

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 547

SENATORS TRUMP AND PLYMALE, *original sponsors*

[Passed March 7, 2020; in effect 90 days from
passage]

1 AN ACT to amend and reenact §21-3E-16 of the Code of West Virginia, 1931, as amended; and
2 to amend and reenact §21A-6-3 of said code, all relating to unemployment compensation;
3 revising provisions relating to employer testing, notice, termination, and forfeiture of
4 unemployment compensation benefits; and providing that violation of an employer's drug-
5 free workplace program, or violation of an employer's alcohol-free workplace program,
6 can still be grounds for a finding of gross misconduct.

Be it enacted by the Legislature of West Virginia:

CHAPTER 21. LABOR.

ARTICLE 3E. THE WEST VIRGINIA SAFER WORKPLACE ACT.

§21-3E-16. Employer testing; notice; termination; forfeiture.

1 If an employer implements a drug-free workplace program in accordance with this article,
2 which includes notice, education, and procedural requirements for testing for drugs and alcohol
3 pursuant to this law, the employer may require the employee to submit to a test for the presence
4 of drugs or alcohol. If an employee is terminated because alcohol or a drug is found to be present
5 in the employee's system at a level proscribed by the employer's policy, the employee, if injured
6 at the time of the intoxication, forfeits indemnity benefits under the Workers' Compensation Laws.
7 However, the employer's drug-free workplace program must notify all employees that it is a
8 condition of employment for an employee to refrain from reporting to work or working with the
9 presence of drugs or alcohol in his or her body and that policy must also state that if an injured
10 employee refuses to submit to a test for drugs or alcohol that employee forfeits eligibility for
11 indemnity benefits under the Workers' Compensation Laws. Employers who do not notify their
12 employees of this condition of employment waive their right to assert that eligibility for benefits is
13 entirely forfeited.

14 Nothing in this section may be construed or determined to affect §23-4-2(a) of this code
15 and the provisions of said section shall be the sole manner in which intoxication may be proven
16 to establish such intoxication as the proximate cause of an injury for purposes of said chapter.

CHAPTER 21A. UNEMPLOYMENT COMPENSATION.

ARTICLE 6. EMPLOYEE ELIGIBILITY; BENEFITS.

§21A-6-3. Disqualification for benefits.

1 Upon the determination of the facts by the commissioner, an individual is disqualified for
2 benefits:

3 (1) For the week in which he or she left his or her most recent work voluntarily without
4 good cause involving fault on the part of the employer and until the individual returns to covered
5 employment and has been employed in covered employment at least 30 working days.

6 For the purpose of this subdivision, an individual has not left his or her most recent work
7 voluntarily without good cause involving fault on the part of the employer if the individual leaves
8 his or her most recent work with an employer and if he or she in fact, within a 14-day calendar
9 period, does return to employment with the last preceding employer with whom he or she was
10 previously employed within the past year prior to his or her return to work, and which last
11 preceding employer, after having previously employed the individual for 30 working days or more,
12 laid off the individual because of lack of work, which layoff occasioned the payment of benefits
13 under this chapter or could have occasioned the payment of benefits under this chapter had the
14 individual applied for benefits. It is the intent of this paragraph to cause no disqualification for
15 benefits for an individual who complies with the foregoing set of requirements and conditions.
16 Further, for the purpose of this subdivision, an individual has not left his or her most recent work
17 voluntarily without good cause involving fault on the part of the employer, if the individual was
18 compelled to leave his or her work for his or her own health-related reasons and notifies the
19 employer prior to leaving the job or within two business days after leaving the job or as soon as

20 practicable and presents written certification from a licensed physician within 30 days of leaving
21 the job that his or her work aggravated, worsened, or will worsen the individual's health problem.

22 (2) For the week in which he or she was discharged from his or her most recent work for
23 misconduct and the six weeks immediately following that week; or for the week in which he or she
24 was discharged from his or her last 30-day employing unit for misconduct and the six weeks
25 immediately following that week. The disqualification carries a reduction in the maximum benefit
26 amount equal to six times the individual's weekly benefit. However, if the claimant returns to work
27 in covered employment for 30 days during his or her benefit year, whether or not the days are
28 consecutive, the maximum benefit amount is increased by the amount of the decrease imposed
29 under the disqualification; except that:

30 If he or she were discharged from his or her most recent work for one of the following
31 reasons, or if he or she were discharged from his or her last 30 days employing unit for one of the
32 following reasons: Gross misconduct consisting of willful destruction of his or her employer's
33 property; assault upon the person of his or her employer or any employee of his or her employer;
34 if the assault is committed at the individual's place of employment or in the course of employment;
35 reporting to work in an intoxicated condition, or being intoxicated while at work; reporting to work
36 under the influence of any controlled substance, as defined in chapter 60A of this code without a
37 valid prescription, or being under the influence of any controlled substance, as defined in said
38 chapter without a valid prescription, while at work; adulterating or otherwise manipulating a
39 sample or specimen in order to thwart a drug or alcohol test lawfully required of an employee;
40 refusal to submit to random testing for alcohol or illegal controlled substances for employees in
41 safety-sensitive positions as defined in §21-1D-2 of this code; violation of an employer's drug-free
42 workplace program; violation of an employer's alcohol-free workplace program; arson, theft,
43 larceny, fraud, or embezzlement in connection with his or her work; or any other gross misconduct,
44 he or she is disqualified for benefits until he or she has thereafter worked for at least 30 days in
45 covered employment: *Provided*, That for the purpose of this subdivision, the words "any other

46 gross misconduct” includes, but is not limited to, any act or acts of misconduct where the individual
47 has received prior written warning that termination of employment may result from the act or acts.

48 (3) For the week in which he or she failed without good cause to apply for available,
49 suitable work, accept suitable work when offered, or return to his or her customary self-
50 employment when directed to do so by the commissioner, and for the four weeks which
51 immediately follow for such additional period as any offer of suitable work shall continue open for
52 his or her acceptance. The disqualification carries a reduction in the maximum benefit amount
53 equal to four times the individual’s weekly benefit amount.

54 (4) For any week or portion thereof in which he or she did not work as a result of:

55 (a) A strike or other bona fide labor dispute which caused him or her to leave or lose his
56 or her employment.

57 (b) A lockout is not a strike or a bona fide labor dispute and no individual may be denied
58 benefits by reason of a lockout. However, the operation of a facility by nonstriking employees of
59 the company, contractors, or other personnel is not a reason to grant employees of the company
60 on strike unemployment compensation benefit payments. If the operation of a facility is with
61 workers hired to permanently replace the employees on strike, the employees would be eligible
62 for benefits.

63 (c) For the purpose of this subsection, an individual shall be determined to leave or lose
64 his or her employment by reason of a lockout where the individual employee has established that:

65 (i) The individual presented himself or herself physically for work at the workplace on the first day
66 of such lockout or on the first day he or she is able to present himself at the workplace or herself;
67 and (ii) the employer denied the individual the opportunity to perform work.

68 (d) For purposes of this subsection, an individual is determined to be permanently
69 replaced where the individual employee establishes that: (i) He or she is currently employed by
70 an employer who is the subject of a strike or other bona fide labor dispute; and (ii) the position of
71 the employee has been occupied by another employee who has been notified they are

72 permanently replacing the employee who previously occupied the position. Employees or
73 contractors who are hired to perform striking employees' work on a temporary basis, such as the
74 duration of a strike or other bona fide labor dispute, or a shorter period of time, may not be
75 determined to have permanently replaced a striking employee.

76 (5) For a week with respect to which he or she is receiving or has received:

77 (a) Wages in lieu of notice;

78 (b) Compensation for temporary total disability under the workers' compensation law of
79 any state or under a similar law of the United States; or

80 (c) Unemployment compensation benefits under the laws of the United States or any other
81 state.

82 (6) For the week in which an individual has voluntarily quit employment to marry or to
83 perform any marital, parental, or family duty, or to attend to his or her personal business or affairs
84 and until the individual returns to covered employment and has been employed in covered
85 employment at least 30 working days: *Provided*, That an individual who has voluntarily quit
86 employment to accompany a spouse serving in active military service who has been reassigned
87 from one military assignment to another is not disqualified for benefits pursuant to this subdivision:
88 *Provided, however*, That the account of the employer of an individual who leaves the employment
89 to accompany a spouse reassigned from one military assignment to another may not be charged.

90 (7) Benefits may not be paid to any individual on the basis of any services, substantially
91 all of which consist of participating in sports or athletic events or training or preparing to so
92 participate, for any week which commences during the period between two successive sport
93 seasons (or similar periods) if the individual performed the services in the first of the seasons (or
94 similar periods) and there is a reasonable assurance that the individual will perform the services
95 in the later of the seasons (or similar periods).

96 (8) (a) Benefits may not be paid on the basis of services performed by an alien unless the
97 alien is an individual who was lawfully admitted for permanent residence at the time the services

98 were performed, was lawfully present for purposes of performing the services or was permanently
99 residing in the United States under color of law at the time the services were performed (including
100 an alien who is lawfully present in the United States as a result of the application of the provisions
101 of Section 203(a)(7) or Section 212(d)(5) of the Immigration and Nationality Act): *Provided*, That
102 any modifications to the provisions of Section 3304(a)(14) of the federal Unemployment Tax Act
103 as provided by Public Law 94-566 which specify other conditions or other effective date than
104 stated in this subdivision for the denial of benefits based on services performed by aliens and
105 which modifications are required to be implemented under state law as a condition for full tax
106 credit against the tax imposed by the federal Unemployment Tax Act are applicable under the
107 provisions of this section.

108 (b) Any data or information required of individuals applying for benefits to determine
109 whether benefits are not payable to them because of their alien status shall be uniformly required
110 from all applicants for benefits.

111 (c) In the case of an individual whose application for benefits would otherwise be
112 approved, no determination that benefits to the individual are not payable because of his or her
113 alien status may be made except upon a preponderance of the evidence.

114 (9) For each week in which an individual is unemployed because, having voluntarily left
115 employment to attend a school, college, university, or other educational institution, he or she is
116 attending that school, college, university, or other educational institution, or is awaiting entrance
117 thereto or is awaiting the starting of a new term or session thereof, and until the individual returns
118 to covered employment.

119 (10) For each week in which he or she is unemployed because of his or her request, or
120 that of his or her duly authorized agent, for a vacation period at a specified time that would leave
121 the employer no other alternative but to suspend operations.

122 (11) In the case of an individual who accepts an early retirement incentive package, unless
123 he or she: (i) Establishes a well-grounded fear of imminent layoff supported by definitive objective

124 facts involving fault on the part of the employer; and (ii) establishes that he or she would suffer a
125 substantial loss by not accepting the early retirement incentive package.

126 (12) For each week with respect to which he or she is receiving or has received benefits
127 under Title II of the Social Security Act or similar payments under any Act of Congress, or
128 remuneration in the form of an annuity, pension, or other retirement pay from a base period
129 employer or chargeable employer or from any trust or fund contributed to by a base period
130 employer or chargeable employer or any combination of the above, the weekly benefit amount
131 payable to the individual for that week shall be reduced (but not below zero) by the prorated
132 weekly amount of those benefits, payments, or remuneration: *Provided*, That if the amount of
133 benefits is not a multiple of \$1, it shall be computed to the next lowest multiple of \$1: *Provided*,
134 *however*, That there is no disqualification if in the individual's base period there are no wages
135 which were paid by the base period employer or chargeable employer paying the remuneration,
136 or by a fund into which the employer has paid during the base period: *Provided further*, That
137 notwithstanding any other provision of this subdivision to the contrary, the weekly benefit amount
138 payable to the individual for that week may not be reduced by any retirement benefits he or she
139 is receiving or has received under Title II of the Social Security Act or similar payments under any
140 Act of Congress. A claimant may be required to certify as to whether or not he or she is receiving
141 or has been receiving remuneration in the form of an annuity, pension, or other retirement pay
142 from a base period employer or chargeable employer or from a trust fund contributed to by a base
143 period employer or chargeable employer.

144 (13) For each week in which and for 52 weeks thereafter, beginning with the date of the
145 decision, if the commissioner finds the individual who within 24 calendar months immediately
146 preceding the decision, has made a false statement or representation knowing it to be false or
147 knowingly fails to disclose a material fact, to obtain or increase any benefit or payment under this
148 article: *Provided*, That disqualification under this subdivision does not preclude prosecution under
149 §21A-10-7 of this code.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2020.

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Governor