

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 4388

BY DELEGATES HAMRICK, J. JEFFERIES AND C. MARTIN

[Originating in the Committee on Government

Organization; January 20, 2020.]

1 A BILL to amend and reenact §11-16-2 of the Code of West Virginia, 1931, as amended; to amend
2 and reenact §11-16-18 and §11-16-22 of said code; to amend and reenact §60-2-15 of
3 said code; to amend and reenact §60-8-23 of said code, all relating to removing restrictions
4 on advertising, equipment and services by licensees; adding legislative findings; removing
5 restrictions on equipment, fixtures, signs, and supplies; limiting advertising restrictions to
6 false or misleading advertising, irresponsible consumption, and that which targets
7 underage consumption; clarifying that exterior signs are governed by the Division of
8 Highways; eliminating antiquated rule-making language; and limiting promulgation and
9 enforcement of legislative rules.

Be it enacted by the Legislature of West Virginia:

CHAPTER 11. TAXATION.

ARTICLE 16. NONINTOXICATING BEER.

§11-16-2. Declaration of legislative findings, policy and intent; construction.

1 It is hereby found by the Legislature and declared to be the policy of this state that it is in
2 the public interest to regulate and control the manufacture, sale, distribution, transportation,
3 storage and consumption of the beverages regulated by this article within this state and that,
4 therefore, the provisions of this article are a necessary, proper and valid exercise of the police
5 powers of this state and are intended for the protection of the public safety, welfare, health, peace
6 and morals and are further intended to eliminate, or to minimize to the extent practicable, the evils
7 attendant to the unregulated, unlicensed and unlawful manufacture, sale, distribution,
8 transportation, storage and consumption of such beverages and are further intended to promote
9 temperance in the use and consumption thereof. The Legislature further finds and declares that
10 advertising is essential to the growth of business and job promotion within the state. In order to
11 further these ends, the provisions of this article and of the rules ~~and regulations~~ promulgated

12 pursuant thereto, shall be construed so that the accomplishment of these stated purposes may
13 be effectuated.

§11-16-18. Unlawful acts of licensees; criminal penalties.

1 (a) It shall be unlawful:

2 (1) For any licensee, his, her, its or their servants, agents, or employees to sell, give, or
3 dispense, or any individual to drink or consume, in or on any licensed premises or in any rooms
4 directly connected, nonintoxicating beer or cooler on weekdays between the hours of 2:00 a.m.
5 and 7:00 a.m., or between the hours of 2:00 a.m. and 10:00 a.m., or a Class A retail dealer who
6 sells nonintoxicating beer for on-premises consumption only between the hours of 2:00 a.m. and
7 1:00 p.m. in any county upon approval as provided for in §7-1-3ss of this code, on any Sunday,
8 except in private clubs licensed under the provisions of §60-7-1 *et seq.* of this code, where the
9 hours shall conform with the hours of sale of alcoholic liquors;

10 (2) For any licensee, his, her, its or their servants, agents, or employees to sell, furnish,
11 or give any nonintoxicating beer, as defined in this article, to any person visibly or noticeably
12 intoxicated or to any person known to be insane or known to be a habitual drunkard;

13 (3) For any licensee, his, her, its or their servants, agents, or employees to sell, furnish,
14 or give any nonintoxicating beer as defined in this article to any person who is less than 21 years
15 of age;

16 (4) For any distributor to sell or offer to sell, or any retailer to purchase or receive, any
17 nonintoxicating beer as defined in this article, except for cash and no right of action shall exist to
18 collect any claims for credit extended contrary to the provisions of this subdivision. Nothing herein
19 contained in this section prohibits a licensee from crediting to a purchaser the actual price charged
20 for packages or containers returned by the original purchaser as a credit on any sale, or from
21 refunding to any purchaser the amount paid or deposited for the containers when title is retained
22 by the vendor: *Provided*, That a distributor may accept an electronic transfer of funds if the transfer
23 of funds is initiated by an irrevocable payment order on the invoiced amount for the nonintoxicating

24 beer. The cost of the electronic fund transfer shall be borne by the retailer and the distributor shall
25 initiate the transfer no later than noon of one business day after the delivery;

26 (5) For any brewer or distributor or brew-pub or his, her, its or their agents to transport or
27 deliver nonintoxicating beer as defined in this article to any retail licensee on Sunday;

28 ~~(6) For any brewer or distributor to give, furnish, rent, or sell any equipment, fixtures, signs,~~
29 ~~or supplies directly or indirectly or through a subsidiary or affiliate to any licensee engaged in~~
30 ~~selling products of the brewing industry at retail or to offer any prize, premium, gift, or other similar~~
31 ~~inducement, except advertising matter of nominal value, to either trade or consumer buyers:~~
32 ~~Provided, That a distributor may offer, for sale or rent, tanks of carbonic gas. Nothing herein~~
33 ~~contained in this section prohibits a brewer from sponsoring any professional or amateur athletic~~
34 ~~event or from providing prizes or awards for participants and winners in any events: Provided,~~
35 ~~however, That no event shall be sponsored which permits actual participation by athletes or other~~
36 ~~persons who are minors, unless specifically authorized by the commissioner.~~

37 (6) For any brewer or distributor to sponsor any professional or amateur athletic event or
38 from providing prizes or awards for participants and winners when a majority of the athletes
39 participating in the event are minors, unless specifically authorized by the commissioner;

40 (7) For any brewer or distributor to provide any fixtures, equipment, signs, or supplies
41 directly or indirectly exceeding a value of \$50 without being specifically authorized by the
42 commissioner;

43 ~~(7)~~ (8) For any licensee to permit in his or her premises any lewd, immoral or improper
44 entertainment, conduct, or practice;

45 ~~(8)~~ (9) For any licensee except the holder of a license to operate a private club issued
46 under the provisions of §60-7-1 *et seq.* of this code or a holder of a license or a private wine
47 restaurant issued under the provisions of §60-8-1 *et seq.* of this code to possess a federal license,
48 tax receipt or other permit entitling, authorizing, or allowing the licensee to sell liquor or alcoholic
49 drinks other than nonintoxicating beer;

50 ~~(9)~~ (10) For any licensee to obstruct the view of the interior of his or her premises by
51 enclosure, lattice, drapes, or any means which would prevent plain view of the patrons occupying
52 the premises. The interior of all licensed premises shall be adequately lighted at all times:
53 *Provided*, That provisions of this subdivision do not apply to the premises of a Class B retailer,
54 the premises of a private club licensed under the provisions of §60-7-1 *et seq.* of this code, or the
55 premises of a private wine restaurant licensed under the provisions of §60-8-1 *et seq.* of this code;

56 ~~(40)~~ (11) For any licensee to manufacture, import, sell, trade, barter, possess, or
57 acquiesce in the sale, possession, or consumption of any alcoholic liquors on the premises
58 covered by a license or on premises directly or indirectly used in connection with it: *Provided*,
59 That the prohibition contained in this subdivision with respect to the selling or possessing or to
60 the acquiescence in the sale, possession, or consumption of alcoholic liquors is not applicable
61 with respect to the holder of a license to operate a private club issued under the provisions of
62 §60-7-1 *et seq.* of this code nor shall the prohibition be applicable to a private wine restaurant
63 licensed under the provisions of §60-8-1 *et seq.* of this code insofar as the private wine restaurant
64 is authorized to serve wine;

65 ~~(44)~~ (12) For any retail licensee to sell or dispense nonintoxicating beer, as defined in this
66 article, purchased, or acquired from any source other than a distributor, brewer, or manufacturer
67 licensed under the laws of this state;

68 ~~(42)~~ (13) For any licensee to permit loud, boisterous, or disorderly conduct of any kind
69 upon his or her premises or to permit the use of loud musical instruments if either or any of the
70 same may disturb the peace and quietude of the community where the business is located:
71 *Provided*, That a licensee may have speaker systems for outside broadcasting so long as the
72 noise levels do not create a public nuisance or violate local noise ordinances;

73 ~~(43)~~ (14) For any person whose license has been revoked, as provided in this article, to
74 obtain employment with any retailer within the period of one year from the date of the revocation,
75 or for any retailer to knowingly employ that person within the specified time;

76 ~~(14)~~ (15) For any distributor to sell, possess for sale, transport, or distribute nonintoxicating
77 beer except in the original container;

78 ~~(15)~~ (16) For any licensee to knowingly permit any act to be done upon the licensed
79 premises, the commission of which constitutes a crime under the laws of this state;

80 ~~(16)~~ (17) For any Class B retailer to permit the consumption of nonintoxicating beer upon
81 his or her licensed premises;

82 ~~(17)~~ (18) For any Class A licensee, his, her, its or their servants, agents, or employees, or
83 for any licensee by or through any servants, agents, or employees, to allow, suffer, or permit any
84 person less than 18 years of age to loiter in or upon any licensed premises; except, however, that
85 the provisions of this subdivision do not apply where a person under the age of 18 years is in or
86 upon the premises in the immediate company of his or her parent or parents, or where and while
87 a person under the age of 18 years is in or upon the premises for the purpose of and actually
88 making a lawful purchase of any items or commodities therein sold, or for the purchase of and
89 actually receiving any lawful service therein rendered, including the consumption of any item of
90 food, drink or soft drink therein lawfully prepared and served or sold for consumption on the
91 premises;

92 ~~(18)~~ (19) For any distributor to sell, offer for sale, distribute, or deliver any nonintoxicating
93 beer outside the territory assigned to any distributor by the brewer or manufacturer of
94 nonintoxicating beer or to sell, offer for sale, distribute, or deliver nonintoxicating beer to any
95 retailer whose principal place of business or licensed premises is within the assigned territory of
96 another distributor of such nonintoxicating beer: *Provided*, That nothing in this section is
97 considered to prohibit sales of convenience between distributors licensed in this state where one
98 distributor sells, transfers, or delivers to another distributor a particular brand or brands for sale
99 at wholesale; and

100 ~~(19)~~ (20) For any licensee or any agent, servant, or employee of any licensee to knowingly
101 violate any rule lawfully promulgated by the commissioner in accordance with the provisions of
102 chapter 29A of this code.

103 (b) Any person who violates any provision of this article including, but not limited to, any
104 provision of this section, or any rule, or order lawfully promulgated by the commissioner, or who
105 makes any false statement concerning any material fact in submitting application for license or
106 for a renewal of a license or in any hearing concerning the revocation thereof, or who commits
107 any of the acts herein declared to be unlawful is guilty of a misdemeanor and, upon conviction
108 thereof, shall be punished for each offense by a fine of not less than \$25, nor more than \$500, or
109 confined in the county or regional jail for not less than 30 days nor more than six months, or by
110 both fine and confinement. Magistrates have concurrent jurisdiction with the circuit court and any
111 other courts having criminal jurisdiction in their county for the trial of all misdemeanors arising
112 under this article.

113 (c) (1) A Class B licensee that:

114 (A) Has installed a transaction scan device on its licensed premises; and

115 (B) Can demonstrate that it requires each employee, servant, or agent to verify the age of
116 any individual to whom nonintoxicating beer is sold, furnished, or given away by the use of the
117 transaction device may not be subject to: (i) Any criminal penalties whatsoever, including those
118 set forth in subsection (b) of this section; (ii) any administrative penalties from the commissioner;
119 or (iii) any civil liability whatsoever for the improper sale, furnishing, or giving away of
120 nonintoxicating beer to an individual who is less than 21 years of age by one of his or her
121 employees, servants, or agents. Any agent, servant, or employee who has improperly sold,
122 furnished or given away nonintoxicating beer to an individual less than 21 years of age is subject
123 to the criminal penalties of subsection (b) of this section. Any agent, servant, or employee who
124 has improperly sold, furnished, or given away nonintoxicating beer to an individual less than 21

125 years of age is subject to termination from employment, and the employer shall have no civil
126 liability for the termination.

127 (2) For purposes of this section, a Class B licensee can demonstrate that it requires each
128 employee, servant, or agent to verify the age of any individual to whom nonintoxicating beer is
129 sold by providing evidence: (A) That it has developed a written policy which requires each
130 employee, servant, or agent to verify the age of each individual to whom nonintoxicating beer will
131 be sold, furnished, or given away; (B) that it has communicated this policy to each employee,
132 servant, or agent; and (C) that it monitors the actions of its employees, servants, or agents
133 regarding the sale, furnishing, or giving away of nonintoxicating beer and that it has taken
134 corrective action for any discovered noncompliance with this policy.

135 (3) "Transaction scan" means the process by which a person checks, by means of a
136 transaction scan device, the age, and identity of the cardholder, and "transaction scan device"
137 means any commercial device or combination of devices used at a point of sale that is capable
138 of deciphering in an electronically readable format the information enclosed on the magnetic strip
139 or bar code of a driver's license or other governmental identity card.

140 (d) Nothing in this article nor any rule ~~or regulation~~ of the commissioner shall prevent or
141 be considered to prohibit any licensee from employing any person who is at least 18 years of age
142 to serve in the licensee's lawful employ, including the sale or delivery of nonintoxicating beer as
143 defined in this article. With the prior approval of the commissioner, a licensee whose principal
144 business is the sale of food or consumer goods or the providing of recreational activities, including,
145 but not limited to, nationally franchised fast food outlets, family oriented restaurants, bowling
146 alleys, drug stores, discount stores, grocery stores, and convenience stores, may employ persons
147 who are less than 18 years of age but at least 16 years of age: *Provided*, That the person's duties
148 may not include the sale or delivery of nonintoxicating beer or alcoholic liquors: *Provided*,
149 *however*, That the authorization to employ persons under the age of 18 years shall be clearly
150 indicated on the licensee's license.

§11-16-22. Powers of the commissioner; rules, or orders.

1 (a) In addition to all other powers conferred upon the commissioner and in order to
2 effectively carry out the provisions, intent and purposes of this article, the commissioner shall
3 have the power and authority to adopt, promulgate, repeal, rescind and amend, in accordance
4 with the provisions of chapter 29A of this code, rules, standards, requirements and orders,
5 including, but not limited to, the following:

6 (1) Prescribing records and accounts, pertaining to the manufacture, distribution and sales
7 of nonintoxicating beer, to be kept by the licensee and the form thereof;

8 (2) Requiring the reporting of such information by licensees as may be necessary for the
9 effective administration of this article;

10 (3) Regulating the branding and labeling of packages, bottles or other containers in which
11 nonintoxicating beer may be sold; and, in his or her discretion, requiring the collection of all taxes
12 provided for under §11-16-13 of this code;

13 (4) Prohibiting shipment into the state and sale within the state of low grade or under-
14 standard nonintoxicating beer;

15 (5) Referring to licenses and the issuance and revocation of the same;

16 (6) Establishing the suitability of businesses and locations for licensure, and requiring
17 licensees to keep their places of business where nonintoxicating beer is sold at retail, and the
18 equipment used in connection therewith, clean and in a sanitary condition;

19 ~~(7) The establishment of advertising guidelines, prohibitions and prior permissions~~
20 ~~generally, including, but not limited to, (i) the use of posters, placards, mirrors, windows, doors or~~
21 ~~indoor and outdoor signs generally, and print and electronic advertising of retail licensees~~
22 ~~specifically, (ii) the sponsoring of athletic events or contests by licensees and restrictions relating~~
23 ~~thereto, (iii) the use of equipment, fixtures or supplies in advertising, (iv) false advertising with~~
24 ~~respect to any product of or sold by any licensee, including, but not limited to, draft beer and~~
25 ~~coolers and (v) the extent, if any, to which free goods and other inducements may be utilized by~~

26 ~~any licensee~~ Restricting the content of advertising so as to prohibit false, misleading, or deceptive
27 claims, depictions or descriptions of nonintoxicating beer being consumed irresponsibly or
28 immoderately, or advertising presentations designed to appeal to persons below the legal drinking
29 age: *Provided*, That the commissioner may not promulgate any rule which prohibits the
30 advertising of a particular brand or brands of nonintoxicating beer and the price thereof, which
31 restricts or prohibits:

32 (A) The advertising medium or equipment used;

33 (B) The services provided by any manufacturer or distributor; or

34 (C) Signage except for exterior signage governed by §17-22-1 et seq. of this code.

35 (8) Wholesale prices or price changes, including, but not limited to, the regulation and
36 extent, if any, of any temporary price markoff or markdown, temporary wholesale price change
37 downward or price discount, sometimes referred to as “post downs” or as “posting down” or any
38 other price change, the express purpose of which is to put into effect a temporary price reduction,
39 as well as the duration of time during which such temporary price reduction is to remain in effect;

40 (9) Restrictions upon West Virginia distributors or other licensees with respect to the
41 purchase of any nonintoxicating beer or malt coolers from manufacturers or brewers whether
42 within or without the state who have failed to qualify for manufacture or shipment of any such
43 product in the state; and

44 (10) Regulating, restricting or prohibiting a distributor from selling, offering for sale,
45 distributing or delivering nonintoxicating beer to any retailer whose principal place of business,
46 residence or licensed premises is located without or beyond the assigned territory of such
47 distributor of such nonintoxicating beer.

48 ~~(b) Any rule or order heretofore adopted by the commissioner and currently in effect upon~~
49 ~~the convening of the regular session of the Legislature held in the year one thousand nine hundred~~
50 ~~eighty six shall remain in effect until changed by the commissioner in the manner prescribed by~~

51 ~~article three, chapter twenty nine a of this code, irrespective of whether specific authority for such~~
52 ~~currently effective rule existed prior to such date~~

53 (b) The commission may not promulgate or enforce any rule that restricts the equipment
54 or services provided by, offered to, or used by any entity licensed by the commission except for
55 health and sanitation.

CHAPTER 60. STATE CONTROL OF ALCOHOLIC LIQUORS.

ARTICLE 2. ALCOHOL BEVERAGE CONTROL COMMISSIONER.

§60-2-15. Regulation of advertising.

1 The commission shall prescribe ~~regulations~~ rules governing the advertising of alcoholic
2 liquors in this state. The ~~regulations shall~~ rules may only prohibit advertising that encourages
3 intemperance, induces minors to purchase, or tends to deceive or misrepresent.

ARTICLE 8. SALE OF WINES.

§60-8-23. Duties and powers of commissioner; rules.

1 (a) The commissioner is authorized:

2 (1) To enforce the provisions of this article.

3 (2) To enter the premises of any licensee at reasonable times for the purpose of inspecting
4 the premises and determining the compliance of the licensee with the provisions of this article
5 and any rules promulgated by the commissioner.

6 (3) In addition to rules relating to the tax imposed by §60-8-4 of this code or otherwise
7 authorized by this article, to promulgate reasonable rules as he or she deems necessary for the
8 execution and enforcement of the provisions of this article, which may include, but shall not be
9 limited to:

10 (A) The transport, use, handling, service and sale of wine;

11 (B) Establishing standards of identity, quality and purity to protect the public against wine
12 containing deleterious, harmful or impure substances or elements and against spurious or
13 imitation wines and wines unfit for human consumption; and

14 (C) Restricting the content of wine advertising so as to prohibit false or misleading claims,
15 or depictions or descriptions of wine being consumed irresponsibly or immoderately, or
16 advertising presentations designed to appeal to persons below the legal drinking age: *Provided*,
17 That the commissioner shall not promulgate any rule which prohibits the advertising of a particular
18 brand or brands of wine and the price thereof, or which prohibits or restricts the advertising
19 medium used: *Provided, however*, That price shall not be advertised in a medium of electronic
20 communication subject to the jurisdiction of the Federal Communications Commission.

21 (4) To issue subpoenas and subpoenas duces tecum for the purpose of conducting
22 hearings under the provisions of §60-8-12 of this code, which subpoenas and subpoenas duces
23 tecum shall be issued in the time, for the fees, and shall be enforced in the manner specified in
24 §29A-5-1 of this code with like effect as if said section was set forth in extenso in this subdivision.

25 (b) The authority granted in this subsection and subsections (a) and (d) of this section may
26 also be exercised by the duly authorized or designated agents of the commissioner.

27 (c) Except as may be in this article to the contrary, the commissioner shall not have
28 authority by rule or otherwise to regulate markups, prices, discounts, allowances or other terms
29 of sale at which wine may be purchased or sold by wine distributors or licensees authorized to
30 sell wine at retail but nothing herein shall be deemed to authorize or permit any discriminatory
31 practice prohibited by §60-8-31(a), of this code or any other discriminatory practice.

32 (d) All rules promulgated by the commissioner pursuant to this article shall be so
33 promulgated in accordance with the provisions of chapter 29A of this code. The rules promulgated
34 pursuant to the prior enactment of this article and not disapproved by the Legislature shall remain
35 in full force and effect to the extent that such rules are not abrogated and made null and void by
36 the reenactment of the sections of this article during the regular session of the Legislature for
37 1986. Any rule which is inconsistent or contrary in any way to any provision of this article now or
38 hereafter enacted are null and void.

NOTE: The purpose of this bill is to limit the Alcohol Beverage Control Commissioner's authority to restrict advertising, equipment, or services provided by or offered to licensees.

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