

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

**FILED**

2004 AUG 11 A 12:27

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Procedural CITE AUTHORITY: W.Va. Code §21-5F-4(a)

AMENDMENT TO AN EXISTING RULE: YES  NO

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

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

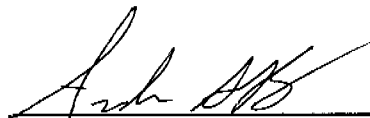
IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 29

TITLE OF RULE BEING PROPOSED: Nurse Overtime Complaints

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON September 15, 2004 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Division of Labor  
Attn: Andrew A. Brown  
Room B-709, Building #6  
State Capitol Complex  
Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

□  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Nurse Overtime Complaints

Type of Rule:  Legislative  Interpretive  Procedural

Agency: West Virginia Division of Labor

Address: Room B-709, Building #6  
State Capitol Complex  
Charleston, WV 25305

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<b>ESTIMATED TOTAL COST</b>	50,000	-0-	50,000	50,000	52,500
<b>PERSONAL SERVICES</b>	32,338	-0-	32,338	32,338	33,838
<b>CURRENT EXPENSE</b>	9,982	-0-	9,982	9,982	9,982
<b>REPAIRS &amp; ALTERATIONS</b>	-0-	-0-	-0-	-0-	-0-
<b>EQUIPMENT</b>	2,650	-0-	2,650	2,650	2,000
<b>OTHER</b>	5,030	-0-	5,030	5,030	6,680

2. Explanation of Above Estimates:

The above estimate represents the fiscal note attached to Senate Bill 251 which was passed during the 2004 Regular Session. This funding was NOT provided in the Division's FY05 appropriation. Senate Bill 251 is an un-funded mandate.

3. Objectives of These Rules:

The object of this rule is to establish a procedure for the receipt, handling and resolution of complaints filed with the Division of Labor relative to W.Va. Code §21-5F-1, et seq.


Rule Title: Nurse Overtime Complaints

4. Explanation of Overall Economic Impact of Proposed Rule:

- A. Economic Impact on State Government:  
The Division of Labor received no funding relative to this enforcement mandate.  
Funding is needed.
  
- B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: NONE
  
- C. Economic Impact on Citizens/Public at Large.  
NONE

Date: August 11, 2004

Signature of Agency Head or Authorized Representative:

  
\_\_\_\_\_

**TITLE 42**

**FILED**

**Procedural Rule  
West Virginia Division of Labor  
Nurse Overtime Complaints**

2004 AUG 11 A 12: 27

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**Series 29**

**§28-3-1. General.**

1.1. Scope. This legislative rule governs the procedures for the handling of nurse overtime complaints against hospitals in accordance with W.Va. Code §21-5F-4 and W.Va. Code §29A-5-1 et seq.

1.2. Authority. W.Va. Code §21-5F-4.

1.3. Filing Date.

1.4. Effective Date.

**§28-3-2. Application and Enforcement.**

2.1. Application. This procedural rule applies to the West Virginia Division of Labor and all persons, firms or corporations governed or otherwise defined under the coverage of the West Virginia Code §21-5F-1 et seq.

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor.

**§28-3-3. Definitions.**

3.1. The "Act" means the Nurse Overtime and Patient Safety Act, W.Va. Code §21-5F-1 et seq., and applicable rules.

3.2. "Commissioner" means the commissioner of the West Virginia Division of Labor.

3.3. "Division" means the West Virginia Division of Labor.

3.4 "Nurse" means a certified or licensed practical nurse or a registered nurse who is

providing nursing services and is involved in direct patient care activities or clinical services, but does not include certified nurse anesthetists. Nurse managers are included with respect to their delivery of in-hospital patient care.

3.5. "Overtime" means the hours worked in excess of an agreed upon, predetermined, regularly scheduled shift.

#### **§28-3-4. Filing of Complaints.**

4.1. The Division may accept complaints alleging that a hospital has violated the Nurse Overtime and Patient Safety Act by requiring overtime work contrary to the provisions of W.Va. Code §21-5F-3.

4.2. All complaints to the Division shall be in writing. The Division may provide forms for the filing of complaints, however, complaints submitted in other forms shall be accepted by the Division. The Division, on its own initiative, may file complaints. The Division shall review each complaint to determine whether it should be dismissed, or subjected to any other action specified by this rule.

4.3. Within three (3) days of the receipt of a complaint, the Division shall notify the hospital named in the complaint that the complaint has been filed. Upon receipt of the notification, the hospital named in the complaint has ten (10) days in which to respond to the complaint in writing. If, upon consideration of the complaint and the response, the Division determines that no violation of any applicable state law has occurred, the Division may dismiss the complaint through the issuance of a written order setting forth the basis for the dismissal. If, however, the Division determines that further review or other action is necessary, the Division may proceed as set forth in this rule.

#### **§28-3-5. Investigations.**

5.1. The Division and its authorized agents, employees, or authorized inspectors may independently investigate the basis for any complaint filed with the Division. During the course of an investigation, the Division or its authorized representatives may conduct a physical inspection of the hospital personnel records and payroll records to assess the merits of the complaint. If at any time during the course of an investigation it becomes apparent that no violation of any applicable state law has occurred, the Division may dismiss the complaint in the manner set forth in Section 4.3 of this rule.

5.3. The Division or authorized inspector shall file a written report with the commissioner as to his or her findings during the course of the inspection.

**§28-3-6. Hearings.**

6.1. The commissioner may, at any time after the receipt of a complaint, issue a written notice of his or her intent to conduct a hearing. The notice of intent shall be provided to all interested persons by certified mail at least twenty (20) days in advance of the hearing date. The notice shall include:

- (a) a statement of the time, place and nature of the proceeding; and
- (b) a statement of the subject matter of the proceeding to include the issues in question.

6.2. All hearings shall be conducted in Charleston, West Virginia and in accordance with the provisions of W. Va. Code §29A-5 et seq., The Administrative Procedures Act-Contested Cases.

6.3 The commissioner may employ the services of an independent hearing examiner to conduct hearings. The examiner shall conduct all hearings in accordance with the provisions of this rule. The examiner shall submit proposed findings of fact and conclusions of law to the commissioner. The report may contain the examiner's recommendations for the final disposition of the complaint.

6.4. After the commissioner has received the hearing examiner's report, the commissioner may adopt, modify or reject the hearing examiner's findings, conclusions and recommendations. The commissioner shall issue a written order within thirty (30) days of the receipt of the hearing examiner's report. The order shall include a brief statement of its findings and conclusions, with specific references to principal supporting items of evidence as well as the reasons or basis for the order.

6.5. (a).The commissioner may order the resolution of the complaint by its dismissal or by the issuance of one of the following penalties:

1. For a first offense, a written public reprimand and an order to cease the unlawful practice;
2. For a second offense, a fine not to exceed five hundred dollars; and
3. For a third or subsequent offense, a fine of not less than two thousand five hundred dollars and not more than five thousand dollars for each violation.

(b). To be eligible to be charged with a second offense or third offense under the Act, the subsequent offense must have occurred within twelve months of the prior offense.

6.6. Any person adversely affected by any action of the commissioner may appeal the action to the Circuit Court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business.

### **§28-3-8. Confidentiality of Records.**

8.1. All investigations, complaints, reports, records, proceedings and other information received by the Division and related to complaints pursuant to this rule, including the identity of the complainant or respondent, are confidential and shall not be knowingly and improperly disclosed by any person, the commissioner or Division staff, except as follows:

(a) Upon a finding that probable cause exists to believe that a respondent has violated the provisions of the act, the complaint and all reports, records, non-privileged and non-deliberative materials introduced at any probable cause hearing held pursuant to the complaint are thereafter not confidential: Provided, that the confidentiality of the information shall remain in full force and effect until the respondent has been served with a copy of the statement of charges;

(b) Any subsequent hearing held in the matter for the purpose of receiving evidence or the arguments of the parties or their representatives shall be open to the public and all reports, records and non-deliberative materials introduced into evidence at the subsequent hearing, as well as the commissioner's orders, are not confidential;

(c) The complaint as well as the identity of the complainant shall be disclosed to a person named as respondent in any complaint filed immediately upon the respondent's request; or

(d) Where the commissioner or the Division is otherwise required by the provisions of the Act to disclose the information or to proceed in a manner that disclosure is necessary and required to fulfill the requirements.

8.2. If, in a specific case, the commissioner or Division finds that there is a reasonable likelihood that the dissemination of information or opinion in connection with a pending or imminent proceeding will interfere with a fair hearing or otherwise prejudice the due administration of justice, the commissioner or Division shall order that all or a portion of the information communicated to the commissioner or the Division to cause an investigation and all allegations of violations or misconduct contained in a complaint is confidential, and the person providing the information or filing a complaint is bound to confidentiality until further order of the commissioner.