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

3915

2009-2010 Regular Sessions

I N S E N A T E

April 6, 2009

Introduced by Sens. LANZA, SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to requiring persons offering weight loss services to provide notice of certain risks

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

Section 1. The general business law is amended by adding a new article 30-B to read as follows:

ARTICLE 30-B

WEIGHT LOSS SERVICES

SECTION 641. WEIGHT LOSS SERVICES AND PRODUCTS.
642. WEIGHT LOSS SERVICES; NOTICE.
643. DECEPTIVE PRACTICES.
644. LOCAL REGULATION.
645. PENALTIES.

S 641. WEIGHT LOSS SERVICES AND PRODUCTS. FOR THE PURPOSES OF THIS ARTICLE:

1. "WEIGHT LOSS SERVICES" SHALL MEAN COUNSELING AND EDUCATIONAL ACTIVITIES, INCLUDING, BUT NOT LIMITED TO, RECOMMENDING THE USE OF WEIGHT LOSS PRODUCTS, WHICH HAVE THE PRIMARY PURPOSE OF HELPING INDIVIDUALS REDUCE BODY WEIGHT. WEIGHT LOSS SERVICES DOES NOT INCLUDE PROVIDING INFORMATION TO THE PUBLIC REGARDING INDIVIDUAL WEIGHT LOSS PRODUCTS IF THE PERSON, FIRM OR CORPORATION IS NOT ALSO ENGAGED IN COUNSELING ACTIVITIES.

2. "WEIGHT LOSS PRODUCTS" SHALL MEAN ANY FOODS, INGREDIENTS OR COMPONENTS OF FOODS, NUTRITIONAL FORMULAS OR SUPPLEMENTS, DRUGS, EQUIPMENT OR ANY OTHER PRODUCTS SOLD OR OFFERED FOR THE PRIMARY PURPOSE OF HELPING INDIVIDUALS REDUCE BODY WEIGHT.

3. "DIRECT SELLER" SHALL MEAN ANY PERSON IF (A) SUCH PERSON IS (I) ENGAGED IN THE TRADE OR BUSINESS OF SELLING OR SOLICITING THE SALE OF

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

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CONSUMER PRODUCTS TO ANY BUYER ON A BUY-SELL BASIS OR A DEPOSIT-COMMISSION BASIS FOR RESALE BY THE BUYER OR ANY OTHER PERSON IN THE HOME OR OTHERWISE THAN IN A PERMANENT RETAIL ESTABLISHMENT, OR (II) ENGAGED IN THE TRADE OR BUSINESS OF SELLING OR SOLICITING THE SALE OF CONSUMER PRODUCTS IN THE HOME OR OTHERWISE THAN IN A PERMANENT RETAIL ESTABLISHMENT;

(B) SUBSTANTIALLY ALL THE REMUNERATION, WHETHER OR NOT PAID IN CASH, FOR THE PERFORMANCE OF THE SERVICES DESCRIBED IN PARAGRAPH (A) OF THIS SUBDIVISION IS DIRECTLY RELATED TO SALES OR OTHER OUTPUT, INCLUDING THE PERFORMANCE OF SERVICES, RATHER THAN TO THE NUMBER OF HOURS WORKED; AND

(C) THE SERVICES PERFORMED BY THE PERSON ARE PERFORMED PURSUANT TO A WRITTEN CONTRACT BETWEEN SUCH PERSON AND THE PERSON FOR WHOM THE SERVICES ARE PERFORMED AND SUCH CONTRACT PROVIDES THAT THE PERSON WILL NOT BE TREATED AS AN EMPLOYEE WITH RESPECT TO SUCH SERVICES FOR STATE AND FEDERAL TAX PURPOSES.

S 642. WEIGHT LOSS SERVICES; NOTICE. 1. ANY PERSON, FIRM OR CORPORATION OFFERING WEIGHT LOSS SERVICES OR WEIGHT LOSS SERVICES AND PRODUCTS IN THIS STATE BY MEANS OF SELLING OR OFFERING TO SELL SUCH SERVICES OR PRODUCTS TO THE PUBLIC SHALL EITHER (I) CONSPICUOUSLY POST A SIGN, MEASURING AT LEAST NINE INCHES BY FOURTEEN INCHES, WHERE CONSUMERS ARE OFFERED THE SERVICES OR PRODUCTS, IN WRITING, IN AT LEAST TEN POINT PRINT, OR (II) PROVIDE IN WRITING, IN AT LEAST TEN POINT PRINT, TO INDIVIDUALS AND CONSUMERS PRIOR TO THE PURCHASE OF SUCH GOODS OR SERVICES THE FOLLOWING NOTICE OR SOME OTHER NOTICE WHICH SUBSTANTIALLY CONTAINS OR PROVIDES THE FOLLOWING INFORMATION.

WEIGHT LOSS AND DIETING INFORMATION

A. WARNING! RAPID WEIGHT LOSS MAY CAUSE SERIOUS HEALTH PROBLEMS. RAPID WEIGHT LOSS IS WEIGHT LOSS OF MORE THAN 1 1/2 TO 2 POUNDS PER WEEK OR WEIGHT LOSS OF MORE THAN 1 PERCENT OF BODY WEIGHT PER WEEK AFTER THE SECOND WEEK OF PARTICIPATION IN A WEIGHT LOSS PROGRAM.

B. CONSULT YOUR PHYSICIAN BEFORE STARTING ANY WEIGHT LOSS PROGRAM OR USING ANY DIET MEDICATIONS OR FORMULAS.

C. LONG TERM WEIGHT CONTROL IS THE SAFEST AND MOST IMPORTANT GOAL OF ANY DIET PROGRAM. PERMANENT LIFESTYLE CHANGES SUCH AS EATING NUTRITIOUS FOODS, CALORIE CONTROL AND INCREASING PHYSICAL ACTIVITY HELP PROMOTE LONG TERM WEIGHT LOSS ACCORDING TO MEDICAL EXPERTS.

D. ASK THE PERSON PROVIDING OR SELLING YOU WEIGHT LOSS ADVICE OR DIET PRODUCTS, MEDICATIONS OR FORMULAS ABOUT THEIR QUALIFICATIONS AND TRAINING IN NUTRITION AND HEALTH.

E. YOU HAVE THE RIGHT TO:

(I) ASK QUESTIONS ABOUT THE POTENTIAL HEALTH RISKS OF THIS PROGRAM OR PRODUCT, ITS NUTRITIONAL CONTENT, AND ITS PSYCHOLOGICAL-SUPPORT AND EDUCATIONAL COMPONENTS;

(II) KNOW THE PRICE OF TREATMENT, INCLUDING THE PRICE OF ANY EXTRA PRODUCTS, SERVICES, SUPPLEMENTS AND LABORATORY TESTS; AND

(III) KNOW THE PROGRAM DURATION OF THE PROGRAM RECOMMENDED TO YOU.

2. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO DIRECT SELLERS, RETAIL STORES OR PHARMACIES SELLING WEIGHT LOSS PRODUCTS AND PROVIDING INFORMATION TO THE PUBLIC REGARDING INDIVIDUAL PRODUCTS, UNLESS SUCH BUSINESSES OFFER BOTH WEIGHT LOSS SERVICES AND WEIGHT LOSS PRODUCTS. FURTHERMORE, THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO WEIGHT LOSS SERVICES PROVIDED TO AN INDIVIDUAL BY ANY PERSON, FIRM OR CORPORATION WHICH PROVIDES WEIGHT LOSS SERVICES INCIDENTAL TO THEIR PRIMARY PROFESSIONAL SERVICES TO SUCH INDIVIDUAL AND WHICH DOES NOT OFFER TO SELL WEIGHT LOSS SERVICES OR WEIGHT LOSS PRODUCTS TO THE PUBLIC.

3. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO ANY PERSON, FIRM OR CORPORATION WHOSE SALE OR ADVERTISING OF WEIGHT LOSS SERVICES OR PRODUCTS COMPLIES WITH THE RULES, REGULATIONS, BINDING DECISIONS AND ORDERS OF, AND THE STATUTES ADMINISTERED BY, THE FEDERAL TRADE COMMISSION OR ANY OFFICIAL DEPARTMENT, DIVISION, COMMISSION OR AGENCY OF THE UNITED STATES AS SUCH RULES, REGULATIONS, BINDING DECISIONS, ORDERS, OR STATUTES ARE INTERPRETED BY THE FEDERAL TRADE COMMISSION OR SUCH DEPARTMENT, DIVISION, COMMISSION OR AGENCY OR THE FEDERAL COURTS, AND AS SUCH RULES, REGULATIONS, BINDING DECISIONS, ORDERS, OR STATUTES APPLY TO THE SALE OR ADVERTISING OF WEIGHT LOSS SERVICES OR PRODUCTS.

S 643. DECEPTIVE PRACTICES. IT SHALL BE A DECEPTIVE TRADE PRACTICE FOR ANY PERSON, FIRM OR CORPORATION OFFERING OR PROVIDING WEIGHT LOSS SERVICES OR WEIGHT LOSS PRODUCTS TO MISREPRESENT, DIRECTLY OR INDIRECTLY:

1. THE POTENTIAL HEALTH RISKS OF THE WEIGHT LOSS SERVICES OR PRODUCTS OFFERED;

2. THE SUCCESS OF PARTICIPANTS USING THE WEIGHT LOSS SERVICES OR PRODUCTS OFFERED IN ACHIEVING OR MAINTAINING WEIGHT LOSS OR WEIGHT CONTROL. ANY REPRESENTATION OF SUCCESSFUL WEIGHT LOSS OR WEIGHT CONTROL BY PARTICIPANTS WILL BE CONSIDERED MISLEADING IF THE PERSON, FIRM OR CORPORATION DOES NOT POSSESS OR RELY UPON A REASONABLE BASIS FOR THE REPRESENTATION AT THE TIME IT IS DISSEMINATED. IF A CLAIM IS MADE THAT SCIENTIFIC EVIDENCE SUPPORTS THE REPRESENTATION, THE PERSON, FIRM OR CORPORATION MUST POSSESS COMPETENT AND RELIABLE SCIENTIFIC EVIDENCE SUBSTANTIATING SUCH CLAIM. FOR THE PURPOSES OF THIS SUBDIVISION, "COMPETENT AND RELIABLE SCIENTIFIC EVIDENCE" SHALL MEAN THOSE TESTS, ANALYSES, RESEARCH, STUDIES OR OTHER EVIDENCE BASED ON THE EXPERTISE OF PROFESSIONALS IN THE RELEVANT AREA, THAT HAVE BEEN CONDUCTED AND EVALUATED IN AN OBJECTIVE MANNER BY PERSONS QUALIFIED TO DO SO, USING PROCEDURES GENERALLY ACCEPTED IN THE PROFESSION TO YIELD ACCURATE AND RELIABLE RESULTS;

3. THE EDUCATIONAL AND PROFESSIONAL EXPERIENCE OF THE PERSONNEL PROVIDING WEIGHT LOSS SERVICES OR WEIGHT LOSS PRODUCTS;

4. THE TOTAL CHARGES FOR ANY WEIGHT LOSS SERVICES AND PRODUCTS; OR

5. THE ACTUAL OR ESTIMATED DURATION OF THE USE OF THE WEIGHT LOSS SERVICES OR PRODUCTS OFFERED.

COMPLIANCE WITH THE RULES, REGULATIONS, BINDING DECISIONS AND ORDERS OF, AND THE STATUTES ADMINISTERED BY, THE FEDERAL TRADE COMMISSION OR ANY OFFICIAL DEPARTMENT, DIVISION, COMMISSION OR AGENCY OF THE UNITED STATES AS SUCH RULES, REGULATIONS, BINDING DECISIONS, ORDERS, OR STATUTES ARE INTERPRETED BY THE FEDERAL TRADE COMMISSION OR SUCH DEPARTMENT, DIVISION, COMMISSION OR AGENCY OR THE FEDERAL COURTS, AND APPLY TO THE SALE OR ADVERTISING OF WEIGHT LOSS SERVICES OR PRODUCTS, SHALL BE DEEMED COMPLIANCE WITH THE PROVISIONS OF THIS SECTION.

S 644. LOCAL REGULATION. ANY LOCAL LAWS OR RULES REGULATING WEIGHT LOSS SERVICES AND PRODUCTS IN A CITY HAVING A POPULATION OF ONE MILLION OR MORE AND WHICH WERE IN EFFECT PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE AND ANY NOTICE PROVIDED PURSUANT TO SUCH LAW OR RULE, SHALL BE DEEMED TO BE CONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

S 645. PENALTIES. EACH DAY A PERSON, FIRM OR CORPORATION VIOLATES ANY PROVISION OF THIS ARTICLE SHALL CONSTITUTE A SINGLE VIOLATION. WHENEVER THERE SHALL BE A VIOLATION OF THIS ARTICLE, AN APPLICATION MAY BE MADE BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO A COURT OR JUSTICE HAVING JURISDICTION BY A SPECIAL PROCEEDING TO ISSUE AN INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH

VIOLATIONS. IF IT SHALL APPEAR TO THE COURT OR JUSTICE THAT THE DEFENDANT HAS IN FACT, VIOLATED THIS ARTICLE, AN INJUNCTION MAY BE ISSUED BY SUCH COURT OR JUSTICE, ENJOINING AND RESTRAINING ANY FURTHER VIOLATION, WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT BEEN INJURED OR DAMAGED THEREBY. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF THIS ARTICLE HAS OCCURRED, THE COURT MAY IMPOSE A CIVIL PENALTY OF NOT MORE THAN ONE HUNDRED DOLLARS FOR THE FIRST VIOLATION AND TWO HUNDRED DOLLARS FOR EACH VIOLATION THEREAFTER, BUT IN NO EVENT SHALL THE TOTAL PENALTY THEREFOR EXCEED ONE THOUSAND DOLLARS. IN CONNECTION WITH ANY SUCH APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES.

S 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.