

How to Respond to State Attempts to Prohibit Local LGBTQ Nondiscrimination Laws

More than 225 cities and counties have acted to protect LGBTQ individuals against employment discrimination.ⁱ As more localities step up to lead on LGBTQ rights, there is a growing threat to this local progress.

States are increasingly interfering with the traditional power of localities to legislate across an incredibly broad range of issues, including nondiscrimination. Three states—Arkansas, Tennessee, and North Carolina—have already enacted statewide laws that block (or “preempt”) local nondiscrimination ordinances that establish protections beyond those provided by the state. These three states are not alone: a growing number of states have introduced bills in recent years that would accomplish the same result.

Although these state laws are usually a reaction to local LGBTQ rights advances, the bills and laws *themselves* are written in a neutral way that does not directly address sexual orientation or nondiscrimination.ⁱⁱ This type of artful drafting makes lawsuits more challenging. So, what can advocates do when these “nondiscrimination preemption” bills are introduced?

I. Steps to Take *Prior* to Passage of a Nondiscrimination Preemption Bill

- ***Develop the Legislative Record***
 - If the nondiscrimination bill is passed, the legislative record—floor debates in the state legislature, official statements, comments from the sponsor in hearings, etc.—will be extremely important to the case.
 - Advocates should encourage hearings and floor debate. They should work with officials and partners to “smoke out” or draw out statements showing that, despite the neutral language in the bill, the legislative purpose is to stop protections for LGBTQ individuals and/or disadvantage LGBTQ individuals based on religious motivations or animus. Getting these statements on the record will be extremely helpful in any future litigation.
 - Challenge sponsors on the need for the bill and the fact that there are no other justifications for the law beyond disadvantaging LGBTQ people. Many of these bills talk about the need for statewide uniformity on nondiscrimination, rather than addressing anti-LGBTQ motivation. This rationale should be challenged. For example, have cities and/or counties in the state passed other types of protections against discrimination in the past? Have businesses long been complying with local laws that go beyond state law with additional protections against discrimination? In many states, localities have a long history of passing local nondiscrimination laws that go beyond state law—such as by establishing local enforcement procedures, covering more classes of people (like veterans, family caregivers, etc.). If this is the case, sponsors should be asked on the record why there’s a need *now* to preempt local nondiscrimination ordinances. Such questioning can show the real motivation for the law—targeting LGBTQ individuals.
- ***Raise Legal Concerns***
 - Consider whether it’s helpful to raise legal questions about these nondiscrimination preemption bills and the likelihood of a lawsuit if passed. Advocates can stress that these bills may be challenged on numerous grounds, including under the U.S. Constitution’s Equal Protection Clause and/or the Federal Civil Rights Act. Some legislators who are on the fence could be discouraged from supporting a bill if there are legal questions.
 - Arkansas and North Carolina are currently facing active litigation on their nondiscrimination preemption bills. While both laws preempt local nondiscrimination ordinances, North Carolina’s

HB2 is facing additional legal challenges because the law specifically targets transgender individuals and their bathroom access.

- **Coalition Building and “Unintended Consequences”**
 - In addition to drawing on allies to stand up for LGBTQ rights, consider other organizations and constituencies that may be affected by a nondiscrimination preemption law. This assessment can help to build cross-movement coalitions to speak out together against the state proposal and draw attention to the importance of robust local nondiscrimination protections.
 - Even if the true motivation for the nondiscrimination preemption bill is bias or animus against LGBTQ people, some legislators might give pause to supporting a bill that could have more sweeping effects on local civil rights protections.
 - A few questions to help determine new allies and potential unintended consequences:
 - In what ways have localities built on state nondiscrimination laws? Would the state bill affect local nondiscrimination laws that protect against discrimination on the basis of race, ethnicity, age, sex, pregnancy, disability, veteran status, and other categories?
 - Do local laws provide protections—not included in state law—on the basis of categories like conviction record, domestic violence, unemployment status, marital status, caregiver status, etc.?
 - Would the preemption law affect the ability of cities to enforce stronger penalties against discrimination?
- **Messaging**
 - Depending upon what is right for your community, consider the best ways to frame and draw attention to the anti-LGBTQ motivations and effects of this legislation, as well as other consequences for local nondiscrimination protections.
 - Emphasize the fact that communities should have a say over their own laws. Local governments know the values of their community and what is best for the people who live there. Local communities should be allowed to build upon state laws that protect against discrimination.

II. Steps to Take After Passage of a Nondiscrimination Preemption Bill

- **Legal Challenges**
 - Once a neutral preemption nondiscrimination bill passes into law, legal challenges should be considered. Experts in preemption and LGBTQ rights are available to help and discuss legal options with you.

For more on the information detailed here or for help with legal research on this issue in your state, contact A Better Balance’s LGBTQ Rights and Defending Local Democracy Projects at 212-430-5989 or dlankachandra@abetterbalance.org.

¹ See <http://www.equalityfederation.org/2017/01/2016-state-states-part-4-accomplishing-priorities-creating-strategic-partnerships/>; http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances.

² This is different than the Colorado statute overturned by the Supreme Court of the United States in *Romer v. Evans* in 1996. In the *Romer* case, the state constitutional amendment *itself* (“on its face”) prohibited localities from protecting individuals on the basis of “homosexual, lesbian or bisexual orientation.” The types of laws or bills described in this fact sheet, on the other hand, do not refer to sexual orientation or gender identity/expression in the law or bill but instead say that localities cannot pass nondiscrimination protections that exceed any classifications or protections at the state level.