

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4237**

4 (By Delegates Lawrence, Barrett, Guthrie, Skinner, Perdue,
5 Campbell, Marshall, Poore, Fleischauer, Staggers and Evans,A)

6 (Originating in the Committee on the Judiciary)

7
8 [February 7, 2014]

9
10 A BILL to amend and reenact §16-9A-2, §16-9A-3, §16-9A-6, §16-9A-7
11 and §16-9A-8 of the Code of West Virginia, 1931, as amended,
12 all relating to restrictions placed on products containing
13 nicotine; defining vapor products and alternative nicotine
14 products; exclusions; limiting the use of and sale of vapor
15 products and alternative nicotine products to persons under
16 the age of eighteen in the same manner as tobacco and tobacco
17 products; prohibiting the sale or furnishing of vapor products
18 and alternative nicotine products to individuals under
19 eighteen years of age; prohibiting the use and possession of
20 vapor products or alternative nicotine product by an
21 individual under eighteen years of age; allowing employers to
22 dismiss an employee for cause for the knowing or intentional
23 sale or furnishing of vapor products or alternative nicotine
24 products to someone under the age of eighteen; allowing for
25 the conduct of unannounced inspections to ensure compliance
26 with sales restrictions; restricting the use of vapor products

1 and alternative nicotine products on school grounds;
2 restricting the sale of vapor products and alternative
3 nicotine products in vending machines; criminal penalties;
4 civil penalties; defenses and rulemaking.

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

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

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

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

18 (a) In this article:

19 (1) "Alternative nicotine product" means any non-combustible
20 product containing nicotine that is intended for human consumption,
21 whether chewed, absorbed, dissolved or ingested by any other means.
22 "Alternative nicotine product" does not include any tobacco
23 product, vapor product or product regulated as a drug or device by
24 the United States Food and Drug Administration under Chapter V of
25 the Food, Drug and Cosmetic Act.

1 (2) "Tobacco product" means any product, including cigarettes,
2 cigars, pipe tobacco, snuff and chewing tobacco, that is made of
3 tobacco and is intended for human consumption. "Tobacco product"
4 does not include any alternative nicotine product, vapor product or
5 product that is regulated by the United States Food and Drug
6 Administration under Chapter V of the Food, Drug and Cosmetic Act.

7 (3) "Vapor product" means any noncombustible product
8 containing nicotine that employs a heating element, power source,
9 electronic circuit, or other electronic, chemical or mechanical
10 means, regardless of shape and size, that can be used to produce
11 vapor from nicotine in a solution or other form. "Vapor product"
12 includes any electronic cigarette, electronic cigar, electronic
13 cigarillo, electronic pipe, or similar product or device, and any
14 vapor cartridge or other container of nicotine in a solution or
15 other form that is intended to be used with or in an electronic
16 cigarette, electronic cigar, electronic cigarillo, electronic pipe,
17 or similar product or device. "Vapor product" does not include any
18 product that is regulated by the United States Food and Drug
19 Administration under Chapter V of the Food, Drug and Cosmetic Act.

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

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

26 (2) Any cigar, cigarette, snuff, chewing tobacco or tobacco

1 product, in any form; or

2 (3) Any alternative nicotine product or any vapor product.

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

17 ~~(c)~~(d) Any individual who knowingly and intentionally sells,
18 gives or furnishes or causes to be sold, given or furnished to any
19 person under the age of eighteen years any cigar, cigarette, snuff,
20 chewing tobacco or tobacco product, in any form, or any alternative
21 nicotine product or any vapor product is guilty of a misdemeanor
22 and, upon conviction thereof, for the first offense shall be fined
23 not more than \$100; upon conviction thereof for a second or
24 subsequent offense, is guilty of a misdemeanor and shall be fined
25 not less than \$100 nor more than \$500.

26 ~~(d)~~ (e) Any employer who discovers that his or her employee

1 has sold or furnished tobacco products, alternative nicotine
2 products or vapor products to minors may dismiss such employee for
3 cause. Any such discharge shall be considered as "gross
4 misconduct" for the purposes of determining the discharged
5 employee's eligibility for unemployment benefits in accordance with
6 the provisions of section three, article six, chapter twenty-one-a
7 of this code, if the employer has provided the employee with prior
8 written notice in the workplace that such act or acts may result in
9 their termination from employment.

10 **§16-9A-3. Use or possession of tobacco or tobacco products,**
11 **alternative nicotine products or vapor products by**
12 **persons under the age of eighteen years; penalties.**

13 No person under the age of eighteen years shall have on or
14 about his or her person or premises or use any cigarette, or
15 cigarette paper or any other paper prepared, manufactured or made
16 for the purpose of smoking any tobacco products, in any form; ~~or,~~
17 any pipe, snuff, chewing tobacco, ~~or~~ tobacco product, alternative
18 nicotine product or vapor product: *Provided*, That minors
19 participating in the inspection of locations where tobacco
20 products, alternative nicotine products or vapor products are sold
21 or distributed pursuant to section seven of this article is not
22 considered to violate the provisions of this section. Any person
23 violating the provisions of this section shall for the first
24 violation be fined \$50 and be required to serve eight hours of
25 community service; for a second violation, the person shall be

1 fined \$100 and be required to serve sixteen hours of community
2 service; and for a third and each subsequent violation, the person
3 shall be fined \$200 and be required to serve twenty-four hours of
4 community service. Notwithstanding the provisions of section two,
5 article five, chapter forty-nine, the magistrate court has
6 concurrent jurisdiction.

7 **§16-9A-4. Use of tobacco, tobacco products, alternative nicotine**
8 **products or vapor products in certain areas of certain**
9 **public schools prohibited; penalty.**

10 Every person who shall smoke a cigarette or cigarettes, pipe,
11 cigar or other implement, of any type or nature, designed, used or
12 employed for smoking any tobacco or tobacco product; or who shall
13 use any tobacco product, ~~whether chewing tobacco, snuff or~~
14 ~~otherwise~~ alternative nicotine product or vapor product in any
15 building or part thereof used for instructional purposes, in any
16 school of this state, as defined in section one, article one,
17 chapter eighteen of this code, or on any lot or grounds actually
18 used for instructional purposes of any such school of this state
19 while such school is used or occupied for school purposes, shall be
20 guilty of a misdemeanor, and, upon conviction thereof, shall be
21 punished for each offense by a fine of not less than one nor more
22 than five dollars: *Provided*, That this prohibition shall not be
23 construed to prevent the use of any tobacco or tobacco product,
24 alternative nicotine product or vapor product in any faculty lounge
25 or staff lounge or faculty office or other area of said public

1 school not used for instructional purposes: *Provided, however,* That
2 students do not have access thereto: *Provided further,* That nothing
3 herein contained shall be construed to prevent any county board of
4 education from promulgating rules and regulations that further
5 restrict the use of tobacco or tobacco products, in any form, or
6 alternative nicotine products or vapor products from any other part
7 or section of any public school building under its jurisdiction.

8 **§16-9A-7. Enforcement of youth smoking laws and youth nicotine**
9 **restrictions; inspection of retail outlets where**
10 **tobacco, tobacco products, vapor products or**
11 **alternative nicotine products are sold; use of minors**
12 **in inspections; annual reports; penalties; defenses.**

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

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

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

25 (3) Such person carefully checked a driver's license or an
26 identification card issued by this state or another state of the

1 United States, a passport or a United States armed services
2 identification card presented by the buyer or recipient and acted
3 in good faith and in reliance upon the representation and appearance
4 of the buyer or recipient in the belief that the buyer or recipient
5 was eighteen years of age or older.

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

20 (d) The Commissioner of the West Virginia Alcohol Beverage
21 Control Administration or his or her designee shall prepare and
22 submit to the Governor on the last day of September of each year a
23 report of the enforcement and compliance activities undertaken
24 pursuant to this section and the results of the same, with a copy
25 to the Secretary of the West Virginia Department of Health and Human
26 Resources. The report shall be in the form and substance that the

1 Governor shall submit to the applicable state and federal programs.

2 **§16-9A-8. Selling of tobacco products, alternative nicotine**
3 **products or vapor products in vending machines**
4 **prohibited except in certain places.**

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