

# STATE OF NEW YORK

2543--A

Cal. No. 646

2017-2018 Regular Sessions

## IN SENATE

January 13, 2017

Introduced by Sens. HANNON, AKSHAR, ALCANTARA, AVELLA, BRESLIN, BROOKS, CARLUCCI, COMRIE, FUNKE, HAMILTON, HELMING, JACOBS, KAMINSKY, KRUEGER, LARKIN, LAVALLE, PERSAUD, RITCHIE, VALESKY -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the public health law, in relation to including vaping within the provisions of law regulating smoking in certain public areas

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1399-n of the public health law is amended by adding three new subdivisions 9, 10 and 11 to read as follows:

9. "Vaping" means the use of an electronic cigarette.

10. "Electronic cigarette" shall have the same meaning as in subdivision thirteen of section thirteen hundred ninety-nine-aa of this chapter.

11. "Retail electronic cigarette store" means a retail store devoted primarily to the sale of electronic cigarettes, and in which the sale of other products is merely incidental. The sale of such other products shall be considered incidental if such sales generate less than twenty-five percent of the total annual gross sales.

§ 2. Section 1399-q of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

§ 1399-q. Smoking and vaping restrictions inapplicable. This article shall not apply to:

1. Private homes, private residences and private automobiles;
2. A hotel or motel room rented to one or more guests;
3. Retail tobacco businesses;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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4. Membership associations; provided, however, that smoking and vaping shall only be allowed in membership associations in which all of the duties with respect to the operation of such association, including, but not limited to, the preparation of food and beverages, the service of food and beverages, reception and secretarial work, and the security services of the membership association are performed by members of such membership association who do not receive compensation of any kind from the membership association or any other entity for the performance of such duties;

5. Cigar bars that, in the calendar year ending December thirty-first, two thousand two, generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, and is registered with the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article. Such registration shall remain in effect for one year and shall be renewable only if: (a) in the preceding calendar year, the cigar bar generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, and (b) the cigar bar has not expanded its size or changed its location from its size or location since December thirty-first, two thousand two;

6. Outdoor dining areas of food service establishments with no roof or other ceiling enclosure; provided, however, that smoking and vaping may be permitted in a contiguous area designated for smoking and vaping so long as such area: (a) constitutes no more than twenty-five percent of the outdoor seating capacity of such food service establishment, (b) is at least three feet away from the outdoor area of such food service establishment not designated for smoking and vaping, and (c) is clearly designated with written signage as a smoking and vaping area; ~~and~~

7. Enclosed rooms in food service establishments, bars, catering halls, convention halls, hotel and motel conference rooms, and other such similar facilities during the time such enclosed areas or rooms are being used exclusively for functions where the public is invited for the primary purpose of promoting and sampling tobacco products or electronic cigarettes, and the service of food and drink is incidental to such purpose, provided that the sponsor or organizer gives notice in any promotional material or advertisements that smoking and vaping will not be restricted, and prominently posts notice at the entrance of the facility and has provided notice of such function to the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article, at least two weeks prior to such function. The enforcement officer shall keep a record of all tobacco sampling events, and such record shall be made available for public inspection. No such facility shall permit smoking and vaping under this subdivision for more than two days in any calendar year; and

8. Retail electronic cigarette stores, provided however, that such stores may only permit the use of electronic cigarettes.

§ 3. The article heading of article 13-E of the public health law, as added by chapter 244 of the laws of 1989, is amended to read as follows:

ARTICLE 13-E

REGULATION OF SMOKING AND VAPING IN CERTAIN PUBLIC AREAS

§ 4. Section 1399-o of the public health law, as amended by chapter 389 of the laws of 2011, subdivision 2 as amended by chapter 179 of the laws of 2013, subdivision 3 as added by chapter 449 of the laws of 2012, and subdivision 4 as added by chapter 100 of the laws of 2015, is amended to read as follows:

§ 1399-o. Smoking and vaping restrictions. 1. Smoking and vaping shall not be permitted and no person shall smoke or vape in the following indoor areas:

- a. places of employment;
- b. bars;
- c. food service establishments, except as provided in subdivision six of section thirteen hundred ninety-nine-q of this article;
- d. enclosed indoor areas open to the public containing a swimming pool;
- e. public means of mass transportation, including subways, underground subway stations, and when occupied by passengers, buses, vans, taxicabs and limousines;
- f. ticketing, boarding and waiting areas in public transportation terminals;
- g. youth centers and facilities for detention as defined in sections five hundred twenty-seven-a and five hundred three of the executive law;
- h. any facility that provides child care services as defined in section four hundred ten-p of the social services law, provided that such services provided in a private home are excluded from this subdivision when children enrolled in such day care are not present;
- i. child day care centers as defined in section three hundred ninety of the social services law and child day care centers licensed by the city of New York;
- j. group homes for children as defined in section three hundred seventy-one of the social services law;
- k. public institutions for children as defined in section three hundred seventy-one of the social services law;
- l. residential treatment facilities for children and youth as defined in section 1.03 of the mental hygiene law;
- m. all public and private colleges, universities and other educational and vocational institutions, including dormitories, residence halls, and other group residential facilities that are owned or operated by such colleges, universities and other educational and vocational institutions, except that these restrictions shall not apply in any off-campus residential unit occupied by a person who is not enrolled as an undergraduate student in such college, university or other educational or vocational institution;
- n. general hospitals and residential health care facilities as defined in article twenty-eight of this chapter, and other health care facilities licensed by the state in which persons reside; provided, however, that the provisions of this subdivision shall not prohibit smoking and vaping by patients in separate enclosed rooms of residential health care facilities, adult care facilities established or certified under title two of article seven of the social services law, community mental health residences established under section 41.44 of the mental hygiene law, or facilities where day treatment programs are provided, which are designated as smoking and vaping rooms for patients of such facilities or programs;
- o. commercial establishments used for the purpose of carrying on or exercising any trade, profession, vocation or charitable activity;
- p. indoor arenas;
- q. zoos; and
- r. bingo facilities.

2. Smoking and vaping shall not be permitted and no person shall smoke or vape in the following outdoor areas:

1 a. ticketing, boarding or platform areas of railroad stations operated  
2 by the metropolitan transportation authority or its subsidiaries.

3 b. on the grounds of general hospitals and residential health care  
4 facilities as defined in article twenty-eight of this chapter, within  
5 fifteen feet of a building entrance or exit or within fifteen feet of  
6 the entrance to or exit from the grounds of any such general hospital or  
7 residential health care facility. This subdivision shall not prohibit  
8 smoking and vaping by a patient or a visitor or guest of a patient of a  
9 residential health care facility in a separate area on the grounds  
10 designated as a smoking and vaping area by the residential health care  
11 facility, provided such designated smoking and vaping area is not within  
12 thirty feet of any building structure (other than a non-residential  
13 structure wholly contained within the designated smoking and vaping  
14 area), including any overhang, canopy, awning, entrance, exit, window,  
15 intake or exhaust.

16 3. Smoking and vaping shall not be permitted and no person shall smoke  
17 or vape within one hundred feet of the entrances, exits or outdoor areas  
18 of any public or private elementary or secondary schools; provided,  
19 however, that the provisions of this subdivision shall not apply to  
20 smoking or vaping in a residence, or within the real property boundary  
21 lines of such residential real property. The provisions of section thir-  
22 teen hundred ninety-nine-p of this article shall not apply to this  
23 subdivision.

24 4. Smoking and vaping shall not be permitted and no person shall smoke  
25 or vape within one hundred feet of the entrances, exits or outdoor areas  
26 of any after-school program licensed or registered pursuant to section  
27 three hundred ninety of the social services law; provided, however, that  
28 the provisions of this subdivision shall only apply on those days and  
29 during those hours in which such after-school programs are operational;  
30 and provided, further, that the provisions of this subdivision shall not  
31 apply to smoking or vaping in a residence, or within the real property  
32 boundary lines of such residential real property.

33 § 5. Section 1399-o-1 of the public health law, as added by chapter  
34 102 of the laws of 2013, is amended to read as follows:

35 § 1399-o-1. Smoking and vaping restrictions; certain outdoor areas. 1.  
36 Smoking and vaping shall not be permitted and no person shall smoke or  
37 vape during the hours between sunrise and sunset, when one or more  
38 persons under the age of twelve are present at any playground. For the  
39 purposes of this section, the term "playground" means an improved area  
40 designed, equipped, and set aside for play of six or more children which  
41 is not intended for use as an athletic playing field or athletic court,  
42 and shall include any play equipment, surfacing, fencing, signs, inter-  
43 nal pathways, internal land forms, vegetation, and related structures.  
44 Playgrounds or playground equipment constructed upon one, two and three-  
45 family residential real property are exempt from the requirements of  
46 this section. This section shall not apply to any playground located  
47 within the city of New York.

48 2. No police officer, peace officer, regulatory officer or law  
49 enforcement official may arrest, ticket, stop or question any person  
50 based solely or in part on an alleged violation of subdivision one of  
51 this section, nor may an alleged violation of subdivision one of this  
52 section support probable cause to conduct any search or limited search  
53 of any person or his or her immediate surroundings.

54 § 6. Section 1399-p of the public health law, as added by chapter 244  
55 of the laws of 1989, subdivision 1 as amended by chapter 13 of the laws

1 of 2003, and subdivision 3 as added by chapter 100 of the laws of 2015,  
2 is amended to read as follows:

3 § 1399-p. Posting of signs. 1. "Smoking" or "No Smoking" signs, or  
4 "Vaping" or "No Vaping" signs, or the international "No Smoking" symbol,  
5 which consists of a pictorial representation of a burning cigarette  
6 enclosed in a circle with a bar across it, shall be prominently posted  
7 and properly maintained where smoking ~~[is]~~ and vaping are regulated by  
8 this article, by the owner, operator, manager or other person having  
9 control of such area.

10 2. The owner, operator or manager of a hotel or motel that chooses to  
11 develop and implement a smoking and vaping policy for rooms rented to  
12 guests shall post a notice at the reception area of the establishment as  
13 to the availability, upon request, of rooms in which no smoking ~~[is]~~ and  
14 vaping are allowed.

15 3. The provisions of this section shall apply to after-school programs  
16 that are subject to the provisions of subdivision four of section thir-  
17 teen hundred ninety-nine-o of this article, provided that signs posted  
18 pursuant to this subdivision shall specify the specific time period  
19 during which smoking and vaping shall be prohibited.

20 § 7. Section 1399-r of the public health law, as added by chapter 244  
21 of the laws of 1989, is amended to read as follows:

22 § 1399-r. General provisions. 1. Nothing in this article shall be  
23 construed to deny the owner, operator or manager of a place covered by  
24 this article the right to designate the entire place, or any part there-  
25 of, as a nonsmoking and nonvaping area.

26 2. The provisions of this article shall apply to the legislative,  
27 executive and judicial branches of state government and any political  
28 subdivision of the state.

29 3. Smoking and vaping may not be permitted where prohibited by any  
30 other law, rule, or regulation of any state agency or any political  
31 subdivision of the state. Nothing herein shall be construed to restrict  
32 the power of any county, city, town, or village to adopt and enforce  
33 additional local law, ordinances, or regulations which comply with at  
34 least the minimum applicable standards set forth in this article.

35 § 8. Section 1399-s of the public health law, as amended by chapter 13  
36 of the laws of 2003, is amended to read as follows:

37 § 1399-s. Violations. 1. It shall be unlawful for any person, firm,  
38 limited liability company, corporation or other entity that owns,  
39 manages, operates or otherwise controls the use of an area in which  
40 smoking and vaping is prohibited or restricted pursuant to section thir-  
41 teen hundred ninety-nine-o of this article to fail to comply with the  
42 provisions of this article. For violations of this subdivision, it shall  
43 be an affirmative defense that during the relevant time period actual  
44 control of the area was not exercised by the respondent, but rather by a  
45 lessee, the sublessee or any other person. To establish an affirmative  
46 defense, the respondent shall submit an affidavit and may submit any  
47 other relevant proof indicating that the respondent did not exercise  
48 actual control of said area during the relevant time period. Such affi-  
49 davit and other proof shall be mailed by certified mail to the appropri-  
50 ate enforcement officer within thirty days of receipt of such notice of  
51 violation.

52 2. It shall be unlawful for an employer whose place of employment is  
53 subject to subdivision one of section thirteen hundred ninety-nine-o of  
54 this article to fail to comply with the provisions of such subdivision.  
55 For violations of such subdivision, it shall be an affirmative defense

1 that the employer has made good faith efforts to ensure that employees  
2 comply with the provisions of this article.

3 3. It shall be unlawful for any person to smoke or vape in any area  
4 where smoking and vaping is prohibited or restricted under section  
5 thirteen hundred ninety-nine-o of this article.

6 § 9. Subdivision 4 of section 1399-t of the public health law, as  
7 amended by chapter 13 of the laws of 2003, is amended to read as  
8 follows:

9 4. The owner, manager, operator or other person having control of any  
10 area subject to the provisions of this article, shall inform, or shall  
11 designate an agent who shall be responsible for informing individuals  
12 smoking or vaping in an area in which smoking or vaping is not permitted  
13 that they are in violation of this article.

14 § 10. Subdivision 2 of section 1399-u of the public health law, as  
15 amended by chapter 13 of the laws of 2003, is amended to read as  
16 follows:

17 2. Every waiver granted shall be subject to such conditions or  
18 restrictions as may be necessary to minimize the adverse effects of the  
19 waiver upon persons subject to an involuntary exposure to second-hand  
20 smoke or vaping and to ensure that the waiver is consistent with the  
21 general purpose of this article.

22 § 11. Section 1399-w of the public health law, as added by chapter 244  
23 of the laws of 1989, is amended to read as follows:

24 § 1399-w. Limitation of causes of action. An employer, administrator,  
25 manager, owner or operator of any indoor area, food service establish-  
26 ment, or place of employment regulated by this article who complies or  
27 fails to comply with the provisions of this article shall not be subject  
28 to any legal liability or action solely as a result of such compliance  
29 or noncompliance except as provided in section thirteen hundred ninety-  
30 nine-v of this article. Nothing in any other section of this article  
31 shall be construed to create, impair, alter, limit, modify, enlarge,  
32 abrogate or restrict any theory of liability upon which any person may  
33 be held liable to any other person for exposure to smoke or vaping.

34 § 12. Section 1399-x of the public health law, as amended by chapter  
35 389 of the laws of 2011, is amended to read as follows:

36 § 1399-x. Rules and regulations. The commissioner shall not promulgate  
37 any rules or regulations to effectuate the provisions of section thir-  
38 teen hundred ninety-nine-n, paragraph f of subdivision one of section  
39 thirteen hundred ninety-nine-o or subdivision one of section thirteen  
40 hundred ninety-nine-p of this article. The commissioner shall not  
41 promulgate any rules or regulations that create, limit or enlarge any  
42 smoking or vaping restrictions.

43 § 13. This act shall take effect on the thirtieth day after it shall  
44 have become a law; provided, however, that effective immediately, the  
45 addition, amendment and/or repeal of any rule or regulation necessary  
46 for the implementation of this act on its effective date is authorized  
47 and directed to be made and completed on or before such effective date.