

**WEST VIRGINIA CODE
CHAPTER 21
LABOR**

**ARTICLE 3A
OCCUPATIONAL SAFETY AND HEALTH ACT**

§21-3A-1. Short title.

This article shall be known and cited as the "West Virginia Occupational Safety and Health Act."

§21-3A-1a. Legislative policy.

The Legislature finds that the safety and health of public employees in the workplace is of primary public concern. Personal injuries and illnesses arising out of work situations result not only in wage loss and increased medical expenses for public employees, but also in decreased productivity and increased workers' compensation expenses for public employers. The Legislature therefore declares:

- (a) That it is the policy of this state to ensure that all public employees be provided with safe and healthful work environments free from recognized and avoidable hazards;
- (b) That it is the responsibility of the state to promulgate standards for the protection of the health and safety of its public workforce; and
- (c) That it is in the public interest for public employers and public employees to join in a cooperative effort to enforce these standards.

§21-3A-2. Definitions.

As used in this chapter, unless the context clearly indicates otherwise:

- (a) "Commission" means the occupational safety and health review commission established under this article;
- (b) "Commissioner" means the labor commissioner or his designated agent;
- (c) "Employee" means any public employee of the state, or any state agency;
- (d) "Employer" means public employer and shall include the state or any department, division, bureau, board, council, agency or authority of the state, but shall not include the department of corrections, the department of health and the Legislature;
- (e) "Occupational safety and health standard" means a standard for health or safety which requires the adoption or use of one or more practices, means, methods, operations or processes reasonably necessary or appropriate to provide safe and healthful employment in places of employment;

(f) "Person" means one or more individuals; and

(g) "Workplace" means a place where public employees are assigned to work but shall not include any place where public employees are assigned to work that is inspected and regulated in accordance with federal occupational safety and health standards or mine safety and health administration standards, or facilities under the authority of the department of corrections, the department of health, or the Legislature.

§21-3A-3. Division of occupational safety and health; coordination of activities with workers' compensation commission.

(a) There is continued in the labor department a division of occupational safety and health comprised of a subdivision for safety, a subdivision for health and the other subdivisions the commissioner considers necessary. This division shall administer all matters pertaining to occupational safety and occupational health.

(b) The labor commissioner may require the assistance of other state agencies and may enter into agreements with other state agencies and political subdivisions of the state for the administration of this chapter.

(c) The labor commissioner shall provide for coordination between the division of occupational safety and health and the workers' compensation commission including, but not limited to, the establishment of standardized procedures and reportings.

§21-3A-4. Application of article.

(a) This article applies to all public employers, public employees and public workplaces within the state of West Virginia.

(b) Nothing in this article may be construed to supersede or in any manner affect any workers' compensation law or to diminish in any manner common law or statutory rights, duties or liabilities of employers or employees, under any law with respect to injuries, diseases or death of employees arising out of and in the course of employment.

§21-3A-5. Duties of employer and employee.

(a) Each employer shall furnish to each of his employee's employment and a place of employment which are free from recognized hazards causing or likely to cause death or serious physical harm or serious illness to his employees.

(b) Each employer shall, upon the written request of any employee, furnish the employee with a written statement listing the substances which the employee uses or with which the employee comes into contact, which substances have been identified as toxic and hazardous by occupational safety and health standards, under Title 29 CFR 1910.1000 "Air Contaminant Code of Federal Regulations" through 1910.1046, or listed in the most recent National Institute for Occupational Safety and Health Registry of the Toxic Effects of Chemical Substances (RTECS).

(c) Each employer shall comply with occupational safety and health standards promulgated under this article.

(d) Each employee shall comply with occupational safety and health standards and all regulations and orders issued pursuant to this article which are applicable to his actions and conduct.

§21-3A-6. Rules.

In the rules adopted under the authority of this article, the commissioner shall:

(a) Provide for the preparation, adoption, amendment or repeal of rules necessary to effectuate the health and safety purposes of this article;

(b) Provide educational programs to encourage employers and employees in their efforts to reduce the number of safety and health hazards and to stimulate employers and employees to institute new programs, and to perfect existing programs to provide for safe and healthful working conditions;

(c) Provide for appropriate reporting procedures by employers with respect to information relating to conditions of employment which will assist in achieving the objectives of this article;

(d) Provide for the frequency, method and manner of making inspections of workplaces without advance notice: **Provided**, That in the event of an emergency or unusual situation, the commissioner may give advance notice;

(e) Provide for the publication and dissemination to employers, employees and labor organizations and the posting, where appropriate, by employers of informational, educational or training materials calculated to aid and assist in achieving the objectives of this article; and

(f) Provide for the establishment of new programs, and the perfection and expansion of existing programs for occupational safety and health education for employers and employees and institute methods and procedures to establish a program for voluntary compliance by employers and employees with the requirements of this article and all applicable safety and health standards and regulations promulgated pursuant to the authority of this article.

§21-3A-7. Adoption of federal and state standards; variances.

(a) The commissioner, on or before the first day of July, one thousand nine hundred eighty-seven, shall provide at the minimum, for the adoption of all occupational safety and health standards, amendments or changes adopted or recognized by the United States secretary of labor under the authority of the Occupational Safety and Health Act of 1970, which are in effect on the effective date of this section. Where no federal standards are applicable, or where standards more stringent than the federal standards are deemed advisable, the commissioner shall provide for the development of such state standards as will comport with the purposes of this act. Standards shall be adopted through state administrative procedures.

(b) In the event of emergency or unusual situations, the commissioner shall provide for an emergency temporary standard to take effect immediately if he determines:

(1) Employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and

(2) The emergency standard is necessary to protect employees from such danger.

The emergency standard may be in effect not longer than one hundred eighty days or, if renewed in compliance with the laws of this state governing the adoption or extension of rules, not longer than sixty additional days. On or before the expiration date of the emergency standard or renewal thereof, the commissioner shall develop a permanent standard to replace the emergency standard.

(c) Any standard promulgated shall prescribe the use of labels or other appropriate forms of warning necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and, where appropriate, proper conditions and precautions of safe use or exposure. The standard shall also prescribe suitable protective equipment and control procedures for use in connection with such hazards and shall provide for measuring employee exposure in the manner necessary for the protection of employees. In addition, where appropriate, the standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available to employees exposed to such hazards in order to determine any adverse effect from that exposure.

(d) Any employer may apply to the commissioner for a temporary order granting a variance from a standard, or any provision thereof, promulgated under this section. A temporary order shall be granted if the employer files an application which meets the requirements of subsection (e) of this section and establishes that:

(1) He is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

(2) He is taking all available steps to safeguard employees against the hazards covered by the standard; and

(3) He has an effective program for coming into compliance with the standard as quickly as practicable.

Any temporary order issued under this subsection shall prescribe the practices, means, methods, operations and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. A temporary order may be granted only after notice by the commissioner to employees and an opportunity for a hearing before the commissioner: **Provided**, That the commissioner may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter: **Provided, however**, That an order may be renewed if the requirements of this subsection are met and if an application for renewal is filed at least ninety days prior to the expiration date of the order. No interim renewal of an order may remain in effect longer than one hundred eighty days.

(e) An application for a temporary variance order shall contain:

- (1) A specification of the standard or portion thereof from which the employer seeks a variance;
- (2) A representation by the employer, supported by representations from qualified persons who have firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor;
- (3) A statement of the steps he has taken and will take, with specific dates, to protect employees against the hazard covered by the standards;
- (4) A statement of when he expects to comply with the standard and what steps he has taken and what steps he will take, with dates specified, to come into compliance with the standard; and
- (5) A certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted and by other appropriate means. A description of how employees have been informed shall be contained in the certification. The information to employees shall inform them of their right to petition the commissioner for a hearing. The commissioner is authorized to grant a variance from any standard or portion thereof whenever he determines that a variance is necessary to permit an employer to participate in an experiment, approved by the commissioner, designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(f) Any affected employer may apply to the commissioner for an order granting a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing before the commissioner. The commissioner shall issue such order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations or processes used or proposed to be used by an employer will provide employment and places of employment which are as safe and healthful as those which would prevail if he complied with the standard. The order issued shall prescribe the conditions the employer must maintain and the practices, means, methods, operations and processes which he must adopt and utilize to the extent they differ from the standard in question. The order may be modified or revoked upon application by an employer or employees, or by the commissioner on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(g) Any employee who may be adversely affected by a standard or variance or regulation issued under this section may challenge the validity or applicability of a standard or variance or regulation by bringing an action for a declaratory judgment.

(h) It is the expressed intent of the Legislature that an unlimited number of variances may be granted, if the conditions of this section are met.

§21-3A-8. Inspections and investigations; records.

(a) In order to carry out the purposes of this article, the commissioner or his agent, upon presenting appropriate credentials to the employer, is authorized:

(1) To enter without advance notice, except as provided in subsection (d) of section six, and at reasonable times may enter any workplace or environment where work is performed by an employee of an employer; and

(2) To inspect and investigate, during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, any place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and the materials therein, and to question privately any employer or employee. No public employer may refuse to allow a representative of the commissioner to inspect a place of employment. If an employer attempts to prevent a representative of the department from conducting an inspection, the commissioner may obtain an inspection warrant from the circuit court of Kanawha County or the circuit court of the county wherein the employer is located.

(b) In making his inspections and investigations under this entire article the commissioner may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of this state. In case of contumacy or failure or refusal of any person to obey such an order, the circuit court for the judicial circuit wherein the person resides, is found or transacts business has jurisdiction to issue to the person an order requiring the person to appear, to produce evidence if asked and, when so ordered, to give testimony relating to the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof.

(c) (1) Each employer shall make, keep, preserve and make available to the commissioner and the United States secretary of labor records regarding his activities relating to this entire article as the commissioner may prescribe by rule as necessary or appropriate for the enforcement of this article or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this subdivision, these rules may include provisions requiring employers to conduct periodic inspections. The commissioner shall also issue rules requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this entire article, including the provisions of applicable standards.

(2) The commissioner shall prescribe rules requiring employers to maintain accurate records of and to make periodic reports on work-related deaths, injuries and illnesses other than minor injuries requiring only first-aid treatment and not involving medical treatment, loss of consciousness, restriction of work or motion or transfer to another job.

(3) The commissioner shall issue rules requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under any occupational safety and health standard adopted under this entire chapter. These regulations shall provide employees or their representatives an opportunity to observe the monitoring or measuring and to have access to the records. The

regulations shall also make appropriate provisions for each employee or former employee to have such access to the records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section six of this article and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the commissioner under this entire article shall be obtained with a minimum burden upon employers. Unnecessary duplication of efforts in obtaining information shall be eliminated to the maximum extent feasible.

(e) Subject to rules issued by the commissioner, a representative of the employer and a representative authorized by the employees of the employer shall be given an opportunity to accompany the commissioner or his authorized representative during the physical inspection of any workplace for the purpose of aiding the inspection. Where there is no authorized employee representative, the commissioner or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f) (1) Any employee or representative of employees who believes that there is a violation of an occupational safety or health standard or that there is an imminent danger of physical harm may request an inspection by giving notice to the commissioner or his authorized representative of the violation or danger. The notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice and shall be signed by the employees or their representative. A copy of the notice shall be provided the employer or his agent no later than the time of the inspection: **Provided**, That upon the request of the person giving the notice, his name and the names of individual employees referred to therein shall not appear in the copy or on any record published, released or made available pursuant to subsection (g) of this section. If, upon receipt of the notification, the commissioner determines there are reasonable grounds to believe that such violation or danger exists, he shall make an inspection in accordance with the provisions of this section as soon as practicable to determine if the violation or danger exists. The commissioner shall maintain records of the results of any such investigation, which shall be made available to the public upon request. The authority of the commissioner to inspect any premises for purposes of investigating an alleged violation of safety standards shall not be limited to the alleged violation but shall extend to any other area of the premises in which he has reason to believe that a violation of the safety standards promulgated under this act exists. If the commissioner determines there are no reasonable grounds to believe that the violation or danger exists, he shall notify the employer, employee or representative of employees in writing of the determination. The notification does not preclude future enforcement action if conditions change.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in the workplace may notify the commissioner, or any representative of the commissioner responsible for conducting the inspection, in writing of any violation of this entire article which they have reason to believe exists in the workplace. The commissioner shall, by rule, establish procedures for review of any refusal by a representative of the commissioner to issue a citation with respect to any alleged violation, and shall furnish the employer and the employees or representative of employees requesting the review a written statement of the reasons for the

commissioner's final disposition of the case. The notification does not preclude future enforcement action if conditions change.

(g) (1) The commissioner is authorized to compile, analyze and publish in either summary or detail form all reports or information obtained under this section.

(2) The commissioner shall prescribe such rules as he considers necessary to carry out his responsibilities under this article, including rules dealing with the inspection of an employer's or owner's establishment.

§21-3A-9. Citation for violation.

(a) If, upon inspection or investigation, the commissioner or his authorized representative believes that an employer or employee has violated any safety and health standards or variance or the commissioner finds a condition which poses a recognized hazard likely to cause death or serious physical harm or illness, the commissioner shall, with reasonable promptness, issue a citation to the employer or employee. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of this article, or the standard, rule or order alleged to have been violated. The citation shall fix a reasonable time for the abatement of the violation.

(b) Each citation issued under this section or a copy or copies thereof shall be prominently posted as prescribed in rules issued by the commissioner at or near each place a violation referred to in the citation occurred.

§21-3A-10.

Repealed.

Acts, 2015 Reg. Sess., Ch. 53.

§21-3A-11. Notice to employer of contest period; action by commissioner; action by review commission.

(a) If, after inspection or investigation, the commissioner issues a citation pursuant to section nine, he shall, within a reasonable time after the termination of the inspection or investigation, notify the employer or employee by certified mail. The notification shall inform the employer or employee that he has fifteen working days from the receipt of notice within which to notify the commissioner that he wishes to contest the citation or to seek a variance. If the employer or employee fails to so notify the commissioner within fifteen days, and if no notice is filed by any employee or representative of employees pursuant to subsection (c) of this section within fifteen days, the citation, as proposed, becomes a final order and not subject to review by any court or agency.

(b) If the commissioner has reason to believe that an employer or employee has failed to correct a violation for which a citation has been issued within the period permitted for correction, the commissioner shall notify the employer or employee by certified mail or personal service of such failure and the commissioner shall seek judicial enforcement of such citation order: **Provided**, That in the case of a review proceeding initiated by the employer or employee under this section in good faith and not solely for delay, the period permitted for correction of the violation does not begin to run until the entry of a

final order by the review commission. The notification by the commissioner shall inform the employer or employee that he has fifteen working days from the receipt of the notice within which to notify the commissioner that he wishes to contest the notification. If, within fifteen days from receipt of notification under this section, the employer or employee fails to notify the commissioner that he intends to contest the notification, the notification and assessment as proposed become a final order of the commission and not subject to review by any court or agency.

(c) If an employer or employee notifies the commissioner within the fifteen-day period provided for in subsection (b) of this section that he wishes to contest the notification, the commissioner shall immediately advise the commission of the notification and the commission shall afford an opportunity for a hearing. Upon a showing by an employer or employee of a good faith effort to comply with the abatement requirements of a citation and a showing that abatement has not been completed because of factors beyond his reasonable control, the commissioner, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in the citation. The rules of procedure prescribed by the commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

(d) If the employer or employee, at a hearing under subsection (c) of this section, does not prove he made a good faith effort to comply, the commission shall seek judicial enforcement to compel compliance.

§21-3A-12. Appeal from review commission.

Any employer or employee, or the commissioner, adversely affected or aggrieved by an order of the review commission, after all administrative remedies provided by this article have been exhausted, is entitled to judicial review pursuant to section four, article five, chapter twenty-nine-a of this code.

§21-3A-13. Discrimination against employee filing complaint.

(a) No employer may discharge or in any manner discriminate against any employee because the employee has filed any complaint, instituted or caused to be instituted or participated in any proceedings under or related to this article, has testified or is about to testify in any such proceedings or has exercised on behalf of himself or others any right afforded by this article.

(b) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after the alleged violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of the complaint the commissioner shall cause an investigation to be made. If after such investigation the commissioner determines that the provisions of this section have been violated, he shall bring an action in the circuit court of Kanawha County against the employer. In any such action, the court has jurisdiction, for cause shown, to restrain violations of subsection (a) of this section and to order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay plus interest at the statutory rate in this state.

§21-3A-14. Enjoining of conditions or practices at places of employment; mandamus against commissioner for failure to act.

(a) The circuit court of Kanawha County or the circuit court in the county wherein the workplace is located has jurisdiction, upon petition by the commissioner, to restrain or enjoin any conditions or practices in any workplace which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided by this article. Any order issued under this section may require such steps to be taken as are necessary to avoid, correct or remove the imminent danger and prohibit the employment or presence of any individual in locations or under conditions where the imminent danger exists, except the presence of those individuals whose presence is necessary to avoid, correct or remove such imminent danger, or to maintain the capacity of a continuous process operation, or to resume normal operations without a complete cessation of operations or, where a cessation of operation is necessary, to permit such to be accomplished in a safe and orderly manner. No temporary restraining order issued without notice may be effective for more than five days.

(b) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) of this section exist in any place of employment, he shall inform the affected employees and employer of the danger and shall further inform those persons that he is recommending to the commissioner that relief be sought. If the commissioner fails to seek relief under this section within forty-eight hours of being notified of such conditions, any employee who may have been injured by reason of such failure or the authorized representative of such employee may seek injunctive relief.

§21-3A-15. Research and demonstration projects.

The commissioner shall conduct research and undertake demonstration projects relating to occupational safety and health issues and problems, either within the labor department or by grants or contracts. The commissioner may prescribe rules requiring employers to measure, record and make reports on exposure of employees to toxic substances which he believes may endanger the health or safety of employees. The commissioner shall cooperate with the director of the national institute for occupational safety and health of the department of health and human services of the United States in establishing programs of medical examinations and tests necessary to determine the incidence of occupational illness and employee susceptibility to such illnesses. Such programs, upon the request of the employer, may be paid for by the commissioner, together with such other assistance as may be required. Information obtained under this section shall be made public without revealing the names of individual workers covered by physical examination or special studies and shall be made available to employers, employees and their authorized representatives.

§21-3A-16. Education program.

(a) The commissioner shall conduct directly or by grants or contracts education programs to provide an adequate supply of qualified personnel to carry out the purposes of this article and information programs on the importance and proper use of adequate safety and health equipment.

(b) The commissioner is authorized to conduct directly or by grants or contracts short-term training of personnel engaged in work related to this responsibility under this article.

(c) The commissioner shall provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe or unhealthful working conditions in employment covered by this article. The commissioner shall consult with and advise employers, employees and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

§21-3A-17. Reports to United States secretary of labor.

In regard to the administration and enforcement of this article, the commissioner shall make reports to the secretary of labor of the United States in such form and containing such information as the secretary shall from time to time require.

§21-3A-18. Repealed. Acts, 2015 Reg. Sess., Ch. 53.

§21-3A-19. Optional coverage by subdivisions.

The governing body of any county or municipality or any department, division, bureau, board, council, agency or authority of any county or municipality or of any school district or special purposes district created pursuant to law may, by ordinance, resolution or other procedure, explicitly elect that some or all of its workplaces or employees shall be covered by the provisions of this article. The commissioner shall issue rules and regulations and prescribe forms and procedures regarding such optional coverage. The commissioner may issue rules and regulations providing for variances from the procedural and substantive requirements of this article in the case of the optional coverage described herein.