

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5408

By Delegates Crouse, Tully, Phillips, Williams, Dean,

Cannon, Hornby, and Young

[Introduced February 1, 2024; Referred

to the Committee on the Judiciary]

1 A BILL to amend and reenact §16-9E-1, §16-9E-3, §16-9E-4, and §16-9E-5, of the Code of West
2 Virginia, 1931, as amended, all relating to the delivery sales of tobacco; providing
3 definitions; authorizing the delivery sales within State boundaries by retail sellers and
4 remote delivery services; providing age verification requirements for online delivery sales;
5 altering labeling requirements; and providing record retention requirements for information
6 relating to delivery sales of tobacco products.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9E. DELIVERY SALES OF TOBACCO.

§16-9E-1. Definitions.

1 For purposes of this article:

2 (a) "Adult" means a person who is at least the legal minimum purchase age, as defined by
3 section two, article nine-a of this chapter.

4 (b) "Consumer" means an individual who does not hold a business registration certificate in
5 this state for the business of selling tobacco products as a wholesale or retail dealer.

6 (c) "Delivery sale" means any sale of ~~cigarettes~~ tobacco products, tobacco-derived
7 products, or vapor products to a consumer in this state where either: (1) The purchaser submits
8 the order for such sale by means of a telephonic or other method of voice transmission, the mails
9 or any other delivery service, or the Internet or other online service; or (2) the ~~cigarettes~~ tobacco
10 products, tobacco-derived products, or vapor products are delivered by use of the mails or a
11 delivery service. A sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor
12 products shall be a delivery sale regardless of whether or not the seller is located within this state.
13 A sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products not for
14 personal consumption to a person who holds a business registration certificate as a wholesale
15 dealer or a retail dealer shall not be a delivery sale.

16 (d) "Delivery service" means any person or distributor who is engaged in the commercial
17 delivery of letters, packages, or other containers.

18 (e) "Department" means the State Tax Department.

19 (f) "Legal minimum purchase age" is at least 18 years of age as defined by §16-9A-2 of this
20 code for the purchase of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products
21 in this state.

22 (g) "Mails" or "mailing" means the shipment of ~~cigarettes~~ tobacco products, tobacco-
23 derived products, or vapor products through the United States postal service.

24 (h) "Retail seller" means a retailer located within this State who makes a delivery sale to
25 consumers within this state: *Provided*, That retail sellers may obtain tobacco products, tobacco-
26 derived products, or vapor products from a distributor outside the State so long as the consumer
27 and delivery reside within the State: *Provided, however*, That retail sellers may make delivery
28 sales direct to consumer or through a remote delivery service as defined in subsection (i) of this
29 section.

30 (i) "Remote delivery service" means a person or third-party entity who delivers tobacco
31 products, tobacco-derived products, or vapor products to the ultimate consumer of the product,
32 from a delivery sale ordered through a retail seller to a consumer.

33 (h)(j) "Shipping container" means a container in which ~~cigarettes~~ tobacco products,
34 tobacco-derived products, or vapor products are shipped in connection with a delivery sale.

35 (i)(k) "Shipping documents" means bills of lading, airbills, or any other documents used to
36 evidence the undertaking by a delivery service to deliver letters, packages, or other containers.

37 (l) "Tobacco product" and "tobacco-derived product" means any product, containing, made
38 or derived from tobacco, or containing nicotine derived from tobacco, that is intended for human
39 consumption, whether smoked, breathed, chewed, absorbed, dissolved, inhaled, vaporized,
40 snorted, sniffed or ingested by any other means, including but not limited to cigarettes, cigars,
41 cigarillos, little cigars, pipe tobacco, snuff, snus, chewing tobacco or other common tobacco-
42 containing products. A "tobacco-derived product" includes electronic cigarettes or similar devices,
43 alternative nicotine products and vapor products. "Tobacco product" or "tobacco-derived product"

44 does not include any product that is regulated by the United States Food and Drug Administration
45 under Chapter V of the Food, Drug and Cosmetic Act.

46 (m) "Alternative nicotine product" means any non-combustible product containing nicotine
47 that is intended for human consumption, whether chewed, absorbed, dissolved or ingested by any
48 other means. "Alternative nicotine product" does not include any tobacco product, vapor product
49 or product regulated as a drug or device by the United States Food and Drug Administration under
50 Chapter V of the Food, Drug and Cosmetic Act.

51 (n) "Vapor product" means any non-combustible product containing nicotine that employs
52 a heating element, power source, electronic circuit or other electronic, chemical or mechanical
53 means, regardless of shape and size, that can be used to produce vapor from nicotine in a solution
54 or other form. "Vapor product" includes any electronic cigarette, electronic cigar, electronic
55 cigarillo, electronic pipe or similar product or device, and any vapor cartridge or other container of
56 nicotine in a solution or other form that is intended to be used with or in an electronic cigarette,
57 electronic cigar, electronic cigarillo, electronic pipe or similar product or device. "Vapor product"
58 does not include any product that is regulated by the United States Food and Drug Administration
59 under Chapter V of the Food, Drug and Cosmetic Act.

§16-9E-3. Age verification requirements.

1 (a) No person or retail seller shall mail, ship, or otherwise deliver cigarettes tobacco
2 products, tobacco-derived products, or vapor products in connection with a delivery sale unless
3 prior to the first delivery sale to a consumer, the person or retail seller:

4 (1) Obtains from the prospective consumer a certification, which shall include online
5 certification via check box when accompanied with the appropriate warnings provided in this
6 section, that includes a reliable confirmation that the consumer is at least the legal minimum
7 purchase age and a ~~statement signed~~ certification by the prospective consumer ~~in writing that~~
8 ~~certifies~~ affirming the prospective consumer's address and that the consumer is at least eighteen
9 years of age. The ~~statement~~ certification shall also confirm: (i) That the prospective consumer

10 understands that it is illegal to sign another person's name to the certification; (ii) that the sale of
11 cigarettes tobacco products, tobacco-derived products, or vapor products to individuals under the
12 legal minimum purchase age is illegal; and (iii) that the purchase of cigarettes tobacco products,
13 tobacco-derived products, or vapor products by individuals under the legal minimum purchase age
14 is illegal under the laws of this state;

15 (2) Verifies the information contained in the certification provided by the prospective
16 consumer against an appropriate database of government records available to the distributor or
17 seller, or obtains simultaneous with the certificate as provided for in subdivision (1), a photocopy or
18 other image of the valid, government-issued identification stating the date of birth or age of the
19 individual placing the order;

20 ~~(3) Sends to the prospective consumer, via e-mail or other means, a notice that contains:~~
21 ~~(A) A prominent and clearly legible statement that cigarette sales to a consumer below the legal~~
22 ~~minimum purchase age is illegal; (B) a prominent and clearly legible statement that consists of one~~
23 ~~of the warnings set forth in section 4(a)(1) of the federal Cigarette Labeling and Advertising Act, 15~~
24 ~~U.S.C. §1333(a)(1), rotated on a quarterly basis; (C) a prominent and clearly legible statement that~~
25 ~~sales of cigarettes are restricted to those consumers who provide verifiable proof of age in~~
26 ~~accordance with section three of this article; and (D) a prominent and clearly legible statement that~~
27 ~~cigarette sales are subject to excise and sales taxes in this state, and an explanation of how such~~
28 ~~taxes have been, or are to be, paid with respect to the delivery sale~~

29 ~~(4)(3) In the case of an order for cigarettes tobacco products, tobacco-derived products, or~~
30 ~~vapor products pursuant to an advertisement on the Internet, receives payment for the delivery~~
31 ~~sale from the prospective consumer by a credit or debit card or check that has been issued in the~~
32 ~~consumer's name.~~

33 (b) Persons accepting purchase orders for delivery sales may request that prospective
34 consumers provide their e-mail addresses.

§16-9E-4.

Shipping

requirements.

1 (a) Each person, retail seller, or remote delivery service who mails, ships, or otherwise
2 delivers ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection
3 with a delivery sale:

4 (1) Shall include ~~as part of the bill of lading or other~~ a shipping documents ~~a clear and~~
5 ~~conspicuous statement~~ label providing as follows: "~~Cigarettes: West Virginia Law Prohibits~~
6 ~~Shipping to Individuals Under 18, and Requires the Payment of all Applicable Taxes~~" age
7 verification is required upon arrival;

8 (2) Shall use a method of mailing, shipping, or delivery that obligates the delivery service to
9 require: (i) The consumer placing the purchase order for the delivery sale, or another adult of legal
10 minimum purchase age, to sign to accept delivery of the shipping container; and (ii) proof, in the
11 form of a valid, government-issued identification bearing a photograph of the individual who signs
12 to accept delivery of the shipping container, demonstrating that he is either the addressee or
13 another adult of legal minimum purchase age; and

14 (3) Shall provide to the delivery service retained for such delivery sale evidence of full
15 compliance with §16-9E-7 of this code.

16 (b) A delivery service shall be in violation of this article if it: (1) Ships or otherwise delivers
17 ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in connection with a
18 delivery sale without first receiving evidence of compliance with §16-9E-7 of this code; or (2) fails
19 to comply with the requirements described in subsection (a) of this section or described in §16-9E-
20 6 of this code:

21 (1) When obligated to do so under a method of shipping or delivery;

22 (2) When delivering any container pursuant to shipping documents containing the
23 statement described in subdivision (1), subsection (a) of this section; or

24 (3) When delivering any container that the delivery service otherwise has reason to know
25 contains ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products.

26 (c) If the person accepting a purchase order for a delivery sale delivers the ~~cigarettes~~

27 tobacco products, tobacco-derived products, or vapor products without using a delivery service,
28 that person shall comply with all requirements of this article applicable to a delivery service and
29 shall be in violation of the provisions of this article upon failure to comply with the requirements.

§16-9E-5. Registration and reporting requirements.

1 (a) ~~Prior to making~~ For each delivery sales sale or mailing, shipping, or other delivery of
2 ~~otherwise delivering cigarettes~~ tobacco products, tobacco-derived products, or vapor products in
3 connection with any such sales sale, every person retail seller shall ~~file with the department~~
4 maintain a statement-setting forth the seller's name, trade name, and the address of the seller's
5 principal place of business and any other place of business.

6 (b) ~~Not later than the tenth day of each calendar month, each~~ All persons, retail sellers, or
7 remote delivery services that has made a delivery sale or mailed, shipped, or otherwise delivered
8 engage in the sale of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor products in
9 ~~connection with any such sale during the previous calendar month~~ under the delivery system
10 provided in §16-9E-1 et seq. of this code shall ~~file with the department~~ maintain a memorandum or
11 a copy of the ~~invoice that provides~~ following information for each and every delivery sale:

12 (1) The name, ~~and address, and postal code~~ of the consumer to whom the delivery sale
13 was made;

14 (2) The brand or brands of the ~~cigarettes~~ tobacco products, tobacco-derived products, or
15 vapor products that were sold in the delivery sale; and

16 (3) The quantity of ~~cigarettes~~ tobacco products, tobacco-derived products, or vapor
17 products that were sold in the delivery sale.

18 (c) Any person that satisfies the requirements of 15 U.S.C. §376 shall be deemed to satisfy
19 the requirements of this section.

20 (d) All merchants who engage in the sale of tobacco products, tobacco-derived products,
21 or vapor products under the delivery system provided in §16-9E-1, et seq. of this code, shall
22 maintain a record containing the following information:

23 (e) All records required under subsections (b) and (d) of this section are subject to
24 inspection by the department upon request. Any merchant who delivers tobacco products,
25 tobacco-derived products, or vapor products shall retain records for three years, and shall not
26 unreasonably withhold the records from the commissioner's inspection.

NOTE: The purpose of this bill is to provide safeguards when retail sellers engage in online delivery sales of tobacco products, tobacco-derived products, or vapor products via online certification and to further permit retail sellers to engage third party remote delivery services to carry out delivery sales to consumers.

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