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2011-2012 Regular Sessions

I N A S S E M B L Y

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Introduced by M. of A. COOK, ORTIZ, PHEFFER, ZEBROWSKI -- Multi-Sponsored by -- M. of A. COLTON, CYMBROWITZ, DINOWITZ, GLICK, HIKIND, MARKEY, McENENY, J. RIVERA, SCARBOROUGH, SCHROEDER, TOWNS -- read once and referred to the Committee on Consumer Affairs and 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.

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

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

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

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

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

28 WEIGHT LOSS AND DIETING INFORMATION

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

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

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

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

42 E. YOU HAVE THE RIGHT TO:

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

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

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

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

1 PROFESSIONAL SERVICES TO SUCH INDIVIDUAL AND WHICH DOES NOT OFFER TO
2 SELL WEIGHT LOSS SERVICES OR WEIGHT LOSS PRODUCTS TO THE PUBLIC.

3 S 643. DECEPTIVE PRACTICES. IT SHALL BE A DECEPTIVE TRADE PRACTICE FOR
4 ANY PERSON, FIRM OR CORPORATION OFFERING OR PROVIDING WEIGHT LOSS
5 SERVICES OR WEIGHT LOSS PRODUCTS TO MISREPRESENT, DIRECTLY OR INDIRECT-
6 LY:

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

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

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

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

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

29 S 644. LOCAL REGULATION. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO
30 RESTRICT THE POWER OF ANY COUNTY, CITY, TOWN OR VILLAGE TO ADOPT AND
31 ENFORCE LOCAL LAWS, ORDINANCES OR REGULATIONS WHICH EXCEED THE MINIMUM
32 REQUIREMENTS OF THIS ARTICLE, AS LONG AS SUCH LOCAL LAWS, ORDINANCES OR
33 REGULATIONS ARE NOT INCONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.
34 ANY LOCAL LAWS OR RULES REGULATING WEIGHT LOSS SERVICES AND PRODUCTS IN
35 A CITY HAVING A POPULATION OF ONE MILLION OR MORE AND WHICH WERE IN
36 EFFECT PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE AND ANY NOTICE
37 PROVIDED PURSUANT TO SUCH LAW OR RULE, SHALL BE DEEMED TO BE CONSISTENT
38 WITH THE PROVISIONS OF THIS ARTICLE.

39 S 645. PENALTIES. EACH DAY A PERSON, FIRM OR CORPORATION VIOLATES ANY
40 PROVISION OF THIS ARTICLE SHALL CONSTITUTE A SINGLE VIOLATION. WHENEVER
41 THERE SHALL BE A VIOLATION OF THIS ARTICLE, AN APPLICATION MAY BE MADE
42 BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE STATE OF NEW
43 YORK TO A COURT OR JUSTICE HAVING JURISDICTION BY A SPECIAL PROCEEDING
44 TO ISSUE AN INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS
45 THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH
46 VIOLATIONS. IF IT SHALL APPEAR TO THE COURT OR JUSTICE THAT THE DEFEND-
47 ANT HAS IN FACT, VIOLATED THIS ARTICLE, AN INJUNCTION MAY BE ISSUED BY
48 SUCH COURT OR JUSTICE, ENJOINING AND RESTRAINING ANY FURTHER VIOLATION,
49 WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT BEEN INJURED OR
50 DAMAGED THEREBY. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF
51 THIS ARTICLE HAS OCCURRED, THE COURT MAY IMPOSE A CIVIL PENALTY OF NOT
52 MORE THAN ONE HUNDRED DOLLARS FOR THE FIRST VIOLATION AND TWO HUNDRED
53 DOLLARS FOR EACH VIOLATION THEREAFTER, BUT IN NO EVENT SHALL THE TOTAL
54 PENALTY THEREFOR EXCEED ONE THOUSAND DOLLARS. IN CONNECTION WITH ANY
55 SUCH APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND

1 MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN
2 ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES.
3 S 2. This act shall take effect on the one hundred eightieth day after
4 it shall have become a law.