

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

**Introduced**

### **House Bill 3152**

By Delegates Kelly, Honaker, Worrell, and Hott

[By Request of the West Virginia State Police]

[Introduced January 30, 2023; Referred to the  
Committee on Veterans' Affairs and Homeland

Security then the Judiciary]

1 A BILL to amend and reenact §17C-5-4, §17C-5-5, §17C-5-6a, §17C-5-8, and §17C-5-10 of the  
 2 Code of West Virginia, 1931, as amended, all relating to driving under the influence;  
 3 making the West Virginia State Police Forensic Laboratory the certifying entity for  
 4 secondary chemical tests, method and administration of secondary chemical tests, and  
 5 approval of preliminary breath analysis devices and use; eliminating rule-making authority  
 6 of the Bureau of Public Health; providing rule-making authority for the State Police;  
 7 correcting blood alcohol levels related to juveniles; removing propoxyphene from the list of  
 8 substances tested for in a chemical analysis of blood; eliminating outdated references to  
 9 urine collection and analysis; and making technical corrections.

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

**ARTICLE                    5.                    SERIOUS                    TRAFFIC                    OFFENSES.**

**§17C-5-4. Implied consent to test; administration at direction of law-enforcement officer;  
 designation of type of test; definition of "law-enforcement officer".**

1 (a) Any person who drives a motor vehicle in this state is considered to have given his or  
 2 her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary  
 3 chemical test of either his or her blood or breath to determine the alcohol concentration in his or  
 4 her blood, or the concentration in the person's body of a controlled substance, drug, or any  
 5 combination thereof.

6 (b) A preliminary breath analysis may be administered in accordance with the provisions of  
 7 §17C-5-5 of this code whenever a law-enforcement officer has reasonable cause to believe a  
 8 person has committed an offense prohibited by §17C-5-2 of this code or by an ordinance of a  
 9 municipality of this state which has the same elements as an offense described in §17C-5-2 of this  
 10 code.

11 (c) A secondary test of blood or breath is incidental to a lawful arrest and is to be  
 12 administered at the direction of the arresting law-enforcement officer having probable cause to  
 13 believe the person has committed an offense prohibited by §17C-5-2 of this code or by an

14 ordinance of a municipality of this state which has the same elements as an offense described in  
15 said section: *Provided*, That absent written consent of the person, a secondary test of blood may  
16 not be performed without issuance of a warrant signed by a magistrate or a circuit judge.

17 (d) The law-enforcement agency that employs the arresting law-enforcement officer shall  
18 designate the secondary tests to be administered. Notwithstanding §17C-5-7a of this code, the  
19 refusal to submit to a blood test only may not result in the revocation of the arrested person's  
20 license to operate a motor vehicle in this state.

21 (e) Any person to whom a preliminary breath test is administered who is arrested shall be  
22 advised verbally and given a written statement advising him or her of the following:

23 (1) That the person's refusal to submit to the secondary chemical test, designated pursuant  
24 to subsection (d) of this section, will result in the revocation of his or her license to operate a motor  
25 vehicle for a period of at least 45 days and up to life;

26 (2) That, if a designated secondary chemical test is taken, the results of the test may be  
27 used against him or her in court as evidence of violating §17C-5-2 of this code or an ordinance of a  
28 municipality of this state which has the same elements as an offense described in said section;  
29 and

30 (3) That, if the person first submits to the requested secondary chemical test, the person  
31 has the right to have a test or tests of his or her blood performed as provided in §17C-5-9 of this  
32 code.

33 (f) Any law-enforcement officer who has been properly trained in the administration of any  
34 secondary chemical test authorized by this article, including, but not limited to, certification by the  
35 ~~Bureau for Public Health~~ West Virginia State Police Forensic Laboratory in the operation of any  
36 equipment required for the collection and analysis of a breath sample, may conduct the test at any  
37 location in the county wherein the arrest is made: *Provided*, That the law-enforcement officer may  
38 conduct the test at the nearest available properly functioning secondary chemical testing device  
39 located outside the county in which the arrest was made, if: (1) There is no properly functioning

40 secondary chemical testing device located within the county the arrest was made; or (2) there is no  
41 magistrate available within the county the arrest was made for the arraignment of the person  
42 arrested. A law-enforcement officer who is directing that a secondary chemical test be conducted  
43 has the authority to transport the person arrested to where the secondary chemical testing device  
44 is located.

45 (g) If the arresting officer lacks proper training in the administration of a secondary  
46 chemical test, then any other law-enforcement officer who has received training in the  
47 administration of the secondary chemical test to be administered may, upon the request of the  
48 arresting law-enforcement officer and in his or her presence, conduct the secondary test. The  
49 results of a test conducted pursuant to this subsection may be used in evidence to the same extent  
50 and in the same manner as if the test had been conducted by the arresting law-enforcement  
51 officer.

52 (h) Only the person actually administering or conducting a test conducted pursuant to this  
53 article is competent to testify as to the results and the veracity of the test.

54 (i) (1) For the purpose of this article, the term "law-enforcement officer" or "police officer"  
55 means: (A) Any member of the West Virginia State Police; (B) any sheriff and any deputy sheriff of  
56 any county; (C) any member of a police department in any municipality as defined in §8-1-2 of this  
57 code; (D) any Natural Resources police officer of the Division of Natural Resources; and (E) any  
58 special police officer appointed by the Governor pursuant to the provisions of §61-3-41 of this code  
59 who has completed the course of instruction at a law-enforcement training academy as provided  
60 for under the provisions of §30-29-9 of this code.

61 (2) In addition to standards promulgated by the Governor's Committee on Crime,  
62 Delinquency, and Correction, pursuant to §30-29-3 of this code, governing the qualification of  
63 law-enforcement officers and the entry-level law-enforcement training curricula, the Governor's  
64 Committee on Crime, Delinquency, and Correction shall require the satisfactory completion of a  
65 minimum of not less than six hours of training in the recognition of impairment in drivers who are

66 under the influence of controlled substances or drugs other than alcohol.

67 (3) In addition to standards promulgated by the Governor's Committee on Crime,  
68 Delinquency, and Correction, pursuant to §30-29-3 of this code, establishing standards governing  
69 in-service law-enforcement officer training curricula and in-service supervisory level training  
70 curricula, the Governor's Committee on Crime, Delinquency, and Correction shall require the  
71 satisfactory completion of a minimum of not less than six hours of training in the recognition of  
72 impairment in drivers who are under the influence of controlled substances or drugs other than  
73 alcohol.

74 (4) A law-enforcement officer who has not satisfactorily completed the minimum number of  
75 hours of training in the recognition of impairment in drivers who are under the influence of  
76 controlled substances or drugs other than alcohol, required by subdivisions (2) and (3) of this  
77 subsection, may not require any person to submit to secondary chemical test of his or her blood for  
78 the purposes of determining the concentration in the person's body of a controlled substance,  
79 drug, or any combination thereof.

80 (j) A law-enforcement officer who has reasonable cause to believe that a person has  
81 committed an offense prohibited by §20-7-18 of this code, relating to the operation of a motorboat,  
82 jet ski, or other motorized vessel, shall follow the provisions of this section when administering, or  
83 causing to be administered, a preliminary breath analysis and, incidental to a lawful arrest, a  
84 secondary chemical test of the accused person's blood or breath to determine the alcohol  
85 concentration in his or her blood, or the concentration in the person's body of a controlled  
86 substance, drug, or any combination thereof.

**§17C-5-5. Preliminary analysis of breath to determine alcoholic content of blood.**

1 When a law-enforcement officer has reason to believe a person has committed an offense  
2 prohibited by ~~section two of this article~~ §17C-5-2 of this code or by an ordinance of a municipality of  
3 this state which has the same elements as an offense described in ~~said section two of this article~~  
4 §17C-5-2 of this code, the law-enforcement officer may require such person to submit to a

5 preliminary breath analysis for the purpose of determining such person's blood alcohol content.  
6 Such breath analysis must be administered as soon as possible after the law-enforcement officer  
7 has a reasonable belief that the person has been driving while under the influence of alcohol,  
8 controlled substances or drugs. Any preliminary breath analysis required under this section must  
9 be administered with a device and in a manner approved by the ~~department of health~~ West Virginia  
10 State Police Forensic Laboratory for that purpose. The results of a preliminary breath analysis  
11 shall be used solely for the purpose of guiding the officer in deciding whether an arrest should be  
12 made. When a driver is arrested following a preliminary breath analysis, the tests as hereinafter  
13 provided in this article shall be administered in accordance with the provisions thereof.

**§17C-5-6a. Taking a child into custody; driving a motor vehicle with any amount of blood alcohol.**

1 (a) A preliminary breath analysis may be administered to a child whenever a law-  
2 enforcement official has reasonable cause to believe the child to have been driving a motor vehicle  
3 with any amount of alcohol in his or her blood for the purpose of determining the child's blood  
4 alcohol content. The breath analysis must be administered as soon as possible after the law-  
5 enforcement officer arrives at a reasonable belief that the child has been driving a motor vehicle  
6 with any amount of alcohol in his or her blood. Any preliminary breath analysis administered  
7 pursuant to this subsection must be administered with a device and in a manner approved by the  
8 ~~division of health~~ West Virginia State Police Forensic Laboratory for that purpose. If a preliminary  
9 breath analysis is administered, the results shall be used solely for the purpose of guiding the  
10 officer in deciding whether the child, at the time of driving the motor vehicle, had an alcohol  
11 concentration in his or her blood of ~~.0002~~ .02 of one percent or more, by weight, and should,  
12 therefore, be taken into custody to administer a secondary test in accordance with the provisions  
13 of this section.

14 (b) A child may be taken into custody by a law-enforcement official without a warrant or  
15 court order if the official has reasonable grounds to believe the child to have been driving a motor

16 vehicle with any amount of alcohol in his or her blood. If a preliminary breath analysis is  
17 administered and the results of the analysis indicate that the child has an alcohol concentration in  
18 his or her blood of less than ~~.0002~~ .02 of one percent, by weight, the child may not be taken into  
19 custody unless other grounds exist under §49-4-705(b) of this code. Upon taking a child into  
20 custody pursuant to the provisions of this section, the official shall take all reasonable steps to  
21 cause notification to be made to the child's parent or custodian or, if the parent or custodian cannot  
22 be located, to a close relative.

23 (c) Upon taking a child into custody pursuant to this section, the official shall take the child  
24 to a facility where a secondary test of the child's blood ~~or urine~~ may be administered at the  
25 direction of the official or a test of the child's breath may be administered by the official. The law-  
26 enforcement agency by which such law-enforcement official is employed shall designate whether  
27 the secondary test is a test of either blood ~~breath, or urine~~ or breath: *Provided*, That if the test is a  
28 blood test and the child refuses to submit to the blood test, then the law-enforcement official taking  
29 the child into custody shall designate in lieu thereof a breath test to be administered.  
30 Notwithstanding the provisions of ~~§17C-5-7~~ §17C-5-7a of this code, a refusal to submit to a blood  
31 test only shall not result in the revocation of the child's license to operate a motor vehicle in this  
32 state. Any child taken into custody pursuant to this section shall be given a written statement  
33 advising him or her that a refusal to submit to a secondary test of either blood ~~breath, or urine~~ or  
34 breath, as finally designated by the law-enforcement agency or official in accordance with this  
35 subsection, will result in the suspension of his or her license to operate a motor vehicle in this state  
36 for a period of at least 30 days or a revocation of the license for a period up to life.

37 (d) If the law-enforcement official taking the child into custody is employed by a law-  
38 enforcement agency which does not have available the testing equipment or facilities necessary to  
39 conduct any secondary breath test which may be administered pursuant to the provisions of this  
40 section, then the official who took the child into custody may request another qualified person to  
41 administer a secondary breath test: *Provided*, That the breath test shall be administered in the

42 presence of the official who took the child into custody. The results of the breath test may be used  
43 in evidence to the same extent and in the same manner as if the test had been conducted by the  
44 law-enforcement official who took the child into custody. The qualified person administering the  
45 breath test must be a member of the ~~West Virginia state police~~ State Police, the sheriff of the  
46 county where the child was taken into custody, or any deputy of the sheriff or a law-enforcement  
47 official of another municipality within the county wherein the child was taken into custody. Only the  
48 person actually administering the secondary breath test is competent to testify as to the results  
49 and the veracity of the test. If the secondary test is a blood test, the test shall be conducted in  
50 accordance with the provisions of §17C-5-6 of this code.

51 (e) After taking the child into custody, if the law-enforcement official has reasonable cause  
52 to believe that the act of the child in driving the motor vehicle is such that it would provide grounds  
53 for arrest for an offense defined under the provisions of §17C-5-2 of this code if the child were an  
54 adult, then the official shall proceed to treat the child in the same manner as any other child taken  
55 into custody without a warrant or court order, in accordance with the provisions of §17C-5-8 of this  
56 code.

57 (f) If the results of any secondary test administered pursuant to this section indicate that the  
58 child, at the time of driving the motor vehicle, had an alcohol concentration in his or her blood of  
59 ~~.0008~~ .08 of one percent or less, by weight, and if the law-enforcement official does not have  
60 reasonable cause to believe that the act of the child in driving the motor vehicle is such that it  
61 would provide grounds for arrest for an offense defined under the provisions of §17C-5-2 of this  
62 code if the child were an adult, then the official shall release the child: *Provided*, That if the results  
63 of any secondary test administered pursuant to this section indicate that the child, at the time of  
64 driving the motor vehicle, had an alcohol concentration in his or her blood of ~~.0002~~ .02 of one  
65 percent or more, by weight, the child shall only be released to a parent or custodian, or to some  
66 other responsible adult.

**§17C-5-8. Interpretation and use of chemical test.**



1 (a) Upon trial for the offense of driving a motor vehicle in this state while under the influence  
2 of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out  
3 of acts alleged to have been committed by any person driving a motor vehicle while under the  
4 influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the  
5 person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of  
6 his or her blood or breath, is admissible, if the sample or specimen was taken within the time  
7 period provided in subsection (g).

8 (b) The evidence of the concentration of alcohol in the person's blood at the time of the  
9 arrest or the acts alleged gives rise to the following presumptions or has the following effect:

10 (1) Evidence that there was, at that time, ~~five hundredths~~ .05 of one percent or less, by  
11 weight, of alcohol in his or her blood, is prima facie evidence that the person was not under the  
12 influence of alcohol;

13 (2) Evidence that there was, at that time, more than ~~five hundredths~~ .05 of one percent and  
14 less than ~~eight hundredths~~ .08 of one percent, by weight, of alcohol in the person's blood is  
15 relevant evidence, but it is not to be given prima facie effect in indicating whether the person was  
16 under the influence of alcohol;

17 (3) Evidence that there was, at that time, ~~eight hundredths~~ .08 of one percent or more, by  
18 weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was  
19 under the influence of alcohol.

20 (c) A determination of the percent, by weight, of alcohol in the blood shall be based upon a  
21 formula of:

22 (1) The number of grams of alcohol per ~~one hundred~~ 100 cubic centimeters of blood;

23 (2) The number of grams of alcohol per ~~two hundred ten~~ 210 liters of breath; or

24 (3) The number of grams of alcohol per ~~eighty-six~~ 86 milliliters of serum.

25 (d) A chemical analysis of blood for the purpose of determining the controlled substance or  
26 drug concentration of a person's blood, must include, but is not limited to, the following drugs or

27 classes of drugs:

28 (1) Marijuana metabolites;

29 (2) Cocaine metabolites;

30 (3) Amphetamines;

31 (4) Opiate metabolites;

32 (5) Phencyclidine (PCP);

33 (6) Benzodiazepines;

34 ~~(7) Propoxyphene;~~

35 ~~(8) (7) Methadone;~~

36 ~~(9) (8) Barbiturates;~~ and

37 ~~(10) (9) Synthetic narcotics.~~

38 (e) (1) A chemical analysis of a person's blood or breath, in order to give rise to the  
39 presumptions or to have the effect provided for in this section, must be performed in accordance  
40 with methods and standards approved by the ~~state Bureau for Public Health~~ West Virginia State  
41 Police Forensic Laboratory.

42 (A) The ~~Bureau for Public Health~~ State Police shall prescribe, by legislative rules  
43 promulgated pursuant to ~~article three, chapter twenty-nine-a~~ §29A-3-1 *et seq.* of this code,  
44 methods and standards for the chemical analysis of a person's blood or breath.

45 (B) Legislative rules proposed by the ~~Bureau for Public Health~~ State Police must specify  
46 the test or tests that are approved for reliability of result and ease of administration using scientific  
47 methods and instrumentation generally accepted in the forensic community, and must provide an  
48 approved method of administration which must be followed in all such tests given under this  
49 section.

50 (C) The ~~bureau~~ West Virginia State Police Forensic Laboratory shall review prescribed  
51 standards and methods at least every two years to ensure that the methods and standards are  
52 approved for reliability of result and ease of administration using scientific methods and

53 instrumentation generally accepted in the forensic community.

54 (2) A chemical analysis of blood to determine the alcohol content or the controlled  
55 substance or drug content of blood shall be conducted by a qualified laboratory or by the State  
56 Police scientific laboratory of the West Virginia State Police Forensic Laboratory.

57 (f) The provisions of this article do not limit the introduction in any administrative or judicial  
58 proceeding of any other competent evidence bearing on the question of whether the person was  
59 under the influence of alcohol, controlled substances or drugs.

60 (g) For the purposes of the admissibility of a chemical test under subsection (a):

61 (1) A sample or specimen taken to determine the alcohol concentration of a person's  
62 blood, must be taken within two hours from the time of the person's arrest; or

63 (2) For a sample or specimen to determine the controlled substance or drug content of a  
64 person's blood, must be taken within four hours of the person's arrest.

65 (h) The results of any test administered pursuant to this section for the purpose of detecting  
66 the concentration of any controlled substance shall not be admissible as evidence in a criminal  
67 prosecution for the possession of a controlled substance.

**§17C-5-10. Fee for withdrawing blood sample and making urine test; payment of fees.**

1 A reasonable fee shall be allowed to the person withdrawing a blood sample or  
2 administering a urine test at the request and direction of a law-enforcement officer in accordance  
3 with the provisions of this article. If the person whose blood sample was withdrawn or whose urine  
4 was tested was arrested and charged with a violation of section two of this article §17C-5-2 of this  
5 code, the county having venue of such charge shall pay said the fee, and if said the person  
6 arrested is subsequently convicted of such charge, such fee shall be taxed as a part of the costs of  
7 the criminal proceeding and shall be paid, notwithstanding any other provision of this code to the  
8 contrary, into the General Fund of said county. If the person whose blood sample was withdrawn or  
9 whose urine was tested was arrested and charged with a violation of a similar ordinance of any  
10 municipality, said municipality shall pay said the fee, and if said the person arrested is

- 11 subsequently convicted of such charge, such fee shall be taxed as a part of the costs of the  
12 criminal proceeding and shall be paid, notwithstanding any other provision of this code to the  
13 contrary, into the General Fund of said municipality.

NOTE: The purpose of this bill is to make the West Virginia State Police Forensic Laboratory the entity responsible for the certification, standards, and administration of secondary chemical tests. The bill also makes the West Virginia State Police Forensic Laboratory responsible for approval of the devices and methods of preliminary breath analysis. The bill transfers rule-making authority from the Bureau of Public Health to the State Police. This bill was recommended for introduction in the 2023 regular session of the Legislature by the West Virginia State Police.

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