WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5408

By Delegates Crouse, Tully, Phillips, Williams, Dean, Cannon, Hornby, and Young

[Introduced February 1, 2024; Referred
to the Committee on the Judiciary]

A BILL to amend and reenact §16-9E-1, §16-9E-3, §16-9E-4, and §16-9E-5, of the Code of West Virginia, 1931, as amended, all relating to the delivery sales of tobacco; providing definitions; authorizing the delivery sales within State boundaries by retail sellers and remote delivery services; providing age verification requirements for online delivery sales; altering labeling requirements; and providing record retention requirements for information relating to delivery sales of tobacco products.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 9E. Delivery Sales of tobacco.**

**§16-9E-1. Definitions.**

For purposes of this article:

(a) "Adult" means a person who is at least the legal minimum purchase age, as defined by section two, article nine-a of this chapter.

(b) "Consumer" means an individual who does not hold a business registration certificate in this state for the business of selling tobacco products as a wholesale or retail dealer.

(c) "Delivery sale" means any sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products to a consumer in this state where either: (1) The purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service; or (2) the ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products are delivered by use of the mails or a delivery service. A sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products shall be a delivery sale regardless of whether or not the seller is located within this state. A sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products not for personal consumption to a person who holds a business registration certificate as a wholesale dealer or a retail dealer shall not be a delivery sale.

(d) "Delivery service" means any person or distributor who is engaged in the commercial delivery of letters, packages, or other containers.

(e) "Department" means the State Tax Department.

(f) "Legal minimum purchase age" is at least 18 years of age as defined by §16-9A-2 of this code for the purchase of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in this state.

(g) "Mails" or "mailing" means the shipment of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products through the United States postal service.

(h) "Retail seller" means a retailer located within this State who makes a delivery sale to consumers within this state: *Provided*, That retail sellers may obtain tobacco products, tobacco-derived products, or vapor products from a distributor outside the State so long as the consumer and delivery reside within the State: *Provided, however,* Thatretail sellers may make delivery sales direct to consumer or through a remote delivery service as defined in subsection (i) of this section.

(i) "Remote delivery service" means a person or third-party entity who delivers tobacco products, tobacco-derived products, or vapor products to the ultimate consumer of the product, from a delivery sale ordered through a retail seller to a consumer.

~~(h)~~(j) "Shipping container" means a container in which ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products are shipped in connection with a delivery sale.

~~(i)~~(k) "Shipping documents" means bills of lading, airbills, or any other documents used to evidence the undertaking by a delivery service to deliver letters, packages, or other containers.

(l) "Tobacco product" and "tobacco-derived product" means any product, containing, made or derived from tobacco, or containing nicotine derived from tobacco, that is intended for human consumption, whether smoked, breathed, chewed, absorbed, dissolved, inhaled, vaporized, snorted, sniffed or ingested by any other means, including but not limited to cigarettes, cigars, cigarillos, little cigars, pipe tobacco, snuff, snus, chewing tobacco or other common tobacco-containing products. A "tobacco-derived product" includes electronic cigarettes or similar devices, alternative nicotine products and vapor products. "Tobacco product" or "tobacco-derived product" does not include any product that is regulated by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

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

(n) "Vapor product" means any non-combustible product containing nicotine that employs a heating element, power source, electronic circuit or other electronic, chemical or mechanical means, regardless of shape and size, that can be used to produce vapor from nicotine in a solution or other form. "Vapor product" includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe or similar product or device. "Vapor product" does not include any product that is regulated by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

§16-9E-3. Age verification requirements.

(a) No person or retail seller shall mail, ship, or otherwise deliver ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection with a delivery sale unless prior to the first delivery sale to a consumer, the person or retail seller:

(1) Obtains from the prospective consumer a certification, which shall include online certification via check box when accompanied with the appropriate warnings provided in this section, that includes a reliable confirmation that the consumer is at least the legal minimum purchase age and a ~~statement signed~~ certification by the prospective consumer ~~in writing that certifies~~ affirming the prospective consumer's address and that the consumer is at least eighteen years of age. The ~~statement~~ certification shall also confirm: (i) That the prospective consumer understands that it is illegal to sign another person's name to the certification; (ii) that the sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products to individuals under the legal minimum purchase age is illegal; and (iii) that the purchase of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products by individuals under the legal minimum purchase age is illegal under the laws of this state;

(2) Verifies the information contained in the certification provided by the prospective consumer against an appropriate database of government records available to the distributor or seller, or obtains simultaneous with the certificate as provided for in subdivision (1), a photocopy or other image of the valid, government-issued identification stating the date of birth or age of the individual placing the order;

~~(3) Sends to the prospective consumer, via e-mail or other means, a notice that contains:~~ ~~(A) A prominent and clearly legible statement that cigarette sales to a consumer below the legal minimum purchase age is illegal; (B) a prominent and clearly legible statement that consists of one of the warnings set forth in section 4(a)(1) of the federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1333(a)(1), rotated on a quarterly basis; (C) a prominent and clearly legible statement that sales of cigarettes are restricted to those consumers who provide verifiable proof of age in accordance with section three of this article; and (D) a prominent and clearly legible statement that cigarette sales are subject to excise and sales taxes in this state, and an explanation of how such taxes have been, or are to be, paid with respect to the delivery sale~~

~~(4)~~(3) In the case of an order for ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products pursuant to an advertisement on the Internet, receives payment for the delivery sale from the prospective consumer by a credit or debit card or check that has been issued in the consumer's name.

(b) Persons accepting purchase orders for delivery sales may request that prospective consumers provide their e-mail addresses.

§16-9E-4. Shipping requirements.

(a) Each person, retail seller, or remote delivery service who mails, ships, or otherwise delivers ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection with a delivery sale:

(1) Shall include ~~as part of the bill of lading or other~~ a shipping ~~documents a clear and conspicuous statement~~ label providing ~~as follows: "Cigarettes: West Virginia Law Prohibits Shipping to Individuals Under 18, and Requires the Payment of all Applicable Taxes"~~ age verification is required upon arrival;

(2) Shall use a method of mailing, shipping, or delivery that obligates the delivery service to require: (i) The consumer placing the purchase order for the delivery sale, or another adult of legal minimum purchase age, to sign to accept delivery of the shipping container; and (ii) proof, in the form of a valid, government-issued identification bearing a photograph of the individual who signs to accept delivery of the shipping container, demonstrating that he is either the addressee or another adult of legal minimum purchase age; and

(3) Shall provide to the delivery service retained for such delivery sale evidence of full compliance with §16-9E-7 of this code.

(b) A delivery service shall be in violation of this article if it: (1) Ships or otherwise delivers ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection with a delivery sale without first receiving evidence of compliance with §16-9E-7 of this code; or (2) fails to comply with the requirements described in subsection (a) of this section or described in §16-9E-6 of this code:

(1) When obligated to do so under a method of shipping or delivery;

(2) When delivering any container pursuant to shipping documents containing the statement described in subdivision (1), subsection (a) of this section; or

(3) When delivering any container that the delivery service otherwise has reason to know contains ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products.

(c) If the person accepting a purchase order for a delivery sale delivers the ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products without using a delivery service, that person shall comply with all requirements of this article applicable to a delivery service and shall be in violation of the provisions of this article upon failure to comply with the requirements.

§16-9E-5. Registration and reporting requirements.

(a) ~~Prior to making~~ For each delivery ~~sales~~ sale or mailing, shipping, or other delivery of ~~otherwise delivering cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection with any such ~~sales~~ sale, every ~~person~~ retail seller shall ~~file with the department~~ maintain a statementsetting forth the seller's name, trade name, and the address of the seller's principal place of business and any other place of business.

(b) ~~Not later than the tenth day of each calendar month, each~~ All persons, retail sellers, or remote delivery services that ~~has made a delivery sale or mailed, shipped, or otherwise delivered~~ engage in the sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products ~~in connection with any such sale during the previous calendar month~~ under the delivery system provided in §16-9E-1 *et seq.* of this codeshall ~~file with the department~~ maintain a memorandum or a copy of the ~~invoice that provides~~ following information for each and every delivery sale:

(1) The name, ~~and~~ address, and postal code of the consumer to whom the delivery sale was made;

(2) The brand or brands of the ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products that were sold in the delivery sale; and

(3) The quantity of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products that were sold in the delivery sale.

(c) Any person that satisfies the requirements of 15 U.S.C. §376 shall be deemed to satisfy the requirements of this section.

(d) All merchants who engage in the sale of tobacco products, tobacco-derived products, or vapor products under the delivery system provided in §16-9E-1, *et seq.* of this code, shall maintain a record containing the following information:

(e) All records required under subsections (b) and (d) of this section are subject to inspection by the department upon request. Any merchant who delivers tobacco products, tobacco-derived products, or vapor products shall retain records for three years, and shall not unreasonably withhold the records from the commissioner’s inspection.

NOTE: The purpose of this bill is to provide safeguards when retail sellers engage in online delivery sales of tobacco products, tobacco-derived products, or vapor products via online certification and to further permit retail sellers to engage third party remote delivery services to carry out delivery sales to consumers.

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