

# WEST VIRGINIA LEGISLATURE

## 2022 REGULAR SESSION

Introduced

### House Bill 4262

FISCAL  
NOTE

BY DELEGATES STEELE AND FOSTER

[Introduced January 19, 2022; Referred to the  
Committee on Government Organization]

1 A BILL to amend and reenact §21-5-5a, §21-5-5b, §21-5-5c, and §21-5-5d of the Code of West  
2 Virginia, 1931, as amended, all relating to licensure for polygraph examiners, establishing  
3 definitions for national associations of polygraph examiners, clearly defining employer  
4 limitations for use of detection of deception equipment; removing state licensure  
5 requirements for polygraph examiners and requiring other conditions be met; and updating  
6 code citations.

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

## **ARTICLE 5. WAGE PAYMENT AND COLLECTION.**

### **§21-5-5a. Definitions.**

1 As used in §21-5-5b, §21-5-5c, and §21-5-5d of this ~~article~~ code, unless the context clearly  
2 requires otherwise:

3 (1) "American Association of Policy Polygraphists (AAPP)" means an organization  
4 dedicated to bringing together law enforcement professionals from local, state, tribal, and federal  
5 branches of law enforcement to advance the latest training, technology, and ethical standards in  
6 the field of deception detection.

7 (2) "American Polygraph Association (APA)" means a professional organization that exists  
8 to provide training, model best practices, and offer professional resources for the continued  
9 growth of ethical and evidence-based detection of deception through the use of polygraph.

10 (3) "Employer" means any individual, person, corporation, department, board, bureau,  
11 agency, commission, division, office, company, firm, partnership, council or committee of the state  
12 government; public benefit corporation, public authority or political subdivision of the state; or  
13 other business entity, which employs or seeks to employ an individual or individuals. All provisions  
14 of sections five-b, five-c and five-d of this article pertaining to employers shall apply in equal force  
15 and effect to their agents and representatives.

16 ~~(2)~~ (4) "Employee" means an individual employed by an employer.

17 ~~(3)~~ (5) "Psychophysiological detection of deception instrument" means an instrument used

18 for the detection of deception which records permanently and simultaneously a person's  
19 cardiovascular and respiratory patterns and galvanic skin response: *Provided*, That the instrument  
20 may record other physiological changes pertinent to the detection of deception.

21 ~~(4)~~ (6) "Prospective employee" means an individual seeking or being sought for  
22 employment with an employer.

23 ~~(5)~~ (7) "Psychophysiological detection of deception" means an examination which records  
24 permanently and simultaneously a person's cardiovascular and respiratory patterns and galvanic  
25 skin response.

**§21-5-5b. Employer limitations on use of detection of deception devices or instruments;  
exceptions.**

1 (a) No employer may require or request either directly or indirectly, that any employee or  
2 prospective employee of the employer submit to a psychophysiological detection of deception  
3 examination, lie detector or other similar examination utilizing mechanical or electronic measures  
4 of physiological reactions to evaluate truthfulness, and no employer may knowingly allow the  
5 results of any examination administered outside this state to be utilized for the purpose of  
6 determining whether to employ a prospective employee or to continue the employment of an  
7 employee in this state ~~*Provided*, That the provisions of this section shall not apply to employees~~  
8 ~~or prospective employees who would have direct access to the manufacture, storage, distribution~~  
9 ~~or sale of any controlled substance listed in schedule I, II, III, IV or V of section eight hundred~~  
10 ~~twelve of title twenty-one of the United States code: *Provided, however*, That the provisions of~~  
11 ~~this section shall not apply to law enforcement agencies or to military forces of the state as defined~~  
12 ~~by section one, article one, chapter fifteen of the code: *Provided further*, That the results of any~~  
13 ~~examination shall be used solely for the purpose of determining whether to employ or to continue~~  
14 ~~to employ any person exempted hereunder and for no other purpose unless one of the following~~  
15 conditions applies:

16 (1) The employee or prospective employee would have direct access to the manufacture,

17 storage, distribution, or sale of any controlled substance listed in schedule I, II, III, IV or V of §60A-  
 18 2-1 et seq. of this code;

19 (2) The employee or prospective employee is employed or seeking to be employed with  
 20 law-enforcement agencies or to military forces of the state as defined by §15-1-1 et seq. of this  
 21 code; or

22 (3) Otherwise complies with the Employee Polygraph Protection Act 29 U.S.C. § 2001 et  
 23 seq.

24 (b) The results of any examination shall be used solely for the purpose of determining  
 25 whether to employ or to continue to employ any person exempted hereunder and for no other  
 26 purpose.

**§21-5-5c. Requirements for psychophysiological detection of deception examiners.**

~~License required for psychophysiological detection of deception examiners;  
 qualifications; promulgation of rules governing administration of  
 psychophysiological detection of deception examinations~~

1 ~~(a) No person, firm, or corporation shall administer a psychophysiological detection of~~  
 2 ~~deception examination, lie detector, or other similar examination utilizing mechanical or electronic~~  
 3 ~~measures of physiological reactions to evaluate truthfulness without holding a current valid license~~  
 4 ~~to do so as issued by the Commissioner of Labor being a member of the American Polygraph~~  
 5 ~~Associate or the American Association of Police Polygraphists and otherwise meeting the~~  
 6 ~~requirements in the Employee Polygraph Protection Act, 29 U.S.C. § 2007. No examination shall~~  
 7 ~~be administered by a licensed corporation except by an officer or employee thereof who is also~~  
 8 ~~licensed.~~

9 ~~(b) A person is qualified to receive a license as an examiner if he or she:~~

10 ~~(1) Is at least 21 years of age;~~

11 ~~(2) Is a citizen of the United States;~~

12 ~~(3) Has not been convicted of a felony: *Provided*, That the commissioner shall apply §21-~~

13 ~~1-6 of this code to determine if the prior criminal conviction bears a rational nexus to the license~~  
14 ~~being sought;~~

15 ~~(4) Has not been released or discharged with other than honorable conditions from any of~~  
16 ~~the armed services of the United States or that of any other nation;~~

17 ~~(5) Has passed an examination conducted by the Commissioner of Labor or under his or~~  
18 ~~her supervision to determine his or her competency to obtain a license to practice as an examiner;~~

19 ~~(6) Has satisfactorily completed not less than six months of internship training; and~~

20 ~~(7) Has met any other qualifications of education or training established by the~~  
21 ~~Commissioner of Labor in his or her sole discretion which qualifications are to be at least as~~  
22 ~~stringent as those recommended by the American Polygraph Association.~~

23 ~~(c) The Commissioner of Labor may designate and administer any test he or she considers~~  
24 ~~appropriate to those persons applying for a license to administer psychophysiological detection~~  
25 ~~of deception, lie detector, or similar examination. The test shall be designed to ensure that the~~  
26 ~~applicant is thoroughly familiar with the code of ethics of the American Polygraph Association and~~  
27 ~~has been trained in accordance with association rules. The test must also include a rigorous~~  
28 ~~examination of the applicant's knowledge of and familiarity with all aspects of operating~~  
29 ~~psychophysiological detection of deception equipment and administering psychophysiological~~  
30 ~~detection of deception examinations.~~

31 ~~(d) The license to administer psychophysiological detection of deception, lie detector, or~~  
32 ~~similar examinations to any person shall be issued for a period of one year. It may be reissued~~  
33 ~~from year to year. The licenses to be issued are:~~

34 ~~(1) "Class I license" which authorizes an individual to administer psychophysiological~~  
35 ~~detection of deception examinations for all purposes which are permissible under the provisions~~  
36 ~~of this article and other applicable laws and rules.~~

37 ~~(2) "Class II license" which authorizes an individual who is a full-time employee of a law-~~  
38 ~~enforcement agency to administer psychophysiological detection of deception examinations to its~~

39 ~~employees or prospective employees only.~~

40 ~~(e) The Commissioner of Labor shall charge an annual fee to be established by legislative~~  
41 ~~rule. All fees paid pursuant to this section shall be paid to the Commissioner of Labor and~~  
42 ~~deposited in an appropriated special revenue account hereby created in the State Treasury to be~~  
43 ~~known as the Psychophysiological Examiners Fund and expended for the implementation and~~  
44 ~~enforcement of this section. Through June 30, 2019, amounts collected which are found from time~~  
45 ~~to time to exceed funds needed for the purposes set forth in this section may be utilized by the~~  
46 ~~commissioner as needed to meet the division's funding obligations: *Provided*, That beginning July~~  
47 ~~1, 2019, amounts collected may not be utilized by the commissioner as needed to meet the~~  
48 ~~division's funding obligations. In addition to any other information required, an application for a~~  
49 ~~license shall include the applicant's Social Security number.~~

50 ~~(f) The Commissioner of Labor shall propose rules for legislative approval in accordance~~  
51 ~~with §29A-3-1 et seq. of this code governing the administration of psychophysiological detection~~  
52 ~~of deception, lie detector, or similar examination to any person: *Provided*, That all applicable rules~~  
53 ~~in effect on the effective date of §21-5-5a, §21-5-5b, §21-5-5c, and §21-5-5d of this code will~~  
54 ~~remain in effect until amended, withdrawn, revoked, repealed, or replaced. The legislative rules~~  
55 ~~shall include:~~

56 ~~(1) The type and amount of training or schooling necessary for a person before which he~~  
57 ~~or she may be licensed to administer or interpret a psychophysiological detection of deception,~~  
58 ~~lie detector, or similar examination;~~

59 ~~(2) Testing requirements, including the designation of the test to be administered to~~  
60 ~~persons applying for licensure;~~

61 ~~(3) Standards of accuracy which shall be met by machines or other devices to be used in~~  
62 ~~psychophysiological detection of deception, lie detector, or similar examination;~~

63 ~~(4) The conditions under which a psychophysiological detection of deception, lie detector,~~  
64 ~~or similar examination may be administered;~~

65 ~~(5) Fees for licenses, renewals of licenses, and other services provided by the~~  
66 ~~commissioner;~~

67 ~~(6) Any other qualifications or requirements, including continuing education, established~~  
68 ~~by the commissioner for the issuance or renewal of licenses; and~~

69 ~~(7) Any other purpose to carry out the requirements of §21-5-5a, §21-5-5b, §21-5-5c, and~~  
70 ~~§21-5-5d of this code~~

**§21-5-5d. Penalties; cause of action.**

1 (a) It shall be a misdemeanor to administer or interpret a psychophysiological detection of  
2 deception, lie detector or similar examination utilizing mechanical or electronic measures of  
3 physiological reactions to evaluate truthfulness without ~~having received a valid and current license~~  
4 ~~to do so as issued by the commissioner of labor or in violation of any rule or regulation~~  
5 ~~promulgated by the commissioner under section five c of this article~~ being a member of the  
6 American Polygraph Associate or the American Association of Police Polygraphists and otherwise  
7 meeting the requirements in the Employee Polygraph Protection Act, 29 U.S.C. § 2007. Any  
8 person convicted of violating §21-5-5c of this code shall be fined not more than \$500.

9 (b) Any person who violates §21-5-5b of this ~~article~~ code is guilty of a misdemeanor and,  
10 upon conviction thereof, shall be fined not more than \$500.

11 (c) Any employee or prospective employee has a right to sue an employer or prospective  
12 employer for a violation of the provisions of §21-5-5b of this ~~article~~ code. If successful, the  
13 employee or prospective employee shall recover threefold the damages sustained by him or her,  
14 together with reasonable attorneys' fees, filing fees, and reasonable costs of the action.  
15 Reasonable costs of the action may include, but shall not be limited to, the expenses of discovery  
16 and document reproduction. Damages may include, but shall not be limited to, back pay for the  
17 period during which the employee did not work or was denied a job.

NOTE: The purpose of this bill is to eliminate state licensing of polygraph examiners.

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