

# **WEST VIRGINIA LEGISLATURE**

## **2019 REGULAR SESSION**

**Introduced**

### **House Bill 3094**

BY DELEGATES LONGSTRETH, FLEISCHAUER, DOYLE,

PYLES, WILLIAMS, PUSHKIN, ZUKOFF AND EVANS

[Introduced February 12, 2019; Referred  
to the Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia 1931, as amended, by adding thereto a new section,  
 2 designated §3-10-3B; and to amend and reenact §3-10-3, §3-10-4, §3-10-5, §3-10-6, §3-  
 3 10-7, and §3-10-8 of said code, all relating to political affiliation of elected officials;  
 4 providing legislative findings regarding constitutional conflicts and public policy to protect  
 5 the voters choices; providing that if an elected official changes parties resulting in vacancy  
 6 of elected office, requiring that vacancies in certain elected offices be filled by persons of  
 7 the same political party of which the person vacating the office was a member at his or  
 8 her time of election.

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

## **ARTICLE 10. FILLING VACANCIES.**

### **§3-10-3. Vacancies in offices of state officials, justices, judges, and magistrates.**

1 (a) Any vacancy occurring in the offices of Secretary of State, Auditor, Treasurer, Attorney  
 2 General, Commissioner of Agriculture, or in any office created or made elective to be filled by the  
 3 voters of the entire state, is filled by the Governor of the state by appointment and subsequent  
 4 election to fill the remainder of the term, if required by §3-10-1 of this code. The Governor shall  
 5 make the appointment from a list of three legally qualified persons submitted by the party  
 6 executive committee of the same political party with which the person holding the office  
 7 immediately preceding the vacancy was affiliated at the time ~~the vacancy occurred~~ he or she was  
 8 elected to the office. The list of qualified persons to fill the vacancy shall be submitted to the  
 9 Governor within 15 days after the vacancy occurs, and the Governor shall duly make his or her  
 10 appointment to fill the vacancy from the list of legally qualified persons within five days after the  
 11 list is received. If the list is not submitted to the Governor within the 15-day period, the Governor  
 12 shall appoint, within five days thereafter, a legally qualified person of the same political party with  
 13 which the person holding the office immediately preceding the vacancy was affiliated at the time  
 14 ~~the vacancy occurred~~ he or she was elected to the office: *Provided,* That the provisions of this  
 15 subsection do not apply to §3-10-3(b), §3-10-3(c), §3-10-3(d), and §3-10-3(e) of this code.

16 (b) Any vacancy occurring in the offices of Justice of the Supreme Court of Appeals, judge  
17 of a circuit court, or judge of a family court is filled by the Governor of the state by appointment  
18 and, if the unexpired term be for a period of more than two years, by a subsequent election to fill  
19 the remainder of the term, as required by §3-10-3(d) of this code. If an election is required under  
20 §3-10-3(d) of this code, the Governor, circuit court, or the chief judge thereof in vacation, is  
21 responsible for the proper proclamation by order and notice required by §3-10-1 of this code.

22 (c) Any vacancy in the office of magistrate is appointed according to the provisions of §50-  
23 1-6 of this code, and, if the unexpired term be for a period of more than two years, by a subsequent  
24 election to fill the remainder of the term, as required by §3-10-3(d) of this code.

25 (d) (1) When the vacancy in the office of Justice of the Supreme Court of Appeals, judge  
26 of the circuit court, judge of a family court, or magistrate occurs after the 84th day before a general  
27 election, and the affected term of office ends on December 31 following the succeeding general  
28 election two years later, the person appointed to fill the vacancy shall continue in office until the  
29 completion of the term.

30 (2) When the vacancy occurs before the close of the candidate filing period for the primary  
31 election, and if the unexpired term be for a period of greater than two years, the vacancy shall be  
32 filled by election in the nonpartisan judicial election held concurrently with the primary election  
33 and the appointment shall continue until a successor is elected and certified.

34 (3) When the vacancy occurs after the close of candidate filing for the primary election  
35 and not later than 84 days before the general election, and if the unexpired term be for a period  
36 of greater than two years, the vacancy shall be filled by election in a nonpartisan judicial election  
37 held concurrently with the general election, and the appointment shall continue until a successor  
38 is elected and certified.

39 (e) When an election to fill a vacancy is required to be held at the general election,  
40 according to the provisions of §3-10-3(d) of this code, a special candidate filing period shall be  
41 established. Candidates seeking election to any unexpired term for Justice of the Supreme Court

42 of Appeals, judge of a circuit court, judge of the family court, or magistrate shall file a certificate  
43 of announcement and pay the filing fee no earlier than the first Monday in August and no later  
44 than 77 days before the general election.

**§3-10-3b. Vacancy created when party affiliation changed.**

1 (a) Legislative findings- The Legislature finds that the freedom of association protected  
2 by Art. 3 §11 of the Constitution of the State of West Virginia, prohibiting political tests and allowing  
3 citizens to enjoy political rights and freedom of association without limitation, which preserves the  
4 rights of elected officials to change political party affiliation after being elected by state citizens, is  
5 in opposition with the rights preserved to state citizens as provided in Art. 2 §2 of the Constitution  
6 of the State of West Virginia, which reserves the powers of government to our citizens, and  
7 provides that the powers of government can only be rightfully exercised in accordance with their  
8 will and appointment. Further, this protection is violated by an elected official, when voters chose  
9 that person by election, in whole or part, based on his or her affiliation with a political party or  
10 alternatively as an independent during the election to public office, with knowledge and  
11 representation to voters of his or her affiliation, creates an inherent conflict between these two  
12 competing constitutionally protected rights. Therefore, the Legislature finds, that a balance of  
13 these two interests must be struck, and therefore this act is necessary to resolve the conflict  
14 between these constitutionally protected rights. Further, that this balance is best found by  
15 protecting the rights of all citizens to elect persons consistent with the values and representations  
16 of a candidate made while running for political office. Therefore, removing a person from an  
17 elected office when he or she changes party affiliation status from that which he or she ran and  
18 was elected to that office preserves the integrity of our system of government and supersedes  
19 the rights of the individual to change their political affiliation during his or her term of office.

20 (b) If an elected official changes his or her party affiliation or independent candidate status  
21 while servicing as an elected official of this state, notwithstanding the length of term normally  
22 afforded that office and any other code provision to the contrary, the office shall be deemed

23 vacated by the elected official and his or her replacement shall be made pursuant to the provisions  
24 of this code that provides for replacement of an elected official when a vacancy occurs in that  
25 elected office.

**§3-10-4. Vacancies in representation in United States Congress.**

1 (a) (1) If there is a vacancy in the representation from this state in the House of  
2 Representatives in the Congress of the United States, the Governor shall, within five days after  
3 the fact comes to his or her knowledge, issue a proclamation setting dates for a special general  
4 election that is not less than 84 nor more than 120 days from the date of the vacancy and requiring  
5 nomination of candidates as provided in §3-10-4(a)(2) of this code: *Provided*, That no such  
6 proclamation may be made nor may a special election be held if the vacancy occurs after the 84th  
7 day prior to the regularly scheduled general election for a new full term of the office. The election  
8 shall follow the requirements of §3-10-1 of this code that are not in conflict with this section.

9 (2) The party executive committees for the congressional district for which there is a  
10 vacancy shall each, within 30 days of the Governor's proclamation, nominate a candidate to stand  
11 at the general election required by §3-10-4(a)(1) of this code.

12 (b) If there is a vacancy in the representation from this state in the Senate of the United  
13 States Congress, the vacancy shall be filled by the Governor of the state by appointment. The  
14 Governor shall make the appointment from a list of three legally qualified persons submitted by  
15 the party executive committee of the same political party with which the person holding the office  
16 immediately preceding the vacancy was affiliated at the time ~~the vacancy occurred~~ he or she was  
17 elected to the office. The list of qualified persons to fill the vacancy shall be submitted to the  
18 Governor within 15 days after the vacancy occurs, and the Governor shall duly make his or her  
19 appointment to fill the vacancy from the list of legally qualified persons within five days after the  
20 list is received. If the list is not submitted to the Governor within the 15-day period, the Governor  
21 shall appoint, within five days thereafter, a legally qualified person of the same political party with  
22 which the person holding the office immediately preceding the vacancy was affiliated at the time

23 ~~the vacancy occurred~~ he or she was elected to office.

24 Furthermore,

25 (1) If the vacancy occurs on or before the primary cutoff date, then an election shall be  
26 held pursuant to §3-10-1 of this code; or

27 (2) If the vacancy occurs after the primary cutoff date, but on or before the general cutoff  
28 date, then the Governor shall issue a proclamation providing for: (A) A special filing period; (B) a  
29 special primary election to be held in conjunction with the upcoming general election; and (C) a  
30 special general election to be held not less than 84 nor more than 120 days following the date of  
31 the special primary election. Each election shall follow the requirements of §3-10-1 of this code  
32 that are not in conflict with this section.

**§3-10-5. Vacancies in state Legislature.**

1 (a) Any vacancy in the office of State Senator or member of the House of Delegates  
2 shall be filled by appointment by the Governor, from a list of three legally qualified persons  
3 submitted by the party executive committee of the same political party with which the person  
4 holding the office immediately preceding the vacancy was affiliated at the time ~~the vacancy~~  
5 ~~occurred~~ he or she was elected to the office. The list of qualified persons to fill the vacancy shall  
6 be submitted to the Governor within 15 days after the vacancy occurs and the Governor shall  
7 duly make his or her appointment to fill the vacancy from the list of legally qualified persons  
8 within five days after the list is received. If the list is not submitted to the Governor within the 15-  
9 day period, the Governor shall appoint within five days thereafter a legally qualified person of  
10 the same political party with which the person holding the office immediately preceding the  
11 vacancy was affiliated at the time ~~the vacancy occurred~~ he or she was elected to the office.

12 (b) In the case of a member of the House of Delegates, the list shall be submitted by the  
13 party executive committee of the delegate district in which the vacating member resided at the  
14 time of his or her election or appointment. The appointment to fill a vacancy in the House of  
15 Delegates is for the unexpired term.

16 (c) In the case of a State Senator, the list shall be submitted by the party executive  
17 committee of the state senatorial district in which the vacating senator resided at the time of his  
18 or her election or appointment. The appointment to fill a vacancy in the state Senate is for the  
19 unexpired term, unless §3-10-1 of this code requires a subsequent election to fill the remainder  
20 of the term, which shall follow the procedure set forth in said section.

**§3-10-6. Vacancy in office of circuit court clerk.**

1 (a) When a vacancy occurs in the office of clerk of the circuit court, the circuit court by a  
2 majority vote of the judges shall fill the same within 30 days of the vacancy by appointment of a  
3 person of the same political party as of which the officeholder vacating the office was a member  
4 at the time of his or her election, for the period required by §3-10-1 of this code.

5 (b) Notwithstanding any code provision to the contrary, the chief judge may appoint a  
6 temporary successor to the office of clerk of the circuit court until the requirements of this section  
7 have been met. The temporary successor may serve no more than 30 days from the date of the  
8 vacancy.

9 (c) If an election is necessary, the circuit court, or the chief judge thereof in vacation, is  
10 responsible for the proper proclamation, by order and notice required by §3-10-1 of this code.

11 (d) Section one of this article shall be followed with respect to any election needed to fill a  
12 vacancy, except that if the vacancy occurs after the primary cutoff date but not later than the  
13 general cutoff date, candidates to fill the vacancy shall be nominated by the county executive  
14 committee in the manner provided in §3-5-19 of this code, as in the case of filling vacancies in  
15 nominations, and the names of the persons, so nominated and certified to the clerk of the county  
16 commission of the county, shall be placed upon the ballot to be voted at the next general election.

**§3-10-7. Vacancies in offices of county commissioner and clerk of county commission.**

1 (a) Any vacancy in the office of county commissioner or clerk of county commission shall  
2 be filled by appointment by the county commission. The appointee must be a person of the same  
3 political party with which the person holding the office immediately preceding the vacancy was

4 affiliated at the time ~~the vacancy occurred~~ he or she was elected to the office: *Provided*, That at  
5 the time of appointment, the appointee must have been a member of that political party for at least  
6 60 days prior to the occurrence of the vacancy.

7 (b) If a quorum of the county commission fails to make an appointment within 30 days, the  
8 county executive committee of the same political party with which the person holding the office  
9 preceding the vacancy was affiliated at the time ~~the vacancy occurred~~ he or she was elected to  
10 the office, shall submit a list of three legally qualified persons to fill the vacancy. Within 15 days  
11 from the date on which the list is received, the county commission shall appoint a candidate from  
12 the list to fill the vacancy. If the county commission fails to make the appointment within the  
13 specified time, then the county commissioner with the longest tenure shall eliminate one name  
14 from the submitted list, followed by the county commissioner with the second-longest tenure then  
15 eliminating one name from the submitted list. The name remaining after those two names have  
16 been eliminated shall be deemed to be appointed by the county commission to fill the vacancy.

17 (c) If the number of vacancies in a county commission deprives that body of a quorum,  
18 the Governor shall make an appointment to fill any vacancy in the county commission necessary  
19 to create a quorum, from a list of three legally qualified persons submitted by the party executive  
20 committee of the same political party with which the person holding the office immediately  
21 preceding the vacancy was affiliated at the time ~~the vacancy occurred~~ he or she was elected to  
22 the office. The Governor shall make any appointments necessary, beginning with the vacancy  
23 first created, to create a quorum in accordance with the same procedures applicable to county  
24 commissions under §3-10-7(a) of this code. Once a quorum of the county commission is  
25 reestablished by gubernatorial appointment, the authority to fill the remaining vacancies shall be  
26 filled in the manner prescribed in §3-10-7(a) of this code.

27 (d) An appointment made pursuant to this section is for the period of time provided in §3-  
28 10-1 of this code.

29 (e) Notwithstanding any code provision to the contrary, a county commission may appoint

30 a temporary successor to the office of clerk of the county commission until the requirements of  
31 this section have been met. The temporary successor may serve no more than 30 days from the  
32 date of the vacancy.

33 (f) If an election is necessary under §3-10-1 of this code, the county commission, or the  
34 president thereof in vacation, shall be responsible for the proper proclamation, by order, and  
35 notice required by §3-10-1 of this code.

36 (g) §3-10-1 of this code shall be followed with respect to any election needed to fill a  
37 vacancy, except that if the vacancy occurs after the primary cutoff date but not later than the  
38 general cutoff date, candidates to fill the vacancy shall be nominated by the county executive  
39 committee in the manner provided in §3-5-19 of this code, as in the case of filling vacancies in  
40 nominations, and the names of the persons, so nominated and certified to the clerk of the county  
41 commission of the county, shall be placed upon the ballot to be voted at the next general election.

42 (h) If the election for an unexpired term is held at the same time as the election for a full  
43 term for county commissioner, the full term shall be counted first and the unexpired term shall be  
44 counted second. If the candidate with the highest number of votes for the unexpired term resides  
45 in the same magisterial district as the candidate with the highest number of votes for the full term,  
46 the candidate for the full term shall be seated. The candidate with the next highest number of  
47 votes for the unexpired term residing in a different magisterial district shall be seated for the  
48 unexpired term.

**§3-10-8. Vacancies in offices of prosecuting attorney, sheriff, assessor and surveyor.**

1 (a) Any vacancy occurring in the office of prosecuting attorney, sheriff, assessor or county  
2 surveyor shall be filled by the county commission within 30 days of the vacancy by appointment  
3 of a person of the same political party as the officeholder vacating the office belonged to at the  
4 time he or she was elected to the office. The appointed person shall hold the office for the period  
5 stated by section one of this article.

6 (b) Notwithstanding any code provision to the contrary, a county commission may appoint

7 a temporary successor to the office of prosecuting attorney, sheriff, assessor or county surveyor  
8 until the requirements of this section have been met. The temporary successor may serve no  
9 more than 30 days from the date of the vacancy.

10 (c) If an election is necessary under §3-10-1 of this code, the county commission, or the  
11 president thereof in vacation, shall be responsible for the proper proclamation, by order, and  
12 notice required by §3-10-1 of this code.

13 (d) Section one of this article shall be followed with respect to any election needed to fill a  
14 vacancy, except that if the vacancy occurs after the primary cutoff date but not later than the  
15 general cutoff date, candidates to fill the vacancy shall be nominated by the county executive  
16 committee in the manner provided in §3-5-19 of this code, as in the case of filling vacancies in  
17 nominations, and the names of the persons, so nominated and certified to the clerk of the county  
18 commission of the county, shall be placed upon the ballot to be voted at the next general election.

NOTE: The purpose of this bill is to require persons once elected to remain in the political party from which they were elected; providing legislative findings relating to constitutional requirements associated with elected officials' freedom of association and rights of voters to be represented by persons that have chosen or not chosen a party affiliation; and requiring that if a vacancy occurs in an elected office, that an appointment shall be from a similar political party affiliation.

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