

1 **Senate Bill No. 25**

2 (By Senator Foster)

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4 [Introduced January 12, 2011; referred to the Committee on Health
5 and Human Resources; and then to the Committee on Finance.]

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10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §16-9G-1, §16-9G-2,
12 §16-9G-3, §16-9G-4, §16-9G-5, §16-9G-6, §16-9G-7, §16-9G-8,
13 §16-9G-9, §16-9G-10, §16-9G-11, §16-9G-12, §16-9G-13, §16-9G-
14 14, §16-9G-15 and §16-9G-16, all relating to the Smoke Free
15 West Virginia Act; providing definitions; prohibiting smoking
16 in public places of employment and government vehicles;
17 prohibiting smoking in student dormitories; designating other
18 nonsmoking areas; providing exemptions; providing for
19 enforcement; violations and penalties; local regulation;
20 prohibiting smoking around entrances, exits, windows and
21 ventilation intakes; and rules.

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

23 That the Code of West Virginia, 1931, as amended, be amended
24 by adding thereto a new article, designated §16-9G-1, §16-9G-2,

1 §16-9G-3, §16-9G-4, §16-9G-5, §16-9G-6, §16-9G-7, §16-9G-8, §16-9G-
2 9, §16-9G-10, §16-9G-11, §16-9G-12, §16-9G-13, §16-9G-14, §16-9G-15
3 and §16-9G-16, all to read as follows:

4 **ARTICLE 9G. SMOKE FREE WEST VIRGINIA ACT.**

5 **§16-9G-1. Short title.**

6 This article is to be called the "Smoke Free West Virginia
7 Act."

8 **§16-9G-2. Legislative findings.**

9 (a) The West Virginia Legislature finds that tobacco smoke is
10 a harmful and dangerous carcinogen to human beings and a hazard to
11 public health. Secondhand tobacco smoke causes at least sixty-five
12 thousand deaths each year from heart disease and lung cancer
13 according to the National Cancer Institute. Secondhand tobacco
14 smoke causes heart disease, stroke, cancer, sudden infant death
15 syndrome, low-birth-weight in infants, asthma and exacerbation of
16 asthma, bronchitis and pneumonia in children and adults.
17 Secondhand tobacco smoke is the third leading cause of preventable
18 death in the United States. West Virginia workers exposed to
19 secondhand tobacco smoke are at an increased risk of premature
20 death. An estimated five hundred fifty West Virginia citizens die
21 each year from exposure to secondhand tobacco smoke.

22 (b) The West Virginia Legislature finds that the United States
23 Surgeon General's 2006 report has determined that there is no risk-
24 free level of exposure to secondhand smoke; the scientific evidence

1 that secondhand smoke causes serious diseases, is massive and
2 conclusive; separating smokers from nonsmokers, cleaning the air
3 and ventilating buildings cannot eliminate secondhand smoke
4 exposure; smoke-free workplace policies are effective in reducing
5 secondhand smoke exposure; and smoke-free workplace policies do not
6 have an adverse economic impact on the hospitality industry.

7 (c) The West Virginia Legislature also finds that the
8 Environmental Protection Agency has determined that secondhand
9 smoke cannot be reduced to safe levels in businesses by high rates
10 of ventilation. Air cleaners, which are capable only of filtering
11 the particulate matter and odors in smoke, do not eliminate the
12 known toxins in secondhand smoke. The American Society of Heating,
13 Refrigerating and Air-Conditioning Engineers (ASHRAE) bases its
14 ventilation standards on totally smoke-free environments because it
15 cannot determine a safe level of exposure to secondhand smoke,
16 which contains cancer-causing chemicals, and ASHRAE acknowledges
17 that technology does not exist that can remove chemicals that cause
18 cancer from the air. On June 30, 2005, an ASHRAE position paper on
19 secondhand smoke concluded that, at present, the only means of
20 eliminating health risks associated with indoor exposure is to
21 eliminate all smoking activity indoors.

22 **§16-9G-3. Definitions.**

23 As used in this article:

24 (1) "Bar" means an establishment that is devoted to the

1 serving of alcoholic beverages for consumption by guests on the
2 premises and that derives no more than ten percent of its gross
3 revenue from the sale of food consumed on the premises. "Bar"
4 includes, but is not limited to, taverns, nightclubs, cocktail
5 lounges, adult entertainment facilities, and cabarets.

6 (2) "Department" means the Department of Health and Human
7 Resources.

8 (3) "Employee" means a person who is employed by an employer
9 in consideration for direct or indirect monetary wages or profits
10 or a person who volunteers his or her services for a nonprofit
11 entity.

12 (4) "Employer" means a person, business, partnership,
13 association, or corporation, including a municipal corporation,
14 trust, or nonprofit entity, that employs the services of one or
15 more individual persons.

16 (5) "Enclosed area" means all space between a floor and a
17 ceiling that is enclosed or partially enclosed with: (i) Solid
18 walls or windows, exclusive of doorways; or (ii) solid walls with
19 partitions and no windows, exclusive of doorways, that extend from
20 the floor to the ceiling, including, without limitation, lobbies
21 and corridors.

22 (6) "Enclosed or partially enclosed sports arena" means any
23 sports pavilion, stadium, gymnasium, health spa, boxing arena,
24 swimming pool, roller rink, ice rink, bowling alley, or other

1 similar place where members of the general public assemble to
2 engage in physical exercise or participate in athletic competitions
3 or recreational activities or to witness sports, cultural,
4 recreational, or other events.

5 (7) "Gaming equipment or supplies" means gaming equipment or
6 supplies regulated by the West Virginia Lottery Commission,
7 including, but not limited to, gaming tables, cards, dice, chips,
8 shufflers, drop boxes or any other mechanical, electronic or other
9 device or video lottery game.

10 (8) "Gaming facility" means an establishment where gaming
11 equipment or supplies are operated for the purposes of accruing
12 business revenue.

13 (9) "Healthcare facility" means an office or institution
14 providing care or treatment of diseases, whether physical, mental,
15 or emotional, or other medical, physiological, or psychological
16 conditions, including, but not limited to, hospitals,
17 rehabilitation hospitals, weight control clinics, nursing homes,
18 homes for the aging or chronically ill, laboratories, and offices
19 of surgeons, chiropractors, physical therapists, physicians,
20 dentists, and all specialists within these professions.
21 "Healthcare facility" includes all waiting rooms, hallways, private
22 rooms, semiprivate rooms, and wards within healthcare facilities.

23 (10) "Place of employment" means any area under the control of
24 a public or private employer that employees are required to enter,

1 leave, or pass through during the course of employment, including,
2 but not limited to, entrances and exits to places of employment,
3 including a minimum distance, as set forth in section fifteen of
4 this article, of fifteen feet from entrances, exits, windows that
5 open, and ventilation intakes that serve an enclosed area where
6 smoking is prohibited; offices and work areas; restrooms;
7 conference and classrooms; break rooms and cafeterias; and other
8 common areas. A private residence or home-based business, unless
9 used to provide licensed child care, foster care, adult care, or
10 other similar social service care on the premises, is not a "place
11 of employment".

12 (11) "Private club" means a not-for-profit association that:

13 (A) Has been in active and continuous existence for at least
14 three years prior to the effective date of this article, whether
15 incorporated or not;

16 (B) The owner, lessee, or occupant of a building or portion
17 thereof used exclusively for club purposes at all times;

18 (C) Is operated solely for a recreational, fraternal, social,
19 patriotic, political, benevolent, or athletic purpose, but not for
20 pecuniary gain;

21 (D) Only sells alcoholic beverages incidental to its
22 operation; and

23 (E) Is managed by a board of directors, executive committee,
24 or similar body chosen by the members at an annual meeting, has

1 established bylaws, a Constitution, or both to govern its
2 activities, and has been granted an exemption from the payment of
3 federal income tax as a club under 26 U.S.C. 501.

4 (12) "Private residence" means the part of a structure used as
5 a dwelling, including, without limitation: A private home,
6 townhouse, condominium, apartment, mobile home, vacation home,
7 cabin, or cottage. For the purposes of this definition, a hotel,
8 motel, inn, resort, lodge, bed and breakfast or other similar
9 public accommodation, hospital, nursing home, or assisted living
10 facility shall not be considered a private residence.

11 (13) "Public place" means that portion of any building or
12 vehicle used by and open to the public, regardless of whether the
13 building or vehicle is owned, in whole or in part, by private
14 persons or entities, the State of West Virginia, or any other
15 public entity and regardless of whether a fee is charged for
16 admission, including a minimum distance, as set forth in section
17 fifteen of this article, of fifteen feet from entrances, exits,
18 windows that open, and ventilation intakes that serve an enclosed
19 area where smoking is prohibited. A "public place" does not
20 include a private residence unless the private residence is used to
21 provide licensed child care, foster care, or other similar social
22 service care on the premises. A "public place" includes, but is
23 not limited to, hospitals, restaurants, retail stores, offices,
24 commercial establishments, elevators, indoor theaters, libraries,

1 museums, concert halls, public conveyances, educational facilities,
2 nursing homes, Auditoriums, enclosed or partially enclosed sports
3 arenas, meeting rooms, schools, exhibition halls, convention
4 facilities, polling places, private clubs, gaming facilities, all
5 government owned vehicles and facilities, including buildings and
6 vehicles owned, leased, or operated by the state or state
7 subcontract, healthcare facilities or clinics, enclosed shopping
8 centers, retail service establishments, financial institutions,
9 educational facilities, ticket areas, public hearing facilities,
10 public restrooms, waiting areas, lobbies, bars, taverns, bowling
11 alleys, skating rinks, reception areas, and no less than seventy-
12 five percent of the sleeping quarters within a hotel, motel,
13 resort, inn, lodge, bed and breakfast, or other similar public
14 accommodation that are rented to guests, but excludes private
15 residences.

16 (14) "Restaurant" means:

17 (A) An eating establishment, including, but not limited to,
18 coffee shops, cafeterias, sandwich stands, and private and public
19 school cafeterias, that gives or offers for sale food to the
20 public, guests or employees; and

21 (B) A kitchen or catering facility in which food is prepared
22 on the premises for serving elsewhere. "Restaurant" includes a bar
23 area within the restaurant.

24 (15) "Retail tobacco store" means a retail establishment that

1 derives more than eighty percent of its gross revenue from the sale
2 of loose tobacco, plants, or herbs and cigars, cigarettes, pipes,
3 and other smoking devices for burning tobacco and related smoking
4 accessories and in which the sale of other products is merely
5 incidental. "Retail tobacco store" does not include a tobacco
6 department or section of a larger commercial establishment or any
7 establishment with any type of liquor, food or restaurant license.

8 (16) "Smoke" or "smoking" means the carrying, smoking,
9 burning, inhaling or exhaling of any kind of lighted pipe, cigar,
10 cigarette, hookah, weed, herbs, or any other lighted smoking
11 equipment.

12 (17) "State agency" means a state governmental entity,
13 including any bureau, department, division, commission, agency,
14 committee, office, board, authority, subdivision, program, council,
15 advisory body, cabinet, panel, system, task force, fund, compact,
16 institution, survey, position, coalition or other entity in the
17 State of West Virginia.

18 (18) "Unit of local government" means any unit of local
19 government within the state, including a county, county board of
20 education, municipality, and any other authority, board,
21 commission, district, office, public authority, public corporation,
22 or other instrumentality of a county, county board of education, or
23 municipality or any combination of two or more local governments.

24 **§16-9G-4. Smoking in public places, places of employment and**

1 **governmental vehicles prohibited.**

2 No person may smoke in a public place or in any place of
3 employment or within fifteen feet of any entrance to a public place
4 or place of employment. No person may smoke in any vehicle owned,
5 leased or operated by the state or a political subdivision of the
6 state. Smoking is prohibited in indoor public places and
7 workplaces unless specifically exempted by section eight of this
8 article.

9 **§16-9G-5. Posting of signs; removal of ashtrays.**

10 (a) "No Smoking" signs or a sign consisting of a pictorial
11 representation of a burning cigarette enclosed in a red circle with
12 a red bar across it, shall be clearly and conspicuously posted in
13 each public place and place of employment where smoking is
14 prohibited by this article by the owner, operator, manager or other
15 person in control of that place.

16 (b) Each public place and place of employment where smoking is
17 prohibited by this article shall have posted at every entrance a
18 conspicuous sign clearly stating that smoking is prohibited.

19 (c) All ashtrays shall be removed from any area where smoking
20 is prohibited by this article by the owner, operator, manager or
21 other person having control of the area.

22 **§16-9G-6. Smoking prohibited in student dormitories.**

23 Notwithstanding any other provision of this article, smoking
24 is prohibited in any portion of the living quarters, including, but

1 not limited to, sleeping rooms, dining areas, restrooms, laundry
2 areas, lobbies and hallways of a building used, in whole or in
3 part, as a student dormitory that is owned and operated or
4 otherwise used by a public or private institution of higher
5 education.

6 **§16-9G-7. Designation of other nonsmoking areas.**

7 Notwithstanding any other provision of this article, an
8 employer, owner, occupant, lessee, operator, manager, or other
9 person in control of any public place or place of employment may
10 designate a nonenclosed area of a public place or place of
11 employment, including outdoor areas, as an area where smoking is
12 also prohibited provided that such employer, owner, lessee or
13 occupant shall conspicuously post signs prohibiting smoking in the
14 manner described in section five of this article.

15 **§16-9G-8. Exemptions.**

16 Notwithstanding any other provision of this article, smoking
17 is allowed in the following areas:

18 (1) Private residences or dwelling places, except when used as
19 a child care, adult day care, or healthcare facility or any other
20 home-based business open to the public.

21 (2) Retail tobacco stores as defined in section three of this
22 article in operation prior to the effective date of this article.

23 The retail tobacco store shall annually file with the department by
24 the January 31 an affidavit stating the percentage of its gross

1 income during the prior calendar year that was derived from the
2 sale of loose tobacco, plants, or herbs and cigars, cigarettes,
3 pipes or other smoking devices for smoking tobacco and related
4 smoking accessories. Any retail tobacco store that begins
5 operation after the effective date of this article may only qualify
6 for an exemption if located in a freestanding structure occupied
7 solely by the business and smoke from business does not migrate
8 into an enclosed area where smoking is prohibited.

9 (3) Private and multiprivate rooms in nursing homes and long-
10 term care facilities that are occupied by one or more persons, all
11 of whom are smokers and have requested in writing to be placed or
12 to remain in a room where smoking is permitted and the smoke shall
13 not infiltrate other areas of the nursing home.

14 (4) Hotel and motel sleeping rooms that are rented to guests
15 and are designated as smoking rooms, provided that all smoking
16 rooms on the same floor must be contiguous and smoke from these
17 rooms must not infiltrate into nonsmoking rooms or other areas
18 where smoking is prohibited. Not more than twenty-five percent of
19 the rooms rented to guests in a hotel or motel may be designated as
20 rooms where smoking is allowed. The status of rooms as smoking or
21 nonsmoking may not be changed, except to permanently add additional
22 nonsmoking rooms.

23 **§16-9G-9. Enforcement; complaints.**

24 (a) The department, state certified local board of health and

1 local law-enforcement agencies shall enforce the provisions of this
2 article and may assess fines pursuant to section ten of this
3 article.

4 (b) Any person may register a complaint with the department,
5 a state certified local board of health or local law-enforcement
6 agency for a violation of this article. The department shall
7 establish a telephone number that a person may call to register a
8 complaint under this article.

9 **§16-9G-10. Violations.**

10 (a) A person, corporation, partnership, association or other
11 entity who violates section four of this article shall be fined
12 pursuant to this section. Each day that a violation occurs is a
13 separate and additional fine.

14 (b) A person who smokes in an area where smoking is prohibited
15 under section four of this article shall be fined in an amount that
16 is not less than \$100 and not more than \$250. A person who owns,
17 operates or otherwise controls a public place or place of
18 employment that violates section four of this article shall be
19 fined:

20 (1) Not less than \$250 for the first violation;

21 (2) Not less than \$500 for the second violation within one
22 year after the first violation; and

23 (3) Not less than \$2,500 for each additional violation within
24 one year after the first violation.

1 (c) A fine imposed under this section shall be allocated as
2 follows:

3 (1) One half of the fine is distributed to the department; and

4 (2) One half of the fine is distributed to the enforcing
5 agency.

6 **§16-9G-11. Injunctions.**

7 The department, a state certified local board of health, local
8 law-enforcement agency or any individual personally affected by
9 repeated violations may institute, in a circuit court, an action to
10 enjoin violations of this article.

11 **§16-9G-12. Discrimination prohibited.**

12 No individual may be discriminated against in any manner
13 because of the exercise of any rights afforded by this article.

14 **§16-9G-13. Severability.**

15 If a provision, clause or paragraph of this article is held
16 invalid by a court of law, such validity shall not affect the other
17 provisions of this article.

18 **§16-9G-14. Local regulation.**

19 (a) Any unit of local government may regulate smoking in
20 public places, but that regulation must be no less restrictive than
21 this article.

22 (b) In addition to any regulation authorized under subsection

23 (a) any unit of local government, may regulate smoking in any

1 enclosed indoor area used by the public or serving as a place of
2 work if the area does not fall within the definition of a "public
3 place" under section three of this article.

4 **§16-9G-15. Entrance, exits, windows and ventilation intakes.**

5 Smoking is prohibited within a minimum distance of fifteen
6 feet from entrances, exits, windows that open and ventilation
7 intakes that serve an enclosed area where smoking is prohibited
8 under this article so as to ensure that tobacco smoke does not
9 enter the area through entrances, exits, open windows or other
10 means.

11 **§16-9G-16. Rules.**

12 The department shall propose legislative rules for approval by
13 the Legislature in accordance with the provisions of article three,
14 chapter twenty-nine-a of this code, necessary for the
15 administration of this article.

NOTE: The purpose of this bill is to enact the Smoke Free West Virginia Act, prohibiting smoking in public places, places of employment and government vehicles.

§16-9G-1 through §16-9G-16 are new; therefore, strike-throughs and underscoring have been omitted.