

# **WEST VIRGINIA LEGISLATURE**

## **2021 REGULAR SESSION**

**Introduced**

### **House Bill 2961**

BY DELEGATES BARACH, LOVEJOY, BROWN, ROWE,  
DEAN, GRIFFITH, GARCIA, YOUNG, PUSHKIN, PAYNTER,  
AND FLEISCHAUER

[Introduced March 08, 2021; Referred to the  
Committee on the Judiciary]

1 A BILL to amend and reenact §55-7E-2 and §55-7E-3 of the Code of West Virginia, 1931, as  
 2 amended, all relating to rights of persons in an employment related dispute; requiring a  
 3 jury trial when requested by either party; prohibiting an employer, as a condition of  
 4 employment that an employee consent to binding arbitration as a condition of being hired  
 5 or for continued employment and providing exceptions thereto; and providing an effective  
 6 date.

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

**ARTICLE 7E. ~~DUTY TO MITIGATE DAMAGES~~ RIGHTS OF PARTIES IN  
 EMPLOYMENT CLAIMS.**

**§55-7E-2. Legislative findings and declaration of purpose.**

1 (a) The Legislature finds that:

2 (1) Employees of this state are entitled to be free from unlawful discrimination, wrongful  
 3 discharge and unlawful retaliation in the workplace. Employers are often confronted with difficult  
 4 choices in the hiring, discipline, promotion, layoff and discharge of employees.

5 (2) The citizens and employers of this state are entitled to a legal system that provides  
 6 adequate and reasonable compensation to those persons who have been subjected to unlawful  
 7 employment actions, a legal system that is fair, predictable in its outcomes, and a legal system  
 8 that functions within the mainstream of American jurisprudence.

9 (3) The goal of compensation remedies in employment law cases is to make the victim of  
 10 unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay  
 11 in lieu of reinstatement; and under certain statutes, attorney's fees for the successful plaintiff.

12 (4) In West Virginia, the amount of damages recently awarded in statutory and common  
 13 law employment cases have been inconsistent with established federal law and the law of  
 14 surrounding states. This lack of uniformity in the law puts our state and its businesses at a  
 15 competitive disadvantage.

16 (5) It is at times necessary for West Virginians to protect their employment rights and every  
17 citizen should not be required, as a condition of his or her being hired or continued employment,  
18 to agree to binding arbitration of any legal claims made against an employer.

19 (6) For any employee in any employment related action, the preservation of the right to a  
20 jury trial is a matter of equity, and he or she is therefore entitled to a jury trial.

21 (b) The purpose of this article is to provide a framework for adequate and reasonable  
22 compensation to those persons who have been subjected to an unlawful employment action. ~~but~~  
23 ~~to ensure that compensation does not far exceed the goal of making a wronged employee whole.~~

**§55-7E-3. Statutory or common law employment claims; duty to mitigate damages.**

1 (a) In any employment law cause of action against a current or former employer,  
2 regardless of whether the cause of action arises from a statutory right created by the Legislature  
3 or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative  
4 duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the  
5 defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's  
6 rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back  
7 pay and front pay awards are not an available remedy. Any award of back pay or front pay by a  
8 commission, court or jury shall be reduced by the amount of interim earnings or the amount  
9 earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack  
10 of reasonable diligence.

11 (b) In any employment law claim or cause of action, the trial court shall make a preliminary  
12 ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies  
13 are sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of  
14 front pay, if any, to be awarded shall be an issue for the trial judge to decide.

15 (c) Upon a timely demand of any party in a civil proceeding relating to any employment  
16 related claim, the court shall conduct a jury trial.

17 (d) A person shall not, as a condition of employment, continued employment, or the receipt

18 of any employment-related benefit, require any applicant for employment or any employee to  
19 waive any right, forum, or procedure for a violation of any provision of this code, including the right  
20 to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other  
21 public prosecutor, law-enforcement agency, or any court or other governmental entity of any  
22 alleged violation.

23 (e) An employer shall not threaten, retaliate or discriminate against, or terminate any  
24 applicant for employment or any employee because of the refusal to consent to the waiver of any  
25 right, forum, or procedure for a violation of this code, including the right to file and pursue a civil  
26 action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law-  
27 enforcement agency, or any court or other governmental entity of any alleged violation.

28 (f) For purposes of this section, an agreement that requires an employee to opt out of a  
29 waiver or take any affirmative action in order to preserve their rights is deemed a condition of  
30 employment.

31 (g) An employer shall not condition employment, continued employment, or the receipt of  
32 any employment-related benefit on the party's agreement to arbitration. Any employment  
33 agreement term contemplating arbitration shall include an option for the employee or applicant to  
34 affirmatively acknowledge and agree to arbitration or refuse such term.

35 (1) Agreement to an arbitration term must be separate and distinct from any other written  
36 employment agreement.

37 (2) The arbitration agreement must put the employee on notice that affirmative  
38 acknowledgement and agreement to arbitration will waive their right to a jury trial.

39 (3) Refusal by an employee or applicant to agree to an arbitration term shall not be  
40 grounds for an employer to terminate, retaliate, or discriminate against an employee or applicant.

41 (h) In addition to injunctive relief and any other remedies available, a court may award a  
42 prevailing plaintiff enforcing their rights under this section reasonable attorney's fees.

43 (i) This section does not apply to a person registered with a self-regulatory organization

44 as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted  
45 under that act pertaining to any requirement of a self-regulatory organization that a person  
46 arbitrate disputes that arise between the person and their employer or any other person as  
47 specified by the rules of the self-regulatory organization.

48 (j) If any provision of this section, or the application thereof, to any person or circumstance  
49 is found to be preempted by the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.), such invalidity  
50 shall not affect other provisions or applications of the article, and to this end the provisions of this  
51 article are declared to be severable.

52 (k) This section does not apply to post dispute settlement agreements or negotiated  
53 severance agreements.

54 (l) This section applies to contracts for employment entered into, modified, or extended on  
55 or after January 1, 2022.

NOTE: The purpose of this bill is to provide protections for employees in legal employment disputes by providing that no employee can be required as a condition of employment to agree to mandatory arbitration; and authorizing any party in any legal proceeding relating to employment dispute to demand a jury trial.

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