

Understanding Federal Preemption

The ultimate touchstone is **Congress's intent**, which can be determined through the statute's text, structure, and purpose.

Federal preemption is when a federal law overcomes ("preempts") state law within a given topic. Preemption is broken into four categories. Three of these - field, impossibility, and conflict - are forms of implied preemption; they apply regardless of statutory text.

Express Preemption

When the text of a federal statute/regulation explicitly notes what is preempted. Express preemption is only in these limited instances.

Impossibility Preemption

Impossibility preemption occurs when it is physically impossible for an entity to comply with both the federal law and state law.

Field Preemption

Field preemption follows when Congress manifests its intent to regulate an entire field. This happens when either: 1) legislation is all-encompassing, so states can provide no supplemental regulations, or, 2) where the federal interest is overly dominant.

Obstacle Preemption

Though it may technically be possible to comply with both regulations, obstacle preemption - also known as "frustration of purpose" - occurs when doing so would undermine the federal goal.

A **savings clause** is a provision within a federal statute to limit its preemptive effect by clarifying that federal law is not preempting certain categories of state law. The legal effect of a savings clause will depend greatly on the specific words used. There are three general types of savings clauses.

Anti-Preemption

Contrary to express preemption, an anti-preemption provision explicitly says what is not preempted by the federal statute.

Ex. Fair Housing Act - 42 U.S.C. § 3615

Text: "Nothing in ... may be construed to preempt"

Compliance Savings

Compliance with the federal statute does not relieve a person from liability under state law. It also allows state tort actions to proceed.

Ex. Civil Rights Act, Title XII - 42 U.S.C. § 2000e-7

Text: "[the federal law does not] exempt any person from any liability under common law."

Remedies Savings

This clause can be read as Congress's intent to disavow field preemption.

Ex. Remedies savings clauses are not discussed in detail in this report.

Text: "Nothing in ... shall in any way abridge or alter the remedies now existing at common law or by statute."

Though less common, other preemptive provisions exist.

Sunset

This provides for an automatic repeal of the section or entire law.

Ex: Securities Act - 15 U.S.C. § 77r-1(c)

Floor Preemption

Essentially establishing a set of minimum requirements, floor preemption occurs when legislation has express preemption with a savings clause for state laws that impose stricter requirements or prohibitions.

Ex: Health Insurance Portability and Accountability Act - 45 CFR § 160.203(b)

Ceiling Preemption

Also called "unitary federal choice," ceiling preemption completely displaces state or local actors.

Ex: Federal Cigarette Labeling and Advertising Act - 15 U.S.C. § 1334(a)-(b)