

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1968

## ENROLLED

*Cmn. Sub. Jm*  
SENATE BILL NO. 15

*(By Mr. Originating in the Committee  
in the Judiciary)*

PASSED February 1, 1968

In Effect Ninety days from Passage

FILED IN THE OFFICE  
ROBERT D. BAILEY  
SECRETARY OF STATE  
THIS DATE 2-16-68

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**ENROLLED**

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 15**

(Originating in the Committee on the Judiciary)

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[Passed February 8, 1968; in effect ninety days from passage.]

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AN ACT to repeal section two-a, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said chapter seventeen-c by adding thereto a new article, designated article five-a, relating to implied consent to a chemical test to determine the alcoholic content of the blood of the operator of a motor vehicle arrested for driving a

motor vehicle while under the influence of intoxicating liquor and the designation and administration of such a chemical test; relating to chemical test requested or demanded by arrested person; granting certain immunity from criminal and civil liability which might otherwise arise incident to the administration of such a chemical test; providing for suspension of such arrested person's operator's or chauffeur's license, or junior or probationary operator's license, or nonresident privilege to drive for refusal to submit to a designated chemical test; providing hearing and judicial review procedures; specifying certain presumptions with respect to and the evidentiary value of a chemical test as to intoxication; and providing for the payment of a fee for the cost of administering certain chemical tests.

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

That section two-a, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter seventeen-c be further amended by adding thereto a new article, designated article five-a, to read as follows:

**ARTICLE 5A. IMPLIED CONSENT FOR CHEMICAL TEST FOR  
INTOXICATION.**

**§17C-5A-1. Implied consent to test; administration at direction  
of law enforcement officer; definition of law  
enforcement officer.**

1 Any person who drives a motor vehicle upon the public  
2 streets or highways of this state shall be deemed to have  
3 given his consent by the operation thereof, subject to the  
4 provisions of this article, to a chemical test of either his  
5 blood, breath or urine for the purpose of determining the  
6 alcoholic content of his blood whenever he shall be law-  
7 fully arrested by a law enforcement officer as hereinafter  
8 defined for the offense of driving a motor vehicle upon  
9 the public streets or highways of this state while under  
10 the influence of intoxicating liquor. The test shall be  
11 incidental to a lawful arrest and shall be administered at  
12 the direction of the arresting law enforcement officer  
13 having reasonable grounds to believe the person to have  
14 been driving a motor vehicle upon the public streets or  
15 highways while under the influence of intoxicating liquor.  
16 The law enforcement agency by which such law enforce-

17 ment officer is employed shall designate which one of the  
18 aforesaid tests shall be administered: *Provided*, That if  
19 the test so designated is a blood test and the person so  
20 arrested refuses to submit to such blood test, then the law  
21 enforcement officer making such arrest shall designate in  
22 lieu thereof, either a breath or urine test be administered,  
23 and notwithstanding the provisions of section three of  
24 this article, such refusal to submit to a blood test only  
25 shall not result in the suspension of the arrested person's  
26 operator's or chauffeur's license, or junior or probationary  
27 operator's license, or nonresident privilege to drive. The  
28 person arrested shall be told that his refusal to submit  
29 to the test finally designated as provided in this section,  
30 will result in the suspension of his operator's or chauffeur's  
31 license, or junior or probationary operator's license, or  
32 nonresident privilege to drive for a period of six months.

33 For the purposes of this article the term "law enforce-  
34 ment officer" shall mean and be limited to (1) any mem-  
35 ber of the department of public safety of this state, (2)  
36 any sheriff and any deputy sheriff of any county, and (3)  
37 any member of a municipal police department under civil

38 service in accordance with the provisions of article five-a,  
39 chapter eight of this code.

**§17C-5A-2. How blood test administered; use of test results;  
certain immunity from liability incident to  
administering test.**

1 Only a doctor of medicine or osteopathy, or registered  
2 nurse, or trained medical technician at the place of his  
3 employment, acting at the request and direction of the  
4 law enforcement officer, may withdraw blood for the pur-  
5 pose of determining the alcoholic content thereof. These  
6 limitations shall not apply to the taking of a breath test  
7 or a urine specimen. In withdrawing blood for the pur-  
8 pose of determining the alcoholic content thereof, only  
9 a previously unused and sterile needle and sterile vessel  
10 may be utilized and the withdrawal shall otherwise be  
11 in strict accord with accepted medical practices. A non-  
12 alcoholic antiseptic shall be used for cleansing the skin  
13 prior to venapuncture. The person tested may, at his  
14 own expense, have a doctor of medicine or osteopathy,  
15 or registered nurse, or trained medical technician at the  
16 place of his employment, of his own choosing, administer

17 a chemical test in addition to the test administered at  
18 the direction of the law enforcement officer. The failure  
19 or inability of the person arrested to obtain an additional  
20 test shall not preclude the admission into evidence at any  
21 administrative or judicial proceeding of the results of the  
22 test taken at the direction of the law enforcement officer.  
23 Upon the request of the person who is tested, full infor-  
24 mation concerning the test taken at the direction of the  
25 law enforcement officer shall be made available to him.  
26 No person who administers any such test upon the request  
27 of a law enforcement officer as herein defined, no hospital  
28 in or with which such person is employed or is otherwise  
29 associated or in which such test is administered, and no  
30 other person, firm or corporation by whom or which such  
31 person is employed or is in any way associated, shall be  
32 in any wise criminally liable for the administration of  
33 such test, or civilly liable in damages to the person tested  
34 unless for gross negligence or wilful or wanton injury.

**§17C-5A-3. Refusal to submit to certain chemical tests; suspen-  
sion of license or privilege; consent not with-  
drawn if person arrested is incapable of refusal.**

1 If any person under arrest as specified in section one of

2 this article refuses to submit to the test finally designated  
3 in the manner provided in section one hereof, no test shall  
4 be given, but the commissioner of motor vehicles, upon  
5 receipt of a sworn statement of the law enforcement  
6 officer that (1) he had reasonable grounds to believe such  
7 person had been driving a motor vehicle upon the public  
8 or highways of this state while under the influence of  
9 intoxicating liquor, (2) such person was lawfully placed  
10 under arrest for the offense of driving a motor vehicle  
11 upon the public streets or highways of this state while  
12 under the influence of intoxicating liquor, (3) such per-  
13 son refused to submit to the test finally designated in  
14 the manner provided in section one of this article,  
15 and (4) such person was told that his operator's or  
16 chauffeur's license, or junior or probationary operator's  
17 license, or nonresident privilege to drive would be sus-  
18 pended for a period of six months if he refused to sub-  
19 mit to the test finally designated in the manner provided  
20 in section one of this article, shall make and enter an  
21 order suspending such person's operator's or chauffeur's  
22 license, or junior or probationary operator's license, or

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23 nonresident privilege to drive for a period of six months.  
24 A copy of such order shall be forwarded to such person  
25 by registered or certified mail, return receipt requested.  
26 No such suspension shall become effective until ten days  
27 after receipt of the copy of such order. Any person who  
28 is unconscious or who is otherwise in a condition render-  
29 ing him incapable of refusal, shall be deemed not to have  
30 withdrawn his consent for a test of his blood, breath or  
31 urine as provided in section one of this article and the test  
32 may be administered although such person is not told  
33 that his failure to submit to the test will result in the  
34 suspension of his operator's or chauffeur's license, or  
35 junior or probationary operator's license, or nonresident  
36 privilege to operate a motor vehicle for a period of six  
37 months.

38 A suspension hereunder shall run concurrently with  
39 the period of any suspension or revocation imposed in  
40 accordance with other provisions of this code and grow-  
41 ing out of the same incident which gave rise to the arrest  
42 for driving a motor vehicle while under the influence of  
43 intoxicating liquor and the subsequent refusal to undergo

44 the test finally designated in accordance with the provi-  
45 sions of section one of this article.

**§17C-5A-4. Hearing procedures; judicial review.**

1 Upon the written request of a person whose operator's  
2 or chauffeur's license, or junior or probationary operator's  
3 license, or nonresident privilege to drive has been so  
4 suspended, the commissioner of motor vehicles shall afford  
5 the person an opportunity to be heard. Such written re-  
6 quest must be filed with the commissioner in person or  
7 by registered or certified mail, return receipt requested,  
8 within ten days after receipt of a copy of the order of  
9 suspension. The hearing shall be before said commis-  
10 sioner or authorized deputy or agent of said commissioner,  
11 and all of the pertinent provisions of article five, chapter  
12 twenty-nine-a of this code shall apply to and govern the  
13 hearing and the administrative procedures in connection  
14 with and following such hearing, with like effect as if the  
15 provisions of said article five were set forth in extenso  
16 in this section, except that in the case of a resident of  
17 this state the hearing shall be held in the county where-  
18 in the person resides unless the commissioner or his

19 authorized deputy or agent and such person agree that  
20 the hearing may be held in some other county. Any such  
21 hearing shall be held within twenty days after the date  
22 upon which the commissioner received the timely writ-  
23 ten request therefor, unless there is a postponement or  
24 continuance. The commissioner may postpone or continue  
25 any hearing on his own motion, or upon application of  
26 such person for good cause shown. For the purpose of  
27 conducting such hearing, the commissioner shall have the  
28 power and authority to issue subpoenas and subpoenas  
29 duces tecum in accordance with the provisions of section  
30 one, article five, chapter twenty-nine-a of this code. All  
31 subpoenas and subpoenas duces tecum shall be issued  
32 and served within the time and for the fees and shall be  
33 enforced, as specified in section one, article five of said  
34 chapter twenty-nine-a, and all of the said section one  
35 provisions dealing with subpoenas and subpoenas duces  
36 tecum shall apply to subpoenas and subpoenas duces  
37 tecum issued for the purpose of a hearing hereunder.  
38 The scope of such hearing shall be (1) whether the  
39 arresting law enforcement officer had reasonable grounds

40 to believe such person had been driving a motor vehicle  
41 upon the public streets or highways of this state while  
42 under the influence of intoxicating liquor, (2) whether  
43 such person was lawfully placed under arrest for the  
44 offense of driving a motor vehicle upon the public streets  
45 or highways of this state while under the influence of  
46 intoxicating liquor, (3) whether such person refused to  
47 submit to the test finally designated in the manner pro-  
48 vided in section one of this article, and (4) whether such  
49 person had been told that his operator's or chauffeur's  
50 license, or junior or probationary operator's license, or  
51 nonresident privilege to drive would be suspended for a  
52 period of six months if he refused to submit to the test  
53 finally designated in the manner provided in section one  
54 of this article.

55 After such hearing and consideration of all of the testi-  
56 mony, evidence and record in the case, the commissioner  
57 shall make and enter an order affirming or rescinding  
58 his earlier order of suspension. The commissioner shall  
59 affirm his earlier order of suspension if he finds that (1)  
60 the arresting law enforcement officer had reasonable

61 grounds to believe such person had been driving a motor  
62 vehicle upon the public streets or highways of this state  
63 while under the influence of intoxicating liquor, (2) such  
64 person was lawfully placed under arrest for the offense  
65 of driving a motor vehicle upon the public streets or high-  
66 ways of this state while under the influence of intoxicat-  
67 ing liquor, (3) such person refused to submit to the test  
68 finally designated in the manner provided in section one  
69 of this article, and (4) such person had been told that his  
70 operator's or chauffeur's license, or junior or probation-  
71 ary operator's license, or nonresident privilege to drive  
72 would be suspended for a period of six months if he re-  
73 fused to submit to the test finally designated in the man-  
74 ner provided in section one of this article. If the com-  
75 missioner finds to the contrary with respect to any one  
76 of the above issues, he shall rescind his earlier order of  
77 suspension.

78 A copy of the commissioner's order made and entered  
79 following the hearing shall be served upon such person  
80 by registered or certified mail, return receipt requested.  
81 During the pendency of any such hearing, the suspension

82 of the operator's or chauffeur's license, or junior or pro-  
83 bationary operator's license, or nonresident privilege to  
84 drive of such person shall be stayed, and if the commis-  
85 sioner has possession of such person's operator's or chauf-  
86 feur's license, or junior or probationary operator's license,  
87 the same shall be forthwith returned to him pending the  
88 outcome of such hearing or any judicial review thereafter,  
89 as hereinafter provided.

90 If the commissioner shall after hearing make and enter  
91 an order affirming his earlier order of suspension, such  
92 person shall be entitled to judicial review thereof. All  
93 of the pertinent provisions of section four, article five,  
94 chapter twenty-nine-a of this code shall apply to and  
95 govern such review with like effect as if the provisions  
96 of said section four were set forth in extenso in this  
97 section. The judgment of the circuit court shall be final  
98 unless reversed on appeal to the supreme court of appeals,  
99 in accordance with the provisions of section one, article  
100 six, chapter twenty-nine-a of this code, except that not-  
101 withstanding the provisions of said section one, the  
102 petition seeking such review must be filed with said

103 supreme court of appeals within thirty days from the date  
104 of entry of the judgment of the circuit court. Notwith-  
105 standing any provisions in said chapter twenty-nine-a  
106 to the contrary, during the pendency of any appeal to  
107 the circuit court or supreme court of appeals, the suspen-  
108 sion of the operator's or chauffeur's license, or junior or  
109 probationary operator's license, or nonresident privilege  
110 to drive of such person shall be stayed, pending the out-  
111 come of such judicial review.

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

1 Upon trial for the offense of driving a motor vehicle  
2 on the public streets or highways of this state while  
3 under the influence of intoxicating liquor, or upon the  
4 trial of any civil or criminal action or proceeding arising  
5 out of acts alleged to have been committed by any person  
6 while driving a motor vehicle while under the influence  
7 of intoxicating liquor, evidence of the amount of alcohol  
8 in the person's blood at the time of the arrest or of the  
9 acts alleged, as shown by a chemical analysis of his blood,  
10 breath or urine, is admissible, if the sample or specimen  
11 was taken within two hours from and after the time of

12 arrest or of the acts alleged, and shall give rise to the  
13 following presumptions or have the following effect:

14 (a) Evidence that there was, at that time, five hun-  
15 dredths of one percent or less, by weight, of alcohol in  
16 his blood, shall be prima facie evidence that the person  
17 was not under the influence of intoxicating liquor;

18 (b) Evidence that there was, at that time, more than  
19 five hundredths of one percent and less than ten hun-  
20 dredths of one percent, by weight, of alcohol in the per-  
21 son's blood shall be relevant evidence, but it is not to be  
22 given prima facie effect in indicating whether the person  
23 was under the influence of intoxicating liquor;

24 (c) Evidence that there was, at that time, ten hundredths  
25 of one percent or more, by weight, of alcohol in his blood,  
26 shall be admitted as prima facie evidence that the person  
27 was under the influence of intoxicating liquor.

28 Percent by weight of alcohol in the blood shall be based  
29 upon milligrams of alcohol per one hundred cubic centi-  
30 meters of blood.

31 A chemical analysis of a person's blood, breath or urine,  
32 in order to give rise to the presumptions or to have the



33 effect provided for in subdivisions (a), (b) and (c) of  
34 this section, must be performed in accordance with meth-  
35 ods and standards approved by the state department of  
36 health. A chemical analysis of blood or urine to determine  
37 the alcoholic content of blood shall be conducted by a  
38 qualified laboratory or by the state police scientific lab-  
39 oratory, of the criminal identification bureau of the de-  
40 partment of public safety.

41 The provisions of this article shall not limit the intro-  
42 duction in any administrative or judicial proceeding of  
43 any other competent evidence bearing on the question of  
44 whether the person was under the influence of intoxicat-  
45 ing liquor.

**§17C-5A-6. Right to demand test.**

1 Any person lawfully arrested for driving a motor ve-  
2 hicle on the public streets or highways of this state while  
3 under the influence of intoxicating liquor and who is not  
4 tested at the direction of the arresting law enforcement  
5 officer under the provisions of this article, or who is law-  
6 fully arrested as aforesaid by any other police officer,  
7 shall have the right to demand that a sample or specimen

8 of his blood, breath or urine be taken within two hours  
9 from and after the time of arrest, and that a chemical test  
10 thereof be made. The analysis disclosed by such chemical  
11 test shall be made available to such arrested person forth-  
12 with upon demand.

**§17C-5A-7. Fee for withdrawing blood sample and making  
urine test.**

1 A fee not exceeding five dollars shall be allowed to  
2 the person withdrawing a blood sample or administering  
3 a urine test at the request and direction of a law enforce-  
4 ment officer in accordance with the provisions of this  
5 article. If the person whose blood sample was withdrawn  
6 or whose urine was tested was arrested and charged with  
7 a violation of subsection (a) of section two, article five  
8 of this chapter, the county having venue of such charge  
9 shall pay said fee, and if said person is subsequently con-  
10 victed of such charge, such fee shall be taxed as a part  
11 of the costs of the criminal proceeding and shall be paid,  
12 notwithstanding any other provision of this code to the  
13 contrary, into the general fund of said county. If the  
14 person whose blood sample was withdrawn or whose

15 urine was tested was arrested and charged with a vio-  
16 lation of a similar ordinance of any municipality, said  
17 municipality shall pay said fee, and if said person is sub-  
18 sequently convicted of such charge, such fee shall be  
19 taxed as a part of the costs of the criminal proceeding  
20 and shall be paid, notwithstanding any other provision of  
21 this code to the contrary, into the general fund of said  
22 municipality.

**§17C-5A-8. Severability.**

1 If any provision of this article or its application to any  
2 person or circumstance be held invalid, such invalidity  
3 shall not affect other provisions or applications of this  
4 article, and to this end the provisions of this article are  
5 declared to be severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*William Tompa*  
Chairman Senate Committee

*Clayton C. Davidson*  
Chairman House Committee

Originated in the Senate.

To take effect 90 days from passage.

*Johnson Myers*  
Clerk of the Senate

*W. Blankenship*  
Clerk of the House of Delegates

*Howard W. Cassen*  
President of the Senate

*H. Lahan White*  
Speaker House of Delegates

The within approved this the 14  
day of February, 1968.

*Huey C. Smith*  
Governor



PRESENTED TO THE  
GOVERNOR

Date 2/12/68  
Time 3:02 P.M.

RECEIVED

FEB 13 1 00 PM '68

OFFICE OF  
GOVERNOR  
STATE OF ALABAMA