

COMMITTEE SUBSTITUTE

FOR

H. B. 2778

(BY DELEGATE(S) PERRY, ELDRIDGE, WILLIAMS, MOYE, STAGGERS,
PINO, MARSHALL, PERDUE, POORE, PASDON AND COWLES)

(Originating in the Committee on the Judiciary)

[March 26, 2013]

A BILL to amend and reenact §16-9A-2, §16-9A-3, §16-9A-7 and §16-9A-8 of the Code of West Virginia, 1931, as amended, all relating to the usage restrictions for tobacco and tobacco products; defining tobacco products; defining vapor products; including vapor products within the definition of tobacco products; exclusions; prohibiting the sale of vapor products to individuals under eighteen years of age; prohibiting the use and possession of vapor products by an individual under eighteen years of age; including vapor products within the tobacco products for which unannounced

inspections may be conducted to ensure compliance with sales restrictions; and restricting the sale of vapor products in vending machines; establishing associated misdemeanor offenses and penalties for prohibited use, sale and possession and related violations.

Be it enacted by the Legislature of West Virginia:

That §16-9A-2, §16-9A-3, §16-9A-7 and §16-9A-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 9A. TOBACCO USAGE RESTRICTIONS.

§16-9A-2. Definitions; sale or gift of cigarette, cigarette paper, pipe, cigar, snuff, chewing tobacco, pipe tobacco, roll-your-own tobacco, vapor products and other tobacco products to persons under eighteen; penalties for first and subsequent offense; consideration of prohibited act as grounds for dismissal; impact on eligibility for unemployment benefits.

1 (a) In this article:

2 (1) “Chewing tobacco” means any leaf tobacco that is not
3 intended to be smoked.

4 (2) “Cigar” means any roll of tobacco wrapped in leaf
5 tobacco or in any substance containing tobacco, other than any
6 roll of tobacco which is a “cigarette”.

7 (3) “Cigarette” means any product that contains nicotine, is
8 intended to be burned or heated under ordinary conditions of use,
9 and consists of or contains:

10 (A) Any roll of tobacco wrapped in paper or in any
11 substance not containing tobacco; or

12 (B) Tobacco, in any form, that is functional in the product,
13 which, because of its appearance, the type of tobacco used in the
14 filler, or its packaging and labeling, is likely to be offered to, or
15 purchased by, consumers as a cigarette; or

16 (C) Any roll of tobacco wrapped in any substance containing
17 tobacco which, because of its appearance, the type of tobacco
18 used in the filler, or its packaging and labeling, is likely to be
19 offered to, or purchased by, consumers as a cigarette as that term
20 is described in this subsection.

21 (D) For the purposes of this article, the term “cigarette”
22 includes cigarettes made with “roll-your-own” tobacco.

23 (4) “Pipe tobacco” means any tobacco which, because of its
24 appearance, type, packaging or labeling, is suitable for use and
25 likely to be offered to, or purchased by, consumers as tobacco to
26 be smoked in a pipe.

27 (5) “Roll-your-own tobacco” means any tobacco which,
28 because of its appearance, type, packaging or labeling, is suitable
29 for use and likely to be offered to, or purchased by, consumers
30 as tobacco for making cigarettes or cigars, or for use as wrappers
31 thereof.

32 (6) “Smokeless tobacco” means any tobacco product that
33 consists of cut, ground, powdered, or leaf tobacco and that is not
34 intended to be smoked and is intended to be placed in the oral or
35 nasal cavity, and includes both chewing tobacco and snuff.

36 (7) “Snuff” means any finely cut, ground or powdered
37 tobacco that is not intended to be smoked.

38 (8) “Tobacco product” means any product made or derived
39 from tobacco that is intended for human consumption, including
40 cigarettes, cigars, snuff, chewing tobacco, pipe tobacco, roll-
41 your-own tobacco and vapor products. “Tobacco product” shall
42 not include any product that is regulated by the United States
43 Food and Drug Administration under Chapter V of the Federal
44 Food, Drug and Cosmetic Act.

45 (9) “Vapor product” means any noncombustible tobacco
46 derived product containing nicotine that employs a mechanical
47 heating element, battery or circuit, regardless of shape or size,

48 that can be used to heat a liquid nicotine solution contained in
49 cartridges, and includes an electronic cigarette, electronic cigar,
50 electronic cigarillo or electronic pipe. “Vapor product” shall not
51 include any product that is regulated by the United States Food
52 and Drug Administration under Chapter V of the Federal Food,
53 Drug and Cosmetic Act.

54 ~~(a)~~ (b) No person, firm, corporation or business entity may
55 sell, give or furnish, or cause to be sold, given or furnished, to
56 any person under the age of eighteen years:

57 (1) Any pipe, cigarette paper or any other paper prepared,
58 manufactured or made for the purpose of smoking any tobacco
59 or tobacco product; ~~or~~

60 (2) Any electronic cigarette, electronic cigar, electronic
61 cigarillo, electronic pipe or any other vapor product or
62 component or cartridge of a vapor product; or

63 ~~(2)~~(3) Any cigar, cigarette, snuff, chewing tobacco, pipe
64 tobacco, roll-your-own tobacco or any other tobacco product, in
65 any form;

66 ~~(b)~~ (c) Any firm or corporation that violates any of the
67 provisions of subdivision (1), ~~or~~ (2) or (3), subsection ~~(a)~~ (b) of
68 this section and any individual who violates any of the

69 provisions of subdivision (1), subsection ~~(a)~~ (b) of this section is
70 guilty of a misdemeanor and, upon conviction thereof, shall be
71 fined \$50 for the first offense. Upon any subsequent violation at
72 the same location or operating unit, the firm, corporation or
73 individual shall be fined as follows: At least \$250 but not more
74 than \$500 for the second offense, if it occurs within two years of
75 the first conviction; at least \$500 but not more than \$750 for the
76 third offense, if it occurs within two years of the first conviction;
77 and at least \$1,000 but not more than \$5,000 for any subsequent
78 offenses, if the subsequent offense occurs within five years of
79 the first conviction.

80 ~~(c)~~ (d) Any individual who knowingly and intentionally
81 sells, gives or furnishes or causes to be sold, given or furnished
82 to any person under the age of eighteen years any cigar,
83 cigarette, snuff, chewing tobacco, pipe tobacco, roll-your-own
84 tobacco, vapor product, or any other tobacco product, in any
85 form, is guilty of a misdemeanor and, upon conviction thereof,
86 for the first offense shall be fined not more than \$100; upon
87 conviction thereof for a second or subsequent offense, is guilty
88 of a misdemeanor and shall be fined not less than \$100 nor more
89 than \$500.

90 ~~(d)~~ (e) Any employer who discovers that his or her employee
 91 has sold or furnished tobacco products to minors may dismiss
 92 such employee for cause. Any such discharge shall be considered
 93 as “gross misconduct” for the purposes of determining the
 94 discharged employee’s eligibility for unemployment benefits in
 95 accordance with the provisions of section three, article six,
 96 chapter twenty-one-a of this code, if the employer has provided
 97 the employee with prior written notice in the workplace that such
 98 act or acts may result in their termination from employment.

§16-9A-3. Use or possession of tobacco or tobacco products by persons under the age of eighteen years; penalties.

1 No person under the age of eighteen years shall have on or
 2 about his or her person or premises or use any cigarette, or
 3 cigarette paper or any other paper prepared, manufactured or
 4 made for the purpose of smoking any tobacco products, in any
 5 form; ~~or~~; any pipe, snuff, chewing tobacco, ~~or~~ pipe tobacco or
 6 roll-your-own tobacco; any vapor product or component or
 7 cartidge of a vapor product; or any other tobacco product:
 8 *Provided*, That minors participating in the inspection of locations
 9 where tobacco products are sold or distributed pursuant to
 10 section seven of this article is not considered to violate the

11 provisions of this section. Any person violating the provisions of
12 this section shall for the first violation be fined \$50 and be
13 required to serve eight hours of community service; for a second
14 violation, the person shall be fined \$100 and be required to serve
15 sixteen hours of community service; and for a third and each
16 subsequent violation, the person shall be fined \$200 and be
17 required to serve twenty-four hours of community service.
18 Notwithstanding the provisions of section two, article five,
19 chapter forty-nine, the magistrate court has concurrent
20 jurisdiction.

§16-9A-7. Enforcement of youth smoking laws; retail tobacco outlet inspections; use of minors in inspections; annual reports; penalties; defenses.

1 (a) The commissioner of the West Virginia alcohol beverage
2 control administration, the superintendent of the West Virginia
3 state police, the sheriffs of the counties of this state and the
4 chiefs of police of municipalities of this state, may periodically
5 conduct unannounced inspections at locations where tobacco
6 products are sold or distributed to ensure compliance with the
7 provisions of sections two and three of this article and in such
8 manner as to conform with applicable federal and state laws,

9 rules and regulations. Persons under the age of eighteen years
10 may be enlisted by such commissioner, superintendent, sheriffs
11 or chiefs of police or employees or agents thereof to test
12 compliance with these sections: *Provided*, That the minors may
13 be used to test compliance only if the testing is conducted under
14 the direct supervision of the commissioner, superintendent,
15 sheriffs or chiefs of police or employees or agents thereof and
16 written consent of the parent or guardian of such person is first
17 obtained and such minors shall not be in violation of section
18 three of this article and chapter when acting under the direct
19 supervision of the commissioner, superintendent, sheriffs or
20 chiefs of police or employees or agents thereof and with the
21 written consent of the parent or guardian. It is unlawful for any
22 person to use persons under the age of eighteen years to test
23 compliance in any manner not set forth herein and the person so
24 using a minor is guilty of a misdemeanor and, upon conviction
25 thereof, shall be fined the same amounts as set forth in section
26 two of this article.

27 (b) A person charged with a violation of section two or three
28 of this article as the result of an inspection under subsection (a)
29 of this section has a complete defense if, at the time the cigarette

30 or other tobacco product or cigarette wrapper was sold,
31 delivered, bartered, furnished or given:

32 (1) The buyer or recipient falsely evidenced that he or she
33 was eighteen years of age or older;

34 (2) The appearance of the buyer or recipient was such that a
35 prudent person would believe the buyer or recipient to be
36 eighteen years of age or older; and

37 (3) Such person carefully checked a driver's license or an
38 identification card issued by this state or another state of the
39 United States, a passport or a United States armed services
40 identification card presented by the buyer or recipient and acted
41 in good faith and in reliance upon the representation and
42 appearance of the buyer or recipient in the belief that the buyer
43 or recipient was eighteen years of age or older.

44 (c) Any fine collected after a conviction of violating section
45 two of this article shall be paid to the clerk of the court in which
46 the conviction was obtained: *Provided*, That the clerk of the
47 court upon receiving the fine shall promptly notify the
48 commissioner of the West Virginia alcohol beverage control
49 administration of the conviction and the collection of the fine:
50 *Provided, however*, That any community service penalty

51 imposed after a conviction of violating section three of this
52 article shall be recorded by the clerk of the court in which the
53 conviction was obtained: *Provided further*, That the clerk of the
54 court upon being advised that community service obligations
55 have been fulfilled shall promptly notify the commissioner of the
56 West Virginia alcohol beverage control administration of the
57 conviction and the satisfaction of imposed community service
58 penalty.

59 (d) The commissioner of the West Virginia alcohol beverage
60 control administration or his or her designee shall prepare and
61 submit to the governor on the last day of September of each year
62 a report of the enforcement and compliance activities undertaken
63 pursuant to this section and the results of the same, with a copy
64 to the secretary of the West Virginia department of health and
65 human resources. The report shall be in the form and substance
66 that the governor shall submit to the applicable state and federal
67 programs.

**§16-9A-8. Selling of tobacco products in vending machines
prohibited except in certain places.**

1 No person or business entity may offer for sale any cigarette;
2 any vapor product, component or cartridge of a vapor product;

3 or other tobacco product in a vending machine. Any person or
4 business entity which violates the provisions of this section is
5 guilty of a misdemeanor and, upon conviction thereof, shall be
6 fined two hundred fifty dollars: *Provided*, That an establishment
7 is exempt from this prohibition if individuals under the age of
8 eighteen years are not permitted to be in the establishment or if
9 the establishment is licensed by the alcohol beverage control
10 commissioner as a Class A licensee. The alcohol beverage
11 control commissioner shall promulgate rules pursuant to article
12 three, chapter twenty-nine-a of this code prior to the first day of
13 July, two thousand, which rules shall establish standards for the
14 location and control of the vending machines in Class A licensed
15 establishments for the purpose of restricting access by minors.