

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
KEN HECHLER  
**ADMINISTRATIVE LAW DIVISION**

Form #6

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OFFICE OF THE SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Title 77, Series 5

TITLE OF RULE BEING PROPOSED: Rules Regarding Exemption of Private  
Clubs

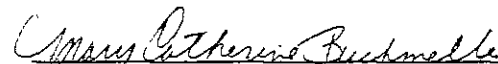
THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 1

SECTION 64-5-8(c), PASSED ON March 14, 1992

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON

THE FOLLOWING DATE: April 29, 1992



MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

2.50

TITLE 77  
LEGISLATIVE RULES  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 5  
RULES REGARDING EXEMPTION OF PRIVATE CLUBS

§77-5-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq., set forth guidelines for interpreting the Act's exemption of private clubs from the operation of its provisions and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the HRA.

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq. They are based on decisions of the United States Supreme Court and various federal circuit and district courts, and an interpretation of the HRA. It is proper for the Commission to look for guidance to federal court interpretations of similar federal statutes when interpreting the HRA. Human Rights Commission v. United Transportation Union, et al., 280 S.E.2d 553 (1981).

1.3. Filing Date -- These regulations are promulgated on the \_\_\_\_\_ day of \_\_\_\_\_, 1990, 19 and filed on the \_\_\_\_\_ day of \_\_\_\_\_, 1990, 19 in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the \_\_\_\_\_ day of \_\_\_\_\_, 1990 19.

§77-5-2. Exemption of Truly Private Clubs.

2.1. The exemption afforded private clubs by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d) & (j) and § 5-11-19, may be invoked as a defense to a complaint filed under the HRA only by clubs which are truly private and which are not in fact open to the public.

2.2. In determining whether a respondent is a truly private club which is not in fact open to the public, the Commission shall examine the following factors:

2.2.1. Whether the respondent is a club in the ordinary sense of the word and was formed because of common associational interests among the members;

2.2.2. Whether it carefully screens applicants for membership and selects new members with reference to the common intimacy of the association;

2.2.3. Whether it limits its membership to a number small enough to allow full membership participation and to ensure that all members share the common associational bond;

2.2.4. Whether it limits the use of its facilities and services strictly to members and bona fide guests of members;

2.2.5. Whether it is controlled by the membership either in the form of a general meeting or some other organizational form;

2.2.6. Whether publicity is directed solely to members for their information and guidance;

2.2.7. Whether it is nonprofit and operated solely for the benefit of the members.

#### §77-5-3. Additional Indicators.

3.1. In addition to the factors set forth in section 2.2. above, the Commission shall consider the following indicators in determining whether a respondent qualifies for a private club exemption:

3.1.1. It is an indicator that a club is not a truly private club not in fact open to the public if it provides regular meal service and regularly receives payment for dues, fees, use of space, facilities services, meals, or beverages directly or indirectly from or on behalf of nonmembers;

3.1.2. It is an indicator that a club is not a truly private club not in fact open to the public if it carries on in any significant degree functions which are considered commercial in nature, such as if it provides a forum where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed.

3.2. An alleged private club exemption must be examined in light of the HRA's clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective.

3.3. An alleged private club exemption must be examined in light of the remedial purpose of the HRA to eliminate discrimination.

~~§77-5-4. Burden of Proof.~~

~~4.1. The respondent shall bear the burden of proving that it is a truly private club not in fact open to the public and that it qualifies for a private club exemption.~~

~~§77-5-5. Preservation of Right to Expressive Association.~~

~~5.1. At no time shall the Commission interfere in the activities of an alleged private club or subject club opportunities to scrutiny beyond what is necessary in good faith to enforce the HRA.~~

~~5.2. The Commission shall not direct the manner in which alleged private clubs conduct their activities or select their members except insofar as is necessary to ensure that an alleged club does not automatically exclude persons from consideration for membership, or enjoyment of club accommodations and facilities, and the advantages and privileges of membership on account of unlawful and invidious discrimination.~~

~~5.3. The burden shall be on the purported private club to demonstrate that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.~~

~~§ 77-5-6. Scope of Coverage.~~

~~6.1. This rule shall apply to private clubs in their capacities as an employer as well as an alleged place of public accommodation.~~

§77-5-4. Standards of Review; Burden of Proof.

4.1. The claimant of unlawful discrimination against a club has the burden of proving unlawful discrimination.

4.2. The following guidelines shall be considered in determining whether a purported private club is truly private pursuant to the criteria contained in Section 2 and the indicators contained in Section 3:

4.2.1. An alleged private club exemption shall be examined in light of the HRA's clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective.

4.2.2. An alleged private club exemption shall be examined in light of the remedial purpose of the HRA to eliminate discrimination.

4.3. The burden of proof in establishing the exemption for a truly private club and in sustaining the defense of freedom of expression is as follows:

4.3.1. The alleged private club shall bear the burden of proving that it is a truly private club not in fact open to the public and that it qualifies for a private club exemption.

4.3.2. The purported private club shall bear the burden of proving that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.

§77-5-5. Preservation of and Defense of Right of Expressive Association.

5.1. The Commission may not interfere in the activities of an alleged private club or subject club opportunities to scrutiny beyond what is necessary in good faith to enforce the HRA.

5.2. An alleged private club which is not in fact open to the public and which does not qualify for an exemption of truly private clubs pursuant to Section 2 of this rule may defend a prima facie case of unlawful discrimination by demonstrating that compliance with the HRA imposes a serious burden on its members' freedom of expressive association.

5.2.1. A purported private club may have a defense to a claim of unlawful discrimination if the purported private club does not automatically exclude persons from consideration for membership, or enjoyment of club accommodations and facilities, and the advantages and privileges of membership on account of race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.

5.2.2. A purported private club may have a defense to a claim of unlawful discrimination if the purported private club is selective in its membership based upon a stated criterion unique to club members and such criterion is the primary basis of association, and the denial of club membership is not automatically based upon the applicant's race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.

Example - An alleged private club which requires that each member possess an IQ score exceeding 140 points may deny membership to a person with an IQ score less than 140 but may not deny membership to a person with an IQ score in excess of 140 on the basis of race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.

Bill Human Rights, Clubs 77-5

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H. B. 4291

(By Delegate Grubb)

(Introduced January 27, 1992; referred to the

Committee on the Judiciary)

A BILL to amend and reenact section eight, article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to authorizing the human rights commission to promulgate legislative rules relating to the exemption of private clubs.

Be it enacted by the Legislature of West Virginia:

That section eight, article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH AND HUMAN RESOURCES TO PROMULGATE LEGISLATIVE RULES.

§64-5-8. Human rights commission.

(a) The legislative rules filed in the state register on the tenth day of August, one thousand nine hundred ninety, modified by the human rights commission to meet the objections of the

1 legislative rule-making review committee and refiled in the state  
2 register on the twelfth day of December, one thousand nine  
3 hundred ninety, relating to the human rights commission  
4 (discrimination against the handicapped), are authorized.

5 (b) The legislative rules filed in the state register on the  
6 twenty-second day of March, one thousand nine hundred ninety-one,  
7 modified by the human rights commission to meet the objections of  
8 the legislative rule-making review committee and refiled in the  
9 state register on the eighteenth day of November, one thousand  
10 nine hundred ninety-one, relating to the human rights commission  
11 (exemption of private clubs), are authorized.

12

13 NOTE: The purpose of this bill is to authorize the Human  
14 Rights Commission to promulgate legislative rules relating to the  
15 exemption of private clubs.

16

17 Strike-throughs indicate language that would be stricken from  
18 the present law, and underscoring indicates new language that  
19 would be added.



KEN HECHLER  
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Director, Corporations

(Plus all the volunteer  
help we can get)

### STATE OF WEST VIRGINIA

#### SECRETARY OF STATE

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RECEIVED  
DEC 15 1992  
ATTORNEY GENERAL  
CIVIL RIGHTS DIV.

TO: Mary Kay Buchmelter

AGENCY: Human Rights Commission

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: December 11, 1992

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 5 TITLE: 77 Human Rights Commission

\* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: \_\_\_\_\_

TITLE OF PERSON SIGNING: \_\_\_\_\_

DATE: \_\_\_\_\_

\*\*\*\*\*

\* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: D. Monz

TITLE OF PERSON SIGNING: Legal Secretary

DATE: 12-30-92

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.