

1 **ENROLLED**

2 **COMMITTEE SUBSTITUTE**

3 **FOR**

4 **H. B. 4237**

5 (By Delegates Lawrence, Barrett, Guthrie, Skinner, Perdue,
6 Campbell, Marshall, Poore, Fleischauer, Staggers and Evans,A)

7
8 [Passed March 8, 2014; in effect ninety days from passage.]
9

10 AN ACT to amend and reenact §16-9A-2, §16-9A-3, §16-9A-4, §16-9A-7
11 and §16-9A-8 of the Code of West Virginia, 1931, as amended,
12 all relating to restrictions placed on tobacco products and
13 tobacco-derived products containing nicotine; defining terms;
14 defining vapor products and alternative nicotine products as
15 tobacco-derived products; creating exclusions; limiting the
16 use of and sale of tobacco-derived products to persons under
17 the age of eighteen in the same manner as tobacco; prohibiting
18 the sale or furnishing of tobacco and tobacco-derived products
19 to individuals under eighteen years of age; prohibiting the
20 use and possession of tobacco or tobacco-derived products by
21 an individual under eighteen years of age; allowing employers
22 to dismiss an employee for cause for the knowing or
23 intentional sale or furnishing of tobacco or tobacco-derived
24 to someone under the age of eighteen; allowing for the conduct
25 of unannounced inspections to ensure compliance with sales
26 restrictions; restricting the use of tobacco and tobacco-

1 derived products on school grounds; restricting the sale of
2 tobacco and tobacco-derived products in vending machines;
3 creating misdemeanor offenses and criminal penalties relating
4 to tobacco-derived products that are consistent with tobacco
5 products; creating a defense in certain circumstances; and
6 authorizing continued rulemaking authority.

7 *Be it enacted by the Legislature of West Virginia:*

8 That §16-9A-2, §16-9A-3, 16-9A-4, §16-9A-7 and §16-9A-8 of the
9 Code of West Virginia, 1931, as amended, be amended and reenacted,
10 all to read as follows:

11 **ARTICLE 9A. TOBACCO USAGE RESTRICTIONS.**

12 **§16-9A-2. Definitions; sale or gift of cigarette, cigarette paper,**
13 **pipe, cigar, snuff, chewing tobacco, pipe tobacco,**
14 **roll-your-own tobacco, tobacco products, tobacco-derived and**
15 **alternative nicotine product or vapor products to persons**
16 **under eighteen; penalties for first and subsequent offense;**
17 **consideration of prohibited act as grounds for dismissal;**
18 **impact on eligibility for unemployment benefits.**

19 (a) For purposes of this article, the term:

20 (1) "Tobacco product" and "tobacco-derived product" means any
21 product, containing, made or derived from tobacco, or containing
22 nicotine derived from tobacco, that is intended for human
23 consumption, whether smoked, breathed, chewed, absorbed, dissolved,
24 inhaled, vaporized, snorted, sniffed or ingested by any other
25 means, including but not limited to cigarettes, cigars, cigarillos,

1 little cigars, pipe tobacco, snuff, snus, chewing tobacco or other
2 common tobacco-containing products. A "tobacco-derived product"
3 includes electronic cigarettes or similar devices, alternative
4 nicotine products and vapor products. "Tobacco product" or
5 "tobacco-derived product" does not include any product that is
6 regulated by the United States Food and Drug Administration under
7 Chapter V of the Food, Drug and Cosmetic Act.

8 (2) "Alternative nicotine product" means any non-combustible
9 product containing nicotine that is intended for human consumption,
10 whether chewed, absorbed, dissolved or ingested by any other means.
11 "Alternative nicotine product" does not include any tobacco
12 product, vapor product or product regulated as a drug or device by
13 the United States Food and Drug Administration under Chapter V of
14 the Food, Drug and Cosmetic Act.

15 (3) "Vapor product" means any non-combustible product
16 containing nicotine that employs a heating element, power source,
17 electronic circuit or other electronic, chemical or mechanical
18 means, regardless of shape and size, that can be used to produce
19 vapor from nicotine in a solution or other form. "Vapor product"
20 includes any electronic cigarette, electronic cigar, electronic
21 cigarillo, electronic pipe or similar product or device, and any
22 vapor cartridge or other container of nicotine in a solution or
23 other form that is intended to be used with or in an electronic
24 cigarette, electronic cigar, electronic cigarillo, electronic pipe
25 or similar product or device. "Vapor product" does not include any
26 product that is regulated by the United States Food and Drug

1 Administration under Chapter V of the Food, Drug and Cosmetic Act.

2 (b) No person, firm, corporation or business entity may sell,
3 give or furnish, or cause to be sold, given or furnished, to any
4 person under the age of eighteen years:

5 (1) Any pipe, cigarette paper or any other paper prepared,
6 manufactured or made for the purpose of smoking any tobacco or
7 tobacco product;

8 (2) Any cigar, cigarette, snuff, chewing tobacco or tobacco
9 product, in any form; or

10 (3) Any tobacco-derived product, alternative nicotine product
11 or vapor product.

12 (c) Any firm or corporation that violates any of the
13 provisions of subsection (b) of this section and any individual who
14 violates any of the provisions of subsection (b) of this section is
15 guilty of a misdemeanor and, upon conviction thereof, shall be
16 fined \$50 for the first offense. Upon any subsequent violation at
17 the same location or operating unit, the firm, corporation or
18 individual shall be fined as follows: At least \$250 but not more
19 than \$500 for the second offense, if it occurs within two years of
20 the first conviction; at least \$500 but not more than \$750 for the
21 third offense, if it occurs within two years of the first
22 conviction; and at least \$1,000 but not more than \$5,000 for any
23 subsequent offenses, if the subsequent offense occurs within five
24 years of the first conviction.

25 (d) Any individual who knowingly and intentionally sells,
26 gives or furnishes or causes to be sold, given or furnished to any

1 person under the age of eighteen years any cigar, cigarette, snuff,
2 chewing tobacco, tobacco product or tobacco-derived product, in any
3 form, is guilty of a misdemeanor and, upon conviction thereof, for
4 the first offense shall be fined not more than \$100; upon
5 conviction thereof for a second or subsequent offense, is guilty of
6 a misdemeanor and shall be fined not less than \$100 nor more than
7 \$500.

8 (e) Any employer who discovers that his or her employee has
9 sold or furnished tobacco products or tobacco-derived products to
10 minors may dismiss such employee for cause. Any such discharge
11 shall be considered as "gross misconduct" for the purposes of
12 determining the discharged employee's eligibility for unemployment
13 benefits in accordance with the provisions of section three,
14 article six, chapter twenty-one-a of this code, if the employer has
15 provided the employee with prior written notice in the workplace
16 that such act or acts may result in their termination from
17 employment.

18 **§16-9A-3. Use or possession of tobacco or tobacco products,**
19 **alternative nicotine products or vapor products by persons**
20 **under the age of eighteen years; penalties.**

21 No person under the age of eighteen years shall have on or
22 about his or her person or premises or use any cigarette, or
23 cigarette paper or any other paper prepared, manufactured or made
24 for the purpose of smoking any tobacco products, in any form; any
25 pipe, snuff, chewing tobacco, tobacco product or tobacco-derived

1 product: *Provided*, That minors participating in the inspection of
2 locations where tobacco products or tobacco-derived products, are
3 sold or distributed pursuant to section seven of this article is
4 not considered to violate the provisions of this section. Any
5 person violating the provisions of this section shall for the first
6 violation be fined \$50 and be required to serve eight hours of
7 community service; for a second violation, the person shall be
8 fined \$100 and be required to serve sixteen hours of community
9 service; and for a third and each subsequent violation, the person
10 shall be fined \$200 and be required to serve twenty-four hours of
11 community service. Notwithstanding the provisions of section two,
12 article five, chapter forty-nine, the magistrate court has
13 concurrent jurisdiction.

14 **§16-9A-4. Use of tobacco, tobacco products, alternative nicotine**
15 **products or vapor products in certain areas of certain public**
16 **schools prohibited; penalty.**

17 Every person who shall smoke a cigarette or cigarettes, pipe,
18 cigar or other implement, of any type or nature, designed, used or
19 employed for smoking any tobacco or tobacco product; or who shall
20 use any tobacco product or tobacco-derived product in any building
21 or part thereof used for instructional purposes, in any school of
22 this state, as defined in section one, article one, chapter
23 eighteen of this code, or on any lot or grounds actually used for
24 instructional purposes of any such school of this state while such
25 school is used or occupied for school purposes, shall be guilty of

1 a misdemeanor, and, upon conviction thereof, shall be punished for
2 each offense by a fine of not less than one nor more than five
3 dollars: *Provided*, That this prohibition shall not be construed to
4 prevent the use of any tobacco or tobacco product or tobacco-
5 derived product, in any faculty lounge or staff lounge or faculty
6 office or other area of said public school not used for
7 instructional purposes: *Provided, however*, That students do not
8 have access thereto: *Provided further*, That nothing herein
9 contained shall be construed to prevent any county board of
10 education from promulgating rules and regulations that further
11 restrict the use of tobacco products or tobacco-derived products,
12 in any form, from any other part or section of any public school
13 building under its jurisdiction.

14 **§16-9A-7. Enforcement of youth smoking laws and youth nicotine**
15 **restrictions; inspection of retail outlets where tobacco,**
16 **tobacco products, vapor products or alternative nicotine**
17 **products are sold; use of minors in inspections; annual**
18 **reports; penalties; defenses.**

19 (a) The commissioner of the West Virginia alcohol beverage
20 control administration, the Superintendent of the West Virginia
21 State Police, the sheriffs of the counties of this state and the
22 chiefs of police of municipalities of this state, may periodically
23 conduct unannounced inspections at locations where tobacco products
24 or tobacco-derived products, are sold or distributed to ensure
25 compliance with the provisions of sections two and three of this

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

19 (b) A person charged with a violation of section two or three
20 of this article as the result of an inspection under subsection (a)
21 of this section has a complete defense if, at the time the
22 cigarette, other tobacco product or tobacco-derived product, or
23 cigarette wrapper, was sold, delivered, bartered, furnished or
24 given:

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

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

4 (3) Such person carefully checked a driver's license or an
5 identification card issued by this state or another state of the
6 United States, a passport or a United States armed services
7 identification card presented by the buyer or recipient and acted
8 in good faith and in reliance upon the representation and appearance
9 of the buyer or recipient in the belief that the buyer or recipient
10 was eighteen years of age or older.

11 (c) Any fine collected after a conviction of violating section
12 two of this article shall be paid to the clerk of the court in which
13 the conviction was obtained: *Provided*, That the clerk of the court
14 upon receiving the fine shall promptly notify the Commissioner of
15 the West Virginia Alcohol Beverage Control Administration of the
16 conviction and the collection of the fine: *Provided, however*, That
17 any community service penalty imposed after a conviction of
18 violating section three of this article shall be recorded by the
19 clerk of the court in which the conviction was obtained: *Provided*
20 *further*, That the clerk of the court upon being advised that
21 community service obligations have been fulfilled shall promptly
22 notify the Commissioner of the West Virginia Alcohol Beverage
23 Control Administration of the conviction and the satisfaction of
24 imposed community service penalty.

25 (d) The Commissioner of the West Virginia Alcohol Beverage
26 Control Administration or his or her designee shall prepare and

1 submit to the Governor on the last day of September of each year a
2 report of the enforcement and compliance activities undertaken
3 pursuant to this section and the results of the same, with a copy
4 to the Secretary of the West Virginia Department of Health and Human
5 Resources. The report shall be in the form and substance that the
6 Governor shall submit to the applicable state and federal programs.

7 **§16-9A-8. Selling of tobacco products, tobacco-derived products,**
8 **alternative nicotine products or vapor products in vending**
9 **machines prohibited except in certain places.**

10 No person or business entity may offer for sale any cigarette,
11 tobacco product or tobacco-derived product, in a vending machine.
12 Any person or business entity which violates the provisions of this
13 section is guilty of a misdemeanor and, upon conviction thereof,
14 shall be fined \$250: *Provided*, That an establishment is exempt from
15 this prohibition if individuals under the age of eighteen years are
16 not permitted to be in the establishment or if the establishment is
17 licensed by the alcohol beverage control commissioner as a Class A
18 licensee. The alcohol beverage control commissioner shall
19 promulgate rules pursuant to article three, chapter twenty-nine-a
20 of this code to establish standards for the location and control of
21 the vending machines in Class A licensed establishments for the
22 purpose of restricting access by minors.