

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 3121

BY DELEGATES S. BROWN, PYLES, ZUKOFF, WALKER AND

LAVENDER-BOWE

[Introduced February 12, 2019; Referred

to the Committee on Industry and Labor then the

Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §21-17-1, §21-17-2, §21-17-3, §21-17-4, §21-17-5, §21-17-6, §21-17-7, §21-
3 17-8, §21-17-9, and §21-17-10, all relating to enacting fair workweek employment
4 standards; requiring certain retail, hospitality, and food services establishments, and
5 property services companies to meet certain employment standards; requiring advance
6 notice of work schedules and compensation for changed work schedules; providing a right
7 to rest between work shifts; requiring offer of work to existing employees; providing
8 protections for the exercise of rights; prohibiting retaliation; and including provisions for
9 rules, certain notice requirements, required employer records, and enforcement, including
10 criminal penalties.

Be it enacted by the Legislature of West Virginia:

ARTICLE 17. FAIR WORKWEEK EMPLOYMENT STANDARDS.

§21-17-1. Definitions.

1 As used in this article:
2 “Calendar week” means a period of seven consecutive days beginning on any designated
3 day.
4 “Chain” means a set of establishments that do business under the same trade name or
5 brand or that are characterized by standardized options for decor, marketing, packaging, products
6 and services, regardless of the type of ownership of each individual establishment.
7 “Commissioner” means the West Virginia Commissioner of Labor.
8 “Covered employer” is limited to an employer that is: A retail establishment, a hospitality
9 establishment, a food services establishment, or a property services company as defined in this
10 section, that employs 250 or more employees worldwide regardless of where those employees
11 perform work, including, but not limited to, chain establishments or franchises associated with a
12 franchisor or network of franchises that employ more than 250 employees in aggregate. In
13 determining the number of employees for purposes of this subsection, all employees performing

14 work for compensation on a full-time, part-time or temporary basis shall be counted, provided that
15 where the number of employees who work for an employer for compensation fluctuates, business
16 size may be determined for the current calendar year based upon the average number of
17 employees who worked for compensation per week during the preceding calendar year, and
18 provided further that in determining the number of employees performing work for an employer
19 that is a chain business, the total number of employees in that group of establishments shall be
20 counted.

21 “Employee” means any person employed or permitted to work at or for a covered employer
22 within the geographic boundaries of West Virginia who is required under state or federal law to
23 be paid at an overtime rate for hours in excess of a maximum number per workweek or calendar
24 week, including, but not limited to, full-time employees, part-time employees, and seasonal and
25 temporary workers. An alleged employer bears the burden of proof that the individual is an
26 independent contractor rather than an employee.

27 “Employer” means any individual, partnership, association, corporation or business trust
28 or any person or group of persons, or a successor thereof, that employs another person, and
29 includes any entity or person acting directly or indirectly in the interest of the employer in relation
30 to the employee. More than one entity may be the “employer” if employment by one employer is
31 not completely disassociated from employment by the other employer.

32 “Food services establishment” means a food services contractor, caterer, mobile food
33 service, drinking place (alcoholic beverages); full service restaurant, limited-service restaurant,
34 cafeteria, grill buffet, or buffet; or snack and nonalcoholic beverage bar. as defined under the 2012
35 North American Industry Classification System (“NAICS”) 722: *Provided, That full-service*
36 restaurants must have 30 or more locations worldwide, including, but not limited to, chain
37 establishments or franchises where the franchisor and franchisees own or operate 30 or more
38 such establishments in the aggregate worldwide.

39 “Hospitality establishment” means a hotel or motel as defined under NAICS 721110.

40 “On-call shift” or “on-call hours” means any time that an employer requires an employee
41 to be available to work, and to contact the employer or the employer's designee or wait to be
42 contacted by the employer or its designee, to determine whether the employee must report to
43 work at that time.

44 “Predictability pay” means a payment calculated on an hourly basis at the employee's
45 regular rate of pay and paid to an employee as compensation for changes made by the employer
46 to an employee's work schedule, in addition to any wages earned for work performed by that
47 employee.

48 “Posted work schedule” means the written notice of work hours required to be provided
49 no later than 14 days before the first day of any new schedule pursuant to §21-17-2(c) of this
50 code.

51 “Property services company” means any contractor or subcontractor of an employer that
52 provides janitorial or security services, or both, at a hospitality, retail or food services
53 establishment covered by this article.

54 “Retail establishment” means a retail business as defined under NAICS 441 through 454.

55 “Shift” means the consecutive hours an employer requires an employee to work or to be
56 on-call to work: *Provided*, That breaks totaling two hours or less are not considered an interruption
57 of consecutive hours.

58 “Successor” means any person to whom an employer quitting, selling out, exchanging, or
59 disposing of a business sells or otherwise conveys in hulk and not in the ordinary course of the
60 employer's business. a major part of the property, whether real or personal, tangible or intangible,
61 of the employer's business. For purposes of this definition “person” includes an individual,
62 receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, corporation,
63 business trust, partnership, limited liability partnership, company, joint stock company, limited
64 liability company, association, joint venture, or any other legal or commercial entity.

65 “Work schedule” means all of an employee's regular and on-call shifts, including specific

66 start and end times for each shift, during a calendar week.

§21-17-2. Advance notice of work schedules.

1 (a) Upon hiring an employee, a covered employer shall provide the employee with a
2 written, good faith estimate of the employee's work schedule. The employer shall revise the good
3 faith estimate when there is a significant change to the employee's work schedule due to changes
4 in the employee's availability, or to the employer's business needs. The good faith estimate is not
5 a contractual offer binding the employer, but an estimate made without a good faith basis is a
6 violation of this section. The good faith estimate shall contain:

7 (1) The average number of work hours the employee can expect to work each week;

8 (2) Whether the employee can expect to work any on-call shifts;

9 (3) A subset of days and a subset of times or shifts that the employee can expect to work.
10 or days of the week and times or shifts on which the employee will not be scheduled to work.

11 (b) At the time of hire and during employment the employee has the right to make work
12 schedule requests. The requests protected under this section include, but are not limited to:

13 (1) Requests not to be scheduled for work shifts during certain days or times or at certain
14 locations;

15 (2) Requests not to work on-call shifts;

16 (3) Requests for certain hours, days, or locations of work; and

17 (4) Requests for more or fewer work hours.

18 The employer is encouraged to engage in an interactive process to discuss the employee
19 requests but may grant or deny the request for any reason that is not unlawful.

20 (c) On or before the commencement of employment, a covered employer shall provide the
21 employee with a written work schedule that runs through the last date of the currently posted
22 schedule. Thereafter, an employer shall provide written notice of work hours no later than 14 days
23 before the first day of any new schedule pursuant to §21-17-2(d) of this code. This section does
24 not prohibit an employer from providing greater advance notice of employee's work schedules

25 and/or changes in schedules than that required by this section. An employer who fails to post a
26 written work schedule at least 14 calendar days before the first day of the work schedule shall
27 compensate each employee in the amount of \$75 per day that the schedule is not posted.

28 (d) Written notice of the work schedule shall be provided by posting the work schedule in
29 a conspicuous place at the workplace that is readily accessible and visible to all employees and
30 transmitting the posted work schedule to each employee. The transmission may be done
31 electronically if electronic means are regularly used to communicate scheduling information to
32 employees. The posted work schedule shall include the shifts of all current employees at that
33 worksite, whether or not they are scheduled to work or be on-call that week.

34 (e) A covered employer shall provide notice of any proposed changes to the employee's
35 posted work schedule as promptly as possible and prior to the change taking effect. The covered
36 employer must revise the written work schedule to reflect any changes within 24 hours of making
37 the change.

38 (f) An employee may decline to work any hours not included in the posted work schedule.
39 If the employee voluntarily consents to work the hours, the consent must be recorded in writing.
40 A communication of an employee's desire to work shifts made available pursuant to §21-17-5 of
41 this code is considered written consent.

§21-17-3. Compensation for changed work schedules.

1 (a) For each employer-initiated change to the posted work schedule that occurs after the
2 advance notice required in §21-17-2(c) of this code, a covered employer shall pay an employee
3 predictability pay at the following rates:

4 (1) One hour of predictability pay when the covered employer adds hours of work or
5 changes the date, time, or location of a work shift with no loss of hours.

6 (2) No less than one-half times the employee's regular rate of pay per hour for any
7 scheduled hours the employee does not work when the covered employer:

8 (A) Subtracts hours from a regular or on-call shift; or

9 (B) Cancels a regular or on-call shift.

10 (b) A covered employer is not required to pay predictability pay under this section or obtain
11 written consent pursuant to §21-17-2(f) of this code when:

12 (1) An employee requests a shift change in writing, including, but not limited to, the use of
13 sick leave, vacation leave, or other leave policies offered by the employer;

14 (2) A schedule change is the result of a mutually agreed upon shift trade or coverage
15 arrangement between employees, subject to any existing employer policy regarding required
16 conditions for employees to exchange shifts;

17 (3) The covered employer's operations cannot begin or continue due to:

18 (A) Threats to the employees or the employer's property;

19 (B) The failure of a public utility or the shutdown of public transportation;

20 (C) A fire, flood or other natural disaster;

21 (D) A state of emergency declared by the President of the United States, the Governor, or
22 the governing body of the municipality; or

23 (E) Severe weather conditions that pose a threat to employee safety.

§21-17-4. Right to rest between work shifts.

1 (a)(1) An employee may decline, without penalty, any work hours that are scheduled or
2 otherwise occur:

3 (A) Less than 11 hours after the end of the previous day's shift; or

4 (B) During the 11 hours following the end of a shift that spanned two days.

5 (2) An employee may consent to work such shifts: however, consent must be provided in
6 writing, either for each such shift or for multiple shifts, and may be revoked in writing at any time
7 during employment.

8 (b) The employer shall compensate the employee for each instance that the employee
9 works a shift described in subsection (a) of this section at one and one-half times the employee's
10 scheduled rate of pay for the hours worked that are less than 11 hours apart.

§21-17-5. Offer of work to existing employees.

1 (a) Before hiring new employees from an external applicant pool or subcontractors,
2 including hiring through the use of temporary services or staffing agencies, a covered employer
3 shall offer work shifts to existing employees.

4 (b) The employer shall post written notice of available work shifts for at least 72 hours,
5 unless a shorter posting period is necessary in order for the work to be timely performed.

6 (1) The notice shall be in English and in the primary language or languages of the
7 employees at the particular workplace, posted in a conspicuous location at the workplace that is
8 readily accessible to all employees. The notice shall also be provided electronically to each
9 employee if the covered employer customarily communicates in that manner with employees.

10 (2) The notice shall include a description of the position and its required qualifications, the
11 schedule of available shifts, the length of time the employer anticipates requiring coverage of the
12 additional hours, the process by which employees may notify the employer of their desire to work
13 the offered shifts, and an advisement that an employee may accept a subset of the shifts offered.

14 (3) The employer may post the notice concurrently at the location where the hours
15 described in the notice will be worked, locations other than the location where the work is to be
16 performed, and to external candidates.

17 (c) A covered employer shall distribute hours, in accordance with the criteria contained in
18 the notice required by subdivision (2) subsection (b) of this section, to one or more employees
19 who have accepted such shifts and who, to a reasonable employer acting in good faith, are
20 qualified to perform the work: *Provided, That:*

21 (1) A covered employer shall distribute hours to employees whose regular workplace is
22 the location where the hours described in the notice will be worked; or, if no such employee
23 accepts the hours within the time defined in this section, to employees whose regular workplace
24 is a covered location other than the location where such hours will be worked; or, if no such
25 employee accepts the hours described in the notice within the time defined in this section, to

26 temporary or seasonal workers who have been continuously assigned for at least four weeks to
27 the location where the hours described in the notice will be worked.

28 (2) The employer's system for distribution of hours may not discriminate on the basis of
29 race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity,
30 disability, age, citizenship, marital or familial status, nor on the basis of family caregiving
31 responsibilities or status as a student, and the employer may not distribute hours in a manner
32 intended to avoid application of the Patient Protection and Affordable Care Act, 42 U.S.C. §
33 18001, and the employer may not distribute hours in a manner intended to retaliate against an
34 employee for exercising rights under this article.

35 (d) A covered employer may hire individuals from an external applicant pool or
36 subcontractors to perform the work described in, and in accordance with the criteria set forth in,
37 the notice posted pursuant to subdivision (2), subsection (b) of this section if the employer
38 provides notice of available work shifts to all employees as required herein, and:

39 (1) No employee responds to the written notice of available work shifts by the end of the
40 72-hour posting period; or

41 (2) Within the 72-hour posting period, the employer receives written confirmation from
42 eligible employees that they are not interested in accepting the available work shifts; or

43 (3) Existing employees have accepted a subset of the offered work hours, in which case
44 the existing employees must be awarded that subset of work hours and external applicants may
45 be offered the remaining shifts.

46 (e) This section does not require any covered employer to offer employees work hours
47 paid at a premium rate under state or federal law, or prohibit the employer from offering such work
48 hours.

49 (f) An employer must notify an employee in writing of their policy for offering and
50 distributing work hours under this section, at the time of hire and within 24 hours of any change.
51 and must post the notice in an accessible location in the workplace. The notice shall communicate:

52 (1) Where employees can access written notices of available work hours;

53 (2) The process by which employees may notify the employer of their desire to work the
54 available work hours; and

55 (3) The criteria for distribution of work hours among qualified and interested employees.

56 (g) An employer who fails to offer hours of work as required by this section must
57 compensate each existing employee \$100 for each such occurrence. An employer who fails to
58 award hours to the qualified employee who is eligible to receive the hours under the policy posted
59 pursuant to subdivision (3), subsection (f) of this section must compensate the qualified employee
60 in the amount of \$1,000.

§21-17-6. Exercise of rights protected; retaliation prohibited.

1 (a) It is unlawful for an employer or any other person to interfere with, restrain, or deny the
2 exercise of, or the attempt to exercise, any right protected under this article.

3 (b) A person may not take adverse action against an employee that penalizes the
4 employee for, or is reasonably likely to deter such employee from, exercising or attempting to
5 exercise any right protected under this article. Taking an adverse action includes threatening,
6 intimidating, disciplining, discharging, demoting, suspending, or harassing an employee;
7 assigning an employee to a lesser position in terms of job classification, job security, or other
8 condition of employment; reducing the hours or pay of an employee or denying the employee
9 additional hours; informing another employer that an employee has engaged in activities
10 protected by this article, and discriminating against the employee, including actions or threats
11 related to perceived immigration status or work authorization.

12 (c) Protections of this section apply to any person who mistakenly but in good faith alleges
13 violations of this article.

14 (d) There is a rebuttable presumption of retaliation if the employer or any other person
15 takes an adverse action against an employee within 90 calendar days of the employee's exercise
16 of rights protected in this article. In the case of seasonal employment that ended before the close

17 of the 90-calendar day period, the presumption also applies if the employer fails to rehire a former
18 employee at the next opportunity for work in the same position.

§21-17-7. Rules.

1 The commissioner is authorized to coordinate the implementation, administration, and
2 enforcement of this article, and shall propose rules for legislative approval in accordance with the
3 provisions of §29A-3-1 et seq. of this code it considers necessary.

§21-17-8. Notice.

1 Each covered employer shall post and keep posted, in conspicuous places on the
2 premises of the employer where notices to employees and applicants for employment are
3 customarily posted, a notice, to be prepared or approved by the commissioner, setting forth the
4 rights and privileges provided under this article, stating that retaliation against employees for
5 exercising their rights is prohibited, and providing other information the commissioner may
6 require. If the employer has an employee handbook, the notice shall also be included in the
7 employee handbook.

§21-17-9. Employer records.

1 (a) Covered employers shall keep records necessary to demonstrate compliance with this
2 article, including, but not limited to, good faith estimates of work schedules, written work
3 schedules and any modifications thereto, written consent for work shifts as required by this article,
4 and offers of work shifts to existing employees and responses to those offers. Employers shall
5 retain those records for a period of two years, and shall allow the commissioner access to the
6 records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the
7 requirements of this article. When an issue arises as to a covered employer's compliance with
8 this article, if the employer does not maintain or retain adequate records documenting compliance
9 or does not allow the commissioner reasonable access to the records within 30 days of the
10 commissioner's request, it is presumed that the employer has violated the article, absent clear
11 and convincing evidence otherwise.

12 (b) Upon request by any employee, and in accordance with the rules of the commissioner,
13 a covered employer shall provide the employee with work schedules in writing for any previous
14 week worked for the past two years, including the originally posted and modified versions of work
15 schedules. The work schedules shall be considered personnel records.

16 (c) Employers may record employee consent and employee requests using any printed or
17 printable communication in physical or electronic format, including a communication that is
18 transmitted through email, text message, or a computer system, or is otherwise sent and
19 maintained electronically.

§21-17-10. Enforcement and penalties.

1 (a) An employee or other person may report to the commissioner any suspected violation
2 of this article.

3 (b) The commissioner is authorized to take steps it considers appropriate to resolve
4 complaints and enforce this article, including, but not limited to, establishing a system to receive
5 complaints regarding noncompliance with this article, investigating alleged violations in a timely
6 manner, and resolving complaints through mediation. The commissioner may also open an
7 investigation on its own initiative.

8 (c) Any person alleging a violation of this article shall file a complaint with the
9 commissioner within two years of the date the person knew or should have known of the alleged
10 violation. The commissioner shall maintain confidential the identity of any complainant unless
11 disclosure of the complainant's identity is necessary for resolution of any investigation by the
12 commissioner, or otherwise required by law. The commissioner shall, to the extent practicable,
13 notify the complainant that the commissioner will be disclosing his or her identity prior to the
14 disclosure.

15 (d) Upon receiving a complaint alleging a violation of this article, the commissioner shall
16 investigate the complaint and, if appropriate, attempt to resolve it through mediation. The
17 commissioner may designate representatives, including representatives of unions or nonprofit

18 organizations, to inspect worksites and access records required to be maintained under §21-17-
19 9 of this code. Within 14 days of receipt of a complaint regarding an alleged violation, the
20 commissioner shall send a demand letter to the covered employer notifying the employer that the
21 commissioner is in receipt of a complaint of noncompliance and instructing the covered employer
22 to provide, within 10 days of receipt of the letter, written confirmation of compliance or an
23 admission of noncompliance and plan for corrective action. The letter shall inform the employer
24 that failure to respond to the demand letter is a basis for further enforcement action that may
25 result in an order to pay back wages, civil fines, an award of attorneys' fees, and other remedies.
26 The letter shall also inform the covered employer that retaliation against an employee for claiming
27 rights under the ordinance is prohibited and subject to additional penalties. The commissioner
28 shall keep complainants reasonably notified regarding the status of their complaint and any
29 resulting investigation and shall notify complainants of any final decision of the commissioner,
30 including any mediation result, with respect to the complaint. Whenever the commissioner finds
31 that a violation of this article has occurred, it shall issue to the offending employer a notice of
32 violation.

33 (e)(1) The commissioner may impose penalties and fines for violation of this article and to
34 provide or obtain appropriate relief. Remedies may include reinstatement and full restitution to
35 the employee for lost wages and benefits, including predictability pay required by this article.

36 (2) A covered employer who retaliates against an employee for an activity protected under
37 this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined \$2,000.

38 (3) A person who violates any other provision of this article is guilty of a misdemeanor and,
39 upon conviction thereof, shall be fined \$1,000.

40 (f) The commissioner or any person aggrieved by a violation of this article, or any entity a
41 member of which is aggrieved by a violation of this article may bring a civil action in a court of
42 competent jurisdiction against an employer violating this article,

43 (g) For violations of this article, the civil fines specified in this section may be recovered

44 through a civil action brought on behalf of the commissioner by any employee allegedly harmed
45 by a violation of this article, whether or not that person has received full or partial relief from the
46 harm or by a representative organization designated by said employee, pursuant to the following
47 procedures:

48 (1) The employee representative organization shall give written notice to the commissioner
49 of the specific provisions of this article alleged to have been violated, including the facts and
50 theories to support the alleged violation;

51 (2) The commissioner shall notify the employee or representative organization that it does
52 not intend to investigate the alleged violation within 65 calendar days of the postmark date of the
53 employee's notice. Upon receipt of the commissioner's notice, or if no notice is provided within 65
54 calendar days of the postmark date of the notice, the aggrieved employee or representative
55 organization may commence a civil action under this subsection.

56 (3) If the commissioner intends to investigate the alleged violation, it shall notify the
57 employee or representative organization of its decision within 65 calendar days of the postmark
58 date of the notice. Within 60 calendar days of that decision, the commissioner may investigate
59 the alleged violation and issue any appropriate citation. If the commissioner, during the course of
60 its investigation, determines that additional time is necessary to complete the investigation, it may
61 extend the time by not more than 60 additional calendar days and shall issue a notice of the
62 extension. If the commissioner determines that no citation will be issued, it shall notify the
63 employee or representative organization of that decision within five business days. Upon receipt
64 of that notice or if no citation is issued by the commissioner within the time limits prescribed by
65 this subsection, or if the commissioner fails to provide timely or any notification, the employee or
66 representative organization may commence a civil action under this subsection.

67 (4) No action may be brought under this section if the commissioner, on the same facts
68 and theories, cites a person within the timeframes set forth in subsection (d) of this section for a
69 violation of the same section or sections of this article under which the employee or representative

70 organization is attempting to recover a civil penalty, or files a proceeding to assess penalties or
71 enforce other remedies.

72 (5) Any employee or representative organization who prevails in any action under this
73 subsection is entitled to an award of reasonable attorney's fees and costs.

74 (6) Civil penalties recovered pursuant to this subsection shall be distributed as follows: 70
75 percent to the commissioner for enforcement of this article and community-based enforcement
76 partnerships; and 30 percent to the employees or representative organization.

77 (7) The right to bring an action under this section may not be impaired by a private contract.

78 (8) No employer or his or her agent or any other person may retaliate in any manner, or
79 threaten to retaliate, against an employee because the employee has, or is believed to have,
80 participated in or cooperated with an action under this section. Any person so retaliated against
81 may bring an action for compensatory and punitive damages or equitable relief, including restraint
82 of prohibited acts, restitution wages or benefits, reinstatement, costs, reasonable attorney's fees
83 and other appropriate relief. There is a rebuttable presumption that any adverse action taken
84 against an employee within 90 days after the employee has filed an action under this article is
85 retaliatory.

86 (9) No action brought pursuant to this article is required to meet the requirements of Rule
87 23(a) of the Rules of Civil Procedure.

NOTE: The purpose of this bill is to enact fair workweek employment standards for certain retail, hospitality, and food services establishments, and property services companies to meet certain employment standards. The bill would require notice of work schedules and require compensation for changed work schedules. It would also require a right to rest between work shifts and require an offer of certain work to existing employees. It provides protections for the exercise of rights and prohibits retaliation.

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