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**S. 546**

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Currently residing in the Senate Committee on **Medical Affairs**

Summary: Physical Fitness Services Act

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

3/10/2009 Senate Introduced and read first time [SJ](file:///h:\SJ%20Archive\2009\03-10-09.docx)‑9

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**VERSIONS OF THIS BILL**

[3/10/2009](file:///p:\pprever\2009-10\546_20090310.docx)

**A** **BILL**

TO AMEND CHAPTER 79 OF TITLE 44, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO “PHYSICAL FITNESS SERVICES ACT”, SO AS TO DELETE A TANNING CENTER AND MARTIAL ARTS STUDIO FROM ITS APPLICABILITY, TO PROVIDE FOR PERMANENT CLOSURE OF A SUBJECT FACILITY AS AN EVENT ALLOWING CANCELLATION OF A CONTRACT, TO DEFINE “PERMANENT CLOSURE”, TO PROVIDE FOR RETURN OF UNEARNED PAYMENTS AND ANY EVIDENCE OF INDEBTEDNESS TO THE CANCELING CUSTOMER, TO PROVIDE THAT A SUBJECT CONTRACT MUST NOT BE SOLD OR ASSIGNED WITHOUT THE CUSTOMER’S CONSENT OR REQUIRE A CUSTOMER TO AFFIRMATIVELY CANCEL THE CONTRACT TO STOP AUTOMATIC RENEWAL, TO PROVIDE THAT A CONTRACT MAY BE ON A MONTH TO MONTH BASIS AND MAY BE PAID FOR BY AUTOMATIC DEBITS SUBJECT TO CERTAIN LIMITATIONS, TO PROVIDE THAT A SUBJECT CONTRACT IS VOIDABLE BY THE CUSTOMER IF THE FACILITY FAILS TO OBTAIN THE REQUISITE CERTIFICATE OF AUTHORITY, AND TO PROVIDE THAT THE PROVISIONS ARE ENFORCEABLE BY THE DEPARTMENT OF CONSUMER AFFAIRS AND THE ATTORNEY GENERAL.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 79, Title 44 of the 1976 Code is amended to read:

“CHAPTER 79

Physical Fitness Services Act

Section 44‑79‑10. This chapter may be cited as the ‘Physical Fitness Services Act’.

Section 44‑79‑20. As used in this chapter:

(1) ‘Physical fitness services’ mean facilities or services for the development of physical fitness through exercise or weight control. The term includes the facilities and services of health or exercise centers, clubs, studios, or classes; health spas; weight control centers, clinics, or studios; figure salons; ~~tanning centers;~~ and athletic or sport clubs. It does not include rehabilitative therapy administered by a licensed physical therapist or martial arts studios.

(2) ‘Customer’ or ‘member’ means a person who contracts for the use of physical fitness services.

(3) ‘Major facility’ means swimming pool, whirlpool, tennis courts, racquet or handball courts, indoor or outdoor track, gymnasium with exercise equipment, calisthenic room, or similar collection of physical fitness equipment.

(4) ‘Major service’ means locations ~~which~~ that have offices, treatment rooms, or counseling rooms but no major facilities and other treatments, visits, or sessions to reduce and control weight.

(5) ‘Center’ means any person or organization ~~which~~ that, for profit, offers physical fitness services, whether at multiple outlets bearing the same name or a single outlet. ~~Any~~ A subsidiary of a center, operating under the same name and offering ~~such~~ those services, is a part of the center.

(6) ‘Outlet’ means a separate location of a center which is not physically connected with another center but which uses the same name.

(7) ‘Administrator’ means the administrator of the South Carolina Department of Consumer Affairs.

(8) ‘Permanent closure’ means:

(a) nonoperation for thirty consecutive days;

(b) nonoperation for twenty or more days during a sixty‑day period; or

(c) abandonment of the facility.

Section 44‑79‑30. (A) ~~Every~~ A prepaid or credit contract for physical fitness services of over three months’ duration or over two hundred dollars in amount must ~~conform to the following requirements~~:

(1) ~~the contract must~~ be in writing, and a copy must be given to the customer at the time he signs it;

(2) ~~the contract shall~~ state clearly the street address or location of the center and outlets ~~which~~ that the member may use at the time the contract is executed and the major facilities or major services ~~which~~ that each offers;

(3) ~~the contract shall~~ reveal the finance charge, if any, ~~which~~ that the member agrees to pay;

(4) ~~if the customer executes a promissory note in connection with the contract, the contract shall~~ clearly indicate whether the promissory note is assignable paper and whether it may be discounted and sold to third parties if the customer executes a promissory note in connection with the contract. Assignment of the promissory note does not affect the right of the member to cancel the contract or the method by which the cancellation may be made;

(5) ~~the contract must~~ contain a right to cancel provision in the following language:

‘CUSTOMER’S RIGHT TO CANCEL

(a) You may cancel this contract by sending notice of your wish to cancel to the center before midnight of the third business day after you sign the contract. ‘Business day’ means Monday through Friday excluding state holidays and federal holidays. This notice must be sent certified mail to the following:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Within thirty days of receipt of this notice, the center ~~shall~~ must return ~~any~~ payments made and ~~any~~ a note or other evidence of indebtedness. If you use the seller’s facilities or services, the center may deduct a reasonable fee from the payments being returned based on the actual fee paid divided on a pro rata share by the number of days used by the customer.

(b) In addition, you or your estate ~~may~~ also may cancel the contract at any time by written notice to the center at the above address if the following circumstances occur:

(1) the customer’s death;

(2) substantial physical disability, certified by a physician, ~~which~~ that makes it permanently impossible for the customer to use the center’s services;

(3) the customer’s permanent relocation to a residence over ~~fifty~~ thirty miles distant from an outlet operated by the center, if the center is unable to arrange for the customer’s use of another center with equivalent major facilities and services~~.~~ acceptable to the customer;

(4) permanent closure of the facility the customer joined or is currently attending.

(c) The center may require reasonable presentation of information to substantiate that ~~one of these circumstances~~ circumstance (1), (2), or (3) has occurred. If the contract is cancelled because of disability, death, or permanent change of residence, the center ~~shall~~ must return ~~any~~ a note or other evidence of indebtedness and unearned prepayments as follows: ~~For~~ for each month ~~that~~ the contract was in effect, the center is entitled to the rate a month or a treatment ~~which~~ it would have charged if the contract had initially been one for the number of months or the number of treatments for which the contract was actually in effect. The rate is to be determined from a fee schedule in effect on the date of the contract. If the contract is cancelled because of permanent closure, the center or its assignee must return a note or other evidence of indebtedness and unearned payments on a pro rata basis.

~~(c)~~(d) The right of cancellation ~~shall affect~~ affects only the financial obligations under the contract and customer’s right to use the center’s physical fitness services.’

(6) clearly state services such as personal training, personal fitness testing, and daily visitor fees that are not subject to being refunded ~~must be clearly stated in the contract;~~.

~~(7)~~(B) ~~Any~~ A contractual provision allowing more liberal rights of cancellation than set forth in this chapter may be substituted for the notice required in this chapter.

~~(B)~~(C) A contract is not required for personal training, private consultations, and fitness testing rendered on an hourly basis unless they are part of a package of over three hundred dollars.

Section 44‑79‑40. ~~No~~ A contract for physical fitness services may not:

(1) have a duration of longer than twenty‑four months, nor a duration measured by the life of the customer, the life of the center, or ~~any~~ a similar indefinite term; ~~provided, however~~ except that, if a center demonstrates financial responsibility to the administrator ~~of the Department of Consumer Affairs~~ and has been in operation for five or more years in this State, it may offer contracts for physical fitness services for a duration of up to thirty‑six months if approved in writing by the administrator;

(2) waive the required provisions of this chapter;

(3) provide that a right of action or defense of the customer may be cut off by assignment of the contract to a third person.

(4) unilaterally be sold or assigned to a third party successor for performance of the contract without the express written consent of the customer if the center has permanently closed; or

(5) have a negative renewal option in which the customer affirmatively must cancel the contract at the end of an agreed initial, or renewal, membership term.

Section 44‑79‑50. ~~Any~~ A provision of ~~any~~ a contract for physical fitness services which does not comply with this chapter is unenforceable against the member.

Section 44‑79‑60. A contract for physical fitness services may contain clauses ~~which~~ that provide:

(1) ~~provide~~ for extension of the term of the agreement for a period equal to a period of temporary disability or pregnancy of the customer, or for ~~any other~~ another just or reasonable cause;

(2) ~~specify~~ that the written contract constitutes the entire agreement between the parties;

(3) ~~provide~~ for a renewal option, for a duration longer than one month but not more than twelve months, which to be enforceable must be exercised by the buyer in writing, or by payment by the buyer of part or all of the renewal price. A renewal option for a duration longer than one month may be exercised only near the expiration of ~~any~~ a previous contract and for not more than twelve months;

(4) ~~provide~~ for an automatic renewal option, for a duration of no longer than one month, which to be enforceable must be disclosed in bold type of at least fourteen‑point font on the front page of the contract and must be initialed by the customer. The customer ~~will~~ must be given the ability to ~~opt‑in~~ opt in to the automatic renewal provision at the time the initial contract is executed by initialing an opt‑in provision. Near the expiration of the initial contract, the facility shall notify the customer in writing at the customer’s last known address of the automatic renewal option ~~which~~ that the customer selected at the time the initial contract was executed. Price may not increase or decrease in an automatically renewed contract without written notice to the customer of at least thirty, but not more than sixty days ~~prior to~~, before the effective date of the change in price;

(5) ~~specify~~ that cancellation of a contract voids automatic renewal provisions~~.~~;

(6) for month‑to‑month terms, except that agreements with month‑to‑month contract terms must have a definite period with a duration of no longer than one year;

(7) for payments that are automatically debited from a customer’s banking or credit card account, except that automatic debits may not extend beyond the initial or renewal contract term.

Section 44‑79‑70. ~~Any~~ A right of action or defense which the member may raise based on the contract for physical fitness services is preserved against any assignee or successor to the contract.

Section 44‑79‑80 ~~(1)~~(A) ~~Every~~ A center ~~which~~ that enters into prepaid or credit contracts for physical fitness services of over three months’ duration or over two hundred dollars in amount ~~shall~~ must maintain with the administrator a surety bond in a sum to be determined by the administrator based on the estimated future costs to service contracts sold, but not to exceed fifty thousand dollars.

~~(2)~~(B) ~~In lieu of the bond required in this section, the center may furnish under penalty of perjury information which reasonably demonstrates financial responsibility as will enable the center to satisfy the possible claims against the bond. In the event the center is controlled by, under common control with, or controls other corporations and the other corporation agrees in writing to satisfy the claims against a bond allowed under this section, the financial responsibility of the other corporation must be considered in determining the requirement for a bond.~~ In determining ~~whether~~ if the center has the requisite financial responsibility, the administrator may consider the operating and business history, reputation, and management within and without the State, as well as the operating and business history and reputation of ~~any~~ a business controlled by, under common control with, or controlling the center. The provisions of subsections ~~(1)~~(A) and ~~(2)~~(B) of this section do not apply to physical fitness service facilities that have been in operation for five years or more ~~on the effective date of this Chapter~~ in 1985.

~~(3)~~(C) ~~Each~~ A center is required to notify the administrator upon substantial change of its financial status and to submit an annual report.

~~(4)~~(D) ~~No~~ A person may not offer physical fitness services in this State without first obtaining a certificate of authority from the administrator. A certificate of authority must be issued by the administrator upon submission of items ~~(a)~~(1) through ~~(f)~~(7) of this section. The applicant must submit:

~~(a)~~(1) ~~A~~ a formal application for the certificate in ~~such~~ form and detail as the administrator requires~~.~~;

~~(b)~~(2) ~~A~~ a certified copy of its charter or articles of incorporation and its bylaws, if any~~.~~;

~~(c)~~(3) ~~If~~ if a corporation, a certified copy of the certificate of authority or good standing certificate from the Secretary of State of South Carolina~~.~~;

~~(d)~~(4) ~~A~~ a copy of its membership agreement~~.~~;

~~(e)~~(5) ~~A~~ a copy of any contract to be issued~~.~~;

~~(f)~~(6) ~~A~~ a list of outlets at which physical fitness services will be offered~~.~~; and

~~(g)~~(7) ~~Any~~ other relevant information required by the administrator.

~~(5)~~(E) ~~No~~ A certificate of authority ~~may~~ must not be issued by the administrator until the center pays an initial certificate of authority fee of fifty dollars ~~an~~ for each outlet. ~~Certificates~~ A certificate of authority may be renewed upon payment of an annual renewal fee of fifty dollars ~~an~~ for each outlet ~~on or before~~ by December thirty‑first.

~~(6)~~(F) A copy of the ~~Certificate~~ certificate of ~~Authority~~ authority required by this chapter must be posted conspicuously at every location where monies or contracts are received by the center.

~~(7)~~(G) It is unlawful for ~~any~~ a center or person acting on behalf of a center required to obtain and maintain a ~~Certificate~~ certificate of ~~Authority~~ authority ~~under~~ pursuant to this chapter to advertise, sell, or offer to sell the use of physical fitness services ~~when~~ if a valid certificate is not on file with the administrator.

~~(8)~~(H) The administrator may file a request for a contested case hearing with the Administrative Law Court to obtain a cease and desist order or an order revoking, suspending, or vacating the certificate of authority of a center~~,~~ if the department determines that the center has violated or failed to comply with ~~any~~ a provision of this chapter or regulation promulgated under the authority of this chapter or if the department shows that:

~~(a)~~(1) a document or declaration required by subsection ~~(4)~~(D), items ~~(a)~~(1) through ~~(g)~~(7) were false or misleading; or

~~(b)~~(2) by clear and convincing evidence the center or its agents, officers, or employees have engaged in false, fraudulent, or deceptive conduct in its dealings with customers.

~~(9)~~(I) Instead of revocation, suspension, or refusal to continue a certificate of authority of a center, the administrative law judge may assess an administrative penalty for a violation of subsection ~~(4)~~(D) or ~~(8)~~(H) of this section not to exceed five hundred dollars for each violation, not to exceed five thousand dollars for matters commenced in any calendar year. These penalties may be assessed in connection with orders to cease and desist.

(J) Failure of a center to obtain a certificate of authority renders any written or oral contract, agreement, or membership voidable at the option of the consumer.

Section 44‑79‑90. The administrator shall administer this chapter and may promulgate regulations, subject to the Administrative Procedures Act, necessary to carry out its provisions.

Section 44‑79‑100. (1) ~~No~~ A center ~~shall~~ may not advertise physical fitness services ~~which~~ that are not operating or available without clearly and conspicuously disclosing in the advertisement that ~~such~~ they are not presently operating or available.

(2) ~~No~~ A center ~~shall~~ may not advertise physical fitness services ~~which~~ that are not operating or available in ~~each and~~ every outlet unless the advertisement clearly and conspicuously discloses the facilities or services ~~which~~ that are not operating or available at each outlet.

(3) Substantiation for physical fitness services advertising claims, and information necessary to determine the amount of the bonds required by this chapter, must be provided upon request of a circuit solicitor, the Attorney General, or the Department of Consumer Affairs.

Section 44‑79‑110. The State of South Carolina and its political subdivisions and ~~any~~ not‑for‑profit corporations are exempt from the terms of this chapter.

Section 44‑79‑120. (A) ~~Any~~ A person who violates ~~any~~ a provision of this chapter is guilty of a misdemeanor and upon conviction must be fined not less than five hundred dollars ~~nor~~ or more than five thousand dollars or be imprisoned for no more than three years, or both.

(B) A violation of ~~any~~ a provision of this chapter is considered a violation of Section 39‑5‑20 of the South Carolina Unfair Trade Practices Act.

(C) The department or the Attorney General may file an action in circuit court to enforce the provisions of this chapter.”

SECTION 2. This act takes effect upon approval by the Governor.

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