



PUBLIC HEALTH  
LAW CENTER  
at Mitchell Hamline School of Law



# Kansas' Government Control of Local Food Policies Law

## What is HB 2595/SB 366?

This is a Kansas law enacted in 2016 that preempts local authority in favor of state government authority in several areas, including with respect to local regulation and oversight of food service operations, retail food establishments, and other matters concerning local food and agricultural practices. This law (“Government Control” law) also expressly limits local authority to try to reduce food-based health disparities.<sup>1</sup> It is very similar to laws passed in Ohio and Mississippi (see

box on page 3 about the invalidation of Ohio’s law). The Ohio,<sup>2</sup> Mississippi,<sup>3</sup> and Kansas laws closely resemble an ALEC (American Legislative Exchange Council) bill.<sup>4</sup>

## What does the Government Control law say about restrictions on the authority of “political subdivisions?”

The law says that the following topics are matters of statewide concern that can only be regulated through state legislation:

- the regulation of “consumer incentive items,” which are toys, crayons, coupons, and any other premium, prize or consumer product associated with a meal served by a food service operation;
- nutrition labeling for food and nonalcoholic beverages in restaurants, retail food establishments or vending machines; and
- how food service operations are “characterized.”

## WHAT IS PREEMPTION?

**Preemption** occurs when, by legislative or regulatory action, a “higher” level of government (state or federal) eliminates or restricts the authority of a “lower” level over a given issue. **Preemption** can impact a local government’s ability to implement public health strategies that are different from or go beyond existing state and federal laws.

Public Health Law Center, *Preemption in Public Health*, <http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health>. For more information about the impact of preemption on public health efforts, see Grassroots Change, *Preemption*, <http://grassrootschange.net/issues/preemption>.



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The Government Control law only applies to efforts by **political subdivisions** of the state (such as cities and counties — see Key Terms section on page 5) to address food-based health disparities and regulate retail food establishments. It does not apply to efforts by foundations, nonprofits, volunteer groups, civic groups, or other non-governmental initiatives aimed at promoting or supporting healthier eating.

The law also limits the authority of political subdivisions to address food-based health disparities through their licensing, permitting, or regulatory approval processes.<sup>5</sup>

Specifically, the Government Control law says that with respect to retail food establishments, local political subdivisions may not:

- Enact or enforce any local law or ordinance pertaining to the availability of food nutrition information;<sup>6</sup>
- Enact or enforce any local law or ordinance related to “consumer incentive items” given away with food;<sup>7</sup>
- Ban, prohibit, or otherwise restrict retail food establishments (including through licenses, permits, or another regulatory approval process) based on: the availability of nutrition information; whether or not consumer incentive items are given away with food; or on the existence (or non-existence) of a food-based health disparity;<sup>8</sup>
- Restrict the sale of foods and nonalcoholic beverages approved for sale by the USDA or other federal or state government agencies;<sup>9</sup>
- Restrict the growing or raising of livestock or crops approved for sale by the USDA or other federal or state government agencies.<sup>10</sup>

## What is a “food-based” “health disparity?”

The Government Control law does not define these terms. It simply refers to food-based health disparities “as recognized by the department of health, the institute of health, and centers for disease control [sic].”<sup>11</sup>

Although this language is somewhat vague, state and national public health experts have long recognized the problem of health disparities. The U.S. Department of Health and Human Services (the parent agency of the Centers for Disease Control and Prevention (CDC)) defines “health disparity” to be “a particular type of health difference that is closely linked with social or economic disadvantage. Health disparities adversely affect groups of people who have systematically experienced greater social or economic obstacles to health based on their racial or ethnic group, religion, socioeconomic status, gender, mental health, cognitive, sensory, or physical disability, sexual orientation, geographic location, or other characteristics historically linked to discrimination or exclusion.”<sup>12</sup> The CDC has identified disparities in access to healthier food retailers as a health disparity.<sup>13</sup> The CDC also explains that disparities related to nutrition could be addressed by a variety of local efforts, including: strategies to increase access to healthier food outlets; initiatives for businesses to provide healthier food and beverages; education combined with vouchers to encourage and support low-income families to purchase healthier food, and food policy councils, among others.<sup>14</sup>

Similarly, the Kansas Department of Health and Environment (KDHE) explains that “there are striking disparities in the burden of illness and death experienced by African Americans, Hispanics, Native Americans, Alaska Natives, Asians, and Pacific Islanders, and underserved groups such as disadvantaged rural Whites” and that “[d]isparities are evident in nearly every health indicator in Kansas (i.e. heart disease, diabetes, obesity, elevated blood level, low birth weight).”<sup>15</sup>

## Preempting Preemption in Ohio

Ohio passed a law in the summer of 2011 similar to Kansas' Government Control law. The City of Cleveland, which had launched a historic Healthy Cleveland Initiative earlier that spring and which had passed a law restricting use of artificial trans fats in restaurant foods, challenged the constitutionality of the Ohio law. The city won. The law was held unconstitutional by *Cleveland v. State of Ohio*, 989 N.E.2d 1072 (Oh. Ct. App. 2013) because it violated Ohio's Home Rule Amendment, and Ohio's One-Subject Rule. Similar to Ohio, Kansas' constitution grants strong home rule powers to local jurisdictions (see Article 12, Section 5 of the Kansas Constitution).

## Does the Government Control law include any provisions to address nutrition labeling, consumer incentive items, food-based health disparities, or any other nutrition-related concern in a statewide way?

No. The law says it restricts state agencies from taking action in the same way that it restricts local political subdivisions.<sup>16</sup> Although the Kansas Legislature specifically reserved all lawmaking power on those subjects for itself, it hasn't taken any actions to address any of these topics.

## What does the Government Control law say it does *not* restrict?

**General planning and zoning authority:** The law states that it in no way limits or restricts the authority of cities, municipalities, counties, and county officers to plan and zone for the protection of public health, safety, and welfare.<sup>17</sup>

**Creating a policy with nutrition standards for foods served or sold by local government through concession stands or other venues:** The law does not prohibit political subdivisions from owning or managing food service operations, or from setting policies about what foods and beverages they will purchase and serve in accordance with the Kansas food code. The law expressly allows political subdivisions to set their own policies within their own food service operations, so long as those policies are not laws or ordinances restricting other food service entities.<sup>18</sup>

**Nutrition education activities:** The law does not prohibit political subdivisions from creating and sharing educational information about food nutrition and food-based health disparities, so long as the information is consistent with the USDA's Dietary Guidelines for Americans<sup>19</sup> and is not part of a law or ordinance restricting other food service entities.<sup>20</sup>



**Participating in Double Up Food Bucks and similar matching programs:** The law does not prohibit political subdivisions from participating in food assistance programs as long as the programs operate in accordance with the USDA's Dietary Guidelines for Americans and the programs are not part of a law or ordinance restricting other food service entities.<sup>21</sup>

**Does the Government Control law interfere with the federal calorie labeling law?**

No, HB 2595/SB 366 expressly states that it should not be interpreted as interfering with the federal calorie labeling law that was adopted in 2010.<sup>22</sup> For more information about the federal law, see the [Public Health Law Center's resource on the federal calorie labeling law](#).

**Does the Government Control law prohibit the creation of food and farm councils?**

No. Food and farm councils can still be created, whether voluntarily or through government action.

**Does the Government Control law prohibit community gardens?**

No. In fact, the law states that political subdivisions may not “restrict the growing ... of grain, vegetables, fruits or other crops grown or raised for food and approved for sale by the USDA or other federal or state government agencies.”<sup>23</sup> However, the law also states that it does not limit or restrict a political subdivision's general zoning authority, so it appears that political subdivisions may continue to apply general zoning laws to these gardens as appropriate.

**Does the Government Control law limit local communities' ability to recruit grocery stores to underserved areas or food deserts?**

The law's impact is unclear. It is unclear whether a grocery store qualifies as a “retail food establishment” under the law. If so, the law expressly prohibits political subdivisions from conditioning a license, permit, or other regulatory approval for a retail food establishment on the existence of a food-based health disparity.

**Does the Government Control law limit local communities' ability to regulate the keeping of chickens, bees, or other livestock within city, county, or town limits?**

It depends. The law says that political subdivisions may not restrict the growing or raising of livestock or crops approved for sale by the USDA or other federal or state government agencies. However, the law also says it does not limit the general zoning and planning



authority of political subdivisions. So for political subdivisions that regulate these practices through their general zoning laws, these regulations should continue to be valid. But for political subdivisions that use animal control ordinances or other means to regulate these practices, they may be preempted.

## Key Terms from the Government Control of Local Food Policies Law

The following is a partial list of the defined terms included in the law.<sup>24</sup>

- **“Retail Food Establishment” or “Food Service Operation”** means any place in which food is served or is prepared on the premises for retail sale or service while hot (or heated by the seller), is mixed or combined by the seller for sale as a single item, or sold with eating utensils, and is intended for immediate consumption. This term includes places such as: fixed or mobile restaurants; coffee shops; cafeterias; cafes; grills; tea rooms; sandwich shops; soda fountains; taverns; private clubs; roadside kitchens; commissaries; any other private, public or nonprofit organization or institution that routinely serves food; and any other eating or drinking establishment or operation where food is served or provided for the public with or without charge.<sup>25</sup>
- **“Political Subdivision”** means political or taxing subdivisions of the state, including counties, townships, cities, school districts, authorities or other municipal or public corporations, agencies, boards, commissions, councils, committees, subcommittees and other subordinate groups or administrative units thereof, that receive, expend, and are supported, in whole or in part, by public funds.<sup>26</sup>
- **“Food nutrition information”** includes, but is not limited to, the caloric, fat, carbohydrate, cholesterol, fiber, sugar, potassium, protein, vitamin, mineral, sodium and allergen content of food. It also includes the designation of food as healthy or unhealthy.<sup>27</sup>

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## Endnotes

- <sup>1</sup> S. 366 86th Gen. Assemb., Reg. Sess. (Kan. 2016). The law also restricts local authority in regards to residential property inspections, price control of real estate, and labor work schedules.
- <sup>2</sup> As explained in this resource, the Ohio law was invalidated through a challenge brought by the City of Cleveland.
- <sup>3</sup> Miss Code Ann. §75-29-901 (2016).
- <sup>4</sup> ALEC, Food and Nutrition Act, <https://www.alec.org/model-policy/food-and-nutrition-act> (accessed on June 13, 2016).
- <sup>5</sup> S. 366 § 2(a), (b), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>6</sup> S. 366 § 2(b)(1), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>7</sup> S. 366 § 2(b)(1), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>8</sup> S. 366 § 2(b)(3), (4), (5), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>9</sup> S. 366 § 2(b)(6), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>10</sup> S. 366 § 2(b)(7), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>11</sup> S. 366 § 2(b)(5), 86th Gen. Assemb., Reg. Sess. (Kan. 2016)
- <sup>12</sup> U.S. Dep't of Health and Human Servs., *The Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020. Phase I report: Recommendations for the framework and format of Healthy People 2020.* (October 28, 2008), at 28, [https://www.healthypeople.gov/sites/default/files/PhaseI\\_0.pdf](https://www.healthypeople.gov/sites/default/files/PhaseI_0.pdf).
- <sup>13</sup> CDC, Morbidity and Mortality Weekly Report, *CDC Health Disparities and Inequalities Report — United States, 2013* (Nov. 22, 2013) at 20, <http://www.cdc.gov/mmwr/pdf/other/su6203.pdf>.
- <sup>14</sup> *Id.*, at 126.
- <sup>15</sup> KDHE, What are health disparities?, [http://www.healthequityks.org/health\\_disparities.html](http://www.healthequityks.org/health_disparities.html).
- <sup>16</sup> S. 366 § 2(b), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>17</sup> S. 366 § 2(e), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>18</sup> S. 366 § 2(d), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>19</sup> These guidelines can be found at 7 U.S.C § 5341 (2016).
- <sup>20</sup> S. 366 § 2(f), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>21</sup> S. 366 § 2(g), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>22</sup> S. 366 § 2(c), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).; 21 U.S.C. § 343(q)(5) (2010).
- <sup>23</sup> S. 366 § 2(b)(7), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>24</sup> Other terms and phrases defined in the law are: “food,” “food that is a menu item in vending machines,” and “consumer incentive item.” S. 366 § 1(a), (b), and (f) 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>25</sup> S. 366 § 1(c), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>26</sup> S. 366 § 1(e), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).
- <sup>27</sup> S. 366 § 1(d), 86th Gen. Assemb., Reg. Sess. (Kan. 2016).