

5665

2009-2010 Regular Sessions

I N S E N A T E

May 27, 2009

Introduced by Sens. DUANE, DIAZ, FOLEY, HASSELL-THOMPSON, MONTGOMERY,
ONORATO -- (at request of the Governor) -- 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 ASSEM-
BLY, DO ENACT AS FOLLOWS:

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

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

14 S 1351. Food places; duty to permit inspections. Every owner, opera-
15 tor, lessor, lessee or person in charge of any hotel, restaurant, dining
16 room, dining car, drug store, soda fountain, steamboat or other place
17 engaged in the preparation, sale or service of food for and to the
18 general public, and every officer or other person in charge of any
19 public, penal or charitable institution in this state, shall permit the
20 commissioner or his duly authorized agents or employees to have access
21 to all parts of any and all of such places herein mentioned wherein food
22 is stored, prepared or served for the purpose of ascertaining whether
23 the provisions of sections thirteen hundred fifty to thirteen hundred

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

LBD12034-06-9

1 fifty-two, inclusive, AND SECTION THIRTEEN HUNDRED FIFTY-SEVEN of this
2 [chapter] ARTICLE, and the provisions of the sanitary code and
3 provisions of local ordinances or regulations are being observed.

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

6 S 1357. RETAIL FOOD ESTABLISHMENTS; POSTING OF CALORIE CONTENT VALUES.

7 1. WHENEVER USED IN THIS SECTION, UNLESS OTHERWISE EXPRESSLY STATED OR
8 UNLESS THE CONTEXT OR SUBJECT MATTER REQUIRES A DIFFERENT MEANING, THE
9 FOLLOWING TERMS SHALL HAVE THE MEANINGS HEREINAFTER SET FORTH OR INDI-
10 CATED:

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

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

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

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

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

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

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

44 (H) "FOOD ITEM TAG" MEANS A TAG, LABEL OR PLACARD PLACED IN CLOSE
45 PROXIMITY TO A FOOD ITEM DISPLAYED FOR SALE BY A RETAIL FOOD ESTABLISH-
46 MENT THAT IDENTIFIES THE ITEM.

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

55 (B) CALORIE CONTENT VALUES AT DRIVE-THROUGH WINDOWS SHALL BE DISPLAYED
56 ON EITHER THE DRIVE-THROUGH MENU BOARD OR A STANCHION, ADJACENT TO SUCH

1 MENU BOARD, WHICH IS VISIBLE TO CUSTOMERS AT OR PRIOR TO THE POINT OF
2 ORDERING, SO LONG AS THE CALORIE CONTENT VALUE OF EACH MENU ITEM IS
3 LISTED CLEARLY AND CONSPICUOUSLY, ADJACENT TO OR IN CLOSE PROXIMITY TO
4 THE APPLICABLE MENU ITEM SO THAT IT IS CLEARLY ASSOCIATED WITH SUCH
5 ITEM, AND IN A FONT AND FORMAT THAT IS AT LEAST AS PROMINENT, IN SIZE
6 AND APPEARANCE, AS THAT USED TO POST EITHER THE NAME OR PRICE OF THE
7 MENU ITEM ON THE MENU BOARD.

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

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

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

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

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

33 (B) IN LIEU OF LISTING A CALORIE CONTENT VALUE FOR EACH ALCOHOLIC
34 BEVERAGE OFFERED FOR SALE, A RETAIL FOOD ESTABLISHMENT MAY LIST AN AVER-
35 AGE CALORIE CONTENT VALUE PER STANDARD SERVING FOR EACH TYPE OF ALCOHOL-
36 IC BEVERAGE OFFERED FOR SALE BY THE ESTABLISHMENT, ACCORDING TO REGU-
37 LATIONS OF THE DEPARTMENT.

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

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

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

53 7. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PROHIBIT A MUNICI-
54 PALITY OR OTHER UNIT OF LOCAL GOVERNMENT FROM ENACTING, AMENDING, MODI-
55 FYING OR REPEALING A LOCAL LAW, ORDINANCE, OR RESOLUTION THAT IMPOSES
56 STRICTER CALORIE OR MORE INCLUSIVE NUTRIENT LISTING OR POSTING REQUIRE-

1 MENTS ON RETAIL FOOD ESTABLISHMENTS UNDER ITS JURISDICTION, PROVIDED
2 THAT THE MINIMUM REQUIREMENTS OF THIS SECTION ARE MET.

3 S 4. Section 500 of the agriculture and markets law is amended by
4 adding a new subdivision 7 to read as follows:

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

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

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

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

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

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

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

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

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

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

1 (III) FOR COMBINATIONS OF DIFFERENT FOOD ITEMS LISTED OR PICTURED AS A
2 SINGLE MENU ITEM, THE RANGE OF CALORIE CONTENT VALUES SHOWING THE MINI-
3 MUM TO MAXIMUM NUMBERS OF CALORIES FOR ALL COMBINATIONS OF THAT MENU
4 ITEM SHALL BE LISTED ON MENUS AND MENU BOARDS. IF THERE IS ONLY ONE
5 POSSIBLE CALORIE TOTAL FOR THE COMBINATION, THEN THAT TOTAL SHALL BE
6 LISTED ON MENUS AND MENU BOARDS.

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

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

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

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

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

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