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2009-2010 Regular Sessions

I N A S S E M B L Y

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Introduced by M. of A. MORELLE, HOYT, PAULIN, CASTRO, GOTTFRIED, LANCMAN, COLTON, KOON, MILLMAN -- Multi-Sponsored by -- M. of A. COOK, GLICK, GREENE, MAGNARELLI -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT in relation to creating the menu nutritional disclosure act of 2009

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. This act shall be known and may be cited as the "menu
2 nutritional disclosure act of 2009".
3 S 2. 1. For purposes of this act, the following definitions shall
4 apply:
5 (a) "Food facility" means a food facility in the state that operates
6 under common ownership or control with at least 9 other food facilities
7 with the same name in the state that offer for sale substantially the
8 same menu items, or operates as a franchised outlet of a parent company
9 with at least 9 other franchised outlets with the same name in the state
10 that offer for sale substantially the same menu items, except that a
11 "food facility" does not include the following:
12 (i) Certified farmer's markets.
13 (ii) Commissaries.
14 (iii) Licensed health care facilities.
15 (iv) Mobile support units.
16 (v) Restricted food service facilities.
17 (vi) Retail stores in which a majority of sales are from a pharmacy.
18 (vii) Vending machines.
19 (b) "Calorie content information" means the total number of calories
20 per standard menu item, as that item is usually prepared and offered for
21 sale.

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

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- 1 (c) "Drive-through" means an area where a customer may provide an
2 order for and receive standard menu items while occupying a motor vehi-
3 cle.
- 4 (d) "Menu board" means a posted list or pictorial display of food or
5 beverage items offered for sale by a food facility. "Menu board" does
6 not include printed or pictorial materials for the purpose of marketing.
- 7 (e) "Menu" means a printed list or pictorial display of food or bever-
8 age items offered for sale by a food facility. "Menu" shall not include
9 printed or pictorial materials for the purpose of marketing.
- 10 (f) "Food item tag" means a label or placard that identifies any food
11 item displayed for sale at a food facility. "Food item tag" shall not
12 include printed or pictorial materials for the purpose of marketing.
- 13 (g) "Nutritional information" includes, but is not limited to, all of
14 the following, per standard menu item, as that item is usually prepared
15 and offered for sale:
- 16 (i) Total number of calories.
- 17 (ii) Total number of grams of carbohydrates.
- 18 (iii) Total number of grams of saturated fat.
- 19 (iv) Total number of milligrams of sodium.
- 20 (h) "Point of sale" means the location where a customer makes an
21 order.
- 22 (i) "Standard menu item" means a food or beverage item offered for
23 sale by a food facility through a menu, menu board, or food item tag at
24 least 180 days per calendar year, except that "standard menu item" does
25 not include any of the following:
- 26 (i) A food item that is customized on a case-by-case basis in response
27 to an unsolicited customer request.
- 28 (ii) An alcoholic beverage, the labeling of which is not regulated by
29 the federal food and drug administration.
- 30 (iii) A packaged food otherwise subject to the nutrition labeling
31 requirements of the federal Nutrition Labeling and Education Act of
32 1990.
- 33 (iv) A food item when served at a consumer self-service salad bar.
- 34 (v) A food or beverage item when served at a consumer self-service
35 buffet.
- 36 (vi) Condiments.
- 37 (vii) Other items placed on counters or tables for use without charge
38 to consumers.
- 39 (j) "Reasonable basis" means any reasonable means recognized by the
40 federal food and drug administration of determining nutritional informa-
41 tion, as well as calorie content information, for a standard menu item,
42 as usually prepared and offered for sale, including, but not limited to,
43 nutrient databases and laboratory analyses.
- 44 (k) "Appetizer" means a food item that is generally served prior to a
45 food item that is generally regarded as the primary food item in a meal.
46 An "appetizer" includes a first course, starter, or small plate.
- 47 (l) "Dessert" means a food item that is generally served after a food
48 item that is generally regarded as the primary food item in a meal.
49 "Dessert" includes, but is not limited to, cakes, pastries, pies, ice
50 cream and food items that contain ice cream, confections, and other
51 sweets.
- 52 2. (a) Commencing July 1, 2010 and remaining in effect until December
53 31, 2011, inclusive, every food facility shall disclose nutritional
54 information as required by paragraph (b) of this subdivision or comply
55 with the requirements of subdivision three of this section during this
56 time.

1 (b) (i) In order to comply with paragraph (a) of this subdivision, a
2 food facility that does not provide sit-down service shall disclose the
3 information in a clear and conspicuous manner on a brochure that is made
4 available at the point of sale prior to or during the placement of an
5 order. A food facility that provides sit-down service shall provide the
6 nutritional information in a clear and conspicuous size and typeface on
7 at least one of the following:

8 (1) A brochure available on the table.

9 (2) A menu next to each standard menu item.

10 (3) A menu, under an index section that is separate from the listing
11 of standard menu items.

12 (4) A menu insert.

13 (5) A table tent on the table.

14 (ii) Notwithstanding subparagraph (i) of this paragraph, a food facil-
15 ity that has a drive-through area and uses a menu board to display or
16 list standard menu items at the point of sale shall, for purposes of the
17 drive-through area only, disclose the nutritional information in a clear
18 and conspicuous manner on a brochure or other printed material that is
19 available upon request, and shall conspicuously display a notice at the
20 point of sale that reads: "NUTRITIONAL INFORMATION IS AVAILABLE UPON
21 REQUEST" or other similar statement that indicates the disclosure of
22 nutritional information is available upon request.

23 3. (a) On and after January 1, 2012, every food facility that provides
24 a menu shall disclose calorie content information for a standard menu
25 item next to the item on the menu in a size and typeface that is clear
26 and conspicuous.

27 (b) On and after January 1, 2012, every food facility that uses an
28 indoor menu board shall disclose calorie content information for a stan-
29 dard menu item next to the item on the menu board in a size and typeface
30 that is clear and conspicuous.

31 (c) On and after January 1, 2012, every food facility that uses a food
32 item tag as an alternative to a menu or menu board to describe a stand-
33 ard menu item that is displayed for sale in a display case within the
34 food facility shall disclose calorie content information for that stand-
35 ard menu item on the food item tag for that item in a size and typeface
36 that is clear and conspicuous.

37 (d) On and after January 1, 2012, every food facility that has a
38 drive-through area and uses a menu board to display or list standard
39 menu items at the point of sale shall, for purposes of the drive-through
40 area only, disclose the nutritional information for each standard menu
41 item in a clear and conspicuous manner on a brochure or other printed
42 material that is available upon request, and shall clearly and conspicu-
43 ously display a notice at the point of sale that reads: "NUTRITIONAL
44 INFORMATION IS AVAILABLE UPON REQUEST" or other similar statement that
45 indicates the disclosure of nutritional information is available upon
46 request. If a food facility subject to this paragraph discloses nutri-
47 tional information in the manner described in paragraph (b) of this
48 subdivision, the food facility shall be deemed to be in compliance with
49 this paragraph.

50 4. For purposes of subdivision 3 of this section, the disclosure of
51 calorie content information on a menu or menu board next to a standard
52 menu item that is a combination of at least two standard menu items on
53 the menu or menu board, shall, based upon all possible combinations for
54 that standard menu item, include both the minimum amount of calories for
55 the calorie count information and the maximum amount of calories for the

1 calorie count information. If there is only one possible total amount of
2 calories, then this total shall be disclosed.

3 5. For purposes of subdivision 3 of this section, the disclosure of
4 calorie content information on a menu or menu board next to a standard
5 menu item that is not an appetizer or dessert, but is intended to serve
6 more than one individual, shall include both of the following:

7 (a) The number of individuals intended to be served by the standard
8 menu item.

9 (b) The calorie content information per individual serving. If the
10 standard menu item is a combination of at least two standard menu items,
11 this disclosure shall, based upon all possible combinations for that
12 standard menu item, include both the minimum amount of calories for the
13 calorie count information and the maximum amount of calories. If there
14 is only one possible total amount of calories, then this total shall be
15 disclosed.

16 6. For beverage items, a range of calorie count information may be
17 provided, which includes both the minimum amount of calories for any
18 beverage item and the maximum amount of calories.

19 7. The nutritional information and calorie content information
20 required by this act shall be determined on a reasonable basis. A
21 reasonable basis determination of nutritional information and calorie
22 content information shall be required only once per standard menu item,
23 provided that portion size is reasonably consistent and the food facili-
24 ty follows a standardized recipe and trains to a consistent method of
25 preparation.

26 8. Menus and menu boards may include a disclaimer that indicates that
27 there may be variations in nutritional content across servings, based on
28 variations in overall size and quantities of ingredients, and based on
29 special ordering.

30 9. This act shall not be construed to create or enhance any claim,
31 right of action, or civil liability that did not previously exist under
32 state law or limit any claim, right of action, or civil liability that
33 otherwise exists under state law. No private right of action shall arise
34 out of this act. The only enforcement mechanism of this act shall be the
35 local enforcement agency.

36 10. This act shall not be construed to preclude any food facility from
37 voluntarily providing nutritional information in addition to the
38 requirements of this act.

39 11. To the extent consistent with federal law, this act, as well as
40 any other state law that regulates the disclosure of nutritional infor-
41 mation, is a matter of statewide concern and occupies the whole field of
42 regulation regarding the disclosure of nutritional information by a food
43 facility as well as content required to be posted on menus, menu boards
44 and food item tags. No ordinance or regulation of a local government
45 shall regulate the dissemination of nutritional information or the
46 content required to be placed on menus, menu boards or food item tags by
47 a food facility. Any ordinance or regulation that violates this prohibi-
48 tion is void and shall have no force or effect.

49 12. Commencing July 1, 2010, a food facility that violates this act is
50 guilty of an infraction, punishable by a fine of not less than fifty
51 dollars or more than five hundred dollars, which may be assessed by a
52 local enforcement agency. However, a food facility may not be found to
53 violate this act more than once during an inspection visit. Notwith-
54 standing the penal law or any other provision of law to the contrary, a
55 violation of this act shall not constitute a misdemeanor.

1 13. Within 180 days after the effective date of this act, the New York
2 state department of health shall promulgate regulations defining the
3 specific requirements that constitute substantial compliance with this
4 act by food facilities.

5 14. If any provision of this act or the application thereof is for any
6 reason held invalid, ineffective, or unconstitutional by a court of
7 competent jurisdiction, the remainder of this act shall not be affected
8 thereby, and to this end, the provisions of this act are severable.

9 S 3. This act shall take effect immediately.