WEST VIRGINIA REGISTER

Published by the Office of the Secretary of State

Volume XXXVIII

Issue 37

September 17, 2021

A Weekly Publication

Administrative Law Division

Mac Warner
Secretary of State
Bldg. 1, Suite 157K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

(304) 558-6000

sos.wv.gov

CONTENTS

Chronological Index

Rule Monitor

Notices

a. **Legislative Rules**
b. **Interpretive Rules**
c. **Procedural Rules**
d. **Emergency Rules**
e. **LRMRC and LOCEA**

Legislative Interims

Orders

Ethics Commission Opinions

Grievances Reports

Office of Tax Appeal Decisions

Governor's Executive Orders

Attorney General Opinions

Other Documents or Information Filed

This week's publication includes documents submitted by the following agencies:

Auditor

Education

Health and Human Resources
Bureau for Public Health

Health Care Authority

Human Rights Commission

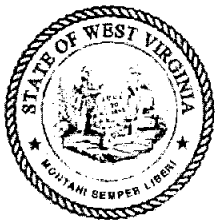
Insurance Commission

Water Resources, Div. of Water & Waste Mgmt.

CHRONOLOGICAL INDEX, VOLUME XXXVIII ISSUE 37			
RULES FILED FOR PUBLIC COMMENT THIS WEEK			
AGENCY	**RULE/TYPE**	**AUTHORITY**	**HEARING/COMMENT PERIOD/LOCATION**
Water Resources, Div. of Water & Waste Management (47-30B)	Administrative Proceedings and Civil Penalty Assessment Legislative	§§22-11-22a(b) and (d)	Public Hearing: October 14, 2021, 6:00 pm WV Dept. of Environmental Protection 601 57th Street Charleston, WV 25304 Written Comments: October 15, 2021, 5:00 pm Charles S. Sturey WV Dept. of Environmental Protection 601 57th Street Charleston, WV 25304 Charles.s.sturey@wv.gov

NO EMERGENCY RULES FILED THIS WEEK				
AGENCY	**RULE/TYPE**	**AUTHORITY**	**EFFECTIVE DATE**	**DATE NOTICE OF HEARING**

Office of the Secretary of State
State Capitol
Charleston, West Virginia 25305



Mac Warner
Secretary of State
State of West Virginia

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.gov

GUIDE FOR USING THE RULE MONITOR IN THE STATE REGISTER

Column	1.	Agency Name, (Title and Series Number)
Column	2.	Rule Title, Price and Type
Column	3.	Date Notice of Public Hearing or Comment Period Filed
Column	4.	Date of Public Hearing or Last Date Comments Will Be Received
Column	5.	Date Emergency Rule Filed, Emergency Amendments Filed, Emergency Rule Decision (ERD) Number & Date ERD Filed (Effective Date of Emergency Rule)
Column	6.	Date Agency Approved Legislative Rules Filed.
Column	7.	Date Review by the Legislative Rule-Making Review Committee & Action Taken **Please Note** The Board of Education, Board of Trustees & Board of Directors File Their Rules With the Educational Over-Sight Committee
Column	8.	Legislative Action
Column	9.	Date Agency Final Files Legislative, Procedural or Interpretive Rules. This is the Final Step for Procedural & Interpretive Rules
Column	10.	Date Rule is Effective

- Emergency rules will not have a "Notice" date until the agency files one, but the rule will appear in Columns 1, 2 & 5. An Agency must file for either a public hearing or public comment period either before filing as an emergency or no more than 30 days after filing the rule as an emergency
- If more than one date appears in a column, it means the agency has repeated that step (ex. - holding an additional public hearing)

CROSS REFERENCE OF RULE MONITOR TITLE NUMBERS AND AGENCIES

TITLE NUMBER		NAME OF AGENCY
TITLE	1	ACCOUNTANCY
TITLE	2	ARCHITECTS
TITLE	3	BARBERS AND COSMETOLOGISTS
TITLE	4	CHIROPRACTIC EXAMINERS
TITLE	5	DENTISTRY
TITLE	6	FUNERAL SERVICE EXAMINERS
TITLE	7	PROFESSIONAL ENGINEERS
TITLE	10	LICENSED PRACTICAL NURSES
TITLE	11	MEDICINE
TITLE	14	OPTOMETRY
TITLE	15	PHARMACY
TITLE	16	PHYSICAL THERAPY
TITLE	17	PSYCHOLOGISTS
TITLE	19	REGISTERED PROFESSIONAL NURSES
TITLE	20	SANITARIANS
TITLE	22	FORESTRY
TITLE	24	OSTEOPATHIC MEDICINE
TITLE	25	SOCIAL WORK EXAMINERS
TITLE	26	VETERINARY MEDICINE
TITLE	27	COUNSELING
TITLE	29	SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY
TITLE	30	RESPIRATORY CARE
TITLE	31	DIETITIANS
TITLE	32	ACUPUNCTURE
TITLE	33	WASTE MANAGEMENT, DIV. OF WATER AND WASTE MGMT.
TITLE	35	OIL AND GAS
TITLE	36	COAL MINE HEALTH AND SAFETY
TITLE	38	MINING AND RECLAMATION
TITLE	42	LABOR
TITLE	45	AIR QUALITY
TITLE	47	WATER RESOURCES, DIV. OF WATER AND WASTE MGMT.
TITLE	56	MINERS' HEALTH, SAFETY AND TRAINING
TITLE	58	NATURAL RESOURCES
TITLE	60	ENVIRONMENTAL PROTECTION – SECRETARY'S OFFICE
TITLE	61	AGRICULTURE
TITLE	64	HEALTH
TITLE	65	HEALTH CARE AUTHORITY
TITLE	69	HEALTH AND HUMAN RESOURCES
TITLE	76	SENIOR SERVICES
TITLE	78	HUMAN SERVICES
TITLE	81	STATE POLICE
TITLE	87	FIRE COMMISSION
TITLE	89	PUBLIC DEFENDER SERVICES
TITLE	90	CORRECTIONS
TITLE	91	MOTOR VEHICLES
TITLE	94	REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
TITLE	110	TAX DEPARTMENT
TITLE	112	TREASURER
TITLE	114	INSURANCE COMMISSION
TITLE	126	EDUCATION
TITLE	127	SECONDARY SCHOOLS ACTIVITIES COMMISSION
TITLE	133	HIGHER EDUCATION POLICY COMMISSION
TITLE	135	COMMUNITY AND TECHNICAL COLLEGE EDUCATION
TITLE	143	PERSONNEL
TITLE	144	TOURISM
TITLE	145	DEVELOPMENT OFFICE
TITLE	146	STATE ELECTION COMMISSION
TITLE	148	ADMINISTRATION
TITLE	149	CRIME, DELINQUENCY AND CORRECTIONS
TITLE	150	PUBLIC SERVICE COMMISSION
TITLE	153	SECRETARY OF STATE
TITLE	155	AUDITOR
TITLE	157	HIGWAYS
TITLE	164	SCHOOL BUILDING AUTHORITY
TITLE	174	REAL ESTATE COMMISSION
TITLE	175	ALCOHOL BEVERAGE CONTROL COMMISSION
TITLE	176	ALCOHOL BEVERAGE CONTROL COMMISSION - BEER
TITLE	177	ATHLETIC COMMISSION
TITLE	178	RACING COMMISSION
TITLE	179	LOTTERY COMMISSION
TITLE	190	REAL ESTATE APPRAISER LICENSING & CERTIFICATION BOARD

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Agriculture (61-01A)	Feeding of Untreated Garbage to Swine Legislative	6/16/2021	7/16/2021		7/19/2021				
Agriculture (61-05)	Commercial Feed Legislative	6/25/2021	7/24/2021	7/27/2021 Approved 8/9/2021	7/26/2021				
Agriculture (61-07, Repeal)	Enrichment of Flour and Bread Law Regulations Legislative	6/28/2021	7/28/2021		7/28/2021	Modified & Approved 8/19/2021 Filed 8/31/2021			
Agriculture (61-08C, Repeal)	Fruits and Vegetables Certification of Potatoes for Seeding Purposes Legislative	6/28/2021	7/28/2021		7/28/2021	Approved 8/19/2021			
Agriculture (61-10)	Fresh Food Act Legislative	6/29/2021	7/29/2021		7/29/2021				
Agriculture (61-11B)	Auctioneers Legislative	6/29/2021	7/29/2021		7/29/2021				
Agriculture (61-30)	Hemp Products Legislative	6/28/2021	7/28/2021	7/30/2021 Approved 8/9/2021	7/30/2021				
Agriculture (61-31)	Livestock Care Standards Legislative	6/30/2021	7/30/2021	6/30/2021 Effective 8/11/2021	7/30/2021				
Agriculture (61-33)	Rural Rehabilitation Program Legislative	6/24/2021	7/24/2021		7/27/2021				
Agriculture (61-36)	Farm to Food Bank Tax Credit Legislative	6/16/2021	7/16/2021		7/19/2021				
Agriculture (61-38)	Farmers Markets Legislative	6/24/2021	7/24/2021	7/30/2021 Approved 8/9/2021	7/30/2021				
Agriculture (61-39)	Seed Certification Legislative	6/28/2021	7/28/2021		7/30/2021				
Air Quality (45-08)	Ambient Air Quality Standards Legislative	6/2/2021	7/6/2021		7/16/2021	Approved 8/19/2021			
Air Quality (45-16)	Standards of Performance for New Stationary Sources Legislative	6/2/2021	7/6/2021		7/16/2021	Approved 8/19/2021			
Air Quality (45-18)	Control of Air Pollution from Combustion of Solid Waste Legislative	6/2/2021	7/6/2021		7/16/2021	Modified & Approved 8/20/2021 Filed 8/26/2021			

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Air Quality (45-34)	Emission Standards for Hazardous Air Pollutants Legislative	6/2/2021	7/6/2021		7/16/2021	Approved 8/19/2021			
Alcohol Beverage Control Comm. (175-02)	Private Club Licensing Legislative	6/1/2021	7/1/2021		7/27/2021				
Alcohol Beverage Control Comm. – Beer (176-01)	Nonintoxicating Beer Licensing and Operations Procedures Legislative	6/1/2021	7/1/2021		7/28/2021				
Auditor (155-09)	Accountability Requirements for State Funds and Grants Legislative	7/30/2021	8/30/2021		9/13/2021				
Chiropractic Examiners (4-09)	Chiropractic Telehealth Practice Legislative	6/9/2021	7/9/2021	6/8/2021 Effective 7/20/2021	7/13/2021				
Contractor Licensing Board (28-01)	Board Organization and Meeting Procedures, Hearing Procedures Procedural	7/12/2021	8/16/2021						
Contractor Licensing Board (28-02)	Contractor Licensing Act Legislative	6/30/2021	7/30/2021		7/30/2021				
Contractor Licensing Board (28-04)	Written Contracts for Services Procedural	7/12/2021	8/16/2021						
Counseling (27-01)	Licensing Rule Legislative	6/30/2021	7/29/2021		7/29/2021				
Counseling (27-02)	Licensed Professional Counselor Fees Rule Legislative	6/29/2021	7/29/2021		7/30/2021				
Counseling (27-08)	Marriage and Family Therapist Licensing Rule Legislative	6/30/2021	7/29/2021		7/30/2021				
Counseling (27-09)	Marriage and Family Therapist Fees Rule Legislative	6/30/2021	7/29/2021		7/30/2021				
Crime, Delinquency and Correction (149-02)	Law Enforcement Training and Certification Standards Legislative	6/28/2021	7/28/2021	6/28/2021 Effective 8/9/2021	7/29/2021				
Dentistry (5-01)	Rule for the WV Board of Dentistry Legislative	6/18/2021	7/21/2021		7/26/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Dentistry (5-02)	Formation and Approval of Professional Limited Liability Companies Legislative	6/18/2021	7/21/2021		7/26/2021				
Dentistry (5-06)	Formation and Approval of Dental Corporations; and Dental Practice Ownership Legislative	6/18/2021	7/21/2021		7/26/2021				
Dentistry (5-11)	Continuing Education Requirements Legislative	6/18/2021	7/21/2021		7/26/2021				
Dentistry (5-12)	Administration of Anesthesia by Dentists Legislative	6/18/2021	7/21/2021		7/26/2021				
Dentistry (5-13)	Expanded Duties of Dental Hygienists and Dental Assistants Legislative	6/18/2021	7/21/2021		7/26/2021				
Dentistry (5-16)	Teledentistry Legislative	6/17/2021	7/17/2021	6/17/2021 Amendment 7/26/2021 Effective 9/6/2021	7/26/2021				
Economic Development, WV Dept. of (145-17)	Purchasing Rule Procedural	7/12/2021	8/13/2021					8/26/2021	9/27/2021
Education (126-022)	Driver Education Regulations (Policy 2422.2) Legislative Exempt	8/16/2021	9/15/2021						
Education (126-044CC)	WV College and Career-Readiness Standards for Science (Policy 2520.3C) Legislative Exempt	6/9/2021	7/12/2021					8/16/2021	7/1/2022
Education (126-136)	Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel and Advanced Salary Classifications (Policy 5202) Legislative Exempt	8/16/2021	9/15/2021						
Education (126-161)	Regulations for the Alternative Certification Programs for the Education of Teachers (Policy 5901) Legislative Exempt	7/14/2021	8/16/2021					9/9/2021	10/12/2021

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Education (126-174)	Investigating Indoor Air Quality Complaints (Policy 6202) Legislative Exempt	7/14/2021	8/16/2021					9/9/2021	10/12/2021
Education (126-175)	WV Dept. of Ed. Heating, Ventilating and Air-Conditioning (HVAC) Technicians (Policy 6203) Legislative Exempt	7/14/2021	8/16/2021					9/9/2021	10/12/2021
Education (126-176)	School Closings or Consolidations (Policy 6204) Legislative Exempt	7/14/2021	8/16/2021					9/9/2021	10/12/2021
Education (126-189)	Intercounty Student Transfer Appeal (Policy 7212) Legislative Exempt	8/16/2021	9/15/2021						
Education (126-201)	Computation of Average Daily Attendance (ADA) and Average Daily Membership (ADM) (Policy 8100.1) Legislative Exempt	9/9/2021	10/12/2021						
Emergency Management (170-04)	SIRN Emergency Purchasing Procedure Procedural	1/29/2021	3/1/2021					8/27/2021	9/26/2021
Emergency Management (170-05)	Purchases During States of Emergency Procedural	1/29/2021	3/1/2021					8/27/2021	9/26/2021
Environmental Protection, Secretary's Office (60-10)	Purchasing Procedure Procedural	8/19/2021	9/20/2021						
Ethics Commission (158-06)	Use of Office for Private Gain, Including Nepotism Legislative	3/22/2021	4/22/2021		5/12/2021				
Family Protection Services Bd. (191-01)	Operation of the Family Protection Services Board Legislative	6/30/2021	7/30/2021		7/30/2021				
Family Protection Services Bd. (191-02)	Domestic Violence Program Licensure Standards Legislative	6/30/2021	7/30/2021		7/30/2021				
Fire Commission (87-01)	Fire Code Legislative	6/28/2021	7/28/2021		7/30/2021				
Fire Commission (87-04)	State Building Code Legislative	6/23/2021	7/26/2021		7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Fire Commission (87-10)	Volunteer Fire Department Equipment and Training Grant Funding Disbursement Legislative	4/12/2021	5/31/2021	3/30/2021 Effective 5/11/2021	6/23/2021				
Fire Commission (87-11)	Specialized Membership Legislative	6/22/2021	7/23/2021		7/30/2021				
Fire Commission (87-12)	Junior Firefighters Legislative	6/22/2021	7/23/2021	6/22/2021 Effective 8/3/2021	7/30/2021				
Fire Commission (87-13)	Certification of Fire Chiefs Legislative	6/22/2021	7/23/2021	6/22/2021 Effective 8/3/2021	7/30/2021				
Fire Commission (87-14)	Use of Aqueous Film-Forming Foam (AFFF) for Fire Training Program Purposes Legislative	6/23/2021	7/26/2021		7/27/2021				
Fire Marshal (103-04)	Regulation of Fireworks and Related Explosive Materials Legislative	6/25/2021	7/27/2021		7/28/2021				
Funeral Service Examiners (6-07)	Fee Schedule Legislative	6/30/2021	7/30/2021		7/30/2021				
Health (64-10)	Methods and Standards for Chemical Tests for Intoxication Legislative	6/29/2021	7/29/2021		7/30/2021				
Health (64-12)	Hospital Licensure Legislative	6/22/2021	7/22/2021	5/20/2021 Effective 7/1/2021	7/23/2021				
Health (64-42)	Childhood Lead Screening Legislative	6/29/2021	7/29/2021		7/30/2021				
Health (64-43)	Food Manufacturing Facilities Legislative	6/30/2021	7/30/2021		7/30/2021				
Health (64-47)	Sewage Treatment and Collection System Design Standards Legislative	6/29/2021	7/29/2021		7/30/2021				
Health (64-48)	Emergency Medical Services Legislative	7/29/2021	8/30/2021	7/1/2021 Approved 7/1/2021	9/10/2021				
Health (64-57)	Clinical Laboratory Practitioner Licensure and Certification Legislative	6/29/2021	7/29/2021		7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Health (64-92)	Clandestine Drug Laboratory Remediation Legislative	6/29/2021	7/29/2021		7/30/2021				
Health (64-97)	Maternal Risk Screening Legislative	6/29/2021	7/29/2021		7/30/2021				
Health & Human Resources (69-17)	Syringe Services Program Licensure Legislative	7/15/2021	8/16/2021	7/15/2021 Effective 8/26/2021 Amendment 8/27/2021 ERD by 10/8/2021	8/27/2021				
Health Care Authority (65-32)	Certificate of Need Legislative	6/29/2021	7/29/2021		7/30/2021				
Higher Education Policy Comm. (133-59)	Awarding Undergraduate College Credit for Prior Learning, Advanced Placement Credit, and College-Level Examination Program Procedural	4/30/2021	6/1/2021						
Highways (157-01)	Rules Relating Generally to Various Functions of the Commissioner of Highways Procedural	9/8/2021	10/8/2021						
Insurance Comm. (114-42)	Continuing Education for Individual Insurance Producers and Individual Insurance Adjusters Legislative	5/28/2021	7/1/2021		7/8/2021	Approved 8/19/2021			
Insurance Comm. (114-99)	Pharmacy Auditing Entities and Pharmacy Benefit Managers Legislative	6/1/2021	7/1/2021		7/27/2021				
Insurance Comm. (114-102)	Term and Universal Life Insurance Reserve Financing Legislative	5/28/2021	7/1/2021		7/8/2021				
Insurance Comm. (114-103)	Bail Bondsmen in Criminal Cases Legislative	6/1/2021	7/1/2021		7/9/2021	Modified & Approved 8/19/2021 Filed 8/24/2021			
Labor (42-09)	Child Labor Rule Legislative	6/29/2021	7/30/2021		7/30/2021	Modified & Approved 8/19/2021 Filed 9/1/2021			
Lottery Comm. (179-01)	WV Lottery State Lottery Rules Legislative	5/28/2021	6/29/2021		7/7/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Lottery Comm. (179-05)	WV Limited Video Lottery Rule Legislative	6/1/2021	7/1/2021		7/8/2021				
Massage Therapy Licensure Bd. (194-01)	General Provisions Legislative	6/29/2021	7/29/2021		7/30/2021	Modified & Approved 8/19/2021 Filed 9/1/2021			
Medicine (11-01A)	Licensing and Disciplinary Procedures: Physicians, Podiatric Physicians and Surgeons Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-01B)	Licensure, Disciplinary and Complaint Procedures, Continuing Education, Physician Assistants Legislative	6/29/2021	7/29/2021	6/29/2021 Effective 8/10/2021	7/30/2021				
Medicine (11-05)	Bd. Of Medicine Rule for Dispersing of Prescription Drugs by Practitioners Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-06)	Continuing Education for Physicians and Podiatric Physicians Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-10)	Practitioner Requirements for Accessing the WV Controlled Substances Monitoring Program Database Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-11)	Establishment and Regulation of Limited License to Practice Medicine and Surgery at Certain State Veterans Nursing Home Facilities Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-14)	Registration to Practice During Declared State of Emergency Legislative	6/29/2021	7/29/2021		7/30/2021				
Medicine (11-15)	Telehealth and Interstate Telehealth Registration for Physicians, Podiatric Physicians and Physicians Assistants Legislative	6/29/2021	7/29/2021	6/29/2021 Effective 8/10/2021	7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Miners Health Safety and Training (56-03)	Rule Governing the Safety of Those Employed in and Around Surface Mines in WV Legislative	5/7/2021	6/7/2021	5/7/2021 Approved 6/7/2021 Amendment 8/24/2021 ERD by 10/5/2021	6/11/2021	Modified & Approved 8/18/2021 Filed 8/24/2021			
Miners Health Safety and Training (56-11, repeal)	Rule Governing First-Aid Training of Shaft and Slope Employees Legislative	5/7/2021	6/7/2021		6/11/2021	Approved 8/18/2021			
Miners Health Safety and Training (56-19)	Substance Abuse Screening, Standards and Procedures Legislative	6/25/2021	7/26/2021		7/30/2021	Modified & Approved 8/19/2021 Filed 8/24/2021			
Miner Training Education and Certification (48-02)	Safety Training Program for Prospective Underground Coal Miners Legislative Exempt	5/3/2021	6/17/2021					9/7/2021	1/5/2022
Miner Training Education and Certification (48-03)	Safety Training Programs for Prospective Surface Coal Miners Legislative Exempt	5/3/2021	6/17/2021					9/7/2021	1/5/2022
Miner Training Education and Certification (48-04)	Initial Training Program for Prospective Mine Rescue Team Members and Additional Mine Rescue Requirements Legislative Exempt	5/3/2021	6/17/2021					9/7/2021	10/7/2021
Motor Vehicles (91-04)	Examination and Issuance of Drivers License Legislative	6/25/2021	7/26/2021	6/24/2021 Effective 8/5/2021	7/27/2021	Modified & Approved 8/19/2021 Filed 8/30/2021			
Motor Vehicles (91-06)	Dealer Licensing Legislative	6/29/2021	7/29/2021		7/29/2021				
Motor Vehicles (91-09)	Collection of Tax on the Sale of a Vehicle Legislative	6/11/2021	7/12/2021		7/20/2021	Modified & Approved 8/19/2021 Filed 8/30/2021			
Natural Resources (58-12)	Commercial Whitewater Outfitters Legislative	6/30/2021	7/29/2021		7/30/2021				
Natural Resources (58-23)	Revocation of Hunting and Fishing Licenses Legislative	6/30/2021	7/29/2021		7/30/2021	Modified & Approved 8/19/2021 Filed 8/31/2021			
Natural Resources (58-25)	Boating Rule Legislative	6/30/2021	7/29/2021		7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Natural Resources (58-26)	Special Boating Rules Legislative	6/30/2021	7/29/2021	6/30/2021 Effective 8/11/2021	7/30/2021				
Natural Resources (58-27)	Special Motorboating Regulations Legislative	6/30/2021	7/29/2021		7/30/2021	Approved 8/19/2021			
Natural Resources (58-30)	Wildlife Education Facilities Legislative	6/30/2021	7/29/2021		7/30/2021				
Natural Resources (58-38)	Public Shooting Ranges Legislative	6/30/2021	7/29/2021	6/30/2021 Effective 8/11/2021	7/30/2021	Modified & Approved 8/19/2021 Filed 8/31/2021			
Natural Resources (58-47)	Prohibitions When Hunting and Trapping Legislative	6/30/2021	7/29/2021		7/30/2021				
Natural Resources (58-49)	General Hunting Legislative	6/30/2021	7/29/2021		7/30/2021	Approved 8/19/2021			
Natural Resources (58-53)	General Trapping Legislative	6/30/2021	7/29/2021		7/30/2021				
Natural Resources (58-63)	Commercial Sale of Wildlife Legislative	6/30/2021	7/29/2021		7/30/2021				
Natural Resources (58-67)	Lifetime Hunting, Trapping and Fishing Licenses Legislative	6/30/2021	7/29/2021		7/30/2021	Modified & Approved 8/19/2021 Filed 8/31/2021			
Natural Resources (58-69)	Wildlife Disease Management Legislative	6/30/2021	7/29/2021		7/30/2021				
Office of Technology (163-02)	Chief Information Officer Review Legislative	6/23/2021	7/23/2021		7/30/2021				
Office of Technology (163-03)	Cyber Reporting Legislative	6/15/2021	7/15/2021		7/30/2021				
Osteopathic Medicine (24-01)	Licensing Procedures for Osteopathic Physicians Legislative	6/29/2021	7/29/2021		7/30/2021				
Osteopathic Medicine (24-02)	Osteopathic Physician Assistants Legislative	6/29/2021	7/29/2021	6/29/2021 Effective 8/10/2021	7/30/2021				
Osteopathic Medicine (24-07)	Practitioner Requirements for Controlled Substances Licensure and Accessing the WV Controlled Substances Monitoring Program Database Legislative	6/29/2021	7/29/2021		7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Osteopathic Medicine (24-10)	Telehealth Practice and Interstate Telehealth Registration for Osteopathic Physicians and Physician Assistants Legislative	6/29/2021	7/29/2021	6/29/2021 Effective 8/10/2021	7/30/2021				
Personnel (143-01)	Administrative Rule of the WV Division of Personnel Legislative	5/28/2021	6/30/2021		7/29/2021	Modified & Approved 8/18/2021 Filed 8/24/2021			
Pharmacy (15-01)	Licensure and Practice of Pharmacy Legislative	6/11/2021	7/12/2021		7/21/2021				
Pharmacy (15-02)	Uniform Controlled Substances Act Legislative	7/21/2021	8/25/2021	6/23/2021 Effective 8/4/2021					
Pharmacy (15-08)	Controlled Substances Monitoring Program Legislative	6/11/2021	7/12/2021		7/21/2021				
Pharmacy (15-16)	Regulations Governing Pharmacists Legislative	6/14/2021	7/15/2021		7/21/2021				
Public Service Commission (150-02)	Rules for the Construction and Filing of Tariffs Legislative Exempt	8/4/2020	10/5/2020 Extended to 6/15/2021						
Public Service Commission (150-09)	Rules Governing Motor Carriers, Private Commercial Carriers, and the Filing of Evidence of Insurance and Financial Responsibility by Motor Carriers Legislative Exempt	8/4/2020	10/5/2020 Extended to 6/15/2021						
Racing Commission (178-01)	Thoroughbred Racing Legislative	5/28/2021	6/28/2021		7/28/2021				
Real Estate Appraiser Licensing and Certification Bd. (190-02)	Requirements for Licensure and Certification Legislative	6/29/2021	7/29/2021		7/30/2021				
Real Estate Appraiser Licensing and Certification Bd. (190-03)	Renewal of Licensure or Certification Legislative	6/29/2021	7/29/2021		7/30/2021				
Real Estate Appraiser Licensing and Certification Bd. (190-05)	Requirements for Registration and Renewal of Appraisal Management Companies Legislative	6/29/2021	7/30/2021		7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Registered Professional Nurses (19-16)	Telehealth Practice Legislative	6/30/2021 7/30/2021	7/30/2021 8/29/2021	7/2/2021 Withdrawn 7/8/2021 7/29/2021 Effective 9/9/2021	8/31/2021				
School Building Authority (164-01)	Policy and Procedures Handbook Procedural	6/30/2021	8/2/2021						
Sec. of WV DHHR, and WV Insurance Commissioner (114A-01)	All-Payer Claims Database – Data Submission Requirements Legislative	6/30/2021	7/30/2021		7/30/2021				
Sec. of WV DHHR, and WV Insurance Commissioner (114A-02, repeal)	All-Payer Claims Database – Privacy and Security Requirements Legislative	6/30/2021	7/30/2021		7/30/2021				
Secretary of State (153-25)	Combined Voter Registration and Driver Licensing Fund Legislative	6/25/2021	7/27/2021		7/30/2021				
Secretary of State (153-30)	Use of Digital Signatures Legislative	6/24/2021	7/27/2021		7/30/2021				
Secretary of State (153-43)	Regulation of Political Party Headquarters Finances Legislative	6/24/2021	7/27/2021		7/30/2021				
Secretary of State (153-45)	Standards and Guidelines for Electronic Notarization, Remote Online Notarization, and Remote Ink Notarization Legislative	6/24/2021	7/27/2021		7/30/2021				
Secretary of State (153-48)	Real Property Electronic Recording Standards and Regulations Legislative	6/29/2021	7/29/2021		7/30/2021				
Secretary of State (153-53)	Election Processes and Absentee Eligibility During State of Emergency			3/20/2020 Effective 3/20/2020					
Senior Services (76-04)	WV State Plan for Aging Programs Interpretive	6/22/2021	7/22/2021					7/23/2021	10/1/2021
Social Work Examiners (25-01)	Qualifications for the Profession of Social Work Legislative	6/30/2021	7/30/2021	6/30/2021 Effective 8/11/2021	7/30/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Social Work Examiners (25-05)	Continuing Education for Social Workers and Providers Legislative	6/30/2021	7/30/2021		7/30/2021				
Speech Language Pathology and Audiology (29-01)	Licensure of Speech-Pathology and Audiology Legislative	4/28/2021	6/4/2021	4/27/2021 Effective 6/8/2021	6/9/2021				
State Emergency Response Comm. (55-03)	Requests for Information Pursuant to the Community Right to Know Act Procedural	5/12/2021	6/11/2021						
State Police (81-03)	Career Progression Legislative	6/29/2021	7/30/2021		7/30/2021	Modified & Approved 8/18/2021			
Tax (110-01A)	Valuation of Farmland and Structures Situated Thereon for Ad Valorem Property Tax Purposes Legislative Exempt	6/3/2021	7/7/2021		7/8/2021 Withdrawn 8/27/2021			8/27/2021	9/27/2021
Tax (110-01J)	Valuation of Producing and Reserve Oil, Natural Gas Liquids, and Natural Gas for Ad Valorem Property Tax Purposes Legislative	6/4/2021	7/7/2021	6/8/2021 Effective 7/20/2021	7/30/2021				
Tax (110-13KK)	WV Tax Credit for Federal Excise Tax Imposed Upon Small Arms and Ammunition Manufacturers Legislative	6/4/2021	7/7/2021		7/8/2021	Modified & Approved 8/19/2021 Filed 9/7/2021			
Tax (110-15F)	Sales Tax Holiday Legislative	5/11/2021	6/11/2021	5/7/2021 Amendment 6/3/2021 Approved 6/7/2021	6/30/2021				
Tax (110-15L)	Exemption for Repair, Remodeling, and Maintenance of Aircraft Legislative	6/2/2021	7/7/2021	6/2/2021 Effective 7/14/2021	7/8/2021	Modified & Approved 8/19/2021 Filed 9/7/2021			
Tax (110-15M)	Vendor Absorption or Assumption of Sales and Use Tax Legislative	6/3/2021	7/7/2021		7/8/2021				
Tax (110-16A)	On-Line Bingo and Raffles Legislative	6/3/2021	7/7/2021		7/8/2021				
Tax (110-24)	Corporation Net Income Tax Legislative	6/2/2021	7/7/2021		7/27/2021				

RULE MONITOR

AGENCY/SERIES NUMBER	RULE	NOTICE	HEARING	EMER RULE	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Transportation (217-01)	Employment Procedures Legislative	6/30/2021	7/30/2021		7/30/2021				
Treasurer (112-02)	Substitute Checks-Exceptional Items Fund Legislative	6/28/2021	7/28/2021		7/29/2021	Approved 8/19/2021			
Treasurer (112-10)	Reporting Debt Legislative	6/28/2021	7/29/2021		7/29/2021	Approved 8/19/2021			
Treasurer (112-12)	Procedures for Fees in Collections by Charge, Credit or Debit Card or by Electronic Payment Legislative	6/28/2021	7/28/2021		7/29/2021	Approved 8/19/2021			
Treasurer (112-13)	Procedures for Providing Services to Political Subdivisions Legislative	6/25/2021	7/26/2021		7/29/2021	Approved 8/20/2021			
Underground Facilities Damage Prevention Bd. (214-02)	Rules of Procedure for Complaints and Contested Cases Before the WV Underground Facilities Damage Prevention Board Procedural	4/21/2021	5/21/2021						
Waste Management, Div. of Water & Waste Mgmt. (33-01B)	Requirements for the Management of Coal Combustion Residuals Legislative	6/25/2021	7/26/2021		7/30/2021				
Water Resources, Div. of Water & Waste Mgmt. (47-02)	Requirements Governing Water Quality Standards Legislative	6/4/2021	7/19/2021		7/30/2021				
Water Resources, Div. of Water & Waste Mgmt. (47-02B)	Assessment Methodology for the Biological Component of the Narrative Criteria in Wadeable Streams Procedural	2/9/2021	3/11/2021 Written Comments Extended To 3/26/2021						
Water Resources, Div. of Water & Waste Mgmt. (47-13)	Underground Injection Control Legislative	6/23/2021	7/23/2021		7/30/2021				
Water Resources, Div. of Water & Waste Mgmt. (47-30B)	Administrative Proceedings and Civil Penalty Assessment Legislative	9/14/2021	10/15/2021	8/19/2021 ERD by 9/30/2021					

LEGISLATIVE RULES FILED PER THE SUNSET PROVISION W. Va. Code §29A-3-19 and 29A-3A-20

AGENCY/SERIES NUMBER	RULE/SUNSET DATE	REQUEST	AGENCY APPROVED	LRMRC/LOCEA ACTION	LEGIS	FINAL FILE	EFFECTIVE
Auditor 155-08	Procedure for Local Levying Bodies to Apply for Permission to Extend Time to Meet as Levying Body 7/1/2022	5/13/2021					
Community & Technical College Education 135-35	Correspondence, Business, Occupational, and Trade Schools 7/19/2022	4/5/2021	4/27/2021				
Community & Technical College Education 135-52	Annual Reauthorization of Degree-Granting Institutions 7/19/2022	4/6/2021	4/27/2021				
Dangerous Wild Animal Board 74-01	Dangerous Wild Animals 6/5/2022	4/5/2021	4/5/2021	Approved 8/18/2021			
Health 64-103	Expedited Paratner Therapy 6/1/2022	5/10/2021	5/10/2021				
Health and Human Resources 69-11	Medication-Assisted treatment – Opioid Treatment Programs 6/1/2022	5/10/2021	5/10/2021				
Higher Education Policy Commission 133-48	Research Trust Fund 8/5/2022	5/5/2021	5/5/2021				
Higher Education Policy Commission 133-52	Annual Reauthorization of Degree-Granting Institutions 8/5/2022	5/5/2021	5/5/2021				
Insurance Commission 114-98	Adoption of Valuation Manual 5/19/2022	3/31/2021	3/31/2021	Approved 8/19/2021			
Public Service Commission (150-37)	Rules Governing the Occupancy of Customer-Provided Conduit 8/1/2022	5/6/2021	8/6/2021	Modified & Approved 8/19/2021 Filed 8/24/2021			
Racing Commission 178-05	Pari-Mutuel Wagering 8/1/2022	4/26/2021	4/30/2021	Approved 8/18/2021			
Registererd Professional Nurses 19-08	Limited Prescriptive Authority for Nurses in Advanced Practice 5/15/2022	3/17/2021	5/10/2021				
Risk and Insurance Management 115-07	Patient Injury Compensation Fund 5/1/2022	4/21/2021					
Secretary of State 153-03	Voter Registration at the Division of Motor Vehicles 5/23/2022	5/10/2021	5/10/2021				

LEGISLATIVE RULES FILED PER THE SUNSET PROVISION W. Va. Code §29A-3-19 and 29A-3A-20							
AGENCY/SERIES NUMBER	**RULE/SUNSET DATE**	**REQUEST**	**AGENCY APPROVED**	**LRMRC/LOCEA ACTION**	**LEGIS**	**FINAL FILE**	**EFFECTIVE**
Secretary of State 153-05	Voter Registration List Maintenance by the Secretary of State 5/23/2022	5/10/2021	5/10/2021				
Treasurer 112-04	Procedures for Deposit of Monies with the State Treasurer's Office by State Agencies 6/1/2022	5/5/2021	5/6/2021	Approved 8/19/2021			
Treasurer 112-06	Selection of State Depositories for Disbursement Accounts through Competitive Bidding 6/1/2022	5/6/2021	5/6/2021	Approved 8/19/2021			
Treasurer 112-07	Selection of State Depositories for Receipt Accounts 6/1/2022	5/7/2021	5/7/2021	Approved 8/19/2021			
Treasurer 112-08	Procedures for Processing Payments from the State Treasury 6/1/2022	5/7/2021	5/7/2021	Approved 8/19/2021			

WEST VIRGINIA SECRETARY OF STATE
MAC WARNER
ADMINISTRATIVE LAW DIVISION

eFILED
9/13/2021 4:20:34 PM
Office of West Virginia
Secretary Of State

LEGISLATIVE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Auditor TITLE-SERIES: 155-09

RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No

RULE NAME: 155-09 Accountability Requirements for State Funds and Grants

PRIMARY CONTACT

NAME: Stephen R Connolly General Counsel Deputy State Auditor

ADDRESS: State Capitol Building Bldg 1 Suite W 100

Charleston, WV 25305

EMAIL: steve.connolly@wvsao.gov

PHONE NUMBER: 304-558-2251

CITE STATUTORY AUTHORITY: 12-4-14(d)(11)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The Code provides for procedural, interpretive and legislative rulemaking to effectuate the provisions of the Section which provides for greater transparency and accountability to State grants.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 7/30/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 8/30/2021

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING:

FILED
2021 SEP 10 P 12:53
OFFICE WEST VIRGINIA SECRETARY OF STATE

WEST VIRGINIA BOARD OF EDUCATION
Capitol Building 6, Room 351
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0330
Telephone: 304.558.3660
Facsimile: 304.558.0048

September 10, 2021

The Honorable Mac Warner
Secretary of State
State of West Virginia
Capitol Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Secretary Warner:

The West Virginia Board of Education, at its September 8, 2021 meeting, repealed 126CSR192, Policy 5103, Prospective Employable Professional Personnel, filed November 9, 2000, and effective December 9, 2000.

Thank you for your attention to this matter.

Sincerely,

Michele L. Blatt

Michele L. Blatt
Deputy State Superintendent of Schools
West Virginia Department of Education

WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED
9/10/2021 5:15:26 PM

Office of West Virginia
Secretary Of State

LEGISLATIVE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Health

TITLE-SERIES: 64-48

RULE TYPE: Legislative

Amendment to Existing Rule: Yes

Repeal of existing rule: No

RULE NAME: 64-48 Emergency Medical Services

PRIMARY CONTACT

NAME: Michelle L Bradley

ADDRESS: One Davis Sqaure
Suite 100 E
Charleston, WV 25301

EMAIL: michelle.l.bradley@wv.gov

PHONE NUMBER: 304-558-6052

CITE STATUTORY AUTHORITY: 16-1-4, 16-4C-6, 16-4C-14, 16-4C-23, 29A-3-15

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The Secretary may propose rules in accordance with the provisions of 29A-3-1 et seq. of the code that are necessary and proper to effectuate the purposes of Chapter 16.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 7/29/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 8/30/2021

COMMENTS RECEIVED:

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING:

WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED
9/14/2021 3:06:18 PM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Water Resources Division Of Water And Waste Management

TITLE-SERIES: 47-30B

RULE TYPE: Legislative

Amendment to Existing Rule: Yes

Repeal of existing rule: No

RULE NAME: ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT

CITE STATUTORY AUTHORITY: W. Va. Code § 22-11-22a(b) and (d

COMMENTS LIMITED TO:

Oral and Written

DATE OF PUBLIC HEARING: 10/14/2021 6 PM

LOCATION OF PUBLIC HEARING:

WV Department of Environmental Protection,601 57th Street Charleston, WV 25304

DATE WRITTEN COMMENT PERIOD ENDS: 10/15/2021 5 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Charles S Sturey

ADDRESS: WV Department of Environmental Protection

601 57th Street Charleston, WV 25304

EMAIL: charles.s.sturey@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

Orders Report

Docket Number	Agency	Respondent	Date Rendered
21-7-12069-H	**Health Care Authority**	Stonewall Jackson Memorial Hospital Company	9/1/2021
21-1-12068-H	**Health Care Authority**	Raleigh General Hospital	9/14/2021
HD-44-21	**Human Rights Commission**	Emil R. Knutti	9/9/2021
HD-37-21	**Human Rights Commission**	C&D Assets, LLC	9/10/2021
20-FP-02028	**Insurance Commission**	Highmark West Virginia	9/10/2021

STATE OF WEST VIRGINIA

EXECUTIVE DEPARTMENT

At Charleston

EXECUTIVE ORDER NO. 25-21

By the Governor

WHEREAS, a State of Emergency was declared on the Sixteenth Day of March, Two Thousand Twenty for all counties in West Virginia ("the State of Emergency Declaration") to allow agencies to coordinate and create necessary measures to prepare for and respond to the outbreak of the respiratory disease caused by the novel coronavirus now known as COVID-19; and

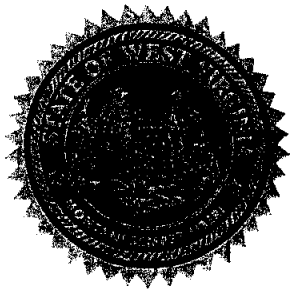
WHEREAS, West Virginia Code § 15-5-6 authorizes the Governor to, among other things, suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules of any state agency, if strict compliance therewith would in any way prevent, hinder, or delay necessary action in coping with the emergency; and

WHEREAS, West Virginia Code § 11-1C-5 requires the Tax Commissioner to compile a schedule of automobile values based upon the lowest values shown in a nationally accepted used car guide for use in determining the value on the July 1 assessment date; and

WHEREAS, due to the ongoing pandemic, the automobile values in all nationally accepted used car guides are artificially inflated primarily due to supply issues created by the coronavirus pandemic, and basing such schedule for taxation purposes on such artificially-inflated used car prices would be to the detriment of West Virginia's citizenry; and

NOW, THEREFORE, I, JIM JUSTICE, pursuant to the authority vested in me pursuant to the provisions of West Virginia Code § 15-5-6, hereby **DECLARE** and **ORDER** that the applicable provisions of the above-referenced regulatory statute are hereby suspended to the extent necessary to account for the used car prices in the current year's nationally accepted used car guides being artificially-inflated and, to that end, I further **DIRECT** that the Tax Commissioner shall compile a schedule of automobile values based upon the lowest values shown in a nationally accepted used car guide from the current year or the previous year, whichever is lower. Such schedule shall be furnished to each assessor and shall be used by the several county assessors to determine the assessed value for all motor vehicles in an amount equal to sixty percent of said lowest values.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.



DONE at the Capitol in the City of Charleston, State of West Virginia, this Fifteenth day of September, in the year of our Lord, Two Thousand Twenty-One in the One Hundred Fifty-Ninth year of the State.

GOVERNOR

By the Governor

SECRETARY OF STATE

FILED
2021 SEP 13 P 2:11
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

AG OPINION

State of West Virginia
Office of the Attorney General
State Capitol
Building 1, Room 26-E
Charleston, WV 25305-0220

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

September 10, 2021

The Honorable Craig P. Blair
President of the Senate
State Capitol Building 1, Room 229M
1900 Kanawha Boulevard East
Charleston, WV 25305

The Honorable Roger Hanshaw
Speaker of the House of Delegates
State Capitol Building 1, Room 228M
1900 Kanawha Boulevard East
Charleston, WV 25305

Dear President Blair and Speaker Hanshaw:

You have asked for an Opinion of the Attorney General about legal issues that may arise from vaccine mandates and vaccine passports related to coronavirus disease 2019 ("COVID-19"). This opinion is issued under West Virginia Code § 5-3-1, which provides that the Attorney General will "render to the President of the Senate and/or the Speaker of the House of Delegates a written opinion or advice upon any questions submitted to the Attorney General by them . . . whenever he . . . is requested in writing so to do."

Your letter observes that "public discussion" has recently increased surrounding the concepts of "mandatory vaccinations and vaccine passports." The letter asks questions about two forms of potential vaccine mandates: (1) a mandate imposed by the "State of West Virginia" requiring that state employees be vaccinated against COVID-19; and (2) mandates imposed by private employers requiring that their employees be vaccinated. Your letter also poses questions about "vaccine passports." You define "vaccine passports" to mean "any certification or required verification through some documentary or electronic means that would make access to some public accommodation or service dependent upon proof of a required vaccination status."

Your letter raises three primary legal questions:

(1) Could the State require state employees to be vaccinated?

(2) Could the State require businesses to request vaccine passports before permitting entry into public or private establishments?

(3) Can private entities require their employees to be vaccinated or ask for entrants to present vaccine passports to gain entry to their premises? Could the State prohibit them from doing so?

Your original questions focused on the constitutionality of the potential measures. Notably, this area of law is still developing and evolving, and specific authorities on these issues are often non-existent. Further, any complete answer to your questions also requires one to analyze state and federal authorities beyond the state Constitution. Accordingly, we offer here our best advice as to all the interests that the Legislature should bear in mind as it proceeds to consider legislation such as that described above. Rather than provide a simple, clinical description of the current state of play, this letter highlights the important liberty interests that mandates and passports implicate.

As explained below, broad vaccine mandates without exceptions and vaccine-passport requirements may offend:

- Constitutional interests in personal medical decision-making;
- The sacred constitutional right to religious freedom; and
- Fundamental rights to assemble, vote, petition, and generally engage as a member of civil society.

Even if a blanket mandate or passport requirement could pass constitutional muster, the Attorney General could not endorse it. "[T]he Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond [that floor]." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (citing JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS (2018)). This situation is an opportunity for the Legislature to exercise its authority to guard and protect individual rights while advancing the public health.

For reasons discussed further, the Legislature can undeniably act. In fact, "[t]he Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact *any measure* not inhibited thereby." Syl. pt. 5, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) (emphasis added; quotaton marks omitted). Ultimately, "[i]t is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation." Syl. pt. 3 (in part), *State v. Dubuque*, 239 W. Va. 660, 805 S.E.2d 421 (2017) (quotation marks omitted).

With those matters in mind, this letter first provides some factual and legal background before analyzing the specific questions your letter presents.

Factual Background

A. COVID-19 and Vaccines in West Virginia

Ever since the first documented case of COVID-19 in this State in March 2020, the virus has had significant consequences to the lives of West Virginians. Acting under his emergency powers, Governor Jim Justice proclaimed a state of emergency and took steps to address the spread of the virus. Among other things, the Governor closed schools, public services, elective medical facilities, and certain types of businesses. He instructed citizens to stay home as much as possible. As the State began to reopen over the next several months, the Governor required individuals to wear face coverings when gathering indoors, imposed smaller capacity limits for many businesses, mandated social distancing, and barred certain activities. Many of these measures remained in place well into 2021, as public health experts and policymakers grappled with how to return to "normal" while limiting disease spread. The Legislature, too, passed certain measures designed to address the crisis. *See, e.g.*, 2021 W. Va. Acts c.1 (COVID-19 Jobs Protection Act).

Vaccines offered a tool to help respond to the virus. In May 2020, President Donald Trump announced Operation Warp Speed, a public-private partnership meant to help speed the development of a COVID-19 vaccine. *See generally* U.S. Gov't Accountability Office, *Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges* (Feb. 2021), *available at* https://www.gao.gov/assets/gao-21-319.pdf. Together, the Department of Defense and Department of Health and Human Services devoted billions in funds to support vaccine development, manufacturing, and distribution.

These efforts produced results. In December 2020, the Food and Drug Administration issued the first emergency use authorization ("EUA") for a vaccine to prevent COVID-19, the Pfizer-BioNTech COVID-19 Vaccine. The EUA authorized the vaccine for use in individuals 16 years and older, and the FDA later amended the EUA to permit the vaccine for those 12 years and older. Days after the first EUA, the FDA issued an EUA for persons 18 and older for the Moderna COVID-19 Vaccine. And in February 2021, the FDA issued an EUA for a third vaccine, the Johnson & Johnson/Janssen COVID-19 Vaccine; again, individuals 18 years and older could get it. The FDA and CDC recommended a pause in using this third vaccine in April 2021 while experts reviewed data on a potential side effect pertaining to blood clots. They recommended resuming use of the vaccine (with new warnings) a few days later. Just a few weeks ago, the FDA formally approved a COVID-19 vaccine for the first time: the Pfizer-BioNTech vaccine marketed as "Comirnaty."[1]

As these vaccines have become available, the Governor and state agencies have encouraged vaccination against COVID-19 through public-education campaigns, incentive programs, vaccination clinics, and similar measures. The State has not required its employees to be

[1] The FDA has said: "The licensed vaccine has the same formulation as the EUA-authorized vaccine and the products can be used interchangeably to provide the vaccination series without presenting any safety or effectiveness concerns. The products are legally distinct with certain differences that do not impact safety or effectiveness." FDA Letter to Elisa Harkins, Pfizer (Aug. 23, 2021), *available at* https://www.fda.gov/media/150386/download.

AG OPINION

vaccinated against COVID-19 as a condition of employment. West Virginia schools do not require a COVID-19 vaccine for eligible schoolchildren. And although some private businesses in the State have required their employees to be vaccinated, the State has not demanded that these businesses do so (or, conversely, prohibited their private decisions to do so). Nor has the State imposed "vaccine passport" requirements on public facilities. In short, the State has not dictated private vaccination efforts.

Many in West Virginia have already been vaccinated. All West Virginians ages 12 and older are eligible to receive a COVID-19 vaccine for free. The West Virginia Department of Health and Human Resources reports that roughly 920,000 West Virginians are fully vaccinated against COVID-19 as of September 7, 2021. As the B.1.617.2 (Delta) variant spreads throughout the United States, West Virginia has seen a jump in COVID-19 cases and related hospitalizations. Most individuals currently hospitalized for COVID-19 are unvaccinated.

B. COVID-19 and Vaccines Elsewhere

Other governments have taken varying approaches to COVID-19 vaccine mandates. Some States have required their employees to be vaccinated against COVID-19, while others have banned such mandates. Similarly, some States require health workers to be vaccinated against COVID-19, while others prohibit such requirements. States have implemented these various provisions through executive orders, amendments to existing legislation, and new laws.

Montana provides an example of one of the broadest anti-vaccine mandate laws. The law amends Montana's anti-discrimination statutes. The first subsection speaks to public services and benefits, the second subsection refers to employment, and the third subsection addresses access to public accommodations. *See* 2021 Mont. Laws c. 418 ("Prohibit Discrimination Based on Vaccine Status or Possessing Immunity Passport"). Together, the provisions make it an "unlawful discriminatory practice" to deny these benefits and rights "based on the person's vaccination status or whether the person has an immunity passport." *Id.* § 1. In other words, vaccination now constitutes a protected trait in Montana. The statute also provides for certain exceptions relevant to school vaccinations and the healthcare field. *Id.* § 2. Furthermore, it says that "[a]n individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials." *Id.* § 1(4).

Likewise, States have diverged when it comes to vaccine passports. The National Academy for State Health Policy reports that at least twenty States ban such passports in at least some form. Nat'l Acad. for State Health Policy, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports* (Sept. 9, 2021), *available at* https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/. In an amendment to its public health laws, for example, Florida prohibited private entities, governmental entities, and educational institutions from requiring persons to provide "any documentation certifying COVID-19 vaccination or post-infection recovery" as condition of obtaining services from those entities. *See* Fla. Stat. § 381.00316(1)-(3). Health care providers are exempt. *Id.* § 381.00316(5). Likewise, a Tennessee law forbids the state from mandating that private businesses demand vaccine passports

from customers; it also prohibits state and local entities from requiring a vaccine passport to gain entry to government facilities. *See* Tenn. Code § 68-5-117(A).

In contrast, some locales have launched vaccine documentation and verification programs. In places like New York City, San Francisco, and Honolulu, patrons and staff must generally show proof of vaccination against COVID-19 to gain entry to entertainment venues, restaurants, and certain other public facilities.

Legal Background

A. The Constitution and Medical Treatment: Two Relevant but Divergent Doctrines

Substantial authorities from the U.S. Supreme Court and elsewhere address various forms of vaccine mandates and, more generally, the right to control one's own medical decisions. These federal cases guide how courts will likely construe provisions in our state constitution. As discussed more below, however, "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded the Federal Constitution." *State v. Clark*, 232 W. Va. 480, 494, 752 S.E.2d 907, 921 (2013) (quotation marks omitted, alterations in original).

The U.S. Supreme Court has not been consistent in how it has approached compulsory medical treatment like vaccines. Some scholars have identified two competing (and not entirely reconcilable) lines of cases addressing constitutional issues in medical decision-making: the so-called "public health cases" and the so-called "autonomy cases." *See, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 294 (2007) (explaining how "two distinct lines of cases, both implicating the right to make medical treatment decisions, have developed without merging"); *see also* Sapna Kumar, *Life, Liberty, and the Pursuit of Genetic Information*, 65 ALA. L. REV. 625, 653 (2014) (describing three lines of cases: autonomy cases, public-health cases, and moral-values cases).

This letter addresses both lines of authority in turn—ultimately concluding that the autonomy cases should decide these issues.

1. Public Health Cases

The U.S. Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 13, 25 S. Ct. 358, 359 (1905), represents the chief authority in the public-health line of cases. In *Jacobson*, the Court addressed a regulation requiring every adult in a city to be vaccinated against smallpox. *Id.* at 12-13. A challenger argued that this compulsory vaccination "invaded" an individual's liberty in an "unreasonable, arbitrary, and oppressive" way—and was "hostile to the inherent right of every freeman to care for his own body." *Id.* at 26. The Supreme Court disagreed, concluding that the federal Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Ultimately, the Court thought Cambridge's mandatory-vaccination regulation had a "real [and] substantial relation to the

AG OPINION

protection of the public health and the public safety," such that it could not be "in palpable conflict with the Constitution." *Id.* at 31. In effect, the Court believed that the interests of the city overcame the individual's interests in those specific circumstances:

> A community has the right to protect itself against an epidemic of disease which threatens the safety of its members. . . . There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 27-29.

Jacobson itself cautioned that a vaccination requirement might be applied in such an "arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Id.* at 28. Even so, the Court—in addressing a school vaccination requirement roughly two decades later—considered it "settled ... that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 25 (1922). Courts have since construed *Jacobson* as a case that applies only the lightest form of scrutiny: a "rational basis" test that will sustain most laws. *See Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020) ("*Jacobson* represents a legal standard that is at least the opposite of strict judicial scrutiny. It barely authorizes judicial review at all.").

Since *Jacobson*, courts have employed a broad understanding of the case to hold that state-affiliated entities may require vaccines. Most often, these cases involved student challenges to compulsory vaccination as a condition for attending school. *See, e.g.*, *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (rejecting challenge to university vaccine mandate and explaining that "*Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack [a fundamental] right [to be free from vaccination]"); *Phillips v. City of New York*, 775 F.3d 538, 542-44 (2d Cir. 2015) (holding that a substantive due process challenge to a school vaccination requirement was "foreclosed by ... *Jacobson*"); *Harris v. Univ. of Mass.*, No. 21-CV-11244-DJC, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) (rejecting challenge to vaccine mandate and relying on *Jacobson*); *Doe v. Zucker*, No. 120CV840BKSCFH, 2021 WL 619465, at *21-*22 (N.D.N.Y. Feb. 17, 2021) (same); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-89 (S.D. Cal. 2016) (same); *Boone v. Boozman*, 217 F. Supp. 2d 938, 952-57 (E.D. Ark. 2002) (same).

West Virginia is no exception. In *Workman v. Mingo County Board of Education*, 419 F. App'x 348, 352-56 (4th Cir. 2011), the Fourth Circuit relied extensively on *Jacobson* and its successor cases to hold that West Virginia's mandatory school vaccine program did not offend

several provisions of the federal constitution. *See also D.J. v. Mercer Cty. Bd. of Educ.*, No. 13-0237, 2013 WL 6152363, at *3-4 (W. Va. Nov. 22, 2013) (mem. decision) (rejecting argument that West Virginia's compulsory vaccination program was unconstitutional under state constitution, as the State had a "compelling state interest" in "the protection of the health and safety of the public").

Beyond vaccines, courts have broadly applied *Jacobson* and its related cases to sustain other COVID-19 public-health measures. For example, courts upheld mask mandates in essentially every case in which persons challenged them on constitutional grounds. *See generally Stewart v. Justice*, No. CV 3:20-0611, 2021 WL 472937 (S.D.W. Va. Feb. 9, 2021) (rejecting several challenges to West Virginia's COVID-19 mask mandate); *see also, e.g.*, *Resurrection Sch. v. Hertel*, No. 20-2256, 2021 WL 3721475, at *16 (6th Cir. Aug. 23, 2021); *Denis v. Ige*, No. CV 21-00011 SOM-RT, 2021 WL 1911884 (D. Haw. May 12, 2021); *Oakes v. Collier Ct'y*, 515 F. Supp. 3d 1202, 1209 (M.D. Fla. 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55, 73 (D. Mass. 2021). And taking a public-health-focused approach, courts have generally upheld even more aggressive measures than masks, including the total *closure* of certain private entities. *See generally* Order Granting Defendant's Motion to Dismiss, *Eden LLC v. Justice*, No. 5:20-cv-00201-JPB (N.D.W. Va. Jan. 7, 2021), ECF No. 14; *AJE Enter. LLC v. Justice*, No. 1:20-CV-229, 2020 WL 6940381 (N.D.W. Va. Oct. 27, 2020); *accord Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 537–38 (E.D.N.C. 2020) (upholding COVID-19 restrictions that closed businesses); *Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1121 (N.D. Cal. 2020) (same).

2 Bodily Integrity and Autonomy Cases

A competing line of cases recognizes broader rights to bodily integrity, personal autonomy, and individual choice in medical treatment. Over the past several decades, "[t]he right to be free of compelled physical invasions has been recognized as an integral part of the individual's constitutional freedoms, whether termed a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights." *United States v. Charters*, 829 F.2d 479, 491 (4th Cir. 1987), *on reh'g*, 863 F.2d 302 (4th Cir. 1988).

In modern times, the Supreme Court has seemed especially unwilling to endorse unwanted medical treatments. So, for example, the U.S. Supreme Court recognizes that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041 (1990). And generally, modern courts have been more reluctant to override an individual's choice and compel a specific medical treatment. *See generally, e.g.*, *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003) (anti-psychotic drugs); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841 (1990) (life-sustaining treatment); *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611 (1985) (surgery under anesthesia); *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254 (1980) (transfer to mental hospital); *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952) (stomach-pumping). This long line of cases grows from the "well-established, traditional rights to

AG OPINION

bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807, 117 S. Ct. 2293, 2301, 138 L. Ed. 2d 834 (1997).

These more recent cases suggest that courts might well revisit *Jacobson*'s light-touch form of review if given the right opportunity to do so. Requiring an individual to obtain a vaccine as a condition of state employment might implicate the right to personal medical decisionmaking. *See, e.g.*, Christopher Richins, *Jacobson Revisited an Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 423 (2011) ("[T]he rights to privacy and bodily integrity necessarily encompass the right to be free from compulsory vaccination."); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586, 2595, 186 L. Ed. 2d 697 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *cf. Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 727, 815 S.E.2d 520, 538 (2018) ("This Court has held that public employees are protected from adverse employment consequences resulting from the exercise of their ... First Amendment Rights.").

If a court finds the right to medical decision-making to be a *fundamental* right, then strict scrutiny would apply. *Bd. of Educ. of Cty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807, 639 S.E.2d 893, 899 (2006) ("[T]he strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right."). Under strict scrutiny, "the State rather than [any] complainants must carry a heavy burden of justification." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16, 93 S. Ct. 1278, 1288, 36 L. Ed. 2d 16 (1973). First, "the State must prove that its action is necessary to serve some compelling State interest." Syl. pt. 1, *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 524, 490 S.E.2d 340, 343 (1997). Second, the law must be "narrowly tailored" to advance the interest served. *Id.* To do that, the State will need to show that the challenged mandate was the "least restrictive" means available to address the identified interest. *Pendleton Citizens for Cmty. Sch. v. Marockie*, 203 W. Va. 310, 318, 507 S.E.2d 673, 681 (1998); *see also Holt v. Hobbs*, 574 U.S. 352, 364, 135 S. Ct. 853, 864, 190 L. Ed. 2d 747 (2015) ("The least-restrictive-means standard is exceptionally demanding.").

A West Virginia court applying the West Virginia Constitution may consider setting the framework of *Jacobson* aside and instead choose to apply strict scrutiny in evaluating a case involving compulsory medical treatment. The Supreme Court of Appeals of West Virginia has held "repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart." *State v. Mullens*, 221 W. Va. 70, 89, 650 S.E.2d 169, 188 (2007) (internal quotation marks omitted); *see also Morrisey v. W. Va. AFL-CIO*, 243 W. Va. 86, 124, 842 S.E.2d 455, 493 (2020) (Workman, J., concurring and dissenting) (collecting authorities). That Court has also already agreed that the right to bodily integrity embraces the right to refuse medical treatment. *See Kruse v. Farid*, 242 W. Va. 299, 304-05, 835 S.E.2d 163, 169 (2019); *see also State ex rel. White v. Narick*, 170 W. Va. 195, 199, 292 S.E.2d 54, 58 (1982) ("[R]ational patients have been allowed to determine their fates by refusing medical treatment."); *but see, e.g.*, *In re Kilpatrick*, 180 W. Va. 162, 165–66, 375 S.E.2d 794, 797–98 (1988) (holding that the State's requirement for a serological test before issuing a marriage license did not violate

the West Virginia Constitution). Indeed, even the Legislature has recognized the importance of autonomy in medical decision-making, stressing:

> Common law tradition and the medical profession in general have traditionally recognized the right of a capable adult to . . . reject medical . . . intervention affecting one's own medical condition.

W. Va. Code §16-30-2(b)(1).

B. Religious Freedom: An Evolving Area of Constitutional Law

An independent line of cases reflecting greater protections for religious freedom may also push against applying *Jacobson* reflexively. In our view, courts in the past have been inappropriately hostile to claims premised on religious freedom. In rejecting a religious-based objection to West Virginia's school vaccine mandate, for instance, the Fourth Circuit cited "numerous federal and state courts that have reached similar conclusions in comparable cases" rejecting religious challenges. *Workman*, 419 F. App'x at 354; *see also Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021) (collecting authorities rejecting religious objections to vaccine requirements); *F.F. v. State*, 194 A.D.3d 80, 87, 143 N.Y.S.3d 734, 741 (2021) (same); *Brown v. Smith*, 24 Cal. App. 5th 1135, 1145, 235 Cal. Rptr. 3d 218, 225 (2018) (same). Some of these courts have relied on the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990). There, the Supreme Court held that it would not deem a "valid and neutral law of general applicability" unconstitutional "on the ground that the law proscribes (or prescribes) conduct that [a claimant's] religion prescribes (or proscribes)." *Id.* Applying this thinking, courts have often agreed—though not universally—that COVID-19 vaccine mandates constitute "neutral laws of general applicability" that carry only incidental effects on the exercise of religion. *But see, e.g.*, *Dahl v. Bd. of Trustees of W. Michigan Univ.*, No. 1:21-CV-757, 2021 WL 3891620, at *2 (W.D. Mich. Aug. 31, 2021) (finding that plaintiffs had a likelihood of success on their free-exercise claim against student-athlete vaccine mandate and temporarily enjoining the mandate); *Magliulo v. Edward Via Coll. of Osteopathic Med.*, No. 3:21-CV-2304, 2021 WL 3679227, at *8 (W.D. La. Aug. 17, 2021) (same as to vaccine mandate for medical students). Other courts have employed *Jacobson*'s communitarian approach to reject other religious-based claims, even though *Jacobson* did not even address a claim based on religious freedom. *See Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944) (citing *Jacobson* and holding that "[a parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds").

Fortunately, though, the ground is shifting—and these anti-religion precedents may not survive for much longer. Just last year, the Supreme Court granted certiorari to decide whether *Smith* should be overruled. *See Fulton v. City of Philadelphia*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020). Although the Court ultimately did not reach that question, five justices signed opinions attacking *Smith*. *See Fulton*, 140 S. Ct. at 1882 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are … compelling."); *id.* at 1924 (Alito, J., concurring in the

AG OPINION

judgment) ("*Smith* was wrongly decided. … [T]he Court's error in *Smith* should now be corrected."); *id.* at 1931 (Gorsuch, J., concurring in the judgment) ("*Smith* committed a constitutional error."). *Smith*, then, seems ripe for reversal. And if *Smith* falls, then it seems likely religious objections to compulsory vaccines could be reinvigorated—a reality that *Smith* itself recognized. *See Smith*, 494 U.S. at 888–89 (describing how applying strict scrutiny would "open the prospect of constitutionally required religious exemptions from … compulsory vaccination laws").

Meanwhile, the West Virginia Supreme Court of Appeals has never endorsed *Smith*. The Court never endorsed *Smith* and instead applied the Supreme Court's more restrictive, pre-*Smith* approach. *See State ex rel. Heck's Inc. v. Gates*, 149 W. Va. 421, 444, 141 S.E.2d 369, 384 (1965) ("[I]f the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden*." (emphasis added)).

Generally, though, West Virginia courts seem to have taken a more favorable approach to free-exercise claims than federal courts. That different approach makes good sense, as Article III, Section 15 of the West Virginia Constitution "guarantee[s]" "religious freedom" in much broader terms than the First Amendment. Hence, the West Virginia Supreme Court of Appeals has broadly defined "religion" to reach any "convictions which form the basis for the moral and ethical aspirations upon which [West Virginians] structure their lives." *State v. Riddle*, 168 W. Va. 429, 441, 285 S.E.2d 359, 365 n.4 (1981). The Court has thus found that the "freedom of religion provision" of the West Virginia Constitution protected someone who raised a "personal conscientious objection" against jury service "based on his religious beliefs." Syl. pt. 2, *State v. Everly*, 150 W. Va. 423, 427, 146 S.E.2d 705, 706 (1966).

This solicitous approach toward religious objections contrasts with the Legislature's approach to this point. West Virginia is one of only six States to refuse any religious exemption to its school vaccination requirements. *See* Nat'l Conference of State Legislatures, *States with Religious and Philosophical Exemptions From School Immunization Requirements* (Apr. 30, 2021), *available at* https://bit.ly/3DRFjP0. That unusually restrictive approach, of course, is something that can—and should—be changed.

Even if a West Virginia court were to apply *Smith* in a vaccine case, the case provides at least two exceptions to its general rule. *First*, "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."). And *second*, some courts have applied strict scrutiny in so-called "hybrid rights" cases. In those cases, the free-exercise claim is bound up with another constitutional claim. *Smith*, 494 U.S. at 882. Under the most permissive version of the hybrid-rights approach, a court will apply strict scrutiny where a

claimant brings a free-exercise claim and simultaneously establishes a "colorable" companion constitutional claim. *See, e.g., Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). Whether this view is the right one—or whether a hybrid-rights claim is even viable—is a matter of debate among the federal courts. *See Fulton*, 141 S. Ct. at 1918 (Alito, J., concurring in the judgment).

Finally, the constitution provides substantial room for the Legislature to implement religious exceptions to otherwise generally applicable vaccine laws. The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45, 107 S. Ct. 1046, 1051, 94 L. Ed. 2d 190 (1987). "[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 2868, 97 L. Ed. 2d 273 (1987). "The burdensome issue-by-issue free exercise litigation that would be necessary absent a general exemption "results in considerable ongoing government entanglement in religious affairs[,]" ... [which would] chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity, and centrality of the religious beliefs of others." *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 264 (4th Cir. 1988) (internal quotation marks omitted). Thus, forty-four States and the District of Columbia have some form of religious exemption to compulsory vaccination requirements in schools; successful challenges to such exemptions are few and far between.

C. Federal and State Anti-Discrimination Laws

The imposition of vaccine mandates and vaccine passports may also be subject to attack under various state and federal anti-discrimination laws.

1. Disability Discrimination

An individual unable to obtain a vaccine for medical reasons may be able to successfully challenge a mandate under federal and state law. The West Virginia Human Rights Act ("WVHRA") bars disability discrimination in employment. An employee making disability discrimination claim under that Act must show that "(1) he or she meets the definition of having a 'disability,' (2) he or she is a 'qualified individual with a disability,' [(meaning he or she could do the job with accommodation)] and (3) he or she was discharged from his or her job." Syl. pt. 5, *Woods v. Jefferds Corp.*, 241 W. Va. 312, 824 S.E.2d 539, 541 (2019) (alterations omitted). The employer then must present "a legitimate nondiscriminatory reason for such person's discharge." *Id.* If the employer does so, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge. *Id.*

Title I of the Americans with Disabilities Act ("ADA"), which applies to employers with more than 15 full-time employees, also governs disability-related employment discrimination.

AG OPINION

"[T]he standards governing the ADA ... and the WVHRA are coextensive." *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589, 593 n.5 (S.D. W. Va. 2008) (internal quotation marks omitted). To establish discrimination under the ADA, the employee must show "(1) he was a qualified individual with a disability; (2) he was discharged; (3) he was fulfilling his employer's legitimate expectations at the time of discharge; and (4) the circumstances of his discharge raise a reasonable inference of unlawful discrimination." *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012) (internal alterations and quotation marks omitted).

An employer could impose a qualification standard such as a vaccine requirement only if that standard "is job-related and consistent with business necessity." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79, 122 S. Ct. 2045, 2049, 153 L. Ed. 2d 82 (2002) (internal quotation marks omitted); *accord Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W. Va. 91, 99, 538 S.E.2d 389, 397 (2000). If a disabled employee cannot meet that standard, then the employer cannot enforce the standard against the employee unless the employee poses a "direct threat" to himself or others. *Echazabal*, 536 U.S. at 80. Even then, the employer must offer a reasonable accommodation (so long as it will not unduly burden the employer to do so); *see also Bills v. OS Rest. Servs., LLC*, No. CV 3:18-1232, 2019 WL 3491249, at *4 (S.D.W. Va. July 31, 2019) (applying WVHRA "direct threat" provisions). If the reasonable accommodation eliminates or reduces the threat, then the employee can keep his job. *Id.* Deciding what constitutes a "direct threat" involves a multi-factor test that focuses on the facts of each case.

Under Title III of the ADA, a disabled person can also bring a claim based on disability-discrimination in public accommodations. *See* 42 U.S.C. § 12182. To do that, the claimant must only show that "(1) he is disabled within the meaning of the ADA; (2) the defendant owns, leases, or operates a place of public accommodation; and (3) the defendant discriminated against him because of his disability." *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 669–70 (4th Cir. 2019). If the claimant can meet that test, then the business owner must offer a reasonable modification—that is, a modification comprising "necessary and reasonable" steps to afford a "like experience." *Id.* at 671. Meanwhile, under similar standards, Title II of the ADA prohibits disability-based discrimination in the provision of public services. *Id.* at 670 (noting the "similar standards" under Title II). And the WVHRA contains a similar provision precluding discrimination as to public accommodations. *See* W. Va. Code § 5-11-9(6).

2. Religious Discrimination

Title VII of the Civil Rights Act of 1964 ("Title VII") "makes it an unlawful employment practice 'to discharge any individual because of such individual's religion.'" *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017) (internal quotation marks omitted). In other words, the law provides potentially significant protections to West Virginians who might seek a religious exemption from an employer-imposed vaccine requirement. To make out a *prima facie* case of that type of discrimination, an employee must show that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief, and, (3) he or she was not hired or promoted, fired, or otherwise discriminated against for failure to comply with the conflicting employment requirement." *Henegar v. Sears, Roebuck &*

Co., 965 F. Supp. 833, 836 (N.D.W. Va. 1997). "[A]n employer must make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Consol Energy*, 860 F.3d at 141. An accommodation becomes an "undue hardship" when it imposes "more than a de minimis cost" on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 2277, 53 L. Ed. 2d 113 (1977).

The WVHRA prohibits religious discrimination in employment, too. *See* W. Va. Code §§ 5-11-3(h), 5-11-9(1). "[T]he [WVHRA] should be construed to coincide with the prevailing federal application of Title VII unless variations in statutory language or other compelling reasons require a different result." *Henegar*, 965 F. Supp. at 836 (internal quotation marks omitted). We presume then that West Virginia courts would apply the same religious discrimination standards in applying the WVHRA that a federal court would in applying Title VII.

Title II of the Civil Rights Act of 1964 provides further relevant protections. In general, Title II bars religious and other forms of discrimination as to certain facilities open to the public. *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 431 (4th Cir. 2006). Courts do not agree about whether Title II requires public facilities to accommodate religious objections—but it might. *Compare Dragonas v. Macerich*, No. CV-20-01648-PHX-MTL, 2021 WL 363852, at *5 (D. Ariz. Feb. 3, 2021) (finding that apparent failure-to-accommodate claim premised on religion survived motion to dismiss), *with Zinman v. Nova Se. Univ.*, No. 21-CIV-60723-RAR, 2021 WL 1945831, at *2 (S.D. Fla. May 14, 2021) ("Plaintiff has not pointed to any authority indicating that Title II requires public facilities to *accommodate* religious beliefs and practices." (emphasis in original)).

3. Disparate Impact

The WVHRA—along with its federal counterparts—generally prohibits employment "practices [that] have the *effect* of disproportionately excluding persons on the basis of race, age, and so forth." *W. Va. Univ. v. Decker*, 191 W. Va. 567, 573, 447 S.E.2d 259, 265 (1994). If a claimant can indeed show that a given employment practice has had a disparate impact, then the employer must show that the practice is "job related and consistent with business necessity." *Anderson v. Consolidation Coal Co.*, No. 1:11CV138, 2014 WL 4388288, at *11 (N.D.W. Va. Sept. 5, 2014). If the State (as employer) meets that standard, then the employee could still succeed if he shows that the State had an "alternative, less burdensome practice" that it refused to adopt. *Id.*

Analysis

I. A Blanket Law Requiring All State Employees To Obtain the COVID-19 Vaccine Contravenes the West Virginia Constitution and Conflicts With Other State and Federal Laws.

No West Virginia authority specifically addresses whether, under our constitution, a state employer can mandate that an employee be vaccinated as a condition of employment. Our analysis concludes, however, that such a mandate should be held unconstitutional.

AG OPINION

Jacobson alone canot provide the answer. As one federal court recognized, "*Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and did not address the free exercise of religion." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (internal quotation marks omitted); *see also, e.g., Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) ("Since [*Jacobson*], there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers."); *Bayley's Campground Inc.*, 463 F. Supp. 3d at 32 ("[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review."). Decided the same year as the now-repudiated decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the case seems out of step with our country's present understanding of the Bill of Rights. Extending it too far could lead to disastrous results—as demonstrated by the U.S. Supreme Court's use of *Jacobson* to justify forced sterilization in one infamous case. *See Buck v. Bell*, 274 U.S. 200, 207, 47 S. Ct. 584, 585, 71 L. Ed. 1000 (1927) (citing *Jacobson* and holding: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

If a court were to apply the so-called "autonomy cases" to any mandate case, then the court could apply strict scrutiny to the challenged mandate. Rather than relying on the permissive *Jacobson* standard, strict scrutiny focuses more on the individual liberty and autonomy interests at stake. "[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting from denial of application for injunctive relief). And "*Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring). But in many respects, some have incorrectly read it to do just that. *See id.* at 71 ("Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? ... [W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."). This analysis suggests that any state-based vaccine-related mandate should be subject to more stringent scrutiny than *Jacobson* applied. *See, e.g., Culinary Studios, Inc. v. Newsom*, 517 F. Supp. 3d 1042, 1063 (E.D. Cal. 2021) (citing the recent Supreme Court opinions and concluding from the "the normal constitutional standards of review should apply, not a separate '*Jacobson* standard'").

A broad state-employee mandate—especially one without exceptions—would not survive strict scrutiny, if for no other reason than the mandate's overbreadth and lack of tailoring. "Stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020). Yet a mandate for *all* employees to be vaccinated is not narrowly tailored to achieve that interest. Most obviously, "there are many other less restrictive rules that could be adopted to minimize the risk." *Id.* Remote work, social distancing, frequent testing, altered shifts, and similar mechanisms are now familiar tools to limit spread of COVID-19; they stem the spread with less of an imposition on bodily integrity.

Public information campaigns and the similar initiatives in place serve the State's apparent interest in encouraging its employees to obtain the vaccine. At least without legitimate legislative findings describing why those other methods are insufficient, a broad mandate would likely fail constitutional review.

Also, a mandate fully embracing those who have had COVID-19—and who therefore may possess some natural immunity already—may be overbroad for the same reasons. *See United States v. Arencibia*, No. CR 18-294 ADM/DTS, 2021 WL 2530209, at *4 (D. Minn. June 21, 2021) (noting how an individual's prior infection with COVID-19 "provide[d] him with some natural immunity and lessen[ed] his risk of re-infection"). Although data is still developing, research suggests that those with natural immunity may enjoy the same—or even greater—levels of protection that those who are vaccinated. *See, e.g.*, Faye Flam, *Vaccines Versus Covid-19: The Great Immunity Debate*, WASH. POST (Sept. 7, 2021), *available at* https://wapo.st/3lcyyP6 ("People who had two Pfizer shots were about 27 times more likely to get symptomatic Covid-19 and eight times more likely to be hospitalized than were people who'd been infected."). Insisting that persons who already enjoy a high level of protection against the disease to obtain an *additional* level of protection is not the least restrictive means of achieving the State's interest in advancing public health. *See, e.g.*, Chris Burt, *George Mason Relents, Grants COVID-19 Medical Exemption to Professor*, University Business (Aug. 17, 2021), *available at* https://bit.ly/2X8Ez7z (describing settlement of litigation brought by law professor with natural immunity against his employer).

If the State were to proceed with a mandate anyway, then the burden would fall on the State to show why the alternative mitigation measures or a more circumscribed mandate would not be as effective as a broader, universal mandate for state employees. *See Ashcroft v. ACLU*, 542 U.S. 656, 665, 124 S. Ct. 2783, 2791, 159 L. Ed. 2d 690 (2004). Carrying that burden will be difficult for the State to do, especially if new variants challenge the effectiveness of vaccines, more individuals acquire long-lasting natural immunity, and state entities become used to life with limited mitigation measures in place.

In summary, a mandate that all state employees obtain a COVID-19 vaccine as a condition of employment offends the constitutional right to bodily integrity and personal medical decision-making.

Beyond the bodily-integrity issue, a wide-ranging state-employee mandate lacking any religious exemption would offend our constitution's guarantee of religious freedom. "Texts and decisions of appellate courts dealing with the fundamental nature of religious liberty are almost without limit." *Bond v. Bond*, 144 W. Va. 478, 494, 109 S.E.2d 16, 24 (1959). As the U.S. Supreme Court explained long ago:

> We are a religious people whose institutions presuppose a Supreme Being. ... [The State may] respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. ... But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

AG OPINION

Zorach v. Clauson, 343 U.S. 306, 313–14, 72 S. Ct. 679, 684, 96 L. Ed. 954 (1952).

Smith stands apart from principles like these, and it does not adequately protect the free exercise of religion. Given the direction of the Court, however, it is conceivable, if not likely, that the *Smith* test will be buried soon—at least in this State. And once *Smith* is gone, the strict-scrutiny standard should apply in any free-exercise challenge, too. Once that happens, the tailoring problems already described would defeat the law—particularly as religious objectors would represent only a subset of state employees. *See Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 1359, 79 L. Ed. 2d 604 (1984) ("[T]he Constitution ... affirmatively mandates accommodation, not merely tolerance, of all religions.").

Even if the test in *Smith* were to survive, two other significant problems exist for a mandate in the religious sphere. For one thing, if a mandate provides for a medical exemption (as most every vaccination mandate now in place does), then that mandate should no longer be called "generally applicable." At the same time, exempting religious objectors would not necessarily defeat the objective of reaching a high enough level of immunization to achieve herd immunity if national rates hold. *See* Seither R. McGill, et al., *Vaccination Coverage with Selected Vaccines and Exemption Rates Among Children in Kindergarten - United States, 2019-20 School Year*, 70 MMWR MORB. MORTAL. W'KLY REP. 75 (2021) (showing an average non-medical exemption rate of 2.5% from kindergarten compulsory vaccinations). For another thing, this situation appears to present a classic "hybrid rights" case. Free exercise is at stake, but so, too, is bodily integrity. We cannot say with certainty whether the Supreme Court of Appeals of West Virginia would adopt the "hybrid rights" model that has so divided federal courts. But given that the Court has never spoken to the issue, it is at least plausible that the Court may embrace it.

Accordingly, if the State or state actor does not offer any religious exemption to a mandate that State employees be vaccinated, then such a mandate violates the West Virginia Constitution's guarantee of religious freedom.

Of course, the problems of a state-employee vaccine mandate go beyond the aforementioned analysis; additional challenges to such a mandate are likely to arise under federal and state law.

First, a mandate requiring vaccination under penalty of dismissal could be subject to a claim of disability discrimination. If an employee cannot get a COVID-19 vaccine because of a disability, and the State then dismisses him for it, then that dismissal could violate both the WVHRA and the ADA. An employer could find it hard to establish a "direct threat" on these facts given that many employees in this State have worked in the office without mandatory vaccines for several months. Even if the State can establish that a particular employee's unvaccinated status poses a "direct threat," then reasonable accommodations—such as the mitigation measures

described above—would still seem to be available to reduce or eliminate that threat. For this reason, the Equal Employment Opportunity Commission ("EEOC") counsels that "an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis." EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* § K.5 (updated May 28, 2021), *available at* https://bit.ly/3zQ0COB ("EEOC Guidance").

Second, the State could unwittingly engage in religious discrimination if it requires all employees to be vaccinated without exception. An employee objecting to a vaccine based on bona fide religious grounds would be entitled to a reasonable accommodation. And *any* religious belief *or* practice would be enough to compel the employer to offer those accommodations, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774, 135 S. Ct. 2028, 2033, 192 L. Ed. 2d 35 (2015), so long as the cost is insubstantial to the employer. *Accord* EEOC Guidance at K.12. The employee cannot insist on any specific form of accommodation. *See EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312–13 (4th Cir. 2008). But where an employee raises a valid religious objection, and *some* reasonable accommodation is available, that accommodation must be offered.

Third, the State could face a disparate-impact discrimination claim. Given that disparities in vaccination rates among racial and ethnic populations have persisted, the State could face disparate-impact claims from members of those protected classes should a mandate be implemented. *See* Nambi Ndugga, *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, Kaiser Family Foundation (Sept. 9, 2021), *available at* https://bit.ly/2Vp7542 (providing data concerning disparities among vaccination rates); *see also* EEOC Guidance at K.1 ("[E]mployers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact. ... [B]ecause some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.").

All together, these other state and federal laws confirm that an unmitigated law mandating that all state employees be vaccinated is ill advised and unlawful.

II. A Blanket Law Requiring All Public or Private Establishments To Demand That Patrons Present a "Vaccine Passport" Before Entry Is Unconstitutional Under the West Virginia Constitution and Conflicts with Other State and Federal Laws.

In contrast to existing requirements,[2] a separate requirement that a person show a vaccine passport to enter "*either* public *or* private establishments throughout the state" is a legal step too

[2] West Virginia law already incorporates certification requirements that would qualify as "passports" under the definition you offered. *See* W. Va. Code R. § 64-95-14.1 (providing that a child must have "a complete certificate of immunization or similar medical record of immunizations" to gain entry to a state-regulated childcare facility or public, private, or parochial school). The Supreme Court of Appeals has held that "there is a compelling state interest for the rules requiring proof of these vaccinations to attend public school in this state." *Mercer Cty. Bd. of Educ.*, 2013 WL 6152363, at *4. COVID-19 is not one of the diseases against which compulsory vaccination is required. W. Va. Code § 16-3-4(b).

AG OPINION

far. Such a far-reaching requirement effectively equals banishment from society, preventing a person from participating in even the most basic activities of society. *See Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("Banishment has also been viewed as unconstitutional because it amounts to cruel and unusual punishment or is a denial of due process of law."). It is one thing to impair a person's right to social association—a right that has never been viewed as fundamental. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24–25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18 (1989) (holding that dance-hall patrons had no fundamental right to association); *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990) (explaining that a business's relationship with its customers does not implicate a protected First Amendment right). Although courts have not yet addressed the question, it is quite another matter to insist on total isolation for the unvaccinated—an outcome that would seem to inevitably result from the lack of a passport.

A state-enforced, total prohibition on entry to public and private establishments could significantly impair the exercise of many fundamental rights—the right to worship, speak, assemble, petition, vote, travel, and more. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *but cf. Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1300 (11th Cir. 2013) (finding that prohibition against persons under age 21 in bars did not violate First Amendment because it did not regulate speech). And it should make no difference that the ultimate actor could well be a private entity, as your hypothetical contemplates that the State will have compelled the private entity to demand a passport in the first place. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405 (2019) (explaining that a private entity can become a state actor, to which constitutional strictures apply, "when the government compels the private entity to take a particular action").

These substantial impairments—whether examined through the lens of due process, equal protection, or the First Amendment—would, in our view, trigger strict scrutiny. And as already detailed, a law like this would struggle to meet the narrow-tailoring aspect of the strict-scrutiny analysis, especially if other mitigation methods have been used to good effect for some time.

Further, as with the hypothetical state-employee mandate, this universal vaccine passport would struggle to fit with other state and federal anti-discrimination statutes. For instance, a private business could find itself facing an ADA or WVHRA claim if it were compelled to bar an unvaccinated person from its premises and that person was unable to obtain the vaccine because of a disability. We recognize that the Department of Justice (the agency that enforces ADA Titles II and III) has not yet issued guidance on this issue. But we can imagine many troubling scenarios. For example, giving an unvaccinated-because-of-disability patron the chance to order takeout, while denying him the chance to eat in, might deny the guest a "like experience" and thus contravene the statute. *Id.* at 672 n.7 (rejecting the argument that a disabled patron could have just eaten his meal later). Ultimately, the business would need to show that the vaccination "passport" requirement was an essential eligibility requirement justified by a patron's "direct threat."

Theriault v. Flynn, 162 F.3d 46, 48 (1st Cir. 1998). That analysis would track the similar rationale described above in the employment context.

Overall, any passport requirement would, in our view, present significant additional problems under the West Virginia Constitution—as well as state and federal law.

III. A Private Entity's Choice to Require Employee Vaccination or Request Showing of a Vaccine Passport Without Exceptions Already Violates Federal and State Law, But the Legislature Could—and Should—Pass Additional Laws Banning Vaccine Mandates or Vaccine Passports.

While a private entity is not, as a general matter, subject to the same constitutional duties or restrictions as public entities, *W. Va. Tr. Fund, Inc. v. Bailey*, 199 W. Va. 463, 466, 485 S.E.2d 407, 410 (1997), imposition of a vaccine mandate without exception may still give rise to some legal liability.

The anti-discrimination laws described above, including Title II, Title VII, the ADA, and the WVHRA, would still apply to both a private vaccine mandate and a request for a passport in a private business subject to these statutes. *See, e.g.*, *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 41 (3d Cir. 2018) (finding that nurse plausibly alleged an ADA claim premised on the anxiety she faced from a compulsory vaccine); *Chmura v. Monongalia Health Sys.*, No. 1:17CV222, 2019 WL 3767469, at *9 (N.D. W. Va. Aug. 9, 2019) (applying ADA to case in which employee was fired for failure to satisfy vaccine requirement, but ultimately finding that the claim failed); *EEOC v. Mission Hosp., Inc.*, No. 116CV00118MOCDLH, 2017 WL 3392783, at *3 (W.D.N.C. Aug. 7, 2017) (denying summary judgment on religious discrimination claim based on religious objections to hospital's vaccination mandate); *Chenzira v. Cincinnati Child.'s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (finding that employee stated plausible religious-discrimination claim as to vaccine mandate based on her asserted veganism).[3] Thus, at a minimum, even private employers need to provide exceptions for religious- and disability-based objections for their employees.

In short, state and federal law may prevent private entities from imposing a blanket employee vaccination mandate.

To the extent that, as discussed above, state law does not expressly limit private entities from imposing vaccine-related initiatives, we believe this area is one ripe for legislative action—at a minimum, to provide for express religious or health exceptions to any such mandate. As a general matter, the West Virginia Constitution would not prevent the Legislature from banning

[3] Courts have rejected more generalized challenges to private mandates premised on generalized constitutional concerns or similar policy arguments. *See, e.g.*, *Bridges v. Houston Methodist Hospital*, No. 4:21-cv-01774, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021); *Hencey v. United Airlines, Inc.*, No. 21-61702-CIV, 2021 WL 3634630, at *2 (S.D. Fla. Aug. 17, 2021); *LaBarbera v. NYU Winthrop Hosp.*, No. 218CV6737DRHSIL, 2021 WL 980873, at *21 (E.D.N.Y. Mar. 16, 2021); *Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania*, 200 F. Supp. 3d 553, 564 (E.D. Pa. 2016), *aff'd*, 877 F.3d 487 (3d Cir. 2017).

AG OPINION

both vaccine mandates (imposed by public or private entities) and vaccine mandates (imposed by the same). Even a broad ban—such as an amendment to the WVHRA like the Montana law—would not give rise to significant constitutional concerns, although it would impact the traditional framework for analyzing current anti-discrimination laws.

While we believe that such a restriction or model could be defended, we acknowledge that a federal court in Florida has enjoined enforcement of that State's vaccine-passport bans, reasoning that they violate the First Amendment and substantially burden interstate commerce. *See Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, No. 21-22492-CIV, 2021 WL 3471585, at *19 (S.D. Fla. Aug. 8, 2021). Among other things, the court did not believe that Florida had identified any compelling state interest that the law advanced. *Id.* The court thought the law (1) did not protect medical privacy in any provable way; (2) did not stop other ways to invade a patron's privacy, like simply asking about vaccine status orally; (3) did not prohibit private entities from discriminating against *un*vaccinated people; and (4) did not regulate employers. *Id.* But in contrast to the view of the Florida court, West Virginia's interest in preserving the liberty of its citizens is real. A conscientious Legislature can address these under- and over-inclusiveness issues addressed in the Florida district court's opinions through careful drafting.

There should be no reason for hesitation in passing a ban on vaccine mandates or passport requirements or, at a minimum, requiring religious or medical exemptions in such requirements.

* * * *

In the end, a law requiring all state employees to be vaccinated or requiring all businesses to demand vaccine passports from all patrons would violate our State's constitution (as it should be properly understood) and violate both state and federal law. The same finding would follow no matter what aspect of "state" government is implicated; mandates and passport requirements imposed by counties, municipalities, and other public actors would give rise to the same legal concerns as a mandate or passport requirement imposed at the statewide level. We therefore urge any public entities to comply with such guidance and come into accordance with this opinion.

Likewise, a private employer's mandate or vaccine-passport requirement may violate federal and state anti-discrimination laws if it does not, at a minimum, provide for appropriate exceptions for those with religious- or disability-based objections.

Additional steps can and should be taken by the Legislature to ensure that individual liberty interests are protected. The Legislature could:

- Preclude vaccine mandates for some or all employees;
- Bar governments from imposing vaccine passport requirements or bar such passport requirements outright;

AG OPINION

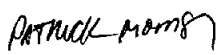
- Ensure that employment-related policies contain, at a minimum, exceptions for those with religious objections and other objections, such as those of a medical or conscientious nature; and/or

- Implement a religious or conscientious objector exception for compulsory school vaccinations.

Legislation already implemented in states such as Arizona, Florida, Montana, and North Dakota provide examples of how such protections might be implemented in practice.

"In view of the broad notions of individual liberty and security which underlie our sense of freedom, potent constraints on overreaching governmental intrusions are appropriate." *State v. Mullens*, 221 W. Va. 70, 99, 650 S.E.2d 169, 198 (2007) (Benjamin, J., dissenting). As many other states have already recognized, an anti-passport, anti-mandate law could helpfully serve as one such constraint—all at a time when individual liberty has too often fallen by the wayside. We strongly implore the Legislature to act.[4]

Sincerely,



Patrick Morrisey
West Virginia Attorney General

[4] Since you sent your opinion request, there has been an additional major development concerning vaccine mandates. On Thursday evening, President Biden issued a proposal to impose broad new vaccine mandates on large employers and others across the nation. We are now closely analyzing the details of that overreaching proposal. Our first reaction is that the Biden administration is greatly overstepping its authority and none of our recommendations in this letter will change. At the same time, we are now working with other state attorneys general to ascertain appropriate ways to challenge the new Biden proposal when it is finalized. We will work to ensure that the federal government does not impose an unlawful mandate on West Virginians.

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Bureau for Public Health
Office of Environmental Health Service

Bill J. Crouch
Cabinet Secretary

Ayne Amjad, MD, MPH
Commissioner & State Health Officer

MEMORANDUM

FILED
2021 SEP 15 P 1:51
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

TO: Interested Parties

FROM: Stephanie Hickerson, P. E. SDH
Drinking Water Treatment Revolving Fund

DATE: September 15, 2021
SUBJECT: Categorical Exclusion Decision (CE)
Town of Worthington – Water System Improvements Project

A copy of the Town of Worthington – Water System Improvements Project Categorical Exclusion Decision (CE) is enclosed for your records.

The review process concluded that the proposed action is consistent with the categories of actions eligible for categorical exclusion. This means that environmental information documents and environmental assessments or environmental impact statements **will not** be required for this project and the project is authorized to proceed forward.

This decision is based upon a careful review of supporting documents provided by the applicant and other documentation available to the West Virginia Bureau of Public Health (WVBPH). These documents are on file with the WVBPH, Office of Environmental Health Services (OEHS), Environmental Engineering Division (EED), and are available for review upon request.

Comments on this decision may be submitted for consideration to WVBPH/OEHS/EED, attention Stephanie Hickerson, 350 Capitol Street, Room 313 Charleston, WV 25301-3713; or you may e-mail stephanie.d.hickerson@wv.gov .

SDH

350 Capitol Street, Room 313
Charleston, West Virginia 25301-3713
Telephone: (304) 558-2981 / Fax: (304) 558-0691

OTHER

Distribution List:
Regional P&D Council – Region 6
West Virginia Division of Natural Resources
West Virginia Bureau of Public Health
West Virginia Department of Environmental Protection
Division of Culture & History
U.S. Fish and Wildlife Service
Department of the Army
State Register Publication
Fred Hypes, PE, Dunn Engineering

FILED

2021 SEP 15 P 1:51

OTHER

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

Town of Worthington
CATEGORICAL EXCLUSION DECISION

September 15, 2021

TO: ALL INTERESTED PARTIES

In accordance with the Environmental Protection Agency (EPA) regulations for complying with the National Environmental Policy Act (NEPA) of 1969 (P.L. 91-190), a review has been performed on a request for a categorical exclusion for the environmental review requirements under NEPA, for the proposed action described below:

Town of Worthington
PO Box 265
Worthington, WV 26591
WVIJDC Project #: **2019W-1810**
SRF Project #: 19DWTRFA004
Water System Improvement Project

(Official Project Name and Number)

Town of Worthington
PO Box 265
Worthington, WV 26591

(Project Applicant)

Town of Worthington
Marion County, West Virginia

(Project Location, City, County, State)

$ 2,836,390

(Estimated Drinking Water Treatment Revolving Fund Financial Share)

$ 3,366,390

(Estimated Total Project Cost)

ENVIRONMENTAL ASSESSMENT

for the
Town of Worthington
Water System Improvement Project
WV IJDC Project No.: **2019W-1810** / SRF Project No.: **19DWTRFA004**

I. PROPOSED PROJECT:

This project will make upgrades to the Town of Worthington's distribution system, provide an interconnection between Four States and Monongah, refurbish two (2) tanks and upgrade the existing maintenance building. The project will consist of the installation of approximately 18,900 LF of 6" and 18,000 LF of 2" water line, 10,000 LF of ¾" service line replacement, 28 valves, two (2) PRV Stations, 12 fire hydrants, two (2) solenoid master meters, 13 leak detection meters, 465 radio-read meters and all other necessary piping, valves and appurtenances.

II. PURPOSE AND NEED:

This project is necessary to meet the needs of the service area. These needs include health, safety, and a reliable source of potable drinking water. Much of the existing water distribution system tanks, piping, valves and meters are old and in need of repair or replacement. A booster station is proposed to serve customers in the Davis Road area due to low pressures problems. Replacing the old, deteriorating and outdated portions of the potable water system will help the PSD provide safe reliable potable water in an efficient manner.

III. ENVIRONMENTAL CONSEQUENCES IF PROJECT IS NOT BUILT:

If this project is not constructed the system will continue to deteriorate, increasing the frequency of leaks and the amount of water loss, decreasing water quality to the customer, and increasing the operating and maintenance costs to the PSD. Potentially leading to the loss of viability of the PSD.

IV. CATEGORICAL EXCLUSION CRITERIA:

EPA regulation 40 CFR 6.106(d) permits the use of categorical exclusions from substantive environmental requirements of the National Environmental Policy Act (NEPA) for:

1. Actions which are solely directed toward minor rehabilitation of existing facilities, functional replacement of equipment, or construction of ancillary facilities; or
2. Other actions specifically allowed in program specific subparts of this regulation.
   Criteria which would prevent the use of a categorical exclusion are found in 40 CFR §6.107(e) summarized as follows:
3. The action may have a significant effect on the quality of the human environment, or
4. The action may affect cultural resource areas, endangered or threatened species, environmentally important natural resource, or other identified resource areas of concern; or
5. The action is not cost-effective or may cause public controversy.

V. ANALYSIS:

The proposed project meets the criteria for categorical exclusion. The project includes replacement of approximately 8.9 miles of distribution line and other appurtenances. All work will be done in DOH right of way or previously disturbed ground and will have no adverse environmental impacts.

VI. FLOODPLAIN MANAGEMENT/RESILIENCY

This project consists of water line replacements and system improvements along the West Fork River, and Camp Run Creek. Some work falls within the flood plain (plus 3ft) as indicated on the FEMA map. However, this work is permanently underground (with one exception) and so therefore does not fall under the flood plain regulations. Only one of the solenoid valve/meter vaults is located in the 100-year flood plain (the one near City Hall and the bridge). The design requires installing a flood tight hatch on this vault. This project will comply with all provisions of Executive Order 11988 as amended by Executive Order 13690.

VII. CLIMATE CHANGE/ENERGY EFFICIENCY

A greenhouse gases evaluation was conducted for this project. There should be a significant decrease of water loss within the system, and thereby a decrease in associated greenhouse gases. The CO2 **reduction** due to the project will be approximately 6,700 lbs/yr. An energy efficiency evaluation was also conducted as part of the review. This evaluation concluded that there would be an increase in energy efficiency with a reasonable payback if a small 2 horsepower high efficiency pump motor with a VFD is installed to increase system pressure.

VIII. REVOCATION:

This conclusion can be revoked if additional and/or future information indicates any of the following;

1. The proposed action no longer meets the defined category due to changes in the proposed action;
2. Serious local or environmental issues now exist; and/or
3. Federal, state or local laws may be violated.

IX. DOCUMENTATION:

1. Town of Worthington Environmental Assessment Report, April 2019.
2. Town of Worthington Design Report, February 2021.
3. Categorical Exclusion Checklist as prepared by Fred Hypes, PE, Dunn Engineering. May 3, 2021.
4. WV Division of Culture and History letter dated December 18, 2018.
5. WV Department of Environmental Protection letter dated November 8, 2018.

OTHER

6. WV Division of Natural Resources letter dated November 19, 2018.
7. US Fish and Wildlife Service letter dated October 31, 2018.
8. US Army Corps of Engineers letter dated November 15, 2018.
9. US Department of Agriculture letter dated December 14, 2018.
10. Public Participation Documentation.
11. Environmental Energy Efficiency, August 2020
12. Environmental Justice Certification, May 2021.
13. Flood plain management documentation (Appendix B, Design Report, February 2021).

WEST VIRGINIA HEALTH CARE AUTHORITY
CERTIFICATE OF NEED
100 Dee Drive
Charleston, West Virginia 25311-1600

FILED

2021 SEP 14 A 9:50

OTHER

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

September 13, 2021

LEGAL NOTICE

The West Virginia Health Care Authority announces the following Certificate of Need activities for the week ending **September 10, 2021**.

LETTER OF INTENT RECEIVED

September 7, 2021 – Tugaloo Dialysis, LLC, Denver, Colorado, CON File #21-6-12158-R, for the addition of two stations at its outpatient dialysis facility in Clarksburg, Harrison County; capital expenditure: $10,000.

ORDER TO WITHDRAW CON APPLICATION ISSUED

September 9, 2021 - Stonewall Jackson Memorial Hospital Company, Weston, Lewis County, CON File #21-7-12069-H, for the relocation of the hospital and construction of a new 29 bed acute care hospital; capital expenditure: $55,950,000.

PROJECT EXEMPT FROM REVIEW

September 10, 2021 – Generations Health & Wellness, LLC, Oak Hill, Fayette County, CON File #21-4-12161-X, for the development of a drug and alcohol treatment program and the provision of related counseling services at 240 Central Avenue, Oak Hill, Fayette County.

CERTIFICATE OF NEED APPROVALS ISSUED

September 8, 2021 - Preston Memorial Hospital Corporation, Kingwood, Preston County, CON File #21-6-12118-P, for the development of an ambulatory health care facility to be located at 110 North Price Street, Kingwood, through the acquisition of the assets and a lease of the real property of Milestones Family Practice and employment of Drs. Bernice and Michael Schwarzenberg; capital expenditure: $150,000.

September 9, 2021 - West Virginia University Hospitals, Inc., Morgantown, Monongalia County, CON File #21-6-12125-A, for the acquisition of the real property currently leased by West Virginia University Hospitals, Inc. for Fairmont Medical Center in Fairmont, Marion County; capital expenditure: $9,335,000.

EXTENSION GRANTED

September 8, 2021 - Pocahontas Memorial Hospital, Buckeye, Pocahontas County, CON File #20-4-11889-H, for a renovation and expansion project at Pocahontas Memorial Hospital; capital expenditure: $9,500,000.

Extension granted through March 31, 2022.

NOTICE OF SUBSTANTIAL COMPLIANCE

The following project has been implemented in substantial compliance with the decision issued in this matter and the case file is now closed:

September 9, 2021 - Pleasant Valley Hospital, Inc., Point Pleasant, Mason County, CON File #21-2-12070-P, for the development of an ambulatory care center through the relocation of Pomeroy Therapy Center from 518 East Main Street, Pomeroy, Ohio, to 106 Gander Lane, Mason, West Virginia; capital expenditure: $21,524.63.

Further information may be obtained on any of the above-referenced projects by contacting Barbara Skeen, Director, Certificate of Need Division.

FILED

2021 SEP 10 P 12: 55

OFFICE WEST VIRGINIA SECRETARY OF STATE

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
WV Health Care Authority

Bill J. Crouch
Cabinet Secretary

FILED

2021 SEP 10 P 12: 55

OFFICE WEST VIRGINIA SECRETARY OF STATE

Barbara Skeen
Interim Executive Director

OTHER

In Re:

STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
CON File No. 21-7-12069-H

NOTICE OF CANCELLATION OF ADMINISTRATIVE HEARING

PLEASE TAKE NOTICE that pursuant to Chapter 16, Article 2D, and to Chapter 29A, Article 5, of the West Virginia Code of 1931, as amended, that Barbara Skeen, Interim Executive Director of the West Virginia Health Care Authority, wishes to announce that Stonewall Jackson Memorial Hospital Company has withdrawn its Certificate of Need application in the above-captioned matter.

As such, **the ADMINISTRATIVE HEARING** scheduled for **September 2, 2021, at 9:00 a.m.**, in the Large Conference Room of the West Virginia Health Care Authority, 100 Dee Drive, Charleston, West Virginia has been **CANCELLED**.

This application concerns the relocation of the hospital and construction of a new 29 bed acute care hospital.

If you have any questions concerning this matter, please contact Barbara Skeen, Director of Certificate of Need, at (304) 558-7000.

Date: September 1, 2021

Barbara Skeen
Barbara Skeen, Interim Executive Director

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
WV Health Care Authority

FILED

2021 SEP 16 P 1: 55

OFFICE WEST VIRGINIA SECRETARY OF STATE

Bill J. Crouch
Cabinet Secretary

Barbara Skeen
Interim Executive Director

In Re:

RALEIGH GENERAL HOSPITAL
CON File No. 21-1-12068-H

NOTICE OF CANCELLATION OF ADMINISTRATIVE HEARING

PLEASE TAKE NOTICE that pursuant to Chapter 16, Article 2D, and to Chapter 29A, Article 5, of the West Virginia Code of 1931, as amended, that Barbara Skeen, Interim Executive Director of the West Virginia Health Care Authority, wishes to announce that Raleigh General Hospital has withdrawn its Certificate of Need application in the above-captioned matter.

As such, **the ADMINISTRATIVE HEARING** scheduled for **September 14, 2021, and September 15, 2021, at 9:00 a.m.**, in the Large Conference Room of the West Virginia Health Care Authority, 100 Dee Drive, Charleston, West Virginia has been **CANCELLED**.

This application concerns the development of cardiac surgery services.

If you have any questions concerning this matter, please contact Barbara Skeen, Director of Certificate of Need, at (304) 558-7000.

Date: September 14, 2021

Barbara Skeen
Barbara Skeen, Interim Executive Director

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
WV Health Care Authority

Bill J. Crouch
Cabinet Secretary

Barbara Skeen
Interim Executive Director

FILED
2021 SEP 16 P 1:56 OTHER
SECRETARY OF STATE

In Re:

ROANE GENERAL HOSPITAL
CON File No. 21-5-12124-P

NOTICE OF PREHEARING CONFERENCE AND ADMINISTRATIVE HEARING

PLEASE TAKE NOTICE that pursuant to Chapter 16, Article 2D, and to Chapter 29A, Article 5, of the West Virginia Code of 1931, as amended, that Barbara Skeen, Interim Executive Director of the West Virginia Health Care Authority, wishes to announce that the following proceedings have been scheduled for the above-noted application:

A PREHEARING CONFERENCE will be held, **December 7, 2021, at 1:30 p.m.**, in the Large Conference Room of the West Virginia Health Care Authority, 100 Dee Drive, Charleston, West Virginia.

AN ADMINISTRATIVE HEARING will be held, **December 14, 2021, at 9:00 a.m.**, in the Large Conference Room of the West Virginia Health Care Authority, 100 Dee Drive, Charleston, West Virginia.

This application concerns the development of an ambulatory health care facility in Arnoldsburg, Calhoun County, West Virginia through the relocation of a rural health clinic currently located on the Roane General Hospital campus.

You and any other "affected persons" as defined by W. Va. Code §16-2D-2 wishing to participate in the hearing of this application are directed to be present at both the prehearing conference and the administrative hearing.

The purpose of the prehearing conference is to designate parties to the hearing, to designate the issues for the hearing, resolve any procedural matters, receive any motions, establish the order of proceedings, receive a listing of the witnesses and a summary of direct testimony that will be offered at the hearing, receive a listing of evidence to be offered and copies of any documents to be offered such as reports or analysis prepared by expert witnesses including any financial reports and any other procedural matters. The prehearing conference will be conducted in conformance to Rule 16, West Virginia Rules of Civil Procedure for pretrial conferences.

In a hearing, any person has the right to be present or to be represented by counsel and to present oral or written arguments and relevant evidence. Any person affected by the matter which is the subject of the hearing may conduct reasonable questioning of persons who make factual allegations relevant to such matters.

PLEASE TAKE NOTICE that if the party who requested the hearing withdraws that request, then the hearing will be canceled.

The file on this application is available for examination in the offices of the Health Care Authority from 8:30 a.m. to 4:30 p.m., Monday through Friday. If you have questions concerning this matter, please contact Barbara Skeen, Interim Executive Director, at (304) 558-7000.

Date: September 14, 2021

Barbara Skeen
Barbara Skeen, Interim Executive Director

WEST VIRGINIA
HEALTH CARE AUTHORITY

SEP 16 2021 FILED
2021 SEP 16 P 1:55
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

OTHER

In Re: **ROANE GENERAL HOSPITAL**
CON File # 21-5-12124-P

HEARING ORDER

The following shall apply to and govern the above-captioned action and activities conducted in connection with it. In the absence of a specific date or deadline for a given activity, it is anticipated that such activity will be scheduled and conducted within a reasonable time prior to the hearing.

The parties may not amend, modify or adjust any provision of this order except by leave of the Authority.

1. Hearing date: **December 14, 2021, at 9:00 a.m.**

2. Prehearing conference date: **December 7, 2021, at 1:30 p.m.**

3. Settlement conference (optional): **N/A**

4. All replacement pages to CON application to be filed by: **October 6, 2021**
   Pursuant to W. Va. Code St. R. §65-32-6, if the applicant submits a substantial amendment to the application the Authority may withdraw the application from review. The board may examine the extent of additional information or any amendment made by the applicant to the application and its impact on the new institutional health service, and determine the application to be a new proposal subject to a new review cycle.

5. Motions for discovery to be filed by: **October 20, 2021**

6. Discovery completed on or before: **November 17, 2021**
   Parties engaging in discovery are required to file a copy of the certificate of service attached to the discovery request or response with the board. Affected parties shall not file copies of the actual discovery and responses with the board. To the extent that an affected party intends to introduce a document obtained through the discovery process at the administrative hearing, the document and two (2) copies must be filed at the prehearing conference.

7. Dispositive and preliminary motions to be filed by: **December 1, 2021**
   Parties shall file all prehearing motions with the board a minimum of three (3) days prior to the prehearing conference.

8. All requests for subpoenas and/or subpoenas duces tecum to be filed by: **December 1, 2021**

Entered this 14th day of September, 2021.

OTHER

B. Allen Campbell

B. Allen Campbell
Senior Assistant Attorney General
Counsel for the West Virginia Health Care Authority