

# **WEST VIRGINIA LEGISLATURE**

**FIRST REGULAR SESSION, 2011**



# **ENROLLED**

**COMMITTEE SUBSTITUTE**

**FOR**

**House Bill No. 2438**

(By Delegates Miley, Hunt, Brown, Frazier,  
Barker, Moore, Hamilton and Ellem)



Passed March 9, 2011

In Effect Ninety Days From Passage

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## H. B. 2438

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AN ACT to amend and reenact §3-1-2 of the Code of West Virginia, 1931, as amended; and to amend and reenact §3-4A-9 and §3-4A-20 of said code, all relating to independent voters; defining independent voters; reforming conflicts in voting procedures; and making technical corrections throughout.

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

That §3-1-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §3-4A-9 and §3-4A-20 of said code be amended and reenacted, all to read as follows:

### **ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.**

#### **§3-1-2. Scope of chapter; definitions.**

1 Unless restricted by the context, the provisions of this  
2 chapter apply to every general, primary and special election  
3 in which candidates are nominated or elected or in which  
4 voters pass upon any public question submitted to them,  
5 except that the provisions hereof shall be construed to be  
6 operative in municipal elections only in those instances in  
7 which they are made expressly so applicable.

8 Unless the context clearly requires a different meaning,  
9 as herein used:

10 “Voter” means any person who possesses the statutory  
11 and Constitutional qualifications for voting;

12 “Independent” means a registered voter who declined to  
13 state a preference for party affiliation on their voter  
14 registration or who listed a party affiliation which is not  
15 qualified as a political party as defined in section eight,  
16 article one of this chapter.

17 “Election” means the procedures whereby the voters of  
18 this state or any subdivision thereof elect persons to fill  
19 public offices, or elect members of a Constitutional  
20 convention, or vote on public questions;

21 “Any election” or “all elections” means every general,  
22 primary or special election held in this state, or in any of its  
23 subdivisions, for the purpose of nominating or electing  
24 federal or state officers, or county, city, town or village  
25 officers of any subdivision now existing or hereafter created,  
26 or for the purpose of electing members of a Constitutional  
27 convention, or for voting upon any public question submitted  
28 to the people of the state or any of the aforesaid subdivisions;

29 “Office” or “public office” means: (1) Any elective office  
30 provided for by the Constitution or laws of the United States

31 or of this state to which a salary or other compensation  
32 attaches; or (2) membership in a Constitutional convention.

33 “Candidate” means any person to be voted for at an  
34 election;

35 “Public question” means any issue or proposition, now or  
36 hereafter required by the governing body of this state or any  
37 of its subdivisions to be submitted to the voters of the state or  
38 subdivision for decision at elections;

39 The term “minor” as used in article four, section one of  
40 the State Constitution and as used in this chapter means a  
41 person who has not become eighteen years of age.

#### **ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.**

##### **§3-4A-9. Minimum requirements of electronic voting systems.**

1 An electronic voting system of particular make and  
2 design may not be approved by the State Election  
3 Commission or be purchased, leased or used by any county  
4 commission unless it meets the following requirements:

5 (1) It secures or ensures the voter absolute secrecy in the  
6 act of voting or, at the voter’s election, provides for open  
7 voting;

8 (2) It is constructed to ensure that, except in instances of  
9 open voting as provided in this section, the contents of a  
10 ballot may not be seen or known by anyone other than the  
11 voter who has voted or is voting;

12 (3) It permits each voter to vote at any election for all  
13 persons and offices for whom and which he or she is lawfully  
14 entitled to vote, whether or not the name of any person

15 appears on a ballot as a candidate; and it permits each voter  
16 to vote for as many persons for an office as he or she is  
17 lawfully entitled to vote for; and to vote for or against any  
18 question upon which he or she is lawfully entitled to vote.  
19 The automatic tabulating equipment used in electronic voting  
20 systems is to reject choices recorded on any ballot if the  
21 number of choices exceeds the number to which a voter is  
22 entitled;

23 (4) It permits each voter to, write in, the names of persons  
24 for whom he or she desires to vote whose names do not  
25 appear upon the ballots or ballot labels;

26 (5) It permits each voter to change his or her vote for any  
27 candidate and upon any question appearing upon the ballots  
28 or ballot labels up to the time when his or her ballot is  
29 deposited in the ballot box or his or her ballot is cast by  
30 electronic means;

31 (6) It contains programming media containing  
32 sequentially numbered program instructions and coded or  
33 otherwise protected from tampering or substitution of the  
34 media or program instructions of unauthorized persons and  
35 capable of tabulating all votes cast in each election;

36 (7) It contains two standard validation test decks  
37 approved as to form and testing capabilities by the State  
38 Election Commission;

39 (8) It correctly records and counts accurately all votes  
40 cast for the candidate and for and against each question  
41 appearing upon the ballots;

42 (9) It permits each voter at any election, other than a  
43 primary election, to vote a straight party ticket, as provided  
44 in section five, article six of this chapter, by one mark or  
45 punch;

46 (10) It permits a voter in a primary election to: (A) vote  
47 only for the candidates of the party for which the voter is  
48 legally permitted to vote; (B) vote for the candidates, if any,  
49 for nonpartisan nominations or election; and (C) vote on  
50 public questions; and precludes the voter from voting for any  
51 candidate seeking nomination by any other political party  
52 unless that political party has determined that the voter may  
53 participate in its primary election;

54 (11) It, where applicable, is provided with means for  
55 sealing or electronically securing the vote recording device  
56 to prevent its use and to prevent operation of the vote  
57 recording device for an election is begun and immediately  
58 after the polls are closed or after the operation of the vote  
59 recording device for an election is completed;

60 (12) It has the capacity to contain the names of candidates  
61 constituting the tickets of at least nine political parties and  
62 accommodates the wording of at least fifteen questions;

63 (13) (A) Direct recording electronic voting machines  
64 must generate a paper copy of each voter's vote that will be  
65 automatically kept within a storage container, that is locked,  
66 closely attached to the direct recording electronic voting  
67 machine, and inaccessible to all but authorized voting  
68 officials, who will handle such storage containers and such  
69 paper copies contained therein in accordance with section  
70 nineteen of this article.

71 (B) The paper copy of the voter's vote shall be generated  
72 at the time the voter is at the voting station using the direct  
73 recording electronic voting machine.

74 (C) The voter may examine the paper copy visually or  
75 through headphone readout, and may accept or reject the  
76 printed copy.

77 (D) The voter may not touch, handle or manipulate the  
78 printed copy manually in any way.

79 (E) Once the printed copy of the voter's votes is accepted  
80 by the voter as correctly reflecting the voter's intent, but not  
81 before, it will automatically be stored for recounts or random  
82 checks and the electronic vote will be cast within the  
83 computer mechanism of the direct recording electronic voting  
84 machine.

85 (F) Direct recording electronic voting machines with a  
86 mandatory paper copy shall be approved by the Secretary of  
87 State. The Secretary of State may promulgate rules and  
88 emergency rules to implement or enforce this subsection  
89 pursuant to the provisions of section five, article three,  
90 chapter twenty-nine-a of this code.

91 (14) Where vote recording devices are used, they shall:

92 (A) Be durably constructed of material of good quality  
93 and in a workmanlike manner and in a form which makes it  
94 safely transportable;

95 (B) Bear a number that will identify it or distinguish it  
96 from any other machine;

97 (C) Be constructed to ensure that a voter may easily learn  
98 the method of operating it and may expeditiously cast his or  
99 her vote for all candidates of his or her choice and upon any  
100 public question;

101 (D) Be accompanied by a mechanically or electronically  
102 operated instruction model which shows the arrangement of  
103 ballot labels, party columns or rows, and questions;

104 (15) For electronic voting systems that utilize a screen  
105 upon which votes may be recorded by means of a stylus or by  
106 means of touch:

107 (A) Be constructed to provide for the direct electronic  
108 recording and tabulating of votes cast in a system specifically  
109 designed and engineered for the election application;

110 (B) Be constructed to prevent any voter from voting for  
111 more than the allowable number of candidates for any office,  
112 to include an audible or visual signal, or both, warning any  
113 voter who attempts to vote for more than the allowable  
114 number of candidates for any office or who attempts to cast  
115 his or her ballot prior to its completion and are constructed to  
116 include a visual or audible confirmation, or both, to the voter  
117 upon completion and casting of the ballot;

118 (C) Be constructed to present the entire ballot to the  
119 voter, in a series of sequential pages, and to ensure that the  
120 voter sees all of the ballot options on all pages before  
121 completing his or her vote and to allow the voter to review  
122 and change all ballot choices prior to completing and casting  
123 his or her ballot;

124 (D) Be constructed to allow election commissioners to  
125 spoil a ballot where a voter fails to properly cast his or her  
126 ballot, has departed the polling place and cannot be recalled  
127 by a poll clerk to complete his or her ballot;

128 (E) Be constructed to allow election commissioners, poll  
129 clerks, or both, to designate, mark or otherwise record  
130 provisional ballots;

131 (F) Consist of devices which are independent,  
132 nonnetworked voting systems in which each vote is recorded  
133 and retained within each device's internal nonvolatile



134 electronic memory and contain an internal security, the  
135 absence of which prevents substitution of any other device;

136 (G) Store each vote in no fewer than three separate,  
137 independent, nonvolatile electronic memory components and  
138 that each device contains comprehensive diagnostics to  
139 ensure that failures do not go undetected;

140 (H) Contain a unique, embedded internal serial number  
141 for auditing purposes for each device used to activate, retain  
142 and record votes;

143 (I) Be constructed to record all preelection, election and  
144 post-election activities, including all ballot images and  
145 system anomalies, in each device's internal electronic  
146 memory and are to be accessible in electronic or printed  
147 form;

148 (J) Be constructed with a battery backup system in each  
149 device to, at a minimum, prevent the loss of any votes, as  
150 well as all preelection, election and post-election activities,  
151 including all ballot images and system anomalies, stored in  
152 the device's internal electronic memory and to allow voting  
153 to continue for two hours of uninterrupted operation in case  
154 of an electrical power failure; and

155 (K) Be constructed to prevent the loss of any votes, as  
156 well as all preelection, election and post-election activities,  
157 including all ballot images and system anomalies, stored in  
158 each device's internal electronic memory even in case of an  
159 electrical and battery power failure.

**§3-4A-20. Non-affiliated voters in primary elections.**

1 Unless voter not affiliated with a party, is permitted to  
2 participate in the primary election of a political party, the

3 following provisions apply to voters, not affiliated with a  
4 party, in primary elections that include non-partisan  
5 candidates or public questions:

6 (1) Election officers shall provide a vote recording  
7 device, where applicable, or the appropriate ballot to be  
8 marked by an electronically sensible pen or ink, or by means  
9 of a stylus or by means of touch, or by other electronic  
10 means, so that voters not affiliated with a party may vote only  
11 those portions of the ballot relating to the nonpartisan  
12 candidates and the public questions submitted, or shall  
13 provide a ballot containing only provisions for voting for  
14 those candidates and upon those issues submitted common to  
15 the ballots provided to all voters regardless of political party  
16 affiliation, or both.

17 (2) In counties utilizing electronic voting systems in  
18 which votes are recorded by perforating, if vote recording  
19 devices are not available for the voters not affiliated with a  
20 party, provisions are to be made for sealing the partisan  
21 section or sections of the ballot or ballot labels on a vote  
22 recording device using temporary seals, thus permitting the  
23 voter not affiliated with a party to vote for the nonpartisan  
24 section or sections of the ballot or ballot labels.

25 (3) After a voter not affiliated with a party has voted,  
26 temporary seals may be removed and the device may then be  
27 used by partisan voters.



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, House Committee*

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*Chairman, Senate Committee*

Originating in the House.

To take effect ninety days from passage.

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*Clerk of the House of Delegates*

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*Clerk of the Senate*

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*Speaker of the House of Delegates*

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*President of the Senate*

The within \_\_\_\_\_ this the \_\_\_\_\_  
day of \_\_\_\_\_, 2011.

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*Governor*