

# New York Weight Loss Supplement Law Has Stakeholders Scrambling But Faces Legal Challenges

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On October 25, 2023, New York enacted GBL 391-00, which bans the sale of over-the-counter diet pills and dietary supplements intended for weight loss and muscle building to individuals under the age of 18. Covered products include diet pills and dietary supplements that are “labeled, marketed or otherwise represented for the purpose of achieving weight loss or muscle building.” The law requires retailers, both physical stores and online vendors, to verify the age of individuals prior to sale or at the point of delivery. At present, the law is set to take effect on April 22, 2024.

## What’s the issue?

Although it exempts protein powders, protein drinks and other protein foods unless they contain ingredients promoted for weight loss or muscle building specifically, the language is otherwise very broad, making compliance a challenge. Here are just some of the friction points:

- **Age-Gating, Including At Delivery:** Retailers must verify the age of individuals purchasing covered products. Valid verification documents include an individuals’ driver’s license, state ID or passport. For sales that are delivered, retailers are tasked with implementing age verification processes at the point of delivery. Most common carriers have processes to age-gate at age 21; however, age-gating at 18 is not broadly offered or will cost extra. Neither the law nor guidance offer direction for sales completed via direct selling companies or through delivery services such as Doordash or similar.
- **“Covered Products” Effectively Includes Every Possible Means of Labeling, Categorizing, or Promoting the Products - Including Those Outside the Manufacturer’s Control:** The law explicitly states that covered products containing certain ingredients, such as steroids, green tea extract, garcinia cambogia, or creatine, cannot be sold to minors. Moreover, products whose labeling includes statements or imagery that imply health benefits related to weight loss or muscle enhancements are also subject to this new law - targeting not just ingredients, but how products are presented to consumers. As such, even if the manufacturer does not include an express weight loss claim on the label, if a retail platform categorizes it under “weight loss” on its website, this could cause the product to be covered.
- **Enforcement and Penalties:** The law allows the New York Attorney General to bring an action to stop a violation and impose civil penalties of up to \$500 per violation. While the law does not expressly provide for a private right of action, impacted stakeholders should anticipate that interested parties may conduct “secret shopping” campaigns and provide any relevant findings

to the AG's office.

## **Legal Challenges**

In December 2023, the Natural Products Association filed suit seeking to stop implementation of the law on constitutional grounds. More recently, another dietary supplement trade association, the Council for Responsible Nutrition (CRN), also filed suit. Highlights of CRN's complaint include the following:

- **Constitutional Challenge:** CRN contends that the law infringes on constitutional principles by imposing restrictions that infringe on lawful commercial speech. CRN claims that the law unduly restricts lawful commercial speech by targeting "all representations concerning covered products, regardless of their accuracy."
- **Lack of Scientific Basis:** The complaint challenges the legislative intent behind the law which aims to prevent eating disorders among minors. CRN argues that while it is a "noble and worthwhile goal," there is "absolutely no evidence" demonstrating a causal link between covered products and eating disorders, citing the state's lack of substantiation for its claims. For example, CRN cites studies that support the safety of prebiotic fiber supplements (which would be subject to the law) for combating childhood obesity.
- **Economic and Practical Burdens:** CRN further argues that the law's overly broad definitions and the lack of specificity could post significant economic challenges for the industry. CRN notes that "[w]ithout any guidance from the State, but substantial financial penalties for violations, the act compels retailers and marketers to err on the side of restricting sales of products with lawful claims."

## **Looking forward:**

While New York leads the charge as the first state to enact this type of legislation, there are indicators that other states may be considering similar paths. At present, California, Massachusetts, New Jersey and Rhode Island all have bills pending at various stages. These bills all have varying and inconsistent language, which could further increase the complexities of selling these products nationwide.