

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 2778**

4
5 (By Delegates Perry, Eldridge, Williams, Moye, Staggers, Pino,
6 Marshall, Perdue, Poore, Pasdon and Cowles)

7 (Originating in the Committee on the Judiciary)

8 [March 26, 2013]

9
10 A BILL to amend and reenact §16-9A-2, §16-9A-3, §16-9A-7 and §16-
11 9A-8 of the Code of West Virginia, 1931, as amended, all
12 relating to the usage restrictions for tobacco and tobacco
13 products; defining tobacco products; defining vapor products;
14 including vapor products within the definition of tobacco
15 products; exclusions; prohibiting the sale of vapor products
16 to individuals under eighteen years of age; prohibiting the
17 use and possession of vapor products by an individual under
18 eighteen years of age; including vapor products within the
19 tobacco products for which unannounced inspections may be
20 conducted to ensure compliance with sales restrictions; and
21 restricting the sale of vapor products in vending machines;
22 establishing associated misdemeanor offenses and penalties for
23 prohibited use, sale and possession and related violations.

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

25 That §16-9A-2, §16-9A-3, §16-9A-7 and §16-9A-8 of the Code of

1 West Virginia, 1931, as amended, be amended and reenacted, all to
2 read as follows:

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

4 **§16-9A-2. Definitions; sale or gift of cigarette, cigarette**
5 **paper, pipe, cigar, snuff, chewing tobacco, pipe**
6 **tobacco, roll-your-own tobacco, vapor products and**
7 **other tobacco products to persons under eighteen;**
8 **penalties for first and subsequent offense;**
9 **consideration of prohibited act as grounds for**
10 **dismissal; impact on eligibility for unemployment**
11 **benefits.**

12 (a) In this article:

13 (1) "Chewing tobacco" means any leaf tobacco that is not
14 intended to be smoked.

15 (2) "Cigar" means any roll of tobacco wrapped in leaf tobacco
16 or in any substance containing tobacco, other than any roll of
17 tobacco which is a "cigarette".

18 (3) "Cigarette" means any product that contains nicotine, is
19 intended to be burned or heated under ordinary conditions of use,
20 and consists of or contains:

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

23 (B) Tobacco, in any form, that is functional in the product,
24 which, because of its appearance, the type of tobacco used in the

1 filler, or its packaging and labeling, is likely to be offered to,
2 or purchased by, consumers as a cigarette; or

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

8 (D) For the purposes of this article, the term "cigarette"
9 includes cigarettes made with "roll-your-own" tobacco.

10 (4) "Pipe tobacco" means any tobacco which, because of its
11 appearance, type, packaging or labeling, is suitable for use and
12 likely to be offered to, or purchased by, consumers as tobacco to
13 be smoked in a pipe.

14 (5) "Roll-your-own tobacco" means any tobacco which, because
15 of its appearance, type, packaging or labeling, is suitable for use
16 and likely to be offered to, or purchased by, consumers as tobacco
17 for making cigarettes or cigars, or for use as wrappers thereof.

18 (6) "Smokeless tobacco" means any tobacco product that
19 consists of cut, ground, powdered, or leaf tobacco and that is not
20 intended to be smoked and is intended to be placed in the oral or
21 nasal cavity, and includes both chewing tobacco and snuff.

22 (7) "Snuff" means any finely cut, ground or powdered tobacco
23 that is not intended to be smoked.

24 (8) "Tobacco product" means any product made or derived from

1 tobacco that is intended for human consumption, including
2 cigarettes, cigars, snuff, chewing tobacco, pipe tobacco, roll-
3 your-own tobacco and vapor products. "Tobacco product" shall not
4 include any product that is regulated by the United States Food and
5 Drug Administration under Chapter V of the Federal Food, Drug and
6 Cosmetic Act.

7 (9) "Vapor product" means any noncombustible tobacco derived
8 product containing nicotine that employs a mechanical heating
9 element, battery or circuit, regardless of shape or size, that can
10 be used to heat a liquid nicotine solution contained in cartridges,
11 and includes an electronic cigarette, electronic cigar, electronic
12 cigarillo or electronic pipe. "Vapor product" shall not include
13 any product that is regulated by the United States Food and Drug
14 Administration under Chapter V of the Federal Food, Drug and
15 Cosmetic Act.

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

19 (1) Any pipe, cigarette paper or any other paper prepared,
20 manufactured or made for the purpose of smoking any tobacco or
21 tobacco product; ~~or~~

22 (2) Any electronic cigarette, electronic cigar, electronic
23 cigarillo, electronic pipe or any other vapor product or component
24 or cartidge of a vapor product; or

1 ~~(2)~~(3) Any cigar, cigarette, snuff, chewing tobacco, pipe
2 tobacco, roll-your-own tobacco or any other tobacco product, in any
3 form;

4 ~~(b)~~ (c) Any firm or corporation that violates any of the
5 provisions of subdivision (1), ~~or~~ (2) or (3), subsection ~~(a)~~ (b) of
6 this section and any individual who violates any of the provisions
7 of subdivision (1), subsection ~~(a)~~ (b) of this section is guilty of
8 a misdemeanor and, upon conviction thereof, shall be fined \$50 for
9 the first offense. Upon any subsequent violation at the same
10 location or operating unit, the firm, corporation or individual
11 shall be fined as follows: At least \$250 but not more than \$500
12 for the second offense, if it occurs within two years of the first
13 conviction; at least \$500 but not more than \$750 for the third
14 offense, if it occurs within two years of the first conviction; and
15 at least \$1,000 but not more than \$5,000 for any subsequent
16 offenses, if the subsequent offense occurs within five years of the
17 first conviction.

18 ~~(c)~~ (d) Any individual who knowingly and intentionally sells,
19 gives or furnishes or causes to be sold, given or furnished to any
20 person under the age of eighteen years any cigar, cigarette, snuff,
21 chewing tobacco, pipe tobacco, roll-your-own tobacco, vapor
22 product, or any other tobacco product, in any form, is guilty of a
23 misdemeanor and, upon conviction thereof, for the first offense
24 shall be fined not more than \$100; upon conviction thereof for a

1 second or subsequent offense, is guilty of a misdemeanor and shall
2 be fined not less than \$100 nor more than \$500.

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

12 **§16-9A-3. Use or possession of tobacco or tobacco products by**
13 **persons under the age of eighteen years; penalties.**

14 No person under the age of eighteen years shall have on or
15 about his or her person or premises or use any cigarette, or
16 cigarette paper or any other paper prepared, manufactured or made
17 for the purpose of smoking any tobacco products, in any form; ~~or,~~
18 any pipe, snuff, chewing tobacco, ~~or pipe tobacco or roll-your-own~~
19 tobacco; any vapor product or component or cartidge of a vapor
20 product; or any other tobacco product: *Provided,* That minors
21 participating in the inspection of locations where tobacco products
22 are sold or distributed pursuant to section seven of this article
23 is not considered to violate the provisions of this section. Any
24 person violating the provisions of this section shall for the first

1 violation be fined \$50 and be required to serve eight hours of
2 community service; for a second violation, the person shall be
3 fined \$100 and be required to serve sixteen hours of community
4 service; and for a third and each subsequent violation, the person
5 shall be fined \$200 and be required to serve twenty-four hours of
6 community service. Notwithstanding the provisions of section two,
7 article five, chapter forty-nine, the magistrate court has
8 concurrent jurisdiction.

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

12 (a) The commissioner of the West Virginia alcohol beverage
13 control administration, the superintendent of the West Virginia
14 state police, the sheriffs of the counties of this state and the
15 chiefs of police of municipalities of this state, may periodically
16 conduct unannounced inspections at locations where tobacco
17 products are sold or distributed to ensure compliance with the
18 provisions of sections two and three of this article and in such
19 manner as to conform with applicable federal and state laws, rules
20 and regulations. Persons under the age of eighteen years may be
21 enlisted by such commissioner, superintendent, sheriffs or chiefs
22 of police or employees or agents thereof to test compliance with
23 these sections: *Provided*, That the minors may be used to test
24 compliance only if the testing is conducted under the direct
25 supervision of the commissioner, superintendent, sheriffs or chiefs

1 of police or employees or agents thereof and written consent of the
2 parent or guardian of such person is first obtained and such minors
3 shall not be in violation of section three of this article and
4 chapter when acting under the direct supervision of the
5 commissioner, superintendent, sheriffs or chiefs of police or
6 employees or agents thereof and with the written consent of the
7 parent or guardian. It is unlawful for any person to use persons
8 under the age of eighteen years to test compliance in any manner
9 not set forth herein and the person so using a minor is guilty of
10 a misdemeanor and, upon conviction thereof, shall be fined the same
11 amounts as set forth in section two of this article.

12 (b) A person charged with a violation of section two or three
13 of this article as the result of an inspection under subsection (a)
14 of this section has a complete defense if, at the time the
15 cigarette or other tobacco product or cigarette wrapper was sold,
16 delivered, bartered, furnished or given:

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

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

22 (3) Such person carefully checked a driver's license or an
23 identification card issued by this state or another state of the
24 United States, a passport or a United States armed services
25 identification card presented by the buyer or recipient and acted
26 in good faith and in reliance upon the representation and

1 appearance of the buyer or recipient in the belief that the buyer
2 or recipient was eighteen years of age or older.

3 (c) Any fine collected after a conviction of violating section
4 two of this article shall be paid to the clerk of the court in
5 which the conviction was obtained: *Provided*, That the clerk of
6 the court upon receiving the fine shall promptly notify the
7 commissioner of the West Virginia alcohol beverage control
8 administration of the conviction and the collection of the fine:
9 *Provided, however*, That any community service penalty imposed after
10 a conviction of violating section three of this article shall be
11 recorded by the clerk of the court in which the conviction was
12 obtained: *Provided further*, That the clerk of the court upon being
13 advised that community service obligations have been fulfilled
14 shall promptly notify the commissioner of the West Virginia alcohol
15 beverage control administration of the conviction and the
16 satisfaction of imposed community service penalty.

17 (d) The commissioner of the West Virginia alcohol beverage
18 control administration or his or her designee shall prepare and
19 submit to the governor on the last day of September of each year a
20 report of the enforcement and compliance activities undertaken
21 pursuant to this section and the results of the same, with a copy
22 to the secretary of the West Virginia department of health and
23 human resources. The report shall be in the form and substance
24 that the governor shall submit to the applicable state and federal
25 programs.

26 **§16-9A-8. Selling of tobacco products in vending machines**

1 **prohibited except in certain places.**

2 No person or business entity may offer for sale any cigarette;
3 any vapor product, component or cartridge of a vapor product; or
4 other tobacco product in a vending machine. Any person or business
5 entity which violates the provisions of this section is guilty of
6 a misdemeanor and, upon conviction thereof, shall be fined two
7 hundred fifty dollars: *Provided*, That an establishment is exempt
8 from this prohibition if individuals under the age of eighteen
9 years are not permitted to be in the establishment or if the
10 establishment is licensed by the alcohol beverage control
11 commissioner as a Class A licensee. The alcohol beverage control
12 commissioner shall promulgate rules pursuant to article three,
13 chapter twenty-nine-a of this code prior to the first day of July,
14 two thousand, which rules shall establish standards for the
15 location and control of the vending machines in Class A licensed
16 establishments for the purpose of restricting access by minors.