

# WEST VIRGINIA LEGISLATURE

## 2021 REGULAR SESSION

**Introduced**

### **House Bill 3272**

**FISCAL  
NOTE**

BY DELEGATE THOMPSON

[Introduced March 16, 2021; Referred to the  
Committee on Workforce Development then the  
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §21-4A-1, §21-4A-2, §21-4A-3, §21-4A-4, §21-4A-5, §21-4A-6, §21-4A-7,  
 3 §21-4A-8, §21-4A-9, §21-4A-10, §21-4A-11, §21-4A-12, §21-4A-13, §21-4A-14, §21-4A-  
 4 15, and §21-4A-16, all relating to establish the Fair Workweek Act; defining purpose,  
 5 legislative intent, and terms used; specifying covered employees and covered employers;  
 6 requiring posting or publishing advance notice of work schedules; providing employee with  
 7 right to decline additional, unscheduled work; providing acceptable methods of  
 8 rescheduling employee work shifts; specifying exceptions and special circumstances;  
 9 establishing a right to rest; specifying manner and forms of notice; providing for  
 10 confidentiality of schedules in certain circumstances; authorizing rule-making; establishing  
 11 monetary penalties and other sanctions for violations; providing for administrative  
 12 resolution of complaints; providing for private cause of action; requiring employer retention  
 13 of records; and providing for inspection and enforcement by the Division of Labor.

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

**ARTICLE 4A. FAIR WORKWEEK ACT.**

**§21-4A-1. Purpose and intent.**

1 This article shall be known and may be cited as the “Fair Workweek Act.” It is the purpose  
 2 of this article and the policy of the Legislature: (1) To enact and enforce fair and equitable  
 3 employment scheduling practices in the State of West Virginia; (2) to provide the working people  
 4 of West Virginia with protections that ensure employer scheduling practices do not unreasonably  
 5 prevent workers from attending to their families, health, education, and other obligations; and (3)  
 6 to require employers needing additional hours, whether temporary or permanent, to first offer  
 7 those hours to current, part-time, covered employees.

**§21-4A-2. Definitions.**

1 As used in this article, the following terms shall have the following meanings:  
 2 “Banquet event” means a catered event staffed by employees dedicated to the event and

3 held at a hotel. A banquet event is scheduled at the time that the customer provides a deposit in  
4 connection with a specific date.

5 “Building services” means the care and maintenance of property, including, but not limited  
6 to, janitorial services, building maintenance services, and security services. This definition does  
7 not include on-duty police officers or other government officials performing their official duties.

8 “Commissioner” means the Commissioner of Labor or the commissioner’s designee.

9 “Covered employee” means an individual who meets all of the following:

10 (1) Performs work for an employer in the capacity of an employee, as distinguished from  
11 a contractor, determined pursuant to Internal Revenue Service guidelines, or a worker for a day  
12 and temporary labor service agency, who has been on assignment to the employer for 420 hours  
13 within an 18-month period;

14 (2) Spends the majority of his or her time at work for that employer while physically present  
15 within the state of West Virginia;

16 (3) Performs the majority of his or her work in a covered industry for that employer; and

17 (4) Earns less than or equal to \$39,500 per year as a salaried employee, or less than or  
18 equal to \$22.50 per hour as an hourly employee, from that employer. For hotels, set service fees  
19 that an employee earns are included in the calculation of the stated hourly wage threshold. An  
20 employee who staffs a banquet event and receives a set gratuity for that work shall not be deemed  
21 to be a covered employee for purposes of that banquet event. The stated wage amounts in this  
22 definition shall be increased yearly from the previous year in proportion to an increase in the CPI.  
23 Any increase shall be rounded up to the nearest multiple of \$0.05. Any increase shall remain in  
24 effect until any subsequent adjustment is made. On or before June 1, 2021, and on or before  
25 every June 1 thereafter, the division shall make available to employers a bulletin announcing the  
26 adjusted amount for the upcoming year.

27 “Covered industry” means:

28 (1) Building Services;

29 (2) Health care;

30 (3) Hotels;

31 (4) Manufacturing;

32 (5) Restaurants;

33 (6) Retail; and

34 (7) Warehouse services.

35 “CPI” means the Consumer Price Index most recently published by the Bureau of Labor  
36 Statistics of the United States Department of Labor;

37 “Division” means the Division of Labor;

38 “Dialysis facility” means a facility that provides outpatient maintenance dialysis;

39 “Domestic violence” means violence, including physical and sexual abuse, perpetrated by  
40 a family member or member of a person’s household, dating violence, stalking, and human  
41 trafficking.

42 “Employer” means a person who meets all of the following:

43 (1) Employs, globally, 100 or more employees, or in the case of not-for-profit corporations,  
44 250 or more employees, 50 of whom are covered employees; and

45 (2) Is primarily engaged in a covered industry. Numbers of covered employees will be  
46 aggregated if they are employed by members of a single unitary business group.

47 “Family member” shall have the definition applied to that term in section 1-24-010.

48 “Health care service” means: (1) Health care services or long-term care services provided  
49 in the following health care facilities: hospitals, nursing homes, residential rehabilitation facilities,  
50 assisted living facilities, and freestanding emergency centers, or (2) dialysis services provided by  
51 a dialysis facility;

52 “Hotel” shall have the same meaning as defined in §8-13-3 of this code;

53 “Manufacturing” means the production of tangible goods for use from raw or prepared  
54 materials by giving the materials new forms, qualities, properties, or combinations, whether by

55 hand-labor or machines.

56 “Predictability pay” means wages paid to a covered employee, calculated on an hourly  
57 basis at the employee’s regular rate as compensation for schedule changes made by an employer  
58 to a covered employee’s schedule pursuant to this article, in addition to any wages earned for  
59 work performed by that employee.

60 “Restaurant” means any business licensed to serve food in the State of West Virginia that  
61 also has at least 30 locations and employees at least 250 employees globally.

62 “Retail” means the sale to end users of tangible products that are primarily for personal,  
63 household, or family purposes, including, but not limited to, appliances, clothing, electronics,  
64 groceries, and household items.

65 “Self-schedule” means the practice of an employee to self-select work shifts without  
66 employer pre-approval pursuant to a mutually acceptable agreement;

67 “Sexual violence” means any conduct proscribed by §61-8B-1 et seq. of this code;

68 “Shift” means a period of consecutive hours an employer schedules that a covered  
69 employee to work, including employer-approved meal periods and rest periods;

70 “Ticketed event” means a sporting, entertainment, civic, charitable, or other event held at  
71 a venue with a capacity of at least 5,000 people and that requires a ticket for admission. The form  
72 of the ticket may be electronic, physical, or as a name on a list held by the event’s ticket auditor.

73 “Warehouse services” means the storage of goods, wares, or commodities for hire or  
74 compensation, and, in connection with this operation, may include the loading, packing, sorting,  
75 stacking, wrapping, distribution, and delivery of those goods.

76 “Work schedule” means all of a covered employee’s shifts, including specific start and end  
77 times for each shift, during a calendar week.

78 “Writing” or “written” means a printed or printable communication in physical or electronic  
79 format including a communication that is transmitted through electronic mail, text message or a  
80 computer system or is otherwise sent and stored electronically.

**§21-4A-3. Advance notice of work schedules.**(a) Initial Estimate of Work Schedule. —

(1) Prior to or on commencement of employment, an employer shall provide every covered employee with a good faith estimate in writing of the covered employee's projected days and hours of work for the first 90 days of employment, including:

(A) The average number of weekly work hours the covered employee can expect to work each week;

(B) Whether the covered employee can expect to work any on-call shifts;

(C) A subset of days and a subset of times or shifts that the covered employee can expect to work, or days of the week and times or shifts on which the covered employee will not be scheduled to work. The good faith estimate is not a contractual offer binding the employer, but an estimate made without a good-faith basis is a violation of this section.

(2) Prior to or on commencement of employment, the covered employee may request that the employer modify the projected days and hours of work provided under subdivision (a)(1) of this section. The employer shall consider any such request, and in its sole discretion may accept or reject the request, provided that the employer shall notify the covered employee of employer's determination in writing within three days of the request.

(b) Advance Notice of Work Schedule. —

(1) An employer shall provide its covered employees with written notice of work hours by posting the work schedule no later than 10 days before the first day of any new schedule from July 1, 2020, to June 30, 2022, and shall post the work schedule no later than 14 days before the first day of any new work schedule beginning July 1, 2022, by posting the work schedule within the unit or department or workgroup either in a conspicuous place at the workplace that is readily accessible and visible to all covered employees or using the usual methods of communication, or both. The written work schedule shall include the shifts and on-call status of all current covered employees at that worksite. Additionally, upon written request of a covered employee, an

26 employer shall transmit the work schedule to the employee by electronic means.

27 (2) An employer may change a covered employee's work schedule after it is posted and/or  
28 transmitted, up to the deadline articulated in subdivision (b)(1) of this section, without penalty.  
29 After that deadline, schedule changes shall be subject to the notice and compensation  
30 requirements set forth in this article.

31 (3) Covered employees who self-schedule or work in a venue that regularly hosts ticketed  
32 events shall not be bound by this subsection (b) of this section, nor shall their employers to the  
33 extent that the covered employee self-schedules or works in a venue that regularly hosts ticketed  
34 events.

35 (4) A covered employee who is a victim of domestic violence or sexual violence or who  
36 has a family or household member who is a victim may request that the covered employee's work  
37 schedule not be posted or transmitted to other employees. An oral or written request shall be  
38 sufficient and implemented immediately and is sufficient until the covered employee gives written  
39 permission to post the covered employee's schedule. An employer may request a written  
40 statement from the covered employee that states that the covered employee is, or has a family  
41 or household member who is, a victim of domestic violence or sexual violence. The written  
42 statement shall constitute the documentation needed for the employer to implement the request.  
43 The employer may not require a written statement more than once in a calendar year from any  
44 covered employee for this purpose.

**§21-4A-4. Schedule changes.**

1 (a) *Right to Decline.* — Subject to the exceptions in subsection (d) of this section, a  
2 covered employee has the right to decline any previously unscheduled hours that the employer  
3 adds to the covered employee's schedule, and for which the covered employee has been  
4 provided advance notice of less than 10 days before the first day of any new schedule from July  
5 1, 2020, to June 30, 2022, and less than 14 days before the first day of any new schedule  
6 beginning July 1, 2022.

7           (b) Alterations. — Subject to the exceptions in subsection (d) of this section, if an employer  
8 alters a covered employee’s work schedule after the deadline articulated in §21-4A-3(b)(1) of this  
9 code, in addition to the regular rate of pay, the covered employee shall receive:

10           (1) One hour of predictability pay for each shift in which the employer:

11           (A) Adds hours of work.

12           (B) Changes the date or time of a work shift with no loss of hours.

13           (C) With more than 24 hours’ notice, cancels or subtracts hours from a regular or on-call  
14 shift.

15           (2) No less than 50 percent of the covered employee’s regular rate of pay for any  
16 scheduled hours the covered employee does not work because the employer, with less than 24  
17 hours’ notice subtracts hours from a regular or on-call shift or cancels a regular or on-call shift,  
18 including while the covered employee is working on a shift.

19           (c) Posting amended schedule. — The employer shall amend the posted work schedule  
20 and transmit it to the covered employee in writing within 24 hours of a schedule change.

21           (d) Exceptions. — The requirements of this section shall not apply in the following  
22 circumstances:

23           (1) A work schedule change because:

24           (A) Of threats to employers, covered employees, or property, or when civil authorities  
25 recommend that work not begin or continue;

26           (B) Public utilities fail to supply electricity, water, or gas, or the sewer system fails to serve  
27 the work location;

28           (C) Of acts of nature including, but not limited to, flood, earthquake, tornado, or blizzard;  
29 or

30           (D) War, civil unrest, strikes, threats to public safety, or pandemics.

31           (2) A work schedule change that is the result of a mutually agreed upon shift trade or  
32 coverage arrangement between covered employees, subject to any existing employer policy

33 regarding required conditions for covered employees to exchange shifts.

34 (3) A work schedule change that is mutually agreed to by the covered employee and  
35 employer and is confirmed in writing.

36 (4) A covered employee requests a shift change, that is confirmed in writing, including but  
37 not limited to use of sick leave, vacation leave, or other policies offered by the employer.

38 (5) An employer subtracts hours from a work schedule for disciplinary reasons for just  
39 cause, provided the employer documents the incident leading to the covered employee's  
40 discipline in writing.

41 (6) A banquet event is scheduled or rescheduled under circumstances that are outside the  
42 employer's control, the attendee counts increase by more than 20 percent, or a new banquet  
43 event is scheduled within 48 hours of the event occurring, after the employer provides the posted  
44 work schedule.

45 (7) When, in manufacturing, events outside of the control of the manufacturer result in a  
46 change in the need for covered employees, including, but not limited to, when a customer requests  
47 the manufacturer to delay production or there is a delay in the receipt of raw materials or  
48 component parts needed for production.

49 (8) With regard to health care service employers, in: (A) Any declared national, state, or  
50 municipal disaster or other catastrophic event, or any implementation of an employer's disaster  
51 plan, or incident causing a hospital to activate its emergency operations plan, that will substantially  
52 affect or increase the need for health care services; (B) any circumstance in which patient care  
53 needs require specialized skills through the completion of a procedure; or (C) any unexpected  
54 substantial increase in demand for health care services due to large public events, severe  
55 weather, violence, or other circumstances beyond the employer's control.

56 (9) A ticketed event is cancelled, scheduled, rescheduled, postponed, delayed, increases  
57 in expected attendance by 20 percent or more, or increases in duration, due to circumstances  
58 that are outside the employer's control. Additional hours due to a change in a ticketed event's

59 duration that fall within this exemption will also be fully exempt from this section.

60 (10) When covered employees self-schedule.

**§21-4A-5. Offer of additional work hours to existing employees.**

1 (a) Subject to the limitations in this article, when an employer needs to fill additional shifts  
2 of work, the employer shall first offer additional shifts of work to existing covered employees if the  
3 covered employees are qualified to do the additional work, as determined by the employer. If  
4 offered shifts are not accepted by covered employees, the shifts shall be offered to temporary or  
5 seasonal workers who have worked on behalf of the employer for two or more weeks.

6 (b) When distributing additional shifts in compliance with subsection (a) of this section:

7 (1) The employer’s system for distribution of hours shall not discriminate on the basis of  
8 race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity or  
9 expression, disability, age, or marital or familial status;

10 (2) Whenever practicable, the employer shall first offer those hours to part-time covered  
11 employees.

12 (c) This section shall not be construed to require any employer to schedule employees to  
13 work hours required to be paid at a premium rate.

**§21-4A-6. Right to rest.**

1 (a) A covered employee has the right to decline work schedule hours that are less than 10  
2 hours after the end of the previous day’s shift.

3 (b) When a covered employee works a shift that begins less than 10 hours after the end  
4 of the previous day’s shift, the employer shall pay the covered employee at a rate of 1.25 times  
5 the covered employee’s regular rate of pay for that shift.

**§21-4A-7. Right to request a flexible working arrangement.**

1 A covered employee has the right to request a modified work schedule, including, but not  
2 limited, to additional shifts or hours; changes in days of work; changes in shift start and end times;  
3 permission to exchange shifts with other employees; limitations on availability; part-time

4 employment; job sharing arrangements; reduction or change in work duties; or part-year  
5 employment.

**§21-4A-8. Notice and posting.**

1 (a) Every employer shall provide with the first paycheck subject to this article a notice  
2 advising the covered employee of their rights under this article. The commissioner shall prepare  
3 and make available a form notice that satisfies the requirements of this subsection (b).

4 (b) All notices and postings that name individual covered employees shall comply with  
5 §21-4A-3 of this code.

**§21-4A-9. Retaliation prohibited.**

1 (a) It shall be unlawful for any employer to discriminate in any manner or take any adverse  
2 action against any covered employee in retaliation for exercising any right under this article,  
3 including, but not limited to, disclosing, reporting, or testifying about any violation of this article or  
4 rules promulgated thereunder. For purposes of this section, prohibited adverse actions include,  
5 but are not limited to, termination, denial of promotion, negative evaluations, punitive schedule  
6 changes, punitive decreases in the desirability of work assignments, and other acts of harassment  
7 shown to be linked to such exercise of rights.

8 (b) A violation of this section shall subject the employer to a \$1,000 fine.

**§21-4A-10. Avoidance of application.**

1 It shall be unlawful for an employer to engage in any of the following to avoid coverage  
2 under this article: (1) Change a regular rate of pay, (2) interfere with, restrain, deny, or change  
3 scheduled work days or hours, or (3) hire, rehire, terminate, or suspend, a covered employee  
4 even temporarily.

**§21-4A-11. Enforcement; rules.**

1 The division shall administer and enforce this article and may propose rules for legislative  
2 approval, in accordance with the provisions of §29A-3-1 et seq. of this code, in order to implement  
3 and carry out the provisions of this article.

**§21-4A-12. Violations; penalty.**

1        Any employer who violates any provision of this article, other than §21-4A-9 of this code,  
2 or any rule promulgated thereunder is guilty of a misdemeanor and, upon conviction, be fined not  
3 less than \$300 nor more than \$500 for each offense. Each covered employee whose rights are  
4 affected shall constitute a separate and distinct offense to which a separate fine shall apply. Each  
5 day that a violation occurs shall constitute a separate and distinct offense to which a separate fine  
6 shall apply. Any agreement between the employee and employer that would violate this article is  
7 no defense to an enforcement action.

**§21-4A-13. Private cause of action.**

1        (a) An employee may initiate a civil action asserting that they were subjected to a violation  
2 of this article after the following sequence of events occurs: (1) The employee submits to the  
3 division a factually supported written complaint describing the violation, and (2) the division  
4 forwards to the employer the complaint and provides the employer with an opportunity to either  
5 contest the alleged violation, in which case the employer shall provide to the division factual  
6 support for its position, or cure the alleged violation, in which case the employer shall provide the  
7 division with detail as to actions it has taken and will take to make the affected employee(s) whole  
8 and eliminate the basis for future similar complaints, and (3) the division has notified the  
9 complaining employee and the employer in writing that the division considers the complaint to be  
10 closed. The division may consider a complaint closed because: the complaint has been cured by  
11 the employer, or the division has deemed the complaint justified and supported and has enforced  
12 it against the employer to conclusion, or the division has deemed the complaint unjustified or  
13 unsupported.

14        (b) Any claim or action filed under this article must be made within two years of the alleged  
15 conduct resulting in the complaint.

16        (c) A covered employee who prevails in a civil action pursuant to this section shall be  
17 entitled to an award of compensation for any damages sustained, including the payment of

18 predictability pay unlawfully withheld, as a result of the violation, including litigation costs, expert  
19 witness fees, and reasonable attorney’s fees.

**§21-4A-14. Nonexclusive remedy.**

1 The remedies, fines, and procedures provided under this article are cumulative and are  
2 not intended to be exclusive of any other available remedies, penalties, and procedures  
3 established by law which may be pursued to address violations of this article.

**§21-4A-15. Retention of records.**

1 Each employer shall maintain for at least three years, or for the duration of any claim, civil  
2 action, or investigation pending pursuant to this article, whichever is longer, a record of each  
3 covered employee’s name, hours worked, pay rate, and records necessary to demonstrate  
4 compliance with this article, including, but not limited to, good faith estimates of work schedules,  
5 initial posted schedule and all subsequent changes to that schedule, consent to work hours where  
6 such consent is required by this article, and documentation of offers of hours of work to existing  
7 staff and responses to such offers. Each employer shall provide each covered employee a copy  
8 of the records relating to such covered employee upon the covered employee’s reasonable  
9 request.

**§21-4A-16. Access to work site.**

1 Each employer shall permit access to work sites and relevant records for authorized  
2 representatives of the division for the purpose of monitoring compliance with this article and  
3 investigating employee complaints of noncompliance, including production for inspection and  
4 copying of its employment records.

NOTE: The purpose of this bill is to create a Fair Workweek Act, with standards to promote predictability and advance notice of work schedules for employees in certain trades or industries, and to provide remedies and penalties for violations.

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