

H. B. 2778

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

[Introduced March 1, 2013; referred to the
Committee on Health and Human Resources then the
Judiciary.]

A BILL to amend and reenact §16-9A-2, §16-9A-3, §16-9A-7 and
§16-9A-8 of the Code of West Virginia, 1931, as amended, all
relating to defining alternative nicotine products and
electronic cigarettes; prohibiting the sale of alternative
nicotine products to individuals under eighteen years of age;
prohibiting the use and possession of alternative nicotine
products by an individual under eighteen years of age; adding
alternative nicotine products to the list of products for
which unannounced inspections may be conducted to ensure
compliance with sales restrictions; and restricting the sale
of alternative nicotine products in vending machines.

Be it enacted by the Legislature of West Virginia:

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

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

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

9 (a) In this article:

10 (1) "Alternative nicotine product" means an electronic
11 cigarette or any product that consists of or contains nicotine that
12 can be ingested into the body by chewing, smoking, absorbing,
13 dissolving, inhaling or by other means. An alternative nicotine
14 product does not include a cigarette, or other tobacco product
15 referenced in this article, a product that is a drug under 21
16 U.S.C. § 321(g)(1), a product that is a device under 21 U.S.C. §
17 321(h), or a combination product described in 21 U.S.C. 353(g);

18 (2) "Electronic cigarette" means an electronic product or
19 device that produces a vapor that delivers nicotine or other
20 substances to the person inhaling from the device to simulate
21 smoking, and is likely to be offered to, or purchased by consumers
22 as an electronic cigarette, electronic cigar, electronic cigarillo

1 or electronic pipe. Electronic cigarette does not include a
2 cigarette, or other tobacco product referenced in this article, a
3 product that is a drug under 21 U.S.C. § 321(g) (1), a product that
4 is a device under 21 U.S.C. § 321(h), or a combination product
5 described in 21 U.S.C. § 353(g).

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

9 (1) Any pipe, cigarette paper or any other paper prepared,
10 manufactured or made for the purpose of smoking any tobacco or
11 tobacco product; ~~or~~

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

14 (3) Any alternative nicotine product, or any component or
15 cartridge of an alternative nicotine product.

16 ~~(b)~~ (c) Any firm or corporation that violates any of the
17 provisions of subdivision (1), (2) or ~~(2)~~ (3), subsection ~~(a)~~ (b)
18 of this section and any individual who violates any of the
19 provisions of subdivision (1), subsection ~~(a)~~ (b) of this section
20 is guilty of a misdemeanor and, upon conviction thereof, shall be
21 fined \$50 for the first offense. Upon any subsequent violation at
22 the same location or operating unit, the firm, corporation or
23 individual shall be fined as follows: At least \$250 but not more

1 than \$500 for the second offense, if it occurs within two years of
2 the first conviction; at least \$500 but not more than \$750 for the
3 third offense, if it occurs within two years of the first
4 conviction; and at least \$1,000 but not more than \$5,000 for any
5 subsequent offenses, if the subsequent offense occurs within five
6 years of the first conviction.

7 ~~(c)~~ (d) Any individual who knowingly and intentionally sells,
8 gives or furnishes or causes to be sold, given or furnished to any
9 person under the age of eighteen years any cigar, cigarette, snuff,
10 chewing tobacco or tobacco product, in any form, or any alternative
11 nicotine product, or any component or cartridge of an alternative
12 nicotine product is guilty of a misdemeanor and, upon conviction
13 thereof, for the first offense shall be fined not more than \$100;
14 upon conviction thereof for a second or subsequent offense, is
15 guilty of a misdemeanor and shall be fined not less than \$100 nor
16 more than \$500.

17 ~~(d)~~ (e) Any employer who discovers that his or her employee
18 has sold or furnished tobacco products or any alternative nicotine
19 product, or any component or cartridge of an alternative nicotine
20 product to minors may dismiss such employee for cause. Any such
21 discharge shall be considered as "gross misconduct" for the
22 purposes of determining the discharged employee's eligibility for
23 unemployment benefits in accordance with the provisions of section

1 three, article six, chapter twenty-one-a of this code, if the
2 employer has provided the employee with prior written notice in the
3 workplace that such act or acts may result in their termination
4 from employment.

5 **§16-9A-3. Use or possession of tobacco, ~~or~~ tobacco products, or**
6 **alternative nicotine products by persons under the**
7 **age of eighteen years; penalties.**

8 No person under the age of eighteen years shall have on or
9 about his or her person or premises or use any cigarette, or
10 cigarette paper or any other paper prepared, manufactured or made
11 for the purpose of smoking any tobacco products, in any form; ~~or,~~
12 any pipe, snuff, chewing tobacco or tobacco product; or any
13 alternative nicotine product, or any component or cartridge of an
14 alternative nicotine product: *Provided*, That minors participating
15 in the inspection of locations where tobacco products or
16 alternative nicotine products are sold or distributed pursuant to
17 section seven of this article is not considered to violate the
18 provisions of this section. Any person violating the provisions of
19 this section shall for the first violation be fined \$50 and be
20 required to serve eight hours of community service; for a second
21 violation, the person shall be fined \$100 and be required to serve
22 sixteen hours of community service; and for a third and each
23 subsequent violation, the person shall be fined \$200 and be

1 required to serve twenty-four hours of community service.
2 Notwithstanding the provisions of section two, article five,
3 chapter forty-nine, the magistrate court has concurrent
4 jurisdiction.

5 **§16-9A-7. Enforcement of youth smoking laws; retail tobacco outlet**
6 **inspections; use of minors in inspections; annual**
7 **reports; penalties; defenses.**

8 (a) The Commissioner of the West Virginia Alcohol Beverage
9 Control Administration, the Superintendent of the West Virginia
10 State Police, the sheriffs of the counties of this state and the
11 chiefs of police of municipalities of this state, may periodically
12 conduct unannounced inspections at locations where tobacco products
13 or alternative nicotine products are sold or distributed to ensure
14 compliance with the provisions of sections two and three of this
15 article and in such manner as to conform with applicable federal
16 and state laws, rules and regulations. Persons under the age of
17 eighteen years may be enlisted by such commissioner,
18 superintendent, sheriffs or chiefs of police or employees or agents
19 thereof to test compliance with these sections: *Provided*, That the
20 minors may be used to test compliance only if the testing is
21 conducted under the direct supervision of the commissioner,
22 superintendent, sheriffs or chiefs of police or employees or agents
23 thereof and written consent of the parent or guardian of such

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

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

1 identification card presented by the buyer or recipient and acted
2 in good faith and in reliance upon the representation and
3 appearance of the buyer or recipient in the belief that the buyer
4 or recipient was eighteen years of age or older.

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

19 (d) The Commissioner of the West Virginia Alcohol Beverage
20 Control Administration or his or her designee shall prepare and
21 submit to the Governor on the last day of September of each year a
22 report of the enforcement and compliance activities undertaken
23 pursuant to this section and the results of the same, with a copy
24 to the secretary of the West Virginia Department of Health and

1 Human Resources. The report shall be in the form and substance
2 that the Governor shall submit to the applicable state and federal
3 programs.

4 **§16-9A-8. Selling of tobacco products in vending machines**
5 **prohibited except in certain places.**

6 No person or business entity may offer for sale any cigarette,
7 ~~or~~ other tobacco product, or alternative nicotine product in a
8 vending machine. Any person or business entity which violates the
9 provisions of this section is guilty of a misdemeanor and, upon
10 conviction thereof, shall be fined \$250: *Provided*, That an
11 establishment is exempt from this prohibition if individuals under
12 the age of eighteen years are not permitted to be in the
13 establishment or if the establishment is licensed by the Alcohol
14 Beverage Control Commissioner as a Class A licensee. The Alcohol
15 Beverage Control Commissioner shall promulgate rules pursuant to
16 article three, chapter twenty-nine-a of this code prior to July 1,
17 2000, which rules shall establish standards for the location and
18 control of the vending machines in Class A licensed establishments
19 for the purpose of restricting access by minors.

NOTE: The purpose of this bill is to define alternative nicotine products and electronic cigarettes; prohibit the sale of alternative nicotine products to individuals under eighteen years of age; prohibit the use and possession of alternative nicotine products by an individual under eighteen years of age; add alternative nicotine products to the list of products for which unannounced inspections may be conducted to ensure compliance with sales restrictions; and restrict the sale of alternative nicotine

products in vending machines.

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