

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 550

BY SENATORS BOSO, CARMICHAEL, BLAIR, FERNS,

GAUNCH, MAYNARD AND TRUMP

[Introduced February 8, 2016;

Referred to the Committee on Government

Organization.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §29A-8-1, §29A-8-2, §29A-8-3, §29A-8-4, §29A-8-5, §29A-8-6, §29A-8-7,
 3 §29A-8-8, §29A-8-9 and §29A-8-10, all relating generally to lessening regulatory burdens
 4 on small businesses; creating the Small Business Regulatory Review Board; establishing
 5 powers and duties of the board; establishing obligations of departments and agencies;
 6 requiring reports and analysis; establishing rule-making procedures; providing injunctive
 7 relief; requiring notice of hearings; providing for review of existing rules; and defining
 8 terms.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
 2 article, designated §29A-8-1, §29A-8-2, §29A-8-3, §29A-8-4, §29A-8-5, §29A-8-6, §29A-8-7,
 3 §29A-8-8, §29A-8-9 and §29A-8-10, all to read as follows:

ARTICLE 8. SMALL BUSINESS REGULATORY REVIEW BOARD.

§29A-8-1. Small business regulatory review board.

1 There is created a Small Business Regulatory Review Board. The board shall consist of
 2 one representative of the West Virginia Manufacturers Association, one representative from the
 3 West Virginia Business and Industry Council, one representative from the West Virginia Chamber
 4 of Commerce, one representative from the West Virginia Bureau of Business and Economic
 5 Research, one representative from the Center for Business and Economic Research at Marshall
 6 University, and two representatives of small businesses all of whom shall be appointed for three-
 7 year terms by the Governor. One Senate and one House of Delegates committee chairperson
 8 concerned with small businesses shall serve as cochairs of the board.

§29A-8-2. Definitions.

1 In this article:
 2 "Board" means the Small Business Regulatory Review Board.
 3 "Minor violation" means a rule violation that does not cause serious harm to the public, is

4 committed by a small business, and the violation is not willful, the violation is not likely to be
5 repeated, there is a history of compliance by the violator, or the small business has voluntarily
6 disclosed the violation.

7 "Small business" means a business entity, including its affiliates, which is independently
8 owned and operated and which employs fewer than five hundred full-time employees or which
9 has gross annual sales of less than \$6,000,000.

§29A-8-3. Considerations for small business.

1 (a) Each agency shall designate at least one employee to serve as the small business
2 regulatory coordinator for the agency, and shall publicize that employee's electronic mail address
3 and telephone number. The small business regulatory coordinator shall act as a contact person
4 for small business regulatory issues for the agency.

5 (b) Each agency shall promulgate a rule in accordance with article three of this chapter
6 that requires the agency to disclose in advance the discretion that the agency will follow in the
7 enforcement of rules against a small business that has committed a minor violation. The rule
8 promulgated under this subsection may include the reduction or waiver of penalties for a voluntary
9 disclosure, by a small business, of actual or potential violations of rules.

10 (c) The rule promulgated under this section shall specify the situations in which the agency
11 will allow discretion in the enforcement of a rule against a small business that has committed a
12 minor violation. The rule shall consider the following criteria for allowing discretion in the
13 enforcement of the rule and the assessment of a penalty, including a forfeiture, fine, or interest:

14 (1) The difficulty and cost of compliance with the rule by the small business;

15 (2) The financial capacity of the small business, including the ability of the small business
16 to pay the amount of any penalty that may be imposed;

17 (3) The compliance options available, including options for achieving voluntary compliance
18 with the rule;

19 (4) The level of public interest and concern;

20 (5) The opportunities available to the small business to understand and comply with the
21 rule; and

22 (6) Fairness to the small business and to other persons, including competitors and the
23 public.

24 (d) The rule promulgated under this section shall specify the situations in which the agency
25 will not allow discretion in the enforcement of a rule against small businesses that have committed
26 minor violations and shall include all of the following situations in which discretion is not allowed:

27 (1) The violation results in a substantial economic advantage for the small business;

28 (2) The small business has violated the same rule or guideline more than three times in
29 the past five years; or

30 (3) The violation may result in an imminent endangerment to the environment, or to public
31 health or safety.

32 (e) A rule promulgated under this section applies to minor violations committed after the
33 effective date of the rule.

34 (f) To the extent possible, each agency shall:

35 (1) Provide assistance to small businesses to help small businesses comply with rules
36 promulgated by the agency;

37 (2) In deciding whether to impose a fine against a small business found to be in violation
38 of a rule, consider the appropriateness of a written warning, reduced fine, or alternative penalty if
39 all of the following apply:

40 (A) The small business has made a good faith effort to comply with the rule; and

41 (B) The rule violation does not pose a threat to public health, safety, or welfare;

42 (3) Establish methods to encourage the participation of small businesses in the rule
43 making process; and

44 (4) Fully document every instance in which it made the decision to utilize discretion in
45 penalizing businesses as provided in this section, including the reasons for its decision, and shall

46 keep records of those instances on file for not fewer than five years.

§29A-8-4. Analysis.

1 (a) An agency shall prepare in plain language an analysis of each proposed rule, which
2 shall be printed as a preface to the text of the proposed rule when it is published or distributed.

3 The analysis shall include all of the following:

4 (1) A reference to each statute that the proposed rule interprets, each statute that
5 authorizes its promulgation, each related statute or related rule, and an explanation of the
6 agency's authority to promulgate the proposed rule under those statutes;

7 (2) A brief summary of the proposed rule;

8 (3) A summary of and preliminary comparison with any existing or proposed federal
9 regulation that is intended to address the activities to be regulated by the proposed rule;

10 (4) A comparison with similar rules in Ohio, Kentucky, Pennsylvania and Virginia;

11 (5) A summary of the factual data and analytical methodologies that the agency used in
12 support of the proposed rule and how any related findings support the regulatory approach chosen
13 for the proposed rule;

14 (6) Any analysis and supporting documentation that the agency used in support of the
15 agency's determination of the rule's effect on small businesses or that was used when the agency
16 prepared an economic impact analysis;

17 (7) The electronic mail address and telephone number of an agency contact person for
18 the proposed rule; and

19 (8) The place where comments on the proposed rule should be submitted and the deadline
20 for submitting those comments.

21 (b) If applicable, the analysis shall include a reference to the federal regulation upon which
22 it is based. If the proposed rule is prepared in the format permitted by this article but differs from
23 the federal regulation, the analysis shall specify each portion of the proposed rule that differs from
24 the federal regulation upon which it is based.

25 (c) If the proposed rule will have an effect on small businesses the agency shall also
26 prepare an initial regulatory flexibility analysis, which shall contain a description of the types of
27 small businesses that will be affected by the rule, a brief description of the proposed reporting,
28 bookkeeping and other procedures required for compliance with the rule and a description of the
29 types of professional skills necessary for compliance with the rule.

§29A-8-5. Rule-making process.

1 (a) When an agency proposes or revises a rule that may have an effect on small
2 businesses, the agency shall consider each of the following methods for reducing the impact of
3 the rule on small businesses:

4 (1) The establishment of less stringent compliance or reporting requirements for small
5 businesses;

6 (2) The establishment of less stringent schedules or deadlines for compliance or reporting
7 requirements for small businesses;

8 (3) The consolidation or simplification of compliance or reporting requirements for small
9 businesses;

10 (4) The establishment of performance standards for small businesses to replace design
11 or operational standards required in the rule; and

12 (5) The exemption of small businesses from any or all requirements of the rule.

13 (c) The agency shall incorporate into the proposed rule any of the methods it finds to be
14 feasible, unless doing so would be contrary to the statutory objectives which are the basis for the
15 proposed rule.

16 (d) In addition to other requirements of this article the agency shall provide an opportunity
17 for small businesses to participate in the rule-making process, using one or more of the following
18 methods:

19 (1) The inclusion in the notice under of a statement that the rule may have an impact on
20 small businesses;

21 (2) The direct notification of any small business that may be affected by the rule;

22 (3) The conduct of public hearings concerning the impact of the rule on small businesses;

23 and

24 (4) The use of special hearing procedures to reduce the cost or complexity of participation
25 in the rule-making process by small businesses.

26 (e) When an agency files with the Legislative Rule-Making Committee a rule that is subject
27 to this article, the agency shall include with the rule a summary of the analysis prepared pursuant
28 to this article and a summary of the comments of the legislative committees, if any. If the rule
29 does not require the analysis pursuant to this article the agency shall include with the rule a
30 statement of the reason for the small business regulatory review board's determination that the
31 rule will not have a significant economic impact on a substantial number of small businesses. The
32 Secretary of State shall publish the summaries or the statement in the State Register with the
33 rule.

34 (f) This section does not apply to rules that do not affect small businesses directly,
35 including, but not limited to, rules relating to counties or municipalities or the administration of
36 state and federal programs.

§29A-8-6. Review by the Small Business Regulatory Review Board.

1 (a) On the same day that an agency publishes a proposed rule that may have an economic
2 impact on small businesses, the agency shall submit the proposed rule, the required analysis and
3 a description of its actions taken to comply with this article to the small business regulatory review
4 board. The board may use cost-benefit analysis to determine the fiscal effect of the rule on small
5 businesses and shall determine whether the proposed rule will have a significant economic impact
6 on a substantial number of small businesses and whether the agency has complied with this
7 article. Each proposed rule shall include provisions detailing how the rule will be enforced. If the
8 board determines that the rule does not include an enforcement provision or that the agency failed
9 to comply with this article, the board shall notify the agency of that determination and ask the

10 agency to comply with any of those requirements. If the board determines that the proposed rule
11 will not have a significant economic impact on a substantial number of small businesses, the
12 board shall submit a statement to that effect to the agency that sets forth the reason for the board's
13 decision. If the board determines that the proposed rule will have a significant economic impact
14 on a substantial number of small businesses, the board may submit to the agency suggested
15 changes in the proposed rule to minimize the economic impact of the proposed rule, or may
16 recommend the withdrawal of the proposed rule. In addition, the board may submit other
17 suggested changes in the proposed rule to the agency, including proposals to reduce the use of
18 cross-references in the rule. The board shall send a report of any suggested changes and of any
19 notice of failure to include enforcement provisions or to comply with this article to the Legislative
20 Rule-Making Review Committee. The notification to the agency may include a request that the
21 agency do the following:

22 (1) Verify that the proposed rule does not conflict with, overlap, or duplicate other rules or
23 federal regulations; and

24 (2) Require the inclusion of fee information and fee schedules in the analysis, including
25 why fees are necessary and for what purpose the fees will be used.

26 (b) The report required under subsection (a) of this section shall be in writing and shall
27 include:

28 (1) The proposed rule in the form;

29 (2) All relevant and applicable material to the rule, including any statement, suggested
30 changes, or other material submitted to the agency by the Small Business Regulatory Review
31 Board;

32 (3) A copy of any economic impact analysis prepared by the agency;

33 (4) A copy of any revised economic impact analysis prepared by the agency or a copy of
34 any report prepared by another agency or department;

35 (5) A copy of any recommendations of members of the Legislature;

36 (6) A detailed statement explaining the basis and purpose of the proposed rule, including
 37 how the proposed rule advances relevant statutory goals or purposes;

38 (7) A summary of public comments to the proposed rule and the agency's response to
 39 those comments, and an explanation of any modification made in the proposed rule as a result of
 40 public comments or testimony received at a public hearing; and

41 (8) A list of the persons who appeared or registered for or against the proposed rule at a
 42 public hearing.

§29A-8-7. Notice of hearing.

1 (a) If a hearing is required, the agency shall:

2 (1) Send written notice of the hearing, in an electronic format approved by the Secretary
 3 of State for publication in the register and, if required, publish the notice in a local newspaper.

4 (2) Send an electronic copy of the written notice of the hearing under subdivision (1) of
 5 this subsection to each member of the Legislature who has filed a written request for notice with
 6 the Secretary of State. Upon request, the Secretary of State shall furnish an agency with the name
 7 and address of each legislator who has requested notice.

8 (3) Take any action it considers necessary to provide notice to other interested persons.

9 (b) The notice under subsection (a) of this section shall be given at least ten days prior to
 10 the date set for a hearing. Notice through the State Register is considered to have been given on
 11 the date on which the issue of the register in which the notice first appears is published. The
 12 notice shall include:

13 (1) A statement of the date, time and place of the hearing;

14 (2) A copy of the proposed rule as submitted; and

15 (3) Any report prepared by any other agency or department.

16 (c) If the proposed rule will have an effect on small businesses an initial regulatory flexibility
 17 analysis, which shall contain a description of the types of small businesses that will be affected
 18 by the rule and a brief description of the proposed reporting, bookkeeping and other procedures

19 required for compliance with the rule. A final regulatory flexibility analysis, which shall contain as
20 much information about the following as the agency can feasibly obtain and analyze with its
21 existing staff and resources:

22 (1) The agency's reason for including or failing to include in the proposed rule any of the
23 methods for reducing its impact on small businesses;

24 (2) A summary of issues raised by small businesses during the hearings on the proposed
25 rule, any changes in the proposed rule as a result of alternatives suggested by small businesses
26 and the reasons for rejecting any alternatives suggested by small businesses;

27 (3) The nature of any reports and the estimated cost of their preparation by small
28 businesses that must comply with the rule;

29 (4) The nature and estimated cost of other measures and investments that will be required
30 of small businesses in complying with the rule;

31 (5) The additional cost, if any, to the agency of administering or enforcing a rule; and

32 (6) The impact on public health, safety and welfare, if any.

§29A-8-8. Review of administrative rules or guidelines.

1 (a) The Small Business Regulatory Review Board may review current rules and guidelines
2 of any agency to determine whether any of those rules or guidelines place an unnecessary burden
3 on the ability of small businesses to conduct their affairs. If the board determines that a rule or
4 guideline places an unnecessary burden on the ability of a small business to conduct its affairs,
5 the board shall submit a report and recommendations regarding the rule or guideline to the
6 Legislative Rule-Making Review Committee and to the agency.

7 (b) When reviewing the report, the Legislative Rule-Making Review Committee shall
8 consider all of the following:

9 (1) The continued need for the rule or guideline;

10 (2) The nature of the complaints and comments received from the public regarding the
11 rule or guideline;

- 12 (3) The complexity of the rule or guideline;
- 13 (4) The extent to which the rule or guideline overlaps, duplicates, or conflicts with federal
- 14 regulations, other state rules, or local ordinances;
- 15 (5) The length of time since the rule or guideline has been evaluated; and
- 16 (6) The degree to which technology, economic conditions, or other factors have changed
- 17 in the subject area affected by the rule or guideline since the rule or guideline was promulgated.

§29A-8-9. Injunctive relief.

- 1 (a) A small business may commence an action against an agency for injunctive relief to
- 2 prevent the imposition of a penalty if the small business is subject to the penalty as the result of
- 3 the following:
- 4 (1) The small business acted or failed to act due to the failure by the agency's employee,
- 5 officer, or agent with regulatory responsibility for that legal requirement to respond to a specific
- 6 question in a reasonable time; or
- 7 (2) The small business acted or failed to act in response to inaccurate advice given to the
- 8 small business by the agency's employee, officer, or agent with regulatory responsibility for that
- 9 legal requirement.
- 10 (b) The small business may commence the action in the circuit court for the county where
- 11 the property affected is located or, if no property is affected, in the circuit court for the county
- 12 where the dispute arose.
- 13 (c) The circuit court may issue an order enjoining the imposition of the penalty.

§29A-8-10. Additional provisions.

- 1 (a) This article is meant to complement the existing State Administrative Procedures Act
- 2 and provide small businesses with additional flexibility in creating new jobs, creating new
- 3 businesses and to grow the state's economy without imposing undue regulatory burdens that
- 4 would impede those goals.
- 5 (b) All state agencies and departments are required to review this article to ensure they

6 will be in compliance, ready to assist small business owners and properly submit any proposed
7 rules with an economic impact to the Small Business Regulatory Review Board.

8 (c) All state agencies and departments are required to cooperate with the board to identify
9 existing rules hindering job creation and small business growth.

10 (d) All state agencies and departments are required to work with the board to recommend
11 changes to existing rules that will both reduce their burden on job creation while continuing to
12 comply with the intent of the statutes that created them.

13 (e) All state agencies and departments are required to work with the board to identify
14 strategies that will increase compliance with existing rules.

15 (f) The board is requested to engage small business owners and their representative
16 organizations to gather input on any rules hindering job growth.

17 (g) The board is requested to provide a report and analysis of existing rules to the
18 Governor and the agency with the authority to amend the rules which the board has identified for
19 potential modification.

NOTE: The purpose of this bill is to lessen the regulatory burdens on small businesses. The bill creates a Small Business Regulatory Review Board. The bill establishes powers and duties of the board. The bill establishes obligations of departments and agencies. The bill requires reports and analysis. The bill establishes rule-making procedures. The bill provides injunctive relief. The bill requires notice of hearings. The bill provides for review of existing rules. The bill defines terms.

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