STATE OF NEW YORK

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IN ASSEMBLY

January 9, 2017

Introduced by M. of A. ROSENTHAL, DINOWITZ, JAFFEE, ARROYO, HOOPER, ENGLEBRIGHT, FAHY, ZEBROWSKI, MOSLEY, MAGNARELLI, STIRPE, ABINANTI, BRINDISI, CAHILL, ORTIZ, GALEF, GOTTFRIED, SKOUFIS, HUNTER, SEAWRIGHT, WEPRIN, WOERNER, BARRON, HARRIS, GJONAJ, SEPULVEDA, McDONALD -- Multi-Sponsored by -- M. of A. BRAUNSTEIN, BYRNE, GLICK, LOPEZ, PERRY, RIVERA, STECK -- read once and referred to the Committee on Health -- reported and referred to the Committee on Codes -- advanced to a third reading, passed by Assembly and delivered to the Senate, recalled from the Senate, vote reconsidered, bill amended, ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the public health law, in relation to including vaping within the provisions of law regulating smoking in certain public areas

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1399-n of the public health law is amended by adding three new subdivisions 9, 10 and 11 to read as follows:

9. "Vaping" means the use of an electronic cigarette.

10. "Electronic cigarette" shall have the same meaning as in subdivision thirteen of section thirteen hundred ninety-nine-aa of this chapter.

11. "Retail electronic cigarette store" means a retail store devoted primarily to the sale of electronic cigarettes, and in which the sale of other products is merely incidental. The sale of such other products shall be considered incidental if such sales generate less than twenty-five percent of the total annual gross sales.

§ 2. Section 1399-q of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

§ 1399-q. Smoking **and vaping** restrictions inapplicable. This article shall not apply to:

1. Private homes, private residences and private automobiles;

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

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2. A hotel or motel room rented to one or more guests;
3. Retail tobacco businesses;
4. Membership associations; provided, however, that smoking **and vaping** shall only be allowed in membership associations in which all of the duties with respect to the operation of such association, including, but not limited to, the preparation of food and beverages, the service of food and beverages, reception and secretarial work, and the security services of the membership association are performed by members of such membership association who do not receive compensation of any kind from the membership association or any other entity for the performance of such duties;
5. Cigar bars that, in the calendar year ending December thirty-first, two thousand two, generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, and is registered with the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article. Such registration shall remain in effect for one year and shall be renewable only if: (a) in the preceding calendar year, the cigar bar generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, and (b) the cigar bar has not expanded its size or changed its location from its size or location since December thirty-first, two thousand two;
6. Outdoor dining areas of food service establishments with no roof or other ceiling enclosure; provided, however, that smoking **and vaping** may be permitted in a contiguous area designated for smoking **and vaping** so long as such area: (a) constitutes no more than twenty-five percent of the outdoor seating capacity of such food service establishment, (b) is at least three feet away from the outdoor area of such food service establishment not designated for smoking **and vaping**, and (c) is clearly designated with written signage as a smoking **and vaping** area; [~~and~~]
7. Enclosed rooms in food service establishments, bars, catering halls, convention halls, hotel and motel conference rooms, and other such similar facilities during the time such enclosed areas or rooms are being used exclusively for functions where the public is invited for the primary purpose of promoting and sampling tobacco products **or electronic cigarettes**, and the service of food and drink is incidental to such purpose, provided that the sponsor or organizer gives notice in any promotional material or advertisements that smoking **and vaping** will not be restricted, and prominently posts notice at the entrance of the facility and has provided notice of such function to the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article, at least two weeks prior to such function. The enforcement officer shall keep a record of all tobacco sampling events, and such record shall be made available for public inspection. No such facility shall permit smoking **and vaping** under this subdivision for more than two days in any calendar year**; and**
8. Retail electronic cigarette stores, provided however, that such stores may only permit the use of electronic cigarettes.

§ 3. The article heading of article 13-E of the public health law, as added by chapter 244 of the laws of 1989, is amended to read as follows:

ARTICLE 13-E

REGULATION OF SMOKING **AND VAPING** IN CERTAIN PUBLIC AREAS

§ 4. Section 1399-o of the public health law, as amended by chapter 389 of the laws of 2011, subdivision 2 as amended by chapter 179 of the laws of 2013, subdivision 3 as added by chapter 449 of the laws of 2012,

and subdivision 4 as added by chapter 100 of the laws of 2015, is amended to read as follows:

§ 1399-o. Smoking **and vaping** restrictions. 1. Smoking **and vaping** shall not be permitted and no person shall smoke **or vape** in the following indoor areas:

a. places of employment;

b. bars;

c. food service establishments, except as provided in subdivision six of section thirteen hundred ninety-nine-q of this article;

d. enclosed indoor areas open to the public containing a swimming pool;

e. public means of mass transportation, including subways, underground subway stations, and when occupied by passengers, buses, vans, taxicabs and limousines;

f. ticketing, boarding and waiting areas in public transportation terminals;

g. youth centers and facilities for detention as defined in sections five hundred twenty-seven-a and five hundred three of the executive law;

h. any facility that provides child care services as defined in section four hundred ten-p of the social services law, provided that such services provided in a private home are excluded from this subdivision when children enrolled in such day care are not present;

i. child day care centers as defined in section three hundred ninety of the social services law and child day care centers licensed by the city of New York;

j. group homes for children as defined in section three hundred seventy-one of the social services law;

k. public institutions for children as defined in section three hundred seventy-one of the social services law;

l. residential treatment facilities for children and youth as defined in section 1.03 of the mental hygiene law;

m. all public and private colleges, universities and other educational and vocational institutions, including dormitories, residence halls, and other group residential facilities that are owned or operated by such colleges, universities and other educational and vocational institutions, except that these restrictions shall not apply in any off-campus residential unit occupied by a person who is not enrolled as an undergraduate student in such college, university or other educational or vocational institution;

n. general hospitals and residential health care facilities as defined in article twenty-eight of this chapter, and other health care facilities licensed by the state in which persons reside; provided, however, that the provisions of this subdivision shall not prohibit smoking **and vaping** by patients in separate enclosed rooms of residential health care facilities, adult care facilities established or certified under title two of article seven of the social services law, community mental health residences established under section 41.44 of the mental hygiene law, or facilities where day treatment programs are provided, which are designated as smoking **and vaping** rooms for patients of such facilities or programs;

o. commercial establishments used for the purpose of carrying on or exercising any trade, profession, vocation or charitable activity;

p. indoor arenas;

q. zoos; and

r. bingo facilities.

2. Smoking **and vaping** shall not be permitted and no person shall smoke **or vape** in the following outdoor areas:

a. ticketing, boarding or platform areas of railroad stations operated by the metropolitan transportation authority or its subsidiaries.

b. on the grounds of general hospitals and residential health care facilities as defined in article twenty-eight of this chapter, within fifteen feet of a building entrance or exit or within fifteen feet of the entrance to or exit from the grounds of any such general hospital or residential health care facility. This subdivision shall not prohibit smoking **and vaping** by a patient or a visitor or guest of a patient of a residential health care facility in a separate area on the grounds designated as a smoking **and vaping** area by the residential health care facility, provided such designated smoking **and vaping** area is not within thirty feet of any building structure (other than a non-residential structure wholly contained within the designated smoking **and vaping** area), including any overhang, canopy, awning, entrance, exit, window, intake or exhaust.

3. Smoking **and vaping** shall not be permitted and no person shall smoke **or vape** within one hundred feet of the entrances, exits or outdoor areas of any public or private elementary or secondary schools; provided, however, that the provisions of this subdivision shall not apply to smoking **or vaping** in a residence, or within the real property boundary lines of such residential real property. The provisions of section thirteen hundred ninety-nine-p of this article shall not apply to this subdivision.

4. Smoking **and vaping** shall not be permitted and no person shall smoke **or vape** within one hundred feet of the entrances, exits or outdoor areas of any after-school program licensed or registered pursuant to section three hundred ninety of the social services law; provided, however, that the provisions of this subdivision shall only apply on those days and during those hours in which such after-school programs are operational; and provided, further, that the provisions of this subdivision shall not apply to smoking **or vaping** in a residence, or within the real property boundary lines of such residential real property.

§ 5. Section 1399-o-1 of the public health law, as added by chapter 102 of the laws of 2013, is amended to read as follows:

§ 1399-o-1. Smoking **and vaping** restrictions; certain outdoor areas. 1. Smoking **and vaping** shall not be permitted and no person shall smoke **or vape** during the hours between sunrise and sunset, when one or more persons under the age of twelve are present at any playground. For the purposes of this section, the term "playground" means an improved area designed, equipped, and set aside for play of six or more children which is not intended for use as an athletic playing field or athletic court, and shall include any play equipment, surfacing, fencing, signs, internal pathways, internal land forms, vegetation, and related structures. Playgrounds or playground equipment constructed upon one, two and three-family residential real property are exempt from the requirements of this section. This section shall not apply to any playground located within the city of New York.

2. No police officer, peace officer, regulatory officer or law enforcement official may arrest, ticket, stop or question any person based solely or in part on an alleged violation of subdivision one of this section, nor may an alleged violation of subdivision one of this section support probable cause to conduct any search or limited search of any person or his or her immediate surroundings.

§ 6. Section 1399-p of the public health law, as added by chapter 244 of the laws of 1989, subdivision 1 as amended by chapter 13 of the laws of 2003, and subdivision 3 as added by chapter 100 of the laws of 2015, is amended to read as follows:

§ 1399-p. Posting of signs. 1. "Smoking" or "No Smoking" signs, **or "Vaping" or "No Vaping" signs,** or the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a circle with a bar across it, shall be prominently posted and properly maintained where smoking [~~is~~] **and vaping are** regulated by this article, by the owner, operator, manager or other person having control of such area.

2. The owner, operator or manager of a hotel or motel that chooses to develop and implement a smoking **and vaping** policy for rooms rented to guests shall post a notice at the reception area of the establishment as to the availability, upon request, of rooms in which no smoking [~~is~~] **and vaping are** allowed.

3. The provisions of this section shall apply to after-school programs that are subject to the provisions of subdivision four of section thirteen hundred ninety-nine-o of this article, provided that signs posted pursuant to this subdivision shall specify the specific time period during which smoking **and vaping** shall be prohibited.

§ 7. Section 1399-r of the public health law, as added by chapter 244 of the laws of 1989, is amended to read as follows:

§ 1399-r. General provisions. 1. Nothing in this article shall be construed to deny the owner, operator or manager of a place covered by this article the right to designate the entire place, or any part thereof, as a nonsmoking **and nonvaping** area.

2. The provisions of this article shall apply to the legislative, executive and judicial branches of state government and any political subdivision of the state.

3. Smoking **and vaping** may not be permitted where prohibited by any other law, rule, or regulation of any state agency or any political subdivision of the state. Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.

§ 8. Section 1399-s of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

§ 1399-s. Violations. 1. It shall be unlawful for any person, firm, limited liability company, corporation or other entity that owns, manages, operates or otherwise controls the use of an area in which smoking **and vaping** is prohibited or restricted pursuant to section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of this article. For violations of this subdivision, it shall be an affirmative defense that during the relevant time period actual control of the area was not exercised by the respondent, but rather by a lessee, the sublessee or any other person. To establish an affirmative defense, the respondent shall submit an affidavit and may submit any other relevant proof indicating that the respondent did not exercise actual control of said area during the relevant time period. Such affidavit and other proof shall be mailed by certified mail to the appropriate enforcement officer within thirty days of receipt of such notice of violation.

2. It shall be unlawful for an employer whose place of employment is subject to subdivision one of section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of such subdivision.

For violations of such subdivision, it shall be an affirmative defense that the employer has made good faith efforts to ensure that employees comply with the provisions of this article.

3. It shall be unlawful for any person to smoke **or vape** in any area where smoking **and vaping** is prohibited or restricted under section thirteen hundred ninety-nine-o of this article.

§ 9. Subdivision 4 of section 1399-t of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

4. The owner, manager, operator or other person having control of any area subject to the provisions of this article, shall inform, or shall designate an agent who shall be responsible for informing individuals smoking **or vaping** in an area in which smoking **or vaping** is not permitted that they are in violation of this article.

§ 10. Subdivision 2 of section 1399-u of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

2. Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke **or vaping** and to ensure that the waiver is consistent with the general purpose of this article.

§ 11. Section 1399-w of the public health law, as added by chapter 244 of the laws of 1989, is amended to read as follows:

§ 1399-w. Limitation of causes of action. An employer, administrator, manager, owner or operator of any indoor area, food service establishment, or place of employment regulated by this article who complies or fails to comply with the provisions of this article shall not be subject to any legal liability or action solely as a result of such compliance or noncompliance except as provided in section thirteen hundred ninety-nine-v of this article. Nothing in any other section of this article shall be construed to create, impair, alter, limit, modify, enlarge, abrogate or restrict any theory of liability upon which any person may be held liable to any other person for exposure to smoke **or vaping**.

§ 12. Section 1399-x of the public health law, as amended by chapter 389 of the laws of 2011, is amended to read as follows:

§ 1399-x. Rules and regulations. The commissioner shall not promulgate any rules or regulations to effectuate the provisions of section thirteen hundred ninety-nine-n, paragraph f of subdivision one of section thirteen hundred ninety-nine-o or subdivision one of section thirteen hundred ninety-nine-p of this article. The commissioner shall not promulgate any rules or regulations that create, limit or enlarge any smoking **or vaping** restrictions.

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.