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
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.

(a) The term “alcohol test” means a procedure conducted to determine if an individual is under the influence of alcohol.

(b) The term “construction”, as used in this article, means any construction, reconstruction, improvement, enlargement, painting, decorating or repair of any public improvement let to contract the value of which contract is over $100,000. The term “construction” does not include temporary or emergency repairs.

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

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

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

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

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

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

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

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

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

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

(m) The term "reasonable cause" means a belief based on facts and inferences based primarily upon, but not limited to: (1) Observable phenomena, such as direct observation of use, possession or distribution of alcohol or a drug of abuse, or of the physical symptoms of being under the influence of alcohol or a drug of abuse, such as, but not limited to, slurred
speech, dilated pupils, odor of an alcoholic beverage or a
drug of abuse, changes in affect or dynamic mood swings; (2)
a pattern of abnormal conduct, erratic or aberrant behavior or
deteriorating work performance such as frequent
absenteeism, excessive tardiness or recurrent accidents, that
appears to be related to the use of alcohol or a drug of abuse
and does not appear to be attributable to other factors; (3) the
identification of an employee as the focus of a criminal
investigation into unauthorized possession, use or trafficking
of a drug of abuse; (4) a report of use of alcohol or a drug of
abuse provided by a reliable and credible source; and (5)
repeated or flagrant violations of the safety or work rules of
the employee’s employer, that are determined by the
employee’s supervisor to pose a substantial risk of physical
injury or property damage and that appears to be related to
the use of alcohol or a drug of abuse and that does not appear
attributable to other factors.

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

(o) The term “under the influence of alcohol” means a
concentration of eight hundredths of one percent or more by
weight of alcohol in an individual’s blood or a concentration
of eight hundredths of one gram or more by weight of alcohol
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.

In instances where a worker is required by law to follow
United States Department of Transportation drug testing
guidelines, no additional drug tests are required under this
article.
§21-1D-7b. Contractor to provide certified drug-free workplace report.

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

1. Information to show that the education and training service to the requirements of section five of this article was provided;

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

3. The average number of employees in connection with the construction on the public improvement;

4. Drug test results for the following categories including the number of positive tests and the number of negative tests:
   
   (A) Preemployment and new hires;
   
   (B) Reasonable suspicion;
   
   (C) Post-accident;
   
   (D) Random.

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

(a) Any contractor who violates any provision of this article is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000;
for the second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $1,000 nor more than $5,000; for the third or any subsequent offense within the preceding five years, the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $5,000 nor more than $25,000 and the contractor shall be excluded from bidding any additional new public improvement projects for a period of one year.

(b) Any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 nor more 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 5th day of June, 2009.

Governor