

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENROLLED

Committee Substitute

for

Senate Bill 661

By Senators Roberts and Tarr

[Passed March 11, 2023; in effect 90 days from
passage]

1 AN ACT to amend and reenact §23-5A-3 of the Code of West Virginia, 1931, as amended, relating
2 to the preferential recall rights of an employee who is off work due to a compensable injury;
3 providing that any demand for reinstatement made by an injured employee must be made
4 in writing; providing for how and where the demand for reinstatement must be mailed;
5 providing requirements for an injured employee's reinstatement to his or her former
6 position; providing for a preferential recall time period of 120 days when the injured
7 employee is employed by contractors as defined by §30-42-3 of said code; stating that it is
8 the employee's obligation to continually seek the possibility of employment during the
9 preferential recall period; and providing that the employee's right to preferential recall
10 terminates once the employer offers the employee his or her former position or a
11 comparable position.

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 the
15 former position is not available, the employee shall be reinstated to another comparable position
16 which is available and which the employee is capable of performing. A comparable position for the
17 purposes of this section shall mean a position which is comparable as to wages, working
18 conditions and, to the extent reasonably practicable, duties to the position held at the time of injury.
19 A written statement from a duly licensed physician that the physician approves the injured
20 employee's return to his or her regular employment shall be prima facie evidence that the worker is
21 able to perform such duties. In the event that neither the former position nor a comparable position
22 is available, the employee shall have a right to preferential recall to any job which the injured
23 employee is capable of performing which becomes open after the injured employee notifies the
24 employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for
25 one year from the day the injured employee notifies the employer that he or she desires
26 reinstatement: *Provided*, That the employee provides to the employer a current mailing address
27 during this one-year period.

28 (c) For the preferential recall rights authorized by this section when an employee is
29 employed by an employer defined by §30-42-3(d) of this code, the employee's right to preferential
30 recall shall be no greater than 120 days from the date the employee is released by a duly licensed
31 physician to return to his or her regular employment. It is the employee's obligation to continually
32 seek the possibility of employment during the employee's preferential recall period under this
33 subsection. The employee's right to preferential recall authorized by this subsection terminates
34 once the employer offers the employee his or her former position or a comparable position.

35 (d) Any civil action brought under this section shall be subject to the seniority provisions of
36 a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to
37 any court or administrative order applying specifically to the injured employee's employer, and

38 shall further be subject to any applicable federal statute or regulation.

39 (e) Nothing in this section shall affect the eligibility of the injured employee to workers'

40 compensation benefits under this chapter.