

Ultra-Processed Foods and Consumer Protection: What We Learned from ... West Virginia

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Our most recent installment of Kelley Drye's [State Attorney General Webinar Series](#) featured a [conversation](#) with representatives of the West Virginia Attorney General's Office, including Chief Deputy Jace Goins, Consumer Protection and Antitrust Division Director Ann Haight, and AAG Abby Cunningham. The discussion centered on the state's effort to regulate ultra processed foods ("UPFs") and ingredients associated with UPFs—a subject that has attracted commentary from a wide range of sources, including most recently a [Super Bowl ad featuring](#) professional boxer Mike Tyson. The webinar offered a look at how West Virginia is approaching enforcement and compliance in this developing area.

Lightning Round: West Virginia's Consumer Protection Landscape

Before diving into UPFs, Director Haight provided an overview of consumer protection regulation and enforcement in West Virginia. Consumer protection and antitrust are housed together, supported by approximately 11 team members, supplemented as needed by staff from other divisions. The state's primary consumer protection statutes are the Consumer Credit and Protection Act and the Unfair Trade Practices Act. A current enforcement priority of the office, in addition to UPFs, is data privacy and security. The AG's office regularly coordinates with other states—often through NAAG—but also reaches out directly to states when issues have regional impact.

Chief Deputy Goins explained that the new Attorney General in West Virginia, John B. McCuskey, is very focused on consumer protection and highlighted recent actions against pharmacy benefit managers. He also explained the office's focus on tech and UPFs, and how states may be better positioned to tackle consumer protection issues based on the speed at which they can take action.

A First-in-the-Nation Food Dye Ban

The conversation then turned to UPFs and West Virginia's related statute, with Ms. Cunningham explaining her position that ultra-processed food regulation and enforcement can bridge the gap between consumer protection and public health.

She described that while there is no consensus or established definition of ultra-processed foods (either under West Virginia or federal law), a consistent theme is that they undergo extensive industrial processing and ingredients you would not find in a home kitchen. She described how ultra-processed foods became an enforcement priority in West Virginia as a response to health advocacy

groups, concerned consumers, and a public desire to protect children's health.

Ms. Cunningham then outlined West Virginia's landmark statute, [House Bill 2354](#), which she explained prohibits the "manufacture, distribution, sale, or delivery" of any food product in West Virginia that contains certain color food dyes and preservatives, many of which are associated with UPFs. She noted that violations are actionable under the West Virginia Consumer Credit and Protection Act, with penalties up to \$5,000 per violation (with each product sale potentially constituting a separate violation), plus injunctive relief and possible restitution.

While the statute was set to become effective January 1, 2028, a court has [temporarily enjoined](#) the law pending litigation challenging its constitutionality.

Compliance and Enforcement

The West Virginia AGO provided several useful pieces of information for businesses looking to comply with HB 2354:

- **Reformulation.** Ms. Cunningham noted that she has seen some companies reformulate their products only for West Virginia, while others have reformulated on a national basis. She noted that because other states may follow West Virginia's lead in enacting a statewide ban, it may make sense to reformulate nationally rather than taking a state-by-state approach. She further indicated that many businesses have different formulations for sale in European nations, and they should consider whether those same formulas could be used in the U.S.
- **Interplay with FDA.** Ms. Cunningham noted that, from her perspective, it does not matter if the FDA has classified an ingredient as generally recognized as safe (GRAS) if its use is restricted by West Virginia law.
- **Retailers can also be liable depending on the circumstances.** Ms. Cunningham explained that all players in the manufacturing and distribution chain could face liability. Importantly, the office emphasized that context matters, especially in evaluating downstream versus upstream actors.
- **Future expansion of the law.** Ms. Cunningham noted that while she can't speak to any future legislation, there is a public concern about other food dyes and preservatives and emulsifiers, and it is an issue that will likely continue to evolve.
- **Coordination with other states.** Ms. Cunningham stated that red and blue states are generally aligned on these issues, and that a common theme among their laws is the focus on chemical additives. To comply with a patchwork of laws, she suggested that companies focus first on additives and formulation.
- **Enforcement.** While she could not speak to specific investigations or enforcement actions, Ms. Cunningham explained that West Virginia is monitoring the market to determine what products are being sold and is investigating consumer complaints relating to specific issues. (It is important to remember that the Office maintains its ability, separate from HB 2354, to investigate deceptive or unfair acts or practices relating to ultra-processed foods or other consumer packaged goods products under its existing consumer protection authority.)

West Virginia's leadership in this space makes it a state to watch as ultra processed food regulation

accelerates. We will continue to follow this issue closely in our AG Chronicles newsletter and future webinars.