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

Form #2

Do Not Mark In This Box

FILED

2001 JUN 25 P 2:00

OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

RULE TYPE: Legislative CITE AUTHORITY: W.Va. Code §5-11-8(h);29A-3-1 et .seq.

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: -6

TITLE OF RULE BEING AMENDED: Rules Regarding Waiver of Rights Under the West Virginia Human Rights Act.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

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 July 26, 2001 AT 5:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Ivin B. Lee

Executive Director

West Virginia Human Rights Commission
1321 Plaza East, Room 108A

Charleston WV 25301-1400

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

Paul L. Nuse

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Waiver Under the West Virginia Human Rights Act

Type of Rule: x Legislative ____ Interpretive ____ Procedural

Agency: West Virginia Human Rights Commission

Address: West Virginia Human Rights Commission
1321 Plaza East, Room 108 A
Charleston WV 25301-1400

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$0	$0	$0	$0	$0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:
This rule will have no fiscal impact on the West Virginia Human Rights Commission

3. Objectives of These Rules:
This amendment is designed to make it clear waivers need not apply in circumstances where individuals are represented and are negotiating over claims which are currently in litigation.

Rule Title: Rules regarding waiver of rights under the West Virginia Human Rights Act

4. Explanation of Overall Economic Impact of Proposed Rule:

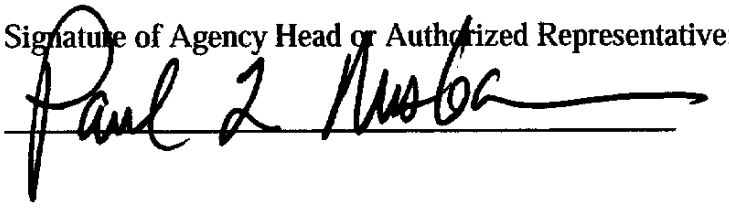
   A. Economic Impact on State Government:
      None

   B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:
      None

   C. Economic Impact on Citizens/Public at Large.
      None

Date: June 22, 2001

Signature of Agency Head or Authorized Representative:



Title 77
Legislative Rule
West Virginia Human Rights Commission
Series 6

Rule Regarding Waiver of Rights Under the West Virginia Human Rights Act

Brief Summary of the Proposed Rule

This is an amendment designed to make it clear waivers need not apply in circumstances where individuals are represented and are negotiating over claims which are currently in litigation.

Title 77
Legislative Rule
West Virginia Human Rights Commission
Series 6

Amendment to Rule Regarding Waiver of Rights
Under the West Virginia Human Rights Act

Statement of Circumstances Which Require this Amendment

The amendment is proposed to expedite the processing of complaints before the Human Rights Commission by clarifying that waivers need not apply in circumstances where individuals are represented and are negotiating over claims which are currently in litigation.

FILED
2001 JUN 25 P 2:00
OFFICE WEST VIRGINIA 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 or pursuant to the West Virginia Human Rights Act.

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 _____, 2001, and filed on the _____ day of _____, 2001, in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the _____ day of _____, 2001.

§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. Except as provided in 3.3 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.

3.3. If an individual is the complaining party in a complaint which is filed with the West Virginia Human Rights Commission and is pending before an Administrative Law Judge or is the plaintiff in a civil action which is pending in court, and a release is negotiated, reduced to writing and executed in connection with the settlement of such complaint or civil action, and said release is entered into by such individual with the direct assistance of an attorney acting on behalf of such individual in the presentation of the complaint or civil action, such release may be considered a knowing and voluntary waiver without regard to the requirements of 3.2.5, 3.2.6 and 3.2.7.

§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.