

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2085

BY DELEGATE ROHRBACH

[Introduced February 10, 2021; Referred to the
Committee on Prevention and Treatment of
Substance Abuse then Health and Human Resources
then the Judiciary]

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 a new section, designated §16-9A-11, all relating to tobacco usage restrictions;
4 modifying legislative intent; modifying definitions; prohibiting persons under the age of 21
5 from purchasing tobacco products, tobacco derived products, or alternative nicotine
6 products; making it a misdemeanor to use tobacco products, tobacco derived products, or
7 alternative nicotine products in a building used for school instruction; prohibiting sales of
8 tobacco products, tobacco derived products, or alternative nicotine products by firm,
9 corporation, or entity to person under age 21; providing criminal penalties for sales of
10 tobacco products, tobacco derived products, or alternative nicotine products; providing
11 employer authority to terminate employment of employee who violates section; making
12 the sale of tobacco products, tobacco derived products, or alternative nicotine products
13 permissible reason for dismissal of employee; establishing that an employee's sale of
14 tobacco products, tobacco derived products, or alternative nicotine products to persons
15 under 21 be considered gross misconduct for purposes of unemployment compensation;
16 designating the Bureau for Behavioral Health of the Department of Health and Human
17 Resources as the entity responsible to enforce tobacco laws and conduct compliance
18 inspections; and prohibit sales of tobacco products, tobacco derived products, or
19 alternative nicotine products in a display independently accessible by individuals under
20 the age of 21.

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 basis for this policy, the Legislature hereby
3 finds and accepts the medical evidence that smoking tobacco or using tobacco or tobacco-derived

4 products may cause lung cancer, lung or heart disease, emphysema, and other serious health
 5 problems while the use of smokeless tobacco may cause gum disease and oral cancer. It is the
 6 further intent of the Legislature to reduce tobacco use by keeping tobacco products out of the
 7 hands of youths and young adults in banning ~~the use of tobacco products by minors~~ the provision
 8 of tobacco products to persons under age 21 to ease the personal tragedy and eradicate the
 9 severe economic loss associated with the use of tobacco and to provide the state with a citizenry
 10 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, 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 or~~ "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 nicotine
 8 delivery systems (ENDS), such as electronic cigarettes, e-cigarettes, or similar devices;
 9 waterpipes, hookah pens, or similar devices; alternative nicotine products; heated tobacco
 10 products; and vapor products, such as vapes, vaporizers, vape pens, vaping device, and any
 11 variation of these terms. "Tobacco product" or "tobacco-derived product" does not include any
 12 product that is ~~regulated~~ approved by the United States Food and Drug Administration under
 13 Chapter V of the Food, Drug and Cosmetic Act either as a tobacco use cessation product or for
 14 other medical purposes and which is being marketed and sold or prescribed solely for such

15 approved purpose.

16 (2) “Electronic nicotine delivery system (ENDS),” “electronic cigarette,” or “e-cigarette”
17 means an electrical or electronic device that provides a smoke, fog, mist, gas, or aerosol
18 suspension of nicotine or another substance that, when inhaled or used, simulates the activity of
19 smoking.

20 ~~(2)~~ (3) “Alternative nicotine product” means synthetic nicotine; any non-combustible
21 product containing tobacco-derived nicotine that is intended for human consumption, whether
22 chewed, absorbed, dissolved or ingested by any other means; and any nicotine liquid solution or
23 other substance that contains nicotine, or a derivation of nicotine, that is depleted when
24 consumed. “Alternative nicotine product” does not include any tobacco product, vapor product, or
25 product ~~regulated as a drug or device~~ approved by the United States Food and Drug
26 Administration under Chapter V of the Food, Drug and Cosmetic Act either as a tobacco use
27 cessation product or for other medical purposes and which is being marked and sold or prescribed
28 solely for such approved purpose.

29 (4) “Heated tobacco product” means a product containing tobacco or any other solid
30 substance containing nicotine that produces an inhalable aerosol.

31 ~~(3)~~ (5) “Vapor product” means any non-combustible product containing nicotine that
32 employs a heating element, power source, electronic circuit or other electronic, chemical or
33 mechanical means, regardless of shape and size, that can be used to produce vapor from nicotine
34 in a solution or other form. “Vapor product” includes any electronic cigarette, e-cigarette,
35 electronic cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor
36 cartridge or other container of nicotine in a solution or other form that is intended to be used with
37 or in an electronic cigarette, e-cigarette, electronic cigar, electronic cigarillo, electronic pipe, or
38 similar product or device. “Vapor product” does not include any product that is ~~regulated~~ approved
39 by the United States Food and Drug Administration under Chapter V of the Food, Drug and
40 Cosmetic Act either as a tobacco cessation product or for other medical purposes and which is

41 being marketed and sold or prescribed solely for such approved purpose.

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

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

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

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

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

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

63 ~~(e) Any employer who discovers that his or her employee has sold or furnished tobacco~~
64 ~~products or tobacco-derived products to minors may dismiss such employee for cause. Any such~~
65 ~~discharge shall be considered as "gross misconduct" for the purposes of determining the discharged~~
66 ~~employee's eligibility for unemployment benefits in accordance with the provisions of section three,~~

67 ~~article six, chapter twenty-one-a of this code, if the employer has provided the employee with prior~~
68 ~~written notice in the workplace that such act or acts may result in their termination from employment~~

**§16-9A-3. ~~Use or possession~~ Purchase of tobacco, ~~or tobacco-derived~~ products, or
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~~ purchase or attempt to purchase tobacco product, tobacco-derived products,
3 alternative nicotine products, any cigarette, or cigarette paper, or any other paper prepared,
4 manufactured or made for the purpose of smoking any tobacco products, in any form; any pipe,
5 snuff, chewing tobacco, tobacco product, or tobacco-derived product: *Provided,* That minors
6 persons under the age of 21 participating in the inspection of locations where tobacco, products
7 ~~or tobacco-derived products, or alternative nicotine products~~ are sold or distributed pursuant to
8 §16-9A-7 of this code is not considered to violate the provisions of this section. Any person
9 violating the provisions of this section shall for the first violation be fined \$50 and be required to
10 serve eight hours of community service; for a second violation, the person shall be fined \$100
11 and be required to serve 16 hours of community service; and for a third and each subsequent
12 violation, the person shall be fined \$200 and be required to serve 24 hours of community service.
13 ~~Notwithstanding~~ Persons under the age of 18 shall be subject to the concurrent jurisdiction of the
14 magistrate court in accordance with the provisions of §49-4-701 of this code. the magistrate court
15 ~~has concurrent jurisdiction~~

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

1 Every person who shall ~~smoke a cigarette or cigarettes, pipe, cigar or other implement, of~~
2 ~~any type or nature, designed, used or employed for smoking any tobacco or tobacco product; or~~
3 ~~who shall use~~ uses any tobacco product, ~~or tobacco-derived product~~ or alternative nicotine

4 product in any building or part thereof of a building used for instructional purposes, in any school
 5 of this state, as defined in §18-1-1 of this code, or on any lot or grounds actually used for
 6 instructional purposes of any ~~such~~ school of this state while ~~such~~ the school is used or occupied
 7 for school purposes, ~~shall be~~ is guilty of a misdemeanor and, upon conviction thereof, shall be
 8 punished for each offense by a fine of not less than \$1 nor more than ~~five dollars~~ \$25: *Provided,*
 9 ~~That this prohibition shall not be construed to prevent the use of any tobacco or tobacco product~~
 10 ~~or tobacco-derived product, in any faculty lounge, or staff lounge, or faculty office or other area of~~
 11 ~~said public school not used for instructional purposes: Provided, however, That students do not~~
 12 ~~have access thereto~~ *Provided* further That nothing herein contained shall be construed to prevent
 13 any county board of education from promulgating rules ~~and regulations~~ that further restrict the
 14 use of tobacco, ~~products or tobacco-derived products,~~ or alternative nicotine products in any form,
 15 from any other part or section of any public school building under its jurisdiction.

**§16-9A-7. Enforcement of youth ~~smoking~~ tobacco laws and youth nicotine restrictions;
 inspection of retail outlets where tobacco, tobacco-derived products, ~~vaper~~
~~products or alternative nicotine products are sold; use of minors~~ persons under
age 21 in inspections; annual reports; penalties for the sale of tobacco, tobacco-
derived products, or alternative nicotine products to persons under age 21;
 defenses.**

1 (a) The Commissioner of the West Virginia ~~Alcohol Beverage Control Administration~~
 2 Bureau for Behavioral Health of the Department of Health and Human Resources, the
 3 Superintendent of the West Virginia State Police, the sheriffs of the counties of this state, and the
 4 chiefs of police of municipalities of this state, may periodically conduct unannounced inspections
 5 at locations where tobacco products, ~~or tobacco-derived products,~~ or alternative nicotine products
 6 are sold or distributed to ensure compliance with the provisions of ~~sections two and three of this~~
 7 article and ~~in such manner as to conform with~~ applicable federal and state laws, rules, and
 8 regulations. Persons under the age of ~~eighteen years~~ 21 may be enlisted by such commissioner,

9 superintendent, sheriffs, ~~or~~ chiefs of police, or employees or agents thereof to test compliance
 10 with these sections: *Provided*, That the minors may be used to test compliance only if the testing
 11 is conducted under the direct supervision of the commissioner, superintendent, sheriffs, ~~or~~ chiefs
 12 of police, ~~or~~ employees or agents thereof and with written consent of the parent or guardian of
 13 ~~such person is first obtained and such~~ the minors. Persons under the age of 21 shall not be in
 14 violation of §16-9A-3 of this code when acting under the direct supervision of the commissioner,
 15 superintendent, sheriffs, ~~or~~ chiefs of police, or employees or agents thereof. ~~and with the written~~
 16 ~~consent of the parent or guardian~~ It is unlawful for any Any person to use who uses persons under
 17 the age of ~~eighteen years~~ 21 to test compliance in any manner not set forth herein ~~and the person~~
 18 ~~so using a minor in this section~~ is guilty of a misdemeanor and, upon conviction ~~thereof~~, shall be
 19 fined ~~the same amounts as set forth in section two of this article~~ not more than \$100 for the first
 20 offense; and upon conviction for a second or subsequent offense, is guilty of a misdemeanor and,
 21 shall be fined not less than \$100 nor more than \$500.

22 (b) A person charged with a violation of ~~section two or three of this article~~ §16-9A-6 of this
 23 code as the result of an inspection under subsection (a) of this section has a complete defense
 24 if, at the time the ~~cigarette, other tobacco, product or tobacco-derived product,~~ alternative nicotine
 25 product, or cigarette ~~wrapper paper~~ paper was sold, ~~delivered, bartered, furnished or given,~~ furnished,
 26 or caused to be sold, given or furnished:

27 (1) The buyer or recipient falsely evidenced that he or she was ~~eighteen years of age~~ 21
 28 or older;

29 (2) The appearance of the buyer or recipient was such that a prudent person would believe
 30 the buyer or recipient to be ~~eighteen years of age~~ 21 or older; and

31 (3) Such person carefully checked a valid driver's license or an identification card issued
 32 by this state or another state of the United States, a passport, or a United States armed services
 33 identification card presented by the buyer or recipient and acted in good faith and in reliance upon
 34 the representation and appearance of the buyer or recipient ~~in the belief~~ that the buyer or recipient

35 was ~~eighteen years of age~~ 21 or older.

36 ~~(c) Any fine collected after a conviction of violating section two of this article shall be paid~~
37 ~~to the clerk of the court in which the conviction was obtained: Provided, That the clerk of the court~~
38 ~~upon receiving the fine shall promptly notify the Commissioner of the West Virginia Alcohol~~
39 ~~Beverage Control Administration of the conviction and the collection of the fine: Provided,~~
40 ~~however, That any community service penalty imposed after a conviction of violating section three~~
41 ~~of this article shall be recorded by the clerk of the court in which the conviction was obtained:~~
42 ~~Provided further, That the clerk of the court upon being advised that community service~~
43 ~~obligations have been fulfilled shall promptly notify the Commissioner of the West Virginia Alcohol~~
44 ~~Beverage Control Administration of the conviction and the satisfaction of imposed community~~
45 ~~service penalty~~

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

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

1 No person, firm, corporation, or business entity may offer for sale any cigarette, tobacco
2 product, ~~or tobacco-derived product,~~ or alternative nicotine product in a vending machine or any
3 other display independently accessible by individuals under the age of 21, except for a store clerk.

4 Any person, firm, corporation, or business entity ~~which violates in violation~~ the provisions of this

5 section is guilty of a misdemeanor and, upon conviction thereof, shall be fined \$250: *Provided,*
6 That an establishment is exempt from this prohibition if individuals under ~~the age of eighteen~~
7 ~~years~~ 21 are not permitted to be in the establishment or if the establishment is licensed by the
8 ~~alcohol beverage control commissioner~~ Commissioner of the West Virginia Alcohol Beverage
9 Control Administration as a Class A licensee. The ~~alcohol beverage control~~ commissioner shall
10 promulgate rules pursuant to §29A-3-1 of this code to establish standards for the location and
11 control of the vending machines in Class A licensed establishments for the purpose of restricting
12 access by ~~minors~~ persons under age 21.

**§16-9A-11. Sale, gift, furnishing, or distribution of tobacco, tobacco-derived products, or
alternative nicotine products to persons under age 21; penalties for first and
subsequent offense; consideration of prohibited act as grounds for dismissal;
impact on eligibility for unemployment benefits.**

1 (a) No firm, corporation, or business entity may sell, give, furnish, distribute, or cause to
2 be sold, given, furnished or distributed, any tobacco, tobacco-derived product, alternative nicotine
3 product, or cigarette paper to any person under the age of 21. Any firm, corporation, or business
4 entity that violates this subsection shall be fined pursuant to a legislative rule as promulgated by
5 the Bureau for Behavioral Health of the Department of Health and Human Resources in the
6 following amounts: \$100 for the first offense and upon any subsequent violation at the same
7 location or operating unit, at least \$250 but not more than \$500 for the second offense, if it occurs
8 within two years of the first fine; at least \$500 but not more than \$750 for the third offense, if it
9 occurs within two years of the first fine; and at least \$1,000 but not more than \$5,000 for any
10 subsequent offenses, if the subsequent offense occurs within five years of the first fine.

11 (b) Any individual who knowingly and intentionally sells, gives, furnishes, distributes,
12 purchases for or causes to be sold, given, furnished or distributed a tobacco, tobacco-derived
13 product, alternative nicotine product, or cigarette paper to any person under the age of 21 is guilty
14 of a misdemeanor and, upon conviction, for the first offense shall be fined not more than \$100;

15 upon conviction for a second or subsequent offense, is guilty of a misdemeanor and shall be fined
16 not less than \$100 nor more than \$500, unless the court elects to order community service in lieu
17 of a fine in accord with §62-4-16 of this code. Any fine collected under this section shall be paid
18 to the clerk of the court in which the conviction was obtained: *Provided*, That the clerk of the court
19 shall promptly notify the Commissioner of the Bureau for Behavioral Health of the Department of
20 Health and Human Resources of the disposition of the case and the collection of any fine or
21 completion of community service.

22 (c) Any employer who discovers that his or her employee has sold, given, furnished, or
23 caused to be sold, given, or furnished, tobacco products, tobacco-derived products, alternative
24 nicotine products, or cigarette papers to persons under the age of 21 may dismiss such employee
25 for cause. Any such discharge shall be considered as “gross misconduct” for the purposes of
26 determining the discharged employee’s eligibility for unemployment benefits in accordance with
27 the provisions of §21A-6-3 of this code, if the employer has provided the employee with prior
28 written notice in the workplace that such act may result in termination from employment.

NOTE: The purpose of this bill is to increase the age for the purchase of tobacco products, tobacco-derived products, and alternative nicotine products from 18 to 21. This bill also changes the way businesses are fined for the underage sale of tobacco products, tobacco-derived products, or alternative nicotine products. This bill further eliminates tobacco use in schools.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.