

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

**Introduced**

### **Senate Bill 304**

By Senators Stuart, Plymale, Hamilton, Maynard, and

Smith

[Introduced January 20, 2023; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §60A-4-401 of the Code of West Virginia, 1931, as amended,  
 2 relating to increasing the criminal penalty for fentanyl; and removing the intent element  
 3 relating to the distribution of a controlled substance using fentanyl as an adulterant, to  
 4 create a counterfeit substance or imitation controlled substance using fentanyl, or to cause  
 5 the adulteration or counterfeiting or imitation of another controlled substance using  
 6 fentanyl.

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

**ARTICLE            4.            OFFENSES            AND            PENALTIES.**

**§60A-4-401. Prohibited acts; penalties.**

1            (a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or  
 2 possess with intent to manufacture or deliver a controlled substance.

3            Any person who violates this subsection with respect to:

4            (i) A controlled substance classified in Schedule I or II, which is a narcotic drug or which is  
 5 methamphetamine, is guilty of a felony and, upon conviction thereof, may be imprisoned in a state  
 6 correctional facility for not less than one year nor more than 15 years, or fined not more than  
 7 \$25,000, or both fined and imprisoned: *Provided*, That any person who violates this section  
 8 knowing that the controlled substance classified in Schedule II is fentanyl, either alone or in  
 9 combination with any other substance shall be fined not more than \$50,000, or be imprisoned in a  
 10 state correctional facility for not less than ~~3~~ 10 nor more than ~~15~~ 20 years, or both fined and  
 11 imprisoned;

12            (ii) Any other controlled substance classified in Schedule I, II, or III is guilty of a felony and,  
 13 upon conviction thereof, may be imprisoned in a state correctional facility for not less than one  
 14 year nor more than five years, or fined not more than \$15,000, or both fined and imprisoned;

15            (iii) A substance classified in Schedule IV is guilty of a felony and, upon conviction thereof,  
 16 may be imprisoned in a state correctional facility for not less than one year nor more than three  
 17 years, or fined not more than \$10,000, or both fined and imprisoned;

18 (iv) A substance classified in Schedule V is guilty of a misdemeanor and, upon conviction  
19 thereof, may be confined in jail for not less than six months nor more than one year, or fined not  
20 more than \$5,000, or both fined and confined: *Provided*, That for offenses relating to any  
21 substance classified as Schedule V in §60A-10-1 *et seq.* of this code, the penalties established in  
22 said article apply.

23 (b) Except as authorized by this act, it is unlawful for any person to create, deliver, or  
24 possess with intent to deliver, a counterfeit substance.

25 Any person who violates this subsection with respect to:

26 (i) A counterfeit substance classified in Schedule I or II, which is a narcotic drug, or  
27 methamphetamine, is guilty of a felony and, upon conviction thereof, may be imprisoned in a state  
28 correctional facility for not less than one year nor more than 15 years, or fined not more than  
29 \$25,000, or both fined and imprisoned;

30 (ii) Any other counterfeit substance classified in Schedule I, II, or III is guilty of a felony and,  
31 upon conviction thereof, may be imprisoned in a state correctional facility for not less than one  
32 year nor more than five years, or fined not more than \$15,000, or both fined and imprisoned;

33 (iii) A counterfeit substance classified in Schedule IV is guilty of a felony and, upon  
34 conviction thereof, may be imprisoned in a state correctional facility for not less than one year nor  
35 more than three years, or fined not more than \$10,000, or both fined and imprisoned;

36 (iv) A counterfeit substance classified in Schedule V is guilty of a misdemeanor and, upon  
37 conviction thereof, may be confined in jail for not less than six months nor more than one year, or  
38 fined not more than \$5,000, or both fined and confined: *Provided*, That for offenses relating to any  
39 substance classified as Schedule V in §60A-10-1 *et seq.* of this code, the penalties established in  
40 said article apply.

41 (c) It is unlawful for any person knowingly or intentionally to possess a controlled  
42 substance unless the substance was obtained directly from, or pursuant to, a valid prescription or  
43 order of a practitioner while acting in the course of his or her professional practice, or except as

44 otherwise authorized by this act. Any person who violates this subsection is guilty of a  
45 misdemeanor, and disposition may be made under §60A-4-407 of this code, subject to the  
46 limitations specified in said section, or upon conviction thereof, the person may be confined in jail  
47 not less than 90 days nor more than six months, or fined not more than \$1,000, or both fined and  
48 confined: *Provided*, That notwithstanding any other provision of this act to the contrary, any first  
49 offense for possession of synthetic cannabinoids as defined by §60A-1-101(d)(32) of this code;  
50 3,4-methylenedioxypropylvalerone (MPVD) and 3,4-methylenedioxypropylvalerone and/or  
51 mephedrone as defined in §60A-1-101(f) of this code; or less than 15 grams of marijuana, shall be  
52 disposed of under §60A-4-407 of this code.

53 (d) It is unlawful for any person knowingly or intentionally:

54 (1) To create, distribute, deliver, or possess with intent to distribute or deliver, an imitation  
55 controlled substance; or

56 (2) To create, possess, sell, or otherwise transfer any equipment with the intent that the  
57 equipment shall be used to apply a trademark, trade name, or other identifying mark, imprint,  
58 number, or device, or any likeness thereof, upon a counterfeit substance, an imitation controlled  
59 substance, or the container or label of a counterfeit substance or an imitation controlled  
60 substance.

61 (3) Any person who violates this subsection is guilty of a misdemeanor and, upon  
62 conviction thereof, may be confined in jail for not less than six months nor more than one year, or  
63 fined not more than \$5,000, or both fined and confined. Any person 18 years old or more who  
64 violates subdivision (1) of this subsection and distributes or delivers an imitation controlled  
65 substance to a minor child who is at least three years younger than that person is guilty of a felony  
66 and, upon conviction thereof, may be imprisoned in a state correctional facility for not less than  
67 one year nor more than three years, or fined not more than \$10,000, or both fined and imprisoned.

68 (4) The provisions of subdivision (1) of this subsection shall not apply to a practitioner who  
69 administers or dispenses a placebo.

- 70 (e) It is unlawful for any person: ~~knowingly or intentionally~~
- 71 (1) To adulterate another controlled substance using fentanyl as an adulterant;
- 72 (2) To create a counterfeit substance or imitation controlled substance using fentanyl; or
- 73 (3) To cause the adulteration or counterfeiting or imitation of another controlled substance
- 74 using fentanyl.
- 75 (4) Any person who violates this subsection is guilty of a felony and, upon conviction
- 76 thereof, shall be imprisoned in a state correctional facility for not less than ~~three~~ 10 nor more than
- 77 ~~15~~ 20 years, or fined not more than \$50,000, or both fined and imprisoned.
- 78 (5) For purposes of this section:
- 79 (i) A controlled substance has been adulterated if fentanyl has been mixed or packed with
- 80 it; and
- 81 (ii) Counterfeit substances and imitation controlled substances are further defined in §60A-
- 82 1-101 of this code.

NOTE: The purpose of this bill is to increase the criminal penalty for fentanyl. The bill also removes the intent element relating to the distribution of a controlled substance using fentanyl as an adulterant, to create a counterfeit substance or imitation controlled substance using fentanyl, or to cause the adulteration or counterfeiting or imitation of another controlled substance using fentanyl.

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