

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

**Introduced**

### **Senate Bill 97**

**FISCAL  
NOTE**

BY SENATORS TRUMP, HAMILTON, LINDSAY, AND ROMANO

[Introduced January 8, 2020; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §51-9-10 of the Code of West Virginia, 1931, as amended, relating  
2 to adding a circumstance, a delay by the Governor in filling a judicial vacancy, to the  
3 circumstances in which a senior judge or justice may continue to receive per diem  
4 compensation after the judge or justice has already received the amount of the annual  
5 salary of a sitting circuit judge.

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

## **ARTICLE 9. RETIREMENT SYSTEM FOR JUDGES OF COURTS OF RECORD.**

### **§51-9-10. Services of senior judges and justices.**

1 (a) The Legislature finds that:

2 (1) Section seven, article VIII of the Constitution of West Virginia expressly requires the  
3 Legislature to fix judicial salaries by statute, providing that: “[j]ustices, judges and magistrates  
4 shall receive the salaries fixed by law”.

5 (2) When originally enacted in 1949, this section of the code required any retired judge  
6 receiving retirement benefits to serve as a special judge, when assigned to temporary service,  
7 “without charge or compensation, per diem or otherwise to him”.

8 (3) In 1974, the Judicial Reorganization Amendment to the Constitution of West Virginia  
9 was ratified. Among other matters, in section eight, article VIII, the amendment addressed the  
10 ongoing practice of recalling retired judicial officers to service by empowering the Chief Justice of  
11 the Supreme Court of Appeals to recall a retired judge or justice to service, “with his permission  
12 and with the approval of the supreme court of appeals”, for temporary assignment.

13 (4) Absent from the Judicial Reorganization Amendment and article VIII of the Constitution  
14 of West Virginia is any provision authorizing the Supreme Court of Appeals to fix compensation  
15 for recalled judges or justices. Indeed, the Judicial Reorganization Amendment added language  
16 to section seven, article VIII of the Constitution of West Virginia, unequivocally stating that  
17 “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

18 (5) In 1975, the Legislature amended and reenacted this section of the code, which still

19 then required any retired judge receiving retirement benefits to serve as a special judge, when  
20 assigned to temporary service “without charge or compensation, per diem or otherwise to him”.

21 (6) In 1991, the Legislature amended and reenacted this section of the code again,  
22 authorizing and empowering the Supreme Court of Appeals to create a panel of senior judges  
23 and justices “to be assigned duties as needed and as feasible toward the objective of reducing  
24 caseloads and providing speedier trials to litigants throughout the State”.

25 (7) The 1991 reenactment of this section of the code statutorily authorized, for the first  
26 time, “reasonable payment” to senior judges and justices “on a per diem basis”, and provided that  
27 “the per diem and retirement compensation of a senior judge shall not exceed the salary of a  
28 sitting judge”.

29 (8) In 2018, the West Virginia House of Delegates adopted and communicated Articles of  
30 Impeachment to the West Virginia Senate, naming justices of the Supreme Court of Appeals  
31 serving at that time as respondents. Several of the articles alleged that certain justices, each while  
32 serving as Chief Justice of the Supreme Court of Appeals, had intentionally signed contracts  
33 agreeing to pay retired judges recalled to service above the compensation limitations of this  
34 section of the code.

35 (9) In a petition to the Supreme Court of Appeals, styled *State ex. rel. Workman v.*  
36 *Carmichael*, one justice named as respondent in the 2018 impeachment proceedings challenged  
37 the constitutionality of the Articles of Impeachment in which she was named, including the articles  
38 alleging payment of senior judges above the limitations of this section of the code.

39 (10) In ruling on the petition in *State ex. rel. Workman v. Carmichael*, the Supreme Court  
40 of Appeals, at that time composed of five circuit judges temporarily assigned to sit as justices for  
41 that case, issued a writ of prohibition staying impeachment proceedings.

42 (11) In direct contradiction of section seven, article VIII of the Constitution of West Virginia,  
43 the decision in *State ex. rel. Workman v. Carmichael* held, in part, that this section of the code,  
44 providing for and limiting the compensation of senior judges, is “unconstitutional and

45 unenforceable”.

46 (12) The majority opinion in State ex. rel. Workman v. Carmichael ignored the plain  
47 language of section seven, article VIII of the Constitution of West Virginia, which explicitly provides  
48 that “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

49 (13) Syllabus point four of the majority opinion in State ex. rel. Workman v. Carmichael  
50 mischaracterizes what the Legislature had done in enacting this section of the code, by providing  
51 that: “West Virginia Code §51-9-10 (1991) violates the Separation of Powers Clause of Article V,  
52 § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment  
53 matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the  
54 West Virginia Constitution. Consequently, W.Va. Code §51-9-10, in its entirety, is unconstitutional  
55 and unenforceable”.

56 (14) Occasionally, circumstances may require the extended assignment of senior judges  
57 and justices, necessitating the Legislature to prescribe such circumstances when the limitations  
58 on compensation of senior judges and justices receiving retirement benefits may be exceeded.

59 (b) The Legislature recognizes and acknowledges the authority of the West Virginia  
60 Supreme Court of Appeals to recall retired judges and justices for temporary assignment and to  
61 create a panel of senior judges and justices to utilize the talent and experience of former circuit  
62 court judges and supreme court justices of this state: *Provided*, That extended assignment of  
63 retired judges and justices must not be utilized in such a way as to threaten the qualified status  
64 of the Judges’ Retirement System under applicable provisions of the Internal Revenue Code,  
65 including Treasury Regulation section 1.401(a)-1(b)(1) requiring that a qualified plan must be  
66 established primarily to provide payment of definitely determinable benefits to its employees after  
67 retirement or attainment of normal retirement age.

68 (c) Senior judges and justices recalled and assigned to service shall receive per diem  
69 compensation set by the Supreme Court of Appeals, but not to exceed \$430 for each day actually  
70 served: *Provided*, That the combined total of per diem compensation and retirement benefits paid

71 to a senior judge or justice during a single calendar year may not exceed the annual salary of a  
 72 sitting circuit judge, except as set forth in subsection (d) of this section.

73 (d) Notwithstanding subsection (c) of this section, for purposes of maintaining judicial  
 74 efficacy and continuity in judicial decision making, a senior judge or justice may continue to  
 75 receive per diem compensation after the combined total of per diem compensation and retirement  
 76 benefits paid to the senior judge or justice during that calendar year exceeds the annual salary of  
 77 a sitting circuit judge if the Chief Justice of the Supreme Court of Appeals enters an administrative  
 78 order certifying there are certain extraordinary circumstances involving the necessary absence of  
 79 a sitting judicial officer because of (1) A protracted, but temporary, illness or medical condition; or  
 80 (2) a lengthy suspension; or (3) a delay by the Governor in filling a judicial vacancy, any of which  
 81 necessitate the extended assignment of the senior judge or justice. Immediately upon entering  
 82 such an order, the Chief Justice shall submit copies of the order to the State Auditor and the State  
 83 Treasurer.

84 (e) In addition to the per diem compensation authorized by this section, senior judges and  
 85 justices recalled to service may be reimbursed for their actual and necessary expenses incurred  
 86 in the performance of their duties.

87 ~~(f) Within 90 days after the effective date of this section, the Treasurer, as the chief~~  
 88 ~~custodian of public funds, shall petition the West Virginia Supreme Court of Appeals for a writ of~~  
 89 ~~prohibition pursuant to the court's original jurisdiction, naming as respondent the State Auditor~~  
 90 ~~and petitioning the court to prohibit the State Auditor from issuing any warrant for the payment of~~  
 91 ~~per diem compensation to senior judges and justices in excess of the limitation on the daily rate~~  
 92 ~~of per diem compensation in subsection (c) of this section~~

NOTE: The purpose of this bill is to add, a delay by the Governor in filling a judicial vacancy, to the circumstances in which a senior judge or justice may continue to receive per diem compensation after the judge or justice has already received the amount of the annual salary of a sitting circuit judge.

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