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OFFICE WEST VIRGINIA  
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**WEST VIRGINIA LEGISLATURE**  
Regular Session, 2005

**ENROLLED**

SENATE BILL NO. 744

(By Senator Kessler, et al )

PASSED April 7, 2005

In Effect July 1, 2005 **Passage**

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## Senate Bill No. 744

(BY SENATORS KESSLER, DEMPSEY, FANNING, FOSTER, HUNTER,  
JENKINS, MINARD, OLIVERIO, WHITE, BARNES, CARUTH,  
HARRISON, LANHAM, MCKENZIE AND WEEKS)

[Passed April 7, 2005; to take effect July 1, 2005.]

AN ACT to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating to clarifying the criteria for an employee to sustain a lawsuit for intentional injury.

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

That §23-4-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

### **ARTICLE 4. DISABILITY AND DEATH BENEFITS.**

#### **§23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; “deliberate intention” defined.**

- 1 (a) Notwithstanding anything contained in this chapter,
- 2 no employee or dependent of any employee is entitled to
- 3 receive any sum from the Workers’ Compensation Fund,
- 4 from a self-insured employer or otherwise under the

5 provisions of this chapter on account of any personal  
6 injury to or death to any employee caused by a self-  
7 inflicted injury or the intoxication of the employee. Upon  
8 the occurrence of an injury which the employee asserts, or  
9 which reasonably appears to have, occurred in the course  
10 of and resulting from the employee's employment, the  
11 employer may require the employee to undergo a blood  
12 test for the purpose of determining the existence or  
13 nonexistence of evidence of intoxication pursuant to rules  
14 for the administration of the test promulgated by the  
15 board of managers: *Provided*, That the employer must  
16 have a reasonable and good faith objective suspicion of the  
17 employee's intoxication and may only test for the purpose  
18 of determining whether the person is intoxicated.

19 (b) For the purpose of this chapter, the commission may  
20 cooperate with the Office of Miners' Health, Safety and  
21 Training and the state division of labor in promoting  
22 general safety programs and in formulating rules to govern  
23 hazardous employments.

24 (c) If injury or death result to any employee from the  
25 deliberate intention of his or her employer to produce the  
26 injury or death, the employee, the widow, widower, child  
27 or dependent of the employee has the privilege to take  
28 under this chapter and has a cause of action against the  
29 employer, as if this chapter had not been enacted, for any  
30 excess of damages over the amount received or receivable  
31 in a claim for benefits under this chapter, whether filed or  
32 not.

33 (d) (1) It is declared that enactment of this chapter and  
34 the establishment of the workers' compensation system in  
35 this chapter was and is intended to remove from the  
36 common law tort system all disputes between or among  
37 employers and employees regarding the compensation to  
38 be received for injury or death to an employee except as  
39 expressly provided in this chapter and to establish a  
40 system which compensates even though the injury or death  
41 of an employee may be caused by his or her own fault or

42 the fault of a coemployee; that the immunity established  
43 in sections six and six-a, article two of this chapter is an  
44 essential aspect of this workers' compensation system; that  
45 the intent of the Legislature in providing immunity from  
46 common lawsuit was and is to protect those immunized  
47 from litigation outside the workers' compensation system  
48 except as expressly provided in this chapter; that, in  
49 enacting the immunity provisions of this chapter, the  
50 Legislature intended to create a legislative standard for  
51 loss of that immunity of more narrow application and  
52 containing more specific mandatory elements than the  
53 common law tort system concept and standard of willful,  
54 wanton and reckless misconduct; and that it was and is the  
55 legislative intent to promote prompt judicial resolution of  
56 the question of whether a suit prosecuted under the  
57 asserted authority of this section is or is not prohibited by  
58 the immunity granted under this chapter.

59 (2) The immunity from suit provided under this section  
60 and under sections six and six-a, article two of this  
61 chapter may be lost only if the employer or person against  
62 whom liability is asserted acted with "deliberate inten-  
63 tion". This requirement may be satisfied only if:

64 (i) It is proved that the employer or person against whom  
65 liability is asserted acted with a consciously, subjectively  
66 and deliberately formed intention to produce the specific  
67 result of injury or death to an employee. This standard  
68 requires a showing of an actual, specific intent and may  
69 not be satisfied by allegation or proof of: (A) Conduct  
70 which produces a result that was not specifically intended;  
71 (B) conduct which constitutes negligence, no matter how  
72 gross or aggravated; or (C) willful, wanton or reckless  
73 misconduct; or

74 (ii) The trier of fact determines, either through specific  
75 findings of fact made by the court in a trial without a jury,  
76 or through special interrogatories to the jury in a jury  
77 trial, that all of the following facts are proven:

78 (A) That a specific unsafe working condition existed in  
79 the workplace which presented a high degree of risk and  
80 a strong probability of serious injury or death;

81 (B) That the employer, prior to the injury, had actual  
82 knowledge of the existence of the specific unsafe working  
83 condition and of the high degree of risk and the strong  
84 probability of serious injury or death presented by the  
85 specific unsafe working condition;

86 (C) That the specific unsafe working condition was a  
87 violation of a state or federal safety statute, rule or  
88 regulation, whether cited or not, or of a commonly ac-  
89 cepted and well-known safety standard within the indus-  
90 try or business of the employer, as demonstrated by  
91 competent evidence of written standards or guidelines  
92 which reflect a consensus safety standard in the industry  
93 or business, which statute, rule, regulation or standard was  
94 specifically applicable to the particular work and working  
95 condition involved, as contrasted with a statute, rule,  
96 regulation or standard generally requiring safe  
97 workplaces, equipment or working conditions;

98 (D) That notwithstanding the existence of the facts set  
99 forth in subparagraphs (A) through (C), inclusive, of this  
100 paragraph, the employer nevertheless intentionally  
101 thereafter exposed an employee to the specific unsafe  
102 working condition; and

103 (E) That the employee exposed suffered serious compen-  
104 sable injury or compensable death as defined in section  
105 one, article four, chapter twenty-three whether a claim for  
106 benefits under this chapter is filed or not as a direct and  
107 proximate result of the specific unsafe working condition.

108 (iii) In cases alleging liability under the provisions of  
109 paragraph (ii) of this subdivision:

110 (A) No punitive or exemplary damages shall be awarded  
111 to the employee or other plaintiff;

112 (B) Notwithstanding any other provision of law or rule  
113 to the contrary, and consistent with the legislative findings  
114 of intent to promote prompt judicial resolution of issues of  
115 immunity from litigation under this chapter, the court  
116 shall dismiss the action upon motion for summary judg-  
117 ment if it finds, pursuant to rule 56 of the rules of civil  
118 procedure that one or more of the facts required to be  
119 proved by the provisions of subparagraphs (A) through (E),  
120 inclusive, paragraph (ii) of this subdivision do not exist,  
121 and the court shall dismiss the action upon a timely  
122 motion for a directed verdict against the plaintiff if after  
123 considering all the evidence and every inference legiti-  
124 mately and reasonably raised thereby most favorably to  
125 the plaintiff, the court determines that there is not suffi-  
126 cient evidence to find each and every one of the facts  
127 required to be proven by the provisions of subparagraphs  
128 (A) through (E), inclusive, paragraph (ii) of this subdivi-  
129 sion; and

130 (C) The provisions of this paragraph and of each sub-  
131 paragraph thereof are severable from the provisions of  
132 each other subparagraph, subsection, section, article or  
133 chapter of this code so that if any provision of a subpara-  
134 graph of this paragraph is held void, the remaining  
135 provisions of this act and this code remain valid.

136 (e) The reenactment of this section in the regular session  
137 of the Legislature during the year one thousand nine  
138 hundred eighty-three does not in any way affect the right  
139 of any person to bring an action with respect to or upon  
140 any cause of action which arose or accrued prior to the  
141 effective date of the reenactment.

142 (f) The amendments to this section enacted during the  
143 two thousand five session of the Legislature shall apply to  
144 all injuries occurring and all actions filed on or after the  
145 first day of July, two thousand five.

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

*Nancy White*

.....  
Chairman Senate Committee

*D. Rich Bruy*

.....  
Chairman House Committee

Originated in the Senate.

To take effect July 1, 2005.

*Darrell Mahrus*

.....  
Clerk of the Senate

*Bruce M. Best*

.....  
Clerk of the House of Delegates

*Carl Ray Tomblin*

.....  
President of the Senate

*[Signature]*

.....  
Speaker House of Delegates

The within *is approved* ..... this the *21st* .....

Day of *April* ....., 2005.

*[Signature]*

.....  
Governor

PRESENTED TO THE  
GOVERNOR

APR 15 2005

Time 4:10 pm

