

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Engrossed

Committee Substitute

for

Committee Substitute

for

Senate Bill 348

SENATORS TAKUBO, MARONEY, PREZIOSO, STOLLINGS,
JEFFRIES, WOELFEL, IHLENFELD, BALDWIN, AND CLINE,

original sponsors

[Originating in the Committee on the Judiciary;

Reported on February 23, 2019]

1 A BILL to amend and reenact §16-9A-1, §16-9A-2, §16-9A-3, §16-9A-4, §16-9A-7, and §16-9A-8
2 of the Code of West Virginia, 1931, as amended; and to amend said code by adding
3 thereto four new sections, designated §16-9A-11, §16-9A-12, §16-9A-13, and §16-9A-14,
4 all relating to tobacco; providing legislative intent; defining terms; raising the legal age
5 from 18 years of age to 21 years for the selling, furnishing, or distribution of tobacco
6 products and increasing penalties for violations; making it illegal for a person under the
7 age of 21 to purchase tobacco products or tobacco-derived products and providing for
8 suspension of driving privileges or a fine; increasing the penalty for certain tobacco-related
9 offenses on public school property; exempting any active duty military personnel over the
10 age of 18; exempting veterans' organizations from rules regulating smoking in indoor
11 spaces adopted by local boards of health; prohibiting political subdivisions from legislating
12 regarding the sale or marketing of tobacco products or tobacco-related products if contrary
13 to state law; requiring certain facilities to provide for smoking and nonsmoking sections;
14 and providing for a secondary offense of driving and using a tobacco product or a tobacco-
15 derived product with a passenger under the age of 17 and providing for a fine.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9A. TOBACCO USAGE RESTRICTIONS.

§16-9A-1. Legislative intent.

1 The Legislature hereby declares it to be the policy and intent of this state to discourage
2 and ban the use of tobacco products by minors. As the basis for this policy, the Legislature hereby
3 finds and accepts the medical evidence that smoking tobacco may cause lung cancer, heart
4 disease, emphysema, and other serious health problems while the use of smokeless tobacco may
5 cause gum disease and oral cancer. It is the further intent of the Legislature to reduce tobacco
6 use by keeping tobacco products out of the hands of youth and young adults in banning ~~the use~~
7 ~~of tobacco products by minors~~ the sale of tobacco products to persons under the age of 21 to

8 ease the personal tragedy and eradicate the severe economic loss associated with the use of
9 tobacco and to provide the state with a citizenry free from the use of tobacco.

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

1 (a) For purposes of this article, the term:

2 (1) "Tobacco product" and "tobacco-derived product" means any product, containing,
3 made, or derived from tobacco, or containing nicotine derived from tobacco, that is intended for
4 human consumption, whether smoked, breathed, chewed, absorbed, dissolved, inhaled,
5 vaporized, snorted, sniffed or ingested by any other means, including, but not limited to,
6 cigarettes, cigars, cigarillos, ~~little cigars~~, pipe tobacco, snuff, snus, chewing tobacco, or other
7 common tobacco-containing products. A "tobacco-derived product" includes ~~electronic cigarettes~~
8 e-cigarettes or similar devices, alternative nicotine products, heated tobacco products, and vapor
9 products. "Tobacco product" or "tobacco-derived product" does not include any product that is
10 regulated by the United States Food and Drug Administration under Chapter V of the Food, Drug
11 and Cosmetic Act.

12 (2) "Alternative nicotine product" means any noncombustible product containing nicotine
13 that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by
14 any other means. "Alternative nicotine product" does not include any tobacco product, vapor
15 product, or product regulated as a drug or device by the United States Food and Drug
16 Administration under Chapter V of the Food, Drug and Cosmetic Act.

17 (3) "Vapor product" means any noncombustible product containing nicotine that employs
18 a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical
19 means, regardless of shape and size, that can be used to produce vapor from nicotine in a solution

20 or other form. "Vapor product" includes any ~~electronic cigarette~~ e-cigarette, electronic cigar,
21 electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other
22 container of nicotine in a solution or other form that is intended to be used with or in an ~~electronic~~
23 ~~eigarette~~ e-cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or
24 device. "Vapor product" does not include any product that is regulated by the United States Food
25 and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

26 (4) "Heated tobacco product" means a product containing tobacco or any other solid
27 substance containing nicotine (collectively tobacco) that produces an inhalable aerosol: (i) By
28 heating the tobacco by means of an electronic device without combustion of the tobacco; or (ii)
29 by heat generated from a combustion source that only or primarily heats rather than burns the
30 tobacco.

31 (5) "E-cigarette" means an electrical or electronic device that provides a smoke, vapor,
32 fog, mist, gas, or aerosol suspension of nicotine or another substance that, when used or inhaled,
33 simulates the activity of smoking. The term e-cigarette includes, but is not limited to, a device that
34 is composed of a heating element, battery, or electrical or electronic circuit, or a combination of a
35 heating element, battery, and electrical or electronic circuit, which works in combination with e-
36 liquid to produce an inhalable product. The term e-cigarette includes, but is not limited to, any so
37 designed, or similarly designed, product that is manufactured, distributed, marketed, or sold as
38 an e-cigarette, e-cigar, e-pipe, or under any other name or descriptor. The term "simulates the
39 activity of smoking", in the context of this definition, means replicating, mimicking, or reproducing
40 an experience similar to inhaling, or otherwise drawing into the mouth or nose, or exhaling the
41 smoke or combustion product of burning tobacco or any other product or material that can be
42 used in a similar fashion.

43 (b) ~~No~~ A person, firm, corporation, or business entity may not sell, give, or furnish, or cause
44 to be sold, given, or furnished, to any person under the age of ~~48~~ 21 years:

45 (1) Any pipe, cigarette paper, or any other paper prepared, manufactured, or made for the
46 purpose of smoking any tobacco or tobacco product;

47 (2) Any ~~cigar, cigarette, snuff, chewing tobacco, or~~ tobacco product, in any form; or

48 (3) Any tobacco-derived product, alternative nicotine product, or vapor product.

49 (c) Any person, firm, or corporation that violates ~~any of the provisions of~~ subsection (b) of
50 this section ~~and any individual who violates any of the provisions of subsection (b) of this section~~
51 is guilty of a misdemeanor and, upon conviction thereof, shall be fined ~~\$50~~ \$300 for the first
52 offense. Upon any subsequent violation at the same location or operating unit, the person, firm,
53 corporation, or individual shall be fined as follows: At least ~~\$250~~ \$600 but not more than ~~\$500~~
54 the second offense, if it occurs within two years of the first conviction; at least ~~\$500~~ \$1,000 but
55 ~~not more than \$750~~ for the third offense, if it occurs within two years of the first conviction; and at
56 least \$1,000 but not more than \$5,000 for any subsequent offenses, if the subsequent offense
57 occurs within five years of the first conviction.

58 ~~(d) Any individual who knowingly and intentionally sells, gives or furnishes or causes to be~~
59 ~~sold, given or furnished to any person under the age of eighteen years any cigar, cigarette, snuff,~~
60 ~~chewing tobacco, tobacco product or tobacco-derived product, in any form, is guilty of a~~
61 ~~misdemeanor and, upon conviction thereof, for the first offense shall be fined not more than \$100;~~
62 ~~upon conviction thereof for a second or subsequent offense, is guilty of a misdemeanor and shall~~
63 ~~be fined not less than \$100 nor more than \$500~~

64 ~~(e)~~ (d) Any employer who discovers that his or her employee has sold or furnished tobacco
65 products or tobacco-derived products ~~to minors~~ to persons under the age of 21 may dismiss ~~such~~
66 that employee for cause. Any ~~such~~ discharge shall be considered as "gross misconduct" for the
67 purposes of determining the discharged employee's eligibility for unemployment benefits in
68 accordance with ~~the provisions of §21A-6-3 of this code, if the employer has provided the~~
69 employee with prior written notice in the workplace that ~~such~~ the act or acts may result in ~~their~~ his
70 or her termination from employment.

~~§16-9A-3. Use or possession~~ Purchase of tobacco or tobacco products, alternative nicotine products, or vapor products by persons under the age of 18 21 years; penalties.

1 A person under the age of 18 21 years ~~shall not have on or about his or her person or~~
2 ~~premises or use~~ may not purchase any cigarette, or cigarette paper, or any other paper prepared,
3 manufactured, or made for the purpose of smoking any tobacco products, in any form; any pipe,
4 snuff, chewing tobacco, tobacco product, or tobacco-derived product: *Provided*, That minors
5 participating in the inspection of locations where tobacco products or tobacco-derived products
6 are sold or distributed pursuant to §16-9A-7 of this code are not considered to violate the
7 provisions of this section. Any person violating the provisions of this section who has a valid West
8 Virginia driver's license shall have his or her driver's license suspended for 30 days. Any person
9 violating the provisions of this section who does not have a valid West Virginia driver's license
10 ~~shall for the first violation be fined \$50. and be required to serve eight hours of community service;~~
11 ~~for a second violation, the person shall be fined \$100 and be required to serve 16 hours of~~
12 ~~community service; and for a third and each subsequent violation, the person shall be fined \$200~~
13 ~~and be required to serve 24 hours of community service. Notwithstanding the provisions of §49-~~
14 ~~4-701 of this code, the magistrate court has concurrent jurisdiction.~~

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

1 Every person who ~~shall smoke~~ smokes a cigarette or cigarettes, pipe, cigar, or other
2 implement, of any type or nature, designed, used, or employed for smoking any tobacco or
3 tobacco product; or who ~~shall use~~ uses any tobacco product, or tobacco-derived product in any
4 building or part thereof of a building used for instructional purposes, in any school of this state, as
5 defined in §18-1-1 of this code, or on any lot or grounds actually used for instructional purposes
6 of any ~~such~~ school of this state while ~~such~~ the school is used or occupied for school purposes,
7 ~~shall be~~ is guilty of a misdemeanor and, upon conviction thereof, shall be punished for each
8 offense by a fine of not less than \$1 nor more than ~~five dollars~~ \$25: *Provided*, That this prohibition

9 ~~shall not be construed to~~ does not prevent the use of any tobacco, or tobacco product, or tobacco-
10 derived product in any faculty lounge, or staff lounge, or faculty office or other area of ~~said a~~ public
11 school not used for instructional ~~purposes~~ purposes. ~~Provided, however, That if~~ students do not
12 have access thereto to the faculty lounge, staff lounge, or faculty office. ~~Provided further, That~~
13 ~~nothing herein contained shall be construed to~~ This section does not prevent any county board of
14 education from promulgating rules ~~and regulations~~ that further restrict the use of tobacco
15 products, or tobacco-derived products, in any form, from any other part or section of any public
16 school building under its jurisdiction.

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

1 (a) The Commissioner of the West Virginia Alcohol Beverage Control Administration, the
2 Superintendent of the West Virginia State Police, the sheriffs of the counties of this state and the
3 chiefs of police of municipalities of this state may periodically conduct unannounced inspections
4 at locations where tobacco products or tobacco-derived products, are sold or distributed to ensure
5 compliance with the provisions of §16-9A-2 ~~and three~~ of this article code and in ~~such a~~ manner
6 ~~as to conform~~ that conforms with applicable federal and state laws, rules, and regulations.
7 Persons under the age of ~~eighteen~~ 21 years may be enlisted by ~~such~~ the commissioner,
8 superintendent, sheriffs or chiefs of police or employees or agents thereof to test compliance with
9 ~~these sections~~ that section: *Provided*, That the ~~minors~~ persons under the age of 21 may be used
10 to test compliance only if the testing is conducted under the direct supervision of the
11 commissioner, superintendent, sheriffs or chiefs of police, or employees or agents thereof and
12 written consent of the parent or guardian of ~~such~~ that person is first obtained. ~~and such minors~~
13 ~~shall not be in violation of section three of this article and chapter when acting under the direct~~
14 ~~supervision of the commissioner, superintendent, sheriffs or chiefs of police, or employees or~~

15 ~~agents thereof and with the written consent of the parent or guardian.~~ It is unlawful for any person
16 to use persons under the age of ~~eighteen~~ 21 years to test compliance in any manner not set forth
17 ~~herein in this subsection~~ and the person ~~so~~ using a minor is guilty of a misdemeanor and, upon
18 conviction thereof, shall be fined the same amounts as set forth in §16-9A-2 of this code.

19 (b) A person charged with a violation of §16-9A-2 ~~and three of this article~~ code as the
20 result of an inspection under subsection (a) of this section has a complete defense if, at the time
21 the ~~cigarette, other tobacco product, or tobacco-derived product, or cigarette wrapper~~ was sold,
22 delivered, bartered, furnished, or given, ~~(1) The~~ the buyer or recipient falsely evidenced that he
23 or she was ~~eighteen~~ 21 years of age or older.

24 ~~(2) The appearance of the buyer or recipient was such that a prudent person would believe~~
25 ~~the buyer or recipient to be eighteen years of age or older; and~~

26 ~~(3) Such person carefully checked a driver's license or an identification card issued by this~~
27 ~~guilty of a misdemeanor and, upon conviction thereof, shall be fined the same amounts as set~~
28 ~~forth in section two of this article.~~

29 ~~state or another state of the United States, a passport or a United States armed services~~
30 ~~identification card presented by the buyer or recipient and acted in good faith and in reliance upon~~
31 ~~the representation and appearance of the buyer or recipient in the belief that the buyer or recipient~~
32 ~~was eighteen years of age or older.~~

33 (c) Any fine collected after a conviction of violating §16-9A-2 of this code shall be paid to
34 the clerk of the court in which the conviction was obtained: *Provided*, That the clerk of the court
35 upon receiving the fine shall promptly notify the Commissioner of the West Virginia Alcohol
36 Beverage Control Administration of the conviction and the collection of the fine. *Provided*,
37 ~~however~~, That any ~~community service penalty imposed after a conviction of violating §16-9A-3 of~~
38 ~~this code shall be recorded by the clerk of the court in which the conviction was obtained: *Provided*~~
39 ~~further~~, That the clerk of the court upon being advised that community service obligations have
40 been fulfilled shall promptly notify the Commissioner of the West Virginia Alcohol Beverage

41 ~~Control Administration of the conviction and the satisfaction of imposed community service~~
42 ~~penalty.~~

43 (d) The Commissioner of the West Virginia Alcohol Beverage Control Administration or his
44 or her designee shall prepare and submit to the Governor on the last day of September of each
45 year a report of the enforcement and compliance activities undertaken pursuant to this section
46 and the results of the same, with a copy to the Secretary of the West Virginia Department of
47 Health and Human Resources. The report shall be in the form and substance that the Governor
48 ~~shall submit~~ submits to the applicable state and federal programs.

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

1 ~~No~~ A person or business entity may not offer for sale any cigarette, tobacco product, or
2 tobacco-derived product in a vending machine. Any person or business entity which violates the
3 provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined
4 ~~\$250~~ \$1,000: *Provided*, That an establishment is exempt from this prohibition if ~~individuals~~
5 persons under the age of ~~eighteen~~ 21 years are not permitted to be in the establishment or if the
6 establishment is licensed by the Alcohol Beverage Control Commissioner as a Class A licensee.
7 The Alcohol Beverage Control Commissioner shall ~~promulgate rules~~ propose rules for
8 promulgation pursuant to §29A-3-1 *et seq.* of this code to establish standards for the location and
9 control of the vending machines in Class A licensed establishments for the purpose of restricting
10 access by ~~minors~~ persons under the age of 21.

§16-9A-11. Applicability.

1 The provisions of this article do not apply to the sale, giving, or furnishing of any tobacco
2 product or tobacco-derived product as defined in §16-9A-2 of this code, to any active duty military
3 personnel who are 18 years of age or older. The Commissioner of the West Virginia Alcohol
4 Beverage Control Administration, the Superintendent of the West Virginia State Police, the

5 sheriffs of the counties of this state, and the chiefs of police of municipalities of this state shall
6 accept an identification card issued by any branch of the armed forces of the United States as
7 proof of age for this purpose.

§16-9A-12. Secondary offense of smoking in a car with a passenger under the age of 17.

1 A person may not smoke any tobacco product or any tobacco-derived product while
2 operating a passenger vehicle on a public street or highway of this state, if any of the passengers
3 in the vehicle are under 17 years of age. Any person who violates the provisions of this section
4 shall be fined \$25. Court costs or other fees may not be assessed for a violation of this section.
5 Enforcement of this section shall be accomplished only as a secondary action when a driver of a
6 passenger vehicle has been detained for probable cause for violating another section of this code.