

STATE OF NEW YORK

9110

IN ASSEMBLY

February 7, 2024

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

AN ACT to amend the public health law and the tax law, in relation to prohibiting the storage of flavored vapor products near where vapor or tobacco products are sold at retail or wholesale

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

1 Section 1. Subdivisions 1, 17 and 18 of section 1399-aa of the public
2 health law, subdivision 1 as amended by chapter 13 of the laws of 2003,
3 and subdivisions 17 and 18 as added by section 2 of part EE of chapter
4 56 of the laws of 2020, are amended to read as follows:

5 1. "Enforcement officer" means the enforcement officer designated
6 pursuant to article thirteen-E of this chapter to enforce such article
7 and hold hearings pursuant thereto; provided that in a city with a popu-
8 lation of more than one million it shall also mean an officer or employ-
9 ee or any agency of such city that is authorized to enforce any local
10 law of such city related to the regulation of the sale of cigarettes,
11 tobacco products, or vapor products to minors.

12 17. "Vapor products" means any noncombustible liquid or gel, regard-
13 less of the presence of nicotine therein, that is manufactured into a
14 finished product for use in an electronic [~~cigarette, including any~~]
15 device that delivers vapor which is inhaled, including any refill,
16 cartridge, device, or component thereof, that contains or is intended
17 to be used with such noncombustible liquid or gel. "Vapor product" shall
18 not include any device, or any component thereof, that does not contain
19 such noncombustible liquid or gel, or any product approved by the United
20 States food and drug administration as a drug or medical device, as
21 those terms are defined in the federal food, drug, and cosmetic act, or
22 manufactured and dispensed pursuant to [~~title five-A~~] article three,
23 four, or five of [~~article thirty-three of this chapter~~] the cannabis
24 law.

25 18. "Vapor products dealer" means a person licensed by the commission-
26 er of taxation and finance to sell vapor products [~~in this state~~], or a
27 person or business required to obtain such license.

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

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§ 2. Subdivision 2 and paragraph (f) of subdivision 3 of section 1399-ee of the public health law, as amended by section 6 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

2. If the enforcement officer determines after a hearing that a violation of this article has occurred, ~~[he or she]~~ or that a state or local health official was denied access to a retail store including all product display and storage areas, for the purpose of evaluating compliance with this article, they shall impose a civil penalty of a minimum of three hundred dollars, but not to exceed one thousand five hundred dollars for a first violation, and a minimum of one thousand dollars, but not to exceed two thousand five hundred dollars for each subsequent violation, unless a different penalty is otherwise provided in this article. The enforcement officer shall advise the retail dealer that upon the accumulation of three or more points pursuant to this section the department of taxation and finance shall suspend the dealer's registration. If the enforcement officer determines after a hearing that a retail dealer was selling tobacco or vapor products while their registration was suspended or permanently revoked pursuant to subdivision three or four of this section, ~~[he or she]~~ they shall impose a civil penalty of twenty-five hundred dollars.

(f) Surcharge. A ~~[two]~~ four hundred ~~[fifty]~~ dollar surcharge to be assessed for every violation will be made available to enforcement officers and shall be used solely for compliance checks to be conducted to determine compliance with this section.

§ 3. Subdivision 1 of section 1399-ff of the public health law, as amended by chapter 100 of the laws of 2019, is amended to read as follows:

1. Where a civil penalty for a particular incident has not been imposed or an enforcement action regarding an alleged violation for a particular incident is not pending under section thirteen hundred ninety-nine-ee of this article, a parent or guardian of a person under twenty-one years of age to whom tobacco products, herbal cigarettes or ~~[electronic cigarettes]~~ vapor products are sold or distributed in violation of this article may submit a complaint to an enforcement officer setting forth the name and address of the alleged violator, the date of the alleged violation, the name and address of the complainant and the person under twenty-one years of age, and a brief statement describing the alleged violation. The enforcement officer shall notify the alleged violator by certified or registered mail, return receipt requested, that a complaint has been submitted, and shall set a date, at least fifteen days after the mailing of such notice, for a hearing on the complaint. Such notice shall contain the information submitted by the complainant.

§ 4. Subdivision 1 of section 1399-gg of the public health law, as amended by chapter 513 of the laws of 2004, is amended to read as follows:

1. All tobacco cigarettes or vapor products sold or offered for sale by a retail dealer shall be sold or offered for sale in the package, box, carton or other container provided by the manufacturer, importer, or packager which bears all health warnings required by applicable law.

§ 5. The opening paragraph and subdivisions 2 and 3 of section 1399-hh of the public health law, as amended by section 8 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

The commissioner shall develop, plan and implement a comprehensive program to reduce the prevalence of tobacco ~~[use,]~~ and vapor product~~[, intended or reasonably expected to be used with or for the consumption~~

1 ~~of nicotine,~~ use, particularly among persons less than twenty-one years
2 of age. This program shall include, but not be limited to, support for
3 enforcement of this article.

4 2. The commissioner shall distribute such monies as are made available
5 for such purpose to enforcement officers and, in so doing, consider the
6 number of licensed vapor products dealers or sellers and retail
7 locations registered to sell tobacco products within the jurisdiction of
8 the enforcement officer and the level of proposed activities. For the
9 purposes of this section, "seller" means a person, sole proprietorship,
10 corporation, limited liability company, partnership or other enterprise
11 that distributes, sells or offers to sell, whether through retail or
12 wholesale, or exchanges or offers to exchange for any form of consider-
13 ation, cigarettes, tobacco products, or vapor products. This definition
14 is without regard to the quantity of cigarettes, tobacco products, or
15 vapor products distributed, sold, offered for sale, exchanged, or
16 offered for exchange.

17 3. Monies made available to enforcement officers pursuant to this
18 section shall only be used for local tobacco and vapor product[~~7~~
19 ~~intended or reasonably expected to be used with or for the consumption~~
20 ~~of nicotine,~~] enforcement activities approved by the commissioner.

21 § 6. Subdivision 2 of section 1399-ii of the public health law, as
22 amended by section 12 of part EE of chapter 56 of the laws of 2020, is
23 amended to read as follows:

24 2. The department shall support tobacco and vapor product use
25 prevention and control activities including, but not limited to:

26 (a) Community programs to prevent and reduce tobacco use through local
27 involvement and partnerships;

28 (b) School-based programs to prevent and reduce tobacco use and use of
29 vapor products;

30 (c) Marketing and advertising to discourage tobacco[~~7~~] and vapor prod-
31 uct [~~and liquid nicotine~~] use, especially among consumers histor-
32 ically targeted by tobacco and vapor product advertising and manufactur-
33 ers;

34 (d) Nicotine cessation programs for youth and adults;

35 (e) Special projects to reduce the disparities in smoking prevalence
36 among various populations;

37 (f) Restriction of youth access to tobacco products and vapor
38 products;

39 (g) Surveillance of smoking and vaping rates; and

40 (h) Any other activities determined by the commissioner to be neces-
41 sary to implement the provisions of this section.

42 Such programs shall be selected by the commissioner through an appli-
43 cation process which takes into account whether a program utilizes meth-
44 ods recognized as effective in reducing [~~nicotine~~] tobacco or vapor
45 product use. Eligible applicants may include, but not be limited to, a
46 health care provider, schools, a college or university, a local public
47 health department, a public health organization, a health care provider
48 organization, association or society, municipal corporation, or a
49 professional education organization.

50 § 7. Section 1399-ii-1 of the public health law, as added by section
51 11 of part EE of chapter 56 of the laws of 2020, is amended to read as
52 follows:

53 § 1399-ii-1. [~~Electronic cigarette and vaping~~] Vapor product
54 prevention, awareness and control program. The commissioner shall, in
55 consultation and collaboration with the commissioner of education,
56 establish and develop [~~an electronic cigarette and vaping~~] a vapor prod-

1 uct prevention, control and awareness program within the department.
2 Such program shall be designed to educate students, parents and school
3 personnel about the health risks associated with vapor product use and
4 control measures to reduce the prevalence of vaping, particularly among
5 persons less than twenty-one years of age. Such program shall include,
6 but not be limited to, the creation of age-appropriate instructional
7 tools and materials that may be used by all schools, and marketing and
8 advertising materials to discourage [~~electronic cigarette~~] vapor product
9 use.

10 § 8. Subdivision 6 of section 1399-11 of the public health law, as
11 amended by section 3 of part EE of chapter 56 of the laws of 2020, is
12 amended to read as follows:

13 6. The attorney general may bring an action to recover the civil
14 penalties provided by subdivision five of this section and for such
15 other relief as may be deemed necessary. In addition, the corporation
16 counsel of any political subdivision that imposes a tax on cigarettes or
17 vapor products [~~intended or reasonably expected to be used with or for the~~
18 ~~consumption of nicotine~~] may bring an action to recover the civil penal-
19 ties provided by subdivision five of this section and for such other
20 relief as may be deemed necessary with respect to any cigarettes or
21 vapor products [~~intended or reasonably expected to be used with or for~~
22 ~~the consumption of nicotine~~] shipped, caused to be shipped or trans-
23 ported in violation of this section to any person located within such
24 political subdivision. All civil penalties obtained in any such action
25 shall be retained by the state or political subdivision bringing such
26 action[~~, provided that no person shall be required to pay civil penal-~~
27 ~~ties to both the state and a political subdivision with respect to the~~
28 ~~same violation of this section~~].

29 § 9. Section 1399-mm-1 of the public health law, as added by section 1
30 of part EE of chapter 56 of the laws of 2020, is amended to read as
31 follows:

32 § 1399-mm-1. Sale of flavored products prohibited. 1. For the purposes
33 of this section "flavored" shall mean any vapor product [~~intended or~~
34 ~~reasonably expected to be used with or for the consumption of nicotine,~~
35 with a [~~distinguishable~~] taste, [~~or~~] aroma, or cooling or numbing sensa-
36 tion, distinguishable by an ordinary customer, other than the taste or
37 aroma of tobacco, imparted either prior to or during consumption of such
38 product or a component part thereof, including but not limited to tastes
39 or aromas relating to any fruit, chocolate, vanilla, honey, candy,
40 cocoa, dessert, alcoholic beverage, mint, wintergreen, menthol, herb or
41 spice, or any concept flavor that imparts a taste or aroma that is
42 distinguishable from tobacco flavor but may not relate to any particular
43 known flavor. A vapor product [~~intended or reasonably expected to be~~
44 ~~used with or for the consumption of nicotine,~~] shall be presumed to be
45 flavored if a product's retailer, manufacturer, or a manufacturer's
46 agent or employee has made a statement or claim, or other action,
47 directed to consumers or the public, whether expressed or implied, that
48 such product or device has a [~~distinguishable~~] taste [~~or~~], aroma, or
49 cooling or numbing sensation, as distinguishable by the ordinary consum-
50 er, other than the taste [~~or~~], aroma, or sensation of tobacco.

51 2. No vapor products dealer, seller or any agent or employee of a
52 vapor products dealer or seller, shall sell or offer for sale [~~at retail~~
53 ~~in the state~~], or exchange or offer for exchange, for any form of
54 consideration, any flavored vapor product [~~intended or reasonably~~
55 ~~expected to be used with or for the consumption of nicotine~~], whether
56 through retail or wholesale. For the purposes of this section, seller

1 means a person, sole proprietorship, corporation, limited liability
2 company, partnership or other enterprise that distributes, sells or
3 offers to sell, whether through retail or wholesale, or exchanges or
4 offers to exchange, for any form of consideration, vapor products. This
5 definition is without regard to the quantity of vapor products distrib-
6 uted, sold, offered for sale, exchanged, or offered for exchange.

7 3. No vapor products dealer or seller or any agent or employee of a
8 vapor products dealer or seller, acting in the capacity thereof, shall
9 keep in inventory, store, stow, warehouse, process, package, ship, or
10 distribute flavored vapor or tobacco products anywhere in, adjacent to,
11 or accessible to a place of business or premises where vapor products
12 are sold, offered for sale, exchanged, or offered for exchange, for any
13 form of consideration, at retail.

14 4. Any vapor products dealer or seller, or any agent or employee of a
15 vapor products dealer or seller, who violates the provisions of this
16 section shall be subject to a civil penalty of not more than [~~one~~] three
17 hundred dollars for each individual package of flavored vapor product
18 [~~intended or reasonably expected to be used with or for the consumption~~
19 ~~of nicotine~~] sold or offered for sale, [~~provided, however, that with~~
20 ~~respect to a manufacturer, it shall be an affirmative defense to a find-~~
21 ~~ing of violation pursuant to this section that such sale~~] or [~~offer of~~
22 ~~sale, as applicable, occurred without the knowledge, consent, authori-~~
23 ~~zation, or involvement, direct~~] exchanged or [~~indirect,~~] offered for
24 exchange, for any form of [~~such manufacturer~~] consideration, whether
25 through retail or wholesale, or kept in inventory, stored, stowed, ware-
26 housed, processed, packaged, shipped, or distributed anywhere in, or
27 adjacent to, a place of business where vapor or tobacco products are
28 sold, offered for sale, exchanged, or offered for exchange, for any form
29 of consideration, at retail. Violations of the provisions of this
30 section shall be enforced pursuant to [~~section~~] sections thirteen
31 hundred ninety-nine-ee and thirteen hundred ninety-nine-ff of this arti-
32 cle, [~~except~~]; provided, however, that [~~any~~] violations of the
33 provisions of this section may also be enforced by the commissioner;
34 provided, further, however, that any monies obtained in any such
35 enforcement action taken by the commissioner shall be made available to
36 support tobacco and vapor product enforcement programs operating pursu-
37 ant to section thirteen hundred ninety-nine-hh of this article. Any
38 person may submit a complaint to an enforcement officer that a violation
39 of this section has occurred.

40 [~~4. The provisions of this section shall not apply to any vapor~~
41 ~~products dealer, or any agent or employee of a vapor products dealer,~~
42 ~~who sells or offers for sale, or who possess with intent to sell or~~
43 ~~offer for sale, any flavored vapor product intended or reasonably~~
44 ~~expected to be used with or for the consumption of nicotine that the~~
45 ~~U.S. Food and Drug Administration has authorized to legally market as~~
46 ~~defined under 21 U.S.C. § 387j and that has received a premarket review~~
47 ~~approval order under 21 U.S.C. § 387j(e) et seq.]~~

48 5. Nothing in this section shall be construed to penalize the
49 purchase, use, or possession of a tobacco product or vapor product by
50 any person not engaged as a vapor products dealer, retail dealer, tobac-
51 co or vapor seller, or any agent or employee of a vapor products dealer,
52 retail dealer, or tobacco or vapor seller.

53 § 10. Paragraph (e) of section 1183 of the tax law, as added by
54 section 1 of part UU of chapter 59 of the laws of 2019, is amended to
55 read as follows:

(e) (1) If a vapor products [~~dealer~~] dealer's certificate or registration is suspended, cancelled or revoked and such vapor products dealer sells vapor products through more than one place of business in this state, the vapor products dealer's certificate of registration issued to that place of business, cart, stand, truck or other merchandising device, where such violation occurred, shall be suspended, revoked or cancelled. Provided, however, upon a vapor products dealer's third suspension, cancellation or revocation within a five-year period for any one or more businesses owned or operated by the vapor products dealer, such suspension, cancellation, or revocation of the vapor products dealer's certificate of registration shall apply to all places of business where he or she sells vapor products in this state.

(2) If a vapor products dealer does not possess a valid certificate of registration, either because it failed to obtain a registration or its registration is suspended or revoked and the commissioner or their designee, pursuant to their authority under this article, attempts to inspect such premises for a violation of this section and such vapor products dealer, including an agent thereof, is found, after notice and opportunity to be heard, to have refused such inspection, such vapor products dealer shall be subject to a penalty of up to four thousand dollars for a first refusal and up to eight thousand dollars for a second or subsequent refusal within three years of a prior refusal.

§ 11. Section 1183 of the tax law is amended by adding two new subdivisions (i) and (j) to read as follows:

(i) At the time of delivering vapor products to any person, each vapor products dealer shall make a true duplicate invoice showing the date of delivery, the number of packages and number of vapor products contained therein, in each shipment of vapor products delivered, and the items and quantity and wholesale price of each item in each shipment of vapor products delivered, and the name of the purchaser to whom delivery is made, and shall retain such duplicate invoices for a period of three years subject to the use and inspection of the commissioner. Each vapor products dealer shall procure and retain invoices showing the number of packages and number of vapor products contained therein, in each shipment of vapor products received by him or her, and the items and quantity and wholesale price of each item in each shipment of vapor products received by him or her, the date thereof, and the name of the shipper, and shall retain such invoices for a period of three years subject to the use and inspection of the commissioner. The commissioner by regulation may provide that whenever vapor products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner a copy of the freight bill within ten days after the delivery in the state of each shipment. All vapor products dealers shall maintain and keep for a period of three years such other records of vapor products received, sold or delivered within the state, as may be required by the commissioner. The commissioner is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where vapor products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the sale and delivery of vapor products taxable under this article, as well as the stock of vapor products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner or his or her duly authorized

1 representatives, the means, facilities and opportunity for such examina-
2 tions as are herein provided for and required.

3 (j) If a vapor products dealer, including an agent thereof, refuses to
4 comply with the requirements of this section, its registration may be
5 revoked (i) for a period of one year, (ii) for a second such violation
6 within a period of five years, for up to three years, or (iii) for a
7 third or subsequent violation within a period of seven years, for a
8 period up to ten years. A vapor products dealer's registration shall be
9 considered to be revoked pursuant to this subdivision immediately upon
10 such dealer's receipt of written notice of revocation from the commis-
11 sioner.

12 § 12. Severability. If any clause, sentence, paragraph, subdivision,
13 section or part of this act shall be adjudged by any court of competent
14 jurisdiction to be invalid, such judgment shall not affect, impair, or
15 invalidate the remainder thereof, but shall be confined in its operation
16 to the clause, sentence, paragraph, subdivision, section or part thereof
17 directly involved in the controversy in which such judgment shall have
18 been rendered. It is hereby declared to have been the intent of the
19 legislature that this act would have been enacted even if such invalid
20 provisions had not been included herein.

21 § 13. This act shall take effect on the ninetieth day after it shall
22 have become a law.