

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 266

FISCAL
NOTE

By Senators Takubo, Woelfel, Queen, and Plymale

[Introduced January 17, 2023; referred
to the Committee on Health and Human Resources;
and then to the Committee on Finance]

1 A BILL to amend and reenact §16-9A-1, §16-9A-2, §16-9A-3, §16-9A-4, §16-9A-7, and §16-9A-8
2 of the Code of West Virginia, 1931, as amended; and to amend said code by adding
3 thereto three new sections, designated §16-9A-11, §16-9A-12, and §16-9A-13, all relating
4 to tobacco usage restrictions; modifying legislative intent; modifying definitions; prohibiting
5 persons under the age of 21 from purchasing tobacco products, tobacco derived products,
6 or alternative nicotine products; making it a misdemeanor to use tobacco products,
7 tobacco derived products, or alternative nicotine products in a building used for school
8 instruction; prohibiting sales of tobacco products, tobacco derived products, or alternative
9 nicotine products by firm, corporation, or entity to person under age of 21; providing
10 criminal penalties for sales of tobacco products, tobacco derived products, or alternative
11 nicotine products; providing employer authority to terminate employment of employee who
12 violates section; making the sale of tobacco products, tobacco derived products, or
13 alternative nicotine products permissible reason for dismissal of employee; establishing
14 that an employee's sale of tobacco products, tobacco derived products, or alternative
15 nicotine products to persons under the age of 21 be considered gross misconduct for
16 purposes of unemployment compensation; designating the Bureau for Behavioral Health
17 of the Department of Health and Human Resources as the entity responsible to enforce
18 tobacco laws and conduct compliance inspections; prohibit sales of tobacco products,
19 tobacco derived products, or alternative nicotine products in a display independently
20 accessible by individuals under the age of 21; making it a secondary misdemeanor offense
21 to use tobacco products in a motor vehicle while an individual age 16 years of age or
22 younger is present; and establishing prohibited areas of regulation for political subdivisions
23 with respect to tobacco products and tobacco derived products.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9A. TOBACCO USAGE RESTRICTIONS.

§16-9A-1. Legislative intent.

1 The Legislature hereby declares it to be the policy and intent of this state to discourage and
 2 ban the use of tobacco products by ~~miners~~ persons under age 21. As basis for this policy, the
 3 Legislature hereby finds and accepts the medical evidence that smoking tobacco may cause lung
 4 cancer, heart disease, emphysema, and other serious health problems while the use of smokeless
 5 tobacco may cause gum disease and oral cancer. It is the further intent of the Legislature to reduce
 6 tobacco use by keeping tobacco products out of the hands of youths and young adults in banning
 7 ~~the use of tobacco products by miners~~ the provision of tobacco products to persons under age 21
 8 to ease the personal tragedy and eradicate the severe economic loss associated with the use of
 9 tobacco and to provide the state with a citizenry free from the use of tobacco.

~~§16-9A-2. Definitions. sale or gift of cigarette, cigarette paper, pipe, cigar, snuff, chewing tobacco, pipe tobacco, roll-your-own tobacco, tobacco products, tobacco-derived and alternative nicotine product or vapor 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)~~ For purposes of this article, the term:

2 (1) "Tobacco product" ~~and~~ or "tobacco-derived product" means any product, containing,
 3 made or derived from tobacco, or containing nicotine derived from tobacco, that is intended for
 4 human consumption, whether smoked, breathed, chewed, absorbed, dissolved, inhaled,
 5 vaporized, snorted, sniffed, or ingested by any other means, including, but not limited to,
 6 cigarettes, cigars, cigarillos, little cigars, pipe tobacco, snuff, snus, chewing tobacco, or other
 7 common tobacco-containing products. A "tobacco-derived product" includes waterpipes, hookah
 8 pens, or similar devices; alternative nicotine products; heated tobacco products; and vapor
 9 products, such as vapes, vaporizers, vape pens, vaping device, and any variation of these terms.
 10 "Tobacco product" or "tobacco-derived product" does not include any product that is ~~regulated~~
 11 approved by the United States Food and Drug Administration under Chapter V of the Food, Drug
 12 and Cosmetic Act either as a tobacco use cessation product or for other medical purposes and

13 which is being marketed and sold or prescribed solely for such approved purpose.

14 (2) "Alternative nicotine product" means synthetic nicotine; any non-combustible product
15 containing tobacco-derived nicotine that is intended for human consumption, whether chewed,
16 absorbed, dissolved or ingested by any other means; and any nicotine liquid solution or other
17 substance that contains nicotine, or a derivation of nicotine, that is depleted when consumed.

18 "Alternative nicotine product" does not include any tobacco product, vapor product, or product
19 regulated as a drug or device approved by the United States Food and Drug Administration under
20 Chapter V of the Food, Drug and Cosmetic Act either as a tobacco use cessation product or for
21 other medical purposes and which is being marked and sold or prescribed solely for such
22 approved purpose.

23 (3) "Heated tobacco product" means a product containing tobacco or any other solid
24 substance containing nicotine that produces an inhalable aerosol.

25 (3) (4) "Vapor product" means any non-combustible product containing nicotine that
26 employs a heating element, power source, electronic circuit or other electronic, chemical or
27 mechanical means, regardless of shape and size, that can be used to produce vapor from nicotine
28 in a solution or other form. "Vapor product" includes any electronic cigarette, e-cigarette, electronic
29 cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor cartridge or
30 other container of nicotine in a solution or other form that is intended to be used with or in an
31 electronic cigarette, e-cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar
32 product or device. "Vapor product" does not include any product that is ~~regulated~~ approved by the
33 United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act
34 either as a tobacco cessation product or for other medical purposes and which is being marketed
35 and sold or prescribed solely for such approved purpose.

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

38 ~~(1) Any pipe, cigarette paper or any other paper prepared, manufactured or made for the~~

39 ~~purpose of smoking any tobacco or tobacco product;~~

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

41 ~~(3) Any tobacco-derived product, alternative nicotine product or vapor product.~~

42 ~~(c) Any firm or corporation that violates any of the provisions of subsection (b) of this~~
43 ~~section and any individual who violates any of the provisions of subsection (b) of this section is~~
44 ~~guilty of a misdemeanor and, upon conviction thereof, shall be fined \$50 for the first offense. Upon~~
45 ~~any subsequent violation at the same location or operating unit, the firm, corporation or individual~~
46 ~~shall be fined as follows: At least \$250 but not more than \$500 for the second offense, if it occurs~~
47 ~~within two years of the first conviction; at least \$500 but not more than \$750 for the third offense, if~~
48 ~~it occurs within two years of the first conviction; and at least \$1,000 but not more than \$5,000 for~~
49 ~~any subsequent offenses, if the subsequent offense occurs within five years of the first conviction.~~

50 ~~(d) Any individual who knowingly and intentionally sells, gives or furnishes or causes to be~~
51 ~~sold, given or furnished to any person under the age of eighteen years any cigar, cigarette, snuff,~~
52 ~~chewing tobacco, tobacco product or tobacco-derived product, in any form, is guilty of a~~
53 ~~misdemeanor and, upon conviction thereof, for the first offense shall be fined not more than \$100;~~
54 ~~upon conviction thereof for a second or subsequent offense, is guilty of a misdemeanor and shall~~
55 ~~be fined not less than \$100 nor more than \$500.~~

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

**~~§16-9A-3. Use or possession Purchase of tobacco, or tobacco-derived products, or~~
~~alternative nicotine products, or vapor products by persons under the age of 18 21~~
~~years; penalties.~~**

1 A person under the age of ~~18~~ 21 years shall not have on or about his or her person or
2 premises or use purchase or attempt to purchase tobacco products, tobacco-derived products,
3 alternative nicotine products, any cigarette, or cigarette paper: or any other paper prepared,
4 manufactured or made for the purpose of smoking any tobacco products, in any form; any pipe,
5 snuff, chewing tobacco, tobacco product, or tobacco-derived product *Provided*, That minors
6 persons under the age of 21 participating in the inspection of locations where tobacco products,
7 or tobacco-derived products, or alternative nicotine products are sold or distributed pursuant to
8 §16-9A-7 of this code is not considered to violate the provisions of this section. Any person
9 violating the provisions of this section shall for the first violation be fined \$50 and be required to
10 serve eight hours of community service; for a second violation, the person shall be fined \$100 and
11 be required to serve 16 hours of community service; and for a third and each subsequent violation,
12 the person shall be fined \$200 and be required to serve 24 hours of community service.
13 ~~Notwithstanding~~ Persons under the age of 18 shall be subject to the concurrent jurisdiction of the
14 magistrate court in accordance with the provisions of §49-4-701 of this code. ~~the magistrate court~~
15 ~~has concurrent jurisdiction~~

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

1 Every person who shall smoke a cigarette or cigarettes, pipe, cigar or other implement, of
2 any type or nature, designed, used or employed for smoking any tobacco or tobacco product; or
3 who shall use uses any tobacco product, or tobacco-derived product or alternative nicotine
4 product in any building or part thereof of a building used for instructional purposes, in any school of
5 this state, as defined in §18-1-1 of this code, or on any lot or grounds actually used for instructional
6 purposes of any ~~such~~ school of this state while ~~such~~ the school is used or occupied for school
7 purposes, shall be is guilty of a misdemeanor and, upon conviction thereof, shall be punished for
8 each offense by a fine of not less than \$1 nor more than ~~five dollars~~ \$25: *Provided*, That this

9 prohibition shall not be construed to prevent the use of any tobacco or tobacco product or tobacco-
 10 derived product, in any faculty lounge, or staff lounge, or faculty office or other area of said public
 11 school not used for instructional purposes: Provided, however, That students do not have access
 12 thereto *Provided, further* That nothing herein contained shall be construed to prevent any county
 13 board of education from promulgating rules and regulations that further restrict the use of tobacco
 14 products, or tobacco-derived products, or alternative nicotine products in any form, from any other
 15 part or section of any public school building under its jurisdiction.

**§16-9A-7. Enforcement of youth ~~smoking~~ tobacco laws and youth nicotine restrictions;
 inspection of retail outlets where tobacco products, tobacco-derived products,
~~vapor products~~ or alternative nicotine products are sold; use of ~~minors~~ persons
under age 21 in inspections; annual reports; penalties for the sale of tobacco
products, tobacco-derived products, or alternative nicotine products to persons
under age 21; defenses.**

1 (a) The Commissioner of the West Virginia Alcohol Beverage Control Administration
 2 Bureau for Behavioral Health of the Department of Health and Human Resources, the
 3 Superintendent of the West Virginia State Police, the sheriffs of the counties of this state, and the
 4 chiefs of police of municipalities of this state, may periodically conduct unannounced inspections
 5 at locations where tobacco products, or tobacco-derived products, or alternative nicotine products
 6 are sold or distributed to ensure compliance with the provisions of ~~sections two and three~~ of this
 7 article and in such manner as to conform with applicable federal and state laws, rules, and
 8 regulations. Persons under the age of ~~eighteen years~~ 21 may be enlisted by such commissioner,
 9 superintendent, sheriffs, or chiefs of police, or employees or agents thereof to test compliance with
 10 these sections: *Provided*, That the persons under the age of 18 may be used to test compliance
 11 only if the testing is conducted under the direct supervision of the commissioner, superintendent,
 12 sheriffs, or chiefs of police, or employees or agents thereof and with written consent of the
 13 person's parent or guardian of such person is first obtained and such minors. Persons under the

14 age of 21 shall not be in violation of §16-9A-3 of this code when acting under the direct supervision
15 of the commissioner, superintendent, sheriffs, or chiefs of police, or employees or agents thereof.
16 ~~and with the written consent of the parent or guardian~~ It is unlawful for any Any person to use who
17 uses persons under the age of ~~eighteen years~~ 21 to test compliance in any manner not set forth
18 ~~herein and the person so using a minor~~ in this section is guilty of a misdemeanor and, upon
19 conviction ~~thereof, shall be fined the same amounts as set forth in section two of this article~~ not
20 more than \$100 for the first offense; and upon conviction for a second or subsequent offense, is
21 guilty of a misdemeanor and, shall be fined not less than \$100 nor more than \$500.

22 (b) A person charged with a violation of ~~section two or three of this article~~ §16-9A-6 of this
23 code as the result of an inspection under subsection (a) of this section has a complete defense if,
24 at the time the ~~cigarette, other tobacco product, or tobacco-derived product,~~ alternative nicotine
25 product, or cigarette wrapper paper was sold, delivered, bartered, furnished or given, furnished, or
26 caused to be sold, given or furnished:

27 (1) The buyer or recipient falsely evidenced that he or she was ~~eighteen years of age~~ 21 or
28 older;

29 (2) The appearance of the buyer or recipient was such that a prudent person would believe
30 the buyer or recipient to be ~~eighteen years of age~~ 21 or older; and

31 (3) Such person carefully checked a valid driver's license or an identification card issued by
32 this state or another state of the United States, a passport, or a United States armed services
33 identification card presented by the buyer or recipient and acted in good faith and in reliance upon
34 the representation and appearance of the buyer or recipient ~~in the belief that the buyer or recipient~~
35 ~~was eighteen years of age~~ 21 or older.

36 ~~(c) Any fine collected after a conviction of violating section two of this article shall be paid to~~
37 ~~the clerk of the court in which the conviction was obtained: Provided, That the clerk of the court~~
38 ~~upon receiving the fine shall promptly notify the Commissioner of the West Virginia Alcohol~~
39 ~~Beverage Control Administration of the conviction and the collection of the fine: Provided,~~

40 however, That any community service penalty imposed after a conviction of violating section three
 41 of this article shall be recorded by the clerk of the court in which the conviction was obtained:
 42 Provided further, That the clerk of the court upon being advised that community service obligations
 43 have been fulfilled shall promptly notify the Commissioner of the West Virginia Alcohol Beverage
 44 Control Administration of the conviction and the satisfaction of imposed community service
 45 penalty

46 (d)(c) The Commissioner of the ~~West Virginia Alcohol Beverage Control Administration~~
 47 Bureau for Behavioral Health of the Department of Health and Human Resources or his or her
 48 designee shall prepare and submit to the Governor on the last day of ~~September~~ October of each
 49 year a report of the enforcement and compliance activities undertaken pursuant to this ~~section~~
 50 article and the results of the same, with a copy to the ~~Secretary of the West Virginia Department of~~
 51 ~~Health and Human Resources~~ Commissioner of the West Virginia Alcohol Beverage Control
 52 Administration. The report shall be in the form and substance that the Governor shall submit to the
 53 applicable state and federal programs.

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

1 No person, firm, corporation, or business entity may offer for sale any cigarette, tobacco
 2 product, ~~or tobacco-derived product,~~ or alternative nicotine product in a vending machine or any
 3 other display independently accessible by individuals under the age of 21, except for a store clerk.
 4 Any person, firm, corporation, or business entity ~~which violates~~ in violation the provisions of this
 5 section is guilty of a misdemeanor and, upon conviction thereof, shall be fined \$250: *Provided,*
 6 That an establishment is exempt from this prohibition if individuals under the age of ~~eighteen years~~
 7 21 are not permitted to be in the establishment or if the establishment is licensed by the ~~alcohol~~
 8 ~~beverage control commissioner~~ Commissioner of the West Virginia Alcohol Beverage Control
 9 Administration as a Class A licensee. The ~~alcohol beverage control commissioner~~ shall

10 promulgate rules pursuant to §29A-3-1 of this code to establish standards for the location and
11 control of the vending machines in Class A licensed establishments for the purpose of restricting
12 access by ~~minors~~ persons under age 21.

§16-9A-11. Sale, gift, furnishing, or distribution of tobacco products, tobacco-derived products, or alternative nicotine products to persons under age 21; penalties for first and subsequent offense; consideration of prohibited act as grounds for dismissal; impact on eligibility for unemployment benefits.

1 (a) No firm, corporation, or business entity may sell, give, furnish, distribute, or cause to be
2 sold, given, furnished or distributed, any tobacco product, tobacco-derived product, alternative
3 nicotine product, or cigarette paper to any person under the age of 21. Any firm, corporation, or
4 business entity that violates this subsection shall be fined pursuant to a legislative rule as
5 promulgated by the Bureau for Behavioral Health of the Department of Health and Human
6 Resources in the following amounts: \$100 for the first offense and upon any subsequent violation
7 at the same location or operating unit, at least \$250 but not more than \$500 for the second offense,
8 if it occurs within two years of the first fine; at least \$500 but not more than \$750 for the third
9 offense, if it occurs within two years of the first fine; and at least \$1,000 but not more than \$5,000
10 for any subsequent offenses, if the subsequent offense occurs within five years of the first fine.

11 (b) Any individual who knowingly and intentionally sells, gives, furnishes, distributes,
12 purchases for or causes to be sold, given, furnished or distributed a tobacco product, tobacco-
13 derived product, alternative nicotine product, or cigarette paper to any person under the age of 21
14 is guilty of a misdemeanor and, upon conviction, for the first offense shall be fined not more than
15 \$100; upon conviction for a second or subsequent offense, is guilty of a misdemeanor and shall be
16 fined not less than \$100 nor more than \$500, unless the court elects to order community service in
17 lieu of a fine in accord with §62-4-16 of this code. Any fine collected under this section shall be
18 paid to the clerk of the court in which the conviction was obtained: *Provided*, That the clerk of the
19 court shall promptly notify the Commissioner of the Bureau for Behavioral Health of the

20 Department of Health and Human Resources of the disposition of the case and the collection of
 21 any fine or completion of community service.

22 (c) Any employer who discovers that his or her employee has sold, given, furnished, or
 23 caused to be sold, given, or furnished tobacco products, tobacco-derived products, alternative
 24 nicotine products, or cigarette paper to persons under the age of 21 may dismiss such employee
 25 for cause. Any such discharge shall be considered as "gross misconduct" for the purposes of
 26 determining the discharged employee's eligibility for unemployment benefits in accordance with
 27 the provisions of §21A-6-3 of this code, if the employer has provided the employee with prior
 28 written notice in the workplace that such act may result in termination from employment.

§16-9A-12. Smoking prohibited in motor vehicle while a person 16 years of age or less is present; _____ penalty.

1 (a) As used in this section:

2 (1) "Lit tobacco product" means any lighted pipe, cigarette, cigar or other lighted device or
 3 product containing a tobacco-based product manufactured or made for the purpose of smoking.

4 (2) "Motor vehicle" means a Class A, Class B, Class H or Class J vehicle as those terms
 5 are defined in §17A-10-1 of this code.

6 (b) No person who is 21 years of age or older may smoke or possess a lit tobacco product
 7 in a motor vehicle if an individual 16 years of age or less is in the motor vehicle.

8 (c) Any person who violates this section is guilty of a misdemeanor and, upon conviction,
 9 shall be fined not more than \$25. No court costs or other fees may be assessed for a violation of
 10 this section.

11 (d) Enforcement of this section may only be accomplished as a secondary action when a
 12 driver of a vehicle, as defined in this section, has been detained for probable cause of violating
 13 another section of this code.

14 (e) Each time a driver of a vehicle is detained for probable cause of violating another
 15 provision of this code and is cited for the offense created pursuant to this section it shall be

16 considered a single offense regardless of the number of individuals 16 years of age or less are in
 17 the motor vehicle.

§16-9A-13. Prohibited areas of regulation.

1 It is intended by this part and other provisions of the Code to occupy and preempt the entire
 2 field of legislation concerning the regulation of tobacco products, tobacco-derived products, and
 3 alternative nicotine products as defined by §16-9A-2 of this code. A political subdivision, as
 4 defined in §29-12A-3c of this code, may not adopt, enforce, or administer an ordinance, regulation,
 5 local policy, local resolution, or other legal requirement regarding the sale, distribution or
 6 marketing of any tobacco product or tobacco-derived product, as defined by §16-9A-2 of this code,
 7 that is different from, or in addition to, any state law: Provided, That nothing in this section shall be
 8 construed as limiting any regulations by local boards of health that limit the smoking of tobacco
 9 products in enclosed public places.

NOTE: The purpose of this bill is to increase the age for the purchase of tobacco products, tobacco-derived products, and alternative nicotine products from 18 to 21. This bill also changes the way businesses are fined for the underage sale of tobacco products, tobacco-derived products, or alternative nicotine products. This bill further eliminates tobacco use in schools, prohibits the use of lit tobacco products in a motor vehicle while individuals 16 years of age or under are present and designates prohibited areas of regulation of tobacco, tobacco-derived products, and alternative nicotine products for political subdivisions.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.