

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:

1 Section 1. The general business law is amended by adding a new article
2 30-B to read as follows:

3 ARTICLE 30-B

4 WEIGHT LOSS SERVICES

5 SECTION 641. WEIGHT LOSS SERVICES AND PRODUCTS.

6 642. WEIGHT LOSS SERVICES; NOTICE.

7 643. DECEPTIVE PRACTICES.

8 644. LOCAL REGULATION.

9 645. PENALTIES.

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

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

19 2. "WEIGHT LOSS PRODUCTS" SHALL MEAN ANY FOODS, INGREDIENTS OR COMPO-
20 NENTS OF FOODS, NUTRITIONAL FORMULAS OR SUPPLEMENTS, DRUGS, EQUIPMENT OR
21 ANY OTHER PRODUCTS SOLD OR OFFERED FOR THE PRIMARY PURPOSE OF HELPING
22 INDIVIDUALS REDUCE BODY WEIGHT.

23 3. "DIRECT SELLER" SHALL MEAN ANY PERSON IF (A) SUCH PERSON IS (I)
24 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.

LBD05431-02-9

1 CONSUMER PRODUCTS TO ANY BUYER ON A BUY-SELL BASIS OR A DEPOSIT-COMMIS-
2 SION BASIS FOR RESALE BY THE BUYER OR ANY OTHER PERSON IN THE HOME OR
3 OTHERWISE THAN IN A PERMANENT RETAIL ESTABLISHMENT, OR (II) ENGAGED IN
4 THE TRADE OR BUSINESS OF SELLING OR SOLICITING THE SALE OF CONSUMER
5 PRODUCTS IN THE HOME OR OTHERWISE THAN IN A PERMANENT RETAIL ESTABLISH-
6 MENT;

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

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

16 S 642. WEIGHT LOSS SERVICES; NOTICE. 1. ANY PERSON, FIRM OR CORPO-
17 RATION OFFERING WEIGHT LOSS SERVICES OR WEIGHT LOSS SERVICES AND
18 PRODUCTS IN THIS STATE BY MEANS OF SELLING OR OFFERING TO SELL SUCH
19 SERVICES OR PRODUCTS TO THE PUBLIC SHALL EITHER (I) CONSPICUOUSLY POST A
20 SIGN, MEASURING AT LEAST NINE INCHES BY FOURTEEN INCHES, WHERE CONSUMERS
21 ARE OFFERED THE SERVICES OR PRODUCTS, IN WRITING, IN AT LEAST TEN POINT
22 PRINT, OR (II) PROVIDE IN WRITING, IN AT LEAST TEN POINT PRINT, TO INDI-
23 VIDUALS AND CONSUMERS PRIOR TO THE PURCHASE OF SUCH GOODS OR SERVICES
24 THE FOLLOWING NOTICE OR SOME OTHER NOTICE WHICH SUBSTANTIALLY CONTAINS
25 OR PROVIDES THE FOLLOWING INFORMATION.

26 WEIGHT LOSS AND DIETING INFORMATION

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

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

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

37 D. ASK THE PERSON PROVIDING OR SELLING YOU WEIGHT LOSS ADVICE OR DIET
38 PRODUCTS, MEDICATIONS OR FORMULAS ABOUT THEIR QUALIFICATIONS AND TRAIN-
39 ING IN NUTRITION AND HEALTH.

40 E. YOU HAVE THE RIGHT TO:

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

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

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

47 2. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO DIRECT SELLERS,
48 RETAIL STORES OR PHARMACIES SELLING WEIGHT LOSS PRODUCTS AND PROVIDING
49 INFORMATION TO THE PUBLIC REGARDING INDIVIDUAL PRODUCTS, UNLESS SUCH
50 BUSINESSES OFFER BOTH WEIGHT LOSS SERVICES AND WEIGHT LOSS PRODUCTS.
51 FURTHERMORE, THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO WEIGHT
52 LOSS SERVICES PROVIDED TO AN INDIVIDUAL BY ANY PERSON, FIRM OR CORPO-
53 RATION WHICH PROVIDES WEIGHT LOSS SERVICES INCIDENTAL TO THEIR PRIMARY
54 PROFESSIONAL SERVICES TO SUCH INDIVIDUAL AND WHICH DOES NOT OFFER TO
55 SELL WEIGHT LOSS SERVICES OR WEIGHT LOSS PRODUCTS TO THE PUBLIC.

1 3. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO ANY PERSON, FIRM
2 OR CORPORATION WHOSE SALE OR ADVERTISING OF WEIGHT LOSS SERVICES OR
3 PRODUCTS COMPLIES WITH THE RULES, REGULATIONS, BINDING DECISIONS AND
4 ORDERS OF, AND THE STATUTES ADMINISTERED BY, THE FEDERAL TRADE COMMIS-
5 SION OR ANY OFFICIAL DEPARTMENT, DIVISION, COMMISSION OR AGENCY OF THE
6 UNITED STATES AS SUCH RULES, REGULATIONS, BINDING DECISIONS, ORDERS, OR
7 STATUTES ARE INTERPRETED BY THE FEDERAL TRADE COMMISSION OR SUCH DEPART-
8 MENT, DIVISION, COMMISSION OR AGENCY OR THE FEDERAL COURTS, AND AS SUCH
9 RULES, REGULATIONS, BINDING DECISIONS, ORDERS, OR STATUTES APPLY TO THE
10 SALE OR ADVERTISING OF WEIGHT LOSS SERVICES OR PRODUCTS.

11 S 643. DECEPTIVE PRACTICES. IT SHALL BE A DECEPTIVE TRADE PRACTICE FOR
12 ANY PERSON, FIRM OR CORPORATION OFFERING OR PROVIDING WEIGHT LOSS
13 SERVICES OR WEIGHT LOSS PRODUCTS TO MISREPRESENT, DIRECTLY OR INDIRECT-
14 LY:

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

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

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

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

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

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

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

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

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

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