WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

FILED
1991 MAR 22 PM 12:26

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

CITE AUTHORITY: W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: §77-6

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Regarding Waiver of Rights under the Human Rights Act

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached sheet

2.50 Use Additional Sheets If Necessary.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Waiver of Rights under the Act

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency West Virginia Human Rights Commission Address 1321 Plaza East, Room 104/106, Charleston, West Virginia 25301

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ 0	$ 0	$ 0	$ 0	$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

The rule will have no fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules:

To provide legal guidelines regulating an employee's waiver of his or her rights under the West Virginia Human Rights Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

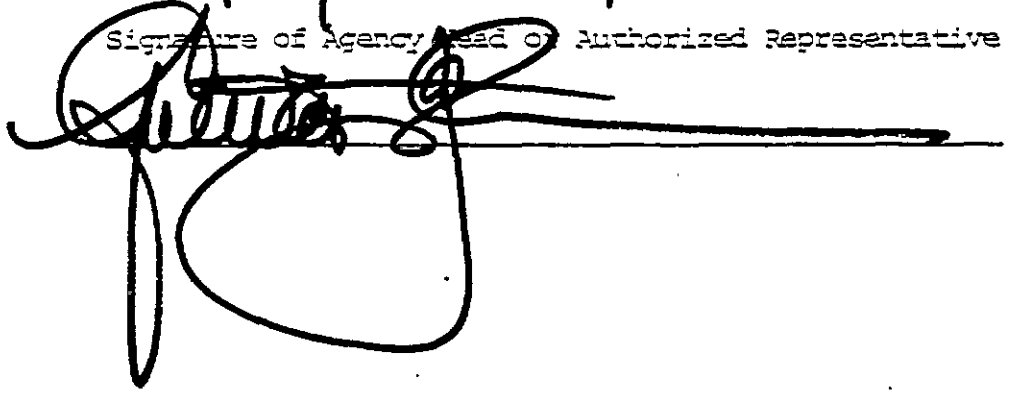
None

C. Economic Impact on Citizens/Public at Large.

None

Date: March 22, 1991

Signature of Agency Head or Authorized Representative



DATE: 22 March 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA HUMAN RIGHTS COMMISSION

EMERGENCY RULE TITLE: RULES REGARDING WAIVER OF RIGHTS UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

1. Date of filing: 22 March 1991

2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

3. Date of filing of proposed legislative rule: 22 March 1991

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

The rule adopts new language consistent with Title II of the federal Older Workers' Benefit Protection Act (S. 1511).

5. Has the same or similar emergency rule previously been filed and expired?

No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

See attached sheet

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See attached sheet

Response to Questions No. 6 and No. 8

A. In October 1990, the U.S. Congress passed, and President Bush signed into law, legislation regulating the waiver of employee's rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.

B. Alleged waiver of rights has been a consistent problem in enforcement of the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq.

C. The standards for waiver established by Congress are likely to serve as guidelines when the courts interpret the HRA and there is a desire to have conformity between federal and state law.

D. The proposed rule faithfully reflects the standards established by Congress for cases arising under the ADEA.

E. The proposed rule is necessary to assist all persons in understanding their rights, obligations, and duties under the Human Rights Act.

F. Unless filed as an emergency rule, employers and employees will be making critical legal decisions, and facing potential legal liability, without benefit of the clear guidelines offered by the rule.

G. Failure to file the rule as an emergency rule would do substantial harm to the public interest in that persons may be held legally liable for acts of discrimination, or may forego those rights, without full benefit of the explanations of the complex legal issue offered by this rule.

Antitrust & Civil Rights Divisions
812 Quarrier Street - 5th Floor
Charleston, WV 25301
(304) 348-0246

MARIO J. PALUMBO
ATTORNEY GENERAL

RICHARD L. GOTTLIEB
CHIEF DEPUTY ATTORNEY GENERAL

STATE OF WEST VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

CHARLESTON 25305

FAX - (304) 348-0184

Consumer Protection Division
812 Quarrier Street - 6th Floor
Charleston, WV 25301
(304) 348-8986
Consumer Hotline
(800) 368-8808

Preneed-Funeral
812 Quarrier Street - 4th Floor
Charleston, WV 25301
(304) 348-0303

22 March 1991

FILED
1991 MAR 22 PM 11:08
OFFICE OF SEC. OF STATE

Chairman, Legislative Rule-
Making Review Committee
State Capitol, M-436
Charleston, West Virginia 25305

Re: Filing of agency approved emergency legislative rule pertaining to waiver of rights under the HRA
Title 77, Series 6

Dear Sir/Ms.:

Enclosed please find fifteen (15) copies of the following documents relative to the above-referenced emergency rule:

1. Notice of an Emergency Rule;
2. Notice of Public Hearing on a Proposed Rule;
3. The full text of the agency approved rule, which is identical to the emergency rule;
4. A brief summary of the content of the legislative rule;
5. A statement of the circumstances which require the rule; and
6. A fiscal note containing a statement of the economic impact of the rule on the Commission and the State of West Virginia.

No amendments have been made to the proposed legislative rule as originally filed with the Office of the Secretary of State. Please let me know if we have failed to attach any required documents.

Sincerely,

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosures
cc: The Hon. Ken Hechler
Secretary of State

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 6
RULES REGARDING WAIVER OF RIGHTS UNDER THE ACT

§77-6-1. 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 criteria for regulating the voluntary release or waiver of an individual's right to pursue a claim before the West Virginia Human Rights Commission.

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 modeled on the provisions governing waiver and release set forth in the Older Workers Benefit Protection Act of 1990 (codified at 42 U.S.C. § 626) and are designed to provide common criteria in federal and state standards concerning voluntary waiver and release.

1.3. Filing Date -- These regulations are promulgated on the _____ day of _____, 1991, and filed on the _____ day of _____, 1991, in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the _____ day of _____, 1991.

§77-6-2. Commission's Right to Investigate.

2.1. No waiver agreement signed by any individual shall effect the Commission's right and statutory duty to enforce the West Virginia Human Rights Act or to investigate any complaint filed before it. No waiver agreement may be used to justify interference with the right of an individual to file a complaint or participate in any proceeding conducted by this Commission.

§77-6-3. Waiver Must Be Knowing and Voluntary.

3.1. An individual may not waive any right or claim under the West Virginia Human Rights Act unless the waiver is knowing and voluntary.

3.2. A waiver shall not be considered knowing and voluntary unless all of the following conditions are met:

3.2.1. The waiver is part of an agreement between the individual and the employer that is written in plain English

and in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question;

3.2.2. The waiver specifically refers to rights or claims arising under the West Virginia Human Rights Act;

3.2.3. The waiver does not extend to rights or claims that may arise after the date the waiver is executed;

3.2.4. The individual waives a right only in exchange for consideration that is in addition to anything of value to which the individual already is entitled;

3.2.5. The individual is advised in writing to consult with an attorney prior to executing the agreement and is provided with the toll free telephone number of the West Virginia State Bar Association (1-800-642-3617);

3.2.6. The individual is given a period of at least twenty-one (21) days within which to consider the agreement; and

3.2.7. The agreement provides that for a period of at least seven (7) days following execution of such agreement, the individual may revoke the agreement in writing, and the agreement shall not become effective or enforceable until the revocation period has expired.

§77-6-4. Waiver in Connection with Group Program.

4.1. In addition to the requirements set forth in § 77-6-3, if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must inform the individual in writing, in a manner calculated to be understood by the average individual eligible to participate, as to the following factors:

4.1.1. Any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program;

4.1.2. The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program;

4.1.3. The method and/or factors used or considered in arriving at the amount of consideration that is offered; and

4.1.4. The right to consider the agreement for a period of at least forty-five (45) days (instead of the twenty-one day period set forth in § 3.2.6. above).

§77-6-5. Burden of Proof on Waiver and Duress.

5.1. In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth above have been met, the party asserting the validity of the waiver shall have the burden of proving as an affirmative defense that a waiver was knowing and voluntary pursuant to the above terms.

5.2. Even if the conditions set forth in this rule have been met, an individual may show that a waiver is involuntary because it was executed as a result of a threat, intimidation or coercion on the part of the employer. The individual shall have the burden of proving that the threat, intimidation or coercion was a determining factor in the individual's decision to execute the waiver.

§77-6-6. Waiver as a Defense.

6.1. During the investigation of a complaint, a properly obtained waiver shall be considered as evidence that a violation of the HRA has not occurred. If a probable cause determination is made despite the presence of a properly obtained waiver, the employer shall be permitted to raise the waiver as an affirmative defense in its answer to the complaint. Upon a finding of probable cause to believe that unlawful discrimination has occurred, the Commission may prosecute a complaint in its own name regardless of a waiver.

§77-6-7. Limit on Confidentiality Provision.

7.1. Any confidentiality or other condition restricting the right of an individual to discuss the terms of a waiver shall be considered null and void and of no effect in regard to communication between an individual and the Human Rights Commission or an individual and similarly situated employees.

§77-6-8. Scope of Coverage.

8.1. The conditions of waiver set forth in this rule are declared to have equal applicability in regard to complaints involving alleged discrimination in employment, housing and public accommodation.