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**Super Preemption and
H.B. 2127 Litigation Update**

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I.

HB 2127 – THE “SUPER PREEMPTION” LAW

Texas House Bill 2127, enacted by 88th Texas Legislature, became effective on September 1, 2024. 88th Leg., R.S., ch. 899, 2023 Tex. Sess. Law Serv. 2873 (eff. Sept. 1, 2023). While referred to in many circles as the “Death Star” bill, or the “Super Preemption” law, the legislation itself labels the law as the “Texas Regulatory Consistency Act.” For purposes of this paper, I will use “HB 2127” as that seems to be the most common label given to this controversial new law, a copy of which is attached in the Appendix to this paper.

The legislative history of HB 2127 indicates the legislature had received complaints that home-rule cities had “began to regulate far beyond the bounds of their historical roles,” creating “a confusing and complex patchwork of requirements” across a variety of areas. House Rsch. Org., Bill Analysis 5-6, Tex. H.B. 2127, 88th Leg., R.S. (2023). According to the bill’s analysis, the resulting “lack of consistency,” businesses and trade groups lamented, is “especially burdensome for [entities] that operate in multiple jurisdictions and must navigate compliance with potentially contradictory regulatory schemes.” *Id.* It was further claimed that this burden can “impede economic growth and job creation, especially for small businesses.” *Id.* at 6.

In response, the 88th Legislature passed the HB 2127. The bill’s analysis further provided that although the State “has historically been the exclusive regulator of many aspects of commerce and trade” in Texas, HB 2127 found that “in recent years, several local jurisdictions have sought to establish their own regulations of commerce” that differ from state law, “le[ading] to a patchwork of regulations that apply inconsistently across this state.” HB 2127, § 2.

HB 2127 does a number of things. One, it expressly preempts certain city regulations in eight codes, to wit: Agriculture, Business and Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property. For each of those codes, a new section is added that states as follows:

PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

Id. §§ 5-6, 8-10, 13-15 (codified at Tex. Agric. Code § 1.004; Tex. Bus. & Com. Code § 1.109; Tex. Fin. Code § 1.004; Tex. Ins. Code § 30.005; Tex. Lab. Code § 1.005; Tex. Nat. Res. Code § 1.003; Tex. Occ. Code § 1.004; Tex. Prop. Code § 1.004). This is referred to as “Field Preemption.”

Two, in some codes, HB 2127 supplements the general preemption language with specific examples. In the Labor Code, for example, HB 2127 elaborates that the occupied fields “include [] employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law” for private employers.

Id. § 10 (codified at Tex. Lab. Code § 1.005(b)). Similarly, the Property Code now preempts any “ordinance, order, or rule regulating evictions or otherwise prohibiting, restricting, or delaying delivery of a notice to vacate or filing a suit to recover possession of the premises under Chapter 24.” *Id.* § 15. And for the Finance and Occupation Codes, the HB 2127 carves out narrow exceptions to preemption for conduct related to credit services organizations or credit access businesses, *id.* § 8(b) (codified at Tex. Fin. Code § 1.004(b)); and massage establishments, *id.* § 14(b) (codified at Tex. Occ. Code § 1.004(b)). HB 2127 also adds new language to the Local Government Code to preempt certain local regulation of animal businesses. *Id.* § 12 (codified at Tex. Loc. Gov’t Code § 229.901). This is referred to as “Express Preemption.”

Third, HB 2127 codifies the preemption rule already prescribed by the Home Rule Amendment that existing law permits a municipality to adopt an ordinance or rule that is both “for the good government, peace,... trade [or] commerce of the municipality” and “necessary or proper for carrying out a power” of the municipality. Tex. Loc. Gov’t Code § 51.001. HB 2127 reiterates, however, that a municipality may exercise that authority “only if the ordinance or rule is consistent with the laws of this [S]tate.” HB 2127, § 11 (codified at Tex. Loc. Gov’t Code § 51.002); *accord* Tex. Const. art. XI, § 5(a).

Finally, HB 2127 creates a new cause of action for any person who suffers an actual or threatened injury from a municipal or county ordinance that was adopted or enforced in violation of any of the bill’s preemption provisions. HB 2127, § 7 (codified at Tex. Civ. Prac. & Rem. Code §§ 102A.002-.003(a)). HB 2127 waives governmental immunity for such actions, *id.* (codified at Tex. Civ. Prac. & Rem. Code § 102A.004), for claims that accrue on or after September 1, 2023, *id.* §§ 16-17. The claimant must, however, give the municipality or county notice of the claim at least three months before filing suit. *Id.* § 7 (codified at Tex. Civ. Prac. & Rem. Code § 102A.005).

Even before the bill became law, it came under fire due to the unresolved question of what fields of regulation does the State occupy through field preemption. Field preemption is a legal doctrine that exists largely to govern preemption questions between federal and state regulations. A court may find that federal law preempts state law because a federal regulatory scheme is so comprehensive that it leaves no room for additional state regulation. HB 2127 applies this concept to city and state regulatory interactions by providing that “unless expressly authorized by another statute, a [city] may not adopt, enforce, or maintain an ordinance or rule that regulates conduct in a field of regulation that is occupied by a provision of this code.” Any ordinance or rule that violates this provision is void and unenforceable.

With certain exceptions, HB 2127 does not explain when a state occupies a field of regulation. So, whether and to what extent the state occupies a field of regulation must be determined by the courts. In fact, the bill’s author stated that the bill was drafted in an open-ended way to prospectively preempt ordinances that the legislature has not considered.

Given the vagueness of HB 2127, it is not surprising that litigation was filed even before the law’s effective date.

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