

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

**Introduced**

### **House Bill 4388**

BY DELEGATES HAMRICK, J. JEFFERIES AND C. MARTIN

[Introduced January 16, 2020; Referred to the  
Committee on Government Organization]

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

39 ~~(8)~~ (7) For any licensee except the holder of a license to operate a private club issued  
40 under the provisions of §60-7-1 *et seq.* of this code or a holder of a license or a private wine  
41 restaurant issued under the provisions of §60-8-1 *et seq.* of this code to possess a federal license,  
42 tax receipt or other permit entitling, authorizing, or allowing the licensee to sell liquor or alcoholic  
43 drinks other than nonintoxicating beer;

44 ~~(9)~~ (8) For any licensee to obstruct the view of the interior of his or her premises by  
45 enclosure, lattice, drapes, or any means which would prevent plain view of the patrons occupying  
46 the premises. The interior of all licensed premises shall be adequately lighted at all times:  
47 *Provided, That provisions of this subdivision do not apply to the premises of a Class B retailer,*  
48 *the premises of a private club licensed under the provisions of §60-7-1 et seq. of this code, or the*  
49 *premises of a private wine restaurant licensed under the provisions of §60-8-1 et seq. of this code;*

50 ~~(10)~~ (9) For any licensee to manufacture, import, sell, trade, barter, possess, or acquiesce

51 in the sale, possession, or consumption of any alcoholic liquors on the premises covered by a  
52 license or on premises directly or indirectly used in connection with it: *Provided*, That the  
53 prohibition contained in this subdivision with respect to the selling or possessing or to the  
54 acquiescence in the sale, possession, or consumption of alcoholic liquors is not applicable with  
55 respect to the holder of a license to operate a private club issued under the provisions of §60-7-  
56 1 *et seq.* of this code nor shall the prohibition be applicable to a private wine restaurant licensed  
57 under the provisions of §60-8-1 *et seq.* of this code insofar as the private wine restaurant is  
58 authorized to serve wine;

59 ~~(44)~~ (10) For any retail licensee to sell or dispense nonintoxicating beer, as defined in this  
60 article, purchased, or acquired from any source other than a distributor, brewer, or manufacturer  
61 licensed under the laws of this state;

62 ~~(42)~~ (11) For any licensee to permit loud, boisterous, or disorderly conduct of any kind  
63 upon his or her premises or to permit the use of loud musical instruments if either or any of the  
64 same may disturb the peace and quietude of the community where the business is located:  
65 *Provided*, That a licensee may have speaker systems for outside broadcasting so long as the  
66 noise levels do not create a public nuisance or violate local noise ordinances;

67 ~~(43)~~ (12) For any person whose license has been revoked, as provided in this article, to  
68 obtain employment with any retailer within the period of one year from the date of the revocation,  
69 or for any retailer to knowingly employ that person within the specified time;

70 ~~(44)~~ (13) For any distributor to sell, possess for sale, transport, or distribute nonintoxicating  
71 beer except in the original container;

72 ~~(45)~~ (14) For any licensee to knowingly permit any act to be done upon the licensed  
73 premises, the commission of which constitutes a crime under the laws of this state;

74 ~~(46)~~ (15) For any Class B retailer to permit the consumption of nonintoxicating beer upon  
75 his or her licensed premises;

76 ~~(47)~~ (16) For any Class A licensee, his, her, its or their servants, agents, or employees, or

77 for any licensee by or through any servants, agents, or employees, to allow, suffer, or permit any  
78 person less than 18 years of age to loiter in or upon any licensed premises; except, however, that  
79 the provisions of this subdivision do not apply where a person under the age of 18 years is in or  
80 upon the premises in the immediate company of his or her parent or parents, or where and while  
81 a person under the age of 18 years is in or upon the premises for the purpose of and actually  
82 making a lawful purchase of any items or commodities therein sold, or for the purchase of and  
83 actually receiving any lawful service therein rendered, including the consumption of any item of  
84 food, drink or soft drink therein lawfully prepared and served or sold for consumption on the  
85 premises;

86 ~~(18)~~ (17) For any distributor to sell, offer for sale, distribute, or deliver any nonintoxicating  
87 beer outside the territory assigned to any distributor by the brewer or manufacturer of  
88 nonintoxicating beer or to sell, offer for sale, distribute, or deliver nonintoxicating beer to any  
89 retailer whose principal place of business or licensed premises is within the assigned territory of  
90 another distributor of such nonintoxicating beer: *Provided*, That nothing in this section is  
91 considered to prohibit sales of convenience between distributors licensed in this state where one  
92 distributor sells, transfers, or delivers to another distributor a particular brand or brands for sale  
93 at wholesale; and

94 ~~(19)~~ (18) For any licensee or any agent, servant, or employee of any licensee to knowingly  
95 violate any rule lawfully promulgated by the commissioner in accordance with the provisions of  
96 chapter 29A of this code.

97 (b) Any person who violates any provision of this article including, but not limited to, any  
98 provision of this section, or any rule, or order lawfully promulgated by the commissioner, or who  
99 makes any false statement concerning any material fact in submitting application for license or  
100 for a renewal of a license or in any hearing concerning the revocation thereof, or who commits  
101 any of the acts herein declared to be unlawful is guilty of a misdemeanor and, upon conviction  
102 thereof, shall be punished for each offense by a fine of not less than \$25, nor more than \$500, or

103 confined in ~~the county or regional~~ jail for not less than 30 days nor more than six months, or by  
104 both fine and confinement. Magistrates have concurrent jurisdiction with the circuit court and any  
105 other courts having criminal jurisdiction in their county for the trial of all misdemeanors arising  
106 under this article.

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

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

109 (B) Can demonstrate that it requires each employee, servant, or agent to verify the age of  
110 any individual to whom nonintoxicating beer is sold, furnished, or given away by the use of the  
111 transaction device may not be subject to: (i) Any criminal penalties whatsoever, including those  
112 set forth in subsection (b) of this section; (ii) any administrative penalties from the commissioner;  
113 or (iii) any civil liability whatsoever for the improper sale, furnishing, or giving away of  
114 nonintoxicating beer to an individual who is less than 21 years of age by one of his or her  
115 employees, servants, or agents. Any agent, servant, or employee who has improperly sold,  
116 furnished or given away nonintoxicating beer to an individual less than 21 years of age is subject  
117 to the criminal penalties of subsection (b) of this section. Any agent, servant, or employee who  
118 has improperly sold, furnished, or given away nonintoxicating beer to an individual less than 21  
119 years of age is subject to termination from employment, and the employer shall have no civil  
120 liability for the termination.

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

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

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