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WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2003



ENROLLED

House Bill No. 2748

(By Delegates Perdue and Hatfield)



Passed March 8, 2003

In Effect Ninety Days from Passage

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WEST VIRGINIA
SHARPLESS

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H. B. 2748

(BY DELEGATES PERDUE AND HATFIELD)

[Passed March 8, 2003; in effect ninety days from passage.]

AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto two new articles, designated articles nine-d and nine-e, all relating to restricting delivery sales of tobacco products and prohibiting possession of counterfeit cigarettes; defining terms; specifying requirements for verification of age and identity of purchasers; requiring notices to consumers; establishing requirements for shipping and shippers; establishing requirements for registration and reporting to the department of tax and revenue; requiring payment of taxes; providing for forfeiture of tobacco products and personal property; prohibiting the possession or sale of counterfeit cigarettes; and providing for civil and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto two new articles, designated articles nine-d and nine-e, all to read as follows:

ARTICLE 9D. DELIVERY SALES OF TOBACCO.

§16-9D-1. Definitions.

1 For purposes of this article:

2 (a) “Adult” means a person who is at least the legal
3 minimum purchase age, as defined by article nine-A, section
4 two of this chapter.

5 (b) “Consumer” means an individual who does not hold a
6 business registration certificate in this state for the business of
7 selling tobacco products as a wholesale or retail dealer.

8 (c) “Delivery sale” means any sale of cigarettes to a
9 consumer in this state where either: (1) The purchaser submits
10 the order for such sale by means of a telephonic or other
11 method of voice transmission, the mails or any other delivery
12 service, or the internet or other online service; or (2) the
13 cigarettes are delivered by use of the mails or a delivery
14 service. A sale of cigarettes shall be a delivery sale regardless
15 of whether or not the seller is located within this state. A sale of
16 cigarettes not for personal consumption to a person who holds
17 a business registration certificate as a wholesale dealer or a
18 retail dealer shall not be a delivery sale.

19 (d) “Delivery service” means any person who is engaged in
20 the commercial delivery of letters, packages, or other contain-
21 ers.

22 (e) “Department” means the state tax department.

23 (f) “Legal minimum purchase age” is at least eighteen years
24 of age as defined by article nine-A, section two of this chapter
25 for the purchase of cigarettes in this state.

26 (g) “Mails” or “mailing” means the shipment of cigarettes
27 through the United States postal service.

28 (h) "Shipping container" means a container in which
29 cigarettes are shipped in connection with a delivery sale.

30 (i) "Shipping documents" means bills of lading, airbills, or
31 any other documents used to evidence the undertaking by a
32 delivery service to deliver letters, packages, or other containers.

§16-9D-2. Requirements for delivery sales.

1 (a) No person shall make a delivery sale of cigarettes to any
2 individual who is under the legal minimum purchase age in this
3 state.

4 (b) Each person accepting a purchase order for a delivery
5 sale shall comply with:

6 (1) The age verification requirements set forth in section
7 three of this article;

8 (2) The disclosure requirements set forth in subdivision (3)
9 of subsection (a) of section three of this article;

10 (3) The shipping requirements set forth in section four of
11 this article;

12 (4) The registration and reporting requirements set forth in
13 section five of this article;

14 (5) The tax collection requirements set forth in section six
15 of this article; and

16 (6) All other laws of this state generally applicable to sales
17 of cigarettes that occur entirely within this state, including, but
18 not limited to, those laws imposing: (i) Excise taxes; (ii) sales
19 taxes; (iii) license and revenue-stamping requirements; and (iv)
20 escrow or other payment obligations.

§16-9D-3. Age verification requirements.

1 (a) No person shall mail, ship, or otherwise deliver ciga-
2 rettes in connection with a delivery sale unless prior to the first
3 delivery sale to a consumer, the person:

4 (1) Obtains from the prospective consumer a certification
5 that includes a reliable confirmation that the consumer is at
6 least the legal minimum purchase age and a statement signed by
7 the prospective consumer in writing that certifies the prospec-
8 tive consumer's address and that the consumer is at least
9 eighteen years of age. The statement shall also confirm (i) that
10 the prospective consumer understands that it is illegal to sign
11 another person's name to the certification, (ii) that the sale of
12 cigarettes to individuals under the legal minimum purchase age
13 is illegal, and (ii) that the purchase of cigarettes by individuals
14 under the legal minimum purchase age is illegal under the laws
15 of this state;

16 (2) Verifies the information contained in the certification
17 provided by the prospective consumer against an appropriate
18 database of government records available to the distributor or
19 seller, or obtains simultaneous with the certificate as provided
20 for in subdivision (1), a photocopy or other image of the valid,
21 government-issued identification stating the date of birth or age
22 of the individual placing the order;

23 (3) Sends to the prospective consumer, via e-mail or other
24 means, a notice that contains: (A) A prominent and clearly
25 legible statement that cigarette sales to a consumer below the
26 legal minimum purchase age is illegal, (B) A prominent and
27 clearly legible statement that consists of one of the warnings set
28 forth in section 4(a)(1) of the federal Cigarette Labeling and
29 Advertising Act, 15 U.S.C. § 1333(a)(1), rotated on a quarterly
30 basis, (C) A prominent and clearly legible statement that sales
31 of cigarettes are restricted to those consumers who provide
32 verifiable proof of age in accordance with section three of this
33 article, and (D) A prominent and clearly legible statement that
34 cigarette sales are subject to excise and sales taxes in this state,

35 and an explanation of how such taxes have been, or are to be,
36 paid with respect to the delivery sale.

37 (4) In the case of an order for cigarettes pursuant to an
38 advertisement on the internet, receives payment for the delivery
39 sale from the prospective consumer by a credit or debit card or
40 check that has been issued in the consumer's name.

41 (b) Persons accepting purchase orders for delivery sales
42 may request that prospective consumers provide their e-mail
43 addresses.

§16-9D-4. Shipping requirements.

1 (a) Each person who mails, ships, or otherwise delivers
2 cigarettes in connection with a delivery sale:

3 (1) Shall include as part of the bill of lading or other
4 shipping documents a clear and conspicuous statement provid-
5 ing as follows: "Cigarettes: West Virginia Law Prohibits
6 Shipping to Individuals Under 18, and Requires the Payment of
7 all Applicable Taxes";

8 (2) Shall use a method of mailing, shipping, or delivery that
9 obligates the delivery service to require (i) the consumer
10 placing the purchase order for the delivery sale, or another adult
11 of legal minimum purchase age, to sign to accept delivery of the
12 shipping container, and (ii) proof, in the form of a valid,
13 government-issued identification bearing a photograph of the
14 individual who signs to accept delivery of the shipping con-
15 tainer, demonstrating that he is either the addressee or another
16 adult of legal minimum purchase age; and

17 (3) Shall provide to the delivery service retained for such
18 delivery sale evidence of full compliance with section seven of
19 this article.

20 (b) A delivery service shall be in violation of this article if
21 it (1) ships or otherwise delivers cigarettes in connection with
22 a delivery sale without first receiving evidence of compliance
23 with section seven of this article; or (2) fails to comply with the
24 requirements described in subsection (a) or described in section
25 six of this article:

26 (1) When obligated to do so under a method of shipping or
27 delivery;

28 (2) When delivering any container pursuant to shipping
29 documents containing the statement described in subdivision
30 one of subsection (a) of this section; or

31 (3) When delivering any container that the delivery service
32 otherwise has reason to know contains cigarettes.

33 (c) If the person accepting a purchase order for a delivery
34 sale delivers the cigarettes without using a delivery service, that
35 person shall comply with all requirements of this article
36 applicable to a delivery service and shall be in violation of the
37 provisions of this article upon failure to comply with the
38 requirements.

§16-9D-5. Registration and reporting requirements.

1 (a) Prior to making delivery sales or mailing, shipping, or
2 otherwise delivering cigarettes in connection with any such
3 sales, every person shall file with the department a statement
4 setting forth the seller's name, trade name, and the address of
5 the seller's principal place of business and any other place of
6 business.

7 (b) Not later than the tenth day of each calendar month,
8 each person that has made a delivery sale or mailed, shipped, or
9 otherwise delivered cigarettes in connection with any such sale
10 during the previous calendar month shall file with the depart-

11 ment a memorandum or a copy of the invoice that provides for
12 each and every delivery sale:

13 (1) The name and address of the consumer to whom the
14 delivery sale was made;

15 (2) The brand or brands of the cigarettes that were sold in
16 the delivery sale; and

17 (3) The quantity of cigarettes that were sold in the delivery
18 sale.

19 (c) Any person that satisfies the requirements of 15 U.S.C.
20 §376 shall be deemed to satisfy the requirements of this section.

§16-9D-6. Collection of taxes.

1 Each person accepting a purchase order for a delivery sale
2 shall collect and remit to the department all cigarette taxes
3 imposed by this state with respect to such delivery sale, except
4 that the collection and remission shall not be required to the
5 extent the person has obtained proof, in the form of the pres-
6 ence of applicable tax stamps or otherwise, that the taxes
7 already have been paid to this state.

§16-9D-7. Penalties.

1 (a) Except as otherwise provided in this section, a first
2 violation of any provision of this article shall be a misdemeanor
3 and punishable by a fine of five hundred dollars or five times
4 the retail value of the cigarettes involved, whichever is greater.

5 (b) Any person who knowingly violates any provision of
6 this article, or who knowingly and falsely submits a certifica-
7 tion under section three of this article in another person's name,
8 shall be guilty of a misdemeanor be fined one thousand dollars

9 or ten times the retail value of the cigarettes involved, which-
10 ever is greater, or confined not more than six months, or both.

11 (c) Any person failing to collect or remit to the department
12 any tax required in connection with a delivery sale shall be
13 assessed, in addition to any other penalty, a penalty of five
14 times the retail value of the cigarettes involved.

15 (d) Any cigarettes sold or attempted to be sold in a delivery
16 sale that does not meet the requirements of this article shall be
17 forfeited to this state and destroyed. All fixtures, equipment,
18 and all other materials and personal property on the premises of
19 any person who, with the intent to defraud this state, violates
20 any of the requirements of this article, shall be forfeited to this
21 state.

§16-9D-8. Enforcement.

1 For violations of this article resulting in a delivery of
2 tobacco products in this state, the prosecuting attorney of the
3 county where the delivery is made shall have the power to
4 prosecute the violation and to bring any action necessary to
5 prevent further violations. The attorney general or any person
6 who holds a valid permit under 26 U.S.C. § 5712 may bring any
7 actions required to enforce all other requirements of this article
8 and to prevent all other violations of its provisions.

ARTICLE 9E. COUNTERFEIT CIGARETTES.

§16-9E-1. Definition.

1 As used in this article, “counterfeit cigarettes” means
2 cigarettes that (a) have false manufacturing labels, (b) are not
3 manufactured by the manufacturer indicated on the container,
4 or (c) have a false tax stamp affixed to the container.

§16-9E-2. Prohibition of counterfeit cigarettes.

1 It shall be unlawful for any person to knowingly possess or
2 sell counterfeit cigarettes, and all counterfeit cigarettes and the
3 equipment, materials and personal property used in substantial
4 connection with a knowing violation of this article may be
5 seized and destroyed by any law enforcement agency of this
6 state.

§16-9E-3. Penalties.

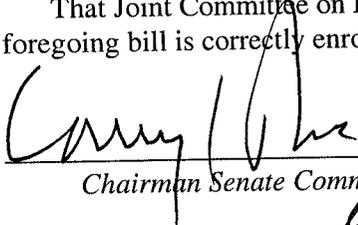
1 (a)Any person who knowingly violates the provisions of
2 this article with a total quantity of less than two cartons of
3 cigarettes shall, for the first offense, be punished by a civil
4 penalty of no more than one thousand dollars, and for a second
5 or subsequent offense involving a total quantity of less than two
6 cartons of cigarettes shall be punished by a civil penalty of no
7 more than five thousand dollars and the revocation for a period
8 of six months of any business held by the person.

9 (b)Any person who knowingly violates the provisions of
10 this article with a total quantity of two or more cartons of
11 cigarettes shall, for the first offense, be punished by a civil
12 penalty of no more than two thousand dollars, and for a second
13 or subsequent offense involving a total quantity of two or more
14 cartons of cigarettes shall be punished by a civil penalty of no
15 more than fifty thousand dollars and the revocation for a period
16 of one year of any business registration certificate held by the
17 person.

§16-9E-4. Enforcement.

1 The attorney general, the prosecuting attorney for the
2 county in which counterfeit cigarettes are found or any person
3 who holds a valid permit under 26 U.S.C. § 5712 may bring an
4 action in the circuit court of that county to prevent or restrain
5 violations of this article by any person, or any person control-
6 ling that person.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



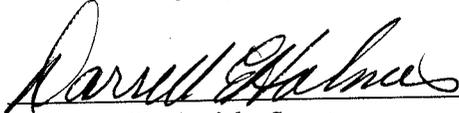
Chairman Senate Committee



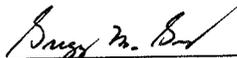
Chairman House Committee

Originating in the House.

In effect ninety days from passage



Clerk of the Senate



Clerk of the House of Delegates

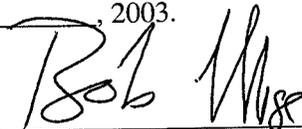


President of the Senate



Speaker of the House of Delegates

The within is approved this the 1st
day of April, 2003.



Governor

PRESENTED TO THE
GOVERNOR

Date 3/26/03

Time 3:50 pm