WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

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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 X

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 6

TITLE OF RULE BEING PROPOSED: Rules Regarding Waiver of Rights Under the Human Rights Act

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(e), 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

MARY CATHERINE BUCHMELTER
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

2.40

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.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

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Deputy Secretary of State

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(Plus all the volunteer help we can get)

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DEC 15 1992
ATTORNEY GENERAL
CIVIL RIGHTS DIV.

RECEIVED
DEC 15 1992
ATTORNEY GENERAL

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: 6 TITLE: 77 Human Rights Commission

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: [signature]

TITLE OF PERSON SIGNING: Legal Secretary

DATE: 12-30-92

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

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

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