
CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
ANDRE M. DAVIS, CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

February 20, 2020

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 18-0311 – Nicotine Replacement Therapy Products– Sale
and Distribution

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0311 for form and legal sufficiency. The bill would add Subtitle 9 titled Nicotine Replacement Therapy Products to the Health Article of the Maryland Code. The Subtitle would do three distinct things. First, it would require tobacco stores that are licensed by the state to sell smoking cessation products, require those products be “packaged in the smallest quantity available to the retailer” and be prominently displayed near the tobacco offered for sale. Second, the bill would also mandate that certain employers provide one dose of a nicotine replacement therapy product “upon request” to employees at no cost. Finally, it would mandate that a facility offering “medication-assisted treatment,” as defined in Federal Regulations, provide one dose of a nicotine replacement therapy product “upon request” to “clients and employees” at no cost.

The first of the bill’s requirements – the sale of Nicotine Replacement Therapy (“NRT”) products by those licensed to sell tobacco – is subject to challenge under the Commerce Clause of the United States Constitution because the requirement arguably burdens interstate commerce by mandating that a store offer a certain product in a particular package and that burden could be deemed by a court to be greater than the legislation’s putative benefits. “[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (cited with approval in *Medical Waste Associates Ltd. Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148, 150 (4th Cir. 1992)).

A court may decide that the City’s legitimate health goals “could be promoted as well with a lesser impact on interstate activities.” For example, a court may find that a Health Department program that offered every City resident one free NRT product could have at least the same effect with far less burden on commerce.

Second, requiring certain employers to provide free NRT products could be preempted by the Employee Retirement Income Security Act of 1974 (“ERISA”) because it arguably “relates to” health benefit plans and therefore runs afoul of Section 1144(a) of Article 29 of the United States Code. 29 U.S.C. § 1144(a); *Retail Industry Leaders Ass’n v. Fielder*, 475 F. 3d 180, 190 (D. Md. 2007). Even occasional and informal benefits of minimal cost and administration are covered by ERISA. *Id.*

Finally, the requirement that “medication-assisted treatment” facilities provide NRT products upon request is problematic. First, although the definition references Federal Regulations, it is not clear whether the intent is to only cover the facilities participating in the federal program for medication assisted treatment for opioid users described in that same section of regulations (42 C.F.R. § 8), or whether the intent is to cover other medication assisted treatment facilities. Either way, if a facility is providing medical treatment of any kind, the City is likely preempted from requiring the distribution of NRT products upon request to clients of the program. The treatment of opioid use disorders and, more generally, the practice of medicine, which includes the dispensing of over-the-counter drugs in some cases, is an area that is so pervasively regulated by both the state and the federal government that it is likely that a court would find that the field of medication assisted treatment is preempted by the existing statutory schemes currently in place. Maryland courts will find an implied intent to preempt when the “Legislature has acted with such force that an intent by the State to occupy the entire field must be implied” *County Council v. Montgomery Ass’n*, 274 Md. 52, 59 (1975). This would bar the City from regulating any aspect of medication assisted treatment programs – including the free distribution of NRT products upon request.

The Law Department advises that this requirement be removed from the bill.

The Law Department has reviewed the proposed amendments dated January 17, 2020. The amendments remove the requirement that tobacco retailers sell NRT products but retain the display and packaging requirements. The amendments also remove the requirement that certain employers provide to their employees free NRT products upon request.

The amendments are legally sufficient.

The Law Department could approve the bill for form and legal sufficiency if the requirement that medication-assisted treatment facilities provide NRT products is removed.

Very truly yours,



Hilary Ruley
Chief Solicitor
Ashlea H. Brown
Assistant Solicitor

cc: Andre M. Davis, City Solicitor
Dana P. Moore, Deputy City Solicitor
Matthew Stegman, Mayor’s Office of Government Relations
Elena DiPietro, Chief Solicitor
Victor Tervala, Chief Solicitor