

1 **Senate Bill No. 394**

2 (By Senators Wills, Kirkendoll, Klempa, McCabe, Minard, Palumbo,
3 Tucker, Williams, K. Facemyer, Nohe, Plymale, Foster and Beach)

4 _____
5 [Introduced January 24, 2012; referred to the Committee on the
6 Judiciary.]
7 _____

**Interim
Bill**

8
9
10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §5-30-1, §5-30-2,
12 §5-30-3, §5-30-4, §5-30-5, §5-30-6, §5-30-7 and §5-30-8; to
13 amend said code by adding thereto a new section, designated
14 §7-1-16; and to amend and reenact §8-5-10 of said code, all
15 relating to procedures for the transfer of power when certain
16 elected officials are unable to fulfill the duties of their
17 office; creating a procedure for the transfer of power due to
18 disability or unavailability of the elected members of the
19 Board of Public Works; requiring designation of chain of
20 succession and waiver of HIPAA rights for certain elected
21 officials; creating the disability evaluation panel; declaring
22 procedures for voluntary temporary transfer of power and
23 involuntary transfer of power; defining the process for

1 reevaluation of findings by the disability evaluation panel;
2 establishing procedures for declaration of unavailability;
3 requiring that certain determinations be published in the
4 State Register; providing for review of the disability
5 evaluation panel's determinations by the Supreme Court of
6 Appeals of West Virginia; directing the Supreme Court to
7 create procedural rules pertaining to the review; requiring
8 continuation of salary and insurance for certain disabled and
9 unavailable elected officials; requiring counties to create a
10 procedure for the transfer of power due to disability or
11 unavailability; and requiring municipalities to create a
12 procedure for the transfer of power due to disability or
13 unavailability.

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

15 That the Code of West Virginia, 1931, as amended, be amended
16 by adding thereto a new article, designated §5-30-1, §5-30-2,
17 §5-30-3, §5-30-4, §5-30-5, §5-30-6, §5-30-7 and §5-30-8; that said
18 code be amended by adding thereto a new section, designated §7-1-
19 16; and that §8-5-10 of said code be amended and reenacted, all to
20 read as follows:

21 **CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR,**
22 **SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD**
23 **OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS,**

1 **OFFICES, PROGRAMS, ETC.**

2 **ARTICLE 30. DISABILITY OF GOVERNOR; ELECTED CONSTITUTIONAL**
3 **OFFICERS; MEMBERS STATE SENATE AND**
4 **HOUSE OF DELEGATES.**

5 **§5-30-1. Definitions.**

6 (a) As used in this article, the terms "disabled" or
7 "disability" mean the inability of the official to exercise and
8 discharge the powers and duties of the office due to any medically
9 determinable physical or mental/psychological impairment or a
10 combination of physical and mental/psychological impairments.

11 (b) As used in this article, the terms "unavailable" or
12 "unavailability" mean the inability of the official to exercise and
13 discharge the powers and duties of the office for any reason other
14 than disability.

15 **§5-30-2. Designation of chain of succession during disability or**
16 **unavailability; requiring waiver of HIPAA upon taking**
17 **office.**

18 (a) If the Governor becomes disabled or unavailable, then the
19 individual who performs the actions of the Governor during the
20 disability or unavailability is determined by article VII, section
21 sixteen of the West Virginia Constitution.

22 (b) The Secretary of State, Treasurer, Auditor, Attorney

1 General and Commissioner of Agriculture shall, upon taking office,
2 provide written authorization to the Office of the Secretary of
3 State naming an employee or a series of employees who will assume
4 the duties of the office in the event the elected official is
5 unable to fulfill his or her duties due to disability or
6 unavailability. The elected official may change his or her
7 designated replacement at any time, by providing a new written
8 authorization to the Office of the Secretary of State.

9 (c) The Governor, Secretary of State, Treasurer, Auditor,
10 Attorney General and Commissioner of Agriculture shall, upon taking
11 office, provide written authorization to the Office of the
12 Secretary of State authorizing the release of any medical records
13 requested by the disability evaluation panel created in section
14 three of this article. The authorization shall be made in
15 accordance with the Health Insurance Portability and Accountability
16 Act of 1996 (HIPAA), Public Law 104-191, on a form created by the
17 Office of the Attorney General.

18 **§5-30-3. Disability evaluation panel.**

19 (a) There is hereby created a disability evaluation panel
20 consisting of the following three members or his or her designee:
21 the Dean of West Virginia University Robert C. Byrd Health Sciences
22 Center School of Medicine, the Dean of the West Virginia School of
23 Osteopathic Medicine, and the Dean of Marshall University Joan C.

1 Edwards School of Medicine. If a dean is not a physician, or is
2 unable to fulfill the duties imposed by this section, he or she
3 shall name a designee who is a licenced physician affiliated with
4 the school he or she is representing on the panel.

5 (b) The disability evaluation panel shall meet only when the
6 requirements of this article are met. Meetings of the disability
7 evaluation panel are not subject to chapter six, article nine-A of
8 this code. Except for the panel's recommendation, records of the
9 panel are not subject to disclosure under chapter twenty-nine-b,
10 article one of this code.

11 **§5-30-4. Temporary transfer of power voluntarily.**

12 (a) The Governor, Secretary of State, Treasurer, Auditor,
13 Attorney General or Commissioner of Agriculture may, at any time,
14 declare that he or she expects to be temporarily disabled or
15 unavailable for a period of time and will not be able to discharge
16 the duties of the office during that period of time.

17 (b) In order to take the action stated in subsection (a) of
18 this section, the elected official shall submit a letter to the
19 Board of Public Works, indicating the date and time that the period
20 of disability or unavailability will commence, and an estimate of
21 the length of time during which he or she will be disabled or
22 unavailable. The letter shall then be printed in the State
23 Register and submitted to the President of the Senate and the

1 Speaker of the House. The Office of the Secretary of State shall
2 notify the person who will temporarily fulfill the elected
3 official's duties, as established pursuant to section two of this
4 article. The notice shall take place within twenty-four hours by
5 certified mail and any other reasonable means to effectuate earlier
6 notice.

7 (c) Upon the date and time specified by the letter required by
8 subsection (b) of this section, the elected official shall be
9 deemed temporarily disabled or unavailable and another person shall
10 fulfill the duties of that elected official's office during the
11 period of disability or unavailability. If the elected official
12 declaring temporary disability or unavailability is the Governor,
13 then the person next in line of succession shall act as Governor
14 pursuant to the provisions of article VII, section sixteen of the
15 West Virginia Constitution. If the elected official declaring
16 temporary disability or unavailability is the Secretary of State,
17 Treasurer, Auditor, Attorney General or Commissioner of
18 Agriculture, then the employee designated by the elected official
19 pursuant to section two of this article shall execute the duties of
20 the office.

21 (d) Upon the elected official's declaration that the period of
22 disability or unavailability has ended by letter to the Board of
23 Public Works, the person acting as Governor or the employee

1 designated by the elected official shall immediately cease to
2 perform those duties and the elected official shall resume
3 performance of the duties of the office. The letter shall then be
4 printed in the State Register and submitted to the President of the
5 Senate and the Speaker of the House.

6 **§5-30-5. Involuntary transfer of power.**

7 (a) The Board of Public Works may meet at any time to consider
8 the disability or unavailability of the Governor, Secretary of
9 State, Treasurer, Auditor, Attorney General or Commissioner of
10 Agriculture at the request of any member of the Board of Public
11 Works. The Board of Public Works shall meet within five business
12 days of a call for an inquiry into the unavailability or suspected
13 disability of a member of the Board of Public Works jointly made by
14 the President of the Senate and the Speaker of the House. If
15 disability is at issue, the procedure set forth in this section to
16 convene the disability evaluation panel shall be followed. If
17 unavailability is at issue, the Board of Public Works may discuss
18 the matter and hold a vote whereby unavailability can only be
19 concluded by unanimous decision of all Board of Public Works
20 members, excluding the member whose unavailability is being
21 discussed, that the Governor, Secretary of State, Treasurer,
22 Auditor, Attorney General or Commissioner of Agriculture is
23 unavailable. If the Board of Public Works makes a unanimous

1 decision of unavailability, the decision shall be printed in the
2 State Register and submitted to the President of the Senate and the
3 Speaker of the House. The elected official is then deemed
4 unavailable and the replacement and return of the elected official
5 to full duties shall be governed by section four of this article,
6 as if the action was taken voluntarily.

7 (b) The disability evaluation panel created in section three
8 of this article may only be convened upon a written request by a
9 majority of the Board of Public Works, except as noted in section
10 six of this article. A request for an evaluation of the Governor,
11 Secretary of State, Treasurer, Auditor, Attorney General or
12 Commissioner of Agriculture by the disability evaluation panel must
13 indicate that the persons making the request believe that the
14 official is suffering from a disability for a continuous period in
15 excess of twenty days. The written request shall be sent by
16 certified mail to each member of the disability evaluation panel.

17 (c) As soon as possible, but no later than three days after
18 the disability evaluation panel is requested to meet, the panel
19 shall meet to discuss whether the elected official is disabled,
20 either temporarily or permanently, for a continuous period in
21 excess of twenty days. The members of the panel shall conduct a
22 physical or mental/psychological examination or, if appropriate,
23 both a physical and mental/psychological examination of the elected

1 official as soon as practicable, but no later than five calendar
2 days after the meeting.

3 (d) The disability evaluation panel is authorized to receive
4 medical information from every available source necessary to reach
5 a decision. Notwithstanding any provision of this code to the
6 contrary, all medical records pertaining to the elected official
7 being evaluated pursuant to this section shall be released to the
8 panel within five business days of receipt of a written request
9 from the panel. Release of the requested medical records to the
10 panel will be conducted in accordance with the Health Insurance
11 Portability and Accountability Act of 1996 (HIPAA), Public Law
12 104-191, pursuant to the authorization obtained under subsection
13 (c) of section two of this article.

14 (e) The disability evaluation panel shall make a determination
15 that an elected official is disabled for a continuous period in
16 excess of twenty days by unanimous vote only. If the panel
17 unanimously concludes that the elected official is not disabled or
18 if the panel is unable to reach a unanimous decision, then the
19 panel shall send a written statement containing that result to the
20 Board of Public Works. If the panel finds, by unanimous vote, that
21 the elected official is disabled for a continuous period in excess
22 of twenty days, then the panel shall designate whether the
23 inability of the elected official to fulfill his or her duties will

1 be temporary or permanent, as follows:

2 (1) If the panel designates the disability as temporary, the
3 panel shall give written notice of its conclusion to the Board of
4 Public Works, along with an estimate of the date when the temporary
5 disability will end. The conclusion shall be printed in the State
6 Register and submitted to the President of the Senate and the
7 Speaker of the House. The Office of the Secretary of State shall
8 notify the person who will temporarily fulfill the disabled elected
9 official's duties, as established pursuant to section two of this
10 article. The notice shall take place within twenty-four hours by
11 certified mail and any other reasonable means to effectuate earlier
12 notice. The elected official deemed temporarily disabled may
13 appeal that decision to the Supreme Court of Appeals of West
14 Virginia within five business days, pursuant to section seven of
15 this article.

16 (2) If the panel designates the disability as permanent,
17 meaning that it will prevent the elected official from performing
18 his or her duties for the remainder of his or her term of office,
19 then the panel shall give written notice of its conclusion to the
20 Board of Public Works. The conclusion shall be printed in the
21 State Register and submitted to the President of the Senate and the
22 Speaker of the House. The conclusion is automatically appealed to
23 the Supreme Court of Appeals of West Virginia and the panel shall

1 recommend that the Supreme Court declare the office vacant,
2 pursuant to section seven of this article. The elected official
3 deemed permanently disabled may submit additional information or
4 argument in response to the recommendation, pursuant to section
5 seven of this article.

6 **§5-30-6. Reevaluation of finding of temporary disability.**

7 (a) If the disability evaluation panel determines that an
8 elected official is temporarily disabled, pursuant to section five
9 of this article, reevaluation of the elected official, shall occur
10 as follows:

11 (1) The elected official who has been found to be disabled may
12 request, no more often than once every three months, that the
13 disability evaluation panel be convened for the purpose of
14 determining whether the elected official is no longer disabled and
15 is able to discharge the duties of the office. The panel shall
16 meet and reexamine the elected official to determine whether he or
17 she remains unable to discharge the duties of the office, following
18 the same procedure set forth in subsections (c) and (d) of section
19 five of this article, and reaching a determination as set forth in
20 subsection (b) of this section.

21 (2) Upon the passage of the estimated date that the temporary
22 disability will end, as listed by the disability evaluation panel
23 on its conclusion to the Board of Public Works, the panel shall

1 meet and reexamine the elected official to determine whether he or
2 she remains unable to discharge the duties of the office, following
3 the same procedure set forth in subsections (c) and (d) of section
4 five of this article with the estimated date treated as a request
5 to meet, and reaching a determination as set forth in subsection
6 (b) of this section.

7 (b) Upon a reevaluation of an elected official previously
8 deemed to have a temporary disability by the panel, as set forth in
9 subsection (a) of this section, the panel may find that the elected
10 official is no longer disabled and is able to discharge the duties
11 of the office by unanimous vote only. If the panel finds that the
12 elected official is no longer disabled, the panel shall send a
13 written statement containing its conclusion to the Board of Public
14 Works; and the conclusion shall be printed in the State Register
15 and submitted to the President of the Senate and the Speaker of the
16 House. The person acting as Governor or the employee designated by
17 the elected official to fulfill the duties of the office shall
18 immediately cease to perform those duties and the elected official
19 shall resume performance of the duties of the office. If the panel
20 is unable to come to a unanimous decision, then the panel shall
21 designate by majority vote whether the inability of the elected
22 official to fulfill his or her duties remains temporary or has
23 become permanent. In doing so, the panel shall follow the

1 procedure set forth in either subdivision (1) or (2) of subsection
2 (e) of section five of this article.

3 **§5-30-7. Review by the Supreme Court of Appeals.**

4 (a) When an elected official is determined to be temporarily
5 disabled, pursuant to section five of this article, the official
6 may file an appeal of that decision directly with the Supreme Court
7 of Appeals of West Virginia within five business days of the
8 determination.

9 (b) When an elected official is determined to be permanently
10 disabled, pursuant to section five of this article, the
11 determination is automatically appealed to the Supreme Court of
12 Appeals of West Virginia.

13 (c) Upon either a direct appeal or an automatic appeal to the
14 Supreme Court of Appeals of West Virginia, as stated in this
15 section, the disability evaluation panel shall submit its
16 recommendation along with all of the records and other information
17 used by the panel to make its determination and a written
18 explanation of the panel's findings supporting the recommendation
19 to the Supreme Court of Appeals and the elected official determined
20 to be disabled within two business days of the direct or automatic
21 appeal.

22 (d) The elected official determined to be disabled may submit
23 additional information or argument in support of his or her opinion

1 that he or she is not disabled within two business days of the
2 submission by the disability evaluation panel.

3 (e) The Supreme Court of Appeals shall immediately take the
4 issue up for consideration and issue a decision either affirming
5 the determination, modifying a permanent disability to a temporary
6 disability, or reversing the determination of the disability
7 evaluation panel that the elected official is disabled. The
8 decision shall be made within fourteen days of receipt of the
9 submission by the disability evaluation panel or any additional
10 information or argument submitted pursuant to this section. If the
11 Supreme Court of Appeals affirms a determination of permanent
12 disability, then the Supreme Court of Appeals shall declare the
13 office vacant and it shall be filled pursuant to chapter three,
14 article ten of this Code. The decision of the Supreme Court is not
15 appealable.

16 (f) The Supreme Court shall establish rules of procedure for
17 the review of a determination by the disability evaluation panel.

18 **§5-30-8. Continuation of salary and insurance.**

19 Pursuant to the provisions of this article, an elected
20 official who declares himself or herself disabled or unavailable or
21 is found to be disabled or unavailable shall continue to receive
22 the salary of the office and be eligible to participate in the
23 public employees insurance and retirement programs, unless the

1 office is declared vacant by the Supreme Court of Appeals. If the
2 office is declared vacant, the elected official shall no longer
3 receive the salary of the office, but shall continue to be eligible
4 to participate in the public employees insurance and retirement
5 programs, as if they completed the term of office without
6 intervention.

7 **CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.**

8 **ARTICLE 1. COUNTY COMMISSIONS GENERALLY.**

9 **§7-1-16. Disability and unavailability of elected officials.**

10 In addition to all other powers and duties now conferred by
11 law upon county commissions, the county commission of each county
12 is authorized, empowered and required to either adopt an ordinance,
13 promulgate a rule, or create by other official means, a process to
14 determine when an elected county official is disabled or
15 unavailable, as those terms are defined in chapter five, article
16 thirty of this code. The county commission shall use the process
17 outlined in chapter five, article thirty of this code, to the
18 extent applicable, as an example of a process to determine
19 disability or unavailability of an elected official and, under the
20 proper circumstances, declare an elected office vacant.

21 **CHAPTER 8. MUNICIPAL CORPORATIONS**

22 **ARTICLE 5. ELECTION, APPOINTMENT, QUALIFICATION AND COMPENSATION**

1 **OF OFFICERS; GENERAL PROVISIONS RELATING TO OFFICERS**
2 **AND EMPLOYEES; ELECTIONS AND PETITIONS GENERALLY;**
3 **CONFLICT OF INTEREST.**

4 **§8-5-10. Vacancies in elective offices; how filled.**

5 All municipalities shall create, either in the charter, by
6 ordinance, or by other official means, a process to determine when
7 an elected municipal official is disabled or unavailable, as those
8 terms are defined in chapter five, article thirty of this code.

9 The municipality shall use the process outlined in chapter five,
10 article thirty of this code, to the extent applicable, as an
11 example of a process to determine disability or unavailability of
12 an elected official and, under the proper circumstances, declare an
13 elected office vacant. Unless otherwise provided by charter
14 provision or ordinance, when a vacancy shall occur from any cause
15 in any municipal elective office, the vacancy, until the next
16 succeeding regular municipal election and until the qualification
17 of an elected successor, shall be filled by appointment by the
18 governing body from among the residents of the municipality
19 eligible under this article.

NOTE: The purpose of this bill is to create a procedure by which the Governor or other elected member of the Board of Public Works can declare themselves disabled or unavailable or be found disabled or unavailable. The bill also includes process for performing these determinations and appealing the determinations. Finally, the bill requires municipalities and counties to provide

a procedure for determining whether elected officials are disabled or unavailable.

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

Chapter 5, Article 30 is new, therefore, strike-throughs and underscoring have been omitted. §7-1-16 is new, therefore strike-throughs and underscoring have been omitted.

This bill was recommended for introduction and enactment by the Joint Judiciary Committee.