

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 398**

SENATORS TRUMP, TAKUBO, STOLLINGS, AND PREZIOSO,

*original sponsors*

[Originating in the Committee on the Judiciary;

Reported on January 30, 2019]



1 A BILL to amend and reenact §5-10-48 of the Code of West Virginia, 1931, as amended; and to  
2 amend and reenact §51-9-10 of said code, all relating generally to compensation for  
3 judicial officers; providing that senior judges, justices, and magistrates may receive per  
4 diem compensation for temporary assignments while receiving retirement benefits,  
5 subject to certain limitations; setting forth legislative findings; limiting the per diem rate of  
6 compensation that may be paid to senior judges and justices for each day served;  
7 providing that the combined total of per diem compensation and retirement benefits paid  
8 to a senior judge or justice during a single calendar year may not exceed the annual salary  
9 of a sitting circuit judge; providing an exception to the limitation on the combined total of  
10 per diem compensation and retirement benefits paid to a senior judge or justice in a  
11 calendar year, if the Chief Justice of the Supreme Court of Appeals enters an  
12 administrative order certifying that certain circumstances necessitate extended  
13 assignment of such judge or justice; requiring that administrative orders regarding  
14 extended assignment of a senior judge or justice be submitted to the State Auditor and  
15 the State Treasurer; providing that senior judges and justices may be reimbursed for  
16 actual and necessary expenses incurred in the performance of their duties; and requiring  
17 the State Treasurer to petition the West Virginia Supreme Court of Appeals for a writ of  
18 prohibition prohibiting the State Auditor from issuing warrants to authorize payment of  
19 compensation to senior judges and justices above statutory limitation on daily rate of per  
20 diem compensation.

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

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE  
GOVERNOR, SECRETARY OF STATE, AND ATTORNEY GENERAL;  
BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,  
COMMISSIONS, OFFICES, PROGRAMS, ETC.**

**ARTICLE 10. WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT ACT.**

**§5-10-48. Reemployment after retirement; options for holder of elected public office.**

1           (a) The Legislature finds that a compelling state interest exists in maintaining an actuarially  
2 sound retirement system and that this interest necessitates that certain limitations be placed upon  
3 an individual's ability to retire from the system and to then later return to state employment as an  
4 employee with a participating public employer while contemporaneously drawing an annuity from  
5 the system. The Legislature hereby further finds and declares that the interests of the public are  
6 served when persons having retired from public employment are permitted, within certain  
7 limitations, to render post-retirement employment in positions of public service, either in elected  
8 or appointed capacities. The Legislature further finds and declares that it has the need for qualified  
9 employees and that in many cases an employee of the Legislature will retire and be available to  
10 return to work for the Legislature as a per diem employee. The Legislature further finds and  
11 declares that in many instances these employees have particularly valuable expertise which the  
12 Legislature cannot find elsewhere. The Legislature further finds and declares that reemploying  
13 these persons on a limited per diem basis after they have retired is not only in the best interests  
14 of this state but has no adverse effect whatsoever upon the actuarial soundness of this particular  
15 retirement system.

16           (b) For the purposes of this section: (1) "Regularly employed on a full-time basis" means  
17 employment of an individual by a participating public employer, in a position other than as an  
18 elected or appointed public official, which normally requires 12 months per year service and at  
19 least 1,040 hours of service per year in that position; (2) "temporary full-time employment" or  
20 "temporary part-time employment" means employment of an individual on a temporary or  
21 provisional basis by a participating public employer, other than as an elected or appointed public  
22 official, in a position which does not otherwise render the individual as regularly employed; (3)  
23 "former employee of the Legislature" means any person who has retired from employment with  
24 the Legislature and who has at least 10 years' contributing service with the Legislature; and (4)

25 “reemployed by the Legislature” means a former employee of the Legislature who has been  
26 reemployed on a per diem basis not to exceed 175 days per calendar year.

27 (c) ~~In the event~~ If a retirant becomes regularly employed on a full-time basis by a  
28 participating public employer, payment of his or her annuity shall be suspended during the period  
29 of his or her reemployment and he or she shall become a contributing member to the retirement  
30 system. If his or her reemployment is for a period of one year or longer, his or her annuity shall  
31 be recalculated and he or she shall be granted an increased annuity due to the additional  
32 employment, the annuity to be computed according to §5-10-22 of this code. If his or her  
33 reemployment is for a period less than one year, he or she may request in writing that the  
34 employee and employer retirement contributions submitted during reemployment be credited to  
35 the participating public employer pursuant to §5-10-44 of this code, and his or her previous annuity  
36 shall be reinstated effective the first day of the month following termination of reemployment and  
37 the board’s receipt of written notice thereof. A retirant may accept legislative per diem, temporary  
38 full-time, or temporary part-time employment from a participating employer without suspending  
39 his or her retirement annuity so long as he or she does not receive annual compensation in excess  
40 of \$20,000.

41 (d) Senior judges, justices, and magistrates. –

42 (1) Notwithstanding the provisions of subsection (c) of this section, a retired judge or  
43 justice who is recalled and assigned to temporary service as a senior judge or justice by the West  
44 Virginia Supreme Court of Appeals may receive per diem compensation pursuant to the  
45 requirements of §51-9-10 of this code while continuing to receive his or her annuity.

46 (2) Notwithstanding the provisions of subsection (c) of this section, a retired magistrate  
47 who is recalled and assigned to temporary service as a senior magistrate by the West Virginia  
48 Supreme Court of Appeals may receive per diem compensation pursuant to the requirements of  
49 §50-1-6a of this code while continuing to receive his or her annuity.

50           ~~(d)~~ (e) ~~In the event~~ If a member retires and is then subsequently elected to a public office  
51 or is subsequently appointed to hold an elected public office, or is a former employee of the  
52 Legislature who has been reemployed by the Legislature, he or she has the option,  
53 notwithstanding subsection (c) of this section, to either:

54           (1) Continue to receive payment of his or her annuity while holding public office or during  
55 any reemployment of a former employee of the Legislature on a per diem basis, in addition to the  
56 salary he or she may be entitled to as an office holder or as a per diem reemployed former  
57 employee of the Legislature; or

58           (2) Suspend the payment of his or her annuity and become a contributing member of the  
59 retirement system as provided in subsection (c) of this section. Notwithstanding the provisions of  
60 this subsection, a member who is participating in the system as an elected public official may not  
61 retire from his or her elected position and commence to receive an annuity from the system and  
62 then be elected or reappointed to the same position unless and until a continuous 12-month period  
63 has passed since his or her retirement from the position: *Provided*, That a former employee of  
64 the Legislature may not be reemployed by the Legislature on a per diem basis until at least 60  
65 days after the employee has retired: *Provided, however*, That the limitation on compensation  
66 provided by subsection (c) of this section does not apply to the reemployed former employee:  
67 *Provided further*, That in no event may reemployment by the Legislature of a per diem employee  
68 exceed 175 days per calendar year.

69           ~~(e)~~ (f) A member who is participating in the system simultaneously as both a regular, full-  
70 time employee of a participating public employer and as an elected or appointed member of the  
71 legislative body of the state or any political subdivision may, upon meeting the age and service  
72 requirements of this article, elect to retire from his or her regular full-time state employment and  
73 may commence to receive an annuity from the system without terminating his or her position as  
74 a member of the legislative body of the state or political subdivision: *Provided*, That the retired  
75 member ~~shall~~ may not, during the term of his or her retirement and continued service as a member

76 of the legislative body of a political subdivision, be eligible to continue his or her participation as  
77 a contributing member of the system and ~~shall~~ may not continue to accrue any additional service  
78 credit or benefits in the system related to the continued service.

79 ~~(f)~~ (g) Notwithstanding the provisions of §5-10-27b of this code, any publicly elected  
80 member of the legislative body of any political subdivision or of the State Legislature, the Clerk of  
81 the House of Delegates, and the Clerk of the Senate may elect to commence receiving in-service  
82 retirement distributions from this system upon attaining the age of 70 and one-half years:  
83 *Provided*, That the member is eligible to retire under the provisions of §5-10-20 or §5-10-21 of  
84 this code: *Provided, however*, That the member elects to stop actively contributing to the system  
85 while receiving the in-service distributions.

86 ~~(g)~~ (h) The provisions of §5-10-22h of this code are not applicable to the amendments  
87 made to this section during the 2006 regular session.

## CHAPTER 51. COURTS AND THEIR OFFICERS.

### ARTICLE 9. RETIREMENT SYSTEM FOR JUDGES OF COURTS OF RECORD.

#### §51-9-10. Services of senior judges and justices.

1 (a) The Legislature finds that:

2 (1) Section seven, article VIII of the Constitution of West Virginia expressly requires the  
3 Legislature to fix judicial salaries by statute, providing that: “[j]ustices, judges and magistrates  
4 shall receive the salaries fixed by law”.

5 (2) When originally enacted in 1949, this section of the code required any retired judge  
6 receiving retirement benefits to serve as a special judge, when assigned to temporary service,  
7 “without charge or compensation, per diem or otherwise to him”.

8 (3) In 1974, the Judicial Reorganization Amendment to the Constitution of West Virginia  
9 was ratified. Among other matters, in section eight, article VIII, the amendment addressed the  
10 ongoing practice of recalling retired judicial officers to service by empowering the Chief Justice of

11 the Supreme Court of Appeals to recall a retired judge or justice to service, “with his permission  
12 and with the approval of the supreme court of appeals”, for temporary assignment.

13 (4) Absent from the Judicial Reorganization Amendment and article VIII of the Constitution  
14 of West Virginia is any provision authorizing the Supreme Court of Appeals to fix compensation  
15 for recalled judges or justices. Indeed, the Judicial Reorganization Amendment added language  
16 to section seven, article VIII of the Constitution of West Virginia, unequivocally stating that  
17 “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

18 (5) In 1975, the Legislature amended and reenacted this section of the code, which still  
19 then required any retired judge receiving retirement benefits to serve as a special judge, when  
20 assigned to temporary service “without charge or compensation, per diem or otherwise to him”.

21 (6) In 1991, the Legislature amended and reenacted this section of the code again,  
22 authorizing and empowering the Supreme Court of Appeals to create a panel of senior judges  
23 and justices “to be assigned duties as needed and as feasible toward the objective of reducing  
24 caseloads and providing speedier trials to litigants throughout the State”.

25 (7) The 1991 reenactment of this section of the code statutorily authorized, for the first  
26 time, “reasonable payment” to senior judges and justices “on a per diem basis”, and provided that  
27 “the per diem and retirement compensation of a senior judge shall not exceed the salary of a  
28 sitting judge”.

29 (8) In 2018, the West Virginia House of Delegates adopted and communicated Articles of  
30 Impeachment to the West Virginia Senate, naming justices of the Supreme Court of Appeals  
31 serving at that time as respondents. Several of the articles alleged that certain justices, each while  
32 serving as Chief Justice of the Supreme Court of Appeals, had intentionally signed contracts  
33 agreeing to pay retired judges recalled to service above the compensation limitations of this  
34 section of the code.

35 (9) In a petition to the Supreme Court of Appeals, styled *State ex. rel. Workman v.*  
36 *Carmichael*, one justice named as respondent in the 2018 impeachment proceedings challenged



37 the constitutionality of the Articles of Impeachment in which she was named, including the articles  
38 alleging payment of senior judges above the limitations of this section of the code.

39 (10) In ruling on the petition in *State ex. rel. Workman v. Carmichael*, the Supreme Court  
40 of Appeals, at that time composed of five circuit judges temporarily assigned to sit as justices for  
41 that case, issued a writ of prohibition staying impeachment proceedings.

42 (11) In direct contradiction of section seven, article VIII of the Constitution of West Virginia,  
43 the decision in *State ex. rel. Workman v. Carmichael* held, in part, that this section of the code,  
44 providing for and limiting the compensation of senior judges, is “unconstitutional and  
45 unenforceable”.

46 (12) The majority opinion in *State ex. rel. Workman v. Carmichael* ignored the plain  
47 language of section seven, article VIII of the Constitution of West Virginia, which explicitly provides  
48 that “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

49 (13) Syllabus point four of the majority opinion in *State ex. rel. Workman v. Carmichael*  
50 mischaracterizes what the Legislature had done in enacting this section of the code, by providing  
51 that: “West Virginia Code §51-9-10 (1991) violates the Separation of Powers Clause of Article V,  
52 § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment  
53 matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the  
54 West Virginia Constitution. Consequently, W.Va. Code §51-9-10, in its entirety, is unconstitutional  
55 and unenforceable”.

56 (14) Occasionally, circumstances may require the extended assignment of senior judges  
57 and justices, necessitating the Legislature to prescribe such circumstances when the limitations  
58 on compensation of senior judges and justices receiving retirement benefits may be exceeded.

59 (b) ~~The West Virginia Supreme Court of Appeals is authorized and empowered to~~ The  
60 Legislature recognizes and acknowledges the authority of the West Virginia Supreme Court of  
61 Appeals to recall retired judges and justices for temporary assignment and to create a panel of  
62 senior judges and justices to utilize the talent and experience of former circuit court judges and

63 supreme court justices of this state. ~~The Supreme Court of Appeals shall promulgate rules~~  
64 ~~providing for said judges and justices to be assigned duties as needed and as feasible toward the~~  
65 ~~objective of reducing caseloads and providing speedier trials to litigants throughout the state.~~  
66 ~~Provided, That Reasonable payment shall be made to said judges and justices on a per diem~~  
67 ~~basis: Provided, however, That the per diem and retirement compensation of a senior judge shall~~  
68 ~~not exceed the salary of a sitting judge and Allowances shall also be made for necessary~~  
69 ~~expenses as provided for special judges under §51-2-1 et seq. and §51-2-1 et seq. of this Code~~

70 (c) Senior judges and justices recalled and assigned to service shall receive per diem  
71 compensation set by the Supreme Court of Appeals, but not to exceed \$430 for each day actually  
72 served: *Provided*, That the combined total of per diem compensation and retirement benefits paid  
73 to a senior judge or justice during a single calendar year may not exceed the annual salary of a  
74 sitting circuit judge, except as set forth in subsection (d) of this section.

75 (d) Notwithstanding subsection (c) of this section, for purposes of maintaining judicial  
76 efficacy and continuity in judicial decisionmaking, a senior judge or justice may continue to receive  
77 per diem compensation after the combined total of per diem compensation and retirement benefits  
78 paid to the senior judge or justice during that calendar year exceeds the annual salary of a sitting  
79 circuit judge if the Chief Justice of the Supreme Court of Appeals enters an administrative order  
80 certifying that circumstances, such as the protracted illness or the lengthy suspension or absence  
81 of a sitting judicial officer, necessitate the extended assignment of the senior judge or justice.  
82 Immediately upon entering such an order, the Chief Justice shall submit copies of the order to the  
83 State Auditor and the State Treasurer.

84 (e) In addition to the per diem compensation authorized by this section, senior judges and  
85 justices recalled to service may be reimbursed for their actual and necessary expenses incurred  
86 in the performance of their duties.

87 (f) Within 90 days after the effective date of this section, the Treasurer, as the chief  
88 custodian of public funds, shall petition the West Virginia Supreme Court of Appeals for a writ of

- 89 prohibition pursuant to the court's original jurisdiction, naming as respondent the State Auditor  
90 and petitioning the court to prohibit the State Auditor from issuing any warrant for the payment of  
91 per diem compensation to senior judges and justices in excess of the limitation on the daily rate  
92 of per diem compensation in subsection (c) of this section.

NOTE: The purpose of this bill is to fix the rate of per diem compensation for senior judges or justices by statute and to limit the combined annual total of per diem compensation and retirement benefits that may be paid to a senior judge or justice, absent an Administrative Order by the Chief Justice of the Supreme Court of Appeals. The bill requires the State Treasurer to petition the West Virginia Supreme Court of Appeals for a writ of prohibition, prohibiting the State Auditor from issuing warrants to authorize payment of compensation to senior judges and justices above the new statutory compensation limits.

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