S T A T E O F N E W Y O R K

9529

I N A S S E M B L Y

January 12, 2010

Introduced by M. of A. ROSENTHAL, TITONE, ENGLEBRIGHT, MAISEL, FIELDS, GALEF, M. MILLER, CASTRO, BENJAMIN -- Multi-Sponsored by -- M. of A. CAMARA, CYMBROWITZ, GOTTFRIED, LUPARDO, PHEFFER, SWEENEY, WEISENBERG -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to prohibiting the sale of electronic cigarettes to minors and in relation to prohibiting the distribution or sale of any item containing or delivering nicotine that is not defined by law as a tobacco product or approved by the United States food and drug administration for sale as a tobacco use cessation or harm reduction product

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

Section 1. Section 1399-cc of the public health law, as amended by chapter 508 of the laws of 2000, subdivision 3 as separately amended by chapter 162 of the laws of 2002 and subdivision 7 as amended by chapter 13 of the laws of 2003, is amended to read as follows:

S 1399-cc. Sale of tobacco products, herbal cigarettes, ELECTRONIC CIGARETTES, rolling papers or pipes to minors prohibited. 1. As used in this section:

(a) "A device capable of deciphering any electronically readable format" or "device" shall mean any commercial device or combination of devices used at a point of sale or entry that is capable of reading the information encoded on the bar code or magnetic strip of a driver's license or non-driver identification card issued by the state commissioner of motor vehicles;

(b) "Card holder" means any person presenting a driver's license or non-driver identification card to a licensee, or to the agent or employee of such licensee under this chapter; [and]

(c) "Transaction scan" means the process involving an automated bar code reader by which a licensee, or agent or employee of a licensee under this chapter reviews a driver's license or non-driver identification card presented as a precondition for the purchase of a tobacco product or herbal cigarettes pursuant to subdivision three of this section; AND

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

LBD15081-01-9

(D) "ELECTRONIC CIGARETTE" OR "E-CIGARETTE" MEANS A BATTERY-OPERATED DEVICE THAT CONTAINS CARTRIDGES FILLED WITH NICOTINE, FLAVOR AND OTHER CHEMICALS THAT ARE TURNED INTO VAPOR WHICH IS INHALED BY THE USER.

2. Any person operating a place of business wherein tobacco products [or], herbal cigarettes OR ELECTRONIC CIGARETTES are sold or offered for sale is prohibited from selling such products, herbal cigarettes, ELECTRONIC CIGARETTES, rolling papers or pipes to individuals under eighteen years of age, and shall post in a conspicuous place a sign upon which there shall be imprinted the following statement, "SALE OF CIGARETTES, CIGARS, CHEWING TOBACCO, POWDERED TOBACCO, OR OTHER TOBACCO PRODUCTS, HERBAL CIGARETTES, ELECTRONIC CIGARETTES, ROLLING PAPERS OR PIPES, TO PERSONS UNDER EIGHTEEN YEARS OF AGE IS PROHIBITED BY LAW." Such sign shall be printed on a white card in red letters at least one-half inch in height.

3. Sale of tobacco products [or], herbal cigarettes, OR ELECTRONIC CIGARETTES in such places, other than by a vending machine, shall be made only to an individual who demonstrates, through (a) a valid driver's license or non-driver's identification card issued by the commissioner of motor vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States or a provincial government of the dominion of Canada, or (b) a valid passport issued by the United States government or any other country, or (c) an identification card issued by the armed forces of the United States, indicating that the individual is at least eighteen years of age. Such identification need not be required of any individual who reasonably appears to be at least twenty-five years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of a tobacco product [or], herbal cigarettes OR ELECTRONIC CIGARETTE to an individual under eighteen years of age.

4. (a) Any person operating a place of business wherein tobacco products [or], herbal cigarettes OR ELECTRONIC CIGARETTES are sold or offered for sale may perform a transaction scan as a precondition for such purchases.

(b) In any instance where the information deciphered by the transaction scan fails to match the information printed on the driver's license or non-driver identification card, or if the transaction scan indicates that the information is false or fraudulent, the attempted transaction shall be denied.

(c) In any proceeding pursuant to section thirteen hundred-ninety-nine-ee of this article, it shall be an affirmative defense that such person had produced a driver's license or non-driver identification card apparently issued by a governmental entity, successfully completed that transaction scan, and that the tobacco product [or], herbal cigarettes OR ELECTRONIC CIGARETTE had been sold, delivered or given to such person in reasonable reliance upon such identification and transaction scan. In evaluating the applicability of such affirmative defense the commissioner shall take into consideration any written policy adopted and implemented by the seller to effectuate the provisions of this chapter. Use of a transaction scan shall not excuse any person operating a place of business wherein tobacco products [or], herbal cigarettes OR ELECTRONIC CIGARETTES are sold, or the agent or employee of such person, from the exercise of reasonable diligence otherwise required by this chapter. Notwithstanding the above provisions, any such affirmative defense shall not be applicable in any civil or criminal proceeding, or in any other forum.

5. A licensee or agent or employee of such licensee shall only use a device capable of deciphering any electronically readable format, and shall only use the information recorded and maintained through the use of such devices, for the purposes contained in subdivision four of this section. No licensee or agent or employee of a licensee shall resell or disseminate the information recorded during such a scan to any third person. Such prohibited resale or dissemination includes but is not limited to any advertising, marketing or promotional activities. Notwithstanding the restrictions imposed by this subdivision, such records may be released pursuant to a court ordered subpoena or pursuant to any other statute that specifically authorizes the release of such information. Each violation of this subdivision shall be punishable by a civil penalty of not more than one thousand dollars.

6. A licensee or agent or employee of such a licensee may electronically or mechanically record and maintain only the information from a transaction scan necessary to effectuate this section. Such information shall be limited to the following: (a) name, (b) date of birth, (c) driver's license or non-driver identification number, and (d) expiration date. The commissioner and state commissioner of motor vehicles shall jointly promulgate any regulations necessary to govern the recording and maintenance of these records by a licensee under this chapter. The commissioner and the state liquor authority shall jointly promulgate any regulation necessary to ensure quality control in the use of the transaction scan devices under this chapter and article five of the alcoholic beverage control law.

7. No person operating a place of business wherein tobacco products [or], herbal cigarettes OR ELECTRONIC CIGARETTES are sold or offered for sale shall sell, permit to be sold, offer for sale or display for sale any tobacco product [or], herbal cigarettes OR ELECTRONIC CIGARETTE in any manner, unless such products and cigarettes are stored for sale (a) behind a counter in an area accessible only to the personnel of such business, or (b) in a locked container; provided, however, such restriction shall not apply to tobacco businesses, as defined in subdivision eight of section thirteen hundred ninety-nine-aa of this article, and to places to which admission is restricted to persons eighteen years of age or older.

S 2. The public health law is amended by adding a new section 1399-mm-1 to read as follows:

S 1399-MM-1. PROHIBITION OF PRODUCTS NOT DEFINED AS TOBACCO PRODUCTS OR APPROVED BY THE UNITED STATES FOOD AND DRUG ADMINISTRATION. 1. PRODUCTS CONTAINING OR DELIVERING NICOTINE INTENDED OR EXPECTED FOR HUMAN CONSUMPTION THAT ARE NOT TOBACCO PRODUCTS, AS DEFINED IN SECTION THIRTEEN HUNDRED NINETY-NINE-AA OF THIS ARTICLE, SHALL NOT BE DISTRIBUTED OR SOLD UNLESS SUCH PRODUCTS HAVE BEEN APPROVED BY THE UNITED STATES FOOD AND DRUG ADMINISTRATION FOR SALE AS TOBACCO USE CESSATION OR HARM REDUCTION PRODUCTS OR FOR OTHER MEDICAL PURPOSES AND ARE BEING MARKETED AND SOLD SOLELY FOR THAT APPROVED PURPOSE.

2. IN ADDITION TO ENFORCEMENT ACTIONS AUTHORIZED IN SECTION THIRTEEN HUNDRED NINETY-NINE-EE OF THIS ARTICLE, THE ATTORNEY GENERAL MAY APPLY IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK ON FIVE DAYS NOTICE, FOR AN ORDER COMPELLING COMPLIANCE WITH THIS SECTION. IN ANY SUCH PROCEEDING THE COURT MAY IMPOSE A CIVIL PENALTY IN AN AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS FOR EACH VIOLATION.

S 3. This act shall take effect immediately; provided however that section two of this act shall take effect on the sixtieth day after it shall have become a law.