STATE OF NEW YORK

1935

2017-2018 Regular Sessions

IN SENATE

January 11, 2017

Introduced by Sen. AVELLA -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to the reduction and recycling of packaging

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

Section 1. Short title. This act shall be known and may be cited as the "environmentally sound packaging act".

§ 2. Legislative findings and declaration. The legislature hereby finds and declares that a solid waste crisis exists in New York state, and that the amount of solid waste requiring disposal has continued to increase. The legislature further finds that over thirty percent of municipal solid waste is comprised of packaging, that the production of packaging has more than doubled in the last twenty years, and that this portion of the municipal solid waste stream could be significantly reduced through source reduction and material changes to increase the reusability, recycled content, and recyclability of such packaging. The legislature further finds that the reduction of packaging waste and the success of municipal recycling is dependent on greatly increasing demand for post-consumer materials in the manufacturing sector, that this demand is very limited at present, and attributable to a lack of incentives for manufacturers to increase the reusability, recycled content or recyclability of their packaging, with no federal or state standards applied to packaging based on such attributes or the lack of same. Therefore, the legislature finds and determines that there is a need to reduce packaging in the solid waste stream, by requiring that all packaging sold in New York state meet certain standards for reduction, reusability, recycled content, or recyclability.

§ 3. The environmental conservation law is amended by adding a new section 27-0721 to read as follows:

§ 27-0721. Packaging reduction and recycling.

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

LBD01176-01-7

1. Definitions. As used in this section: (a) "Concentrate form" shall mean a product sold in a concentrated form that is one-third or less of the volume of the product in its intended use form.

(b) "Environmentally sound packaging" shall mean packaging that is reduced or reusable or recycled or recyclable.

(c) "Intermediate package" shall mean a wrap, box or bundle that contains two or more unit packages of identical items, and that may be enclosed by a shipping container.

(d) "Manufacturer" shall mean a person, firm, association, partnership or corporation engaged in the production of packaging.

(e) "Material" shall mean any substance from which packaging is made, including, but not limited to, paper, glass, plastic, and metal or any combination thereof.

(f) "Packager" shall mean:

(i) for packaging in which products are placed prior to their entry into the state, the packager is the person who receives title to the shipment before or upon entry into the state; provided that if such person is the purchaser in a retail sale involving direct shipment from outside the state, then the packager is the seller;

(ii) for packaging in which a product is placed within the state prior to the sale of the product, the packager is the person who places the product in such packaging;

(iii) for packaging provided by a retail seller to a purchaser at the point of product delivery, the packager is the retail seller.

(g) "Packaging" shall mean any container used to protect, store, contain, transport, display or sell products. Packaging shall not include any detachable closure device such as a cap, clip, cover, lid, tab, or tamper resistant contrivance.

(h) "Person" shall mean any individual, trust, firm, joint stock company, corporation, partnership, or association, including the state of New York and any political subdivision of the state of New York.

(i) "Product" means any commodity destined for wholesale or retail sale.

(j) "Recyclable" shall mean packaging made of a material for which either of the following standards are met, as determined by the department:

(i) access to municipal recyclable recovery programs for that material is available to no less than seventy-five percent of the population of the state;

(ii) a statewide recycling rate of fifty percent has been achieved for the packaging material; or

(iii) a manufacturer, distributor or retailer achieves a statewide recycling rate of fifty percent for the package sold within the state.

Packaging composed of more than one type of material shall not be considered recyclable unless each material in the packaging that represents more than an insubstantial part of the packaging meets one of these standards.

(k) "Recycled" shall mean packaging made with secondary materials content, which meets the recycled content standards specified in regulations promulgated by the department pursuant to subdivision two of section 27-0717 of this title; provided, however, that within five years of the effective date of this section, recycled shall mean a minimum of forty-five percent by weight of post-consumer recycled content, as defined by the department.

(l) "Reduced" shall mean packaging that is either reduced at least fifteen percent by weight when compared with the packaging used for the

same product by the same packager five years earlier or packaging that meets a minimum efficiency ratio of ninety percent product to ten percent packaging by weight, when measured as the combined weight of the intermediate package and the unit package if the product is conveyed to the consumer in multiple layers of packaging, provided however, that packaging exempted pursuant to subdivision three of this section shall not be included in such measurement. In no case may packaging reduction be achieved by the substitution of a different material category for a material that constituted a substantial part of the packaging in question.

(m) "Retail sale" shall mean any sale to a purchaser for consumption or use other than resale or further processing or manufacturing.

(n) "Reusable" shall mean packaging that is designed for refilling or reuse a minimum of five times in a program established by a manufacturer, distributor or retailer for refilling or reuse of the packaging.

(o) "Shipment" shall mean packaged products conveyed by truck or other means of transport, and accompanied by an invoice.

(p) "Shipping container" shall mean packaging that is used in commerce for packing, storing, and shipping products.

(q) "Unit package" shall mean a package which contains a single item, a quantity of the same item, a set or an item with all its component parts.

2. Environmentally sound packaging. Except as provided in subdivision three of this section, no packager shall use or cause to be used any packaging that is not environmentally sound packaging after January first, two thousand twenty.

3. Exemptions. (a) The following types of packaging shall be unconditionally exempt from the provisions of this section:

(i) packaging which is in direct contact with food products, and has not received prior authorization from the federal food and drug administration to incorporate recycled content in such packaging, provided, however, such packaging also does not comply with the standards as defined in this section for reusable or reduced or recyclable;

(ii) packaging associated with drugs, drug products, cosmetics, medical food and medical devices, as those terms are defined under the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder;

(iii) packaging associated with products offered for sale in a concentrate form;

(iv) packaging for products destined for export from the state if the packaging is not separated from the product before export;

(v) those packages or packaging components which have been delivered to a packager prior to January first, two thousand twenty; and those packages or packaging components with a code indicating date of manufacture that were manufactured prior to January first, two thousand twenty;

(vi) packaging associated with retail sales of used merchandise by individual consumers subsequent to initial retail sale;

(vii) packaging associated with sales of food products by or on behalf of a not-for-profit corporation, if such corporation has established a pattern, over a period exceeding twenty years, of relying on such sales for a significant portion of its financial support.

(b) Every packager seeking a conditional exemption pursuant to this subdivision shall submit a written application to the department and shall pay an application fee, as determined by the department, sufficient to meet only the costs associated with the implementation of this subdivision.

(c) Pursuant to rules and regulations promulgated by the department, the commissioner may grant a conditional exemption from any requirement of this section if he or she determines that the requirement, when applied to a particular type of packaging, would impose undue hardship on the general public.

A packager applying for a conditional exemption under this paragraph shall bear the burden of proof in establishing undue hardship. Undue hardship shall be established by providing clear and convincing evidence that there is no environmentally sound packaging available for that type of product or the packaging is necessary to comply with health or safety laws and there is no environmentally sound packaging available that complies with those health and safety laws. Exemptions granted pursuant to this paragraph shall be for a period not to exceed five years.

(d) Within thirty days after the receipt of an application for a conditional exemption pursuant to paragraph (c) of this subdivision, the department shall publish a notice of opportunity for public comment on the application, and shall accept written comments from the public for sixty days thereafter. Before granting a conditional exemption, the department shall make a written finding of undue hardship. The department shall mail written notice of its determination to the applicant within one hundred twenty days after the receipt of an application pursuant to paragraph (c) of this subdivision and shall publish a notice of such determination.

4. Labeling requirements. (a) On or after January first, two thousand twenty, every packager shall ensure that the words "Complies with New York state packaging law," or abbreviations thereof, are affixed to all environmentally sound packaging. The presence of such statement on packaging shall indicate that the manufacturer of such packaging certifies that the packaging is reduced, reusable, recycled, recyclable or exempt from the requirements of this section. Use of this statement on any other packaging shall constitute a violation of this section.

(b) For purposes of intermediate or unit packaging containing one or more layers, only one compliance label is required, which shall appear on that portion of the packaged product visible to the consumer at retail sale.

5. Regulations. On or before September first, two thousand eighteen, the department shall adopt rules and regulations necessary to carry out the provisions of this section. Such rules and regulations shall include, but need not be limited to:

(a) requirements for packagers to demonstrate compliance with the environmentally sound packaging standards established pursuant to subdivision two of this section, and procedures to ensure effective oversight of packager compliance with those standards by the department;

(b) a methodology for the calculation of recycling rates for material used in recyclable packaging, including the conditions and criteria to be met by a packager seeking to qualify a package as recyclable by composting such material; and

(c) procedures for department review of exemptions under subdivision three of this section.

6. Reports on recycling rates. By April first of each year, the department of economic development, shall submit a report to the governor and the legislature stating the recycling rates for the previous calendar year for the types of materials used in packaging, assessing the levels of post-consumer recycled content in a representative sample of packaging, and reviewing the status of reusable packaging in the state. For recyclable packaging, the report shall specify those materi-

als which qualify as recyclable pursuant to each criterion set forth in paragraph (j) of subdivision one of this section.

7. Enforcement and violations. (a) The department of agriculture and markets or the department or, in a city with a population of one million or more, the city's department of consumer affairs, may inspect packaging to determine whether it is environmentally sound. If, on the basis of such inspection, a determination is made that any packager is in violation of the provisions of this section or any rule or regulation promulgated thereunder, the department of agriculture and markets or the department, or, in a city with a population of one million or more, the department of consumer affairs, may issue an order requiring compliance or issue notice of an administrative enforcement hearing, or both. Only one such agency shall issue such order, notice, or hold a hearing on any one violation. The packager shall be given an opportunity to be heard during any such hearing.

(b) As determined by a civil or administrative hearing, any person who violates any of the provisions of, or who fails to perform any duty imposed by this section or any rule or regulation promulgated thereunder, or any final determination or order of the commissioner of the department of agriculture and markets or the commissioner of the department, or in a city with a population of one million or more, the city's department of consumer affairs, shall be liable for a civil penalty not to exceed fifty dollars for each unit package which is not in compliance with the provisions of this chapter, or five hundred dollars for each intermediate package or shipping container which is not in compliance with the provisions of this chapter, provided that no person shall pay a penalty in excess of twenty thousand dollars for any one shipment of packaging. In considering the amount of the penalty to be imposed for each violation, the commissioner of the department or the commissioner of the department of agriculture and markets or the commissioner of the department of consumer affairs shall consider any evidence presented regarding the following factors: cost, size, weight of the product and package, compliance history of the violator, and any other factors which justice requires.

(c) Any person may commence a civil action in supreme court against any packager who is alleged to be in violation of any provision of this section or any regulation promulgated pursuant to this section. No such action may be commenced:

(i) prior to sixty days after the plaintiff or plaintiffs have given notice of the violation to the alleged violator, the attorney general, the department of agriculture and markets and, in a city with a population of one million or more, the city's department of consumer affairs; or

(ii) if the attorney general, the department of agriculture and markets, or, in a city with a population of one million or more, the city's department of consumer affairs has commenced a civil or administrative action to require compliance with the provision or regulation; or

(iii) if an alleged violator has a pending application for an exemption filed with the department.

The court, in issuing any final order in an action commenced or maintained pursuant to this subdivision, may award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing complainant.

(d) No packager of a product will be held in violation of this section who can show that, in the purchase of a package or packaging component,

he or she relied in good faith on the label of the manufacturer on such packaging or packaging component that such packaging or packaging component either complied with or was exempt from the requirements of this section.

(e) No packager who is engaged in retail sale of food products on behalf of a not-for-profit corporation will be held in violation of this section unless such packager is an employee of such corporation or unless such packager acts knowingly and in bad faith.

§ 4. Severability. The provisions of this act shall be severable, and if any part of this act shall be held invalid, the remainder of this act and the application thereof shall not be affected thereby.

§ 5. This act shall take effect immediately.