

## The Plastic Bag Ban Takes Effect: State Agrees to Delay Enforcement As Questions and Controversy Remain

The “Bag Waste Reduction” law banning the distribution of plastic carryout bags took effect across New York on March 1, 2020. However, just a few days before, the State agreed to suspend its enforcement of the new rules during a hearing over a temporary restraining order requested by a plastics manufacturer and New York City bodegas who sued to challenge the ban. That lawsuit alleges, among other claims, that the ban is unconstitutional and vague.

While that proceeding continues, regulations implementing the plastic bag ban, as adopted by the Department of Environmental Conservation (DEC), are set to take effect on March 14, 2020. However, confusion remains for many New York residents and businesses about how these new rules will apply in practice to different types of goods and activities.

When enforcement of the ban resumes, penalties for violations could add up quickly since each commercial transaction is considered a separate violation. The first violation triggers a warning notice, after which the next violation costs \$250 in civil penalties and then \$500 for each subsequent violation. DEC’s new regulations further state that violators can be enjoined from continuing to violate the ban and any permit or registration issued to a violator can be revoked or suspended, or a pending renewal application can be denied. DEC has authority to enforce the bag ban as well as the Department of Agriculture and Markets and the Attorney General.

### How Did We Get Here?

Billions of single-use plastic bags are used in New York each year, often for relatively short periods of time after which people throw them away in the trash. Single-use plastic bags are not biodegradable and often find their way into the environment as litter.

In light of these concerns, the State Legislature has taken several strides over the past decade to try to change people’s behaviors and habits toward plastic carryout bags. Initially, those changes focused on reducing the amount of single-use plastic bags disposed as waste and encouraging people to move toward reusable bags. This led to new laws requiring certain large or chain stores to provide collection bins for customers to return their plastic carryout bags and plastic film packaging so that the material could be sent for recycling at appropriate facilities.

Now the new plastic bag ban goes further and focuses on reducing the amount of these bags used in commerce in the first place. The apparent assumption is that reducing the amount of these bags that are used will result in less plastic bag waste and thereby decrease the environmental harms associated with the material.

### Why the Controversy?

Since the ban was adopted, criticisms have abounded on all sides of the issue—from environmentalists concerned about reducing plastic waste to businesses whose operations the ban impacts. These controversies largely remain unresolved. Flaws identified with implementation of the ban include:

- Banning the single-use plastic bags would increase the amount of paper bags that will be used, which would have ripple effects for industries and consumers ranging from increased costs, to manufacturing scarcity, to increased environmental impacts from additional truck transport (because paper bags take up more room and require more trips than plastic bags); to concerns about the ultimate recyclability of paper bags;

- Reusing bags poses potential health concerns (e.g. cross-contamination of reusable bags from allergens or by meat and dairy products);
- Concerns from sellers that customers bringing reusable bags creates more potential for theft;
- Human behaviors are not really being changed since there are no restrictions on what types of plastic bags individuals can use in their homes and consumers can continue to use plastic film bags to carry out their goods (the law expressly precludes a seller from preventing someone from using “a bag of any kind that they have brought for purposes of carrying goods”); and
- Reusable bags permissible under DEC’s regulations still effectively allow plastic disposable bags to be used (albeit thicker material of 10 mils or more with a minimum lifespan of at least 125 uses), so the rules arguably conflict with the plastic ban under the law and also do not really address the issue of disposable plastic bags, potentially creating even more plastic waste.

Time will tell whether any public opposition or legal challenges will succeed in changing provisions of the laws or regulations to better address these problems.

#### Confusion Over Who and What the Plastic Bag Ban Covers

All vendors required to collect sales tax under the State Tax Law are banned from distributing “plastic carryout bags” to their customers. This covers a host of industries beyond grocery stores, which are often the focus of attention on this subject. For example, the ban would apply to colleges and universities, bookstores, drug stores, gas stations, big box stores, pet supply stores, home décor shops, and more.

“Plastic carryout bags” are defined to mean any non-exempt bag provided by the vendor to a customer to carry the goods sold. However, only stores with more than 10,000 square feet of retail space, or those part of a chain operating five or more units of over 5,000 square feet of retail space within the State under common ownership and management, are affirmatively required to make reusable bags available to customers within the store (either at no charge or for purchase). This means that, while all vendors collecting tax are prohibited from providing their customers with single-use plastic bags to contain their purchases, only some of those vendors must offer alternative reusable bags. This gap in requirements creates another avenue of likely confusion for businesses and consumers during the ban’s implementation because expectations of their respective responsibilities may differ (e.g., a customer may expect the seller to provide something to carry the items purchased, but that seller expects customers to bring their own bags).

There are twelve categories of “exempt bags” that vendors can continue to distribute to customers. Some of these exemptions are clear. For example, customers can continue to receive plastic bags to contain a sandwich prepared for him/her at a deli, to contain their bulk candies, and to contain fruits and vegetables bought at a grocery store. Likewise, the plastic zip bags sold in snack, sandwich, quart and gallon sizes are exempt from the ban. Vendors can also continue to provide trash bags; dry cleaners can continue to provide plastic garment bags; and pharmacies can provide plastic bags to carry prescription drugs.

However, questions remain about how many of these exemptions will apply in practice. Businesses that distribute single-use plastic bags to their customers should carefully evaluate their own operations, along with the purpose and nature of the goods being sold, before distributing a plastic bag to carry the customer’s items. For example, under one exemption, if a customer makes several purchases at a drug store, the pharmacy counter could distribute a plastic bag to contain the prescription drugs sold but not to contain other materials that customer buys at the same time (e.g., a magazine, sunglasses, or non-prescription drugs).

The bag ban also creates significant conundrums for the food service industry. For instance, DEC's rulemaking confirmed that exemptions for bags provided for "food sliced or prepared to order" or for carryout and delivery of prepared foods by "food service establishments" could extend to convenience stores, gas stations, delis, or supermarkets in certain cases. However, the exemptions would only cover the specific food sliced or prepared to order and not anything else sold by a qualifying establishment (unless another exemption applies). Again, this creates an illogical result for businesses and consumers where some items purchased could be placed in a typical single-use plastic bag but other items in that same purchase cannot.

Another broad exemption covers "a film plastic bag for which there is no reasonable or practical alternative for storing, containing or transporting items." Film plastic bags are those made of a flexible sheet(s) less than 10 mils in thickness that are not otherwise classified as an "exempt bag." The parameters of how this exemption could apply in practice remain undefined, and arguably the breadth of its terms could wholly negate the ban on distributing film plastic bags.

If you have questions about how the plastic bag ban could apply to you, please contact any [attorney](#) in the [Environmental and Energy practice](#).



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