

ACT 402

S.B. NO. 3001

A Bill for an Act Relating to Liquor.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 328-6, Hawaii Revised Statutes, is amended to read as follows:

**“§328-6 Prohibited acts.** The following acts and the causing thereof within the State by any person are prohibited:

- (1) The manufacture, sale, delivery, holding, or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;
- (2) The adulteration or misbranding of any food, drug, device, or cosmetic;
- (3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise;
- (4) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 328-11, 328-12, or 328-17;
- (5) The dissemination of any false advertisement;
- (6) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by sections 328-22, 328-23 to 328-27, or to permit access to or copying of any record as authorized by section 328-23;
- (7) The giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address of the person residing in the State from whom he received in good faith the food, drug, device, or cosmetic;
- (8) The removal or disposal of a detained or embargoed article in violation of sections 328-25 to 328-27;
- (9) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, drug, device, or cosmetic, if the act is done while the article is held for sale and results in the article being adulterated or misbranded;
- (10) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under this part of the Federal Act;
- (11) The using, on the labeling of any drug or in any advertisement relating to the drug, of any representation or suggestion that an application with respect to the drug is effective under section 328-17, or that the drug complies with the provisions of such section;

- (12) The using by any person to his own advantage, or revealing other than to the department of health or to the courts when relevant in any judicial proceeding under this part, any information acquired under authority of section 328-11, 328-12, 328-17, or 328-23, concerning any method or process which as a trade secret is entitled to protection;
- (13) In the case of a prescription drug distributed or offered for sale in this State, the failure of the manufacturer, packer, or distributor thereof to maintain for transmittal, or to transmit, to any practitioner licensed by applicable law to administer the drug who makes written request for information as to the drug, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold, or such other printed matter as is approved under the Federal Act. Nothing in this paragraph shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this part;
- (14) (A) Placing or causing to be placed upon any drug or device or container thereof, with intent to defraud, the trade name or other identifying mark, or imprint of another or any likeness of any of the foregoing; or
  - (B) Selling, dispensing, disposing of, or causing to be sold, dispensed, or disposed of, or concealing or keeping in possession, control, or custody, with intent to sell, dispense, or dispose of, any drug<sup>1</sup> device, or any container thereof, with knowledge that the trade name or other identifying mark or imprint of another or any likeness of any of the foregoing has been placed thereon in a manner prohibited by subparagraph (A) hereof; or
  - (C) Making, selling, disposing of, or causing to be made, sold, or disposed of, or keeping in possession, control, or custody, or concealing, with intent to defraud, any punch, die, plate, or other thing designed to print, imprint, or reproduce that trade name or other identifying mark or imprint of another or any likeness of any of the foregoing upon any drug, device, or container thereof;
- (15) Except as provided in part VI, dispensing or causing to be dispensed a different drug or brand of drug in place of the drug or brand of drug ordered or prescribed without express permission in each case of the person ordering or prescribing;
- (16) The distribution in commerce of a consumer commodity as defined in this part, if such commodity is contained in a package, or if there is affixed to that commodity a label, which does not conform to the provisions of this part and of regulations promulgated under authority of this part; provided that this prohibition shall not apply to persons engaged in business as wholesale or retail distributors of consumer commodities except to the extent that such persons (1) are engaged in the packaging or labeling of such commodities, or (2) prescribe or specify by any means the manner in which such commodities are packaged or labeled;
- (17) The selling or dispensing in restaurants, soda fountains, drive-ins, lunch wagons, or similar public eating establishments of imitation milk and imitation milk products in place of fresh milk and fresh milk products respectively; of liquid or dry products which simulate cream but do not comply with content requirements for cream in place of cream; of non-dairy frozen desserts which do not comply with content requirements for dairy frozen desserts in place of dairy frozen desserts; and of any other imitation food or one made in semblance of a genuine

food in place of such genuine food, unless the consumer is notified by either proper labeling or conspicuous posted signs or conspicuous notices on menu cards and advertisements informing of such substitution, to include but not limited to the substitution of imitation milk in milk shake and malted milk drinks;

- (18) Wilfully and falsely representing or using any devices, substances, methods, or treatment as effective in the diagnosis, cure, mitigation, treatment, or alleviation of cancer. The provisions of this paragraph shall not apply to any person who depends exclusively upon prayer for healing in accordance with teachings of a bona fide religious sect, denomination, or organization, nor to a practitioner thereof[.];
- (19) The selling or offering for sale at any food facility which serves or sells over the counter directly to the consumer an unlabeled or un-packaged food that is a confectionery which contains alcohol in excess of one-half of one percent by weight unless the consumer is notified of that fact by either proper labeling or conspicuous posted signs or conspicuous notices on menu cards and advertisements.”

SECTION 2. Section 328-9, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

“(3) If it is confectionery and:

- (A) Has partially or completely embedded therein any nonnutritive object; provided that this clause shall not apply in the case of any nonnutritive object if, in the judgment of the director of health, as provided by rules, promulgated under this part, the object is of practical functional value to the confectionery product and would not render the product injurious or hazardous to health;
- (B) Bears or contains any alcohol [other than alcohol not in excess of one-half of one per cent by volume derived solely from the use of flavoring extract] in excess of 5 percent by weight; or
- (C) Bears or contains any nonnutritive substance; provided that this clause shall not apply to a safe nonnutritive substance which is in or on confectionery by reason of its use for some practical functional purpose in the manufacture, packaging, or storage of the confectionery if the use of the substance does not promote deception of the consumer or otherwise result in adulteration or misbranding in violation of this part; and provided further that the director, for the purpose of avoiding or resolving uncertainty as to the application of this clause, may issue rules under this part, allowing or prohibiting the use of particular nonnutritive substances;”

SECTION 3. Section 328-10, Hawaii Revised Statutes, is amended to read as follows:

“**§328-10 Foods deemed misbranded when.** A food shall be deemed to be misbranded:

- (1) If its labeling is false or misleading in any particular; or if its labeling or packaging fails to conform with the requirements of sections 328-2 and 328-19.1;
- (2) If it is offered for sale under the name of another food;

- (3) If it is an imitation of another food for which a definition and standard of identity has been prescribed by rules as provided by section 328-8; or if it is an imitation of another food that is not subject to paragraph (7), unless its label bears in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated;
- (4) If its container is so made, formed, or filled as to be misleading;
- (5) If in package form, unless it bears a label containing (A) the name and place of business of the manufacturer, packer, or distributor; (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, which statement shall be separately and accurately stated in a uniform location upon the principal display panel of the label; provided that under subparagraph (B) reasonable variations shall be permitted, and exemptions as to small packages shall be established, by rules adopted by the department of health;
- (6) If any word, statement, or other information required by or under authority of this part to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;
- (7) If it purports to be or is represented as a food for which a definition and standard of identity have been prescribed by rules as provided by section 328-8, unless (A) it conforms to such definition and standard, and (B) its label bears the name of the food specified in the definition and standards, and, insofar as may be required by the rules, the common names of optional ingredients (other than spices, flavoring, and coloring) present in the food;
- (8) If it purports to be or is represented as:
  - (A) A food for which a standard of quality has been prescribed by rules as provided by section 328-8 and its quality falls below such standard unless its label bears, in such manner and form as the rules specify, a statement that it falls below such standard; or
  - (B) A food for which a standard or standards of fill of container have been prescribed by rules as provided by section 328-8, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as the rules specify, a statement that it falls below such standard;
- (9) If it is not subject to paragraph (7), unless its label bears (A) the common or usual name of the food, if any there be, and (B) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings, without naming each; provided that to the extent that compliance with the requirements of subparagraph (B) is impractical or results in deception or unfair competition, exemptions shall be established by rules prescribed by the department; and, provided further that the requirements of subparagraph (B) shall not apply to food products which are packaged at the direction of purchasers at retail at the time of sale, the ingredients of which are disclosed to the purchasers by other means in accordance with rules prescribed by the department;

- (10) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the department determines to be, and by rules prescribes, as necessary in order to fully inform purchasers as to its value for such uses;
- (11) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact; provided that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by rules prescribed by the department; and, provided further that this paragraph and paragraphs (7) and (9) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream. The provisions of this paragraph regarding chemical preservatives shall not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the produce of the soil;
- (12) If it is a product intended as an ingredient of another food and, when used according to the directions of the purveyor, will result in the final food product being adulterated or misbranded;
- (13) If it is a color additive unless its packaging and labeling are in conformity with the packaging and labeling requirements applicable to the color additive prescribed under the Federal Act;
- (14) If it is a raw agricultural commodity which is the produce of the soil, bearing or containing a pesticide chemical applied after harvest, unless the shipping container of such commodity bears labeling which declares the presence of such chemical in or on such commodity and the common or usual name and the function of such chemical; provided that no such declaration shall be required while such commodity, having been removed from the shipping container, is being held or displayed for sale in retail out of such container in accordance with the custom of the trade[.];
- (15) If it is a confectionery and contains alcohol in excess of one-half of one percent by weight and that fact does not appear on the label for the food."

SECTION 4. Section 281-2, Hawaii Revised Statutes, is amended to read as follows:

**"§281-2 Excepted articles; penalty.** The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to this chapter if they correspond with the following descriptions and limitations, namely:

- (1) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereinafter in force;
- (2) Medicinal preparations manufactured in accordance with formulas prescribed by The Pharmacopoeia of the United States of America or The National Formulary that are unfit for use for beverage purposes;
- (3) Patented, patent and proprietary medicines that are unfit for use for beverage purposes;
- (4) Toilet, medicinal, and antiseptic preparations and solutions, that are unfit for use for beverage purposes;
- (5) Flavoring extracts and syrups that are unfit for use as a beverage or for intoxicating beverage purposes;

(6) Vinegar and preserved sweet cider[.];

(7) A food which is a confectionery and contains alcohol of 5 percent or less by weight.

Any person who manufactures any of the articles mentioned in this section may purchase and possess alcohol for that purpose, but the person shall not sell, use, or dispose of any alcohol otherwise than as an ingredient of the articles authorize<sup>2</sup> to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, syrup, or article named in paragraphs (2), (3), and (4) of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation thereof.

Any person who knowingly sells any of the articles mentioned in paragraphs (1), (2), (3), and (4) of this section for beverage purposes or any extract or syrup for intoxicating beverage purposes or who sells any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided in section 281-102.

Whenever it is believed that any article mentioned in this section does not correspond with the descriptions and limitations herein provided, the liquor commission or any inspector or any prosecuting officer may cause an analysis thereof to be made, and if, upon such analysis, it is found that the article does not so correspond, the person who manufactures or sells the same may be prosecuted as a manufacturer or seller of liquor contrary to this chapter.”

SECTION 5. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

(Approved June 17, 1988.)

#### Notes

1. Prior to amendment, “,” appeared here.

2. So in original.