

**H. B. 4138**

(By Delegate Perry)

[Introduced January 14, 2014; referred to the  
Committee on 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 the usage restrictions for tobacco and tobacco  
products; defining tobacco products; defining vapor products;  
including vapor products within the definition of tobacco  
products; exclusions; prohibiting the sale of vapor products  
to individuals under eighteen years of age; prohibiting the  
use and possession of vapor products by an individual under  
eighteen years of age; including vapor products within the  
tobacco products for which unannounced inspections may be  
conducted to ensure compliance with sales restrictions; and  
restricting the sale of vapor products in vending machines;  
establishing associated misdemeanor offenses and penalties for  
prohibited use, sale and possession and related violations.

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

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

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

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

13 (a) In this article:

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

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

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

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

1       (B) Tobacco, in any form, that is functional in the product,  
2 which, because of its appearance, the type of tobacco used in the  
3 filler, or its packaging and labeling, is likely to be offered to,  
4 or purchased by, consumers as a cigarette; or

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

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

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

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

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

24       (7) "Snuff" means any finely cut, ground or powdered tobacco

1 that is not intended to be smoked.

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

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

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

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

24 (2) Any electronic cigarette, electronic cigar, electronic

1 cigarillo, electronic pipe or any other vapor product or component  
2 or cartidge of a vapor product; or

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

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

20 ~~(c)~~ (d) Any individual who knowingly and intentionally sells,  
21 gives or furnishes or causes to be sold, given or furnished to any  
22 person under the age of eighteen years any cigar, cigarette, snuff,  
23 chewing tobacco, pipe tobacco, roll-your-own tobacco, vapor  
24 product, or any other tobacco product, in any form, is guilty of a

1 misdemeanor and, upon conviction thereof, for the first offense  
 2 shall be fined not more than \$100; upon conviction thereof for a  
 3 second or subsequent offense, is guilty of a misdemeanor and shall  
 4 be fined not less than \$100 nor more than \$500.

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

14 **§16-9A-3. Use or possession of tobacco or tobacco products by**  
 15 **persons under the age of eighteen years; penalties.**

16 No person under the age of eighteen years shall have on or  
 17 about his or her person or premises or use any cigarette, or  
 18 cigarette paper or any other paper prepared, manufactured or made  
 19 for the purpose of smoking any tobacco products, in any form; ~~or,~~  
 20 any pipe, snuff, chewing tobacco, ~~or~~ pipe tobacco or roll-your-own  
 21 tobacco; any vapor product or component or cartidge of a vapor  
 22 product; or any other tobacco product: *Provided,* That minors  
 23 participating in the inspection of locations where tobacco products  
 24 are sold or distributed pursuant to section seven of this article

1 is not considered to violate the provisions of this section. Any  
2 person violating the provisions of this section shall for the first  
3 violation be fined \$50 and be required to serve eight hours of  
4 community service; for a second violation, the person shall be  
5 fined \$100 and be required to serve sixteen hours of community  
6 service; and for a third and each subsequent violation, the person  
7 shall be fined \$200 and be required to serve twenty-four hours of  
8 community service. Notwithstanding the provisions of section two,  
9 article five, chapter forty-nine, the magistrate court has  
10 concurrent jurisdiction.

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

14 (a) The commissioner of the West Virginia alcohol beverage  
15 control administration, the Superintendent of the West Virginia  
16 State Police, the sheriffs of the counties of this state and the  
17 chiefs of police of municipalities of this state, may periodically  
18 conduct unannounced inspections at locations where tobacco products  
19 or vapor products are sold or distributed to ensure compliance with  
20 the provisions of sections two and three of this article and in such  
21 manner as to conform with applicable federal and state laws, rules  
22 and regulations. Persons under the age of eighteen years may be  
23 enlisted by such commissioner, superintendent, sheriffs or chiefs  
24 of police or employees or agents thereof to test compliance with

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

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

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

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



1           (3) Such person carefully checked a driver's license or an  
2 identification card issued by this state or another state of the  
3 United States, a passport or a United States armed services  
4 identification card presented by the buyer or recipient and acted  
5 in good faith and in reliance upon the representation and appearance  
6 of the buyer or recipient in the belief that the buyer or recipient  
7 was eighteen years of age or older.

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

22           (d) The Commissioner of the West Virginia Alcohol Beverage  
23 Control Administration or his or her designee shall prepare and  
24 submit to the Governor on the last day of September of each year a

1 report of the enforcement and compliance activities undertaken  
2 pursuant to this section and the results of the same, with a copy  
3 to the Secretary of the West Virginia Department of Health and Human  
4 Resources. The report shall be in the form and substance that the  
5 Governor shall submit to the applicable state and federal programs.

6 **§16-9A-8. Selling of tobacco products in vending machines**  
7 **prohibited except in certain places.**

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

NOTE: The purpose of this bill is to define certain tobacco-derived products and electronic cigarettes; prohibit the sale of vapor products to individuals under eighteen years of age;

prohibit the use and possession of vapor products by an individual under eighteen years of age; add vapor products to the list of products for which unannounced inspections may be conducted to ensure compliance with sales restrictions; and restrict the sale of vapor 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.