

Senate Bill No. 602

(By Senator Unger)

[Introduced February 21, 2011; referred to the Committee on
Government Organization; and then to the Committee on Finance.]

A BILL to amend and reenact §23-2-1 and §23-2-1b of the Code of West Virginia, 1931, as amended; to amend and reenact §23-2C-10 of said code; and to amend said code by adding thereto a new section, designated §33-2-21a, all relating to workers' compensation programs of state government entities and their employees; defining participants and exceptions thereto; including the West Virginia Wing of the Civil Air Patrol in such coverage; designating the Insurance Commissioner to manage workers' compensation risks of state entities; creating a purchasing exemption for the program; authorizing commissioner to assess fees; creating a fund in State Treasury; authorizing investment of funds; permitting loan from Insurance Commissioner's administrative fund to the state entities' workers' compensation program fund and repayment to the administrative fund; allowing coverage under assigned risk plan; and authorizing Insurance Commissioner to propose legislative rules and to adopt emergency rules.

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

2 That §23-2-1 and §23-2-1b of the Code of West Virginia, 1931,
3 as amended, be amended and reenacted; that §23-2C-10 of said code
4 be amended and reenacted; and that said code be amended by adding
5 thereto a new section, designated §33-2-21a, all to read as
6 follows:

7 **CHAPTER 23. WORKERS' COMPENSATION.**

8 **ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER;**
9 **EXTRATERRITORIAL COVERAGE.**

10 **§23-2-1. Employers subject to chapter; elections not to provide**
11 **certain coverages; notices; filing of business**
12 **registration certificates.**

13 (a) The State of West Virginia and all governmental agencies
14 or departments created by it, including county boards of education,
15 political subdivisions of the state, the West Virginia Wing of the
16 Civil Air Patrol, any volunteer fire department or company and
17 other emergency service organizations as defined by article five,
18 chapter fifteen of this code, and all persons, firms, associations
19 and corporations regularly employing another person or persons for
20 the purpose of carrying on any form of industry, service or
21 business in this state, are employers within the meaning of this
22 chapter and are required to subscribe to and pay premium taxes into
23 the Workers' Compensation Fund for the protection of their
24 employees and are subject to all requirements of this chapter and
25 all rules prescribed by the Workers' Compensation Commission with
26 reference to rate, classification and premium payment: *Provided,*

1 That rates will be adjusted by the commission to reflect the demand
2 on the compensation fund by the covered employer.

3 (b) The following employers are not required to subscribe to
4 the fund, but may elect to do so:

5 (1) Employers of employees in domestic services;

6 (2) Employers of five or fewer full-time employees in
7 agricultural service;

8 (3) Employers of employees while the employees are employed
9 without the state except in cases of temporary employment without
10 the state;

11 (4) Casual employers. An employer is a casual employer when
12 the number of his or her employees does not exceed three and the
13 period of employment is temporary, intermittent and sporadic in
14 nature and does not exceed ten calendar days in any calendar
15 quarter;

16 (5) Churches;

17 (6) Employers engaged in organized professional sports
18 activities, including employers of trainers and jockeys engaged in
19 thoroughbred horse racing; or

20 (7) Any volunteer rescue squad or volunteer police auxiliary
21 unit organized under the auspices of a county commission,
22 municipality or other government entity or political subdivision;
23 volunteer organizations created or sponsored by government
24 entities, political subdivisions; or area or regional emergency
25 medical services boards of directors in furtherance of the purposes
26 of the Emergency Medical Services Act of article four-c, chapter

1 sixteen of this code: *Provided*, That if any of the employers
2 described in this subdivision have paid employees, to the extent of
3 those paid employees, the employer shall subscribe to and pay
4 premium taxes into the Workers' Compensation Fund based upon the
5 gross wages of the paid employees but with regard to the
6 volunteers, the coverage remains optional.

7 (8) Any employer whose employees are eligible to receive
8 benefits under the federal Longshore and Harbor Workers'
9 Compensation Act, 33 U.S.C. §901, *et seq.*, but only for those
10 employees eligible for those benefits.

11 (c) Notwithstanding any other provision of this chapter to the
12 contrary, whenever there are churches in a circuit which employ one
13 individual clergyman and the payments to the clergyman from the
14 churches constitute his or her full salary, such circuit or group
15 of churches may elect to be considered a single employer for the
16 purpose of premium payment into the Workers' Compensation Fund.

17 (d) Employers who are not required to subscribe to the
18 Workers' Compensation Fund may voluntarily choose to subscribe to
19 and pay premiums into the fund for the protection of their
20 employees and in that case are subject to all requirements of this
21 chapter and all rules and regulations prescribed by the commission
22 with reference to rates, classifications and premium payments and
23 shall afford to them the protection of this chapter, including
24 section six of this article, but the failure of the employers to
25 choose to subscribe to and to pay premiums into the fund shall not
26 impose any liability upon them other than any liability that would

1 exist notwithstanding the provisions of this chapter.

2 (e) Any foreign corporation employer whose employment in this
3 state is to be for a definite or limited period which could not be
4 considered "regularly employing" within the meaning of this section
5 may choose to pay into the Workers' Compensation Fund the premiums
6 provided for in this section, and at the time of making application
7 to the Workers' Compensation Commission, the employer shall furnish
8 a statement under oath showing the probable length of time the
9 employment will continue in this state, the character of the work,
10 an estimate of the monthly payroll and any other information which
11 may be required by the commission. At the time of making
12 application the employer shall deposit with the commission to the
13 credit of the Workers' Compensation Fund the amount required by
14 section five of this article. That amount shall be returned to the
15 employer if the employer's application is rejected by the
16 commission. Upon notice to the employer of the acceptance of his
17 or her application by the commission, he or she is an employer
18 within the meaning of this chapter and subject to all of its
19 provisions.

20 (f) Any foreign corporation employer choosing to comply with
21 the provisions of this chapter and to receive the benefits under
22 this chapter shall, at the time of making application to the
23 commission in addition to other requirements of this chapter,
24 furnish the commission with a certificate from the Secretary of
25 State, where the certificate is necessary, showing that it has
26 complied with all the requirements necessary to enable it legally

1 to do business in this state and no application of a foreign
2 corporation employer shall be accepted by the commission until the
3 certificate is filed.

4 (g) The following employers may elect not to provide coverage
5 to certain of their employees under the provisions of this chapter:

6 (1) Any political subdivision of the state including county
7 commissions and municipalities, boards of education, or emergency
8 services organizations organized under the auspices of a county
9 commission may elect not to provide coverage to any elected
10 official. The election not to provide coverage does not apply to
11 individuals in appointed positions or to any other employees of the
12 political subdivision;

13 (2) If an employer is a partnership, sole proprietorship,
14 association or corporation, the employer may elect not to include
15 as an "employee" within this chapter, any member of the
16 partnership, the owner of the sole proprietorship or any corporate
17 officer or member of the board of directors of the association or
18 corporation. The officers of a corporation or an association shall
19 consist of a president, a vice president, a secretary and a
20 treasurer, each of whom is elected by the board of directors at the
21 time and in the manner prescribed by the bylaws. Other officers
22 and assistant officers that are considered necessary may be elected
23 or appointed by the board of directors or chosen in any other
24 manner prescribed by the bylaws and, if elected, appointed or
25 chosen, the employer may elect not to include the officer or
26 assistant officer as an "employee" within the meaning of this

1 chapter: *Provided*, That except for those persons who are members
2 of the board of directors or who are the corporation's or
3 association's president, vice president, secretary and treasurer
4 and who may be excluded by reason of their positions from the
5 benefits of this chapter even though their duties,
6 responsibilities, activities or actions may have a dual capacity of
7 work which is ordinarily performed by an officer and also of work
8 which is ordinarily performed by a worker, an administrator or an
9 employee who is not an officer, no other officer or assistant
10 officer who is elected or appointed shall be excluded by election
11 from coverage or be denied the benefits of this chapter merely
12 because he or she is an officer or assistant officer if, as a
13 matter of fact:

14 (A) He or she is engaged in a dual capacity of having the
15 duties and responsibilities for work ordinarily performed by an
16 officer and also having duties and work ordinarily performed by a
17 worker, administrator or employee who is not an officer;

18 (B) He or she is engaged ordinarily in performing the duties
19 of a worker, an administrator or an employee who is not an officer
20 and receives pay for performing the duties in the capacity of an
21 employee; or

22 (C) He or she is engaged in an employment palpably separate
23 and distinct from his or her official duties as an officer of the
24 association or corporation;

25 (3) If an employer is a limited liability company, the
26 employer may elect not to include as an "employee" within this

1 chapter a total of no more than four persons, each of whom are
2 acting in the capacity of manager, officer or member of the
3 company.

4 (h) In the event of election under subsection (g) of this
5 section, the employer shall serve upon the commission written
6 notice naming the positions not to be covered and shall not include
7 the "employee's" remuneration for premium purposes in all future
8 payroll reports, and the partner, proprietor or corporate or
9 executive officer is not considered an employee within the meaning
10 of this chapter after the notice has been served. Notwithstanding
11 the provisions of subsection (g), section five of this article, if
12 an employer is delinquent or in default or has not subscribed to
13 the Fund even though it is obligated to do so under the provisions
14 of this article, any partner, proprietor or corporate or executive
15 officer shall not be covered and shall not receive the benefits of
16 this chapter.

17 (i) "Regularly employing" or "regular employment" means
18 employment by an employer which is not a casual employer under this
19 section.

20 (j) Upon the termination of the commission, the criteria
21 governing which employer shall or may subscribe to the Workers'
22 Compensation Commission shall also govern which employers shall or
23 may purchase Workers' Compensation insurance under article two-c of
24 this chapter.

25 **§23-2-1b. Special provisions as to premiums.**

26 (a) Except as provided for in subsection (b) of this section,

1 every executive officer of an association or of a corporation, any
2 member of a partnership or owner of a sole proprietorship which has
3 not elected to forgo coverage under this chapter for such officer,
4 member or owner shall pay premiums based upon the actual salary
5 paid to such employee up to an amount sufficient to qualify such
6 employee to receive the maximum level of benefits, but in no event
7 shall the basis for premium be less than the salary necessary to
8 provide such employee with the minimum level of benefits.

9 (b) Every executive officer of a not-for-profit association or
10 of a not-for-profit corporation which has not elected to forgo
11 coverage under this chapter for such officer, member or owner shall
12 pay premiums based upon the actual salary paid to such employee up
13 to an amount sufficient to qualify such employee to receive the
14 maximum level of benefits, but in no event shall the basis for
15 premium be less than \$100.

16 (c) Every elected official or officer, whether full time or
17 part time and including members of the Legislature, whose
18 governmental entity elects coverage under this chapter for such
19 elected official or officer, shall pay or have paid for him or her
20 premiums based upon the actual salary paid to such elected official
21 or officer up to an amount sufficient to qualify such elected
22 official or officer to receive the maximum level of benefits, but
23 in no event shall the basis for premium be less than the salary
24 necessary to provide such elected official or officer with the
25 minimum level of benefits. For the purposes of this subsection, an
26 elected official or officer shall include a person appointed to an

1 elected position to complete a term for that elected position.

2 (d) The premium and actual expenses in connection with
3 governmental agencies and departments of the State of West Virginia
4 shall be paid out of the State Treasury from appropriations made
5 for such agencies and departments, in the same manner as other
6 disbursements are made by such agencies and departments.

7 (e) County commissions, municipalities, other political
8 subdivisions of the state, county boards of education, emergency
9 service organizations organized as aforesaid and volunteer fire
10 departments or companies or the West Virginia Wing of the Civil Air
11 Patrol, shall provide for the funds to pay their prescribed
12 premiums into the fund and such premiums and premiums of state
13 agencies and departments, including county boards of education,
14 shall be paid into the fund in the same manner as herein provided
15 for other employers subject to this chapter.

16 (f) County commissions and municipalities are hereby
17 authorized to pay all or any part of the premiums prescribed for
18 such emergency service organizations organized as aforesaid and
19 such duly incorporated volunteer fire departments or companies or
20 the West Virginia Wing of the Civil Air Patrol, as may provide
21 services within the county or municipality.

22 **ARTICLE 2C. EMPLOYERS' MUTUAL INSURANCE COMPANY.**

23 **§23-2C-10. West Virginia adverse risk assignment.**

24 (a) The Insurance Commissioner shall provide for the
25 development and administration of an assigned risk plan to provide
26 workers' compensation insurance coverage to employers who are

1 unable to procure coverage in the voluntary market.

2 (b) To qualify for coverage under the plan, an employer must
3 have been categorically declined coverage by at least two insurers
4 that are not affiliated with each other. The employer has the
5 burden of establishing that at least two unaffiliated insurers are
6 unwilling to provide coverage at any premium level that is
7 reasonably related to the risk presented by the employer. The
8 assigned risk plan may also provide for other reasonable
9 qualifications and for the termination of coverage under the plan
10 for specified reasons.

11 (c) Any employer that satisfies the requirements of subsection
12 (b) of this section and other qualifications established in the
13 plan shall be provided coverage at a premium level to be determined
14 or approved by the Insurance Commissioner, which premiums shall be
15 actuarially sound, consistent with classification and rate-making
16 methodologies found in the insurance industry, and calculated to
17 enable the plan to be self-sustaining and, to the greatest extent
18 possible, able to operate without subsidies from employers and
19 insurers in the voluntary market. Rates may not be excessive,
20 inadequate or unfairly discriminatory.

21 (d) The Insurance Commissioner may designate any third party,
22 including any private carrier or rating organization with
23 substantial experience in developing and administering similar
24 programs in other states, to develop and administer the assigned
25 risk plan for a period of three years, and thereafter, shall
26 contract with any qualified party, including the then current

1 administrator, to continue the administration of the assigned risk
2 plan: *Provided*, That the Insurance Commissioner must approve the
3 plan prior to the plan becoming operative. The plan established
4 pursuant to this section shall require that all private carriers
5 participate as a condition of their authority to transact business
6 in this state.

7 (e) In the event the plan incurs a deficit in one or more
8 policy years, the Insurance Commissioner may assess all private
9 carriers providing workers' compensation insurance in voluntary
10 market funds as are necessary to cover the deficits. The
11 assessments shall result in an equitable distribution of costs
12 among private carriers based upon premiums received by the private
13 carriers in the private market. Assessments made upon the policies
14 of each private carrier pursuant to this section may be collected
15 by each carrier in the form of a surcharge.

16 (f) Notwithstanding any other provision of this code, the West
17 Virginia Wing of the Civil Air Patrol qualifies for coverage under
18 the assigned risk plan.

19 **CHAPTER 33. INSURANCE.**

20 **ARTICLE 2. INSURANCE COMMISSIONER.**

21 **§33-2-21a. State Agency Workers' Compensation Programs.**

22 (a) The intent of this section is to provide a means of
23 managing workers' compensation coverage for persons directly
24 employed by the State of West Virginia. For the purposes of this
25 section:

26 (1) "Discretionary participant" means the Parkways Authority,

1 offices of the State Auditor, the State Treasurer, the Secretary of
2 State, the Attorney General, the Department of Agriculture, the
3 State Senate and House of Delegates or their related entities, the
4 Supreme Court of Appeals, the State Police and any other spending
5 unit of the state that is required by section twelve, article two,
6 chapter eleven-b of this code to provide a detailed expenditure
7 schedule to the Secretary of Revenue in his or her capacity as
8 Director of the Budget or the West Virginia Wing of the Civil Air
9 Patrol: *Provided*, That the term "discretionary participant" does
10 not include any executive state entity other than the State Police
11 and Parkways Authority, any county board of education, any other
12 county entity or its instrumentality or any municipality or its
13 instrumentality.

14 (2) "Executive state entity" means the Governor's Office and
15 its affiliated entities, Bureau of Senior Services, or any state
16 department, division, fund, office, position, system, survey or
17 other entity of state government, however designated, transferred
18 to and incorporated in one of the executive departments created in
19 section two, article one, chapter five-f of this code, except the
20 State Police, and that is required by section twelve, article two,
21 chapter eleven-b of this code to provide a detailed expenditure
22 schedule to the Secretary of Revenue in his or her capacity as
23 Director of the Budget.

24 (b) Notwithstanding any provision of this code to the
25 contrary, the commissioner has sole responsibility for managing the
26 workers' compensation risks of all executive state entities and for

1 supervising and controlling the workers' compensation programs for
2 such entities: *Provided*, That any discretionary participant may
3 apply to participate in the program, and if approved to do so by
4 the commissioner, may be allowed to participate under the same
5 terms and conditions as are applicable to executive state entities:
6 *Provided, however*, That the commissioner may remove any such entity
7 from the program for noncompliance with any conditions of
8 participation: *Provided further*, That a discretionary participant
9 is, in accordance with rules governing the program, permitted to
10 withdraw from continued participation in the program.

11 (c) The commissioner may assess such fees or surcharges on
12 participants in the program as he or she determines necessary to
13 manage the workers' compensation risks of those participants.

14 (d) The provisions of article three, chapter five-a of this
15 code relating to the Purchasing Division of the Department of
16 Administration do not apply to any contract entered into by the
17 commissioner in furtherance of the requirements of this section:
18 *Provided*, That those contracts shall be awarded on a competitive
19 basis.

20 (e)(1) There is hereby established the "State Entities
21 Workers' Compensation Program Fund." All premiums, surcharges,
22 assessments, deposits or any other moneys or funds deposited or
23 otherwise designated or accruing to the fund as well as all
24 earnings payable to it, shall be deposited in the State Treasury to
25 the credit of the fund. Expenditures from the fund shall be for
26 the purposes set forth in this section, are authorized from

1 collections, and shall not revert to the General Fund. The fund
2 shall be a separate and distinct fund upon the books and records of
3 the Auditor and Treasurer, and disbursements therefrom shall be
4 made upon requisitions signed by the Insurance Commissioner.

5 (2) Any premiums, assessments or deposits or any other moneys
6 or funds received for the purposes of this section shall be
7 invested by the State Treasurer at the request of the commissioner.

8 (3) The Insurance Commissioner may borrow funds as is
9 determined necessary from the Insurance Commission Fund, created in
10 section thirteen-b, article three, chapter thirty-three of this
11 code, for the initial operations of the workers' compensation
12 program for state entities: *Provided*, That any borrowed funds
13 shall be deposited to the credit of the "State Entities Workers'
14 Compensation Program Fund": *Provided, however*, That these funds
15 shall be repaid, without interest, and redeposited to the credit of
16 the Insurance Commission Fund as determined by the Insurance
17 Commissioner.

18 (f) The commissioner may promulgate emergency rules and shall
19 propose for legislative approval legislative rules, in accordance
20 with the provisions of article three, chapter twenty-nine-a of this
21 code, as are necessary to provide for implementation and
22 enforcement of the provisions of this section.

NOTE: The purpose of this bill is to create a program for managing workers' compensation coverage of state entities by the Insurance Commissioner, including the West Virginia Wing of the Civil Air Patrol.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would

be added.

§33-2-21a is new; therefore, strike-throughs and underscoring have been omitted.