

H. B. 4508

(By Delegate Poore)

[Introduced February 13, 2014; referred to the
Committee on the Judiciary.]

A BILL to amend and reenact §29A-1-2 of the Code of West Virginia, 1931, as amended; and to amend and reenact §29A-3-1a, §29A-3-4, §29A-3-8, §29A-3-13 and §29A-3-15 of said code, all relating generally to the state Administrative Act and rules; defining a new term; setting forth requirements for amendments to existing rules, proposed new rules and the repeal of existing rules; establishing filing and adoption requirements for legislative exempt rules; changing the effective date of certain rules; requiring a list of interested parties be provided with emergency rules; and changing the number of copies required when filing an emergency rule.

Be it enacted by the Legislature of West Virginia:

That §29A-1-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §29A-3-1a, §29A-3-4, §29A-3-8,

1 §29A-3-13 and §29A-3-15 of said code be amended and reenacted, all
2 to read as follows:

3 **ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER.**

4 **§29A-1-2. Definitions of terms used in this chapter.**

5 For the purposes of this chapter:

6 ~~(a)~~ "Agency" means any state board, commission, department,
7 office or officer authorized by law to make rules or adjudicate
8 contested cases, except those in the legislative or judicial
9 branches.

10 ~~(b)~~ "Contested case" means a proceeding before an agency in
11 which the legal rights, duties, interests or privileges of specific
12 parties are required by law or Constitutional right to be
13 determined after an agency hearing, but does not include cases in
14 which an agency issues a license, permit or certificate after an
15 examination to test the knowledge or ability of the applicant where
16 the controversy concerns whether the examination was fair or
17 whether the applicant passed the examination and shall not include
18 rule making.

19 ~~(c)~~ "Interpretive rule" means every rule, as defined in
20 subsection (i) of this section, adopted by an agency independently
21 of any delegation of legislative power which is intended by the
22 agency to provide information or guidance to the public regarding
23 the agency's interpretations, policy or opinions upon the law
24 enforced or administered by it and which is not intended by the

1 agency to be determinative of any issue affecting private rights,
2 privileges or interests. An interpretive rule may not be relied
3 upon to impose a civil or criminal sanction nor to regulate private
4 conduct or the exercise of private rights or privileges nor to
5 confer any right or privilege provided by law and is not admissible
6 in any administrative or judicial proceeding for such purpose,
7 except where the interpretive rule established the conditions for
8 the exercise of discretionary power as herein provided. However, an
9 interpretive rule is admissible for the purpose of showing that the
10 prior conduct of a person was based on good faith reliance on such
11 rule. The admission of such rule in no way affects any legislative
12 or judicial determination regarding the prospective effect of such
13 rule. Where any provision of this code lawfully commits any
14 decision or determination of fact or judgment to the sole
15 discretion of any agency or any executive officer or employee, the
16 conditions for the exercise of that discretion, to the extent that
17 such conditions are not prescribed by statute or by legislative
18 rule, may be established by an interpretive rule and such rule is
19 admissible in any administrative or judicial proceeding to prove
20 such conditions.

21 "Legislative exempt rule" means any rule an agency is
22 authorized by the Legislature to promulgate that meets all
23 requirements of being considered a legislative rule except for the
24 authority granted by the Legislature to the agency expressly

1 allowing the agency to proceed with final adoption of the rule
2 without prior specific authorization by Legislature rule enactment
3 pursuant to section nine, article three of this chapter. A
4 legislative exempt rule to be lawfully promulgated shall comport to
5 all other requirements of this article and shall have the same
6 force and effect as a legislative rule.

7 ~~(d)~~ "Legislative rule" means every rule, as defined in
8 subsection (i) of this section, proposed or promulgated by an
9 agency pursuant to this chapter. Legislative rule includes every
10 rule which, when promulgated after or pursuant to authorization of
11 the Legislature, has: (1) The force of law; or (2) supplies a basis
12 for the imposition of civil or criminal liability; or (3) grants or
13 denies a specific benefit. Every rule which, when effective, is
14 determinative on any issue affecting private rights, privileges or
15 interests is a legislative rule. Unless lawfully promulgated as an
16 emergency rule, a legislative rule is only a proposal by the agency
17 and has no legal force or effect until promulgated by specific
18 authorization of the Legislature. Except where otherwise
19 specifically provided in this code, legislative rule does not
20 include (A) findings or determinations of fact made or reported by
21 an agency, including any such findings and determinations as are
22 required to be made by any agency as a condition precedent to
23 proposal of a rule to the Legislature; (B) declaratory rulings
24 issued by an agency pursuant to the provisions of section one,

1 article four of this chapter; (C) orders, as defined in subdivision
2 (e) of this section; or (D) executive orders or proclamations by
3 the Governor issued solely in the exercise of executive power,
4 including executive orders issued in the event of a public disaster
5 or emergency.

6 ~~(e)~~ "Order" means the whole or any part of the final
7 disposition (whether affirmative, negative, injunctive or
8 declaratory in form) by any agency of any matter other than rule
9 making.

10 ~~(f)~~ "Person" includes individuals, partnerships, corporations,
11 associations or public or private organizations of any character.

12 ~~(g)~~ "Procedural rule" means every rule, as defined in
13 subsection (i) of this section, which fixes rules of procedure,
14 practice or evidence for dealings with or proceedings before an
15 agency, including forms prescribed by the agency.

16 ~~(h)~~ "Proposed rule" is a legislative rule, interpretive rule,
17 or a procedural rule which has not become effective pursuant to the
18 provisions of this chapter or law authorizing its promulgation;

19 ~~(i)~~ "Rule" includes every regulation, standard or statement of
20 policy or interpretation of general application and future effect,
21 including the amendment or repeal thereof, affecting private
22 rights, privileges or interests, or the procedures available to the
23 public, adopted by an agency to implement, extend, apply, interpret
24 or make specific the law enforced or administered by it or to

1 govern its organization or procedure, but does not include
2 regulations relating solely to the internal management of the
3 agency, nor regulations of which notice is customarily given to the
4 public by markers or signs, nor mere instructions. Every rule
5 shall be classified as "legislative rule," "interpretive rule" or
6 "procedural rule," all as defined in this section, and shall be
7 effective only as provided in this chapter.

8 ~~(j)~~ "Rule making" means the process for the formulation,
9 amendment or repeal of a rule as provided in this chapter.

10 **ARTICLE 3. RULE MAKING.**

11 **§29A-3-1a. Filing proposed amendments to an existing rule.**

12 ~~(a) Rules promulgated to amend existing rules may be filed on~~
13 ~~a section by section basis without having to refile in the state~~
14 ~~register all of the other sections of an existing series numbered~~
15 ~~rule: *Provided*, That such filing shall list, by proper citation,~~
16 ~~those sections, not amended, which are directly affected by those~~
17 ~~sections amended: *Provided, however*, That amendments so filed When~~
18 ~~amending an existing rule or proposing a new rule, agencies shall~~
19 ~~file all sections of the proposed rule. Each amendment filed to an~~
20 ~~existing rule shall be accompanied by note of explanation as to the~~
21 effect of such amendment and its relation to the existing rules.

22 ~~(b) Rules promulgated to amend existing rules and filed as an~~
23 ~~emergency rule may be filed on a section by section basis without~~
24 ~~having to refile in the state register all of the other sections of~~

1 ~~an existing series numbered rule: *Provided*, That such filing shall~~
2 ~~list, by proper citation, those sections not amended, which are~~
3 ~~directly affected by those sections amended. Any rule being~~
4 ~~repealed shall be filed in its entirety with the rule series~~
5 ~~provisions stricken. A rule may not be repealed by reference in~~
6 ~~another rule.~~

7 **§29A-3-4. Filing of proposed legislative exempt rules, procedural**
8 **rules and interpretive rules.**

9 (a) When an agency proposes a procedural rule or an
10 interpretive rule, the agency shall file in the state register a
11 notice of its action, including the text of the rule as proposed.

12 (b) All proposed rules filed under subsection (a) of this
13 section shall have a fiscal note attached itemizing the cost of
14 implementing the rules as they relate to this state and to persons
15 affected by the rules. ~~and regulations~~ Such fiscal note shall
16 include all information included in a fiscal note for either house
17 of the Legislature and a statement of the economic impact of the
18 rule on the state or its residents. The objectives of the rules
19 shall be clearly and separately stated in the fiscal note by the
20 agency issuing the proposed rules. No legislative exempt,
21 procedural or interpretive rule shall be void or voidable by virtue
22 of noncompliance with this subsection.

23 **§29A-3-8. Adoption of legislative exempt, procedural and**

1 **interpretive rules.**

2 A legislative exempt, procedural and interpretive rule, shall
3 be considered by the agency for adoption not later than six months
4 after the close of public comment and a notice of withdrawal or
5 adoption shall be filed in the state register within that period.
6 Failure to file such notice shall constitute withdrawal and the
7 Secretary of State shall note such failure in the state register
8 immediately upon the expiration of the six- month period.

9 A legislative exempt, procedural or interpretive rule may be
10 amended by the agency prior to final adoption without further
11 hearing or public comment. No such amendment may change the main
12 purpose of the rule. If the fiscal implications have changed since
13 the rule was proposed, a new fiscal note shall be attached to the
14 notice of filing. Upon adoption of the rule (including any such
15 amendment) the agency shall file the text of the legislative
16 exempt, adopted procedural or interpretive rule with its notice of
17 adoption in the state register and the same shall be effective on
18 the date specified in the rule or thirty days after such filing,
19 whichever is later or as specified in this code.

20 **§29A-3-13. Adoption of legislative rules; effective date.**

21 (a) Except as the Legislature may by law otherwise provide,
22 within sixty days after the effective date of an act authorizing
23 promulgation of a legislative rule, the rule shall be promulgated
24 only in conformity with the provisions of law authorizing and

1 directing the promulgation of such rule. In the case of a rule
2 proposed by an agency which is administered by an executive
3 department pursuant to the provisions of article two, chapter five-
4 f of this code, the secretary of the department shall promulgate
5 the rule as authorized by the Legislature. In the case of an
6 agency which is not subject to administration by the secretary of
7 an executive department, the agency which proposed the rule for
8 promulgation shall promulgate the rule as authorized by the
9 Legislature.

10 (b) A legislative rule authorized by the Legislature shall
11 become effective ~~thirty days after such~~ upon filing in the state
12 register, or on the effective date fixed by the authorizing act or
13 if none is fixed by law, such later date not to exceed ninety days,
14 as is fixed by the agency.

15 (c) The Secretary of State shall note in the state register
16 the effective date of an authorized and promulgated legislative
17 rule, and shall promptly publish the duly promulgated rule in a
18 code of state rules maintained by his or her office.

19 **§29A-3-15. Emergency legislative rules; procedure for**
20 **promulgation; definition.**

21 (a) Any agency with authority to propose legislative rules
22 may, without hearing, find that an emergency exists requiring that
23 emergency rules be promulgated and promulgate the same in
24 accordance with this section. Such emergency rules, together with

1 a statement of the facts and circumstances constituting the
2 emergency, and a listing of state agencies, professions, businesses
3 and other identifiable interest groups affected by the proposed
4 emergency rule shall be filed with the Secretary of State, and a
5 notice of such filing shall be published in the state register.
6 However, failure to list all known state agencies, professions,
7 businesses and other identifiable interest groups may not be the
8 basis for disapproval of the rule or subject the rule to judicial
9 review. Such emergency rules shall become effective upon the
10 approval of the Secretary of State in accordance with section
11 fifteen-a of this article or upon the approval of the Attorney
12 General in accordance with section fifteen-b or upon the forty-
13 second day following such filing, whichever occurs first. Such
14 emergency rules may adopt, amend or repeal any legislative rule,
15 but the circumstances constituting the emergency requiring such
16 adoption, amendment or repeal shall be stated with particularity
17 and be subject to de novo review by any court having original
18 jurisdiction of an action challenging their validity. ~~Fourteen~~
19 ~~copies~~ A copy of the rules and of the required statement shall be
20 filed immediately with the Secretary of State and one copy shall be
21 filed immediately with the Legislative Rule - Making Review
22 Committee.

23 An emergency rule shall be effective for not more than fifteen
24 months and shall expire earlier if any of the following occurs:

1 (1) The Secretary of State, acting under the authority
2 provided ~~for~~ in section fifteen-a of this article, or the Attorney
3 General, acting under the authority provided ~~for~~ in section
4 fifteen-b of this article, disapproves the emergency rule because:
5 (A) The emergency rule or an amendment to the emergency rule
6 exceeds the scope of the law authorizing or directing the
7 promulgation thereof; (B) an emergency does not exist justifying
8 the promulgation of the emergency rule; or (C) the emergency rule
9 was not promulgated in compliance with the provisions of this
10 section. An emergency rule may not be disapproved pursuant to the
11 authority granted by paragraphs (A) or (B) of this subdivision on
12 the basis that the Secretary of State or the Attorney General
13 disagrees with the underlying public policy established by the
14 Legislature in enacting the supporting legislation. An emergency
15 rule which would otherwise be approved as being necessary to comply
16 with a time limitation established by this code or by a federal
17 statute or regulation may not be disapproved pursuant to the
18 authority granted by paragraphs (A) or (B) of this subdivision on
19 the basis that the agency has failed to file the emergency rule
20 prior to the date fixed by such time limitation. When the
21 supporting statute specifically directs an agency to promulgate an
22 emergency rule, or specifically finds that an emergency exists and
23 directs the promulgation of an emergency rule, the emergency rule
24 may not be disapproved pursuant to the authority granted by

1 paragraph (B) of this subdivision. An emergency rule may not be
2 disapproved on the basis that the Legislature has not specifically
3 directed an agency to promulgate the emergency rule, or has not
4 specifically found that an emergency exists and directed the
5 promulgation of an emergency rule,

6 (2) The agency has not previously filed and fails to file a
7 notice of public hearing on the proposed rule within thirty days of
8 the date the proposed rule was filed as an emergency rule; in which
9 case the emergency rule expires on the thirty-first day.

10 (3) The agency has not previously filed and fails to file the
11 proposed rule as approved by the agency following the close of the
12 public comment period with the Legislative Rule - Making Review
13 Committee within ninety days of the date the proposed rule was
14 filed as an emergency rule; in which case the emergency rule
15 expires on the ninety-first day.

16 (4) The Legislature has authorized or directed promulgation of
17 an authorized legislative rule dealing with substantially the same
18 subject matter since such emergency rule was first promulgated, and
19 in which case the emergency rule expires on the date the authorized
20 rule is made effective.

21 (5) The Legislature has, by law, disapproved of such emergency
22 rule; in which case the emergency rule expires on the date the law
23 becomes effective.

24 (b) Any amendment to an emergency rule made by the agency

1 shall be filed in the state register and does not constitute a new
2 emergency rule for the purpose of acquiring additional time or
3 avoiding the expiration dates in subdivision (2), (3), (4) or (5),
4 subsection (a) of this section: *Provided*, That such emergency
5 amendment shall become effective upon the approval of the Secretary
6 of State in accordance with section fifteen-a of this article or
7 upon approval of the Attorney General in accordance with section
8 fifteen-b of this article or upon the forty-second day following
9 such filing, whichever occurs first.

10 (c) Once an emergency rule expires due to the conclusion of
11 fifteen months or due to the effect of subdivision (2), (3), (4) or
12 (5), subsection (a) of this section, the agency may not refile the
13 same or similar rule as an emergency rule.

14 (d) The provision of this section shall not be used to avoid
15 or evade any provision of this article or any other provisions of
16 this code, including any provisions for legislative review and
17 approval of proposed rules. Any emergency rule promulgated for any
18 such purpose may be contested in a judicial proceeding before a
19 court of competent jurisdiction.

20 (e) The Legislative Rule - Making Review Committee may review
21 any emergency rule to determine: (1) Whether the emergency rule or
22 an amendment to the emergency rule exceeds the scope of the law
23 authorizing or directing the promulgation thereof; (2) whether
24 there exists an emergency justifying the promulgation of such

1 emergency rule; and (3) whether the emergency rule was promulgated
2 in compliance with the requirements and prohibitions contained in
3 this section. The committee may recommend to the agency, the
4 Legislature, or the Secretary of State such action as it may deem
5 proper.

6 (f) For the purposes of this section, an emergency exists when
7 the promulgation of an emergency rule is necessary: (1) For the
8 immediate preservation of the public peace, health, safety or
9 welfare; (2) to comply with a time limitation established by this
10 code or by a federal statute or regulation; or (3) to prevent
11 substantial harm to the public interest.

NOTE: The purpose of this bill generally proposes changes to the state Administrative Act and rules. The bill defines a new term. The bill sets forth requirements for amendments to existing rules, proposed new rules and the repeal of existing rules. The bill establishes filing and adoption requirements for legislative exempt rules. The bill changes the effective date of certain rules. The bill requires a list of interested parties be provided with emergency rules. The bill changes the number of copies required when filing an emergency rule.

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