

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENGROSSED

Committee Substitute

for

Senate Bill 661

BY SENATORS ROBERTS AND TARR

[Originating in the Committee on Workforce; reported

on February 20, 2023]

1 A BILL to amend and reenact §23-5A-3 of the Code of West Virginia, 1931, as amended, relating
2 to the clarification of preferential recall rights for employees sustaining a compensable
3 injury; providing for a preferential recall time period of 30 days from the date the employee
4 is released to return to his or her regular employment or 30 days from the date of the
5 employee's demand for reinstatement, whichever time period is shorter; and providing that
6 it is the obligation of the employee to continually seek employment during the employee's
7 preferential recall time period.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5A. DISCRIMINATORY PRACTICES.

§23-5A-3. Termination of injured employees prohibited; reemployment of injured employees.

1 (a) It shall be a discriminatory practice within the meaning of section one of this article to
2 terminate an injured employee while the injured employee is off work due to a compensable injury
3 within the meaning of §23-4-1 *et seq.* of this code and is receiving or is eligible to receive
4 temporary total disability benefits, unless the injured employee has committed a separate
5 dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured
6 employee wholly unrelated to the injury or the absence from work resulting from the injury. A
7 separate dischargeable offense shall not include absence resulting from the injury or from the
8 inclusion or aggregation of absence due to the injury with any other absence from work.

9 (b) It shall be a discriminatory practice within the meaning of section one of this article for
10 an employer to fail to reinstate an employee who has sustained a compensable injury to the
11 employee's former position of employment upon demand made in writing and transmitted by the
12 United States Postal Service, return receipt requested, to the employer's principal office for such
13 reinstatement provided that the position in which the employee sustained the compensable injury
14 is still available and the employee is not disabled from performing the duties of such position. If
15 ~~the former position is not available, the employee shall be reinstated to another comparable~~

16 ~~position which is available and which the employee is capable of performing. A comparable~~
17 ~~position for the purposes of this section shall mean a position which is comparable as to wages,~~
18 ~~working conditions and, to the extent reasonably practicable, duties to the position held at the~~
19 ~~time of injury~~ A written statement from a duly licensed physician that the physician approves the
20 injured employee's return to his or her regular employment shall be prima facie evidence that the
21 worker is able to perform such duties. The employee's right to preferential recall shall be 90 days
22 from the date the employee is released to return to his or her regular employment. It is the
23 employee's obligation to continually seek the possibility of employment during the employee's
24 preferential recall time period. ~~In the event that neither the former position nor a comparable~~
25 ~~position is available, the employee shall have a right to preferential recall to any job which the~~
26 ~~injured employee is capable of performing which becomes open after the injured employee~~
27 ~~notifies the employer that he or she desired reinstatement. Said right of preferential recall shall~~
28 ~~be in effect for one year from the day the injured employee notifies the employer that he or she~~
29 ~~desires reinstatement: *Provided*, That the employee provides to the employer a current mailing~~
30 ~~address during this one year period~~

31 (c) Any civil action brought under this section shall be subject to the seniority provisions
32 of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or
33 to any court or administrative order applying specifically to the injured employee's employer, and
34 shall further be subject to any applicable federal statute or regulation.

35 (d) Nothing in this section shall affect the eligibility of the injured employee to workers'
36 compensation benefits under this chapter.