



WEST VIRGINIA

QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

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Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.

At-Will Employment

West Virginia is an at-will jurisdiction, which means that either the employer or the employee, absent contractual or statutory (e.g., anti-discrimination, anti-retaliation) provisions, may end the employment relationship without cause and for any or no reason. *Cook v. Heck's, Inc.*, 342 S.E.2d 453, 457 (W. Va. 1986) (citing *Wright v. Standard Ultramarine & Color Co.*, 90 S.E.2d 459 (W. Va. 1955)).

Immigration Verification

West Virginia has some additional procedures for employment verification, which reach beyond compliance with Federal I-9. Employers are required to verify a prospective employee's legal status or authorization to work, as it is unlawful to knowingly employ, hire, recruit, or refer an unauthorized worker. W. Va. Code § 21-1B-3(a)-(b).

Employers may verify a prospective employee's legal status or authorization to work by requiring any one of the following types of identification at the time of hire – a valid:

- Social Security card;
- immigration or non-immigration visa, including photo identification;
- birth certificate;
- passport;
- photo identification card issued by a government agency;
- work permit or supervision permit issued by the Division of Labor;
- permit issued by the Department of Justice; or
- document providing evidence of legal residence or authorization to work.

W. Va. Code § 21-1B-3(c).

Additional information regarding West Virginia's employment verification requirements may be accessed at labor.wv.gov/Wage-Hour/Undocumented_Worker/Pages/default.aspx.

Drug Testing

Employers can test employees and applicants for drugs or alcohol as a condition of hiring or continued employment if such testing is conducted in accordance with the West Virginia Safer Workplace Act. W. Va. Code § 21-3E-4. An employer also can require employees to submit to a drug or alcohol test if the employer has a drug-free workplace program, as established in the West Virginia Code. W. Va. Code § 21-3E-4; W. Va. Code § 21-3E-16. For example, an employer may require a current employee to take a drug or alcohol test on suspicion of intoxication or drug use if the employer's written policy allows for drug or alcohol testing to investigate whether an individual employee is impaired, and the employer follows all West Virginia Safer Workplace Act notice, educational, and procedural requirements. W. Va. Code § 21-3E-8(c)(2).

Jury Duty Leave

West Virginia employers must allow employees to take leave to serve as jurors. Jury duty leave can be unpaid. W. Va. Code § 52-3-1(b). Employers cannot discharge or discriminate against employees because they take leave to serve as jurors. W. Va. Code § 61-5-25a. An employee may have a private right of action against their employer if they are discriminated against by their employer because they received or were served with a summons for jury duty, or were absent from work to respond to a summons for jury duty or to serve on any jury in federal or state court. W. Va. Code § 52-3-1(a).

Voting Leave

Employees are entitled to take voting leave for up to three hours between the opening and closing of the polls on Election Day in West Virginia. W. Va. Code § 3-1-42. Employees are required, though, to notify employers in writing at least three days before Election Day that they need time off to vote. *Id.* This leave may not result in a “penalty” or “deduction from... [the employee’s] usual salary or wages.” *Id.* Employers in industries such as essential government, health, hospital, transportation, and communication services; and production, manufacturing, and processing works requiring continuity in operation, can arrange schedules of employees’ voting leave to avoid disruption or impairment of essential services and operations. *Id.*

Other Leave

Emergency Response Leave

No employer may terminate, or use any disciplinary action against, an employee who is a member of a volunteer fire department or who is an emergency medical service attendant and who, in the line of emergency duty as a volunteer fireman or an emergency medical service attendant, responds to an emergency call prior to the time he or she is due to report for work and which emergency results in a loss of time from his or her employment. W. Va. Code § 21-5-17. Any time lost from employment as provided in this section may be charged against the employee’s regular pay or accumulated leave, if any, at the option of the employee. *Id.*

Military Leave

Employers must grant the same re-employment rights to active members of the West Virginia National Guard that are granted to members of the reserve components of the Armed Forces of the United States by applicable federal law. W. Va. Code § 15-1-1; W. Va. Code § 15-1F-8.

Parental Leave

All public employees are entitled to up to twelve weeks of unpaid leave, following the exhaustion of their annual or personal leave: (1) for the birth of a child; (2) for the placement of a child with the employee for adoption; or (3) to care for a child, spouse, parent, or dependent with a serious health condition. W. Va. Code § 21-5D-4. All public employees, in requesting and taking such leave, are entitled to return to their position and to retain coverage via their insurance plan. W. Va. Code § 21-5D-6; W. Va. Code § 21-5D-7. Employers may request certification, including as to the existence and anticipated duration of a serious health condition, if their employee requests leave to care for a family member. W. Va. Code § 21-5D-5.

There is no corresponding protection for private employees. W. Va. Code § 21-5D-2.

Pregnancy Disability Leave

Employers in West Virginia must make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant, unless these accommodations would impose undue hardship on employers. W. Va. Code § 16B-19-2. It is unlawful for employers to deny an employment opportunity to a job applicant or employee if such denial is based on the employer’s refusal to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee or applicant, or require an employee or applicant to accept an accommodation that such applicant or employee chooses not to accept. *Id.* Employers cannot require employees and applicants affected by pregnancy, childbirth, or related medical conditions to take leave if other reasonable accommodations can be provided. *Id.*

Smoking Laws

West Virginia prohibits public and private employers from refusing to hire applicants, discharging employees, or otherwise disadvantaging or penalizing employees solely because they use tobacco products off employer premises during nonwork hours. W. Va. Code § 21-3-19. Employers may still offer or impose a health, disability, or life insurance policy that makes a distinction in type or price of coverage if an employee uses tobacco products. *Id.* This requirement does not apply to non-profit organizations that, as one of their primary purposes or objectives, discourage the use of tobacco products by the general public. *Id.*

Break Time to Express Milk

West Virginia does not have any state-specific statutes or other provisions relating to breastfeeding rights for employees. However, if the employee is protected by the Fair Labor Standards Act (FLSA), employers are required to provide reasonable break time for an employee to express breast milk for their nursing child for one year after the child's birth each time such an employee has the need to express milk. 29 U.S.C. § 218d. In addition, under the FLSA, employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, that may be used by an employee to express breast milk. *Id.*

Meal Breaks

During a workday lasting at least six hours, all West Virginia employers must provide employees with at least 20 minutes for meal breaks at times reasonably designated by the employer. W. Va. Code § 21-3-10a.

Minimum Wage, Overtime, and Wage Recordkeeping

West Virginia's state minimum wage rate is \$8.75 per hour. W. Va. Code § 21-5C-2. For West Virginia's state minimum wage requirements to apply, at least six or more nonexempt employees must be working at the same separate, distinct, and permanent work location. W. Va. Code § 21-5C-1(e)-(f). Employers must still comply with federal wage laws and regulations.

West Virginia's minimum wage standards allow employers a 70 percent credit against the minimum wage requirement for their service employees who receive tips. W. Va. Code § 21-5C-4. That means an employer may pay their tipped employees a cash wage of \$2.62 per hour, as long as the employee's hourly cash rate, plus reported tips, equals the state minimum wage of \$8.75 per hour. *Id.*

West Virginia law requires employers to pay overtime to employees, unless otherwise exempt, at the rate of one and one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours in a workweek. W. Va. Code § 21-5C-3. However, any individual who is involved in one of the categories of work, or descriptions of work, listed in W. Va. Code § 21-5C-1(f) is exempt from overtime requirements under West Virginia law.

This does not apply to agricultural employees. *Id.*

Employers are required to maintain payroll and employment records from the date each record was created. W. Va. Code § 21-5C-5. This record must contain the employee's:

- full name;
- address;
- rate of pay;
- hours of employment;
- payroll deductions; and
- amount paid to them each pay period.

Id.

Final Payments

Whenever a person, firm, or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm, or corporation shall pay the employee's wages due for work that the employee performed before the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable. W. Va. Code § 21-5-4. If a person, firm, or corporation fails to pay an employee wages as required under this section, the person, firm, or corporation is liable to the employee for two times that unpaid amount as liquidated damages in addition to the amount that was unpaid when due. *Id.*

Frequency of Wage Payments

Employers in West Virginia must pay employees at least twice every month with no more than 19 days between pay periods unless otherwise provided by a special agreement. W. Va. Code § 21-5-3(a). If an employee is absent from their regular place of labor and does not receive their wages, the employer must pay the wages due upon the employee's demand at the place where their wages are usually paid. W. Va. Code § 21-5-3(c).

Unemployment Insurance

Unemployment insurance benefits provide income to individuals who have lost work through no fault of their own. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work or until an employer can recall the employee to work. Nothing is deducted from the employee's wages to pay for this coverage. Unemployment benefits are administered by the West Virginia Department of Commerce through WorkForce West Virginia. Additional information regarding the benefits may be accessed at workforcewv.org/unemployment.

Workers' Compensation

The West Virginia Workers' Compensation Act, W. Va. Code § 23-2-1, *et seq.*, applies to any "persons, firms, associations, and corporations" regularly employing "another person or persons." W. Va. Code § 23-2-1(a). Pursuant to this law, most West Virginia employers are statutorily required to maintain workers' compensation insurance coverage. *Id.* Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits.

The following employers are not required to procure workers' compensation insurance, but may elect to do so:

- employers of employees in domestic services;
- employers of five or fewer full-time employees in agricultural service;
- employers of employees while the employees are employed without the state except in cases of temporary employment without the state;
- employers with fewer than three employees, provided that the period of employment is temporary, intermittent, and sporadic in nature and does not exceed ten calendar days in any quarter;
- churches;
- employers engaged in organized professional sports activities;
- any volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality, or other government entity or political subdivision; volunteer organizations created or sponsored by government entities or political subdivisions; or area or regional emergency medical services boards of directors;
- taxicab drivers of taxicab companies that have not been identified as independent contractors; and
- any employer whose employees are eligible to receive benefits under the federal Longshore and Harbor Workers' Compensation Act.

W. Va. Code. § 23-2-1(b).

The West Virginia Workers' Compensation Act is administered by the West Virginia Offices of the Insurance Commissioner. W. Va. Code § 23-2-1. Additional information regarding the Act may be accessed at www.wvinsurance.gov/Workers-Compensation.

Child Labor

Except as permitted, 14 years is the minimum age for employment in West Virginia. W. Va. Code § 21-6-1. However, a child who is under the age of 14 may be employed or permitted to work the following jobs:

- non-hazardous agricultural and horticultural activities;
- domestic service, at least as performed within the residence of their employer;
- work for a parent or legal guardian's solely owned business;
- as an actor or performer (e.g., in motion pictures, productions, etc.); or
- newspaper delivery.

Id.

There are numerous restrictions for places of work dealing with minors, as well as on the hours of the day the minor may work. W. Va. Code § 21-6-2, *et seq.*

Gun Laws

Employers can prohibit employees and applicants from openly carrying or concealing firearms and other deadly weapons on employer-owned property. W. Va. Code § 61-7-14. However, employers may not prohibit any customer, applicant, employee, or other person lawfully on the premises from storing a lawfully possessed firearm inside a privately owned vehicle in the company's parking lot, provided that the firearm is out of view and locked in the vehicle. *Id.* Employers cannot condition employment on whether employees and applicants have a license to carry certain deadly weapons or on agreements that prohibit them from keeping firearms in or on privately owned vehicles under certain conditions. *Id.*

Additional Laws and Regulations

Medical Marijuana

The State of West Virginia allows for the certified medical use of marijuana to treat certain serious medical conditions. W. Va. Code § 16A-1-1, *et seq.* An employer cannot "discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against" an employee solely for their status as an "individual who is certified to use medical cannabis." W. Va. Code § 16A-15-4(b). An employer is not required to accommodate the use of medical cannabis on the property or premises. *Id.*

Employees, though, are prohibited from reporting to work under the influence or using marijuana in the workplace when performing a task while under the influence would constitute "negligence, professional malpractice, or professional misconduct." W. Va. Code § 16A-12-9(1). Further, an employee may be prohibited by an employer from performing any task that may be deemed life-threatening or could result in a public health or safety risk while under the influence of medical cannabis. W. Va. Code § 16A-5-10.

Polygraph Examination

Other than law enforcement agencies and companies that are involved in the manufacture, storage, distribution or sale of any controlled substance, West Virginia state law restricts employers from requiring any employee, or prospective employee, to submit to a polygraph examination, lie detector, or other similar examination to evaluate truthfulness for the purpose of screening new hires or continuing the employment of any employee within this state, outside of a criminal investigation. See W. Va. Code § 21-5-5b.

Employee Personal Social Media

An employer is prohibited from requesting, requiring, or coercing access to an employee's or potential employee's personal account(s). See W. Va. Code § 21-5H-1.