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

6438

I N S E N A T E

January 11, 2010

Introduced by Sen. DUANE -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law and the agriculture and markets law, in relation to the posting of calorie content values for food sold by retail food establishments and retail food service operations

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

Section 1. Legislative intent. The legislature finds that rates of obesity in the state of New York have increased to epidemic proportions. Obesity is associated with numerous health problems, including, but not limited to, diabetes, heart disease, cancer, osteoarthritis and asthma, and carries a great public health cost. On average, Americans consume one-third of their calories from dining away from home or purchasing prepared meals to bring home, and there is evidence that consumers find it difficult to estimate the calorie counts of typical restaurant meals. It is important to ensure that consumers are provided with information sufficient to allow them to make informed decisions about their dining choices.

S 2. Section 1351 of the public health law is amended to read as follows:

S 1351. Food places; duty to permit inspections. Every owner, operator, lessor, lessee or person in charge of any hotel, restaurant, dining room, dining car, drug store, soda fountain, steamboat or other place engaged in the preparation, sale or service of food for and to the general public, and every officer or other person in charge of any public, penal or charitable institution in this state, shall permit the commissioner or his duly authorized agents or employees to have access to all parts of any and all of such places herein mentioned wherein food is stored, prepared or served for the purpose of ascertaining whether the provisions of sections thirteen hundred fifty to thirteen hundred fifty-two, inclusive, AND SECTION THIRTEEN HUNDRED FIFTY-SEVEN of this [chapter] *ARTICLE*, and the provisions of the sanitary code and provisions of local ordinances or regulations are being observed.

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

LBD15353-01-0

S 3. The public health law is amended by adding a new section 1357 to read as follows:

S 1357. RETAIL FOOD ESTABLISHMENTS; POSTING OF CALORIE CONTENT VALUES. 1. WHENEVER USED IN THIS SECTION, UNLESS OTHERWISE EXPRESSLY STATED OR UNLESS THE CONTEXT OR SUBJECT MATTER REQUIRES A DIFFERENT MEANING, THE FOLLOWING TERMS SHALL HAVE THE MEANINGS HEREINAFTER SET FORTH OR INDICATED:

(A) "RETAIL FOOD ESTABLISHMENT" MEANS ANY FOOD SERVICE ESTABLISHMENT OR MOBILE FOOD SERVICE ESTABLISHMENT, AS DEFINED BY THE STATE SANITARY CODE, WHICH IS USED OR OPERATED FOR THE PURPOSE OF PREPARING AND SERVING FOOD AT THE RETAIL LEVEL, AND IS ONE OF A GROUP OF FIFTEEN OR MORE RETAIL FOOD ESTABLISHMENTS DOING BUSINESS NATIONALLY THAT: (I) OFFER FOR SALE SUBSTANTIALLY THE SAME MENU ITEMS, IN SERVINGS THAT ARE STANDARDIZED FOR PORTION SIZE AND CONTENT; AND (II) OPERATE UNDER COMMON OWNERSHIP OR CONTROL, OPERATE AS FRANCHISED OUTLETS OF A PARENT BUSINESS, OR DO BUSINESS UNDER THE SAME NAME.

(B) "FOOD ITEM" MEANS A FOOD, AS DEFINED BY THE STATE SANITARY CODE, WHICH IS OFFERED FOR SALE BY A RETAIL FOOD ESTABLISHMENT IN STANDARDIZED SIZES AND INTENDED FOR INDIVIDUAL PORTION SERVICE.

(C) "MENU" MEANS A PRINTED LIST OR PRINTED PICTORIAL DISPLAY OF FOOD ITEMS AND THEIR PRICES THAT ARE AVAILABLE FOR SALE FROM A RETAIL FOOD ESTABLISHMENT, AND SHALL INCLUDE MENUS DISTRIBUTED OR PROVIDED OUTSIDE OF THE ESTABLISHMENT.

(D) "MENU BOARD" SHALL MEAN ANY LIST OR PICTORIAL DISPLAY OF FOOD ITEMS AND THEIR PRICES THAT IS POSTED AND VISIBLE: (I) WITHIN A RETAIL FOOD SERVICE ESTABLISHMENT, OR (II) OUTSIDE OF A RETAIL FOOD ESTABLISHMENT FOR THE USE OF CUSTOMERS IN ORDERING FROM THE ESTABLISHMENT'S DRIVE-THROUGH.

(E) "MENU ITEM" SHALL MEAN ANY INDIVIDUAL FOOD ITEM, OR COMBINATION OF FOOD ITEMS, THAT IS LISTED OR DISPLAYED ON A RETAIL FOOD ESTABLISHMENT'S MENU OR MENU BOARD. THIS TERM DOES NOT INCLUDE: (I) TEMPORARY ITEMS THAT ARE LISTED ON A MENU OR MENU BOARD FOR LESS THAN THIRTY DAYS IN ONE CALENDAR YEAR; OR (II) CONDIMENTS AND SIMILAR ITEMS PLACED ON A TABLE OR COUNTER FOR GENERAL USE OR OTHERWISE PROVIDED WITHOUT CHARGE.

(F) "CALORIE CONTENT VALUE" MEANS THE NUMBER OF CALORIES IN A FOOD ITEM OR MENU ITEM IN THE SIZE AND PORTION NORMALLY OFFERED FOR SALE, AS DETERMINED PURSUANT TO A METHOD THAT COMPLIES WITH SUBDIVISION FIVE OF THIS SECTION.

(G) "DRIVE-THROUGH" MEANS AN AREA WHERE A CUSTOMER MAY PLACE AN ORDER FOR AND RECEIVE MENU ITEMS WHILE OCCUPYING A MOTOR VEHICLE.

(H) "FOOD ITEM TAG" MEANS A TAG, LABEL OR PLACARD PLACED IN CLOSE PROXIMITY TO A FOOD ITEM DISPLAYED FOR SALE BY A RETAIL FOOD ESTABLISHMENT THAT IDENTIFIES THE ITEM.

2. (A) FOR EACH MENU ITEM OFFERED FOR SALE BY A RETAIL FOOD ESTABLISHMENT, THE TOTAL CALORIE CONTENT VALUE OF SUCH ITEM AS OFFERED FOR SALE SHALL BE LISTED ON ALL OF THE ESTABLISHMENT'S MENUS AND MENU BOARDS. SUCH CALORIE CONTENT VALUE SHALL BE LISTED CLEARLY AND CONSPICUOUSLY, ADJACENT TO OR IN CLOSE PROXIMITY TO THE APPLICABLE MENU ITEM SO THAT IT IS CLEARLY ASSOCIATED WITH SUCH ITEM, AND IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE AND APPEARANCE, AS THAT USED TO POST EITHER THE NAME OR PRICE OF THE MENU ITEM.

(B) CALORIE CONTENT VALUES AT DRIVE-THROUGH WINDOWS SHALL BE DISPLAYED ON EITHER THE DRIVE-THROUGH MENU BOARD OR A STANCHION, ADJACENT TO SUCH MENU BOARD, WHICH IS VISIBLE TO CUSTOMERS AT OR PRIOR TO THE POINT OF ORDERING, SO LONG AS THE CALORIE CONTENT VALUE OF EACH MENU ITEM IS LISTED CLEARLY AND CONSPICUOUSLY, ADJACENT TO OR IN CLOSE PROXIMITY TO

THE APPLICABLE MENU ITEM SO THAT IT IS CLEARLY ASSOCIATED WITH SUCH ITEM, AND IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE AND APPEARANCE, AS THAT USED TO POST EITHER THE NAME OR PRICE OF THE MENU ITEM ON THE MENU BOARD.

(C) FOR MENU ITEMS OFFERED FOR SALE IN DIFFERENT FLAVORS OR VARIETIES, THE RANGE OF CALORIE CONTENT VALUES SHOWING THE MINIMUM TO MAXIMUM NUMBERS OF CALORIES FOR ALL FLAVORS AND VARIETIES OF THAT ITEM SHALL BE LISTED FOR EACH SIZE OFFERED FOR SALE ON MENUS AND MENU BOARDS.

(D) FOR COMBINATIONS OF DIFFERENT FOOD ITEMS LISTED OR PICTURED AS A SINGLE MENU ITEM, THE RANGE OF CALORIE CONTENT VALUES SHOWING THE MINIMUM TO MAXIMUM NUMBERS OF CALORIES FOR ALL COMBINATIONS OF THAT MENU ITEM SHALL BE LISTED ON MENUS AND MENU BOARDS. IF THERE IS ONLY ONE POSSIBLE CALORIE TOTAL FOR THE COMBINATION, THEN THAT TOTAL SHALL BE LISTED ON MENUS AND MENU BOARDS.

(E) WHEN A FOOD ITEM IS DISPLAYED FOR SALE WITH A FOOD ITEM TAG, SUCH FOOD ITEM TAG SHALL INCLUDE THE CALORIE CONTENT VALUE FOR THAT FOOD ITEM IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE AND APPEARANCE, AS THAT USED TO IDENTIFY THE ITEM.

(F) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SUBDIVISION, THE CALORIE CONTENT VALUE OF AN ALCOHOLIC BEVERAGE OFFERED FOR SALE BY A RETAIL FOOD ESTABLISHMENT SHALL BE LISTED AS REQUIRED BY PARAGRAPH (B) OF SUBDIVISION THREE OF THIS SECTION.

3. (A) CALORIE CONTENT VALUES (IN KCAL) REQUIRED BY THIS SECTION SHALL BE BASED UPON A VERIFIABLE ANALYSIS OF A FOOD OR MENU ITEM, WHICH MAY INCLUDE THE USE OF NUTRIENT DATABASES, LABORATORY TESTING, OR OTHER RELIABLE METHODS OF ANALYSIS, AND SHALL BE ROUNDED TO THE NEAREST TEN CALORIES FOR CALORIE CONTENT VALUES ABOVE FIFTY CALORIES AND TO THE NEAREST FIVE CALORIES FOR CALORIE CONTENT VALUES OF FIFTY CALORIES AND BELOW.

(B) IN LIEU OF LISTING A CALORIE CONTENT VALUE FOR EACH ALCOHOLIC BEVERAGE OFFERED FOR SALE, A RETAIL FOOD ESTABLISHMENT MAY LIST AN AVERAGE CALORIE CONTENT VALUE PER STANDARD SERVING FOR EACH TYPE OF ALCOHOLIC BEVERAGE OFFERED FOR SALE BY THE ESTABLISHMENT, ACCORDING TO REGULATIONS OF THE DEPARTMENT.

4. DOCUMENTATION ESTABLISHING THE RESULTS OF ANY ANALYSIS CONDUCTED PURSUANT TO PARAGRAPH (A) OF SUBDIVISION THREE OF THIS SECTION FOR A FOOD OR MENU ITEM SHALL BE MAINTAINED BY THE ESTABLISHMENT FOR AS LONG AS THAT ITEM IS OFFERED FOR SALE AND FOR SUCH ADDITIONAL TIME AS MAY BE DEFINED BY THE DEPARTMENT AND IN THE MANNER SPECIFIED BY THE DEPARTMENT.

5. NOTHING IN THIS SECTION SHALL PRECLUDE A RETAIL FOOD ESTABLISHMENT FROM PROVIDING NUTRITION INFORMATION IN ADDITION TO THAT REQUIRED UNDER THIS SECTION.

6. A RETAIL FOOD ESTABLISHMENT VIOLATES THE PROVISIONS OF THIS SECTION IF THE ESTABLISHMENT: (A) FAILS TO LIST CALORIE CONTENT VALUES AS REQUIRED BY THIS SECTION; (B) FAILS TO OBTAIN CALORIE CONTENT VALUE ANALYSES AND MAINTAIN DOCUMENTATION OF SUCH ANALYSES AS REQUIRED BY THIS SECTION; OR (C) KNOWINGLY OR RECKLESSLY LISTS ON MENUS, MENU BOARDS OR FOOD ITEM TAGS CALORIE CONTENT VALUES THAT ARE MATERIALLY INCORRECT OR MISLEADING.

7. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PROHIBIT A MUNICIPALITY OR OTHER UNIT OF LOCAL GOVERNMENT FROM ENACTING, AMENDING, MODIFYING OR REPEALING A LOCAL LAW, ORDINANCE, OR RESOLUTION THAT IMPOSES STRICTER CALORIE OR MORE INCLUSIVE NUTRIENT LISTING OR POSTING REQUIREMENTS ON RETAIL FOOD ESTABLISHMENTS UNDER ITS JURISDICTION, PROVIDED THAT THE MINIMUM REQUIREMENTS OF THIS SECTION ARE MET.

S 4. Section 500 of the agriculture and markets law is amended by adding a new subdivision 6 to read as follows:

6. (A) WHENEVER USED IN THIS SUBDIVISION, UNLESS OTHERWISE EXPRESSLY STATED OR UNLESS THE CONTEXT OR SUBJECT MATTER REQUIRES A DIFFERENT MEANING, THE FOLLOWING TERMS SHALL HAVE THE MEANINGS HEREINAFTER SET FORTH OR INDICATED:

(I) "RETAIL FOOD SERVICE OPERATION" MEANS AN AREA OF A RETAIL FOOD STORE, AS DEFINED BY PARAGRAPH (B) OF SUBDIVISION ONE OF THIS SECTION: (A) WHERE FOOD IS PREPARED FOR SALE AT THE RETAIL LEVEL IN READY-TO-EAT, INDIVIDUAL PORTIONS FOR CONSUMPTION ON OR OFF THE PREMISES; (B) WHICH IS LOCATED WITHIN A RETAIL FOOD STORE THAT IS ONE OF A GROUP OF FIFTEEN OR MORE RETAIL FOOD STORES DOING BUSINESS NATIONALLY AND OPERATING UNDER COMMON OWNERSHIP OR CONTROL, OPERATING AS FRANCHISED OUTLETS OF A PARENT BUSINESS, OR DOING BUSINESS UNDER THE SAME NAME; AND (C) WHICH OFFERS SUBSTANTIALLY THE SAME MENU ITEMS AS ARE OFFERED IN SIMILAR AREAS OF AT LEAST FOURTEEN OTHER RETAIL FOOD STORES CONTAINED IN THE GROUP DESCRIBED IN CLAUSE (B) OF THIS SUBPARAGRAPH.

(II) "FOOD ITEM" MEANS A FOOD, AS DEFINED BY SECTION ONE HUNDRED NINETY-EIGHT OF THIS CHAPTER, WHICH IS OFFERED FOR SALE BY A RETAIL FOOD SERVICE OPERATION IN STANDARDIZED SIZES AND INTENDED FOR INDIVIDUAL PORTION SERVICE.

(III) "MENU" MEANS A PRINTED LIST OR PRINTED PICTORIAL DISPLAY OF FOOD ITEMS AND THEIR PRICES THAT ARE AVAILABLE FOR SALE FROM A RETAIL FOOD ESTABLISHMENT, AND SHALL INCLUDE MENUS DISTRIBUTED OR PROVIDED OUTSIDE OF THE ESTABLISHMENT.

(IV) "MENU BOARD" SHALL MEAN ANY LIST OR PICTORIAL DISPLAY OF FOOD ITEMS AND THEIR PRICES THAT IS POSTED AND VISIBLE WITHIN A RETAIL FOOD SERVICE OPERATION.

(V) "MENU ITEM" SHALL MEAN ANY INDIVIDUAL FOOD ITEM, OR COMBINATION OF FOOD ITEMS, THAT IS LISTED OR DISPLAYED ON A RETAIL FOOD SERVICE OPERATION'S MENU OR MENU BOARD. THIS TERM DOES NOT INCLUDE: (A) TEMPORARY ITEMS THAT ARE LISTED ON A MENU OR MENU BOARD FOR LESS THAN THIRTY DAYS IN ONE CALENDAR YEAR; OR (B) CONDIMENTS AND SIMILAR ITEMS PLACED ON A TABLE OR COUNTER FOR GENERAL USE OR OTHERWISE PROVIDED WITHOUT CHARGE.

(VI) "CALORIE CONTENT VALUE" MEANS THE NUMBER OF CALORIES IN A FOOD ITEM OR MENU ITEM IN THE SIZE AND PORTION NORMALLY OFFERED FOR SALE, AS DETERMINED PURSUANT TO A METHOD THAT COMPLIES WITH PARAGRAPH (E) OF THIS SUBDIVISION.

(VII) "FOOD ITEM TAG" MEANS A TAG, LABEL OR PLACARD PLACED IN CLOSE PROXIMITY TO A FOOD ITEM DISPLAYED FOR SALE BY A RETAIL FOOD SERVICE OPERATION THAT IDENTIFIES THE ITEM.

(B) (I) FOR EACH MENU ITEM OFFERED FOR SALE BY A RETAIL FOOD SERVICE OPERATION, THE TOTAL CALORIE CONTENT VALUE OF SUCH ITEM AS OFFERED FOR SALE SHALL BE LISTED ON ALL OF THE OPERATION'S MENUS AND MENU BOARDS. SUCH CALORIE CONTENT VALUE SHALL BE LISTED CLEARLY AND CONSPICUOUSLY, ADJACENT TO OR IN CLOSE PROXIMITY TO THE APPLICABLE MENU ITEM SO THAT IT IS CLEARLY ASSOCIATED WITH SUCH ITEM, AND IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE AND APPEARANCE, AS THAT USED TO POST EITHER THE NAME OR PRICE OF THE MENU ITEM.

(II) FOR MENU ITEMS OFFERED FOR SALE IN DIFFERENT FLAVORS OR VARIETIES, THE RANGE OF CALORIE CONTENT VALUES SHOWING THE MINIMUM TO MAXIMUM NUMBERS OF CALORIES FOR ALL FLAVORS AND VARIETIES OF THAT ITEM SHALL BE LISTED FOR EACH SIZE OFFERED FOR SALE ON MENUS AND MENU BOARDS.

(III) FOR COMBINATIONS OF DIFFERENT FOOD ITEMS LISTED OR PICTURED AS A SINGLE MENU ITEM, THE RANGE OF CALORIE CONTENT VALUES SHOWING THE MINIMUM TO MAXIMUM NUMBERS OF CALORIES FOR ALL COMBINATIONS OF THAT MENU

ITEM SHALL BE LISTED ON MENUS AND MENU BOARDS. IF THERE IS ONLY ONE POSSIBLE CALORIE TOTAL FOR THE COMBINATION, THEN THAT TOTAL SHALL BE LISTED ON MENUS AND MENU BOARDS.

(IV) WHEN A FOOD ITEM IS DISPLAYED FOR SALE WITH A FOOD ITEM TAG, SUCH FOOD ITEM TAG SHALL INCLUDE THE CALORIE CONTENT VALUE FOR THAT FOOD ITEM IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE AND APPEARANCE, AS THAT USED TO IDENTIFY THE ITEM.

(C) CALORIE CONTENT VALUES (IN KCAL) REQUIRED BY THIS SUBDIVISION SHALL BE BASED UPON A VERIFIABLE ANALYSIS OF A FOOD OR MENU ITEM, WHICH MAY INCLUDE THE USE OF NUTRIENT DATABASES, LABORATORY TESTING, OR OTHER RELIABLE METHODS OF ANALYSIS, AND SHALL BE ROUNDED TO THE NEAREST TEN CALORIES FOR CALORIE CONTENT VALUES ABOVE FIFTY CALORIES AND TO THE NEAREST FIVE CALORIES FOR CALORIE CONTENT VALUES OF FIFTY CALORIES AND BELOW.

(D) DOCUMENTATION ESTABLISHING THE RESULTS OF ANY ANALYSIS CONDUCTED PURSUANT TO PARAGRAPH (C) OF THIS SUBDIVISION FOR A FOOD OR MENU ITEM SHALL BE MAINTAINED BY THE RETAIL FOOD SERVICE OPERATION FOR AS LONG AS THAT ITEM IS OFFERED FOR SALE AND FOR SUCH ADDITIONAL TIME AS MAY BE DEFINED BY THE DEPARTMENT AND IN THE MANNER SPECIFIED BY THE DEPARTMENT.

(E) NOTHING IN THIS SUBDIVISION SHALL PRECLUDE A RETAIL FOOD SERVICE OPERATION FROM PROVIDING NUTRITION INFORMATION IN ADDITION TO THAT REQUIRED UNDER THIS SUBDIVISION.

(F) A RETAIL FOOD SERVICE OPERATION VIOLATES THE PROVISIONS OF THIS SUBDIVISION IF THE OPERATION: (I) FAILS TO POST CALORIE CONTENT VALUES AS REQUIRED BY THIS SUBDIVISION; (II) FAILS TO OBTAIN CALORIE CONTENT VALUE ANALYSES AND MAINTAIN DOCUMENTATION OF SUCH ANALYSES AS REQUIRED BY THIS SUBDIVISION; OR (III) KNOWINGLY OR RECKLESSLY LISTS ON MENUS, MENU BOARDS OR FOOD ITEM TAGS CALORIE CONTENT VALUES THAT ARE MATERIALLY INCORRECT OR MISLEADING.

S 5. This act shall take effect September 1, 2010, except that the commissioner of health and the commissioner of agriculture and markets are authorized to adopt, amend or repeal, on an emergency basis if necessary, any regulation necessary to implement any provision of this act on its effective date.