

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 287

BY SENATORS BOSO AND TRUMP

[Introduced January 14, 2016;

Referred to the Committee on Labor; and then to the

Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §21-3E-1, §21-3E-2, §21-3E-3, §21-3E-4, §21-3E-5, §21-3E-6, §21-3E-7,
 3 §21-3E-8, §21-3E-9, §21-3E-10, §21-3E-11, §21-3E-12, §21-3E-13, §21-3E-14, §21-3E-
 4 15, §21-3E-16 and §21-3E-17, all relating to creating West Virginia Safer Workplaces Act;
 5 permitting employers to test employees and prospective employees for drugs and alcohol;
 6 providing a short title; defining terms; making findings; declaring public policy; determining
 7 a collection of samples, scheduling of tests and testing procedures; setting forth testing
 8 policy requirements; providing for disciplinary procedures; providing for sensitive
 9 employees; providing for preemption; providing protection from liability; establishing
 10 causes of action; providing exceptions; providing for confidentiality; providing for
 11 termination of employment; providing for forfeiture of certain benefits; and requiring
 12 employers to have drug and alcohol testing policies and procedures when implementing
 13 drug and alcohol testing.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
 2 article, designated §21-3E-1, §21-3E-2, §21-3E-3, §21-3E-4, §21-3E-5, §21-3E-6, §21-3E-7,
 3 §21-3E-8, §21-3E-9, §21-3E-10, §21-3E-11, §21-3E-12, §21-3E-13, §21-3E-14, §21-3E-15,
 4 §21-3E-16 and §21-3E-17, all to read as follows:

ARTICLE 3E. THE WEST VIRGINIA SAFER WORKPLACE ACT.

§21-3E-1. Short title.

1 This article is known as and may be cited as the "West Virginia Safer Workplace Act."

§21-3E-2. Findings.

1 In 1990 the West Virginia Supreme Court of Appeals prohibited the mandatory drug testing
 2 of employees finding a substantial public policy that private sector employees have a right of
 3 privacy permitting mandatory drug testing only in the preemployment application process, where
 4 there is a "reasonable good faith objective suspicion of a current employee's drug usage or where

5 an employee's job responsibility involves public safety or the safety of others." *Twigg v. Hercules*
6 *Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990) and *Baughman v. Wal-Mart Stores, Inc.*, 215 W. Va.
7 45, 592 S.E. 2d 824 (2003).

8 Among the concerns the courts ignored, and continue to ignore, are the legitimate
9 interests of West Virginia employees in working in an environment in which they have substantial
10 confidence that illegal drug usage by coworkers will not subject them to danger in the workplace
11 or erode the viability of the workplace they are employed within. Thus, employers are deterred
12 from administering mandatory drug testing that would strengthen West Virginia workers'
13 confidence in a drug free and successful workplace.

14 The federal government conducted a 2004 survey of over five hundred U.S. companies
15 where more than sixty-two percent reported conducting workplace drug testing. In 2006, the
16 National Household Survey on Drug Use and Health (NHSDUH) found that one third of
17 respondents who worked full time as employees, which was more than thirty-two million adults,
18 reported their employer conducts random drug testing. The United States Navy reported in 1996
19 that its random drug testing program proved it was both cost-effective and deterred drug "abuse."
20 Quest Diagnostics, a national laboratory which publishes a yearly Drug Testing Index, has
21 demonstrated through statistical analysis a genuine decrease in positive illicit drug tests over a
22 five-year period among employees working for employers who have the option to perform random
23 drug tests such as found with the federally mandated safety sensitive workforce.

24 West Virginia is in the small minority of states that have not adopted or otherwise permitted
25 random drug testing by employers while also protecting the rights of its citizens to have certain
26 safeguards attached to such drug tests in the event they will be relied upon for workplace
27 discipline or access to statutory benefits.

28 The Legislature recognizes the toll that illegal and illicit drugs are taking daily on our

29 citizens, our law enforcement resources, our classrooms and our productive and safe workplaces.
30 Drug overdoses are now the leading cause of death for West Virginians under the age of forty-
31 five. Overdose deaths in West Virginia rose five hundred fifty percent from 1994 to 2004. There
32 is currently no statutory or clear case law in West Virginia for what jobs or job tasks allow an
33 employer to require a mandatory drug test of an employee without fear of litigation.

34 In order to do more to solve this serious problem in our state, the Legislature supports a
35 multipronged approach. In our workplaces, this article will bring West Virginia into the norm of
36 other states which have recognized and done more to permit drug testing in the workplace while
37 also protecting an employee's right to a fair drug testing procedure.

§21-3E-3. Definitions.

1 For the purposes of this article:

2 "Alcohol" means ethanol, isopropanol, or methanol.

3 "Drugs" means any substance considered unlawful for nonprescribed consumption or use
4 under the United States Controlled Substances Act (21 U.S.C. §812).

5 "Employer" means any person, firm, company, corporation, labor organization,
6 employment agency or joint labor-management committee, which has one or more full-time
7 employee(s) employed in the same business, or in or about the same establishment, under any
8 contract of hire, express or implied, oral or written. "Employer" does not include, for purposes of
9 this article, the United States, the state, or other public-sector incorporated municipalities,
10 counties, or districts, or any Native American tribe.

11 "Employee" means any person in the service of an employer, as defined in subsection (c)
12 of this section.

13 "Good faith" means reasonable reliance on facts – or that which is held out to be factual—
14 without the intent to deceive or be deceived and without reckless, malicious, or negligent

15 disregard for the truth.

16 “Prospective employee” means any person who has made application to an employer,
17 whether written or oral, to become an employee.

18 “Sample” means such sample of the human body capable of revealing the presence of
19 alcohol or other drugs or other metabolites.

§21-3E-4. Public policy.

1 The Legislature declares that the public policy of this state, in stark contrast to the
2 determinations of the court referenced in section two of this article, is to advance the confidence
3 of West Virginia workers that they are in a safe workplace and to enhance the viability of the
4 workplace they labor in by recognizing the right of West Virginia’s employers to require mandatory
5 drug testing not only of applicants but of current employees.

§21-3E-5. Employers may test current and prospective employees for drugs or alcohol.

1 It is lawful for an employer to test employees or prospective employees for the presence
2 of drugs or alcohol, in accordance with the provisions of this article, as a condition of continued
3 employment or hiring. However, in order to qualify for a bar from being subjected to legal claims
4 for acting in good faith on the results of a drug or alcohol test, employers must adhere to the
5 accuracy and fairness safeguards included in this article.

§21-3E-6. Collection of samples.

1 In order to test reliably for the presence of drugs or alcohol, an employer may require
2 samples from its employees and prospective employees, and may require presentation of reliable
3 individual identification from the person being tested to the person collecting the samples.
4 Collection of the sample shall be in conformance with the requirements of this article. The
5 employer may designate the type of sample to be used for this testing.

§21-3E-7. Scheduling of tests.

1 Regarding the timing and costs of drug and/or alcohol tests, and in order for an employer
2 to qualify for the benefits of this article:

3 (1) Any drug or alcohol testing by an employer of employees normally shall occur during,
4 or immediately before or after, a regular work period. Testing by an employer is worked time for
5 the purposes of compensation and benefits for current employees.

6 (2) An employer shall pay all actual costs for drug and/or alcohol testing required by the
7 employer of employees and prospective employees.

8 (3) An employer is required to provide transportation or to pay reasonable transportation
9 costs to current employees if their required tests are conducted at a location other than the
10 employee's normal work site(s).

§21-3E-8. Testing procedure.

1 All sample collection and testing of drugs and alcohol under this article shall be performed
2 in accordance with the following conditions:

3 (1) The collection of samples shall be performed under reasonable and sanitary
4 conditions.

5 (2) Sample collections shall be documented, and these documentation procedures shall
6 include:

7 (A) Labeling of samples so as to reasonably preclude the possibility of misidentification of
8 the person tested in relation to the test result provided and handling of samples in accordance
9 with reasonable chain-of-custody and confidentiality procedures; and

10 (B) An opportunity for the employee or prospective employee to provide notification of any
11 information which may be considered as relevant to the test, including identification of currently
12 or recently used prescriptions or nonprescription drugs, or other relevant medical information.
13 This may be accomplished by providing procedures for review by a qualified medical professional

14 to verify a laboratory sample which tests “positive” in a confirmatory test.

15 (3) Sample collection, storage, and transportation to the place of testing shall be
16 performed so as to reasonably preclude the possibility of sample contamination, adulteration, or
17 misidentification.

18 (4) Confirmatory drug testing shall be conducted at a laboratory: (i) Certified by the U.S.
19 Department of Health and Human Services’ Substance Abuse and Mental Health Services
20 Administration; (ii) approved by the U.S. Department of Health and Human Services under the
21 Clinical Laboratory Improvements Act; or (iii) approved by the College of American Pathologists.

22 (5) Drug and alcohol testing shall include confirmation of any “positive” test results. For
23 drug testing, confirmation will be by use of a different chemical process than was used by the
24 employer in the initial drug screen. The second confirmatory drug test shall be a chromatographic
25 technique such as gas chromatography/mass spectrometry, or another comparably reliable
26 analytical method. An employer may take any adverse employment action, including job denial
27 to a prospective employee, based only on a confirmed “positive” drug or alcohol test.

§21-3E-9. Testing policy requirements.

1 (a) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried
2 out within the terms of a written policy which has been distributed to every employee subject to
3 testing, and is available for review by prospective employees.

4 (b) In order to comply with the provisions of this article, employers must provide
5 employees, when requested and/or as appropriate, with information as to the existence and
6 availability of counseling, employee assistance, rehabilitation and/or other drug abuse treatment
7 programs which the employer offers, if any. The employer is not required to offer any of the
8 benefits listed above by this article.

9 (c) Within the terms of the written policy, an employer may require the collection and

10 testing of samples for, among other legitimate drug abuse prevention and/or treatment purposes,

11 the following:

12 (1) Deterrence and/or detection of possible illicit drug use, possession, sale, conveyance,
13 or distribution, or manufacture of illegal drugs, intoxicants, or controlled substances in any amount
14 or in any manner, on- or-off the job, or the abuse of alcohol or prescription drugs;

15 (2) Investigation of possible individual employee impairment;

16 (3) Investigation of accidents in the workplace or incidents of workplace theft or other
17 employee misconduct;

18 (4) Maintenance of safety for employees, customers, clients or the public at large; or

19 (5) Maintenance of productivity, quality of products or services, or security of property or
20 information.

21 (d) The collection and testing of samples shall be conducted in accordance with this Act
22 and need not be limited to circumstances where there are indications of individual, job-related
23 impairment of an employee or prospective employee.

24 (e) The employer's use and disposition of all drug or alcohol test results are subject to the
25 limitations of this article and federal and state law if the employer is to qualify for the legal benefits
26 and protections available under this article.

27 (f) Nothing in this article may be construed to encourage, discourage, restrict, limit,
28 prohibit, or require on-site drug or alcohol testing.

§21-3E-10. Disciplinary procedures.

1 Upon receipt of a confirmed "positive" drug or alcohol test result which indicates a violation
2 of the employer's written policy, or upon the refusal of an employee or prospective employee to
3 provide a testing sample, an employer may use that test result or test refusal as a valid basis for
4 disciplinary and/or rehabilitative actions, which may include, among other actions, the following:

5 (1) A requirement that the employee enroll in an employer-provided or approved
6 rehabilitation, treatment, and/or counseling program, which may include additional drug and/or
7 alcohol testing, participation in which may be a condition of continued employment, and the costs
8 of which may or may not be covered by the employer's health plan or policies;

9 (2) Suspension of the employee, with or without pay, for a designated period of time;

10 (3) Termination of employment;

11 (4) Refusal to hire a prospective employee; and/or

12 (5) Other adverse employment action in conformance with the employer's written policy
13 and procedures, including any relevant collective bargaining agreement provisions.

§21-3E-11. Sensitive employees.

1 If the confirmatory drug- or alcohol-test of an employee is "positive," and the employee is
2 in a sensitive position where an accident could cause loss of human life, serious bodily injury, or
3 significant property or environmental damage, the employer may permanently remove the
4 employee from the sensitive position and transfer or reassign the employee to an available
5 nonsensitive position with comparable pay and benefits, or may take other action, including
6 termination or other adverse employment action, consistent with the employer's policy for drug-
7 or alcohol-test "positives" for employees in sensitive positions, provided there are not applicable
8 contractual provisions that expressly prohibit such action.

9 This article preempts any law, rule, regulation, order, or standard that applies to the
10 continued employment or reemployment in a sensitive position of a recovering drug addict,
11 chronic drug abuser, or alcoholic, or the reinstatement or rehiring of any employee in a sensitive
12 position for whom an employer has administered a drug or alcohol test consistent with this article
13 that has produced a confirmed "positive" drug- or alcohol-test result.

14 Employers obligated to perform drug testing under a federal or state mandated drug

15 testing statute will be required to follow whatever additional requirements are mandated by those
16 statutes.

§21-3E-12. Protection from liability.

1 No cause of action is or shall be established for any person against any employer who
2 has established a policy and initiated a testing program in accordance with this article, for any of
3 the following:

4 (1) Actions based on the results of a “positive” drug or alcohol test, or the refusal of an
5 employee or job applicant to submit to a drug test;

6 (2) Failure to test for drugs or alcohol, or failure to test for a specific drug or other controlled
7 substance;

8 (3) Failure to test for, or if tested for, failure to detect, any specific drug or other substance,
9 any medical condition, or any mental, emotional, or psychological disorder or condition; or

10 (4) Termination or suspension of any substance abuse prevention or testing program or
11 policy.

§21-3E-13. Cause of action.

1 (a) No cause of action is or shall be established for any person against an employer who
2 has established a program of drug or alcohol testing in accordance with this article, unless the
3 employee’s action was based on a “false positive” test result, and the employer had actual
4 knowledge that the result was in error, and ignored the true test result because of disregard for
5 the truth and/or the willful intent to deceive or be deceived.

6 (b) In any claim, including a claim under this article, where it is alleged that an employer’s
7 action was based on a “false positive” test result:

8 (1) There is a rebuttable presumption that the test result was valid if the employer complied
9 with the provisions of this article; and

10 (2) The employer is not liable for monetary damages if its reliance on a “false positive” test
11 result was reasonable and in good faith.

12 (c) There is no employer liability for any action taken related to a “false negative” drug or
13 alcohol test.

§21-3E-14. Defamation.

1 No cause of action for defamation of character, libel, slander, or damage to reputation is
2 or shall be established for any person against any employer who has established a program of
3 drug or alcohol testing in accordance with this article, unless:

4 (1) The results of that test were disclosed to a person other than the employer, an
5 authorized employee, agent, or representative of the employer, the tested employee, or the tested
6 prospective employee, or the authorized agent or representative of the employee;

7 (2) The information disclosed was a “false positive” test result.

8 (3) The “false positive” test result was disclosed with negligence; and

9 (4) All elements of an action for defamation of character, libel, slander, or damage to
10 reputation as established by the relevant state’s statute or common law, are satisfied.

§21-3E-15. No requirement to implement a testing policy.

1 No cause of action arises in favor of any person against an employer based upon the
2 failure of the employer to establish a program or policy on substance abuse prevention, or to
3 implement drug or alcohol testing.

§21-3E-16. Confidentiality.

1 All communications received by an employer relevant to employee or prospective
2 employee drug or alcohol test results and received through the employer’s drug testing program
3 are confidential communications and may not be used or received in evidence, obtained in
4 discovery, or disclosed in any public or private proceeding, except in a proceeding related to an
5 action taken by an employer under this article.

§21-3E-17. Employer testing; notice; termination; forfeiture.

1 If an employer implements a drug-free workplace program in accordance with this article
2 which includes notice, education, and procedural requirements for testing for drugs and alcohol
3 pursuant to this law, the employer may require the employee to submit to a test for the presence
4 of drugs or alcohol. If a drug or alcohol is found to be present in the employee's system at a level
5 proscribed by the employer's policy, the employee may be terminated and forfeits his or her
6 eligibility for unemployment compensation benefits and indemnity benefits under the Worker
7 Compensation Laws. However, the employer's drug-free workplace program must notify all
8 employees that it is a condition of employment for an employee to refrain from reporting to work
9 or working with the presence of drugs or alcohol in his or her body and that policy must also state
10 that if an injured employee refuses to submit to a test for drugs or alcohol, that employee forfeits
11 eligibility for unemployment compensation benefits, and if injured, for indemnity benefits under
12 the Worker Compensation Laws. Employers who do not notify their employees of this condition
13 of employment waive their right to assert that eligibility for benefits is entirely forfeited.

NOTE: The purpose of this bill is to create the West Virginia Safer Workplaces Act. The bill permits employers to test employees and prospective employees for drugs and alcohol. The bill provides a short title. The bill defines terms. The bill makes findings. The bill declares public policy. The bill determines a collection of samples, scheduling of tests and testing procedures. The bill sets forth testing policy requirements. The bill provides for disciplinary procedures. The bill provides for sensitive employees. The bill provides for preemption. The bill provides protection from liability. The bill establishes causes of action. The bill provides exceptions. The bill provides for confidentiality. The bill provides for termination of employment. The bill provides for forfeiture of certain benefits. The bill requires employers to have drug and alcohol testing policies and procedures when implementing drug and alcohol testing.

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