

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

## **House Bill 3427**

By Delegate Criss

[Introduced February 13, 2023; Referred to the  
Committee on Finance]



1 A BILL to amend and reenact §11-15-9n of the Code of West Virginia, 1931, as amended, all  
2 relating to the consumers sales and service tax and use tax exemption for qualified  
3 purchases of computers and computer software, primary material handling equipment,  
4 racking and racking systems, and components, building materials and certain tangible  
5 personal property to be incorporated into a qualified, new or expanded warehouse or  
6 distribution facility; changing threshold jobs creation number from 300 to 50; and making  
7 stylistic changes.

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

**ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.**

**§11-15-9n. Exemption of qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components, building materials and certain tangible personal property.**

1 (a) Definitions. — For purposes of this section:

2 (1) "Building materials" means all tangible personal property, including any device or  
3 appliance used by builders, contractors or landowners in making improvements, additions, or  
4 alterations to a building or other structure or to real property in such a way that such tangible  
5 personal property becomes a part of the building or other structure or the realty, which is installed  
6 into or directly used or consumed in the construction, addition, alteration, repair or improvement of  
7 a qualified, new or expanded warehouse or distribution facility. "Building materials" does not  
8 include tools, construction equipment or any property or device which does not become a  
9 permanent part of the realty when construction is completed. A device or appliance becomes a  
10 fixture and a part of the building or other structure or the real property to which it is connected when  
11 it is built into or is attached to the property in such a way that its removal would substantially  
12 damage or deface such property.

13 (2) "Computers and computer software" as defined in ~~section two, article fifteen b of this~~  
14 ~~chapter~~ §11-15B-2 of this code means computer equipment and related software directly and

15 primarily used to control automated machinery in the facility and the movement of goods within the  
16 facility, to facilitate customer delivery operations including shipment, preparation for shipment,  
17 order tracking and delivery inventory control, printing of packing lists and labels and any other  
18 customer order fulfillment functions.

19 (3) "Distribution facility" means a warehouse, facility, structure, or enclosed area which is  
20 used primarily for the storage, shipment, preparation for shipment, or any combination of such  
21 activities, of finished goods, consumer ready wares, and consumer ready merchandise.

22 (4) "Expansion period" means the period of time beginning ~~one~~1 year prior to the start of  
23 the construction or expansion of the qualified, new or expanded warehouse or distribution facility,  
24 and ending ~~one~~1 year after the substantial completion of the construction or expansion of the  
25 facility. In no event shall the expansion period exceed ~~five~~ 5 years.

26 (5) "Full-time employment" for purposes of determining a full-time employee or a full-time  
27 equivalent employee, means employment for at least ~~one hundred forty~~ 140 hours per month at a  
28 wage not less than the prevailing state or federal minimum wage, depending on which minimum  
29 wage provision is applicable to the business.

30 (A) For purposes of this definition, any employee paid less than state or federal minimum  
31 wage, depending on which minimum wage provision is applicable, shall be excluded from the  
32 count of employees for the purpose of determining the ~~three hundred~~ 50 jobs requirement of this  
33 section.

34 (B) For purposes of this definition, seasonal employees and part-time employees may be  
35 converted into full-time equivalent employees if the part-time or seasonal employee is customarily  
36 performing job duties not less than ~~twenty~~ 20 hours per week for at least ~~six~~6 months during the  
37 tax year. Persons who have worked less than ~~twenty~~ 20 hours per week or who have worked less  
38 than ~~six~~6 months during the tax year do not qualify as part-time employees or as seasonal  
39 employees.

40 (6) "Primary material handling equipment" means the principal machinery and equipment  
41 used directly and primarily for the handling and movement of tangible personal property in a  
42 qualified, new or expanded warehouse or distribution facility.

43 (A) The following items may be considered primary material handling equipment:

44 (i) Conveyers, carousels, lifts, positioners, pick-up-and-place units, cranes, hoists,  
45 mechanical arms and robots;

46 (ii) Mechanized systems, including containers which are an integral part thereof, whose  
47 purpose is to lift or move tangible personal property;

48 (iii) Automated storage and retrieval systems, including computers and software which  
49 control them, whose purpose is to lift or move tangible personal property; and

50 (iv) Forklifts and other off-the-road vehicles which are used to lift or move tangible  
51 personal property and which cannot be legally operated on roads and streets.

52 (B) "Primary material handling equipment" does not include:

53 (i) Motor vehicles licensed for operation on the roads and highways of this state or any  
54 other state of the United States or any other political jurisdiction;

55 (ii) Parts or equipment used to repair, refurbish, or recondition other equipment; or

56 (iii) Equipment which replaces, in whole or in part, primary material handling equipment.

57 (7) "Qualified, new or expanded warehouse or distribution facility" means a new or  
58 expanded facility, subject to the following:

59 (A) Qualification criteria. "Qualified, new or expanded warehouse or distribution facility"  
60 means a new or expanded facility located in this state, that is a warehouse or distribution facility  
61 that will employ ~~three hundred~~ 50 or more West Virginia domiciled, West Virginia residents, as full-  
62 time employees in the warehouse or distribution facility once the expansion period is complete and  
63 which is either:

64 (i) An existing warehouse or distribution facility that will be expanded over the expansion  
65 period where the total value of all real and personal property purchased or acquired over the  
66 expansion period as direct investment in the facility is \$50 million or more; or

67 (ii) A new warehouse or distribution facility where the total value of all real and personal  
68 property purchased or acquired over the expansion period as direct investment in the facility is \$50  
69 million or more.

70 (B) Exclusions and disqualifications.

71 (i) Subject to the limitations and restrictions set forth in this section, "qualified, new or  
72 expanded warehouse or distribution facility" does not include a building or facility where tangible  
73 personal property is manufactured, fabricated or assembled.

74 (ii) Subject to the limitations and restrictions set forth in this section, "qualified, new or  
75 expanded warehouse or distribution facility" does not include a building or facility where annual  
76 calendar year retail sales of tangible personal property are made over-the-counter from such  
77 building or facility to the general public, if such sales exceed ~~five percent~~ 5% of the total annual  
78 calendar year revenues of the warehouse or distribution facility during the same calendar year.

79 (iii) Subject to the limitations and restrictions set forth in this section, "qualified, new or  
80 expanded warehouse or distribution facility" does not include a building or facility where the  
81 average monthly full-time employment (determined by including full-time equivalent employees)  
82 for each calendar year at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West  
83 Virginia residents. For purposes of determining average monthly employment for the calendar  
84 year, the taxpayer shall divide the sum of the ~~twelve~~ 12 monthly averages of qualified full-time and  
85 full-time equivalent West Virginia employees at the qualified, new or expanded warehouse or  
86 distribution facility by ~~twelve~~ 12. Each monthly average is computed as the average of West  
87 Virginia employment at the beginning of each calendar month and at the end of each calendar  
88 month. *Provided*, That the State Tax Commissioner may specify a different method for

89 computation of average monthly full-time employment, on a state-wide basis or on a case-by-case  
90 basis, or both, as the State Tax Commissioner may prescribe.

91 (8) "Qualified West Virginia employee" means a full-time employee or full-time equivalent  
92 employee who is a West Virginia domiciled West Virginia resident.

93 (9) "Racking and racking systems" means any system of machinery, equipment, fixtures,  
94 or portable devices whose function is to store, organize, or move tangible personal property within  
95 a warehouse or distribution facility, including, but not limited to, conveying systems, chutes,  
96 shelves, racks, bins, drawers, pallets, and other containers and storage devices which form a  
97 necessary part of the facility's storage system, and which is used directly and primarily for the  
98 storage, handling and movement of tangible personal property in a qualified, new or expanded  
99 warehouse or distribution facility.

100 (10) "Tangible personal property" means tangible personal property as defined in ~~section~~  
101 ~~two, article fifteen-b~~ §11-15B-2 et seq. of this chapter code.

102 (11) "Warehouse" means a facility, structure, or enclosed area which is used primarily for  
103 the storage of finished goods, consumer ready wares, and consumer ready merchandise.

104 (b) Exemption. — Qualified purchases of computers and computer software, primary  
105 material handling equipment, racking and racking systems, and components thereof, building  
106 materials and tangible personal property installed into or directly used or consumed in the  
107 construction, addition, alteration or improvement of a qualified, new or expanded warehouse or  
108 distribution facility, as such terms are defined in this section, purchased during the expansion  
109 period are exempt from the tax imposed by this article and ~~article fifteen-a of this chapter~~ §11-15A-  
110 1 et seq. of this code. This exemption may apply either to qualified purchases made by a person or  
111 entity which will be the owner and operator of the qualified, new or expanded warehouse or  
112 distribution facility or to qualified purchases made by a lessor or lessee of the qualified, new or  
113 expanded warehouse or distribution facility. A purchase of computers and computer software,  
114 primary material handling equipment, racking and racking systems, and components thereof,

115 building materials and tangible personal property is a qualified purchase if all requirements for  
116 exemption set forth in this section are met with relation to the purchase.

117 (c) Application for certification of exemption and plan describing investment to be made.

118 (1) In order to qualify for the exemption authorized by this section, a taxpayer must submit  
119 an application for certification of the exemption to the State Tax Commissioner, together with a  
120 plan describing the investment to be made in the qualified, new or expanded warehouse or  
121 distribution facility. The application and plan shall be submitted on forms prescribed by the State  
122 Tax Commissioner. The plan shall demonstrate that the requirements of the law will be met.

123 (2) Filing date. The application for certification of the exemption and plan describing the  
124 investment to be made must be filed on or before the start of the construction or expansion of the  
125 proposed qualified, new or expanded warehouse or distribution facility.

126 (3) Late filing. If the taxpayer fails to timely file the application for certification of the  
127 exemption with the State Tax Commissioner, together with a plan describing the investment to be  
128 made, on or before the start of the construction or expansion of the proposed qualified, new or  
129 expanded warehouse or distribution facility, the exemption allowed by this section shall not be  
130 available for any purchases of computer and computer software, primary material handling  
131 equipment, racking and racking systems, and components thereof, building materials and tangible  
132 personal property otherwise exempt under this section that were made prior to the filing date of the  
133 application for certification of the exemption, and no refund shall be issued for any such purchase.

134 (4) Exemption in cases of untimely filing. Notwithstanding the untimely filing of the  
135 application for certification of the exemption and plan describing the investment to be made, if  
136 certification of the exemption and plan is issued by the State Tax Commissioner of an untimely  
137 filed application and plan, the exemption shall be available for qualified purchases of computers  
138 and computer software, primary material handling equipment, racking and racking systems, and  
139 components thereof, building materials and tangible personal property made subsequent to the  
140 filing date of the application and plan and before the end of the expansion period.

141 (5) Exemption limited to expansion period purchases.

142 (A) Upon approval of the application and certification of the exemption, qualified  
143 purchases of computers and computer software, primary material handling equipment, racking  
144 and racking systems, and components thereof, building materials and tangible personal property  
145 shall be exempt from the tax imposed by this article and ~~article fifteen-a of this chapter~~ §11-15A-1,  
146 et seq. of this code. However, if the requisite investment is not made within the expansion period,  
147 or if the terms and requirements of this section are not satisfied, the taxpayer shall be subject to  
148 assessment for any tax, penalty or interest that would otherwise have been due.

149 (B) Limitations. Any statute of limitations set forth in ~~article ten of this chapter~~ §11-10-1 et  
150 seq. of this code for assessment made under this subsection for any such tax, penalty or interest  
151 shall not close until five years subsequent to the end of the expansion period.

152 (d) Any person having a right or claim to any exemption set forth in this section shall first  
153 pay to the vendor the tax imposed by this article and then apply to the State Tax Commissioner for  
154 a refund or credit or, as provided in ~~section nine-d~~ §11-15-9d of this ~~article~~ code, give to the vendor  
155 his or her West Virginia direct pay permit number.

156 (e) Additional Restrictions, Assessments and Statutes of Limitations. —

157 (1) Over-the-counter sales restrictions.

158 (A) If within ~~ten~~ 10 years after the end of the expansion period, over-the-counter sales are  
159 made in any ~~one~~ 1 calendar year, from a warehouse or distribution facility for which qualification  
160 for exemption under this section was originally established, which over-the-counter sales, in the  
161 aggregate, exceed ~~five percent~~ 5% of the total revenues of the warehouse or distribution facility  
162 during the same calendar year, the taxpayer will be disqualified from receiving the exemption  
163 under this section as of the close of the calendar year in which over-the-counter sales first exceed  
164 ~~five percent~~ 5% of the total revenues of the warehouse or distribution facility during the same  
165 calendar year; and the taxpayer shall be subject to assessment for any tax, penalty or interest that  
166 would otherwise have been due had the exemption set forth in this section never been applied.

167 This over-the-counter sales restriction shall not apply to any year subsequent to the end of the  
168 ~~tenth~~ 10<sup>th</sup> year after the end of the expansion period.

169 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of  
170 limitations to the contrary, any statute of limitations set forth in ~~article ten of this chapter~~ §11-10-1 et  
171 seq. of this code for assessment for any such tax, penalty or interest shall not close until ~~five~~ 5  
172 years subsequent to the end of the calendar year in which over-the-counter sales first exceed ~~five~~  
173 ~~percent~~ 5% of the total revenues of the warehouse or distribution facility during the same period.

174 (2) Fabrication and Assembly Restriction.

175 (A) Subject to the restriction and limitations set forth in this subsection, a qualified new or  
176 expanded warehouse or distribution facility does not include a building or facility where tangible  
177 personal property is manufactured, fabricated or assembled. If during any calendar year within ~~ten~~  
178 10 years after the end of the expansion period, the building or facility for which qualification for  
179 exemption under this section was originally established, is used for manufacturing, fabrication or  
180 assembly of tangible personal property, the taxpayer will be disqualified from receiving the  
181 exemption set forth in this section as of the date such manufacturing, fabrication or assembly first  
182 occurs, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would  
183 otherwise have been due had the exemption set forth in this section never been applied. This  
184 restriction against manufacturing, fabrication and assembly shall not apply to any year subsequent  
185 to the ~~tenth~~ 10<sup>th</sup> year after the end of the expansion period.

186 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of  
187 limitations to the contrary, any statute of limitations set forth in ~~article ten of this chapter~~ §11-10-1 et  
188 seq. of this code for assessment for any such tax, penalty or interest shall not close until five years  
189 subsequent to the end of the calendar year during which such manufacturing, fabrication or  
190 assembly first occurs.

191 (3) Minimum employment restriction.

192 (A) Subject to the limitations and restrictions set forth in this section, "qualified, new or  
193 expanded warehouse or distribution facility" does not include a building or facility where the  
194 average monthly full-time employment (determined including full-time equivalent employees) for  
195 each calendar year at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West  
196 Virginia residents. If during any calendar year within ten years after the end of the expansion  
197 period, the average monthly full-time employment at the building or facility for which qualification  
198 for exemption under this section was originally established, is fewer than ~~three hundred~~ 50  
199 qualified West Virginia employees, then the taxpayer will be disqualified from receiving the  
200 exemption under this section as of the close of the first calendar year in which the average monthly  
201 full-time employment at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West  
202 Virginia residents, and the taxpayer shall be subject to assessment for any tax, penalty or interest  
203 that would otherwise have been due had the exemption set forth in this section never been  
204 applied. This restriction against having fewer than ~~three hundred~~ 50 qualified West Virginia  
205 employees shall not apply to any year subsequent to the tenth year after the end of the expansion  
206 period.

207 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of  
208 limitations to the contrary, any statute of limitations set forth in ~~article ten of this chapter~~ §11-10-1 et  
209 seq. of this code for assessment for any such tax, penalty or interest shall not close until ~~five~~ 5  
210 years subsequent to the end of the first calendar year in which the average monthly full-time  
211 employment at the facility is less than ~~three hundred~~ 50 qualified West Virginia employees.

212 (f) Assessments Against Taxpayer. — In circumstances where the exemption authorized  
213 under this section has been asserted by a contractor pursuant to the provisions of ~~section eight-d~~  
214 §11-15-8d of this ~~article~~ code for purchases of computers and computer software, primary material  
215 handling equipment, racking and racking systems, and components thereof, building materials  
216 and tangible personal property, the assessment of such tax, interest and penalties shall issue  
217 against, and liability is hereby imposed upon, the purchaser of the contracting services, which is

218 the taxpayer entitled to the exemption set forth in this section, and not against the contractor who  
219 relied in good faith upon the validity of the exemption available under this section to the purchaser  
220 of the contracting services.

221 (g) The amendments made to this section in the 2023 Regular Legislative Session are  
222 effective for purchases of tangible personal property and services made in taxable years  
223 beginning on and after January 1, 2024.

NOTE: The purpose of this bill is to change the threshold jobs creation number from 300 to 50; and to making stylistic changes, which authorizes an exemption for qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components, building materials and certain tangible personal property to be incorporated into a qualified, new or expanded warehouse or distribution facility.

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