

COMMITTEE SUBSTITUTE

FOR

H. B. 2946

(BY DELEGATES ELLEM, BORDER, PERDUE, MILEY, ELLINGTON,
HAMILTON, REYNOLDS, KOMINAR AND C. MILLER)

(Originating in the Committee on the Judiciary)
[February 25, 2011]

A BILL to repeal §60A-10-5 and §60A-10-8 of the code of West Virginia, 1931, as amended; to amend and reenact §60A-10-2, §60A-10-3, §60A-10-4, §60A-10-6, §60A-10-7 and §60A-10-11 of said code, all relating to requiring a prescription to dispense drug products that contain as an active ingredient ephedrine, pseudoephedrine, phenylpropanolamine and other precursors of methamphetamine; making and such drugs a

Schedule III drug; repealing certain provisions and definitions that are no longer applicable; adding findings; exempting wholesalers from certain requirements of the United States Drug Enforcement Administration relating to storage, reporting, record keeping or physical security control requirements for controlled substances containing ephedrine, pseudoephedrine or phenylpropanolamine; adding affirmative defenses; and providing penalties.

Be it enacted by the Legislature of West Virginia:

That §60A-10-5 and §60A-10-8 of the Code of West Virginia, 1931, as amended, be repealed; that §60A-10-2, §60A-10-3, §60A-10-4, §60A-10-6, §60A-10-7 and §60A-10-11 of said code be amended and reenacted to read as follows:

ARTICLE 10. METHAMPHETAMINE LABORATORY ERADICATION ACT.

§60A-10-2. Purpose; findings.

- 1 The Legislature finds:
- 2 (a) That the illegal production and distribution of
- 3 methamphetamine is an increasing problem nationwide and
- 4 particularly prevalent in rural states such as West Virginia.

5 (b) That methamphetamine is a highly addictive drug that
6 can be manufactured in small and portable laboratories.
7 These laboratories are operated by individuals who
8 manufacture the drug in a clandestine and unsafe manner,
9 often resulting in explosions and fires that can injure not only
10 the individuals involved, but their families, neighbors,
11 law-enforcement officers and firemen.

12 (c) That use of methamphetamine can result in fatal
13 kidney and lung disorders, brain damage, liver damage,
14 blood clots, chronic depression, hallucinations, violent and
15 aggressive behavior, malnutrition, disturbed personality
16 development, deficient immune system and psychosis.
17 Children born to mothers who are abusers of
18 methamphetamine can be born addicted and suffer birth
19 defects, low birth weight, tremors, excessive crying, attention
20 deficit disorder and behavior disorders.

21 (d) That in addition to the physical consequences to an
22 individual who uses methamphetamine, usage of the drug
23 also produces an increase in automobile accidents,

24 explosions and fires, increased criminal activity, increased
25 medical costs due to emergency room visits, increases in
26 domestic violence, increased spread of infectious diseases
27 and a loss in worker productivity.

28 (e) That environmental damage is another consequence
29 of the methamphetamine epidemic. Each pound of
30 methamphetamine produced leaves behind five to six pounds
31 of toxic waste. Chemicals and byproducts that result from
32 the manufacture of methamphetamine are often poured into
33 plumbing systems, storm drains or directly onto the ground.
34 Clean up of methamphetamine laboratories is extremely
35 resource-intensive, with an average remediation cost of five
36 thousand dollars.

37 (f) That in other states, which have required a
38 prescription for those drugs that are used to facilitate
39 production of methamphetamine, there has been a significant
40 decrease in the number of methamphetamine laboratories in
41 those states.

42 ~~(f)~~(g) That it is in the best interest of every West
43 Virginian to develop a viable solution to address the growing
44 methamphetamine problem in the State of West Virginia.
45 The Legislature finds that restricting access to
46 ~~over-the-counter~~ drugs used to facilitate production of
47 methamphetamine is necessary to protect the public safety of
48 all West Virginians.

49 ~~(g)~~(h) That it is further in the best interest of every West
50 Virginian to create impediments to the manufacture of
51 methamphetamine by requiring persons purchasing
52 chemicals necessary to the process to ~~provide identification~~
53 have a lawful prescription before purchasing.

§60A-10-3. Definitions.

1 In this article:

2 (a) "Board of Pharmacy" or "board" means the West
3 Virginia Board of Pharmacy established by the provisions of
4 article five, chapter thirty of this code.

5 (b) "Designated precursor" means any drug product made
6 subject to the requirements of this article by the provisions of
7 section seven of this article.

8 (c) "Distributor" means any person within this state or
9 another state, other than a manufacturer or wholesaler, who
10 sells, delivers, transfers or in any manner furnishes a drug
11 product to any person who is not the ultimate user or
12 consumer of the product;

13 (d) "Drug product" means a pharmaceutical product that
14 contains as an ~~its single~~ active ingredient ephedrine,
15 pseudoephedrine or phenylpropanolamine or a substance
16 identified on the supplemental list provided for in section
17 seven of this article which may be sold without a prescription
18 and which is labeled for use by a consumer in accordance
19 with the requirements of the laws and rules of this state and
20 the federal government.

21 (e) "Ephedrine " means ephedrine, its salts or optical
22 isomers or salts of optical isomers.

23 (f) "Manufacturer" means any person within this state
24 who produces, compounds, packages or in any manner
25 initially prepares for sale or use any drug product or any such
26 person in another state if they cause the products to be
27 compounded, packaged or transported into this state.

28 (g) "Phenylpropanolamine" means phenylpropanolamine,
29 its salts, optical isomers and salts of optical isomers.

30 (h) "Pseudoephedrine" means pseudoephedrine, its salts,
31 optical isomers and salts of optical isomers.

32 (i) "Precursor" means any substance which may be used
33 along with other substances as a component in the production
34 and distribution of illegal methamphetamine.

35 (j) "Pharmacist" means an individual currently licensed
36 by this state to engage in the practice of pharmacy and
37 pharmaceutical care as defined in subsection (t), section one-
38 b, article fifty, chapter thirty of this code.

39 (k) "Pharmacy intern" has the same meaning as the term
40 "intern" as set forth in section one-b, article five, chapter
41 thirty of this code.

42 (l) "Pharmacy" means any drugstore, apothecary or place
43 within this state where drugs are dispensed and sold at retail
44 or display for sale at retail and pharmaceutical care is
45 provided outside of this state where drugs are dispensed and
46 pharmaceutical care is provided to residents of this state.

47 ~~(m) "Pharmacy counter" means an area in the pharmacy~~
48 ~~restricted to the public where controlled substances are stored~~
49 ~~and housed and where controlled substances may only be~~
50 ~~sold, transferred or dispensed by a pharmacist or pharmacy~~
51 ~~technician.~~

52 ~~(n)~~(m) "Pharmacy technician" means a registered
53 technician who meets the requirements for registration as set
54 forth in article five, chapter thirty of this code.

55 ~~(o) "Retail establishment" means any entity or person~~
56 ~~within this state who sells, transfers or distributes goods,~~
57 ~~including over-the-counter drug products, to an ultimate~~
58 ~~consumer.~~

59 ~~(p)~~(n) "Schedule ~~V~~VIII" means the schedule of controlled
60 substances set out in section two hundred ~~twelve~~ eight,
61 section two of this chapter.

62 ~~(q) "Single active ingredient" means those ingredients~~
63 ~~listed on a drug product package as the only active ingredient~~
64 ~~in over-the-counter medication or identified on the Schedule~~
65 ~~maintained by the Board of Pharmacy as being primarily~~

66 ~~used in the illegal production and distribution of~~
 67 ~~methamphetamine.~~

68 (r)(o) "Superintendent of the State Police" or
 69 "Superintendent" means the Superintendent of the West
 70 Virginia State Police as set forth in section five, article two,
 71 chapter fifteen of this code.

72 (s)(p) "Wholesaler" means any person within this state or
 73 another state, other than a manufacturer, who sells, transfers
 74 or in any manner furnishes a drug product to any other
 75 person in this state for the purpose of being resold.

**§60A-10-4. Purchase, receipt, acquisition and possession of
 substances to be used as precursor to
 manufacture of methamphetamine or another
 controlled substance; offenses; exceptions;
 penalties.**

1 (a) Any person who within any thirty-day period
 2 knowingly purchases, receives or otherwise possesses more
 3 than ~~three packages of a drug product~~ the amount prescribed
 4 in a single prescription containing as ~~its single~~ an active
 5 ingredient ephedrine, pseudoephedrine or
 6 phenylpropanolamine or more than nine grams of ephedrine,

7 pseudoephedrine or phenylpropanolamine in any form shall
8 be guilty of a misdemeanor and, upon conviction, shall be
9 confined in a jail for not more than one year, fined not more
10 than \$1,000, or both, unless the person can provide an order
11 from a person authorized to prescribe controlled substances
12 explaining why the multiple prescriptions are medically
13 necessary.

14 (b) Notwithstanding the provisions of subsection (a) of
15 this section, any person convicted of a second or subsequent
16 violation of the provisions of said subsection or a statute or
17 ordinance of the United States or another state which
18 contains the same essential elements shall be guilty of a
19 felony and, upon conviction, shall be confined in a state
20 correctional facility for not less than one nor more than five
21 years, fined not more than \$25,000, or both.

22 (c) The provisions of subsection (a) of this section shall
23 not apply to:

24 (1) Drug products which are for pediatric use primarily
25 intended for administration to children under the age of
26 twelve;

27 (2) Drug products which have been determined by the
28 Board of Pharmacy to be in a form which is unamenable to
29 being used for the manufacture of methamphetamine;

30 (3) Persons lawfully possessing drug products in their
31 capacities as distributors, wholesalers, manufacturers,
32 pharmacists, pharmacy interns, pharmacy technicians, health
33 care professionals or persons possessing such drug products
34 pursuant to a valid prescription.

35 (d) Notwithstanding any provision of this code to the
36 contrary, any person who knowingly possesses any amount
37 of ephedrine, pseudoephedrine, phenylpropanolamine or
38 other designated precursor with the intent to use it in the
39 manufacture of methamphetamine or who knowingly
40 possesses a substance containing ephedrine, pseudoephedrine
41 or phenylpropanolamine or their salts, optical isomers or salts
42 of optical isomers in a state or form which is, or has been
43 altered or converted from the state or form in which these
44 chemicals are, or were, commercially distributed shall be
45 guilty of a felony and, upon conviction, shall be confined in

46 a state correctional facility for not less than two nor more
47 than ten years, fined not more than \$25,000, or both.

48 (e) (1) Any pharmacy, wholesaler, manufacturer or
49 distributor of drug products containing as ~~their single~~ an
50 active ingredient ephedrine, pseudoephedrine,
51 phenylpropanolamine, their salts or optical isomers or salts
52 of optical isomers or other designated precursor shall obtain
53 a registration annually from the State Board of Pharmacy as
54 described in section six of this article. ~~Any such pharmacy,~~
55 ~~wholesaler, manufacturer or distributor shall keep complete~~
56 ~~records of all sales and transactions as provided in section~~
57 ~~eight of this article. The records shall be gathered and~~
58 ~~maintained pursuant to legislative rule promulgated by the~~
59 ~~Board of Pharmacy.~~

60 (f) It is an affirmative defense to any offense in this
61 section that the person:

62 (1) Obtained the drug(s) containing ephedrine,
63 pseudoephedrine or phenylpropanolamine lawfully;

64 (2) Possessed no more than nine grams of ephedrine,
65 pseudoephedrine or phenylpropanolamine in any form; and

66 (3) Possessed the drug(s) under circumstances that are
67 consistent with typical medicinal or household use, as
68 indicated by factors including but not limited to: storage
69 location, purchase date, or possession of the product in a
70 variety of strengths, brands, types, purposes or expiration
71 dates.

72 (2) Any drug products possessed without a registration as
73 provided in this section are subject to forfeiture upon
74 conviction for a violation of this section.

75 (3) In addition to any administrative penalties provided
76 by law, any violation of this subsection is a misdemeanor,
77 punishable upon conviction by a fine in an amount not more
78 than \$10,000.

**§60A-10-6. Registration to sell, manufacture or distribute
products; rule-making authority.**

1 The State Board of Pharmacy shall propose rules for
2 legislative approval in accordance with the provisions of

3 article three, chapter twenty-nine-a of this code to require
4 that every wholesaler, manufacturer or distributor of any
5 drug product containing as ~~their single~~ an active ingredient
6 ephedrine or pseudoephedrine or a substance identified on
7 the supplemental list provided for in section seven of this
8 article shall obtain a registration and permit issued by the
9 State Board of Pharmacy to sell, distribute or transfer the
10 product containing as their single active ingredient ephedrine,
11 pseudoephedrine or phenylpropanolamine.

§60A-10-7. Restricted products; rule-making authority.

1 (a) ~~On or before July 1, 2005,~~ The Board of Pharmacy
2 shall promulgate emergency and legislative rules pursuant to
3 the provision of article three, chapter twenty-nine-a of this
4 code to implement a program wherein the Board of
5 Pharmacy shall consult ~~consults~~ with the Superintendent of
6 the State Police in identifying drug products which are a
7 designated precursor, in addition to those that contain as ~~their~~
8 ~~single~~ an active ingredient ephedrine, pseudoephedrine or
9 phenylpropanolamine, that are commonly being used in the

10 production and distribution of methamphetamine. Those
11 drug products which the Superintendent of the State Police
12 have demonstrated by empirical evidence are commonly used
13 in the manufacture of methamphetamine shall be added to a
14 supplemental list and ~~shall be~~ are subject to all of the
15 restrictions of this article. ~~These~~ The rules established
16 pursuant to this section shall include: (1) a process whereby
17 pharmacies are made aware of all drug products that contain
18 as ~~their single~~ an active ingredient ephedrine,
19 pseudoephedrine and phenylpropanolamine that will be listed
20 as a Schedule ~~V~~ III substance, ~~and must be sold, transferred~~
21 ~~or dispensed from behind a pharmacy counter;~~

22 (2) Wholesale drug distributors licensed by the Board of
23 Pharmacy and registered with, and regulated by, the United
24 States Drug Enforcement Administration are exempt from
25 storage, reporting, record keeping or physical security control
26 requirements for controlled substances containing
27 pseudoephedrine. ~~A process whereby pharmacies and retail~~
28 ~~establishments are made aware of additional drug products~~

29 ~~added to Schedule VIII that are required to be placed behind~~
30 ~~the pharmacy counter for sale, transfer or distribution can be~~
31 ~~periodically reviewed and updated.~~

32 ~~(b) At any time after July 1, 2005, the Board of~~
33 ~~Pharmacy, upon the recommendation of the superintendent~~
34 ~~of the State Police, shall promulgate emergency and~~
35 ~~legislative rules pursuant to the provision of article three,~~
36 ~~chapter twenty-nine-a of this code to implement an updated~~
37 ~~supplemental list of products containing the controlled~~
38 ~~substances ephedrine, pseudoephedrine or~~
39 ~~phenylpropanolamine as an active ingredient or any other~~
40 ~~drug used as a precursor in the manufacture of~~
41 ~~methamphetamine, which the superintendent of the State~~
42 ~~Police has demonstrated by empirical evidence is being used~~
43 ~~in the manufacture of methamphetamine. This listing~~
44 ~~process shall comport with the requirements of subsection (a)~~
45 ~~of this section.~~

**§60A-10-11. Reporting to the Legislative Oversight Commission on
Health and Human Resources Accountability.**

1 On or before the first day of December, two thousand
2 ~~five~~eleven, the Superintendent of the West Virginia State
3 Police shall submit a report including findings, conclusions
4 and recommendations, together with drafts of any legislation
5 necessary, to improve the effectiveness of a reduction in
6 illegal methamphetamine production and distribution to the
7 Legislative Oversight Commission on Health and Human
8 Resources Accountability for consideration.