

H. B. 2104

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(By Delegates Arvon, Kessinger, Cooper, Householder,
Sobonya, Rowan, Border, Ellington, Campbell and Miller)

[Introduced January 20, 2015; referred to the
Committee on Health and Human Resources then the Judiciary.]

**FISCAL
NOTE**

A BILL to repeal §47-19-2 of the Code of West Virginia, 1931, as amended; and to amend and
reenact §47-19-1, §47-19-3, §47-19-4, §47-19-5 and §47-19-7 of said code; and to amend
and reenact §60A-4-403a of said code, all relating to drug paraphernalia; terminating the Tax
Commissioner's authority to issue business licenses to sell paraphernalia for use with
controlled substances; revoking licenses previously issued by the Tax Commissioner;
clarifying the definition of drug paraphernalia; requiring the continued retention of
transaction records after the revocation of licensed authority; rule-making authority;
providing for enhanced penalties; effective date; criminal offense elements; and criminal
penalties.

Be it enacted by the Legislature of West Virginia:

That §47-19-2 of the Code of West Virginia, 1931, as amended, be repealed; and that §47-19-
1, §47-19-3, §47-19-4, §47-19-5 and §47-19-7 of said code be amended and reenacted; and that
§60A-4-403a be amended and reenacted, all to read as follows:

CHAPTER 47. REGULATION OF TRADE.

1 **ARTICLE 19. DRUG PARAPHERNALIA.**

2 **§47-19-1. Items designed or marketed for use with controlled substances; license required:**

3 It ~~shall be~~ is unlawful for any person or persons as principal, clerk, agent or servant to sell
4 any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with
5 controlled substances, as defined in chapter sixty-a of this code, on and after the first day of July,
6 2015. ~~without obtaining a license therefor from the State Tax Commissioner. Such licenses shall~~
7 ~~be in addition to any or all other licenses held by applicant. The fee for such license shall be \$150.~~
8 Any license issued by the State Tax Commissioner authorizing the sale of drug paraphernalia in this
9 state pursuant to the provisions of this article prior to July 1, 2015 is void and of no effect.

10 **§47-19-3. Drug paraphernalia defined.**

11 ~~(a) The following items, if marketed for use or designed for the use with controlled~~
12 ~~substances, are considered drug paraphernalia for the purpose stated in section one of this article:~~

13 ~~(1) Kits marketed for use, or designed for use in planting, propagating, cultivating, growing,~~
14 ~~or harvesting of any species of plant which is a controlled substance or from which a controlled~~
15 ~~substance can be derived;~~

16 ~~(2) Kits marketed for use, or designed for use in manufacturing, compounding, converting,~~
17 ~~producing, processing or preparing controlled substances;~~

18 ~~(3) Isomerization devices marketed for use, or designed for use in increasing the potency of~~
19 ~~any species of plant which is a controlled substance;~~

20 ~~(4) Testing equipment marketed for use, or designed for use in identifying, or in analyzing~~
21 ~~the strength, effectiveness or purity of controlled substances;~~

22 ~~(5) Scales and balances used, intended for use, or designed for use in weighing or measuring~~

1 ~~controlled substances;~~

2 ~~(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and~~
3 ~~lactose, marketed for use, or designed for use in cutting controlled substances;~~

4 ~~(7) Separation gins and sifters marketed for use, or designed for use in removing twigs and~~
5 ~~seeds from, or in otherwise cleaning or refining, marijuana;~~

6 ~~(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or~~
7 ~~designed for use in compounding controlled substances;~~

8 ~~(9) Capsules, balloons, envelopes and other containers marketed for use, or designed for use~~
9 ~~in packaging small quantities of controlled substances;~~

10 ~~(10) Hypodermic syringes, needles and other objects marketed for use, or designed for use~~
11 ~~in parenterally injecting controlled substances into the human body;~~

12 ~~(11) Paper of colorful design, with names oriented for use with controlled dangerous~~
13 ~~substances and displayed: *Provided*, That white paper or tobacco oriented paper not necessarily~~
14 ~~designed for use with controlled substances is not covered;~~

15 ~~(12) Pipes displayed in the proximity of roach clips, or literature encouraging illegal use of~~
16 ~~controlled substances, are covered by this article: *Provided*, That pipes otherwise displayed are not~~
17 ~~covered by this article;~~

18 ~~(13) Roach clips: meaning objects used to hold burning material, such as a marijuana~~
19 ~~cigarette, that has become too small or too short to be held in the hand;~~

20 ~~(14) Miniature cocaine spoons, and cocaine vials; or~~

21 ~~(15) Chillums or bongs.~~

22 (a) As used in this section, "drug paraphernalia" means any equipment, product, or material

1 of any kind that is used by the offender, intended by the offender for use, or designed for use, in
2 propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing,
3 processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing,
4 injecting, ingesting, inhaling, or otherwise introducing into the human body, a controlled substance
5 in violation of this chapter. "Drug paraphernalia" includes, but is not limited to, any of the following
6 equipment, products, or materials that are used by the offender, intended by the offender for use, or
7 designed by the offender for use, in any of the following manners:

8 (1) A kit for propagating, cultivating, growing, or harvesting any species of a plant that is a
9 controlled substance or from which a controlled substance can be derived;

10 (2) A kit for manufacturing, compounding, converting, producing, processing, or preparing
11 a controlled substance;

12 (3) Any object, instrument, or device for manufacturing, compounding, converting,
13 producing, processing, or preparing methamphetamine;

14 (4) An isomerization device for increasing the potency of any species of a plant that is a
15 controlled substance;

16 (5) Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of,
17 a controlled substance;

18 (6) A scale or balance for weighing or measuring a controlled substance;

19 (7) A diluent or adulterant, such as quinine hydrochloride, mannitol, mannite, dextrose, or
20 lactose, for cutting a controlled substance;

21 (8) A separation gin or sifter for removing twigs and seeds from, or otherwise cleaning or
22 refining, marihuana;

1 (9) A blender, bowl, container, spoon, or mixing device for compounding a controlled
2 substance;

3 (10) A capsule, balloon, envelope, or container for packaging small quantities of a controlled
4 substance;

5 (11) A container or device for storing or concealing a controlled substance;

6 (12) A hypodermic syringe, needle, or instrument for parenterally injecting a controlled
7 substance into the human body;

8 (13) An object, instrument, or device for ingesting, inhaling, or otherwise introducing into
9 the human body, marihuana, cocaine, hashish, or hashish oil, such as a metal, wooden, acrylic, glass,
10 stone, plastic, or ceramic pipe, with or without a screen, permanent screen, hashish head, or
11 punctured metal bowl; water pipe; carburetion tube or device; smoking or carburetion mask; roach
12 clip or similar object used to hold burning material, such as a marihuana cigarette, that has become
13 too small or too short to be held in the hand; miniature cocaine spoon, or cocaine vial; chamber pipe;
14 carburetor pipe; electric pipe; air driver pipe; chillum; bong; or ice pipe or chiller.

15 ~~(b) In determining whether an object is marketed for use or designed for use as drug~~
16 ~~paraphernalia, the State Tax Commissioner or other authority should consider the following:~~

17 ~~(1) The proximity of the object, in time and space, to a controlled substance;~~

18 ~~(2) The existence of any residue of controlled substances on the object;~~

19 ~~(3) Instructions, oral or written, provided with the object concerning its use;~~

20 ~~(4) Descriptive materials accompanying the object which explain or depict its use;~~

21 ~~(5) National and local advertising concerning its use;~~

22 ~~(6) The manner in which the object is displayed for sale;~~

1 ~~(7) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or~~
2 ~~related items to the community, such as a licensed distributor or dealer of tobacco products;~~

3 ~~(8) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total~~
4 ~~sales of the business enterprise;~~

5 ~~(9) The existence and scope of legitimate uses for the object in the community.~~

6 (b) In determining if any equipment, product, or material is drug paraphernalia, a court or
7 law-enforcement officer shall consider, in addition to other relevant factors, the following:

8 (1) Any statement by the owner, or by anyone in control, of the equipment, product, or
9 material, concerning its use;

10 (2) The proximity in time or space of the equipment, product, or material, or of the act
11 relating to the equipment, product, or material, to a violation of any provision of this chapter;

12 (3) The proximity of the equipment, product, or material to any controlled substance;

13 (4) The existence of any residue of a controlled substance on the equipment, product, or
14 material;

15 (5) Direct or circumstantial evidence of the intent of the owner, or of anyone in control, of
16 the equipment, product, or material, to deliver it to any person whom the owner or person in control
17 of the equipment, product, or material knows intends to use the object to facilitate a violation of any
18 provision of this chapter. A finding that the owner, or anyone in control, of the equipment, product,
19 or material, is not guilty of a violation of any other provision of this chapter does not prevent a
20 finding that the equipment, product, or material was intended or designed by the offender for use as
21 drug paraphernalia.

22 (6) Any oral or written instruction provided with the equipment, product, or material

1 concerning its use;

2 (7) Any descriptive material accompanying the equipment, product, or material and
3 explaining or depicting its use;

4 (8) National or local advertising concerning the use of the equipment, product, or material;

5 (9) The manner and circumstances in which the equipment, product, or material is displayed
6 for sale;

7 (10) The existence and scope of legitimate uses of the equipment, product, or material in the
8 community;

9 (11) Expert testimony concerning the use of the equipment, product, or material.

10 (c) (1) Subject to subsection (d) of this section, no person shall knowingly use, or possess
11 with purpose to use, drug paraphernalia.

12 (2) No person shall knowingly sell, or possess or manufacture with purpose to sell, drug
13 paraphernalia, if the person knows or reasonably should know that the equipment, product, or
14 material will be used as drug paraphernalia.

15 (3) No person may place an advertisement in any newspaper, magazine, handbill, or other
16 publication that is published and printed and circulates primarily within this state, if the person
17 knows that the purpose of the advertisement is to promote the illegal sale in this state of the
18 equipment, product or material that the offender intended or designed for use as drug paraphernalia.

19 (d) This section does not apply to manufacturers, licensed health professionals authorized to
20 prescribe drugs, pharmacists or owners of pharmacies or to any item traditionally intended for use
21 with tobacco products, including any pipe, paper or accessory. This section does not prohibit the
22 possession or use of a hypodermic if required by a prescription.

1 (e) Any drug paraphernalia that was used, possessed, sold or manufactured in violation of this
 2 section shall be seized, after a conviction for that violation shall be forfeited, and upon forfeiture
 3 shall be disposed of by law enforcement.

4 **§47-19-4. Records.**

5 ~~Every licensee must keep~~ entity which was issued a license by the State Tax Commissioner
 6 to sell drug paraphernalia prior to July 1, 2015 shall continue to keep and retain a record of every
 7 item, effect, paraphernalia, accessory or thing which is designed or marketed for use with controlled
 8 substances which ~~is it~~ sold, and this record shall be open to the inspection of any police officer at any
 9 time during the hours of business. ~~Such~~ The record shall contain the name and address of the
 10 purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or
 11 agent of the licensee's signature. ~~Such~~ The records shall be retained for not less than two years.

12 **§47-19-5. Regulations Rules.**

13 ~~The applicant shall comply with all~~ definition of drug paraphernalia, as contained in the
 14 applicable rules of the State Tax Commissioner, promulgated continue to be in effect, until revised.
 15 The State Tax Commissioner is granted authority to promulgate emergency rules and propose rules
 16 for legislative approval to effectuate the revisions to this article, pursuant to the provisions of article
 17 three, chapter twenty-nine-a of this code.

18 **§47-19-7. Penalty Penalties.**

19 ~~Any person violating any provision of this article shall, if convicted, be guilty of a~~
 20 ~~misdemeanor and, be fined not less than \$10 nor more than \$500 for the first offense and succeeding~~
 21 ~~offenses, and each day that such violation shall continue shall be deemed a separate and distinct~~
 22 ~~offense.~~

1 (a) First offense conviction -- Upon a first conviction of possession of drug paraphernalia
2 pursuant to subdivision (1), subsection (c) of section 3 of this article, the person is guilty of a
3 misdemeanor and, shall be fined no less than \$100 nor more than \$500.

4 Second offense conviction – Upon a second conviction of possession of drug paraphernalia
5 pursuant to subdivision (1), subsection (c) of section 3 of this article, the person is guilty of a
6 misdemeanor and, shall be fined not less than \$500 nor more than \$1,000 or confined in jail for a
7 period not to exceed one month, or both fined and confined.

8 Third offense conviction – Upon a third and subsequent possession of drug paraphernalia
9 conviction pursuant to subdivision (1), subsection (c) of section three of this article the person is
10 guilty of a misdemeanor and, shall be fined not less than \$1,000 nor more than \$2,000 or confined
11 in jail for a period not to exceed six months, or both fined and confined.

12 (b) Except as provided in subsection (c) of this section, whoever violates subdivision (2) of
13 subsection (c) of section (3) of this article is guilty of dealing in drug paraphernalia, a misdemeanor
14 and, upon conviction therefor shall be fined not less than \$1,000 nor more than \$2,000.

15 (c) Upon a conviction of selling drug paraphernalia to a juvenile pursuant to subdivision (2)
16 of subsection (c) of section (3) of this article the person is guilty of a misdemeanor and, shall be
17 fined not less than \$2,000 nor more than \$5,000 or confined in jail for a period not to exceed one
18 year, or both fined and confined.

19 (d) Upon a conviction of illegal advertising of drug paraphernalia pursuant to subdivision (3),
20 subsection (c) of section (3) of this article, the person is guilty of a misdemeanor and, shall be fined
21 not less than \$500 nor more than \$1,000.

22 (e) In addition to any other sanction imposed on an offender pursuant to this section, the court

1 shall suspend for not less than six months or more than five years the offender's driver's or
2 commercial driver's license or permit.

3 **CHAPTER 60A. UNIFORM CONTROLLED SUBSTANCES ACT.**

4 **ARTICLE 4. OFFENSES AND PENALTIES.**

5 **§60A-4-403a. Prohibition of illegal drug paraphernalia businesses; definitions; places deemed**
6 **common and public nuisances; abatement; suit to abate nuisances;**
7 **injunction; search warrants; forfeiture of property; penalties.**

8 (a) Any person who knowingly and willfully conducts, finances, manages, supervises, directs
9 or owns all or part of an illegal drug paraphernalia business is guilty of a misdemeanor and, upon
10 conviction thereof, shall be fined not more than \$5,000 , or confined in jail not less than six months
11 nor more than one year, or both.

12 (b) A person violates subsection (a) of this section when:

13 (1) The person knowingly and willfully conducts, finances, manages, supervises, directs, or
14 owns all or part of a business which for profit, in the regular course of business or as a continuing
15 course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed
16 to be primarily useful as drug devices.

17 (2) The person knows or has reason to know that the design of such objects renders them
18 primarily useful as drug devices.

19 (c) As used in this section, "drug device" means an object usable for smoking marijuana, for
20 smoking controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine,
21 includes items described in subsections (a) and (b), section three of this article, and includes, but is
22 not limited to:

- 1 (i) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens,
 2 permanent screens, hashish heads, or punctured metal bowls;
- 3 (ii) Water pipes;
- 4 (iii) Carburetion tubes and devices;
- 5 (iv) Smoking and carburetion masks;
- 6 (v) Roach clips; meaning objects used to hold burning material, such as a marijuana cigarette,
 7 that has become too small or too short to be held in the hand;
- 8 (vi) Chamber pipes;
- 9 (vii) Carburetor pipes;
- 10 (viii) Electric pipes;
- 11 (ix) Air-driven pipes;
- 12 (x) Chillums;
- 13 (xi) Bongs;
- 14 (xii) Ice pipes or chillers; and
- 15 (xiii) Miniature cocaine spoons, and cocaine vials.

16 In any prosecution under this section, the question whether an object is a drug device shall
 17 be a question of fact.

18 (d) A place where drug devices are manufactured, sold, stored, possessed, given away or
 19 furnished in violation of this section shall be deemed a common or public nuisance. Conveyances
 20 or vehicles of any kind shall be deemed places within the meaning of this section and may be
 21 proceeded against under the provisions of subsection (e) of this section. A person who ~~shall~~
 22 ~~maintain~~ knowingly and willfully maintains, or ~~shall aid or abet~~ aids or abets or knowingly be

1 associated with others in maintaining ~~such~~ the common or public nuisance shall be guilty of a
2 misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$1,000, or
3 by confinement in jail not more than six months for each offense, and judgment shall be given that
4 ~~such~~ the nuisance be abated or closed as a place for the manufacture, sale, storage, possession, giving
5 away or furnishing of drug devices.

6 (e) The prosecuting attorney or a citizen of the county or municipality where a nuisance as
7 defined in subsection (d) is located, may maintain a suit in the name of the state to abate and
8 perpetually enjoin the same. Circuit courts shall have jurisdiction thereof. The injunction may be
9 granted at the commencement of the suit and no bond shall be required if such action for injunction
10 be brought by the prosecuting attorney. If such suit for injunction be brought or maintained by a
11 citizen of the county or municipality where such nuisance is alleged to be located, then the court may
12 require a bond as in other cases of injunction. On the finding that the material allegations of the
13 complaint are true, the court or judge thereof in vacation shall order the injunction for such period
14 of time as it or he or she may think proper, with the right to dissolve the injunction upon the
15 application of the owner of the place, if a proper case is shown for such dissolution.

16 The continuance of the injunction as provided in this section may be ordered, although the
17 place complained of may not at the time of hearing be unlawfully used.

18 (f) If there be complaint on oath or affirmation supported by affidavit or affidavits setting
19 forth the facts for such belief that drug devices are being manufactured, sold, kept, stored or in any
20 manner held, used or concealed in a particular house or other place with intent to engage in illegal
21 drug paraphernalia business in violation of law, a magistrate or a circuit court, or the judge thereof
22 in vacation to whom such complaint is made, if satisfied that there is probable cause for such belief,

1 shall issue a warrant to search such house or other place for such devices. Such warrants, except as
2 herein otherwise provided, shall be issued, directed and executed in accordance with the laws of
3 West Virginia pertaining to search warrants. Warrants issued under this section for the search of any
4 automobile, boat, conveyance or vehicle, or for the search of any trunk, grip or other article of
5 baggage, for such devices, may be executed in any part of the state where the same are overtaken,
6 and shall be made returnable before any magistrate or circuit court, or the judge thereof in vacation,
7 within whose jurisdiction such automobile, boat, conveyance, vehicle, trunk, grip or other article of
8 baggage, or any of them, were transported or attempted to be transported.

9 An officer charged with the execution of a warrant issued under this section, may, whenever
10 it is necessary, break open and enter a house, or other place herein described.

11 (g) Any property, including money, used in violation of the provisions of this section may
12 be seized and forfeited to the state.

NOTE: The purpose of this bill is to repeal the statutory provision which authorizes the State Tax Commissioner to issue business licenses for the purpose of selling drug paraphernalia, to void licenses already issued and to prohibit sales on and after July 1, 2015. The bill redefines drug paraphernalia, authorizes rules, clarifies violations and provides enhanced penalties.

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