

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

**Introduced**

### **House Bill 2051**

By Delegate Rohrbach

[Introduced January 11, 2023; Referred to the  
Committee on 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 the  
12 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 the  
20 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 and  
2 ban the use of tobacco products by minors. As basis for this policy, the Legislature hereby finds  
3 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 that

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, electronic  
35 cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor cartridge or  
36 other container of nicotine in a solution or other form that is intended to be used with or in an  
37 electronic cigarette, e-cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar  
38 product or device. "Vapor product" does not include any product that is ~~regulated~~ approved by the  
39 United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act  
40 either as a tobacco cessation product or for other medical purposes and which is being marketed

41 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, if~~  
54 ~~it occurs within two years of the first conviction; and at least \$1,000 but not more than \$5,000 for~~  
55 ~~any subsequent offenses, if the subsequent offense occurs within five years of the first conviction.~~



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

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

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 may 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 or  
 7 tobacco-derived products, or alternative nicotine products are sold or distributed pursuant to §16-  
 8 9A-7 of this code is not considered to violate the provisions of this section. Any person violating the  
 9 provisions of this section shall for the first violation be fined \$50 and be required to serve eight  
 10 hours of community service; for a second violation, the person shall be fined \$100 and be required  
 11 to serve 16 hours of community service; and for a third and each subsequent violation, the person  
 12 shall be fined \$200 and be required to serve 24 hours of community service. ~~Notwithstanding~~  
 13 Persons under the age of 18 are subject to the concurrent jurisdiction of the magistrate court in  
 14 accordance with the provisions of §49-4-701 of this code. the magistrate court has concurrent  
 15 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 of  
 5 this state, as defined in §18-1-1 of this code, or on any lot or grounds actually used for instructional  
 6 purposes of any such school of this state while such the school is used or occupied for school  
 7 purposes, shall be is guilty of a misdemeanor and, upon conviction thereof, shall be punished for  
 8 each offense by a fine of not less than \$1 nor more than ~~five dollars~~ \$25; ~~Provided, That this~~  
 9 ~~prohibition shall not be construed to 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 public~~  
 11 ~~school not used for instructional purposes: Provided, however, That students do not have access~~  
 12 ~~thereto~~ ~~Provided, further~~ That nothing herein contained shall may be construed to prevent any  
 13 county board of education from promulgating rules and regulations that further restrict the use of  
 14 tobacco, ~~products or tobacco-derived products, or alternative nicotine products~~ in any form, from  
 15 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 the  
 9 commissioner, superintendent, sheriffs, or chiefs of police, or employees or agents thereof to test

10 compliance with these sections: *Provided*, That the minors may be used to test compliance only if  
11 the testing is conducted under the direct supervision of the commissioner, superintendent, sheriffs,  
12 or chiefs of police, or employees or agents thereof and with written consent of the parent or  
13 guardian of such person is first obtained and such the minors. Persons under the age of 21 shall  
14 may not be in violation of §16-9A-3 of this code when acting under the direct supervision of the  
15 commissioner, superintendent, sheriffs, or chiefs of police, or employees or agents thereof. and  
16 ~~with the written consent of the parent or guardian~~ It is unlawful for any Any person to use who uses  
17 persons under the age of ~~eighteen years~~ 21 to test compliance in any manner not set forth herein  
18 and ~~the person so using a minor in this section~~ is guilty of a misdemeanor and, upon conviction  
19 thereof, shall be fined ~~the same amounts as set forth in section two of this article~~ not more than  
20 \$100 for the first offense; and upon conviction for a second or subsequent offense, is guilty of a  
21 misdemeanor and, 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 if,  
24 at the time the ~~cigarette, other tobacco, product or tobacco-derived product,~~ alternative nicotine  
25 product, or cigarette wrapper paper was sold, ~~delivered, bartered, furnished or given,~~ furnished, or  
26 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 or  
28 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~~ That person carefully checked a valid driver's license or an identification card  
32 issued by this state or another state of the United States, a passport, or a United States armed  
33 services identification card presented by the buyer or recipient and acted in good faith and in  
34 reliance upon the representation and appearance of the buyer or recipient ~~in the belief that the~~  
35 buyer or recipient 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 to~~  
 37 ~~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 obligations~~  
 43 ~~have been fulfilled shall promptly notify the Commissioner of the West Virginia Alcohol Beverage~~  
 44 ~~Control Administration of the conviction and the satisfaction of imposed community service~~  
 45 ~~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 of~~  
 51 ~~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 the  
 53 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 years~~  
7 21 are not permitted to be in the establishment or if the establishment is licensed by the ~~alcohol~~  
8 ~~beverage control commissioner~~ Commissioner of the West Virginia Alcohol Beverage Control  
9 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 be  
2 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 to  
18 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.