

HB 2771

FILED

2009 JUN -5 PM 4: 08

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
FIRST REGULAR SESSION, 2009



**SECOND  
ENROLLMENT**

**COMMITTEE SUBSTITUTE  
FOR  
House Bill No. 2771**

(By Delegates D. Poling, Hamilton, Ellem, Shook,  
Klempa, Hatfield and Miley)



Amended and again passed May 27, 2009,  
as a result of the objections of the Governor

In Effect Ninety Days From Passage

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**S E C O N D**  
**E N R O L L M E N T**

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

COMMITTEE SUBSTITUTE

FOR

**H. B. 2771**

(BY DELEGATES D. POLING, HAMILTON, ELLEM, SHOOK,  
KLEMPA, HATFIELD AND MILEY)

[Amended and again passed May 27, 2009, as a result of the  
objections of the Governor; in effect ninety days from passage.]

AN ACT to amend and reenact §21-1D-2 and §21-1D-8 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto two new sections, designated §21-1D-5a and §21-1D-7b, all relating to West Virginia Alcohol and Drug-Free Workplace Act; applying the provisions of the Act only to contracts valued in excess of \$100,000; clarifying the definitions of the phrases “drug test”, “drug of abuse” and “reasonable cause”; including a new definition for the phrase “preemployment drug test; requiring drug and alcohol testing for employees of contractors who perform work for counties, municipalities and political subdivisions; providing an exemption for workers covered by United States Department of Transportation drug testing guidelines; requiring contractors to

provide an annual certified drug-free workplace report to public authorities; and limiting the application of the offense for a third or subsequent violation of the Act to violations occurring within the previous five years.

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

That §21-1D-2 and §21-1D-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto two new sections, designated §21-1D-5a and §21-1D-7b, all to read as follows:

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

**§21-1D-2. Definitions.**

1 (a) The term “alcohol test” means a procedure conducted  
2 to determine if an individual is under the influence of  
3 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 public  
7 improvement let to contract the value of which contract is  
8 over \$100,000. The term “construction” does not include  
9 temporary or emergency repairs

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

13 (d) The term “drug test” means a procedure using at  
14 least a nine-panel drug screen in urine specimens that are  
15 collected from individuals for the purpose of scientifically  
16 analyzing the specimens to determine if the individual

17 ingested, was injected or otherwise exposed to a drug of  
18 abuse.

19 (e) The term “drug of abuse” means any substance listed  
20 under subsection (h) of this section and any other substance  
21 the employer chooses to test for.

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

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

43 (h) The term “nine-panel drug screen” means a drug-  
44 testing program that tests for marijuana, cocaine, opiates  
45 including hydromorphone, oxycodone, hydrocodone,  
46 phencyclidine, amphetamines, barbiturates, benzodiazepines,  
47 methadone and propoxyphene at the substance screening and  
48 confirmation limits where provided under federally mandated

49 drug and alcohol testing programs or otherwise accepted as  
50 the industry standard.

51 (i) The term “preemployment drug test” means a drug  
52 test taken within the preceding twelve months from  
53 employment or seven days after hire.

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

63 (k) The term “public improvement”, as used in this  
64 article, includes all buildings, roads, highways, bridges,  
65 streets, alleys, sewers, ditches, sewage disposal plants,  
66 waterworks, airports and all other structures upon which  
67 construction may be let to contract by the State of West  
68 Virginia, its counties or municipalities or any political  
69 subdivision thereof.

70 (l) The term “random drug testing” means a procedure  
71 in which employees who perform safety-sensitive tasks are  
72 selected to undergo a drug test by a statistically valid random  
73 selection method without prearrangement or planning.

74 (m) The term “reasonable cause” means a belief based  
75 on facts and inferences based primarily upon, but not limited  
76 to: (1) Observable phenomena, such as direct observation of  
77 use, possession or distribution of alcohol or a drug of abuse,  
78 or of the physical symptoms of being under the influence of  
79 alcohol or a drug of abuse, such as, but not limited to, slurred

80 speech, dilated pupils, odor of an alcoholic beverage or a  
81 drug of abuse, changes in affect or dynamic mood swings; (2)  
82 a pattern of abnormal conduct, erratic or aberrant behavior or  
83 deteriorating work performance such as frequent  
84 absenteeism, excessive tardiness or recurrent accidents, that  
85 appears to be related to the use of alcohol or a drug of abuse  
86 and does not appear to be attributable to other factors; (3) the  
87 identification of an employee as the focus of a criminal  
88 investigation into unauthorized possession, use or trafficking  
89 of a drug of abuse; (4) a report of use of alcohol or a drug of  
90 abuse provided by a reliable and credible source; and (5)  
91 repeated or flagrant violations of the safety or work rules of  
92 the employee's employer, that are determined by the  
93 employee's supervisor to pose a substantial risk of physical  
94 injury or property damage and that appears to be related to  
95 the use of alcohol or a drug of abuse and that does not appear  
96 attributable to other factors.

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

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

**§21-1D-5a. Drug-free workplace policy not applicable to  
workers required to follow federal Department  
of Transportation drug testing guidelines.**

1 In instances where a worker is required by law to follow  
2 United States Department of Transportation drug testing  
3 guidelines, no additional drug tests are required under this  
4 article.

**§21-1D-7b. Contractor to provide certified drug-free workplace report.**

1 No less than once per year, or upon completion of the  
2 project, every contractor shall provide a certified report to the  
3 public authority which let the contract. The report shall  
4 include:

5 (1) Information to show that the education and training  
6 service to the requirements of section five of this article was  
7 provided;

8 (2) The name of the laboratory certified by the United  
9 States Department of Health and Human Services or its  
10 successor that performs the drug tests pursuant to this article;

11 (3) The average number of employees in connection  
12 with the construction on the public improvement;

13 (4) Drug test results for the following categories  
14 including the number of positive tests and the number of  
15 negative tests:

16 (A) Preemployment and new hires;

17 (B) Reasonable suspicion;

18 (C) Post-accident;

19 (D) Random.

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

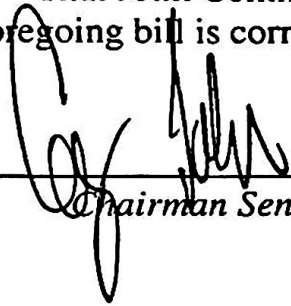
1 (a) Any contractor who violates any provision of this  
2 article is, for the first offense, guilty of a misdemeanor and,  
3 upon conviction thereof, shall be fined not more than \$1,000;

4 for the second offense, the person is guilty of a misdemeanor  
5 and, upon conviction thereof, shall be fined not less than  
6 \$1,000 nor more than \$5,000; for the third or any subsequent  
7 offense within the preceding five years , the person is guilty  
8 of a misdemeanor and, upon conviction thereof, shall be  
9 fined not less than \$5,000 nor more than \$25,000 and the  
10 contractor shall be excluded from bidding any additional new  
11 public improvement projects for a period of one year.

12 (b) Any person who directly or indirectly aids, requests  
13 or authorizes any other person to violate any of the provisions  
14 of this article is guilty of a misdemeanor and, upon  
15 conviction thereof, shall be fined not less than \$50 nor more  
16 than \$250.



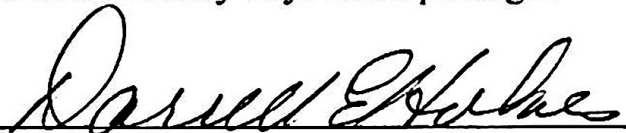
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
\_\_\_\_\_  
Chairman Senate Committee

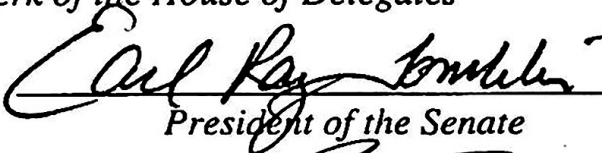
  
\_\_\_\_\_  
Chairman House Committee

Originating in the House.

In 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 is approved this the 5<sup>th</sup>  
day of June, 2009.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

JUN - 1 2009

Time 10:10 am