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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

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: 77-6-1

TITLE OF RULE BEING AMENDED: Waiver of Rights

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Paul 2 Nolan

Authorized Signature

$3.20

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Bob Wise
Governor

Office of the Secretary
State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Paul L. Nusbaum
Secretary

January 15, 2002

Ms. Judy Cooper, Director
Administrative Law Division
Office of the Secretary of State
Building 1, Suite 157-K
State Capitol Complex
Charleston, West Virginia 25305

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

Re: Title 77, Series 6, Revised Legislative Rule on Waiver of Rights of the West Virginia Human Rights Commission

Dear Ms. Cooper:

Having reviewed the amendments made by the Legislative Rule-Making Review Committee to the West Virginia Human Rights Commission's revised Legislative Rule "Waiver of Rights," I hereby authorize said modifications and the filing of the modified rule with your office and with the Legislative Rule-Making Review Committee.

If you have any questions, please call Paul R. Sheridan, Senior Assistant Attorney General, at 558-0546. Thank you for your consideration in this matter.

Sincerely,

Paul L. Nusbaum
Secretary

PLN:sab

Enclosures

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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SERIES 6
WAIVER OF RIGHTS ~~UNDER THE HUMAN RIGHTS ACT~~

§77-6-1. General.

1.1. Scope -- The following legislative rules ~~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~~ under the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq..

1.2. Authority -- These rules 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

1.4. Effective Date

§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~~ 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 a party who has filed a complaint pursuant to the West Virginia Human Rights Act executes a written release in connection with the settlement of the claims made in the complaint, and the release is entered into by the party with the direct assistance of an attorney who has made an appearance on behalf of such complaining party, the 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.