

4493 - Veto

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988



# ENROLLED

*Com. Sub. for*  
**HOUSE BILL No. 4493**

(By *Mr. Delegates McKinley and*  
*Leary*)



Passed *March 12,* 1988

In Effect *Ninety Days From* Passage

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR  
**H. B. 4493**  
(By DELEGATES MCKINLEY and LEARY)

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[Passed March 12, 1988; in effect ninety days from passage.]

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AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article three-c; and to amend and reenact sections twenty-three and thirty-one, article five of said chapter, all relating to AIDS related medical testing and records confidentiality act; defining terms; setting testing requirements; providing for confidentiality of records; prohibiting requiring testing as a condition of employment; providing for remedies, criminal penalties, and private rights of action; prohibiting denial of certain rights; study by department of corrections; providing administrative implementation; and providing for individual banking of blood for elective medical procedures; vital statistics; rules and regulations not to permit extension of time for filing death certificates, etc.; penalties for failure to report suspected contagious disease.

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

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article three-c, and that sections twenty-three and thirty-one, article five of said

chapter be amended and reenacted, all to read as follows:

**CHAPTER 16. PUBLIC HEALTH**

**ARTICLE 3C. AIDS-RELATED MEDICAL TESTING AND RECORDS CONFIDENTIALITY ACT.**

**§16-3C-1. Definitions.**

1 When used in this article:

2 (a) "Department" means the state department of  
3 health.

4 (b) "AIDS" means acquired immunodeficiency  
5 syndrome.

6 (c) "ARC" means AIDS-related complex.

7 (d) "HIV" means the human immunodeficiency virus  
8 identified as the causative agent of AIDS.

9 (e) "HIV-related test" means a test for the HIV  
10 antibody or antigen or any future valid test.

11 (f) "Health facility" means a hospital, nursing home,  
12 clinic, blood bank, blood center, sperm bank, laboratory  
13 or other health care institution.

14 (g) "Health care provider" means any physician,  
15 nurse, paramedic, psychologist or other person provid-  
16 ing medical, nursing, psychological or other health care  
17 services of any kind.

18 (h) "Legal guardian" means a person appointed by a  
19 court to assume legal authority for another who has been  
20 found incompetent or, in the case of a minor, a person  
21 who has legal custody of the child.

22 (i) "Person" includes any natural person, partnership,  
23 association, joint venture, trust, public or private  
24 corporation or health facility.

25 (j) "Release of test results" means a written authori-  
26 zation for disclosure of HIV-related test results which  
27 is signed, dated and which specifies to whom disclosure  
28 is authorized and the time period during which the  
29 release is to be effective.

**§16-3C-2. Testing.**

1 (a) HIV-related testing may be ordered by a physician  
2 or the director of the department when that person has  
3 cause to believe that the test will be positive or that the  
4 test will provide information important to the care of the  
5 patient that cannot be obtained any other way.

6 (b) If the HIV test does not need to be done in an  
7 emergency situation, the ordering physician or the  
8 director of the department shall provide the patient with  
9 the following which may be in the form of a booklet or  
10 printed information prepared by the department:

11 (1) An explanation of the test, including its purpose,  
12 potential uses, limitations and the meaning of its results;  
13 and

14 (2) An explanation of the procedures to be followed,  
15 including that the test is voluntary, that consent may be  
16 withdrawn at any time and that the test may be  
17 obtained anonymously if the subject wishes.

18 (c) Prior to entering a verbal or written consent  
19 agreement, the subject of the test shall receive the  
20 following:

21 (1) An explanation of the nature of asymptomatic  
22 HIV infection, ARC and AIDS and the relationship  
23 between the test result and those diseases; and

24 (2) Information about behaviors known to pose risks  
25 for transmission of HIV infection.

26 (d) If the definitive HIV series of tests determine a  
27 positive result, the patient shall receive from the  
28 ordering physician, or his designee, counseling or  
29 referrals for counseling for coping with the emotional  
30 consequences of learning the test result.

31 (e) A person seeking an HIV-related test who wishes  
32 to remain anonymous has the right to do so, and to  
33 provide, written, informed consent through use of a  
34 coded system with no linking or individual identity to  
35 the test requests or results. A health care provider who  
36 does not provide HIV-related tests on an anonymous  
37 basis shall refer such a person to a test site which does  
38 provide anonymous testing, or to any local or county

39 health department which is within a thirty minute drive  
40 which shall provide for performance of an HIV-related  
41 test and counseling.

42 (f) At the time of learning the test result, the subject  
43 of the test shall be provided with counseling or referrals  
44 for counseling for coping with the emotional consequen-  
45 ces of learning the result.

46 (g) The provisions of subsection (c) of this section do  
47 not apply for:

48 (1) A health care provider or health facility to  
49 perform an HIV-related test when the health care  
50 provider or health facility procures, processes, distrib-  
51 utes or uses a human body part (including tissue)  
52 donated for a purpose specified under the uniform  
53 anatomical gift act, or semen provided for the purpose  
54 of artificial insemination and such test is necessary to  
55 assure medical acceptability of such gift or semen for  
56 the purposes intended.

57 (2) The performance of an HIV-related test in docu-  
58 mented bona fide medical emergencies when the subject  
59 of the test is unable to grant or withhold consent, and  
60 the test results are necessary for medical diagnostic  
61 purposes to provide appropriate emergency care or  
62 treatment, except that post-test counseling shall none-  
63 theless be required. Necessary treatment may not be  
64 withheld pending HIV test results.

65 (3) The performance of an HIV-related test for the  
66 purpose of research if the testing is performed in a  
67 manner by which the identity of the test subject is not  
68 known and may not be retrieved by the researcher.

69 (h) Mandated testing:

70 (1) The director of the department may mandate an  
71 HIV test of a person who received or rendered emer-  
72 gency medical aid involving possible exposure or  
73 exchange of blood or other body fluids, including  
74 morticians. Results of such a test will be used by the  
75 requesting physician for the purpose of determining  
76 appropriate therapy, counseling and psychological  
77 support for the person rendering emergency medical aid

78 including good samaritans, as well as for the patient or  
79 individual receiving the emergency medical aid.

80 (2) When the director of the department knows or has  
81 reason to believe, because of medical or epidemiological  
82 information, that a person, including but not limited to  
83 a person such as an IV drug abuser, or a person who  
84 may have a sexually transmitted disease, or a person  
85 who has sexually molested, abused or assaulted another,  
86 has HIV infection and is a danger to the public health,  
87 he or she may issue an order to:

88 (i) Require a person to be examined and tested to  
89 determine whether the person has HIV infection;

90 (ii) Require a person with HIV infection to report to  
91 a qualified physician or health worker for counseling;

92 (iii) Direct a person with HIV infection to cease and  
93 desist from specified conduct which endangers health of  
94 others.

95 (i) If a person violates a cease and desist order issued  
96 pursuant to this section and it is shown that the person  
97 is a danger to others, the director of the department  
98 shall enforce the cease and desist order by imposing  
99 such restrictions upon the person as are necessary to  
100 prevent the specific conduct which endangers the health  
101 of others. Any restriction shall be in writing, setting  
102 forth the name of the person to be restricted and the  
103 initial period of time, not to exceed three months, during  
104 which the order shall remain effective, the terms of the  
105 restrictions and such other conditions as may be  
106 necessary to protect the public health.

107 (j) Premarital screening:

108 (1) Every person who is empowered to issue a mar-  
109 riage license shall, at the time of issuance thereof,  
110 distribute to the applicants for the license, information  
111 concerning acquired immune deficiency syndrome  
112 (AIDS) informing them of the availability of HIV-  
113 related testing and counseling. The informational  
114 brochures shall be furnished by the department.

115 (2) A notation that each applicant has received the

116 AIDS informational brochure shall be placed on file  
117 with the marriage license on forms provided by the  
118 department.

119 (3) The department shall promulgate emergency rules  
120 for mandatory HIV-related testing as a condition for  
121 obtaining a marriage license when one tenth of one  
122 percent of all blood tested in West Virginia blood banks  
123 becomes HIV positive.

124 (k) The director of the department may obtain and  
125 test specimens for AIDS or HIV infection for research  
126 or epidemiological purposes without consent of the  
127 person from whom the specimen is obtained if all  
128 personal identifying information is removed from the  
129 specimen prior to testing.

130 (l) Nothing in this section shall be applicable to any  
131 insurer regulated under chapter thirty-three of this  
132 code: *Provided*, That the commissioner of insurance  
133 shall develop standards regarding consent for use by  
134 insurers which test for the presence of the HIV  
135 antibody.

**§16-3C-3. Confidentiality of records.**

1 (a) No person may disclose or be compelled to disclose  
2 the identity of any person upon whom an HIV-related  
3 test is performed, or the results of such a test in a  
4 manner which permits identification of the subject of  
5 the test, except to the following persons:

6 (1) The subject of the test;

7 (2) Any person who secures a specific release of test  
8 results executed by the subject of the test;

9 (3) An authorized agent or employee of a health  
10 facility or health care provider if the health facility or  
11 health care provider itself is authorized to obtain the  
12 test results, the agent or employee provides patient care  
13 or handles or processes specimens of body fluids or  
14 tissues and the agent or employee has a need to know  
15 such information which need must be documented in  
16 writing;

17 (4) Licensed medical personnel providing care to the

18 subject of the test, when knowledge of the test results  
19 is necessary to provide appropriate care or treatment.  
20 Such need to know must be documented in writing;

21 (5) The department or the center for disease control  
22 of the United States public health service in accordance  
23 with reporting requirements for a diagnosed case of  
24 AIDS, or a related condition;

25 (6) A health facility or health care provider which  
26 procures, processes, distributes or uses: (A) A human  
27 body part from a deceased person with respect to  
28 medical information regarding that person; or (B)  
29 semen provided prior to the effective date of this article  
30 for the purpose of artificial insemination;

31 (7) Health facility staff committees or accreditation or  
32 oversight review organizations which are conducting  
33 program monitoring, program evaluation or service  
34 reviews so long as any identity remains anonymous; and

35 (8) A person allowed access to said record by a court  
36 order which is issued in compliance with the following  
37 provisions:

38 (i) No court of this state may issue such order unless  
39 the court finds that the person seeking the test results  
40 has demonstrated a compelling need for the test results  
41 which cannot be accommodated by other means. In  
42 assessing compelling need, the court shall weigh the  
43 need for disclosure against the privacy interest of the  
44 test subject and the public interest which may be  
45 disserved by disclosure which deters future testing or  
46 which may lead to discrimination;

47 (ii) Pleadings pertaining to disclosure of test results  
48 shall substitute a pseudonym for the true name of the  
49 subject of the test. The disclosure to the parties of the  
50 subject's true name shall be communicated confidentially,  
51 in documents not filed with the court;

52 (iii) Before granting any such order, the court shall  
53 provide the individual whose test result is in question  
54 with notice and a reasonable opportunity to participate  
55 in the proceedings if he or she is not already a party;



56 (iv) Court proceedings as to disclosure of test results  
57 shall be conducted in camera unless the subject of the  
58 test agrees to a hearing in open court or unless the court  
59 determines that a public hearing is necessary to the  
60 public interest and the proper administration of justice;  
61 and

62 (v) Upon the issuance of an order to disclose test  
63 results, the court shall impose appropriate safeguards  
64 against unauthorized disclosure, which shall specify the  
65 persons who may have access to the information, the  
66 purposes for which the information may be used and  
67 appropriate prohibitions on future disclosure.

68 (b) No person to whom the results of an HIV-related  
69 test have been disclosed pursuant to subsection (a) of this  
70 section may disclose the test results to another person  
71 except as authorized by subsection (a).

72 (c) Whenever disclosure is made pursuant to this  
73 section, it shall be accompanied by a statement in  
74 writing which includes the following or substantially  
75 similar language: "This information has been disclosed  
76 to you from records whose confidentiality is protected  
77 by state law. State law prohibits you from making any  
78 further disclosure of it without the specific written  
79 consent of the person to whom it pertains, or as  
80 otherwise permitted by said law. A general authoriza-  
81 tion for the release of medical or other information is  
82 NOT sufficient for this purpose."

83 (d) Notwithstanding the provisions set forth in  
84 subsections (a) through (c) of this section, the use of HIV  
85 test results to inform individuals named or identified as  
86 sex partners or contacts, that they may be at risk of  
87 having acquired the HIV infection as a result of possible  
88 exchange of body fluids, is permitted. The name or  
89 identity of the positive partner is to remain confidential.  
90 Contacts or identified partners may be tested anonym-  
91 ously at department designated test sites, or at their own  
92 expense by a health care provider or an approved  
93 laboratory of their choice.

**§16-3C-4. Test prohibited as condition of employment.**

1 (a) No person may require an individual to take a  
2 HIV-related test as a condition of promotion or con-  
3 tinued employment unless the test is a bona fide  
4 occupational qualification for the job in question.

5 (b) No person may discharge any individual, or  
6 segregate or classify any individual in any way which  
7 would deprive or tend to deprive that individual of  
8 employment opportunities or adversely affect his or her  
9 status as an employee, or otherwise affect his or her  
10 status as an employee, or otherwise discriminate against  
11 any individual with respect to compensation, terms,  
12 conditions or privileges of employment on the basis of  
13 the results of an HIV-related test unless the test is a  
14 bona fide occupational qualification of the job in  
15 question.

16 (c) A person who asserts that a bona fide occupational  
17 qualification exists for HIV-related testing has the  
18 burden of proving that:

19 (1) The HIV-related test is necessary to ascertain  
20 whether an employee is currently able to perform in a  
21 reasonable manner the duties of the particular job or  
22 whether an employee will present a significant risk of  
23 transmitting HIV infection to other persons in the  
24 course of normal work activities; and

25 (2) There exists no means of reasonable accommoda-  
26 tion short of requiring the test.

**§16-3C-5. Remedies and penalties.**

1 (a) Any person who intentionally or recklessly  
2 violates the provisions of sections two and three of this  
3 article is guilty of a misdemeanor, and, upon conviction  
4 thereof, shall be fined not less than one thousand nor  
5 more than three thousand dollars or imprisoned in jail  
6 for not less than six nor more than nine months, or both  
7 fined and imprisoned: *Provided*, That it shall not be a  
8 violation of this section to issue a marriage license  
9 without presenting an informational brochure concern-  
10 ing AIDS: *Provided, however*, That such brochure is  
11 mailed to the applicants by certified mail, return receipt  
12 requested, within thirty days of granting the marriage

13 license.

14 (b) Such criminal conviction shall not operate to  
15 extinguish any private rights of action against a person  
16 violating the confidentiality requirements of this section:  
17 *Provided*, That nothing in this section may be construed  
18 to impose civil liability or criminal sanction for  
19 disclosure of an HIV-related test result made in strict  
20 compliance with the provisions of section three of this  
21 article.

**§16-3C-6. Human rights and HIV tests results.**

1 (a) A positive HIV test report, or the diagnosis of  
2 AIDS related complex (ARC), or the diagnosis of the  
3 AIDS syndrome or disease, may not constitute a basis  
4 upon which to deny the individual so diagnosed, access  
5 to quality medical care, access to public accommoda-  
6 tions or services or housing: *Provided*, That this  
7 subsection shall not apply to insurance.

8 (b) No student of any school or institute of higher  
9 learning, public or private, may be excluded from  
10 attending said school or institute of higher learning, or  
11 from participating in school sponsored activities, on the  
12 basis of a positive HIV test, or a diagnosis of ARC, or  
13 AIDS syndrome or disease. Inability to attend or  
14 participate, as described above, shall be determined on  
15 a case by case basis, in consultation with the individual's  
16 parents, medical care provider, health authorities,  
17 school or institute administrators or medical advisors, in  
18 accordance with policies and guidance which may have  
19 been established by the entities. Exclusion may only be  
20 based on the student representing an accepted risk as  
21 agreed to by medical authorities for the transmission of  
22 the HIV to others because of the stage or nature of the  
23 illness.

**§16-3C-7. Department of corrections to conduct AIDS related study.**

1 The commissioner of the department of corrections is  
2 authorized and directed to conduct a study at all penal  
3 institutions administered by the department of correc-  
4 tions to determine whether it would be prudent and

5 reasonable to offer or require of each inmate at such  
6 institutions testing, educational classes or counseling  
7 related to AIDS and HIV infections. The commissioner  
8 shall complete the study and present the findings and  
9 recommendations in a report to be filed with the  
10 director of the department of health, the President of the  
11 Senate and the Speaker of the House of Delegates within  
12 six months of the effective date of this article.

**§16-3C-8. Administrative implementation.**

1 (a) The director of the department shall immediately  
2 implement and enforce the provisions of this article, and  
3 shall adopt rules to the extent necessary for further  
4 implementation of the article. The rules promulgated by  
5 the department pursuant to this article may include  
6 procedures for taking appropriate action with regard to  
7 health care facilities or health care providers which  
8 violate this article or the rules promulgated hereunder.  
9 The provisions of the state administrative procedure act  
10 apply to all administrative rules and procedures of the  
11 department pursuant to this article, except that in case  
12 of conflict between the state administrative procedure  
13 act and this article, the provisions of this article shall  
14 control.

15 (b) The department shall promulgate rules to assure  
16 adequate quality control for all laboratories conducting  
17 HIV tests and to provide for a reporting and monitoring  
18 system to the department of positive HIV tests results.

**§16-3C-9. Individual banking of blood by health care  
providers for elective surgery or medical  
procedures.**

1 Any person may, in contemplation of elective surgery  
2 or other elective medical procedures for which a blood  
3 transfusion may be required, request the health care  
4 provider conducting such surgery or medical procedure,  
5 or any private, public or nonprofit blood bank, to store  
6 and bank that individual's blood for use during such  
7 surgery or medical procedure. The health care provider  
8 or the private, public or nonprofit blood bank shall, upon  
9 such request, store and bank a person's blood and the  
10 health care provider shall use such blood in the elective

11 surgery or medical procedure to the extent such blood  
12 is available.

**ARTICLE 5. VITAL STATISTICS.**

**§16-5-23. Extension of time for filing death certificates,  
etc.**

1 (a) The state board of health shall, by rule and  
2 regulation and upon such conditions as it may prescribe  
3 to assure compliance with the purposes of this article,  
4 provide for the extension of the periods prescribed in  
5 sections nineteen, twenty and twenty-one of this article  
6 for the filing of death certificates, fetal death certifi-  
7 cates, medical certifications of the cause of death, and  
8 for the obtaining of burial or transit permits, in cases  
9 in which compliance with the applicable prescribed  
10 period would result in undue hardship.

11 (b) Rules and regulations of the state board of health  
12 shall provide for the issuance of a burial or transit  
13 permit under section twenty-one of this article prior to  
14 the filing of a certificate of death or fetal death upon  
15 conditions designed to assure compliance with the  
16 purposes of this article in cases in which compliance  
17 with the requirement that the certificate be filed prior  
18 to the issuance of the permit would result in undue  
19 hardship: *Provided*, That any rules and regulations  
20 promulgated pursuant to this section shall not permit  
21 any extension of such periods prescribed if there is any  
22 cause to suspect a contagious disease, as documented by  
23 the physician completing and signing the required  
24 medical certification and any person issuing the burial  
25 or transit permit all as provided for in said sections  
26 nineteen, twenty and twenty-one, and any such rules and  
27 regulations shall provide for a physician's certificate of  
28 death form which clearly sets forth the requirements of  
29 this subsection.

**§16-5-31. Penalties.**

1 (a) (1) Any person who willfully and knowingly  
2 makes any false statement in a report, record, or  
3 certificate required to be filed under this article, or in  
4 an application for an amendment thereof or who

5 willfully and knowingly supplies false information  
6 intending that such information be used in the prepa-  
7 ration of any such report, record or certificate, or  
8 amendment thereof; or

9 (2) Any person who without lawful authority and with  
10 the intent to deceive, makes, alters, amends or mutilates  
11 any record, report, or certificate required to be filed  
12 under this article, or any certified copy of such record,  
13 report, or certificate; or

14 (3) Any person who willfully and knowingly uses or  
15 attempts to use, or furnishes or attempts to furnish to  
16 another for use, for any purpose of deception, any  
17 certificate, record, report, or certified copy thereof so  
18 made, altered, amended, or mutilated; or

19 (4) Any person who with the intention to deceive  
20 willfully uses or attempts to use any certificate of birth  
21 or certified copy of a record of birth knowing that such  
22 certificate or certified copy was issued upon a record  
23 which is false in whole or in part or which related to  
24 the birth of another person; or

25 (5) Any person who willfully and knowingly furnishes  
26 a certificate of birth or certified copy of a record of birth  
27 with the intention that it be used by a person other than  
28 the person to whom the record of birth relates, shall be  
29 guilty of a misdemeanor, and, upon conviction thereof,  
30 shall be punished by a fine of not more than one  
31 thousand dollars or by imprisonment for not more than  
32 one year, or by both such fine and imprisonment.

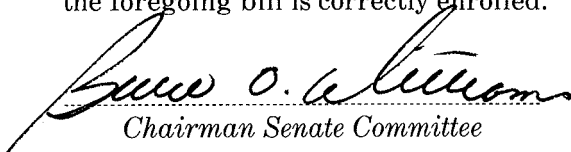
33 (b) (1) Any person who knowingly transports or  
34 accepts for transportation, interment or other disposi-  
35 tion a dead body without an accompanying permit as  
36 provided in this article; or

37 (2) Any person who refuses to provide information  
38 required by this article; or

39 (3) Any person who willfully neglects or violates any  
40 of the provisions of this article or refuses to perform any  
41 of the duties imposed upon him or her by this article,  
42 shall be guilty of a misdemeanor, and, upon conviction  
43 thereof, shall be punished by a fine of not less than

44 twenty-five dollars nor more than one hundred dollars  
45 or by imprisonment for not more than thirty days, or  
46 by both such fine and imprisonment: *Provided*, That  
47 where there is cause to suspect a contagious disease, any  
48 person who willfully neglects to provide information  
49 that there is cause to suspect a contagious disease on any  
50 death certificate or burial or transit permit required  
51 pursuant to sections nineteen, twenty, and twenty-one of  
52 this article shall be guilty of a misdemeanor, and, upon  
53 conviction thereof, shall be punished by a fine of not less  
54 than one thousand nor more than three thousand dollars  
55 or by a confinement in jail for not less than six nor more  
56 than nine months, or by both such fine and confinement  
57 in the discretion of the court. Such criminal conviction  
58 shall not operate to extinguish any private rights of  
59 action against a person violating the requirements of  
60 this section.

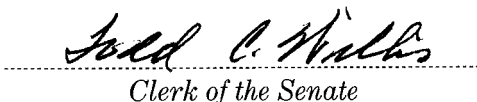
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


  
Chairman Senate Committee

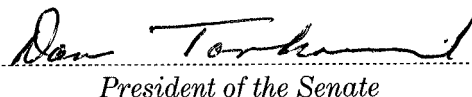
  
Chairman House Committee

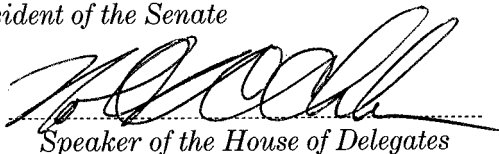
Originating in the House.

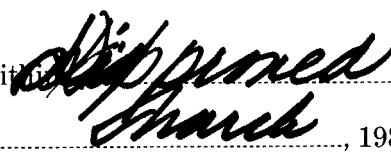
Takes effect ninety days from passage.

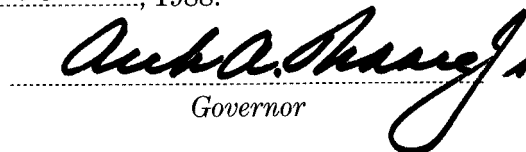
  
Clerk of the Senate

  
Clerk of the House of Delegates

  
President of the Senate

  
Speaker of the House of Delegates

The within  this the 31<sup>st</sup>  
day of March, 1988.

  
Governor



PRESENTED TO THE

GOVERNOR

Date 3/23/88

Time 3:52 p.m.

PROPERTY

1968 MAR 31 PM 5:20

OFFICE OF REEVE THORNTON  
SECRETARY OF STATE