STATE OF TENNESSEE
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Opinion No. 13-99

Regulation of Distribution of Ephedrine and Pseudoephedrine by Tennessee Local Governments

QUESTIONS

1. Would enactment of an ordinance by a Tennessee county or municipality that prohibits the sale, delivery or distribution of over-the-counter products containing ephedrine or pseudoephedrine without a valid prescription from a Tennessee licensed health care professional violate Tenn. Code Ann. § 39-17-431, or any other applicable provision of Tennessee or federal law?

2. Does Tenn. Code Ann. § 39-17-431(n), which provides that "[t]his section [Tenn. Code Ann. § 39-17-431] shall supersede any local laws or ordinances currently regulating sales of products containing any immediate methamphetamine precursor," supersede any future local law or ordinance on the subject?

3. If the local ordinance referenced in Question 1 were to impose monetary civil sanctions, would the ordinance be punitive in nature and violate the equal protection provisions of the Tennessee Constitution, rendering such civil sanctions unenforceable?

4. Would the enactment of the local ordinance referenced in Question 1 be authorized by the powers granted to counties and municipalities under Tenn. Code Ann. §§ 5-1-118, 6-2-201, 6-19-101, 6-33-101 and 7-3-101?

OPINIONS

1. Yes. Enactment by a Tennessee county or municipality of a local ordinance that prohibits the sale, delivery or distribution of over-the-counter products containing ephedrine or pseudoephedrine without a valid prescription from a health care professional licensed in Tennessee would violate Tenn. Code Ann. § 39-17-431. That section demonstrates the General Assembly's intent to occupy the entire field of regulation of immediate methamphetamine precursors such as ephedrine or pseudoephedrine, so as to permit no local enactments.

2. Yes. The language of Tenn. Code Ann. § 39-17-431(n) evidences the General Assembly's intent to occupy the entire field of regulation of immediate methamphetamine precursors so as to permit no local enactments now or in the future.

3 & 4. The responses to the first two questions pretermit the need to answer Questions 3 and 4.

ANALYSIS

1 & 2. The provisions of Tenn. Code Ann. § 39-17-431 regulate the use and sale of any product containing any "immediate methamphetamine precursor." This statute, originally enacted in part as the Meth-Free Tennessee Act of 2005 (2005 Tenn. Pub. Acts ch. 18, hereinafter "the 2005 Act") and then subsequently repealed and reenacted as amended as the "I Hate Meth Act" (2011 Tenn. Pub. Acts ch. 292, § 1, hereinafter "the 2011 Act"), states in relevant part as follows:

> a) Except as provided in this section, any product that contains any immediate methamphetamine precursor may be dispensed only by a licensed pharmacy.
>
> (b)(1) A product or category of products that contains any immediate methamphetamine precursor shall be exempt from the requirements of this section if the ingredients are not in a form that can be used in the manufacture of methamphetamine.
>
> (2) The board of pharmacy, in consultation with the Tennessee bureau of investigation (TBI), shall determine whether a product or category of products that contain any immediate methamphetamine precursor is not in a form that can be used in the manufacture of methamphetamine. In making such a determination, the board shall solicit the written opinion of the bureau and work with the bureau to develop procedures that consider, among other factors:
>
> (A) The ease with which the product can be converted to methamphetamine, including the presence or absence of a "molecular lock" completely preventing a product's use in methamphetamine manufacture;
>
> (B) The ease with which pseudoephedrine can be extracted from a product and whether it forms a salt, emulsion, or other form; and
>
> (C) Any other pertinent data that can be used to determine the risk of a product being viable in the illegal manufacture of methamphetamine.
>
> (3) The board of pharmacy shall maintain a public list of the exempted products or categories of products. Any person may request that a product or category of products be included on the exemption list.
>
> (c)(1) A pharmacy shall not sell to the same person products containing more than three and six tenths (3.6) grams per day, or more than nine (9) grams per thirty-day period, of ephedrine or pseudoephedrine base, or their salts, isomers or salts of isomers. The limits shall apply to the total amount of base ephedrine and pseudoephedrine contained in the products, and not the overall weight of the products. The prohibition contained in this subsection (c) shall not apply to a person who obtains the product or products pursuant to a valid prescription issued by a licensed healthcare practitioner authorized to prescribe by the law of this state.

(2) A person shall not purchase products containing more than three and six tenths (3.6) grams per day, or more than nine (9) grams per thirty-day period, of ephedrine or pseudoephedrine base, or their salts, isomers or salts of isomers. The limits in this subsection (c) apply whether one form of ID is used to make the purchase or if two (2) or more are used to purchase the products. The limits shall apply to the total amount of base ephedrine and pseudoephedrine contained in the products, and not the overall weight of the products. The prohibition contained in this subsection (c) shall not apply to a person who obtains the product or products pursuant to a valid prescription issued by a licensed healthcare practitioner authorized to prescribe by the law of the state.

(3) This subsection (c) also shall apply to pharmacist-generated prescription orders of the product pursuant to § 63-10-206. The provision of the patient education and counseling as a part of the practice of pharmacy shall be required when product is issued under this subsection (c).

(4) There shall be no protocol or procedure mandated by any individual or corporate entity that interferes with the pharmacist's professional duty to counsel and evaluate the patient's appropriate pharmaceutical needs and the exercise of the pharmacist's professional judgment as to whether it is appropriate to dispense medication as set forth in subsection (d) or otherwise.

(d) The pharmacist or pharmacy intern under the supervision of the pharmacist shall require any person purchasing an over-the-counter product containing pseudoephedrine or ephedrine to present valid government issued photo identification at the point of sale. The pharmacist or pharmacy intern shall counsel with the person seeking to purchase the product as to the reasons for needing the product and may decline the sale if the pharmacist or pharmacy intern believes the sale is not for a legitimate medical purpose. The pharmacist, pharmacy technician, or pharmacy intern shall maintain an electronic record of the sale under this subsection (d) and the record may be maintained in the form of a pharmacist prescription order as provided by § 63-10-206(c). The electronic record shall include the name and address of purchaser; name and quantity of product purchased; date and time purchased; purchaser identification type and number, such as driver license state and number; and the identity, such as name, initials or identification code, of the dispensing pharmacist or pharmacy intern. If a system is not able to record the identification type and number, the pharmacist, pharmacy technician, or pharmacy intern shall write the identification type and number on the prescription order. The electronic record shall also be maintained in a manner that allows for the determination of the equivalent number of packages purchased and total quantity of base ephedrine or pseudoephedrine purchased.

. . . .

(k) A violation of subsections (a)-(j) is a Class A misdemeanor, punishable by fine only. If the person in violation is a licensed pharmacy or pharmacist, the violation shall be reported to the board of pharmacy for review and appropriate

> action. If a product is dispensed in violation of subsection (a), the owner or operator of the wholesale or retail establishment dispensing the product shall be in violation of subsection (a).
>
> . . . .
>
> (m)(1) It is an offense for a person not authorized to do so to knowingly engage in any of the following conduct with respect to a nonexempt product containing an immediate methamphetamine precursor and required to be maintained behind-the-counter of the pharmacy as specified in subsection (h):
>
> (A) Attempt to sell the product knowing that it will be used to produce methamphetamine, or with reckless disregard of its intended use;
>
> (B) Attempt to purchase the product with the intent to manufacture methamphetamine or deliver the product to another person whom they know intends to manufacture methamphetamine, or with reckless disregard of the other person's intent;
>
> (C) Purchase the product at different times or locations for the purpose of circumventing the maximum allowable quantity of the product that may lawfully be purchased during a one-day or thirty-day period; or
>
> (D) Use a false identification to purchase the product for the purpose of circumventing the maximum allowable quantity of the product that may lawfully be purchased during a one-day period or thirty-day period.
>
> (2)(A) A violation of this subsection (m) shall be a Class A misdemeanor. All proceeds from fines imposed pursuant to this subsection (m) shall be used by the jurisdiction making the arrest for methamphetamine clean-up activities in that jurisdiction.
>
> . . . .
>
> *(n) This section shall supersede any local laws or ordinances currently regulating sales of products containing any immediate methamphetamine precursor.*

Tenn. Code Ann. § 39-17-431 (emphasis added). The term "immediate methamphetamine precursor" includes ephedrine and pseudoephedrine. Tenn. Code Ann. § 39-17-402(13).

The provisions of Tenn. Code Ann. § 39-17-402 establish a detailed process regulating the sale, delivery and distribution of ephedrine and pseudoephedrine in Tennessee. Indeed, the preamble to the Meth-Free Tennessee Act of 2005 states the General Assembly's intent to "work with law enforcement, the health care industry, community agencies and other interested stakeholders to develop a *comprehensive strategy* including treatment and public awareness for addressing methamphetamine abuse." 2005 Tenn. Pub. Acts ch. 18 (emphasis added). To this end, Tenn. Code Ann. § 39-17-402(n) expressly states its provisions "shall supersede any local

law or ordinances currently regulating any immediate methamphetamine precursor." With the possible exception of Tenn. Code Ann. § 39-17-431(m)(2)(A), which directs that "[a]ll proceeds from fines imposed pursuant to this subsection (m) shall be used by the jurisdiction making the arrest for methamphetamine clean-up activities in that jurisdiction," the entire scheme of Tenn. Code Ann. § 39-17-431 is State-based, utilizing State agencies and imposing State criminal penalties.

The General Assembly's comprehensive regulation of the sale and distribution of products containing ephedrine or pseudoephedrine under Tenn. Code Ann. § 39-17-431, together with the statute's express statement that its provisions supersede "any local law or ordinances currently regulating sales" of such products, evidences the General Assembly's intent to adopt a uniform statewide regulatory process that would preempt and exclude any local regulation in this area. "Municipal legislation is preempted if it expressly contradicts state law or if it runs counter to the legislative intent underlying a statutory scheme." 56 Am. Jur2d *Municipal Corporations* § 316 (August 2013). The enactment of a local ordinance that prohibits the sale, delivery or distribution of over-the-counter products containing ephedrine or pseudoephedrine without a valid prescription from a health care professional licensed in Tennessee would be contrary to Tenn. Code Ann. § 39-17-431 because that section reveals the General Assembly's intent to occupy the entire field of regulation of immediate methamphetamine precursors such as ephedrine or pseudoephedrine, both with a valid prescription from a licensed health care professional and without such prescription, so as to permit no local enactments. This type of preemption, referred to as "field preemption," applies where an analysis of a statute reveals the General Assembly's implicit intent to occupy the entire field, such as to permit no local enactments. Such field preemption occurs "where the subject of the legislation is of State-wide concern and the Legislature has appropriated the field and declared the rule." *State ex rel. Beasley v. Mayor and Aldermen of Town of Fayetteville*, 268 S.W.2d 330, 333 (Tenn. 1954). Such statewide legislation is "binding throughout the State." *Id. See also Morgan Keegan & Co., Inc. v Smythe*, 401 S.W.3d 595, 605-06 (Tenn. 2013); *Leggett v. Duke Energy Co.*, 308 S.W.3d 843, 864-68 (Tenn. 2010).

Further, in this case, the General Assembly expressly preempts any existing local ordinance on this subject. This type of preemption, called "express preemption," occurs where a preemption clause is explicitly stated in the statute's language. *Capitol News Co., Inc. v. Metropolitan Government*, 562 S.W.2d 430, 434 (Tenn. 1978) (citing *City of Tacoma v. Naubert*, 491 P.2d 652 (Wash. 1971) (referencing a specific statute dealing with the sale of erotic material to minors that was held to preempt local authority; the statute contained language expressly making its provisions exclusive.)

The same language codified at Tenn. Code Ann. § 39-17-431(n) and included as part of the 2011 Act, which states that § 39-17-431 shall supersede any local law or ordinance "currently" regulating sales of products containing any immediate methamphetamine precursor, was also included in the 2005 Act at Tenn. Code Ann. § 39-17-431(g) (2010). The subsection provided: "This section shall supersede any local laws or ordinances currently regulating sales of products containing any immediate methamphetamine precursor." Tenn. Code Ann. § 39-17-431(g) (2010). Subsequently, the General Assembly repealed the former § 39-17-431 by deleting it in its entirety and enacting the 2011 Act which contains exactly the same language in Tenn. Code Ann. § 39-17-431(n): "This section shall supersede any local laws or ordinances

currently regulating sales of products containing any immediate methamphetamine precursor." *See* 2011 Tenn. Pub. Act ch. 292, § 2.

The fact that both of these preemption provisions state they supersede local laws or ordinances "currently" in effect does not preclude these provisions from also preempting the enactment of such local laws after the passage of the 2005 and 2011 Acts. Such a literal and narrow reading of these provisions would produce the incongruous result that the General Assembly, after invalidating all local laws in this area, would permit a locality immediately after passage of these Acts to re-enact the same local laws just invalidated. General rules of statutory construction adopted by Tennessee courts presume that the General Assembly acts reasonably and does not enact a statute that produces such an impractical and unrealistic result. *See Powell v. Community Health Systems, Inc.* 312 S.W.3d 496, 508 (Tenn. 2010) (stating courts "are required to interpret all statutes in a way that makes sense rather than nonsense"); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 313 (Tenn. 2005) (recognizing that a court should not adopt an interpretation of a statute that would lead to absurd results).

3 & 4. The responses to the first two questions pretermit the need to respond to the third and fourth questions.

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