

**LETTER OPINION  
2004-L-54**

August 10, 2004

Mr. Garylle Stewart  
Fargo City Attorney  
PO Box 1897  
Fargo, ND 58107-1897

Dear Mr. Stewart:

Thank you for your letter asking whether potential regulations of the State Labor Commissioner regarding environmental tobacco smoke would preempt a home rule city's ordinances regarding environmental tobacco smoke. The Labor Commissioner has not adopted administrative rules relating to your question but instead, has sought guidance from the Legislature. It is my opinion that generally a local ordinance addressing clean indoor air or smoking would neither be expressly nor impliedly preempted by state law, provided that the ordinance does not conflict with the regulations of the State Labor Commissioner.

**ANALYSIS**

The Labor Commissioner has statutory authority to investigate and determine whether smoking in the workplace may be detrimental to employees' health under N.D.C.C. § 34-06-05(2), and may take appropriate administrative action to address the issue, if determined necessary. N.D.A.G. 2004-L-27. The Labor Commissioner's actions may include adopting appropriate standards of conditions of labor for employees through administrative rule making. N.D.C.C. § 34-06-03(2). Administrative rules adopted by the Labor Commissioner have the force and effect of state law. N.D.C.C. § 28-32-06.

A city, whether home-rule or not, has authority to regulate the use of tobacco products. N.D.A.G. 97-F-05. Generally, if a home-rule city enacts such an ordinance under its home rule charter and statutory authority, the ordinance will supersede conflicting state laws unless the home rule authority has been expressly preempted by state law or is impliedly preempted in an area of statewide concern. N.D.A.G. 2000-L-32, N.D.A.G. 97-L-155.

After reviewing the relevant sections of state law, there is not an express preemption of local jurisdiction concerning conditions of labor.

However, that general answer changes when the question concerns administrative rules adopted by the Labor Commissioner. A violation of the Labor Commissioner's rules specifying conditions of employment under chapter 34-06 is a class B misdemeanor. N.D.C.C. § 34-06-19. Any offense or crime defined by state law may not be superseded by a city ordinance or by a home rule charter or ordinance adopted pursuant to the charter. N.D.C.C. § 12.1-01-05. Therefore, administrative rules adopted by the Labor Commissioner to provide standards or conditions of employment may not be superseded by local ordinances, including home rule ordinances.

A city may define an act to be a crime by ordinance that is also punishable under state law without superseding state law if the city has authority to enact the ordinance and if the penalty for violating the ordinance is not greater than the state law penalty. City of Fargo v. Little Brown Jug, 468 N.W.2d 392, 394 n.2, 396 (N.D. 1991) (offense of selling alcoholic beverages to person under 21, maximum city penalty was less than state law penalty). Further, the Labor Commissioner's jurisdiction under the minimum wage and hour law, chapter 34-06, N.D.C.C.,<sup>1</sup> is not mandatory. Pagel v. Trinity Hospital Ass'n., 6 N.W.2d 392, 395 (N.D. 1942). The Commissioner has discretion to determine whether to regulate environmental tobacco smoke in the workplace, and the scope of the regulations. Id., see also N.D.A.G. 2004-L-27. This implies that the Legislature has not intended to prohibit political subdivisions from exercising any statutory authority they may have so long as they do not supersede the Labor Commissioner's authority. N.D.C.C. § 12.1-01-05.

The Labor Commissioner's rules may be supplemented by complementing or non-conflicting standards adopted by political subdivisions having appropriate jurisdiction. The prohibition against superseding state criminal laws was adopted after a home rule city had determined that its ordinances could supersede the state criminal law relating to Sunday business or labor. City of Bismarck v. Hoopman, 421 N.W.2d 466, 469, n. 4 (N.D. 1988). In response, a committee of the Legislative Council determined that state criminal laws should operate throughout the state and should not be superseded by home rule charters or ordinances. Id. Since the term "supersede" is not defined in code, its plain meaning will govern interpretations of N.D.C.C. § 12.1-01-05. N.D.C.C. § 1-02-02. "Supersede" means to take the place of, replace, or to cause to be set aside or displaced. The American Heritage Dictionary 1221 (2d coll. ed. 1991). Therefore, so long as a city's regulations concerning environmental tobacco smoke in the workplace do not take the

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<sup>1</sup> The Labor Commissioner's jurisdiction to establish conditions of employment is contained in this chapter. N.D.C.C. §§ 34-06-03(2), 34-06-05.

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place of or set aside any rules that may be adopted by the Labor Commissioner, they will not run afoul of N.D.C.C. § 12.1-01-05.<sup>2</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

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<sup>2</sup> For example, the Labor Commissioner may choose to address environmental tobacco smoke in some, but not all, workplaces. Pagel, supra. If so, then a city could potentially regulate smoking in those areas where the Labor Commissioner's rules are silent.