

STATE OF NEW YORK

8583--B

2021-2022 Regular Sessions

IN ASSEMBLY

December 13, 2021

Introduced by M. of A. REYES, SOLAGES -- read once and referred to the Committee on Agriculture -- recommitted to the Committee on Agriculture in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the agriculture and markets law and the public health law, in relation to food and food product advertising

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

1 Section 1. Legislative findings and intent. The legislature hereby
2 finds that children are an inherently vulnerable population, and that
3 marketing unhealthy foods in a targeted and persistent manner to this
4 group is inconsistent with this state's efforts to curb the disastrous
5 health outcomes that follow the overconsumption of these products. Such
6 marketing is inherently misleading, as children often lack the same
7 ability to resist the rewarding cues presented in unhealthy food market-
8 ing as adults. This predatory commercial speech has contributed to an
9 epidemic of obesity and its related co-morbidities, particularly in the
10 children of black and brown communities. Furthermore, there is a growing
11 consensus that highly processed food is habit forming, increasing the
12 danger to public health that can arise from succumbing to misleading
13 advertising. New York has a strong and substantial interest in protect-
14 ing our children from negative health consequences. Additionally, the
15 power of the state is at its greatest when protecting the health and
16 welfare of its citizens, especially those most vulnerable. Thus, the
17 legislature finds that unfair and deceptive marketing targeted at chil-
18 dren can mislead and manipulate children into lifelong habits, and that
19 such unfair and deceptive advertising should be regulated accordingly.

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

LBD13338-14-2

§ 2. Subdivision 1 of section 202-a of the agriculture and markets law, as added by chapter 797 of the laws of 1939, is amended and four new subdivisions 4, 5, 6 and 7 are added to read as follows:

1. ~~[An advertisement concerning a food or food product]~~ Any representations disseminated in any manner or by any means including digitally, or by statement, word, design, device, sound or any combination thereof, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of food or food products shall not be false or misleading in any [particular] manner. In determining whether any advertising concerning a food or food product is false or misleading, factors shall include, but not be limited to:

(a) The extent to which the advertising fails to reveal facts material in the light of such representations with respect to the food or food product to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual;

(b) Whether the entity responsible for the advertisement targeting a consumer who is reasonably unable to protect their interests because of their age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factor used:

(i) an unfair act, practice, or conduct; or

(ii) a deceptive representation, omission, practice, or content; and

(c) Whether: (i) the advertisement causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.

(d) For the purposes of this subdivision and subdivision five of this section, a "consumer" is defined as a person who is targeted by and exposed to an advertisement, or those acting on such a person's behalf.

4. For the purposes of paragraph (a) of subdivision one of this section, a true statement of information in brief summary relating to effects of substantial consumption of this product is sufficient. Untrue or misleading information in any part of the advertisement will not be corrected by the inclusion in another distinct part of the advertisement of a brief statement containing true information relating to the effects of consumption.

5. For the purposes of this section, for a consumer:

(a) an act, practice, or conduct is "unfair" where it:

(i) causes or is likely to cause substantial injury to such consumer;

(ii) cannot be reasonably avoided by such consumer; and

(iii) is not outweighed by countervailing benefits to such consumer or to competition.

(b) a representation, omission, or practice is "deceptive" where:

(i) it is likely to mislead such consumer;

(ii) such consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and

(iii) the misleading representation, omission, or practice is material.

6. For purposes of paragraph (b) of subdivision one of this section, special consideration shall be given to advertisements directed at a child as defined in section three hundred seventy-one of the social services law. In determining whether an advertisement concerning a food or food product is directed at a child, factors shall include, but not be limited to:

(a) Subject matter;

- 1 (b) Visual content;
2 (c) Use of animated characters or child-oriented activities and incen-
3 tives;
4 (d) Music or other audio content;
5 (e) Age of models;
6 (f) Presence of child celebrities or celebrities who appeal to chil-
7 dren;
8 (g) Language;
9 (h) Competent and reliable empirical evidence regarding audience
10 composition and evidence regarding the intended audience;
11 (i) Physical location of advertisement, including, but not limited to,
12 proximity to schools or other institutions frequented by children;
13 (j) Medium by which the advertisement is communicated, including, but
14 not limited to, social media; or
15 (k) Other similar factors.

16 7. (a) Whenever there shall be a violation of this section, the attor-
17 ney general, in the name of the people of the state of New York, or a
18 city corporation counsel on behalf of the locality, may bring an action
19 in the supreme court or federal district court to enjoin and restrain
20 such violations and to obtain restitution and damages.

21 (b) Any person, firm, corporation or association that has been damaged
22 as a result of violations of this section shall be entitled to bring an
23 action for recovery of damages or to enforce this section in the supreme
24 court or federal district court by seeking an injunction.

25 (c) The court may award reasonable attorneys' fees to a prevailing
26 plaintiff.

27 § 3. Subdivision 24 of section 16 of the agriculture and markets law,
28 as amended by chapter 108 of the laws of 1974, is amended to read as
29 follows:

30 24. ~~[Co-operate]~~ Cooperate with local health departments and other
31 local agencies in preventing the production, manufacture, sale or offer-
32 ing for sale of fraudulent, deleterious or unwholesome food. The
33 department, in conjunction with the department of health, shall annually
34 produce to the legislature a report detailing a determination as to
35 which foods may be unwholesome or deleterious according to generally
36 accepted nutritional standards. The commissioner may contract with any
37 such local health department or other local agency for the performance
38 of inspections with respect to any food or other product over which he
39 or she has jurisdiction, powers and duties under the provisions of this
40 chapter.

41 § 4. Subdivision 1 of section 2599-b of the public health law, as
42 amended by section 1 of part A of chapter 469 of the laws of 2015, is
43 amended to read as follows:

44 1. The program shall be designed to prevent and reduce the incidence
45 and prevalence of obesity in children and adolescents, especially among
46 populations with high rates of obesity and obesity-related health
47 complications including, but not limited to, diabetes, heart disease,
48 cancer, osteoarthritis, asthma, emphysema, chronic bronchitis, other
49 chronic respiratory diseases and other conditions. The program shall use
50 recommendations and goals of the United States departments of agricul-
51 ture and health and human services, the surgeon general and centers for
52 disease control and prevention in developing and implementing guidelines
53 for nutrition education and physical activity projects as part of obesi-
54 ty prevention efforts. The content and implementation of the program
55 shall stress the benefits of choosing a balanced, healthful diet from
56 the many options available to consumers~~[, without specifically targeting~~

1 ~~the elimination of any particular food group, food product or food re-~~
2 ~~lated industry~~].

3 § 5. Severability. If any part or provision of this act or its appli-
4 cation to a person is held invalid, the invalidity of that provision or
5 application does not affect other provisions or applications of this act
6 that can be given effect without the invalid provision or application.

7 § 6. This act shall take effect on the thirtieth day after it shall
8 have become a law.