STATE OF NEW YORK

3404

2023-2024 Regular Sessions

IN ASSEMBLY

February 3, 2023

Introduced by M. of A. FALL -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to the sale, manufacture, and distribution of vapor products

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

Section 1. Subdivisions 3 and 4 of section 1399-cc of the public health law, subdivision 3 as amended by chapter 100 of the laws of 2019 and subdivision 4 as amended by chapter 542 of the laws of 2014, are amended to read as follows:

3. Sale of tobacco products, herbal cigarettes, liquid nicotine, shisha or electronic cigarettes in such places, [~~other than~~] **including** by a vending machine, shall be made only to an individual who demonstrates, through (a) a valid driver's license or non-driver's identification card issued by the commissioner of motor vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States or a provincial government of the dominion of Canada, or (b) a valid passport issued by the United States government or any other country, or (c) an identification card issued by the armed forces of the United States, indicating that the individual is at least twenty-one years of age. Such identification need not be required of any individual who reasonably appears to be at least twenty-five years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of a tobacco product, herbal cigarettes, liquid nicotine, shisha or electronic cigarettes to an individual under twenty-one years of age.

4. (a) Any person operating a place of business wherein tobacco products, herbal cigarettes, liquid nicotine, shisha or electronic cigarettes are sold or offered for sale [~~may~~] **shall** perform a transaction scan as a precondition for such purchases.

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

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(b) In any instance where the information deciphered by the transaction scan fails to match the information printed on the driver's license or non-driver identification card, or if the transaction scan indicates that the information is false or fraudulent, the attempted transaction shall be denied.

(c) In any proceeding pursuant to section thirteen hundred ninety-nine-ee of this article, it shall be an affirmative defense that such person had produced a driver's license or non-driver identification card apparently issued by a governmental entity, successfully completed that transaction scan, and that the tobacco product, herbal cigarettes or liquid nicotine had been sold, delivered or given to such person in reasonable reliance upon such identification and transaction scan. In evaluating the applicability of such affirmative defense the commissioner shall take into consideration any written policy adopted and implemented by the seller to effectuate the provisions of this chapter. Use of a transaction scan shall not excuse any person operating a place of business wherein tobacco products, herbal cigarettes, liquid nicotine, shisha or electronic cigarettes are sold, or the agent or employee of such person, from the exercise of reasonable diligence otherwise required by this chapter. Notwithstanding the above provisions, any such affirmative defense shall not be applicable in any civil or criminal proceeding, or in any other forum.

§ 2. Section 1399-dd of the public health law, as amended by chapter 448 of the laws of 2012 and subdivision (d) as amended by chapter 100 of the laws of 2019, is amended to read as follows:

§ 1399-dd. Sale of tobacco products, herbal cigarettes or electronic cigarettes in vending machines. No person, firm, partnership, company or corporation shall operate a vending machine which dispenses tobacco products, herbal cigarettes or electronic cigarettes unless such machine is located: (a) in a bar as defined in subdivision one of section thirteen hundred ninety-nine-n of this chapter, or the bar area of a food service establishment with a valid, on-premises full liquor license; (b) in a private club; (c) in a tobacco business as defined in subdivision eight of section thirteen hundred ninety-nine-aa of this article; or (d) in a place of employment which has an insignificant portion of its regular workforce comprised of people under the age of twenty-one years and only in such locations that are not accessible to the general public; provided, however, that in such locations the vending machine is located in plain view and under the direct supervision and control of the person in charge of the location or his or her designated agent or employee**; and provided further, that in such locations the vending machine shall not be operable until the person in charge of such location or his or her designated agent or employee has verified that the person seeking to operate such vending machine is over twenty-one years of age in accordance with the provisions of subdivisions three and four of section thirteen hundred ninety-nine-cc of this article**.

§ 3. Section 1399-ll of the public health law, as amended by section 3 of part EE of chapter 56 of the laws of 2020, is amended by adding three new subdivisions 1-b, 1-c and 1-d to read as follows:

1-b. (a) The commissioner shall establish a vapor product distributor permit to be issued to persons engaged in the business of shipping or causing to be shipped any vapor products intended or reasonably expected to be used with or for the consumption of nicotine to any person in this state. An application for a vapor product distributor permit shall include:

(i) the name, telephone number, and primary business address of the applicant;

(ii) the name, telephone number, and address of any of the applicant's distribution facilities in this state;

(iii) the name, telephone number, title, and address of any person responsible for any of the applicant's distribution facilities in this state;

(iv) written consent allowing the division of state police to conduct a state or national criminal history background check on any person listed on the application;

(v) a non-refundable initial application fee to be determined by the commissioner; and

(vi) any other information the commissioner shall deem relevant and appropriate.

(b) Every person who is engaged in the business of shipping or causing to be shipped any vapor products intended or reasonably expected to be used with or for the consumption of nicotine to any person in this state shall first obtain a vapor product distributor permit from the commissioner.

(c) A vapor product distributor permit shall be valid for one calendar year from the date of issuance unless earlier suspended or revoked. Upon the expiration of the term stated on the vapor product distributor permit, such permit shall be null and void. A vapor product distributor permit shall not be assignable or transferable and shall be destroyed immediately upon the holder of such permit ceasing to do business as specified in such permit.

(d) The department shall publish and maintain on its website a list of all holders of a vapor product distributor permit.

1-c. (a) The commissioner shall establish a vapor product manufacturer permit to be issued to persons engaged in the business of manufacturing any vapor products intended or reasonably expected to be used with or for the consumption of nicotine to any person in this state. An application for a vapor product manufacturer permit shall include:

(i) the name, telephone number, and primary business address of the applicant;

(ii) the name, telephone number, and address of any of the applicant's manufacturing facilities in this state;

(iii) the name, telephone number, title, and address of any person responsible for any of the applicant's manufacturing facilities in this state;

(iv) verification that the applicant's facilities in this state comply with applicable tobacco products good manufacturing practices promulgated under 21 U.S.C. § 387f(e) of the federal Food, Drug, and Cosmetic Act;

(v) verification that the manufacturer is in compliance with the applicable ingredient listing required by 21 U.S.C. § 387d(a)(1) of the federal Food, Drug, and Cosmetic Act, and article seventeen of this chapter;

(vi) written consent allowing the division of state police to conduct a state or national criminal history background check on any person listed on the application;

(vii) a non-refundable initial application fee to be determined by the commissioner; and

(viii) any other information the commissioner shall deem relevant and appropriate.

(b) Every person who is engaged in the business of manufacturing any vapor products intended or reasonably expected to be used with or for the consumption of nicotine to any person in this state shall first obtain a vapor product manufacturer permit from the commissioner.

(c) A vapor product manufacturer permit shall be valid for five calendar years from the date of issuance unless earlier suspended or revoked. Upon the expiration of the term stated on the vapor product manufacturer permit, such permit shall be null and void. A vapor product manufacturer permit shall not be assignable or transferable and shall be destroyed immediately upon the holder of such permit ceasing to do business as specified in such permit.

(d) The department shall publish and maintain on its website a list of all holders of a vapor product manufacturer permit.

1-d. It shall be unlawful for a vapor products dealer under article twenty-eight-C of the tax law to purchase vapor products from anyone other than a holder of a vapor product distributor permit issued pursuant to subdivision one-b, or a holder of a vapor product manufacturer permit issued pursuant to subdivision one-c of this section.

§ 4. The section heading and subdivision 5 of section 1399-ll of the public health law, as amended by section 3 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

§ 1399-ll. Unlawful shipment [~~or~~], transport, or manufacture of cigarettes and vapor products.

5. Any person who violates the provisions of subdivision one, subdivision one-a, paragraph (b) of subdivision one-b, paragraph (b) of subdivision one-c, subdivision one-d, or subdivision two of this section shall be guilty of a class A misdemeanor and for a second or subsequent violation shall be guilty of a class E felony. In addition to the criminal penalty, any person who violates the provisions of subdivision one, subdivision one-a, paragraph (b) of subdivision one-b, paragraph (b) of subdivision one-c, subdivision one-d, or subdivision two or three of this section shall be subject to a civil penalty not to exceed the greater of (a) five thousand dollars for each such violation; (b) one hundred dollars for each pack of cigarettes shipped, caused to be shipped or transported in violation of such subdivision; or (c) one hundred dollars for each vapor product intended or reasonably expected to be used with or for the consumption of nicotine shipped, caused to be shipped or transported in violation of such subdivision or paragraph.

§ 5. Section 1399-aa of the public health law is amended by adding a new subdivision 19 to read as follows:

19. "Illicit vapor product" means any vapor product that:

(a) was not manufactured, prepared, compounded, or processed by a person or entity registered with the U.S. Food and Drug Administration pursuant to 21 U.S.C. § 387e;

(b) is not manufactured by the manufacturer indicated on the product packaging, label, or container; or

(c) is not on the state's vapor product registry pursuant to section thirteen hundred ninety-nine-kk-one of this article.

§ 6. The public health law is amended by adding a new section 1399-dd-2 to read as follows:

§ 1399-dd-2. Sale of illicit vapor products. 1. It shall be unlawful for any person knowingly, directly or indirectly, to manufacture, distribute, sell, barter, or furnish in this state any illicit vapor product.

2. Any person who violates the provisions of subdivision one of this section shall be guilty of a class A misdemeanor for a first violation,

and for a second or subsequent violation shall be guilty of a class E felony.

§ 7. The public health law is amended by adding a new section 1399-kk-1 to read as follows:

§ 1399-kk-1. Vapor product directory. 1. Beginning January first, two thousand twenty-four, every manufacturer of a vapor product that is sold or intended to be sold in this state, whether directly or through a distributor, or vapor products dealer, shall execute and deliver an attestation under the penalty of perjury to the attorney general certifying that, as of the date of such attestation:

(a) such vapor product was on the United States' markets as of August eighth, two thousand eighteen, and such manufacturer has applied for a marketing order for such vapor product by submitting a Premarket Tobacco Product Application to the U.S. Food and Drug Administration on or before September ninth, two thousand twenty-two; or

(b) such manufacturer has received a marketing order or other authorization under 21 U.S.C. § 387j for such vapor product from the U.S. Food and Drug Administration.

2. Every manufacturer of a vapor product that is sold or intended to be sold in this state, whether directly or through a distributor, or vapor products dealer, shall notify the attorney general within thirty days of any material change to an attestation submitted pursuant to subdivision one of this section, including if the U.S. Food and Drug Administration has issued a market order or other authorization, issued a no marketing order, or has ordered such manufacturer to remove such vapor product, either temporarily or permanently, from the U.S. market.

3. The attorney general shall develop a vapor product directory listing all manufacturers that have provided attestations in compliance with subdivision one of this section, and all vapor products that are listed in such attestations. The attorney general shall publish and maintain such vapor product directory on its website.

4. It shall be unlawful for any person knowingly, directly or indirectly, to manufacture, distribute, sell, barter, or furnish in this state any vapor product that is not included in the vapor product directory established pursuant to this section.

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law.