

STATE OF NEW YORK

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IN ASSEMBLY

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Introduced by M. of A. SOLAGES, ZINERMAN, R. CARROLL, LASHER, DAVILA, BRONSON, FORREST, BORES, CRUZ, DINOWITZ, GALLAGHER, RAGA, RAMOS, CUNNINGHAM, LEE, RIVERA, MORENO, SIMON, CLARK, TORRES, GONZALEZ-ROJAS, RAJKUMAR, REYES, HEVESI, BENEDETTO, STIRPE, SEPTIMO, ROSENTHAL, COOK, McMAHON, BUTTENSCHON, SHIMSKY, SEAWRIGHT, LUNSFORD, BICHOTTE HERMELYN, SHRESTHA, JACOBSON, BURKE -- read once and referred to the Committee on Consumer Affairs and Protection -- recommitted to the Committee on Consumer Affairs and Protection in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to establishing the protecting consumers and jobs from discriminatory pricing act

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

1 Section 1. Short title. This act shall be known and may be cited as
2 the "Protecting Consumers and Jobs from Discriminatory Pricing Act".
3 § 2. Legislative findings. The legislature finds and declares that:
4 1. It is the policy of the state of New York to protect consumers from
5 discriminatory pricing schemes in whatever iteration they appear or
6 evolve. Advancements in algorithms, in artificial intelligence, and in
7 electronic shelving technology have created commercial and retail envi-
8 ronments where it is possible to set pricing for a product or service
9 based on personal or protected data. Currently, there are no prohibi-
10 tions on companies using such data to set prices; this gap in the law
11 presents a distinct potential for companies to violate consumer privacy
12 rights and create discriminatory results.
13 While offering goods at different prices due to customer demand is not
14 new, there are subtle and important differences between price optimiza-
15 tion and discriminatory pricing schemes like personalized algorithmic

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

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1 pricing and surveillance pricing, in which companies exploit the
2 personal and protected data of consumers to maximize profits. It is in
3 the interest of the state to regulate any technologies or business
4 models that stifle competition through the monetization of consumers'
5 personal information.

6 2. The state of New York further finds that business models in person-
7 alized algorithmic or surveillance pricing will lead to the elimination
8 of numerous jobs, putting the livelihood of many workers at risk.
9 Protecting these jobs will further benefit consumers who are part of
10 this economic ecosystem. It will also add to the growth of the state's
11 economy and job market. Thus, by enacting rules around personalized
12 algorithmic and surveillance pricing, the state of New York can protect
13 these jobs and promote the growth of jobs in the future.

14 § 3. The general business law is amended by adding a new section 349-
15 a-1 to read as follows:

16 § 349-a-1. Discriminatory pricing. 1. The following terms shall have
17 the following meanings for the purposes of this section:

18 (a) "Algorithm" means a computational process or system that applies
19 one or more sets of rules, including rules generated by a natural person
20 or by a computational process or system, to generate outputs based on
21 inputs and/or to define a sequence of operations.

22 (b) "Consumer" means a natural person who is seeking or solicited to
23 purchase, lease or receive a good or service for personal, family or
24 household use in New York state or from an entity domiciled in New York
25 state.

26 (c) "Personal data" means any data that identifies or could reasonably
27 be linked, directly or indirectly, with a consumer or consumer's device.
28 Personal data includes all data obtained through technological methods,
29 systems, or tools, including, but not limited to, sensors, cameras,
30 device tracking, biometric monitoring, or other forms of observation or
31 data collection, that are capable of gathering covered information about
32 a consumer, including but not limited to the consumer's behavior, char-
33 acteristics, belongings, possessions, location, or other attributes of
34 the consumer, whether in physical or digital environments. Personal
35 data shall not include location data that is affirmatively and knowingly
36 provided or shared by a consumer and used: i. for the purpose of calcu-
37 lating trip duration and mileage costs associated with location-based
38 service, such as transportation, delivery, courier logistics; or ii. to
39 assess local supply and demand conditions.

40 (d) "Dynamic pricing" means pricing that fluctuates automatically
41 depending on conditions based completely or in part on one or more algo-
42 rithms, excluding price fluctuations based solely on bona fide custom
43 discounts or changes to pricing related to retention of existing custom-
44 ers.

45 (e) "Electronic shelving labels" (ESLs) means electronic and wireless
46 paper (E-paper) displays that present product and pricing information.

47 (f) "Food retail establishment" means a retail store that is either:
48 i. over ten thousand square feet in size and sells primarily household
49 foodstuff for offsite consumption including fresh produce, meats, poul-
50 try, fish, deli products, dairy products, canned foods, dry foods,
51 beverages, baked foods and/or prepared foods (other household supplies
52 or products are secondary to the primary purpose of food sales); or ii.
53 over eighty-five thousand square feet and with ten percent of their
54 sales floor area dedicated to the sale of non-taxable merchandise
55 including the sale of fresh produce, meats, poultry, fish, deli

1 products, dairy products, canned foods, dry foods, beverages, baked
2 foods and/or prepared foods.

3 (g) "Drug retail establishment" means a retail store that sells a
4 variety of prescription and nonprescription medicines and miscellaneous
5 items, such as drugs, pharmaceuticals, sundries, fresh produce, meats,
6 poultry, fish, deli products, dairy products, canned foods, dry foods,
7 beverages, prepared foods, and other merchandise.

8 (h) "Entity" means any natural person, firm, organization, partner-
9 ship, association, corporation, or any other entity domiciled or doing
10 business in New York state. A single entity may have one or more food
11 retail establishments or drug retail establishments.

12 (i) "Non-digital presentation of price" i. means: (1) A sign which
13 offers the unit price for one or more brands or sizes of a given good or
14 set of goods; or

15 (2) A sticker, stamp, sign, label, or tag, affixed to the shelf upon
16 which the goods are displayed; and

17 (3) A sticker, stamp, sign, label, or tag, affixed to the consumer
18 good itself.

19 ii. If a single sign or tag does not provide the unit price informa-
20 tion for more than one brand or size of a given good or set of goods,
21 then the following information shall be provided: (1) the identity; (2)
22 the brand name; (3) the quantity of the packaged good if more than one
23 package size per brand is displayed; (4) the total sale price; and (5)
24 the price per appropriate unit.

25 iii. Where a sign providing unit price information for one or more
26 sizes or brands of a given good is used, the sign shall be located
27 centrally as close as practical to all items to which the sign refers,
28 and the unit price information displayed thereon shall be presented in a
29 clear, distinct, and non-deceptive manner.

30 (j) "Surveillance pricing" means pricing set completely or in part by
31 an algorithm that uses personal data to offer different prices to
32 different consumers for the same goods or services and does not include
33 bona fide custom discounts.

34 (k) "Person" means any human being or individual.

35 (l) "Protected class data" means information about an individual
36 person or groups of people that directly, in combination, or by impli-
37 cation identifies a characteristic that is legally protected from
38 discrimination under the laws of this state or under federal law,
39 including but not limited to ethnicity, national origin, age, disabili-
40 ty, predisposing genetic characteristic, sex, sexual orientation, gender
41 identity and expression, pregnancy-related conditions, marital status,
42 familial status, religion, and reproductive health care.

43 (m) "Bona fide discount" means a genuine reduction in price that is
44 referred to as such to consumers, including generally available
45 reductions in price from the reference price based on bulk purchases or
46 subscriptions. Entities may reasonably interpret bona fide discount to
47 mean a genuine reduction from a contemporaneous or recent reference
48 price that is established absent of deceptive, abusive and unfair prac-
49 tices as required by section three hundred forty-nine of the general
50 business law and 16 CFR Part 233.

51 (n) "Bona fide custom discount" means i. A bona fide discount consist-
52 ent with federal, state, and local anti-discrimination laws offered by
53 an entity:

54 (1) to a consumer who affirmatively and knowingly enrolls in a loyal-
55 ty, membership or rewards program, including by signing up for a mailing
56 list, registering for promotional communication, or participating in a

1 promotional event, provided the discount is offered and clearly and
2 conspicuously disclosed to all members in a given local geographic
3 market, or commonly used distribution channels of such loyalty program
4 pursuant to publicly disclosed terms and conditions. Such loyalty,
5 membership or rewards programs may include tiers of bona fide discounts
6 based on prior purchase history data provided that the tiers are clearly
7 and conspicuously disclosed and that such prior purchase history data is
8 not paired, combined, or cross-referenced with any other personal data
9 except enrollment in the loyalty, membership or rewards program;

10 (2) based on a consumer's voluntary self-identification with a broadly
11 defined class of consumers including, but not limited to, military
12 veterans, active duty personnel, seniors, teachers, or employees, or
13 individuals belonging to a class of consumers based on date of birth or
14 anniversary of membership in a loyalty program, provided affirmatively
15 and knowingly by the consumer and is not derived or inferred by the
16 entity from any other data, provided the basis of the discount is clear-
17 ly and conspicuously disclosed to all members of the defined class of
18 consumers; or

19 (3) based solely on a consumer's prior purchase history, including
20 goods or services purchased, timing or frequency of purchases including
21 first-time or subsequent purchases, returns or cancellations, with that
22 specific entity, provided that (A) such purchase data is not paired,
23 combined, or cross-referenced with any other personal data except the
24 fact of enrollment in a loyalty, membership or rewards program; and (B)
25 the entity clearly and conspicuously discloses its use of prior purchase
26 history data.

27 ii. Bona fide custom discount does not include any reduction in refer-
28 ence price based on personal data other than personal data identified in
29 clauses one, two and three of subparagraph i of this paragraph.

30 iii. Nothing herein shall prevent an entity from notifying the consum-
31 er of a bona fide custom discount, or automatically applying a bona fide
32 custom discount where the entity has knowledge of a consumer's eligibil-
33 ity for such a discount, provided the entity does not change the refer-
34 ence price. Where an entity provides a bona fide custom discount auto-
35 matically, such entity shall notify the consumer of their eligibility.

36 iv. Nothing herein shall prevent an entity from marketing a bona fide
37 discount to a consumer for the purposes of attracting a new customer or
38 reengaging a consumer as a customer with the entity unless such consumer
39 opts out of such communications.

40 2. (a) In food retail establishments and in drug retail establish-
41 ments, the use of ESLs or any digital shelf display technology shall be
42 prohibited and a non-digital presentation of price shall be used.

43 (b) The use of ESLs or any digital shelf display technology in food
44 retail establishments and in drug retail establishments to display
45 surveillance pricing is prohibited.

46 (c) It is unlawful, for any reason, for any food retail establishment
47 or drug retail establishment to engage in surveillance pricing. This
48 prohibition does not limit any food retail establishment or drug retail
49 establishment and/or any business from providing consumers a bona fide
50 discount or bona fide custom discount.

51 (d) Where a food retail establishment or drug retail establishment has
52 actual knowledge that it has collected data of a minor under the age of
53 seventeen, such establishment shall cease processing such data, and
54 delete all information associated with the individual within the estab-
55 lishment's possession or control as soon as reasonably practicable,

1 except to the extent necessary to comply with the establishment's legal
2 obligations.

3 (e) No food retail establishment or drug retail establishment shall
4 use protected class data in setting a price for, offering, marketing, or
5 selling any good or service if any of the following are true:

6 i. The use of that data has the effect of withholding or denying any
7 of the accommodations, advantages, and privileges accorded to others.

8 ii. The price for such good or service is different from the price
9 offered to other individuals or groups based in whole or in part on the
10 use of protected class data.

11 (f) Any food retail establishment or drug retail establishment that
12 uses dynamic pricing to vary the price of any good or service more than
13 once in a twenty-four hour period shall clearly and conspicuously
14 disclose the use of such dynamic pricing, the frequency with which price
15 changes may occur, and the conditions that factor into the current
16 dynamic pricing.

17 3. Nothing in this section shall apply to:

18 (a) Any insurer licensed, regulated, or otherwise authorized to do
19 business in the state of New York under the insurance law, including any
20 persons, agents, or affiliates acting on behalf of such insurer.

21 (b) Pricing required or expressly authorized by federal or state law.

22 (c) A food retail establishment or drug retail establishment's use of
23 personal data to set or adjust the price or terms of a good or service
24 based in whole or in part on an evaluation of creditworthiness, includ-
25 ing the pricing of credit, extension or granting of credit, or the
26 refusal to extend credit based on data provided in a consumer report as
27 defined by the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et
28 seq.

29 4. (a) Whenever there shall be a violation of any portion of this
30 section, an application may be made by the attorney general acting on
31 behalf of affected individuals in the name of the people of the state of
32 New York to a court or justice having jurisdiction to issue an injunc-
33 tion, and upon notice to the respondent of not less than five days, to
34 enjoin and restrain the continuance of such violations; and if it shall
35 appear to the satisfaction of the court or justice that the respondent
36 has, in fact, violated any portion, an injunction may be issued by such
37 court or justice, enjoining and restraining any further violation, with-
38 out requiring proof that any person has, in fact, been injured or
39 damaged thereby.

40 (b) Whenever the court shall determine that a violation of any portion
41 of this section has occurred, the court may impose a civil penalty of
42 not more than ten thousand dollars for each violation, with each day of
43 a continuing violation constituting a separate and distinct offense. In
44 connection with any such application, the attorney general is authorized
45 to take proof and make a determination of the relevant facts and to
46 issue subpoenas in accordance with the civil practice law and rules. All
47 penalties collected under this section shall be deposited into a dedi-
48 cated consumer and worker protection fund to support enforcement, educa-
49 tion and remedies for affected individuals.

50 (c) The provisions of this section may be enforced concurrently by the
51 director of a municipal consumer affairs office, or by the town attor-
52 ney, city corporation counsel, or other lawfully designated enforcement
53 officer of a municipality or local government, and all monies collected
54 thereunder shall be retained by such municipality or local government.

1 (d) Nothing in this section shall in any way limit or restrict any
2 rights or remedies which are otherwise available under law to the attor-
3 ney general.

4 § 4. Construction. This act shall be liberally construed to effectu-
5 ate its purposes. This section shall not be construed to limit any
6 other criminal or civil liability such entity may be subject to under
7 law.

8 § 5. Severability. If any clause, sentence, paragraph, subdivision,
9 section, or part of this act shall be adjudged by any court of competent
10 jurisdiction to be invalid, such judgment shall not affect, impair, or
11 invalidate the remainder thereof, but shall be confined in its operation
12 to the clause, sentence, paragraph, subdivision, section, or part there-
13 of directly involved in the controversy in which such judgment shall
14 have been rendered. It is hereby declared to be the intent of the legis-
15 lature that this act would have been enacted even if such invalid
16 provisions had not been included herein. Courts are hereby authorized
17 to reform the provisions of this act in order to preserve the maximum
18 lawful effect thereof.

19 § 6. The attorney general may promulgate such rules and regulations as
20 are necessary to effectuate and enforce the provisions of this section.

21 § 7. This act shall take effect on the one hundred eightieth day after
22 it shall have become a law. Effective immediately, the addition, amend-
23 ment and/or repeal of any rule or regulation necessary for the implemen-
24 tation of this act on its effective date are authorized to be made and
25 completed on or before such effective date.