HB 2127 creates many new challenges for local governance in Texas. Counties and cities that previously had few doubts regarding the scope of their authority to address local concerns will need to evaluate closely the language of HB 2127 for conflicts with both existing and proposed local regulations. Local leaders would also do well to prepare a litigation strategy if such measures are challenged in court pursuant to HB 2127's immunity-waiving provisions.

Contact us

If you have questions related to HB 2127 or other issues pertaining to state-law preemption, please contact Kate David, Sandy Hellums-Gomez, Shae Keefe, Russell Roden, Sebastian Waisman, Logan Leal, Ben Stephens, or your Husch Blackwell attorney.

This content was written with the assistance of Husch Blackwell Summer Associate Melissa Alter.

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