

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

December 20, 2013

Opinion No. 13-108

Prescription Requirement for Pseudoephedrine Products

QUESTION

May the State of Tennessee require that all products containing pseudoephedrine be sold only with a valid prescription from a Tennessee licensed health-care professional, even though pseudoephedrine is not contained on the federal Drug Enforcement Agency's list of scheduled narcotics?

OPINION

Yes.

ANALYSIS

State laws regulating the sale of drugs, medicines, and poisons are an appropriate exercise of the state's police power to protect the public health. *State v. Foutch*, 155 Tenn. 476, 479 (1927). While a state's police power may be preempted under the Supremacy Clause of the United States Constitution, *see* U.S. Const. art. VI, cl. 2, by federal regulation where that was Congress' clear and manifest purpose, preemption is compelled only if it is expressly stated in the federal law or is implied in the law's structure and purpose. *State v. Scott*, 678 S.W.2d 50, 51 (Tenn. 1984) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) and *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982)).

The Federal Food, Drug, and Cosmetic Act contains various provisions relating to prescription and non-prescription drugs. *See* 21 U.S.C. §§ 301, *et seq.* One section of the act imposes national uniformity in the regulation of non-prescription drugs and preempts state requirements concerning over-the-counter medications. *See* 21 U.S.C. § 379r. Thus, without any statutory exemption, § 379r would preempt a state from enacting a prescription requirement for pseudoephedrine. However, § 379r(c)(1) carves out an exception, stating:

This section [§ 379r] shall not apply to—

...

(B) any state or political subdivision requirement that a drug be dispensed only upon the prescription of a practitioner licensed by law to administer such drug.

This statute expressly removes any preemption by federal law of a state's authority to enact a prescription requirement for drugs such as pseudoephedrine. Therefore, the General Assembly could legitimately enact a law requiring that products containing pseudoephedrine be sold only with a valid prescription from a Tennessee licensed health-care professional.¹

ROBERT E. COOPER, JR.
Attorney General and Reporter

GORDON W. SMITH
Associate Solicitor General

SARA E. SEDGWICK
Senior Counsel

Requested by:

The Honorable Mae Beavers
State Senator
6 Legislative Plaza
Nashville, Tennessee 37243

¹This Office has recently opined in Tenn. Att'y Gen. Op. 13-99 (Dec. 6, 2013) that 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.