

## WEST VIRGINIA

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### I. AT-WILL EMPLOYMENT

#### A. Statute

West Virginia has not codified the common law employment-at-will doctrine.

#### B. Case Law

West Virginia recognizes the common law employment-at-will doctrine.

Under the law governing the relation of master and servant, an employment unaffected by contractual or statutory provisions to the contrary, may be terminated, with or without cause, at the will of either party to the contract of employment. When a contract of employment is of indefinite duration it may be terminated at any time by either party to the contract. “An employment upon a monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will, which either party may at any time determine at his pleasure without liability for breach of contract.” A contract of employment, for no definite period of time and under which an employee receives a fixed sum for each day, week, month or year of service, according to the weight of authority in this country, is an employment at will and is terminable at any time at the pleasure of the employer or the employee.

*Wright v. Standard Ultramarine & Color Co.*, 90 S.E.2d 459, 468, 141 W. Va. 368 (1955) (citations omitted); see also *Cook v. Heck’s, Inc.*, 342 S.E.2d 453, 176 W. Va. 368 (1986); *Minshall v. Health Care & Retirement Corp. of America*, 537 S.E.2d 320, 208 W. Va. 4 (2000); *Hatfield v. Health Management Assocs. of West Virginia*, 672 S.E.2d 395, 223 W. Va. 259 (2008); *Swears v. R.M. Roach & Sons, Inc.*, 696 S.E.2d 1, 225 W. Va. 699 (2010); *Melton v. Precision Laser & Instrument, Inc.*, 2013 WL 210900 (S.D. W. Va. Jan. 18, 2013).

### II. EXCEPTIONS TO AT-WILL EMPLOYMENT

#### A. Implied Contracts

##### 1. Employee Handbooks/Personnel Materials

In *Cook v. Heck’s, Inc.*, 342 S.E.2d 453, 176 W. Va. 368 (1986), Cook worked for Heck’s from 1960 through 1977, at which time she went to work for a wholly-owned subsidiary of Heck’s, M & W Distributors. She worked at M & W until her

termination in 1983. M & W distributed an employee handbook to its employees. The handbook contained a section entitled “Rules and Discipline Procedures” which contained a list of forty-one separate offenses, together with a list of possible penalties for first, second or third infractions ranging from verbal warning to discharge.

Subsequent to the termination of her husband’s employment, who had been the president of M & W, Cook was terminated. The only reason given was that it was “in the best interests of the company.” Apparently, the Cooks were terminated based on suspicions that their association with a former officer of the corporation was for the purpose of going into competition with Heck’s.

Cook sued for breach of the provisions of the employee handbook. The trial court granted Heck’s motion for directed verdict at the close of Cook’s case-in-chief and an appeal followed. The West Virginia Supreme Court of Appeals reversed the directed verdict, and held:

We conclude that a promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee’s continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer’s promise binding and enforceable.

The inclusion in the handbook of specified discipline for violations of particular rules accompanied by a statement that the disciplinary rules constitute a complete list is prima facie evidence of an offer for a unilateral contract of employment modifying the right of the employer to discharge without cause.

*Cook, 342 S.E.2d at 460 (citations omitted).*

The court left to the jury, on remand, the issue of whether the handbook applied to Cook, and if so, whether M & W breached the provisions of the handbook.

## 2. Provisions Regarding Fair Treatment

There is no statutory or case law on provisions regarding fair treatment in the employment context.

## 3. Disclaimers

An employer may protect itself from being bound by statements made in an employee handbook by having each prospective employee acknowledge in his employment application that the employment is for no definite period and by providing in the employment handbook that the handbook’s provisions are not exclusive. *Suter v. Harsco, 403 S.E.2d 751, 752, 184 W. Va. 734, 735 (1991); see also Dent v. Fruth, 453 S.E.2d 340, 192 W. Va. 506 (1994).*

An employer may protect itself from being bound by any and all statements in an employee handbook by placing a clear and prominent disclaimer to that effect in the handbook itself. *Suter, 403 S.E.2d at 752.*

To be effective, an employee handbook disclaimer must state that: (1) the employees are employees “at will” and can be terminated at any time; and (2) the handbook is not a contract. *Dent v. Fruth*, 453 S.E.2d 340, 192 W. Va. 506 (1994). It is not enough to have general disclaimer statements to the effect that the information in the handbook is for information only and is not to be construed as a promise or contract, that the handbook is composed of general statements of company policy which may be modified by the employer at any time and should not be considered as a contract, implied or otherwise. *Id.*

#### 4. Implied Covenants of Good Faith and Fair Dealing

West Virginia does not recognize the implied covenant of good faith and fair dealing in the context of an at-will employment contract. See *Miller v. Massachusetts Mut. Life. Ins. Co.*, 455 S.E.2d 799, 193 W. Va. 240 (1995); see also *Hatfield v. Health Management Assocs. of West Virginia, Inc.*, 672 S.E.2d 395, 223 W. Va. 259 (2008).

#### B. Public Policy Exceptions

##### 1. General

See discussion below, “Exercising a Legal Right.”

##### 2. Exercising a Legal Right

In *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717, 184 W. Va. 700 (1991), Powell was employed by Cablevision as a chief installer from February 1983 until October 1986. His duties included climbing utility poles and running cable lines from the poles to homes. On May 22, 1986, Powell injured his heel when he had to jump because the pole he was on began to fall. He began receiving workers' compensation benefits and was unable to perform any job unless it permitted him to keep his foot elevated. After Powell was released to return to work on October 6, 1986, Cablevision terminated him and refused to rehire him.

Powell filed suit alleging that he had been fired in retaliation for filing a workers' compensation claim. Powell prevailed and Cablevision appealed. The Supreme Court of Appeals of West Virginia affirmed the decision, stating that:

[W]e hold that in order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1 [the Workers' Compensation Act], the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

*Powell*, 403 S.E.2d at 721 (footnote omitted).

The court held that Powell had proved a prima facie case. A letter from the employer to Powell indicated that Powell was being discharged because of his compensable injury which the court deemed sufficient to support the jury verdict. Id. at 724.

### 3. Refusing to Violate the Law

West Virginia courts apparently have not expressly recognized a public policy exception to at-will employment for refusing to violate the law. However, in *Swears v. R.M. Roach & Sons, Inc.*, 696 S.E.2d 1, 225 W. Va. 699 (2010), the Supreme Court noted in dicta that “cases that have reviewed assertions of criminal conduct have found a substantial public policy violation to exist only when the claimant was terminated for refusing to engage in illegal activity.” *Id.* at 8 n.9 (citing *Lilly v. Overnight Transp. Co.*, 425 S.E.2d 214, 188 W. Va. 538 (1992); *Cordle v. General Hugh Mercer Corp.* 325 S.E.2d 111, 174 W. Va. 321 (1984); *Vermillion v. AAA Pro Moving & Storage*, 146 Ariz. 215, 704 P.2d 1360 (Ct. App. 1985).

### 4. Exposing Illegal Activity (Whistleblowers)

Under West Virginia’s whistleblower’s law, no employee may be the subject of retaliation for reporting wrongdoing or waste, or for participating in proceedings under the law. W. Va. Code § 6C-1-3 (2002).

In *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270, 162 W. Va. 116 (1978), Harless alleged that he was discharged in retaliation for his efforts to require his employer to operate in compliance with the state and federal consumer credit and protection laws. Harless became aware that the bank was intentionally and illegally overcharging customers and did not make proper rebates. He reported the activities to the vice-presidents of the bank and was demoted and then terminated. Harless claimed that his termination was due to the assistance he gave the attorneys and auditors investigating the alleged illegal activities. Although the trial court found that this did not state a cause of action, the Supreme Court of West Virginia reversed, stating that:

[w]e conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

*Id.* at 275 (footnote omitted).

The court held that the legislature intended to protect consumers from fraud and that discharging an employee for attempting to uphold this public policy gave rise to a cause of action for damages.

Moreover, an employee who alleges that he or she was discharged for reporting the employer’s violations of a permit issued under authority of the West Virginia Water Pollution Control Act (W. Va. Code §§ 22-11-1 to 30), and for making complaints to his or her employer about those permit violations, has established a prima facie case that the employer’s motivation for discharging the employee was to

contravene substantial public policy. Syl. Pt. 5, *Frohnafel v. ArcelorMittal USA LLC*, 772 S.E.2d 350, 235 W. Va. 165 (2015).

Practitioners should also be aware of section 22A-1-22 of the West Virginia Code, part of the West Virginia Mine Safety Act, which provides that no person may be discharged or otherwise discriminated against for reporting violations of state mine safety laws or regulations.

### III. CONSTRUCTIVE DISCHARGE

In *Slack v. Kanawha County Housing & Redevelopment Authority*, 423 S.E.2d 547, 188 W. Va. 144 (1992), Slack began working for the Kanawha County Housing and Redevelopment Authority (the Authority) in August 1983. In April 1984, Slack was promoted to manager of a program designed to provide for the rehabilitation of existing housing for rental by low-income families. In the summer of 1985, Slack became aware that the Executive Director, Vinson, owned an interest in a private company which managed some properties subsidized by Authority funds. When Slack confronted Vinson, she was told to mind her own business. Vinson was fired as a result of information supplied by Slack. Over the next several months, Slack became concerned that there were electronic listening devices in her office. In August 1987, she took sick leave and upon her return was transferred to the position of Public Housing Manager. Slack opposed the transfer but was given no alternative. She tendered her resignation on September 17, 1987. In 1989, federal investigators discovered that Vinson had in fact placed a listening device in Slack's office.

On September 15, 1989, Slack filed suit against the Authority alleging, *inter alia*, that she had been constructively discharged by being forced to transfer to an undesirable position which forced her to quit. The Supreme Court of Appeals of West Virginia reversed the jury verdict in favor of the Authority on the retaliatory discharge claim due to a faulty jury instruction. The court first explained the formulation of a constructive discharge claim:

Typically, in federal cases, the constructive discharge cause of action arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment.

There appears to be no disagreement that one of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions.

*Slack*, 423 S.E.2d at 556 (citations omitted).

The court went on to explain the elements of a constructive discharge in a case of retaliatory discharge:

Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to those facts that gave rise to the retaliatory discharge.

With regard to the constructive discharge aspect of this case, we adopt the majority view that in order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

*Id.* at 558.

The court reversed the decision because the jury instruction erroneously required the plaintiff to establish that the Authority's actions were taken with a specific intent to cause her to quit. Id.

#### IV. WRITTEN AGREEMENTS

##### A. Standard "For Cause" Termination

In *Benson v. AJR, Inc.*, 599 S.E.2d 747, 215 W. Va. 324 (2004), Benson had an eight year employment contract with the employer, requiring the employer to continue paying Benson his salary in the absence of three specified conditions: (1) dishonesty; (2) conviction of felony; and (3) voluntary termination of the agreement by Benson. Prior to this, Benson failed a drug test. The employer conducted meetings with various employees, inquiring whether anyone was aware of an employee who was using illegal drugs or who was arriving at work with illegal drugs or alcohol in their system. Benson attended one of these meetings and did not respond to the question despite personal knowledge that his drug test would come back positive. Benson was terminated under the dishonesty provision in his contract.

Benson filed a lawsuit alleging breach of contract. The trial court granted the employer summary judgment. Benson appealed. The West Virginia Supreme Court of Appeals reversed and remanded the case to the trial court. The Supreme Court held that:

[i]n marked contrast to the trial court's willingness to define the term "dishonesty" within the meaning of the employment contract at issue, we recognize the futility of attempting to fashion a "one size fits all" definition for such term. Dishonesty, like any term that has significance in a given contract, must be defined based on the subject matter of the contract and the intent of the document's drafters.

*Benson*, 599 S.E.2d at 750-51 (citations omitted).

The court stated that "[t]he lower court appears to have assumed that upon finding conduct that qualified dishonest, this case could be resolved solely on legal grounds without requiring the assistance of a jury." Id. at 751. The trial court reasoned that no reasonable jury could find that Benson failing of the drug test, under all the circumstances present, was not dishonest behavior. The court held that Benson was entitled to have a jury determine the basis for the employer's decision to terminate him from his employment, finding that if he were terminated for drug use rather than "dishonesty," the employment contract would require continuation of his salary. Following remand, the Benson case ultimately ended up at the Supreme Court again. This time, the issue was whether the lower court erred by entering judgment in favor of Benson. The Court upheld the verdict based on the jury's finding that Benson's admitted drug use, not dishonesty, was the basis for his termination. Benson v. AJR, Inc., 698 S.E.2d 638, 226 W. Va. 165

(2010). Under the unambiguous terms of the employment agreement, Benson's drug use did not disqualify him from continued payment of his salary, even though it otherwise might have been a valid reason for terminating his employment. *Id.* at 649.

B. Status of Arbitration Clauses

Under West Virginia law, a written agreement to arbitrate disputes is valid, enforceable, and irrevocable, unless the agreement is found to be invalid, unenforceable, or revocable upon a ground that exists at law or in equity for the revocation of any contract. W. Va. Code § 55-10-8(a) (2015); Syl. Pt. 3, *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 242 W. Va. 372, 836 S.E.2d 23 (2019).

In *State ex rel. Wells v. Matish*, 600 S.E.2d 583, 215 W. Va. 686 (2004), the plaintiff, a local "on air" news personality, was employed pursuant to a written contract of employment which included a broad arbitration provision. He was terminated when his wife (also an on air personality) elected to seek election as West Virginia Secretary of State (due to the potential for a conflict of interest or the appearance of bias on the part of the station). The validity of the arbitration provision was upheld on the basis that the contract represented a negotiated agreement between parties of relatively equal bargaining strength, was not a contract of adhesion, and the parties were of relatively equal sophistication.

In *Saylor v. Wilkes*, 613 S.E.2d 914, 216 W. Va. 766 (2005), the plaintiff was an employee of Ryan's Family Steak Houses, Inc. She was required to sign an agreement to arbitrate employment disputes. Upon termination, she sued claiming constructive discharge and discrimination. The trial court stayed proceedings pending arbitration, and the plaintiff sought a writ of prohibition to prevent enforcement of the stay order. The Supreme Court of Appeals of West Virginia held the agreement to arbitrate invalid under state law as an unconscionable contract of adhesion because the parties lacked equal sophistication, were not equal in bargaining strength, and because the plaintiff was required to sign the agreement as a condition of employment. Furthermore, the arbitration agreement was prepared by the arbitration company for Ryan's pursuant to a contract between the company and Ryan's, but Ryan's did not inform the employee of the terms of the contract or that it had a relationship with the arbitration company. The arbitration agreement was subject to unilateral modification by the arbitration company without notice to or input from the employee. There was also insufficient consideration to support the arbitration agreement because Ryan's was not actually required to submit any employment related disputes to arbitration. The court further ruled that since the agreement to arbitrate was invalid under state law, it was not enforceable pursuant to the Federal Arbitration Act. *See also Pingly v. Perfection Plus Turbo-Dry, LLC*, 746 S.E.2d 544, 231 W. Va. 553 (2013) distinguished by *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 230 W. Va. 281 (2012).

When a trial court is presented with a motion to compel arbitration, the authority of the court (in the absence of a delegation provision) is limited to determining whether the movant has established: (1) the existence of a valid, enforceable arbitration agreement between the parties; and (2) that the parties' dispute falls within the scope of the parties' arbitration agreement. W. Va. Code § 55-10-8(b) (2015); Syl. Pt. 4, *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 242 W. Va. 372, 836 S.E.2d 23 (2019); Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). Additionally, in *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 231 W. Va. 518 (2013), the West Virginia Supreme Court of Appeals established that an "order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." *Id. at Syl. Pt. 1.*

In *Shorts v. AT&T Mobility*, 2013 WL 2995944, No. 11-1649 (W. Va. June 17, 2013) (unpublished Memorandum Decision), the West Virginia Supreme Court of Appeals affirmed a circuit court's order granting AT&T's Motion to Compel Arbitration regarding a dispute arising from a cell phone/wireless service plan contract, which contained a "run-of-the-mill" agreement to arbitrate found in most cell phone service provider/consumer contracts.

In *New v. GameStop, Inc.*, 753 S.E.2d 62, 232 W. Va. 564 (2013), the West Virginia Supreme Court of Appeals upheld an arbitration agreement requiring arbitration of employment or work related disputes. The arbitration agreement was contained in a stand-alone document entitled the "GameStop C.A.R.E.S. Rules." The GameStop C.A.R.E.S. Rules plainly stated it was an arbitration agreement, and that continuing to work for GameStop constituted an agreement by an employee to arbitrate all workplace disputes or claims. *Id.* at 572. Nonetheless, the employee argued that a general disclaimer in the employee handbook that the handbook did not constitute an express or implied contract of employment precluding finding the arbitration agreement to be valid and enforceable. *Id.* The Court disagreed, finding the GameStop C.A.R.E.S. Rules clearly stated it was an arbitration agreement, and a " cursory review " of the handbook indicated it was "merely informative of GameStop's various practices, policies and procedures." *Id.* at 574 (footnote omitted). The language of the GameStop C.A.R.E.S. Rules was "clearly more contractual in nature," and the general disclaimer contained in the employee handbook could not undo this clear contractual language. *Id.* at 574, 575.

## V. ORAL AGREEMENTS

In West Virginia, individuals employed pursuant to an oral agreement in which the expected duration of employment was never specified are considered "at will" employees. *Sayres v. Bauman*, 425 S.E.2d 226, 229, 188 W. Va. 550 (1992) (citations omitted).

### A. Promissory Estoppel

West Virginia has considered promissory estoppel in the context of oral agreements for employment. In *Tiernan v. Charleston Area Medical Center, Inc.*, 575 S.E.2d 618, 212 W. Va. 859 (2002) (*Tiernan II*), Tiernan, a highly skilled nurse who opposed a number of nursing staffing changes proposed by her employer, alleged that her employer discharged her in violation of its oral promise that it would not do so if she spoke to the local newspaper about the proposed changes and her opposition to them. *Tiernan II*, 575 S.E.2d at 624. According to Tiernan, a management representative stated that "nurses had every right to speak to newspaper reporters and that he would not retaliate if they [nurses] chose to speak up." *Id.* Tiernan claimed that she relied on those oral assurances to her detriment. *Id.*

In addressing her estoppel claim, the court found that for Tiernan to prevail she would have to prove:

(1) by clear and convincing evidence, that [the employer] made an express promise to its employees that they would suffer no retaliation or adverse action for speaking out and/or talking to newspaper reporters in connection with the campaign in opposition to nurse staffing and employment policies; and that [the employer] intended or reasonably should have expected that such a promise would be relied and/or acted upon by an employee like



Ms. Tiernan; and (2) by a preponderance of the evidence, that Ms. Tiernan, being without fault herself, reasonably relied on that promise by [the employer], which reliance led to her discharge; and that in discharging Ms. Tiernan, [the employer] breached that promise.

*Id. at 625.* The court determined that Tiernan had presented enough evidence to survive summary judgment on her estoppel claim. *Id.*

Conversely, in *Hatfield v. Health Management Associates of West Virginia*, 672 S.E.2d 395, 223 W. Va. 259 (2008), the West Virginia Supreme Court of Appeals upheld a lower court's order granting summary judgment in favor of an employer in the context of an aggrieved employee's assertion of promissory estoppel/detrimental reliance.

In *Hatfield*, an employee was discharged after only four days of employment. The employee filed a five-count complaint against the employer, alleging, among other things, breach of contract. Specifically, the employee alleged that a letter she received, which stated only the amount of her salary and that she was eligible to participate in the employer's benefits program, but which did not include a duration of employment, constituted an offer of employment. The employee contended that the offer became a contract once she signed the letter and subsequently quit her previous job in relying, to her detriment, on the terms of the letter/alleged agreement. The employer countered by arguing it had the right to terminate her employment at any time because the purported "contract" had no provision addressing the duration of employment. Accordingly, the employer argued, she was considered an "at-will" employee, and could be terminated at any time and for any reason.

Agreeing with the employer's argument, the circuit court ultimately granted summary judgment in the employer's favor, and the employee appealed. In affirming the lower court's order granting summary judgment, the West Virginia Supreme Court of Appeals stated:

Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence . . . . To establish detrimental reliance in the employment context, we have stated: Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice . . . . Putting these two elements together . . . the burden was upon appellant Hatfield to show, (1) by clear and convincing evidence, that the [employer] made an express promise and "should have expected that such promise would be relied and/or acted upon by an employee," and (2) by a preponderance of the evidence that the appellant, through no fault of her own, reasonably relied upon the promise.

*Id. at 402 (internal citations omitted).*

B. Fraud

There is no statutory or case law on fraud as it relates to oral contracts in the employment context.

C. Statute of Frauds

West Virginia has addressed the viability of oral contracts for employment within the context of the statute of frauds, W. Va. Code § 55-1-1. See *Sayres v. Bauman*, 425 S.E.2d 226, 229, 188 W. Va. 550 (1992); *Thompson v. Stuckey*, 300 S.E.2d 295, 171 W. Va. 483 (1983).

VI. DEFAMATION

A. General Rule

In *Bryan v. Massachusetts Mutual Life Insurance Co.*, 364 S.E.2d 786, 178 W. Va. 773 (1987), terminated insurance agents alleged defamation based upon a letter sent by the company to its policy holders regarding Plaintiffs' discharges.

The court discussed the elements of defamation, which include: "(1) defamatory statement; (2) a non-privileged communication to a third person; (3) falsity; (4) reference to plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury." *Id.* at 787 (citation omitted). Applying these elements to the facts in *Bryan* indicated that the content of the letter was truthful and the company's actions did not amount to defamation. Thus, Plaintiffs had no cause of action for defamation.

Statements are defamatory if they tend to reflect shame, contumely, and disgrace upon another. *Hupp v. Sasser*, 490 S.E.2d 880, 200 W. Va. 791 (1997); distinguished by *George Golf Design, Inc. v. Greenbrier Hotel Corp.*, 2012 WL 4748812 (S.D. W. Va. Oct. 4, 2012).

In addition to common law tort claims for defamation, West Virginia has an "insulting words" statute, W. Va. Code § 55-7-2, which makes actionable "[a]ll words which, from their usual construction and common acceptance, are construed as insults and tend to violence and breach of the peace." Originally envisioned as an "anti-dueling" statute, the statute creates a cause of action in two circumstances otherwise unprotected by common law defamation. See *Mauck v. City of Martinsburg*, 280 S.E.2d 216, 219, 167 W. Va. 332 (1981). The first cause of action is "for those insults of an unprivileged nature written or stated to the victim of the insult alone and thus not 'published.'" *Id.* The second cause of action is "for insulting words which tend to violence and to a breach of peace, which would include epithets and racial slurs." *Id.* According to the *Mauck* court, "[t]he first cause of action was never available under the common law of defamation, and the second was available only with proof of special damages." *Id.*, (citing William Lloyd Prosser, *Handbook of the Law of Torts*, §§ 112 and 113 (4<sup>th</sup> ed. 1971)). Except for these two distinctions, "the substantive law of the statute is identical to that of common law defamation." *Id.*

The insulting words statute has been asserted in employment cases, most notably in connection with termination letters. However, West Virginia courts have been reluctant to find the statute operative in these circumstances. See *Rice v. Cmty. Health Ass'n*, 40 F.Supp.2d 783, 787 (S.D. W. Va. 1998) (finding no violation of the insulting words statute); *Mauck*, 280 S.E.2d 216 (finding no violation of the insulting words statute based on existence of qualified privilege). The *Rice* court aptly described the concern with applying

the insulting words statute in employment cases, stating that: “[T]he language of the [termination] letter, while surely disturbing to Plaintiff, is not composed of ‘words which, from their usual construction and common acceptance, are construed as insults and tend to violence and breach of the peace.’ Were this Court to hold otherwise, every unfavorable employee evaluation and termination notice would be actionable under the insulting words statute.” Rice, 40 F.Supp.2d at 787.

West Virginia Code also provides immunity to an employer that discloses “job-related information” about a current or former employee. W. Va. Code § 55-7-18a. Any employer, or its designated agent, that discloses job-related information “that may be reasonably considered adverse about a former or current employee to a prospective employer of the former or current employee is presumed to be acting in good faith and is immune from civil liability for the disclosure . . .” as long as the disclosure is in writing and a copy is provided to the current or former employee at the time of disclosure. W. Va. Code § 55-7-18a(a). This presumption of good faith can be rebutted by proving by a preponderance of the evidence that the information disclosed was: (1) knowingly false; (2) disclosed with reckless disregard for the truth; (3) deliberately misleading; (4) provided with a malicious purpose; or (5) provided in violation of a nondisclosure agreement or applicable law. W. Va. Code § 55-7-18a(b). “Job-related information”, for purposes of the statute, means information about the employee’s education, training, experience, qualifications, conduct and job performance that is offered for the purpose of providing criteria for evaluating the person’s suitability for employment. W. Va. Code § 55-7-18a(c). If false or misleading information is disclosed, the employer has to provide corrected information upon the request of the current or former employee. W. Va. Code § 55-7-18a(d).

#### 1. Libel

Libel is defamation which is published in a written form as opposed to spoken form. *Greenfield v. Schmidt Baking Co., Inc.*, 485 S.E.2d 391, 199 W. Va. 447 (1997).

#### 2. Slander

See above discussion under Section VI.A., “General Rule.”

#### B. References

There are no relevant cases on the issue of references in the context of defamation. For instructive case law, see the qualified privilege discussion below. *See also Crump v. Beckley Newspapers*, 320 S.E.2d 70, 173 W. Va. 699 (1984) (indirectly discussing statements made to prospective employers).

“Reference” cases in West Virginia are typically styled as “tortious interference” cases. For a detailed analysis of this tort in the context of an employment reference, *see Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 591, 203 W. Va. 135 (1998), which is discussed *infra* in Section IX.B., “Tortious Interference with Business/Contractual Relations.”

#### C. Privileges

West Virginia recognizes privilege as a defense to defamation. *See Rice v. Rose & Atkinson*, 176 F.Supp.2d 585, 592 n.6 (S.D. W. Va. 2001). Privilege may be either absolute or qualified.

Absolute privilege in West Virginia is limited to legislative, judicial and quasi-judicial proceedings and other acts of the state. *Porter v. Eyster*, 294 F.2d 613, 617 (4<sup>th</sup> Cir. 1961). Absolute privilege does not extend to inferior officers and boards, who in the performance of their duties, are only entitled to the protection of a qualified privilege. *Id.*, citing *City of Mullins v. Davidson*, 57 S.E.2d 1, 133 W. Va. 557 (1949) (addressing the statement of a policeman who accused a citizen of illegal conduct); *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941) (addressing statement of a United States Marshal in explanation of the dismissal of certain deputies).

“A qualified privilege exists when a person publishes a statement in good faith about a subject in which he had an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter.” *Mauck v. City of Martinsburg*, 280 S.E.2d 216, 221, 167 W. Va. 332, 338 (1981) (upholding qualified privilege in connection with a termination letter). “[A] defendant’s conduct is subject to a qualified privilege when he acts to protect or advance his own legitimate interests, the legitimate interests of the others or the legitimate interests of the public.” *Dzinglski v. Weirton Steel Corp.*, 445 S.E.2d 219, 227, 191 W. Va. 278, 286 (1994), citing *Crump v. Beckley Newspapers*, 320 S.E.2d 70, 173 W. Va. 699 (1984)).

The qualified privilege extends to workplace investigations of impropriety. *Dzinglski v. Weirton Steel Corp.*, 445 S.E.2d at 227 (citing defamation cases on qualified privilege in analyzing plaintiff’s tort of outrage claim). While not a defamation case, the Dzinglski case is instructive on the availability of qualified privilege and publication in the context of a workplace investigation.

#### D. Other Defenses

##### 1. Truth

Truth is an absolute defense to defamation. *See Hupp v. Sasser*, 490 S.E.2d 880, 885, 200 W. Va. 791, 796 (1997); *see also* W. Va. Const. Art. 3, § 8 (1872) (“In prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury, that the matter charged as libelous, is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant.”).

##### 2. No Publication

Publication is an essential element of a defamation claim. *See Bryan v. Mass. Mut. Life Ins. Co.*, 364 S.E.2d 786, 178 W. Va. 773 (1987). The “no publication” defense can arise in a number of employment situations. For instance, in *Rice v. Community Health Association*, 40 F.Supp.2d 783 (S.D. W. Va. 1998), Plaintiff asserted a number of defamation claims, one of which was based on a termination letter from his employer. The court held that, because only he and the employer had received the letter, there had been no publication to a third party. *Id.* at 785.

##### 3. Self-Publication

In *Rice v. Community Health Association*, 40 F.Supp.2d 783 (S.D. W. Va. 1998), the court rejected the plaintiff/former employee’s theory of compelled self-publication, which was predicated on the argument that plaintiff would be asked throughout his life about his termination by the defendant, thus forcing him to publish the alleged defamatory statements on an ongoing basis. *Id.* at 786. In rejecting the

plaintiff's theory, the court held that if it were to permit self-publication in his case, then "the theory of self-publication might visit liability for defamation on every . . . employer each time a job applicant is rejected." *Id.* at 786 (quoting *DeLeon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1237 (4<sup>th</sup> Cir. 1989)).

#### 4. Invited Libel

There are no relevant cases on invited libel as a defense to a claim of defamation in the employment context.

#### 5. Opinion

Adopting the United States Supreme Court's standard for opinion, as determined in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court of Appeals of West Virginia, in *Maynard v. Daily Gazette Co.*, 447 S.E.2d 293, 191 W. Va. 601 (1994), recognized that a statement of opinion "which does not contain a provably false assertion of fact is entitled to full constitutional protection." *Maynard*, 447 S.E.2d at 294; see also *Hupp v. Sasser*, 490 S.E.2d at 885-86 (discussing *Maynard* and the opinion defense in detail); *Suriano v. Gaughan*, 480 S.E.2d 548, 198 W. Va. 339 (1996); *Hinerman v. Daily Gazette Co., Inc.*, 423 S.E.2d 560, 188 W. Va. 157 (1992) (holding that an opinion is protected, no matter how scurrilous, unless it implies undisclosed defamatory facts).

#### E. Job References and Blacklisting Statutes

West Virginia does not have a blacklisting statute. However, blacklisting has been tacitly recognized as a common law tort in West Virginia. See *Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 598-602, 203 W. Va. 135, 155-59 (1998) (*Starcher, J., dissenting in part and concurring in part*) (discussing blacklisting in terms of tortious interference with business relations); *Id.* at 603 n.1 (*McCluskey, J., concurring*) (stating that "[b]lacklisting has been tacitly recognized as a common law tort in West Virginia," and citing *Harless v. First Nat'l Bank of Fairmont*, 289 S.E.2d 692, 169 W. Va. 673 (1982), for this proposition).

#### F. Non-Disparagement Clauses

There are no relevant cases on non-disparagement clauses in the employment context.

### VII. EMOTIONAL DISTRESS CLAIMS

#### A. Intentional Infliction of Emotional Distress

In *Bine v. Owens*, 542 S.E.2d 842, 208 W. Va. 679 (2000) (citation omitted), the court held that:

[i]n order for plaintiff to prevail on claim for intentional or reckless infliction of emotional distress, four elements must be established: (1) that defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that defendant acted with intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that actions of defendant caused plaintiff to suffer emotional distress; and, (4) that the

emotional distress suffered by plaintiff was so severe that no reasonable person could be expected to endure it.

Id. at 847.

B. Negligent Infliction of Emotional Distress

See preceding entry. There is only one case on the claim of negligent infliction of emotional distress in the employment context – *State ex rel. Maxxim Shared Servs., LLC v. McGraw*, 242 W. Va. 346, 835 S.E.2d 590 (2019). This case held that “an employee cannot recover damages for emotional distress after witnessing an injury to an unrelated co-worker under a claim of negligent infliction of emotional distress.” Id. at Syl. Pt. 4.

VIII. PRIVACY RIGHTS

A. Generally

“An invasion of privacy includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another’s name or likeness; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public.” *Benson v. AJR, Inc.*, 599 S.E.2d 747, 748, 215 W. Va. 324, 325 (2004).

The elements of an invasion of privacy tort are: (1) that there was a public disclosure by the Defendant of facts regarding the Plaintiff; (2) that the facts disclosed were private facts; (3) that the disclosures of such facts is highly offensive and objectionable to a reasonable person sensibilities; and (4) that the public has no legitimate interest in the facts disclosed.

*Davis v. Monsanto Co.*, 627 F.Supp. 418, 421 (S.D. W. Va. 1986).

B. New Hire Processing

Drug and alcohol testing of new, current, or prospective employees is permitted under the West Virginia Safer Workplaces Act. See discussion under Section XII.B, regarding drug testing by private employers.

If an employer does not have a drug and alcohol testing policy that conforms to the requirements of the West Virginia Safer Workplaces Act, then it is generally against public policy in West Virginia for an employer to require an employee to submit to drug testing, because such test has been deemed to portend an invasion of an individual’s right to privacy. *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 185 W. Va. 155 (1990). However, testing not done pursuant to the West Virginia Safer Workplaces Act does not violate public policy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee’s drug usage or while an employee’s job responsibility involves public safety or the safety of others. Id.

Additionally, in *Baughman v. Wal-Mart Stores*, 592 S.E.2d 824, 215 W. Va. 45 (2003), the state Supreme Court ruled that “post offer” testing of applicants for drugs was permissible. In so doing, the court established a distinction between the degree of privacy enjoyed by job applicants and that enjoyed by employees, finding that the expectation of privacy was greater on the part of employees.

1. Eligibility Verification & Reporting Procedures

Employers in West Virginia must follow federal law regarding employment eligibility verification and reporting.

2. Background Checks

West Virginia has no specific laws regarding background checks for employees. West Virginia employers must follow the federal Fair Credit Reporting Act with respect to background checks.

- C. Other Specific Issues

1. Workplace Searches

There is no specific relevant law on workplace searches in the private employment context. For private employer’s conduct in light of an employee’s right to privacy, see discussion below regarding drug testing in the employment context in West Virginia.

There are different considerations for searches of employees in the public employment context. In particular, there are potential Fourth Amendment implications to address. *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010). The Fourth Amendment “guarantees a person’s privacy, dignity, and security against arbitrary and invasive governmental acts, without regard to whether the government actor is investigating crime or performing another function.” *Id.* at 755-56 (quoting *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989)). It applies when the government is acting in the capacity of an employer. *Id.* at 756 (citation omitted). The Fourth Amendment question is analyzed under two different methods, because there is no majority standard. The first method requires a two-step analysis: (1) whether the operational realities of the workplace implicate an employee’s Fourth Amendment constitutional rights; and (2) where the employee has a legitimate expectation of privacy, whether the employer’s intrusion on that expectation was reasonable under all the circumstances. *Id.* at 756-57. The second method assumes that government employees are generally covered by Fourth Amendment protections, but “that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.” *Id.* at 756 (internal quotation and citation omitted).

The specific search at issue in *Quon*, a search of employer provided communication pagers, was reasonable regardless of the Fourth Amendment analysis used. Assuming that *Quon* had a reasonable expectation of privacy, the employer’s warrantless review of *Quon*’s pager communications transcript was reasonable because it was not excessive in scope, it was necessary for a legitimate business purpose (to

determine whether the City's limit on messages was sufficient to meet the City's needs), and the City had a legitimate interest in ensuring that employees were not required to pay for work-related expenses and that the employer was not paying for personal communications. *Id.* at 760-64.

## 2. Electronic Monitoring

West Virginia has several statutes that address electronic monitoring. The West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 through 62-1D-16 (Wiretapping Act), makes it a felony for any person to intentionally intercept any wire, oral or electronic communication; disclose the contents of any wire, oral or electronic communication; or use the contents of any wire, oral or electronic communication illegally obtained in violation of the Wiretapping Act. W. Va. Code § 62-1D-3. In addition to stiff criminal penalties, the Wiretapping Act permits individuals to bring civil lawsuits seeking damages, including actual damages of not less than \$100 for each day of violation, punitive damages, and reasonable attorney's fees and costs of litigation. W. Va. Code §§ 62-1D-12(a)(1)-(3). It is permissible to intercept a communication "where the person [intercepting] is a party to the communication or where one of the parties to the communication has given prior consent . . ." unless the communication is intercepted for purposes of committing a criminal act or tortious act. W. Va. Code § 62-1D-3(e).

At least one employer has been caught within the Wiretapping Act's wide net. In *Bowyer v. HI-LAD, Inc.*, 609 S.E.2d 895, 216 W. Va. 634 (2004), a hotel employee successfully argued that his employer had violated the Wiretapping Act by installing hidden cameras and microphones that permitted the employer to intercept employee and customer oral communications. The communications at issue were intercepted without the consent of the employees, or notice that the surveillance was occurring. *Id.* at 906. The court rejected the employer's argument that the employee worked in a public space and, therefore, had no reasonable expectation of privacy. Rather, according to the court, "[m]ost employees, even those working in 'public' spaces, have a reasonable expectation that their oral communications with other employees or with customers are not going to be recorded by hidden microphones." *Id.* at 907.

In addition to the Wiretapping Act, West Virginia has adopted an electronic surveillance statute aimed specifically at employers. Pursuant to W. Va. Code § 21-3-20, employers are prohibited from operating,

any electronic surveillance device or system, including, but not limited to, the use of a closed circuit television system, a video-recording device, or any combination of those or other electronic devices for the purpose of recording or monitoring the activities of the employees in areas designed for the health or personal comfort of the employees or for safeguarding their possessions, such as rest rooms, shower rooms, locker rooms, dressing rooms and employee lounges.

W. Va. Code § 21-3-20(a). Unlike under the Wiretapping Act, employers who violate section 21-3-20 are guilty of a misdemeanor, and subject to a minimum fine of \$500.00 and a maximum fine of \$2,000.00. W. Va. Code § 21-3-20(b).

The Convenience Food Stores Safety Act, W. Va. Code §§ 21-13-1 through 21-13-3, requires video surveillance in certain circumstances. *See* W. Va. Code § 21-13-3. The surveillance requirement is



predicated on the need to assure the safety of convenience store employees and patrons. W. Va. Code § 21-13-2.

A matter related to the issue of electronic monitoring is employer access to the social networking accounts or profiles of current or prospective employees. In 2016, the West Virginia Legislature enacted W. Va. Code § 21-5G-1 to prohibit an employer from requesting, requiring or coercing an employee or prospective employee to provide his or her personal account information. The statute specifically forbids an employer from requesting, requiring, or coercing an employee or prospective employee to disclose his or her log-in information, or to access his or her account in the employer's presence. W. Va. Code §§ 21-5G-1(a)(1) and (2). An employer is further prohibited from mandating that the employee or prospective employee add the employer or an employment agency to the list of contacts of the employee or prospective employee's personal social networking account. *Id.* at § 21-5G-1(a)(3). Although the statute may seem broad, it is limited to the personal account of the employee or prospective employee, and there are a number of exceptions. There are no prohibitions on: accessing information that is publicly available; requiring disclosure of usernames or passwords for the purpose of accessing an employer issued electronic device; requiring disclosure of usernames or passwords for accessing an account or service provided by the employer as part of the employment relationship or which is used for the employer's business; or requiring the employee to disclose information available on his or her personal account that is relevant to an unauthorized transfer of the employer's proprietary information, confidential information, or financial data. *Id.* at §§ 21-5G-1(b)(1)–(4). An employer may also require the employee to provide specific information regarding a personal account for the purposes of complying with laws, regulations and prohibitions against work-related employee misconduct. *Id.* at § 21-5G-1(b)(6). Additionally, an employer may always prohibit an employee from using his or her personal account during working hours, or for business purposes. *Id.* at § 21-5G-1(b)(5).

### 3. Social Media

Under W. Va. Code § 21-5H-1, an employer is prohibited from doing any of the following:

- (1) Requesting, requiring, or coercing an employee or potential employee to disclose their username, password, or any other authentication information that allows access to the employee or potential employee's personal social media account;
- (2) Requesting, requiring, or coercing an employee or potential employee to access his or her personal social media account in the presence of the employer; or
- (3) Compelling an employee or potential employee to add the employer or an employment agency to the employee or potential employee's list of contacts that enable the contacts to access his or her personal social media account.

Section 21-5H-1 does not prohibit an employer from accessing information about an employee or potential employee that is publicly available; obtaining information necessary to comply with applicable laws, rules or regulations; requiring an employee to disclose a username, password or similar authentication information to access an employer-issued electronic device, or account or service provided by the employer; and obtaining or requiring information from the employee's social media account for the purpose of conducting an investigation or requiring an employee to cooperate in an investigation. *Id.* at §§

21-5H-1(b)(1)-(4) and (6). The employer may also prohibit an employee or potential employee from using a personal account during employment hours, while on the employer's time, or for business purposes. *Id.* at § 21-5H-1(b)(5).

An employer does not violate the statute and has no liability for inadvertently receiving the username, password or any other authentication information for an employee or potential employee's personal social media account through the use of an otherwise lawful technology that monitors the employer's network or employer-provided electronic devices for network security or data confidentiality purposes. *Id.* at § 21-5H-1(c). However, the employer is in violation of the statute if it uses the inadvertently received information, or enables a third party to use that information, to access the employee or potential employee's personal account; or (2) the employer does not delete the information as soon as is reasonably practicable after becoming aware that it had been inadvertently received, unless that information is being retained by the employer in connection with an ongoing investigation of an actual or suspected breach of the computer, network or data security. *Id.*

#### 4. Taping of Employees

See discussion under Section VIII.C.2, "Electronic Monitoring."

#### 5. Release of Personal Information on Employees

There is no specific law regarding the release of personal information on employees.

#### 6. Medical Information

There is no relevant law on medical information in the employment context.

### IX. WORKPLACE SAFETY

#### A. Negligent Hiring

West Virginia recognizes the tort of negligent hiring (also referred to as negligent retention). *McCormick v. W. Va. Dep't of Pub. Safety*, 503 S.E.2d 502, 506, 202 W. Va. 189, 193 (1998); *W. Va. State Police v. Taylor*, 499 S.E.2d 283, 201 W. Va. 554 (1997). The inquiry for negligent hiring or retention liability is:

[W]hen the employee was hired or retained, did the employer conduct a reasonable investigation into the employee's background vis a vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee? Should the employer have reasonably foreseen the risk caused by hiring or retaining an unfit person?

*McCormick*, 503 S.E.2d at 506 (citation omitted). The inquiry focuses on the "nature of the employee's job assignment, duties and responsibilities—with the employers' duty with respect to hiring or retaining an employee increasing, as the risks to third persons associated with a particular job increases." *Id.* at 507 (citing *Pontiacs v. K.M.S. Inves.*, 331 N.W.2d 907, 913 (Minn. 1983)).

B. Negligent Supervision/Retention

See Section IX.A on “Negligent Hiring.”

C. Interplay with Workers’ Comp. Bar

An employer is generally and broadly immune from lawsuit for work-related injuries sustained by its employees. However, the statutory immunity may be lost if the employer acted with “deliberate intention.” This exception may be established in one of two statutory ways. The second of which requires the proof of a specific unsafe working condition (among other elements). Regardless of the type of deliberate intent claim pursued by the plaintiff, the employee, the employee’s representative, or the employee’s dependent must file a workers’ compensation claim as a prerequisite to filing a civil action for “deliberate intention”, unless he or she can establish good cause for not filing the workers’ compensation claim. W. Va. Code § 23-4-2(c).

The first way in which “deliberate intention” may be established requires proof that the employer acted with a conscious, subjective, and deliberate intent to produce the specific result of injury or death to an employee. W. Va. Code § 23-4-2(d)(2)(A). This standard requires a showing of actual, specific intent and is not satisfied by an allegation or proof of: (1) conduct which produces a result that was not specifically intended; (2) conduct which constitutes negligence, regardless of how gross or aggravated; or (3) willful, wanton or reckless misconduct. W. Va. Code § 23-4-2(d)(2)(A).

“Deliberate intention” may also be found if the trier of fact determines, either through specific findings of fact made by the court or jury, that five specific elements are proven: (1) the existence of a specific unsafe working condition which presents a high degree of risk and a strong probability of serious injury or death; (2) that the employer, prior to the injury, had actual knowledge of the specific unsafe working condition and the high degree of risk and strong probability of serious injury or death presented by such condition; (3) that the unsafe working condition was a violation of a law, regulation, rule, or commonly accepted and well known safety standard within the employer’s industry or business; (4) that notwithstanding the existence of the facts as set forth above, the person or persons alleged to have actual knowledge of the specific unsafe working condition nevertheless intentionally exposed the employee to such specific unsafe working condition; and (5) the employee so exposed suffered serious compensable injury or death as a direct and proximate result of such condition. W. Va. Code § 23-4-2(d)(2)(B)(i) – (v). See generally *Mayles v. Shoney’s, Inc.*, 405 S.E.2d 15, 185 W. Va. 88 (W. Va. 1990); *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 161 W. Va. 695 (W. Va. 1978).

Actual knowledge must be specifically proven, and cannot be “deemed” or presumed to exist. W. Va. Code § 23-4-2(d)(2)(B)(ii)(I). The plaintiff/employee also cannot establish actual knowledge by showing what the employee’s immediate supervisor or manager should have known had he or she exercised reasonable care or been more diligent. *Id.* at § 23-4-2(d)(2)(B)(ii)(II). In addition, to prove that the employee’s immediate supervisor or that management knew of prior accidents, near misses, safety complaints, or citations, the plaintiff must present “documentary or other credible evidence.” *Id.* at § 23-4-2(d)(2)(B)(ii)(III).

The safety standard on which the “deliberate intent” claim is based must be a “consensus written rule or standard promulgated by the industry or business of the employer.” *Id.* at § 23-4-2(d)(2)(B)(iii)(I). The state or federal statute, rule or regulation at issue in the claim must be specifically applicable to the work or working condition involved; must be intended to specifically address the alleged hazard involved; and the determination whether the statute, rule or regulation is applicable is a legal issue to be decided by the Judge. *Id.* at § 23-4-2(d)(2)(B)(iii)(II)(a)-(c).

To constitute a “serious compensable injury” for purposes of the five factor test for a “deliberate intent” claim, the plaintiff must prove that the injury meets one of four specific definitions:

- (1) The injury results in at least 13% whole person impairment granted as a final award in a workers’ compensation claim; causes permanent serious disfigurement, permanent loss or significant impairment of function of any bodily organ or system, or objectively verifiable bilateral or multilateral radiculopathy; and is not a physical injury that has no objective medical evidence to support the diagnosis;
- (2) The plaintiff provides written certification by physician that the injury is caused by the unsafe working condition and is likely to cause death within 18 months or less of filing the civil action;
- (3) If the injury is one for which impairment cannot be determined under applicable impairment rules, the injury causes permanent serious disfigurement, permanent loss or significant impairment of bodily organ or system function, or objectively verified bilateral or multilateral radiculopathy; and is not a physical injury that has no objective medical evidence to support the diagnosis; or
- (4) If the condition is occupational pneumoconiosis, the plaintiff provides written certification from a pulmonologist that the injured employee has complicated pneumoconiosis or pulmonary massive fibrosis that has caused at least 15% impairment as confirmed by reproducible ventilatory testing, and the cause of action is filed within one year of the date the employee meets the requirements of this definition.

W. Va. Code § 23-4-2(d)(2)(B)(v)(I) – (IV).

No punitive or exemplary damages may be awarded in a deliberate intent action that is based on the five factor test. W. Va. Code § 23-4-2(d)(2)(C)(ii). The court is required to dismiss an action for deliberate intent on a motion for summary judgment if the plaintiff has failed to prove all five of the factors in this test. *Id.* at § 23-4-2(d)(2)(C)(iii).

D. Firearms in the Workplace

An employer may prohibit the open or concealed carrying of any deadly weapon or firearm on property under the employer’s domain. W. Va. Code § 61-7-14. This applies to employees and non-employees. *Id.*

E. Use of Mobile Devices

There is no specific law applicable to an employee's use of mobile devices.

X. TORT LIABILITYA. Respondeat Superior Liability

The standard for respondeat superior liability for unlawful discrimination, harassment or retaliation differs based on whether or not the perpetrator is a supervisor. Where a "discriminatory act has been committed by an officer or a supervisory employee, an employer may be held liable without showing that the employer knew or reasonably should have known of the misconduct, except where the employee was acting outside the scope of his employment." Syl. Pt. 7, *Paxton v. Crabtree*, 400 S.E.2d 245, 184 W. Va. 237 (1990) (*emphasis added*). This is sometimes roughly referred to as "strict liability," even though it is not true strict liability. See *Hanlon v. Chambers*, 464 S.E.2d 741, 750, 195 W. Va. 99, 108 (1995). Where the alleged perpetrator of the discrimination, harassment, or retaliation is a non-supervisory co-worker, the employer's "liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response." *Hanlon*, 464 S.E.2d at 750.

For all other intentional torts of an employee, the employer may be held liable under respondeat superior if the employee was acting within the scope of employment. Syl. Pt. 5 and 6, *Travis v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 202 W. Va. 369 (1998). The scope of employment standard applies regardless whether or not the employee was a supervisor. *Id.*

B. Tortious Interference with Business/Contractual Relations

To establish a prima facie case of tortious interference with a business relationship in the employment context, a plaintiff must show:

- (1) existence of a contractual or business relationship or expectancy;
- (2) an intentional act of interference by a party outside that relationship or expectancy;
- (3) proof that the interference caused the harm sustained; and
- (4) damages.

*Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 591, 203 W. Va. 135, 148 (1998), citing *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 314 S.E.2d 166, 173 W. Va. 210 (1983).

Once a prima facie case has been established, a defendant may assert the affirmative defenses of justification or privilege. *Tiernan*, 506 S.E.2d at 592 (*citation omitted*). A defendant is not liable for interference that is negligent rather than intentional, or if it proves that the interference was proper. *Id.* Factors that indicate proper interference include legitimate competition between the plaintiff and the defendant, the defendant's financial interest in the induced party's business, the defendant's responsibility

for another's welfare, the defendant's intention to influence another's business policies in which they have an interest, where the defendant gives honest, truthful requested advice, or other similar factors. Id.

An interesting aspect of the tortious interference claim formulation in West Virginia is the defense of giving honest advice. This defense has been examined several times in the context of employment references. In this regard, the court in Tiernan adopted the RESTATEMENT (SECOND) OF TORTS § 772, which states:

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

- (a) truthful information, or
- (b) honest advice within the scope of a request for the advice.

As noted by the *Tiernan* court, section (a) of § 772 provides an "absolute bar to a claim for tortious interference with a business relationship." *Tiernan*, 506 S.E.2d at 592 (adopting § 772 in its entirety and holding that truthful information, regardless of whether it was requested, is an absolute bar to tortious interference claims). For additional discussion on the interplay between the concept of truthful information, interference with contractual relations, and blacklisting, see Section VI.B. on "References," and Section VI.E. on "Blacklisting Statutes."

## XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

### A. General Rule

An employee covenant not to compete is unreasonable on its face if its time or area limitations are excessively broad, or where the covenant appears designed to intimidate employees rather than to protect the employer's business, and a court should hold any such covenant void and unenforceable, and not undertake even a partial enforcement of it, bearing in mind, however, that a standard of 'unreasonable on its face' is to be distinguished from the standard of 'reasonableness' used in inquiries adopted by other authorities to address the minor instances of over breadth to which restrictive covenants are naturally prone.

*Huntington Eye Assoc., Inc. v. LoCascio*, 553 S.E.2d 773, 774, 210 W. Va. 76, 77 (2001) (citation omitted). "An inherently reasonable restrictive covenant is presumptively enforceable in its entirety upon a showing by the employer that he has interests requiring protection from the employee." Id. at 774-75 (citation omitted).

Parties may properly contract for liquidated damages (1) where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case; or (2) where from the nature of the case and tenor of the

agreement, it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties.

Id. at 775 (citation omitted).

“A clause for damages in a contract is a penalty rather than a liquidated damage provision when the amount is grossly disproportional in comparison to the damages actually incurred. This is true even though the provision is denominated as liquidated damages in the contract.” *Id.* (citation omitted).

B. Blue Penciling

See above discussion.

C. Confidentiality Agreements

In cases in which an employer claims an employee has breached a Confidentiality Agreement for his/her disclosure of the employer’s proprietary business information to third party, West Virginia courts have deferred to a jury’s determination as to whether the employee’s conduct constitutes a material breach thereof. *See Barlow v. Hester Industries, Inc., 479 S.E.2d 628, 198 W. Va. 118 (1996).*

D. Trade Secrets Statutes

West Virginia has adopted the Uniform Trade Secrets Act (UTSA), W. Va. Code §§ 47-22-1 through 47-22-10. The UTSA defines a trade secret as:

[I]nformation, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

W. Va. Code § 47-22-1(d).

Actual or threatened misappropriation may be enjoined. W. Va. Code § 47-22-2. Damages for misappropriation can include both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation. W. Va. Code § 47-22-3. Where misappropriation is willful, the court may award double damages, id. If a claim of misappropriation is made in bad faith or if willful and malicious misappropriation occurs, the court may award reasonable attorneys’ fees to the prevailing party. W. Va. Code § 47-22-4.

“An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered.” W. Va. Code § 47-22-6.

In addition, The West Virginia Computer Crime and Abuse Act (“WVCA”), W. Va. Code §§ 61-3C-1 through 61-3C-14 generally prohibits certain conduct pertaining to the unauthorized use or disclosure of computer-related equipment and information. Criminal and civil penalties attach under the WVCA.

E. Fiduciary Duty and their Considerations

None reported at this time.

XII. DRUG TESTING LAWS

A. Public Employers

Although West Virginia does not have a statute directly related to drug testing by public employers, the West Virginia Alcohol and Drug-Free Workplace Act requires any contractor or subcontractor working on a public improvement project (i.e. public buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia) to have and implement a drug-free workplace policy that requires drug and alcohol testing. W. Va. Code § 21-1D-1, et seq.

In addition, the drug testing of public employees “must conform with the requirements of the Fourth Amendment. . . .” *American Federation of Teachers-West Virginia, AFL-CIO v. Kanawha Co. Board of Education*, 529 F.Supp.2d 883, 892 (S.D. W. Va. Jan. 8, 2009). A public employer therefore cannot conduct an unreasonable search (drug test) of an employee in violation of the Fourth Amendment. *Id.* Generally, there must be some “individualized suspicion of wrongdoing” to justify the drug test, but suspicionless testing may be valid when performed for “special needs, beyond the normal need for law enforcement.” *Id.* (quotation and citation omitted). Moreover, where a safety interest is identified as the justification for the drug testing, the danger to the safety interest has to be concrete. *Id. at 897 (citation omitted)*. To justify suspicionless drug testing, the government employer must demonstrate “that the government’s interest in the special need outweighs the individual’s privacy interest . . . .” *Id. at 898*.

B. Private Employers

The West Virginia Safer Workplaces Act allows an employer to test employees or prospective employees for drugs or alcohol, as a condition of continued employment or hiring. W. Va. Code § 21-3E-4. If the testing is done according to the safeguards and requirements of the Act, the employer is immune to legal claims for acting in good faith on the results of a drug or alcohol test. *Id.*; W. Va. Code § 21-3E-11. Moreover, an employee or prospective employee does not have a cause of action against an employer with respect to its drug or alcohol testing program if the program is compliant with the requirements of the Act, unless the employer’s action was based on a false positive test result, the employer had actual knowledge that the result was false, and the employer ignored the correct test result because of disregard for the truth and/or the willful intent to deceive or be deceived. W. Va. Code § 21-3E-12.



The Act requires that the employer set forth its drug testing policy in a written policy that is distributed to every employee subject to testing, and made available to every prospective employee. W. Va. Code § 21-5E-8(a). The employer must also provide, upon request and/or where appropriate, information to employees regarding any counseling, employee assistance, rehabilitation, or other drug abuse treatment programs that the employer may offer. W. Va. Code § 21-5E-8(b).

Testing under the Act may be for the following reasons:

1. Deterrence and/or detection of possible illicit drug use, possession, sale, conveyance, or distribution, or manufacture, on or off the job;
2. Deterrence and/or detection of abuse of alcohol or prescription drugs;
3. Investigating possible individual employee impairment;
4. Investigation of accidents in the workplace or incidents of workplace theft or other employee misconduct;
5. Maintaining the safety of employees, customers, clients, and the public;
6. Maintaining productivity, quality of products or services, or security; and
7. Any other “legitimate drug abuse prevention and/or treatment purposes . . . .”

W. Va. Code § 21-5E-8(c)(1)-(5).

An employer may impose a range of disciplinary actions against an employee (or prospective employee) for a confirmed positive drug or alcohol test result that violates the employer’s written policy, or for the refusal to provide a testing sample. W. Va. Code §§ 21-3E-9 and 10.

If the employer does not have a drug and alcohol testing program that complies with the requirements of the West Virginia Safer Workplaces Act, the employer is permitted to conduct drug or alcohol testing based upon reasonable good faith objective suspicion of an employee’s drug usage or while an employee’s job responsibility involves public safety or the safety of others. *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 185 W. Va. 155 (1990).

It is also notable that the West Virginia Workers’ Compensation Act, at W. Va. Code § 23-4-2(a), prohibits post accident drug testing unless employer has “a reasonable and good faith objective suspicion of the employee’s intoxication. . . .” However, it appears that this prohibition would be preempted by the West Virginia Safer Workplaces Act. See W. Va. Code § 21-5E-8(c)(4).

### **XIII. STATE ANTI-DISCRIMINATION STATUTE**

The West Virginia Human Rights Act (“WVHRA”), W. Va. Code §§ 5-11-1 through 5-11-21, reflects West Virginia’s commitment to providing an equal opportunity in employment to all of its citizens. W. Va. Code § 5-11-2. (The Act also addresses public accommodation for disabilities and fair housing.)

Equal opportunity in the area of employment is “hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability.” W. Va. Code § 5-11-2.

A. Employers/Employees Covered

State government and private employers employing 12 or more persons within West Virginia for 20 or more calendar weeks in the calendar year in which the act of discrimination allegedly took place, or in the preceding calendar year, are covered by the WVHRA. W. Va. Code § 5-11-3(d). However, the definition of employer does not encompass private clubs. Id.; see also W. Va. Code § 5-11-19 (definition of private club).

While the statute purports to cover only entities employing 12 or more persons within West Virginia, our Supreme Court has held that the statute announces a substantial public policy of prohibiting discrimination against persons in the protected categories, and that employers with fewer than 12 employees violate this public policy through discriminatory actions. Therefore, the prohibitions announced in the statute effectively apply to all employers within the state. *Williamson v. Greene*, 490 S.E.2d 23, 200 W. Va. 421 (1997).

The definition of “employee” does not include any individual employed by his or her parents, spouse or child. W. Va. Code § 5-11-3(e).

B. Types of Conduct Prohibited

Except where based upon a bone fide occupational qualification or applicable federal or state security regulations, employers are not permitted to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if the individual is blind or disabled. W. Va. Code. § 5-11-9(1). However, observing the provisions of any bona fide pension, retirement, group or employee insurance or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of the WVHRA will not constitute a discriminatory practice. *Id.*

No employer, employment agency or labor organization, prior to an individual’s employment or admission to membership, may:

(A) [e]licit any information or make or keep a record of or use any form of application or application blank containing questions or entries concerning the race, religion, color, national origin, ancestry, sex or age of any applicant for employment or membership; (B) print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specifications or discrimination based upon race, religion, color, national origin, ancestry, sex, disability or age; or (C) deny or limit, through a quota system, employment or membership because of race, religion, color, national origin, ancestry, sex, age, blindness or disability.

W. Va. Code § 5-11-9(2). The WVHRA also prohibits discrimination with regard to training, guidance, and apprenticeship programs. W. Va. Code § 5-11-9(4).

The WVHRA prohibits retaliation, in any form of reprisal or discrimination under the Act, against any person “because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.” W. Va. Code § 5-11-9(7).

### C. Administrative Requirements

The West Virginia Human Rights Commission (“Commission”) is charged with receiving, investigating, and passing upon complaints alleging discrimination in employment because of race, religion, color, national origin, ancestry, sex, age, blindness or disability. W. Va. Code § 5-11-8(c).

Section 5-11-10 of the West Virginia Code provides extensive administrative requirements for the handling of complaints filed with the Commission. The following are some of the broad points of which practitioners should be aware.

Individuals claiming to be aggrieved under the WVHRA are required to file and sign a verified complaint with the Commission within one year after the alleged act of discrimination. W. Va. Code § 5-11-10.

If conciliation and persuasion efforts fail, the Commission will conduct an administrative hearing in the county where the employer resides or transacts business. W. Va. Code § 5-11-10. If, after such hearing and consideration of all of the testimony, evidence and record in the case, the Commission determines that an employer has not engaged in unlawful discrimination, it will issue a written order dismissing the complaint and deliver a copy of the order to the complainant, the respondent, the Attorney General and to such other public officers as the Commission may deem proper. *Id.*

Conversely, if the Commission determines that unlawful discrimination has occurred, it will issue a cease and desist order and may take affirmative action, including, but not limited to, requiring hiring, reinstatement or upgrading of employees, with or without back pay. *Id.*

The WVHRA provides an appeal procedure from Commission decisions. W. Va. Code § 5-11-11.

A right to sue notice will be issued upon: (1) The dismissal of the complaint for any reason other than an adjudication of the merits of the case; or (2) the request of a complainant at any time after the timely filing of the complaint in any case which has not been determined on its merits or has not resulted in a conciliation agreement to which the complainant is a party. W. Va. Code § 5-11-13. Upon the issuance of a right to sue letter, the Commission is entitled to dismiss the complaint. *Id.* Service of the notice of right to sue is complete upon mailing. *Id.* Upon receipt of the notice of right to sue, the statute provides that complainant may institute a civil action with ninety (90) days. *Id.* Inasmuch as dismissal is not mandatory, Administrative Law Judges who issue a Notice of Right To Sue at the request of the Complainant prior to a determination on the merits may “stay” the proceedings before the Commission rather than dismissing the Complaint on the basis that the case should remain open until a) the Complainant files a civil action in the appropriate Circuit Court, or b) requests that the Commission resume processing the case.

Administrative Law Judges who “stay” the proceedings before the Commission may provide that the civil action can be filed either within the statutory 90 day period or the 2 year civil statute of limitations applicable to cases under the Act. Where the Administrative Law Judge issues such a “stay,” he or she may also issue “evidence preservation letters” directed to third parties which are believed to be in possession of documents or other evidence which should be preserved until such time as the matter is resolved through a civil action, completion of processing by the Commission, or settlement. (See e.g., *Michael Bayes v. Mountaineer Gas Company*, WVHRC Docket No. ED-34-18.)

D. Remedies Available

If the complainant uses the complaint process and procedure provided by the WVHRA -- that is, the complainant first proceeds with a complaint before the Human Rights Commission -- the WVHRA provides the exclusive remedy. W. Va. Code § 5-11-13(a). If the complainant institutes any action based on an alleged act of discrimination covered by the WVHRA without resorting to the WVHRA’s complaint procedures initially, the complainant cannot subsequently invoke the complaint procedure of the WVHRA. Id.

In any court action in which the court finds that unlawful discrimination has occurred, the court is permitted to order injunctive relief, reinstatement or hiring, granting of back pay or any other legal or equitable relief as the court deems appropriate. Additionally, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorneys’ fees and witness fees, to the complainant. W. Va. Code § 5-11-13(c).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged or otherwise discriminated against for serving on jury duty. W. Va. Code § 61-5-25a (2002).

B. Voting

There is no law for leave for voting in the employment context.

C. Family/Medical Leave

While there is not a state law regulating family and medical leave for private employers in West Virginia, full-time state governmental and school board employees, who have worked for a period of at least 12 weeks, are entitled to 12 weeks of unpaid family leave when certain conditions occur within the family structure. W. Va. Code §§ 21-5D-1 through 21-5D-9. Leave is granted for the birth of a child, the placement of a child by adoption, or to care for an immediate family member or dependent who has a serious health condition. W. Va. Code § 21-5D-4. Following completion of family leave, the employee must be returned to his or her former position. W. Va. Code § 21-5D-6.

D. Pregnancy/Paternity/Maternity Leave

West Virginia does not have a law specifically addressing pregnancy/paternity/maternity, although there is a state family and medical leave law. See Section XIV.C on “Family/Medical Leave.”

E. Day of Rest Statutes

West Virginia does not have a day of rest statute.

F. Military Leave

There is no state military leave law applicable in the private employment arena in West Virginia. However, practitioners should be aware that state government employees, who are members of the national guard or armed forces reserves, are entitled to military leaves of absence without loss of pay, status or efficiency rating, on the days during which they are ordered, by properly designated authority, to be engaged in drills, parades or other duty, during business hours, field training or active service of the state, for a maximum period of 30 working days in any one calendar year. W. Va. Code § 15-1F-1.

G. Sick Leave

West Virginia does not have a sick leave law applicable to private sector employees. However, all full-time state governmental employees accrue one and one-half days of sick leave per month. W. Va. Code St. R. § 143-1-14.4.a.

H. Domestic Violence Leave

West Virginia does not have a specific statute providing for leave in domestic violence situations.

I. Other Leave Laws

West Virginia does not have any other leave laws not already discussed in this section.

**XV. STATE WAGE AND HOUR LAWS**

A. Current Minimum Wage in State

West Virginia’s Minimum Wage and Maximum Hour Law, W. Va. Code §§ 21-5C-1 through 21-5C-11, requires employers with six or more employees to pay a minimum of \$8.75 per hour and to pay overtime at a rate of one and one-half times the regular hourly rate of pay for all hours worked over 40 in a seven consecutive day period. W. Va. Code § 21-5C-2(a)(5). If the federal minimum exceeds the state minimum wage, the state minimum automatically becomes equal to the federal rate. W. Va. Code § 21-5C-2(a)(6). The state rate would thereafter be adjusted consistent with increases to the federal minimum wage. Id.

B. Deductions from Pay

An employer is permitted to take all deductions required by law (such as for taxes and social security, and amounts authorized *in writing* by the employee for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance. W. Va. Code § 21-5-1(g). However, beginning June 17, 2021, no deductions or assignments of earnings are allowed for union, labor organization, or club dues or fees from compensation or wages paid to government employees. W. Va. Code §§ 7-5-25, 8-5-12(c), 12-3-13b(c), and 18-4-9(b).

C. Overtime Rules

Generally, an employee must be paid overtime for any hours in excess of 40 in a workweek, at a rate of at least one and one-half times the regular rate at which he or she is employed. W. Va. Code § 21-5C-3(a). Employees of county and municipal governments may receive, in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment in excess of forty hours in a workweek. *Id.* 21-5C-3(f)(1).

D. Time for Payment Upon Termination

The Wage Payment and Collection Act, W. Va. Code §§ 21-5-1 through 21-5-5, dictates how employees are paid in West Virginia. The Act requires most employers to meet their payroll at least twice every month, and with no more than nineteen days between paydays, unless provided otherwise by a special agreement. W. Va. Code § 21-5-3(a). The Act also prohibits unauthorized payroll assignments (or deductions) unless the employee has agreed to the deduction through a legal wage assignment. W. Va. Code §§ 21-5-3(a) and (e).

Special consideration is given to departing employees under the Act. Whenever an employee is discharged, quits or resigns, the employee's wages due for work performed prior to the end of employment must be paid on or before the next regular payday on which the wages would otherwise be due and payable. W. Va. Code § 21-5-4(b) However, fringe benefits that are subject to an agreement between the employer and the employee that provides for payment at a future date or upon meeting additional conditions are to be paid in accordance with the terms of the agreement. *Id.* When the work of the employee is suspended due to a labor dispute, or when the employee is laid off, the employee's wages must be paid no later than the next regular payday. W. Va. Code § 21-5-4(d) (2015).

The term "wages" has been defined to include all payments subject to calculation at the time of termination including accrued vacation, sick leave or similar benefits. W. Va. Code § 21-5-1(c). The Act does not require that fringe benefits be calculated in a manner inconsistent with any employment agreement that does not contradict the provisions of the Wage Payment and Collection Act. *Id.* However, an employer may exempt such accrued entitlements from the statutory definition if it has specifically advised employees that such accrued benefits may not be paid in cash at termination. Such notice may be included in employee handbooks or in any contract of employment with the employee. The notice must specifically advise the employee, however, that these benefits may not be converted to cash at termination, and that the employee may not be paid cash "in lieu" of these benefits. *See Gress v. Petersburg Foods LLC*, 592 S.E.2d 811, 215 W. Va. 32 (2003); *Walsh v. Jefferson Mem'l Hosp.*, 589 S.E.2d 527, 214 W. Va. 385 (2003); *Howell v. City of Princeton*, 559 S.E.2d 424, 210 W. Va. 735 (2001). A consistently applied unwritten

policy may also allow an employer to exempt fringe benefits from payment at termination or other separation of employment. *Adkins v. American Mine Research, Inc.*, 765 S.E.2d 217 (2014). The preferred course of action of course is to put the notice or policy in writing.

The Act also provides a penalty of two (2) times unpaid wages as liquidated damages for violation, and renders officers potentially liable on a personal basis. W. Va. Code § 21-5-4(e) (2015). Liquidated damages are not available in claims for wages due as a result of an employee's misclassification as exempt under state or federal wage and hour laws. *Id.*

Importantly, there is a statutory "safe harbor" protecting an employer from liability for liquidated damages. Specifically, an employee may not bring an action for liquidated damages or attorney's fees without first making a written demand to the employer for the payment of any alleged underpayment or nonpayment of wages. W. Va. Code § 21-5-4A(a). Upon receiving the written demand, the employer has seven calendar days to correct the alleged underpayment or nonpayment of the wages due. *Id.* If the employer does not correct the alleged underpayment or nonpayment within the seven day period, the employee may seek liquidated damages and attorney's fees. *Id.*

In order to take advantage of the "safe harbor", the employer must notify the employee in writing, at the time of separation or with issuance of the final paycheck, of the identity of the employer's authorized representative and where the written demand should be sent by email and regular mail. W. Va. Code § 21-5-4A(a). If the employer does not provide this written notice, then the employee is not required to send a written demand before seeking liquidated damages and attorney's fees. *Id.*

#### E. Breaks and Meal Periods

West Virginia imposes specific meal break requirements. During the course of a workday of six or more hours, all employees are entitled to at least 20 minutes for meal breaks at times reasonably designated by the employer. W. Va. Code § 21-3-10a. The meal break requirement applies in all situations where employees are not afforded necessary breaks and/or permitted to eat meals while working. *Id.*

#### F. Employee Scheduling Laws

There generally are no employee scheduling laws in West Virginia. It is noted, however, that there is a specific law prohibiting an employer from requiring a nurse to work overtime if the nurse believes that doing so would jeopardize the safety of patients or employees. W. Va. Code § 21-5F-3. See also Section XV.G.13.

### XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

#### A. Smoking in Workplace

Pursuant to W. Va. Code § 21-3-19(a), it is unlawful for any public or private employer, or any agent of the employer, to refuse to hire an individual, to discharge an employee, or to otherwise "disadvantage or penalize" an employee with respect to compensation, terms, conditions or privileges of employment solely because the employee uses tobacco products off the employer's premises during nonworking hours. The prohibition on discriminating against tobacco users does not apply to an employer that is a nonprofit

organization which, as one of its primary purposes, discourages the use of tobacco products by the general public. W. Va. Code § 21-3-19(b). An employer also is not prohibited from offering, imposing, or having a health, disability or life insurance policy that distinguishes between employees for type of coverage or price of coverage based upon the employee's use of tobacco products, as long as the different premium rates reflect the differential costs to the employer, and the employer gives the employee a statement delineating the different rates. W. Va. Code § 21-3-19(c).

#### B. Health Benefit Mandates for Employers

West Virginia has what is known as a "Mini-COBRA" law. This law essentially requires that health benefit plans provided by employers who are not covered by COBRA must provide for a continuation of health benefits coverage for up to 18 months, as if the employer was covered by COBRA. W. Va. Code St. R. § 114-93-3.1.

All health plans in WV, including those offered by employers, must provide contraceptive coverage and coverage for treatment of serious mental illness.

According to the Prescription Fairness Act of 2005, any health plan that provides benefits for prescription drugs or prescription devices or outpatient services may not exclude or restrict benefits for prescription contraceptive drugs, prescription contraceptive devices, or outpatient contraceptive devices. W. Va. Code § 33-16E-4. Such plans are also prohibited from imposing deductibles, copayments, other cost-sharing mechanisms, or waiting periods for prescription contraceptive drugs, prescription contraceptive devices, or outpatient contraceptive devices that are greater than what is provided for other prescription drugs, prescription devices, or outpatient services. W. Va. Code § 33-16E-5. Additional prohibitions on health insurance plans under the Prescription Fairness Act are set forth at W. Va. Code § 33-16E-6. Statutorily defined "religious employers" are not required to provide any contraceptive coverage that is contrary to employer's religious beliefs. A "religious employer" is "an entity whose sincerely held religious beliefs or sincerely held moral convictions are central to the employer's operating principles," and that is listed under 26 U.S.C. § 3121, 26 U.S.C. § 501(c)(3), or the Official Catholic Directory.

The 2009 Mental Health Parity law generally requires that any health benefit plan provide coverage for expenses arising from the treatment of serious mental illness, except for expenses for custodial care, residential care, or schooling. W. Va. Code § 33-16-3a(a)(1).

#### C. Immigration Laws

There are no state specific immigration laws in West Virginia.

#### D. Right to Work laws

In 2016, the West Virginia Legislature passed Senate Bill 1 making West Virginia a "right to work" state. The provisions of Senate Bill 1 are codified at W. Va. Code §§ 21-1A-3, 21-1A-4, 21-5G-1, 21-5G-2, 21-5G-3, 21-5G-4, 21-5G-5, 21-5G-6, and 21-5G-7. Among other things, the law gives employees the right to refrain from participating in labor organizations, collective bargaining activities, or other similar



concerted activities, including the right to refrain from paying union dues, fees or assessments. W. Va. Code § 21-1A-3. The law also makes it a prohibited practice to require an employee to join a union as a condition of employment, or to interfere with, restrain, or coerce an employee into the exercise of the rights provided under the right to work law or WV Labor Management Relations Act, in addition to other prohibited unfair labor practices.

West Virginia's Right to Work law was the subject of longstanding civil litigation initiated by labor unions, who argued that the Right to Work law was unconstitutional. Kanawha County Circuit Court Judge Jennifer Bailey issued an Order on February 27, 2019 concluding that certain portions of the Right to Work law were unconstitutional. However, the Supreme Court of Appeals of West Virginia reversed Judge Bailey's Order, and held that the Right to Work law is constitutional. Syl. Pt. 1, 2, and 3, *Morrissey v. W. Va. AFL-CIO*, 842 S.E.2d 455, 243 W. Va. 86 (2020).

E. Lawful Off-duty Conduct (including lawful marijuana use)

There are no specific statutes applicable to employees in the private employer context, except for the tobacco use anti-discrimination statute discussed above in Section XV.A. However, West Virginia does have a statute specifically applicable to the suspension and discharge of public school personnel, which can apply to lawful off-duty conduct. W. Va. Code § 18A-2-8(a) allows a School Board to suspend or discharge a school employee for immorality, among other reasons. An employee may be discharged or disciplined for off-site conduct that is "immoral", but not illegal. "In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform." Syl. Pt. 2, *Golden v. Bd. of Educ. of Harrison Cnty*, 169 W. Va. 63, 285 S.E.2d 665 (1981). A discharge based solely on off-duty misconduct (whether lawful or not), and not on the effect the conduct has on the employee's fitness to teach or on the school community, is impermissible. *Powell v. Paine*, 221 W. Va. 458, 463, 655 S.E.2d 204, 209 (2007).

There is also a statute specifically applicable to the suspension or revocation of a teaching license, W. Va. Code § 18A-3-6. The standards discussed above in regard to W. Va. Code § 18A-2-8(a) apply to W. Va. Code § 18A-3-6.

F. Gender/Transgender Expression

There are no state statutes addressing this issue in the employment context. Several local ordinances ban discrimination on the basis of sexual orientation or gender identity. The cities of Charleston, Huntington, Morgantown, Athens, Harpers Ferry, Martinsburg, Sutton, Lewisburg, Sheperdstown, Charles Town, Beckley, Fairmont, Thurmond, and Keyser have ordinances prohibiting sexual orientation or gender identity discrimination. It is notable that the town of Thurmond, often called "the smallest town in America," approved its anti-discrimination ordinance with the unanimous vote of all five of its residents. In Elkins, discriminating against city employees or city job applicants on the basis of sexual orientation is prohibited. Additionally, the Cities of Buckhannon and Fayetteville have passed resolutions in support of nondiscrimination on the basis of sexual orientation or gender identity.

G. Other Key State Statutes

1. Senate Bill 277, effective March 11, 2021, provides broad immunity to “any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for [any claims of] loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.” W. Va. Code § 55-19-4. The immunity does “not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice.” W. Va. Code § 55-19-7. In addition, Senate Bill 277 does not preclude the filing of a workers’ compensation claim for a work-related injury, disease, or death caused by, or arising from, COVID-19 in the course of and resulting from covered employment. W. Va. Code § 5-19-6.

2. Senate Bill 272, effective June 9, 2021, provides a new four part test for determining whether a worker is an independent contractor for purposes of West Virginia workers’ compensation, West Virginia unemployment compensation, the West Virginia Wage Payment and Collection Act, and the West Virginia Human Rights Act. In general, the test requires: (1) a written contract between the worker and the principal stating that the worker is an independent contractor; (2) that the worker file his or her earnings as a business or self-employment, or provides his or her services through a business entity; (3) that the worker generally actually and directly controls the manner and means by which the work is to be done; and (4) that the worker meet at least one criterion among a list of certain fact specific criteria. If a worker does not meet any part of the four part test, the entity is to use the IRS test to determine whether the worker is an independent contractor for purposes of workers’ compensation, unemployment compensation, the West Virginia Wage Payment and Collection Act, and the West Virginia Human Rights Act.

3. Under W. Va. Code § 21-5-16, a “prime contractor” is required to notify the West Virginia Division of Labor of its entry into any subcontract which contemplates construction work or the severance, processing or transportation of minerals. Failure to comply is a misdemeanor.

4. West Virginia’s Polygraph Protection Act, W. Va. Code § 21-5-5b, prohibits employers from requiring employees or applicants for employment to undergo polygraph examinations, or any similar test which measures “physiological reactions to evaluate truthfulness,” with limited exception.

5. Under W. Va. Code §§ 23-5A-1 and 23-5A-3, no person may be discharged or otherwise discriminated against for filing a workers’ compensation claim, for claiming benefits, or for receiving benefits. An employer may not cancel or change health insurance coverage for an employee, or his or her dependents, “during the entire period for which that employee during the employer-employee relationship is claiming or is receiving [workers’ compensation] benefits . . . for a temporary disability.” W. Va. Code § 23-5A-2. However, health insurance can be cancelled or changed if all employees and their dependents are treated in the same manner as the employee claiming or receiving temporary total disability benefits. *Id.* It is important to note that in *Fixx v. United Mine Workers of America; Dist. 17, 645 F.Supp.2d 352 (S.D. W. Va. 1986)*, the U.S. District Court for the Southern District of West Virginia found that W. Va. Code § 23-5A-2 was preempted by ERISA. An employer is also prohibited from terminating an employee while he or she is off work due to a compensable work-related injury and “receiving or eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense.” W. Va. Code § 23-5A-3(a). This Code section also grants employees who are on workers’ compensation certain rights of reinstatement. W. Va. Code § 23-5A-3(b).

6. The Convenience Food Stores Safety Act, W. Va. Code §§ 21-13-1 through 21-13-3, includes a number of staffing and surveillance requirements for convenience store employers. One interesting aspect of the Act is the requirement of video surveillance in certain circumstances. See W. Va. Code § 21-13-3. At least one commentator has pondered the potential for conflict between W. Va. Code § 21-13-3 and W. Va. Code § 21-3-20 (prohibition against using video surveillance in areas including those where employees store personal belongings). See Christopher L. Slaughter, Employers Restricted in Workplace Video Surveillance, W. Va. Human Resources J. 1 (August 2004), available at <http://www.wvchamber.com>.

7. W. Va. Code §§ 21-1B-1 through 21-1B-7 governs verifying the legal employment status of workers. The law imposes fines and criminal penalties for employers who hire “unauthorized workers”. See W. Va. Code § 21-1B-5. The business may also lose its business license for the hiring of such workers. See W. Va. Code § 21-1B-7.

8. W. Va. Code § 11-13W-1 provides a state tax credit to employers for employing qualified construction apprentices.

9. W. Va. Code § 60A-4-412 deems it a misdemeanor offense for anyone attempting to adulterate drug or alcohol screening tests. Penalties for these violations are fines ranging from \$1,000 to \$10,000, and imprisonment up to a year.

10. West Virginia Code § 21-1-2 was amended in 2015 to clarify the qualifications of the Commissioner of the West Virginia Division of Labor, and to finally remove very outdated statutory language which required that the Commissioner “be identified with the labor interests of the state. . . .” Now, the Commissioner has the appropriate requirement to be “a competent person, who is identified with and has knowledge and experience in employee issues and interests including employee-employer relations . . . .” W. Va. Code § 21-1-2 (2015) (emphasis added).

11. W. Va. Code § 55-7E-3(a), enacted in 2015, changed the prior law regarding an employee’s duty to mitigate damages in employment cases. The law requires an employee “to mitigate past and future lost wages, regardless whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff’s rights.” W. Va. Code § 55-7E-3(a). This statute abolishes the previous exception to the duty to mitigate where malice had been established, and eliminates unmitigated awards of flat back pay or flat front pay damages. *Id.* Awards of back or front pay must be “reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff.” *Id.* The defendant bears the burden of proving a lack of reasonable diligence. *Id.* W. Va. Code § 55-7E-3 also requires that the trial court make a preliminary determination on the appropriateness of the remedy of reinstatement versus front pay damages. W. Va. Code § 55-7E-3(b). If the Court determines front pay is the appropriate remedy, the amount of any damages to be awarded must be determined by the trial judge. *Id.*

12. West Virginia’s Equal Pay Act, W. Va. Code §§ 21-5B-1 through 21-5B-6, prohibits employers from discriminating between male and female employees regarding the payment of wages for the performance of similar work. W. Va. Code § 21-5B-3. Much like its federal counterpart, the West Virginia Equal Pay Act will consider factors such as seniority and merit in determining whether a violation has occurred. *Id.*

13. Employers engaged in the mining and construction industries are required to post a bond equivalent to four (4) weeks of payroll at full capacity to guarantee the payment of wages. W. Va. Code § 21-5-14. Employers who have been engaged in these industries for more than five (5) years may obtain a waiver of the bonding requirement by applying to the West Virginia Commission of Labor. Id. Failure to comply with the bond requirement is a misdemeanor. *Id.*

14. West Virginia has a number of special wage and hour rules for the employment of minors. *See* W. Va. Code §§ 21-6-1 through 21-6-11.

15. There are special prohibitions regarding overtime for nurses. Hospitals are prohibited from mandating that nurses, directly or through coercion, accept overtime assignments and are prohibited from taking action against a nurse solely on the grounds that the nurse refuses to accept an assignment of overtime at the facility if the nurse declines to work additional hours because doing so may, in the nurse's judgment, jeopardize patient or employee safety. W. Va. Code § 21-5F-3. This prohibition is subject to a number of exceptions. See Id.