

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 2857

BY DELEGATES FOSTER, G., WESTFALL, WHITE,

WALTERS, MOORE AND SUMMERS

[Passed April 8, 2017; in effect ninety days from
passage.]

1 AN ACT 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,
4 §21-3E-15 and §21-3E-16, all relating to creating West Virginia Safer Workplaces Act;
5 permitting employers to test employees and prospective employees for drugs and alcohol
6 under certain circumstances; providing a short title; defining terms; declaring public policy;
7 providing for exceptions to the applicability of the West Virginia Safer Workplaces Act for
8 employers covered by other drug and alcohol testing statutes; clarifying the right of privacy
9 as defined by the West Virginia Supreme Court is outweighed by the public policy set forth
10 in the West Virginia Safer Workplaces Act if an employer complies with the act; providing
11 for the collection of samples, scheduling of tests and testing procedures; requiring
12 employers to adhere to the accuracy and fairness safeguards of the West Virginia Safer
13 Workplaces Act to qualify for the bar from being subjected to legal claims for acting in
14 good faith on the results of a drug or alcohol test; providing for an employee's ability to
15 request split sample be tested to challenge a positive test result; requiring employers to
16 pay for certain drug or alcohol tests and transportation expenses, if any; requiring
17 employer to conduct tests during or immediately before or after a regular work period;
18 providing that testing by an employer is worked time for purposes of compensation and
19 benefits for current employees; establishing responsibility for cost of split sample testing;
20 setting forth testing policy requirements; requiring confirmatory tests before disciplinary
21 action may be taken under the West Virginia Safer Workplaces Act; establishing
22 requirements for confirmatory drug tests; providing for disciplinary procedures; addressing
23 disciplinary action for sensitive employees; describing sensitive employees; providing
24 employers who are obligated to perform drug testing under a federal or state mandated
25 drug testing statute will be required to follow whatever additional requirements are
26 mandated by those statutes; providing protection from liability for certain legal claims

27 under certain circumstances; clarifying that no causes of action for certain acts exists
28 under the West Virginia Safer Workplaces Act; addressing potential causes of action
29 related to false positive test results; addressing claims for defamation arising from
30 circumstances covered by the West Virginia Safer Workplaces Act; clarifying employers
31 are not required to adopt a drug and alcohol testing policy or to conduct drug or alcohol
32 tests of employees or prospective employees; providing for confidentiality and exceptions
33 to confidentiality requirement; addressing discipline for positive drug or alcohol tests
34 including but not limited to termination of employment; providing for forfeiture of certain
35 benefits under certain circumstances including unemployment compensation and workers'
36 compensation benefits; clarifying that the drug and alcohol testing provisions of the West
37 Virginia Safer Workplace Act cannot be used to show intoxication pursuant to section two,
38 article four, chapter twenty-three of this code; requiring employers to provide notice to
39 employees of the potential forfeiture of certain benefits; providing employers waive the
40 right to assert eligibility for benefits is forfeited if notice is not provided; and requiring
41 employers to have written drug and alcohol testing policies and procedures when
42 implementing 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 and
4 §21-3E-16, 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. 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 employed in the same business, or in or about the same establishment, under any
8 contract of hire, express or implied, oral or written in the state. “Employer” does not include, for
9 purposes of this article, the United States, the state, any of its subdivisions or any other public-
10 sector incorporated municipalities, counties, or other local government entities, or any Native
11 American tribe.

12 “Employee” means any person in the service of an employer, as defined in this section.

13 “Good faith” means reasonable reliance on facts, or that which is held to be factual without
14 the intent to deceive or be deceived and without reckless, malicious or negligent disregard for the
15 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.

20 “Split sample” means a part of the sample that is sent to a first laboratory and retained
21 unopened, and which is transported to a second laboratory in the event that the employee
22 requests that it be tested following a verified positive test result of the primary specimen.

§21-3E-3. Public policy; applicability.

1 The Legislature declares that the public policy of this state is to advance the confidence
2 of West Virginia workers that they are in a safe workplace and to enhance the viability of the
3 workplace they labor in by recognizing the right of West Virginia’s employers to require mandatory
4 drug testing, not only of applicants, but of current employees: *Provided*, That this article does not

5 abrogate the right of privacy, including the right of an individual to be let alone and to keep secret
6 his or her private communications, conversations and affairs, as stated in *Roach v. Harper*, 143
7 W. Va. 869, but rather determines that the right of privacy is outweighed by the public policy stated
8 in this section if an employer meets the requirements set forth in this article.

9 This article applies only to employers, as defined in section three of this article, not
10 previously made subject of drug and alcohol testing statutory provisions established by the
11 Legislature including, but not limited to, employers covered by section one, article one-a, chapter
12 twenty-two-a of the code, *et seq.*, and section one, article one-d, chapter twenty-one of the code
13 *et seq.*

§21-3E-4. 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 outlined in this article.

§21-3E-5. 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-6. 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 shall occur during, or
4 immediately before or after, a regular work period. Testing by an employer is worked time for the

5 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-7. 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) Any observer of the collection of urine samples shall be of the same sex as the
6 employee

7 (3) Sample collections shall be documented, and these documentation procedures shall
8 include:

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

12 (B) An opportunity for the employee, or prospective employee, to voluntarily provide
13 notification of any information which may be considered as relevant to the test, including, but not
14 limited to, identification of currently or recently used prescriptions or nonprescription drugs, or
15 other relevant medical information. This may be accomplished by providing procedures for review
16 by a qualified medical professional to verify a laboratory sample which tests positive in a
17 confirmatory test.

18 (4) Sample collection, storage and transportation to the place of testing shall be performed
19 so as to reasonably preclude the possibility of sample contamination, adulteration, or

20 misidentification.

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

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

31 In the event a person desires to challenge the results of his or her initial sample test result,
32 that person shall have the right to have the split sample tested by another laboratory as set forth
33 in subsection four. The cost associated with the testing of the split sample shall be the
34 responsibility of the person challenging the initial sample test results.

§21-3E-8. 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 article
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
26 protections available under this article.

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

§21-3E-9. 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-10. 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 any other action, including
6 termination or other adverse employment action, consistent with the employer's policy for
7 confirmed positive drug or alcohol test for employees in sensitive positions, provided there are
8 not applicable contractual provisions that expressly prohibit such action.

9 Employers obligated to perform drug testing under a federal or state mandated drug
10 testing statute will be required to follow whatever additional requirements are mandated by those
11 statutes.

§21-3E-11. 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 confirmed positive drug or alcohol test, or the refusal
5 of an 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, 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-12. 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-13. 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; and

7 (2) All elements of an action for defamation of character, libel, slander or damage to

8 reputation as established by the relevant state statute or common law are satisfied.

§21-3E-14. 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-15. 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-16. 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, if injured at the time of the intoxication,
7 indemnity benefits under the Worker Compensation Laws. However, the employer's drug-free
8 workplace program must notify all employees that it is a condition of employment for an employee
9 to refrain from reporting to work or working with the presence of drugs or alcohol in his or her
10 body and that policy must also state that if an injured employee refuses to submit to a test for
11 drugs or alcohol, that employee forfeits eligibility for unemployment compensation benefits, and
12 if injured, for indemnity benefits under the Worker Compensation Laws. Employers who do not
13 notify their employees of this condition of employment waive their right to assert that eligibility for
14 benefits is entirely forfeited.

15 Nothing herein may be construed or deemed to affect subsection (a), section two, article
16 four, chapter twenty-three of this code and the provisions of said section shall be the sole manner
17 in which intoxication may be proven to establish such intoxication as the proximate cause of an
18 injury for purposes of said chapter.