

SB 657

FILE

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**WEST VIRGINIA LEGISLATURE**  
SEVENTY-EIGHTH LEGISLATURE  
REGULAR SESSION, 2008

**ENROLLED**

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 657**

(SENATORS KESSLER, MCKENZIE AND  
PLYMALE, *original sponsors*)

[Passed March 8, 2008; to take effect July 1, 2008.]

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OFFICE OF THE  
SECRETARY OF STATE

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AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §21-1D-1, §21-1D-2, §21-1D-3, §21-1D-4, §21-1D-5, §21-1D-6, §21-1D-7, §21-1D-7a, §21-1D-8 and §21-1D-9, all relating to the West Virginia Alcohol and Drug-Free Workplace Act; providing definitions; providing a statement of policy; requiring public improvement contractors to have and implement a drug-free workplace program that requires

drug and alcohol testing; providing standards and protocols for testing; providing for assistance for employees; requiring a drug-free workplace policy to be posted at a public improvement construction site; requiring drug-free workplace records and contents be open for inspection; providing penalties; providing for confidentiality; and providing that this article shall only apply to contracts awarded after this article takes effect.

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

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §21-1D-1, §21-1D-2, §21-1D-3, §21-1D-4, §21-1D-5, §21-1D-6, §21-1D-7, §21-1D-7a, §21-1D-8 and §21-1D-9, all to read as follows:

**ARTICLE 1D. WEST VIRGINIA ALCOHOL AND DRUG-FREE WORKPLACE ACT.**

**§21-1D-1. Short Title.**

1 This article shall be called the West Virginia Alcohol  
2 and Drug-Free Workplace Act.

**§21-1D-2. Definitions.**

1 (a) The term "alcohol test" means a procedure  
2 conducted to determine if an individual is under the  
3 influence of alcohol.

4 (b) The term "construction", as used in this article,  
5 means any construction, reconstruction, improvement,  
6 enlargement, painting, decorating or repair of any  
7 public improvement let to contract. The term  
8 "construction" does not include temporary or  
9 emergency repairs.

10 (c) The term “contractor” means any employer  
11 working on a public improvement without regard to  
12 whether they are serving as the prime or subcontractor  
13 to another.

14 (d) The term “drug test” means a procedure using a  
15 nine-panel drug screen in urine specimens that are  
16 collected from individuals for the purpose of  
17 scientifically analyzing the specimens to determine if  
18 the individual ingested, was injected or otherwise  
19 exposed to a drug of abuse.

20 (e) The term “drug of abuse” means any substance  
21 listed under subsection (h) of this section.

22 (f) The term “employee” means a laborer, mechanic or  
23 other worker. For the purposes of this article, employee  
24 does not include such persons as are employed or hired  
25 directly by a public authority on a regular or temporary  
26 basis engaged exclusively in making temporary or  
27 emergency repairs. Furthermore, employee does not  
28 include such persons employed by a contractor who  
29 does not work in public improvement construction.

30 (g) The term “medical review officer” means a  
31 physician who holds a certificate authorizing them to  
32 practice medicine and surgery or osteopathic medicine  
33 and surgery, has knowledge of substance abuse  
34 disorders, has the appropriate medical training to  
35 interpret and evaluate positive drug and alcohol test  
36 results together with a person’s medical history and  
37 other relevant biomedical information, has successfully  
38 completed qualification training as outlined in the Code  
39 of Federal Regulations at 49 C. F. R. Part 40 §121 (c)  
40 and has passed an exam administered by a nationally

41 recognized medical review officer certification board or  
42 subspecialty board for medical practitioners in the field  
43 of medical review of federally mandated drug testing.

44 (h) The term "nine-panel drug screen" means a drug-  
45 testing program that tests for marijuana, cocaine,  
46 opiates including hydromorphone, oxycodone,  
47 hydrocodone, phencyclidine, amphetamines,  
48 barbiturates, benzodiazepines, methadone and  
49 propoxyphene at the substance screening and  
50 confirmation limits where provided under federally  
51 mandated drug and alcohol testing programs or  
52 otherwise accepted as the industry standard.

53 (i) The term "public authority", as used in this article,  
54 means any officer, board or commission or other agency  
55 of the State of West Virginia authorized by law to enter  
56 into a contract for the construction of a public  
57 improvement, including any institution supported, in  
58 whole or in part, by public funds of the State of West  
59 Virginia and this article applies to expenditures of these  
60 institutions made, in whole or in part, from public  
61 funds.

62 (j) The term "public improvement", as used in this  
63 article, includes all buildings, roads, highways, bridges,  
64 streets, alleys, sewers, ditches, sewage disposal plants,  
65 waterworks, airports and all other structures upon  
66 which construction may be let to contract by the State  
67 of West Virginia.

68 (k) The term "random drug testing" means a  
69 procedure in which employees who perform safety-  
70 sensitive tasks are selected to undergo a drug test by a  
71 statistically valid random selection method without

72 prearrangement or planning.

73 (l) The term “reasonable cause” means a belief based  
74 on facts and inferences based primarily upon, but not  
75 limited to: (1) Observable phenomena, such as direct  
76 observation of use, possession or distribution of alcohol  
77 or a controlled substance, or of the physical symptoms  
78 of being under the influence of alcohol or a controlled  
79 substance, such as, but not limited to, slurred speech,  
80 dilated pupils, odor of an alcoholic beverage or a  
81 controlled substance, changes in affect or dynamic  
82 mood swings; (2) a pattern of abnormal conduct, erratic  
83 or aberrant behavior or deteriorating work performance  
84 such as frequent absenteeism, excessive tardiness or  
85 recurrent accidents, that appears to be related to the use  
86 of alcohol or a controlled substance and does not appear  
87 to be attributable to other factors; (3) the identification  
88 of an employee as the focus of a criminal investigation  
89 into unauthorized possession, use or trafficking of a  
90 controlled substance; (4) a report of use of alcohol or a  
91 controlled substance provided by a reliable and credible  
92 source; and (5) repeated or flagrant violations of the  
93 safety or work rules of the employee’s employer, that  
94 are determined by the employee’s supervisor to pose a  
95 substantial risk of physical injury or property damage  
96 and that appears to be related to the use of alcohol or a  
97 controlled substance and that does not appear  
98 attributable to other factors.

99 (m) The term “safety-sensitive duty” means any task  
100 or duty fraught with such risks of injury to the  
101 employee or others that even a momentary lapse of  
102 attention or judgment, or both, can lead to serious  
103 bodily harm or death.

104 (n) The term "under the influence of alcohol" means  
105 a concentration of eight hundredths of one percent or  
106 more by weight of alcohol in an individual's blood or a  
107 concentration of eight hundredths of one gram or more  
108 by weight of alcohol per two hundred ten liters of an  
109 individual's breath.

**§21-1D-3. Statement of policy.**

1 It is hereby declared to be the policy of the State of  
2 West Virginia to require public improvement  
3 contractors to have and implement a drug-free  
4 workplace policy that requires drug and alcohol testing.

**§21-1D-4. Drug-free workplace policy required for public  
improvement construction.**

1 Except as provided in section eight of this article, no  
2 public authority may award a public improvement  
3 contract which is to be let to bid to a contractor unless  
4 the terms of the contract require the contractor and its  
5 subcontractors to implement and maintain a written  
6 drug-free workplace policy in compliance with this  
7 article and the contractor and its subcontractors  
8 provide a sworn statement in writing, under the  
9 penalties of perjury, that they maintain a valid drug-  
10 free workplace policy in compliance with this article.

11 The public improvement contract shall provide for the  
12 following:

13 (1) That the contractor implements its drug-free  
14 workplace policy;

15 (2) Cancellation of the contract by the awarding  
16 public authority if the contractor:

17 (A) Fails to implement its drug-free workplace policy;

18 (B) Fails to provide information regarding  
19 implementation of the contractor's drug-free workplace  
20 policy at the request of the public authority; or

21 (C) Provides to the public authority false information  
22 regarding the contractor's drug-free workplace policy.

**§21-1D-5. Employee drug-free workplace policy required to  
bid for a public improvement contract.**

1 After the first day of July, two thousand eight, any  
2 solicitation for a public improvement contract shall  
3 require each contractor that submits a bid for the work  
4 to submit at the same time an affidavit that the  
5 contractor has a written plan for a drug-free workplace  
6 policy. A public improvement contract may not be  
7 awarded to a contractor who does not have a written  
8 plan for a drug-free workplace policy and who has not  
9 submitted that plan to the appropriate contracting  
10 authority in timely fashion.

11 For subcontractors, compliance with this section may  
12 take place before their work on the public improvement  
13 is begun.

14 A drug-free workplace policy shall include the  
15 following:

16 (1) Establish drug testing and alcohol testing protocols  
17 that at a minimum require a contractor to:

18 (A) Conduct preemployment drug tests of all  
19 employees;



20 (B) Conduct random drug testing that annually tests  
21 at least ten percent of the contractor's employees who  
22 perform safety-sensitive duties;

23 (C) Conduct a drug test or alcohol test of any  
24 employee who may have caused or contributed to an  
25 accident while conducting job duties where reasonable  
26 cause exists to suspect that the employee may be  
27 intoxicated or under the influence of a controlled  
28 substance not prescribed by the employee's physician  
29 when, but not limited to, the employer has evidence that  
30 an employee is or was using alcohol or a controlled  
31 substance drawn from specific documented, objective  
32 facts and reasonable inferences drawn from these facts  
33 in light of experience and training.

34 The drug or alcohol test shall be conducted as soon as  
35 possible after the accident occurred and after any  
36 necessary medical attention has been administered to  
37 the employee.

38 (D) Conduct a drug test or alcohol test of any  
39 employee when a trained supervisor has reasonable  
40 cause to believe that the employee has reported to work  
41 or is working under the influence of a drug of abuse or  
42 alcohol. Written documentation as to the nature of a  
43 supervisor's reasonable cause shall be created.

44 In order to ascertain and justify implementation of a  
45 reasonable cause test, all supervisors will be trained to  
46 recognize drug and alcohol related signs and symptoms.

47 (2) Require that all drug tests performed pursuant to  
48 this section be conducted by a laboratory certified by  
49 the United States Department of Health and Human

50 Services or its successor;

51 (3) Establish standards governing the performance of  
52 drug tests by such a laboratory that include, but are not  
53 limited to, the following:

54 (A) The collection of urine specimens of individuals in  
55 a scientifically or medically approved manner and  
56 under reasonable and sanitary conditions;

57 (B) The collection and testing of urine specimens with  
58 due regard for the privacy of the individual being tested  
59 and in a manner reasonably calculated to prevent  
60 substitutions or interference with the collection and  
61 testing of specimens;

62 (C) The documentation of urine specimens through  
63 procedures that reasonably preclude the possibility of  
64 erroneous identification of test results and that provide  
65 the individual being tested a reasonable opportunity to  
66 furnish information identifying any prescription or  
67 nonprescription drugs used by the individual in  
68 connection with a medical condition to the medical  
69 review officer;

70 (D) The collection, maintenance, storage and  
71 transportation of urine specimens in a manner that  
72 reasonably precludes the possibility of contamination or  
73 adulteration of the specimens;

74 (E) The testing of a urine specimen of an individual to  
75 determine if the individual ingested, was injected or  
76 otherwise introduced with a drug of abuse in a manner  
77 that conforms to scientifically accepted analytical  
78 methods and procedures that include verification and

79 confirmation of any positive test result by gas  
80 chromatography or mass spectrometry.

81 (4) Establish standards and procedures governing the  
82 performance of alcohol tests;

83 (5) Require that a medical review officer review all  
84 drug tests that yield a positive result;

85 (6) Establish procedures by which an individual who  
86 undergoes a drug test or alcohol test may contest a  
87 positive test result;

88 (7) Require that when an employee of a contractor  
89 tests positive for a drug of abuse or alcohol, or if an  
90 employee is caught adulterating a drug or alcohol test,  
91 as defined in section four hundred twelve, article four,  
92 chapter sixty-a of this code, the employee shall be  
93 subject to appropriate disciplinary measures up to and  
94 including termination from employment, in accordance  
95 with the contractor's written drug-free workplace  
96 policy. If not terminated, the employee shall be subject  
97 to random drug or alcohol tests at any time for one year  
98 after the positive test;

99 (8) Require that when a supervisor has reasonable  
100 cause to believe an employee is under the influence of a  
101 drug of abuse or alcohol at work and requires the  
102 employee to take a drug or alcohol test, the employee  
103 shall immediately be suspended from performing safety-  
104 sensitive tasks by the contractor until such time as a  
105 drug or alcohol test is performed and results of that test  
106 are available;

107 (9) Require a contractor to provide to any employee

108 testing positive for a drug of abuse or alcohol the list of  
109 community resources where employees may seek  
110 assistance for themselves or their families as identified  
111 in paragraph (D), subdivision (12) of this section;

112 (10) Require that a contractor assist an employee who  
113 voluntarily acknowledges that the employee may have  
114 a substance abuse problem by providing the list of  
115 community resources where employees may seek  
116 assistance for themselves or their families as identified  
117 in paragraph (D), subdivision (12) of this section;

118 (11) Require that a contractor establish a written  
119 drug-free workplace policy regarding substance abuse  
120 and provide a copy of the written policy to each of its  
121 employees and to each applicant for employment. The  
122 written policy shall contain, at a minimum, all of the  
123 following:

124 (A) A summary of all the elements of the drug-free  
125 workplace policy established in accordance with this  
126 article;

127 (B) A statement that it is the contractor's intention to  
128 create a drug-free workplace environment;

129 (C) Identification of an employee who has been  
130 designated the contractor's drug-free workplace  
131 representative;

132 (D) Shall list the types of tests an employee may be  
133 subject to, which may include, but are not limited to,  
134 the following:

135 (i) Preemployment;

136 (ii) Post-accident;

137 (iii) Random; and

138 (iv) Reasonable cause.

139 (12) Require that a contractor provide within six  
140 weeks of new employment at least two hours of drug-  
141 free workplace employee education for all employees  
142 unless that employee has already received such training  
143 anytime within a prior two-year period. The employee  
144 shall participate in drug-free workplace employee  
145 education at least biannually thereafter. The employee  
146 education shall include all of the following:

147 (A) Detailed information about the content of the  
148 contractor's specific drug-free workplace policy and an  
149 opportunity for employees to ask questions regarding  
150 the policy;

151 (B) The distribution of a hard copy of the written  
152 drug-free workplace policy, including collecting an  
153 employee-signed acknowledgment receipt from each  
154 employee;

155 (C) Specific explanation of the basics of drugs and  
156 alcohol abuse, including, but not limited to, the disease  
157 model, signs and symptoms associated with substance  
158 abuse, and the effects and dangers of drugs or alcohol in  
159 the workplace; and

160 (D) A list of community resources where employees  
161 may seek assistance for themselves or their families.

162 (13) Require that a contractor provide at least two

163 hours of drug-free workplace supervisor training for all  
164 supervisory employees and annually thereafter. The  
165 supervisor training shall include all of the following:

166 (A) How to recognize a possible drug or alcohol  
167 problem;

168 (B) How to document behaviors that demonstrate a  
169 drug or alcohol problem;

170 (C) How to confront employees with the problem from  
171 observed behaviors;

172 (D) How to initiate reasonable suspicion and post-  
173 accident testing;

174 (E) How to handle the procedures associated with  
175 random testing;

176 (F) How to make an appropriate referral for  
177 assessment and assistance;

178 (G) How to follow up with employees returning to  
179 work after a positive test; and

180 (H) How to handle drug-free workplace  
181 responsibilities in a manner that is consistent with the  
182 applicable sections of any pertinent collective  
183 bargaining agreements.

**§21-1D-6. Drug-free workplace written policy to be kept  
posted.**

1 A clearly legible copy of the contractor's written drug-  
2 free workplace policy shall be kept posted in a

3 prominent and easily accessible place at the public  
4 improvement construction site thereof by each  
5 contractor subject to the provisions of this article.

**§21-1D-7. Drug-free workplace records and contents open for inspection.**

1 Every contractor shall keep an accurate record  
2 showing the names, occupation and safety-sensitive  
3 status of all employees, in connection with the  
4 construction on the public improvement, and showing  
5 any drug tests or alcohol tests performed and employee  
6 education and supervisor training received, which  
7 record shall be open at all reasonable hours for  
8 inspection by the public authority which let the contract  
9 and its officers and agents. It is not necessary to  
10 preserve the record for a period longer than three years  
11 after the termination of the contract.

**§21-1D-7a. Confidentiality; test results not to be used in criminal and administrative proceedings.**

1 All drug testing information specifically related to  
2 individual employees is confidential and should be  
3 treated as such by anyone authorized to review or  
4 compile program records. Drug test results may not be  
5 used in a criminal proceeding without the employee's  
6 consent.

**§21-1D-8. Penalties for violation of this article.**

1 (a) Any contractor who violates any provision of this  
2 article is, for the first offense, guilty of a misdemeanor  
3 and, upon conviction thereof, shall be fined not more  
4 than one thousand dollars; for the second offense, the

5 person is guilty of a misdemeanor and, upon conviction  
6 thereof, shall be fined not less than one thousand dollars  
7 nor more than five thousand dollars; for the third or any  
8 subsequent offense, the person is guilty of a  
9 misdemeanor and, upon conviction thereof, shall be  
10 fined not less than five thousand dollars nor more than  
11 twenty-five thousand dollars and the contractor shall be  
12 excluded from bidding any additional new public  
13 improvement projects for a period of one year.

14 (b) Any person who directly or indirectly aids,  
15 requests or authorizes any other person to violate any of  
16 the provisions of this article is guilty of a misdemeanor  
17 and, upon conviction thereof, shall be fined not less  
18 than fifty dollars nor more than two hundred fifty  
19 dollars.

**§21-1D-9. Existing contracts.**

1 This article applies only to contracts for construction  
2 on public improvements awarded after the effective  
3 date of this article.



Enr. Com. Sub for S. B. No. 657] 16

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

  
.....  
Chairman Senate Committee

  
.....  
Chairman House Committee


Originated in the Senate.

In effect July 1, 2008.

  
.....  
Clerk of the Senate

  
.....  
Clerk of the House of Delegates

  
.....  
President of the Senate

  
.....  
Speaker House of Delegates

The within is approved ..... this  
the 28<sup>th</sup> Day of March ....., 2008.

  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 24 2008

Time 3:08 pm