

Senate Bill No. 140

(By Senators Snyder, Romano and Facemire)

[Introduced January 14, 2015; referred to the Committee on the Judiciary.]



9 A BILL to repeal §29A-2-8 of the Code of West Virginia, 1931, as amended; to amend and reenact
10 §29A-1-2 of said code; to amend said code by adding thereto two new sections, designated
11 §29A-1-3a and §29A-1-3b; and to amend and reenact §29A-3-1a, §29A-3-4, §29A-3-8,
12 §29A-3-13 and §29A-3-15 of said code, all relating generally to the State Administrative
13 Procedures Act; defining “legislative exempt rule”; providing certain technical amendments;
14 providing for nullification and voiding of rules; setting forth requirements for amendments
15 to existing rules, proposed new rules and repeal of existing rules; establishing filing and
16 adoption requirements for legislative exempt rules; making legislative rules effective upon
17 filing; requiring agency to provide a list of interested parties with emergency rules; and
18 changing the number of copies required when filing an emergency rule.

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

20 That §29A-2-8 of the Code of West Virginia, 1931, as amended, be repealed; that §29A-1-2
21 of said code be amended and reenacted; that said code be amended by adding thereto two new
22 sections, designated §29A-1-3a and §29a-1-3b; and that §29A-3-1a, §29A-3-4, §29A-3-8, §29A-3-13

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

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

3 **§29A-1-2. Definitions of terms used in this chapter.**

4 For the purposes of this chapter:

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

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

14 (c) "Interpretive rule" means every rule, as defined in subsection ~~(i)~~(j) of this section, adopted
15 by an agency independently of any delegation of legislative power which is intended by the agency
16 to provide information or guidance to the public regarding the agency's interpretations, policy or
17 opinions upon the law enforced or administered by it and which is not intended by the agency to be
18 determinative of any issue affecting private rights, privileges or interests. An interpretive rule may
19 not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the
20 exercise of private rights or privileges nor to confer any right or privilege provided by law and is not
21 admissible in any administrative or judicial proceeding for ~~such~~ that purpose, except where the
22 interpretive rule established the conditions for the exercise of discretionary power as ~~herein~~ provided

1 in this subsection. However, an interpretive rule is admissible for the purpose of showing that the
 2 prior conduct of a person was based on good faith reliance on ~~such~~ the rule. The admission of ~~such~~
 3 the rule in no way affects any legislative or judicial determination regarding the prospective effect
 4 of ~~such~~ the rule. Where any provision of this code lawfully commits any decision or determination
 5 of fact or judgment to the sole discretion of any agency or any executive officer or employee, the
 6 conditions for the exercise of that discretion, to the extent that ~~such~~ the conditions are not prescribed
 7 by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible
 8 in any administrative or judicial proceeding to prove ~~such~~ the conditions.

9 (d) "Legislative exempt rule" means every rule, as defined in subsection (j) of this section,
 10 promulgated by an agency or relating to a subject matter that is exempt from the rule-making
 11 provisions of article three of this chapter, under section three, article one of this chapter or any other
 12 section of this code.

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

1 agency as a condition precedent to proposal of a rule to the Legislature; (B) declaratory rulings issued
 2 by an agency pursuant to the provisions of section one, article four of this chapter; (C) orders, as
 3 defined in subdivision (e) of this section; or (D) executive orders or proclamations by the Governor
 4 issued solely in the exercise of executive power, including executive orders issued in the event of
 5 a public disaster or emergency.

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

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

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

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

15 ~~(i)~~ (j) "Rule" includes every ~~regulation~~ rule, standard or statement of policy or interpretation
 16 of general application and future effect, including the amendment or repeal ~~thereof~~ of the rule,
 17 affecting private rights, privileges or interests, or the procedures available to the public, adopted by
 18 an agency to implement, extend, apply, interpret or make specific the law enforced or administered
 19 by it or to govern its organization or procedure, but does not include ~~regulations~~ rules relating solely
 20 to the internal management of the agency, nor ~~regulations~~ rules of which notice is customarily given
 21 to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative
 22 rule," "interpretive rule" or "procedural rule," all as defined in this section, and ~~shall be~~ is effective

1 only as provided in this chapter.

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

4 **§29A-1-3a. Technical amendments to a current rule.**

5 The provisions of this chapter do not apply to purely technical amendments to a current rule,
6 including but not limited to, correcting addresses, phone numbers, punctuation, spelling, code
7 citations or internal citations, numbering or grammatical errors. An agency may make these
8 amendments by filing the corrected rule with the Secretary of State's office.

9 **§29A-1-3b. Void rules.**

10 If an agency ceases to exist, through the operation of law or by statute, any rules adopted or
11 promulgated by the agency are void on the date the agency ceases to exist, unless the agency's
12 rule-making power and its rules have been transferred to another agency.

13 **ARTICLE 3. RULE MAKING.**

14 **§29A-3-1a. Filing proposed amendments to an existing rule; and repealing an existing rule.**

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

22 ~~(b) Rules promulgated to amend existing rules and filed as an emergency rule may be filed~~

1 on a section by section basis without having to refile in the state register all of the other sections of
 2 an existing series numbered rule: ~~Provided, That such filing shall list, by proper citation, those~~
 3 ~~sections not amended, which are directly affected by those sections amended.~~ An agency proposing
 4 to repeal a rule, shall file the rule in its entirety with the provisions of the rule struck through. An
 5 agency may not repeal a rule by reference in another rule.

6 **§29A-3-4. Filing of proposed legislative exempt rules, procedural rules and interpretive rules.**

7 (a) When an agency proposes a legislative exempt rule, procedural rule or an interpretive
 8 rule, the agency shall file in the State Register a notice of its action, including the text of the rule as
 9 proposed.

10 (b) All proposed rules filed under subsection (a) of this section shall have a fiscal note
 11 attached itemizing the cost of implementing the rules as they relate to this state and to persons
 12 affected by the rules. ~~and regulations~~ ~~Such~~ The fiscal note shall include all information included in
 13 a fiscal note for either house of the Legislature and a statement of the economic impact of the rule
 14 on the state or its residents. The objectives of the ~~rules~~ rule shall be clearly and separately stated in
 15 the fiscal note by the agency issuing the proposed rules. ~~No~~ A legislative exempt, procedural or
 16 interpretive rule ~~shall be~~ is not void or voidable by virtue of noncompliance with this subsection.

17 **§29A-3-8. Adoption of legislative exempt, procedural and interpretive rules.**

18 ~~▲~~ An agency shall consider a legislative exempt, procedural and interpretive rule, shall be
 19 ~~considered by the agency~~ for adoption not later than six months after the close of public comment
 20 and file a notice of withdrawal or adoption ~~shall be filed~~ in the State Register within that period.
 21 ~~Failure~~ An agency's failure to file ~~such notice shall constitute~~ the notice constitutes withdrawal and
 22 the Secretary of State shall note ~~such~~ the failure in the State Register immediately upon the

1 expiration of the six-month period.

2 A legislative exempt, procedural or interpretive rule may be amended by the agency prior to
 3 final adoption without further hearing or public comment. ~~No such~~ The amendment may not change
 4 the main purpose of the rule. If the fiscal implications have changed since the rule was proposed,
 5 the agency shall attach a new fiscal note ~~shall be attached~~ to the notice of filing. Upon adoption of
 6 the rule (including any ~~such~~ amendment) the agency shall file the text of the adopted legislative
 7 exempt, procedural or interpretive rule with its notice of adoption in the State Register and the ~~same~~
 8 ~~shall be~~ rule is effective on the date specified in the rule or thirty days after ~~such~~ the filing, whichever
 9 is later or as specified in this code.

10 **§29A-3-13. Adoption of legislative rules; effective date.**

11 (a) Except as the Legislature may by law otherwise provide, within sixty days after the
 12 effective date of an act authorizing promulgation of a legislative rule, the agency shall promulgate
 13 the rule ~~shall be promulgated only~~ in conformity with the provisions of law authorizing and directing
 14 the promulgation of ~~such~~ the rule. In the case of a rule proposed by an agency which is administered
 15 by an executive department pursuant to the provisions of article two, chapter five-f of this code, the
 16 secretary of the department shall promulgate the rule as authorized by the Legislature. In the case
 17 of an agency which is not subject to administration by the secretary of an executive department, the
 18 agency which proposed the rule for promulgation shall promulgate the rule as authorized by the
 19 Legislature.

20 (b) A legislative rule authorized by the Legislature ~~shall become~~ is effective ~~thirty days after~~
 21 ~~such~~ upon filing in the State Register, or on the effective date fixed by the authorizing act or if none
 22 is fixed by law, ~~such~~ a later date not to exceed ninety days, as ~~is~~ fixed by the agency.

1 (c) The Secretary of State shall note in the State Register the effective date of an authorized
 2 and promulgated legislative rule and shall promptly publish the duly promulgated rule in a code of
 3 state rules maintained by his or her office.

4 **§29A-3-15. Emergency legislative rules; procedure for promulgation; definition.**

5 (a) Any agency with authority to propose legislative rules may, without hearing, find that an
 6 emergency exists requiring that ~~emergency rules~~ an emergency rule be promulgated and promulgate
 7 the ~~same~~ emergency rule in accordance with this section. ~~Such emergency rules~~ The agency shall
 8 file the emergency rule, together with a statement of the facts and circumstances constituting the
 9 emergency, ~~shall be filed~~ and a listing of state agencies, professions, businesses and other identifiable
 10 interest groups affected by the proposed emergency rule with the Secretary of State, ~~and~~ who shall
 11 publish a notice of ~~such~~ the filing ~~shall be published~~ in the State Register. ~~Such emergency rules~~
 12 ~~shall become~~ However, failure to list all known state agencies, professions, businesses and other
 13 identifiable interest groups is not a basis for disapproval of the emergency rule or does not subject
 14 the emergency rule to judicial review. The emergency rule becomes effective upon the approval of
 15 the Secretary of State in accordance with section fifteen-a of this article or upon the approval of the
 16 Attorney General in accordance with section fifteen-b or upon the forty-second day following ~~such~~
 17 the filing, whichever occurs first. ~~Such emergency rules~~ The emergency rule may adopt, amend or
 18 repeal any legislative rule, but the agency shall state, with particularity, the circumstances
 19 constituting the emergency requiring ~~such~~ the adoption, amendment or repeal ~~shall be stated with~~
 20 particularity and be and the emergency rule is subject to de novo review by any court having original
 21 jurisdiction of an action challenging ~~their~~ its validity. ~~Fourteen copies~~ An agency shall immediately
 22 file a copy of the ~~rules~~ emergency rule and of the required statement ~~shall be filed immediately~~ with

1 the Secretary of State and one copy ~~shall be filed immediately~~ with the Legislative Rule-Making
2 Review Committee.

3 An emergency rule ~~shall be~~ is effective for not more than fifteen months and ~~shall expire~~
4 expires earlier if any of the following occurs:

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

1 specifically found that an emergency exists and directed the promulgation of an emergency rule;

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

5 (3) The agency has not previously filed and fails to file the proposed rule as approved by the
6 agency following the close of the public comment period with the Legislative Rule-Making Review
7 Committee within ninety days of the date the proposed rule was filed as an emergency rule, in which
8 case the emergency rule expires on the ninety-first day;

9 (4) The Legislature has authorized or directed promulgation of an authorized legislative rule
10 dealing with substantially the same subject matter since ~~such~~ the emergency rule was first
11 promulgated, in which case the emergency rule expires on the date the authorized rule is made
12 effective; or

13 (5) The Legislature has, by law, disapproved ~~of such~~ the emergency rule, in which case the
14 emergency rule expires on the date the law becomes effective.

15 (b) Any amendment to an emergency rule made by the agency shall be filed in the State
16 Register and does not constitute a new emergency rule for the purpose of acquiring additional time
17 or avoiding the expiration dates in subdivision (2), (3), (4) or (5), subsection (a) of this section:
18 *Provided*, That ~~such~~ the emergency amendment ~~shall become~~ becomes effective upon the approval
19 of the Secretary of State in accordance with section fifteen-a of this article or upon approval of the
20 Attorney General in accordance with section fifteen-b of this article or upon the forty-second day
21 following ~~such~~ the filing, whichever occurs first.

22 (c) Once an emergency rule expires due to the conclusion of fifteen months or due to the

1 effect of subdivision (2), (3), (4) or (5), subsection (a) of this section, the agency may not refile the
2 same or similar rule as an emergency rule.

3 (d) ~~The provision~~ An agency may not use the provisions of this section ~~shall not be used~~ to
4 avoid or evade any provision of this article or any other provisions of this code, including any
5 provisions for legislative review and approval of proposed rules. Any emergency rule promulgated
6 for ~~any such~~ that purpose may be contested in a judicial proceeding before a court of competent
7 jurisdiction.

8 (e) The Legislative Rule-Making Review Committee may review any emergency rule to
9 determine: (1) Whether the emergency rule or an amendment to the emergency rule exceeds the
10 scope of the law authorizing or directing ~~the its~~ promulgation ~~thereof~~; (2) whether there exists an
11 emergency justifying the promulgation of ~~such~~ the emergency rule; and (3) whether the emergency
12 rule was promulgated in compliance with the requirements and prohibitions contained in this section.
13 The committee may recommend to the agency, the Legislature, or the Secretary of State ~~such~~ any
14 action ~~as it may deem proper~~ it determines appropriate.

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

NOTE: The purpose of this bill is to amend the state Administrative Procedures Act. It defines the term "legislative exempt rule" and adds that term to the provisions regarding the requirements for amendments to existing rules, proposed new rules and the repeal of existing rules. Provisions are added regarding rules of agencies which cease to exist and technical amendments to existing rules. The bill also establishes filing and adoption requirements for legislative exempt rules. The bill makes all legislative rules effective from passage and 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.

§29A-1-3a and §29A-1-3b are new, therefore strike-throughs and underscoring have been omitted.

This bill is recommended for passage by the Legislative Rule-Making Review Committee.