

What to Know About New York's New Supplement Law Going into Effect this Month

Barring a last-minute injunctive relief, New York's law restricting the sale of certain dietary supplements to minors will go into effect on April 22, 2024. The statute presents manufacturers and retailers with multiple challenges, including how to determine which products will be covered under the law, how to identify or mark these products so in-store employees know which products are subject to age-gating, how to meet age-gating requirements for direct-to-consumer e-commerce sales and whether electronic systems, like those used for tobacco sales, can be implemented to flag covered products and restrict the sale of these products at self-checkout counters.

Supplement manufacturers, online retailers and retailers doing business in New York will all need to prepare by identifying impacted products, establishing systems for age verification and training employees.

What is the New York Law?

In October 2023, Governor Kathy Hochul signed A.5610/[S.5823](#) into law to prohibit the sale of specific weight loss and muscle-building dietary supplements to New York consumers under eighteen. The law applies to retail stores in New York and requires these stores to verify a consumer's age at the time of purchase.

Online retailers that ship products to New York must also use a method of shipping that requires a person over eighteen to sign for the package and provide proof of age to the mail carrier. This presents a unique challenge to online retailers as several mail carriers either do not offer age-gating for eighteen or charge a premium for these services.

Valid verification documents include an individual's driver's license, state ID, military ID or passport.

Who Does the Law Apply To?

The law applies to brick-and-mortar retail stores operating in the State of New York, such as pharmacies and grocery stores, and online retailers and vendors that accept orders placed by mail, telephone, electronic mail, internet website, online catalog or software application from persons in New York.

The law does not apply to dietary supplement manufacturers that do not sell products directly to consumers. However, such manufacturers will still be impacted by the law to the extent they sell

through other retail channels and should assess which products will be affected as described below.

It is unclear whether the law will apply to delivery service companies like Doordash or Instacart. However, these companies should consider incorporating age verification requirements into their systems and delivery practices.

What Products are Covered Under the Law?

The law applies to dietary supplements intended for muscle building or weight loss and “over-the-counter” diet pills. The law explicitly states that dietary supplement products containing certain ingredients, such as steroids, creatine, green tea extract, raspberry ketone, garcinia cambogia and green coffee bean extract, are included. Moreover, dietary supplement products whose labeling or marketing bears statements or images that expressly state or imply that the product will help maintain or reduce body weight, fat, appetite or metabolism or is intended for building muscle are also subject to the law. Further, grouping the supplements with other weight loss or muscle-building products in a display, advertisement, webpage or store area could also cause the product to be covered.

Due to the breadth of the law, covered products could include not just products that expressly state they are for weight loss or muscle building but could include products based on their ingredients, how they are marketed to consumers or even what retail shelf they are placed on.

The law exempts protein powders, drinks and foods marketed as containing protein unless they also contain an ingredient other than protein, which would, alone, constitute a dietary supplement for weight loss or muscle building.

By redefining a dietary supplement based on how the product is labeled, marketed or otherwise represented, the statute directly conflicts with how the Federal Food, Drug and Cosmetic Act defines a dietary supplement. This makes it incredibly difficult for companies to determine what products fall under the law and which do not.

What are the Penalties?

The New York Attorney General is tasked with enforcing the law and can bring an action to stop a violation and impose civil penalties of up to \$500 per violation. Because the statute is so ambiguous, it is still unclear if third parties can challenge companies that allegedly violate the law through a private right of action.

Will Litigation Prevent the Law from Going into Effect?

Two trade associations, the Natural Products Association (NPA) and the Council for Responsible Nutrition (CRN), have filed separate lawsuits challenging the law on constitutional grounds. NPA's lawsuit argues that the law is unconstitutional because it is preempted by federal law, void for vagueness, and thus violates the Due Process Clauses and the Dormant Commerce Clause. CRN's lawsuit similarly argues that the law violates New York and United States constitutions because it is ambiguous, restricts speech, is an excessive use of the state's police powers, and is preempted by specific Food, Drug, and Cosmetic Act provisions.

Both trade associations filed motions for preliminary injunctions to prevent the law from being enforced while the cases are being litigated. (Polsinelli is counsel to NPA in the challenge to the NY law.)

What can Companies do to Prepare?

Supplement manufacturers that do not also sell products online will not be directly liable under the law as the age verification requirement only applies to retailers. However, because the statute permits third parties to modify the product's intended use (for example, by placing a display sign next to the products), third parties can put manufacturers' products at risk. Therefore, manufacturers may need to evaluate their retailer contracts and how their products are typically sold online and in brick-and-mortar stores. It is also possible that retailers will use their leverage to try and shift the burden to manufacturers to identify covered products and/or seek indemnification for any violations.

Online retailers and manufacturers should also review their products and marketing materials. Online retailers that sell products manufactured by other companies should consider how those companies and other retailers are also choosing to market those products. The New York law is extraordinarily vague and applies even when a manufacturer does not include an express weight loss or muscle-building claim on the label if other marketing materials or how the product is sold imply that the product is intended for these purposes. Therefore, as discussed above, third-party retailers could cause a product to be covered even when a manufacturer or independent retailer does not intend to position the product as a weight loss supplement.

Online retailers will need to work with their common carriers to ensure proper systems are in place so that covered products are being delivered to and signed for by someone at least eighteen. Although there is ambiguity because the law also restricts the "sale" of supplements to persons under eighteen, online retailers should consider incorporating an age verification requirement at the time of purchase.

Brick-and-mortar retailers in New York should work with supplement manufacturers and distributors to properly categorize their products. We recommend developing a policy on identifying covered products and communicating and training employees on the age-verification requirements. Retailers may also want to consider implementing electronic systems that alert employees to age-restricted supplements or require a date of birth to be implemented to continue a sale.

Companies that wish to minimize their risk of violating the law should carefully review their claims, marketing and imagery and modify them when appropriate to avoid potential ambiguities. To the extent the language is not already on the labels, companies may also want to consider labeling covered products with language stating that they are not for use or sale to persons under eighteen.