WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

CITE AUTHORITY W. Va. Code §§ 5-11-8(h) and 29A-3-1 et seq.

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: 9

TITLE OF RULE BEING PROPOSED: Rule Regarding the Definition of Employer Under the West Virginia Human Rights Act

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Authorized Signature

$4.60

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 108 A
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976

Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

July 30, 1997

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

Re: Title 77, Series 9, Proposed Legislative Rule
of the West Virginia Human Rights Commission

Dear Ms. Cooper:

Having reviewed the West Virginia Human Rights Commission's Proposed Legislative Rule Regarding the Definition of Employer under the West Virginia Human Rights Act and accompanying documents, I hereby authorize the modification of said rule and the filing of the modified rule with your office and with the Legislative Rule-Making Review Committee.

Please do not hesitate to contact me if you have any questions. Thank you for your consideration in this matter.

Sincerely,

Joan E. Ohl, Secretary
West Virginia Department of Health
and Human Resources

DATE: July 30, 1997

TO: **LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

FROM: West Virginia Human Rights Commission

LEGISLATIVE RULE TITLE: Rule Regarding the Definition of Employer Under the West Virginia Human Rights Act

1. **Authorizing statute(s) citation** W. Va. Code §§ 5-11-8(h) and 29A-3-1 et seq.

2. a. **Date filed in State Register with Notice of ~~Hearing~~** Public Comment June 17, 1997

   b. **What other notice, including advertising, did you give of the hearing?**

   None

   c. **Date of ~~Hearing(s)~~** June 17, 1997 - July 18, 1997 Public Comment Period

   d. **Attach list of ~~persons who appeared at hearing,~~ comments received, amendments, reasons for amendments.**

   Attached XX **No comments received** ____

   e. **Date you filed in State Register the agency approved proposed Legislative Rule following public ~~hearing~~ comment period (be exact)**

   July 30, 1997

   f. **Name and phone number(s) of agency person(s) to contact for additional information:**

   Herman H. Jones, Executive Director, West Virginia Human Rights Commission, 1321 Plaza East, Room 108A, Charleston, West Virginia 25301; (304) 558-2616

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

   a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

      not applicable

   b. Date of hearing: _____

   c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

      _____

   d. Attach findings and determinations and reasons:

      Attached _____

TITLE 77
LEGISLATIVE RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 9

RULE REGARDING THE DEFINITION OF EMPLOYER UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Brief Summary of the Proposed Rule

The proposed rule more specifically defines the term "employer."

TITLE 77
LEGISLATIVE RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 9

RULE REGARDING THE DEFINITION OF EMPLOYER UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Statement of Circumstances Which Require this Rule

This rule is proposed pursuant to the recent decision of the West Virginia Supreme Court of Appeals in *Sharon Williamson v. Warren O. Greene, et al.*, No. 23742 (W. Va. Sup. Ct. June 2, 1997). That decision inadvertently renders the state act narrower than the federal act. Such an interpretation seriously jeopardizes the federal funding which the West Virginia Human Rights Commission receives as the substantially equivalent agency to the Equal Employment Opportunity Commission.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rule Regarding the Definition of Employer Under the West Virginia Human Rights Act

Type of Rule: x **Legislative** ____ **Interpretive** ____ **Procedural**

Agency West Virginia Human Rights Commission

Address 1321 Plaza East, Room 108A Attn: Herman H. Jones

Charleston, WV 25301-1400 Executive Director

(304) 558-2616

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 & ALTERNATIONS					
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 interpret and implement the provisions of the West Virginia Human Rights Act, particularly W. Va. Code § 5-11-3(d) related to the definition of employer, and to assist all persons in understanding their rights, obligations and duties under the law.

Rule Title: Rule Regarding the Definition of Employer 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: July 30, 1997

Signature of Agency Head or Authorized Reprensentative

David W. Grinard

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE 77
LEGISLATIVE RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 9

RULE REGARDING THE DEFINITION OF EMPLOYER UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

§ 77-9-1. General

1.1. Scope -- The following legislative regulation sets forth a rule for complying with the definitions provisions of the West Virginia Human Rights Act, West Virginia Code § 5-11-3 *et seq.*, and is intended to interpret and implement the provisions of the West Virginia Human Rights Act, particularly W. Va. Code § 5-11-3(d) related to the definition of employer, and to assist all persons in understanding their rights, obligation and duties under the law.

1.2. Authority -- This regulation is issued under authority of W. Va. Code §§ 5-11-8(h) and 29A-3-1 *et seq.*

1.3. Filing Date -- This regulation is promulgated on the ____ day of _____, filed on the ____ day of _____, in the Secretary of State's Office.

1.4. Effective Date -- This regulation becomes effective on _____.

§ 77-9-2. Definition

2.1. "Employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons, regardless of the work schedules of the employees, within the state at any time during the period of the complainant's employment within one calendar year preceding the date of the alleged discriminatory act.

TITLE 77
LEGISLATIVE RULE
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SERIES 9

RULE REGARDING THE DEFINITION OF EMPLOYER UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Legislative Rule Making
Procedure Following Public Hearing
and/or Comment Period

1. The West Virginia Human Rights Commission filed with the Office of the Secretary of State and the Legislative Rule Making Review Committee a Notice of Comment Period on a Proposed Rule on June 17, 1997, which provided that in lieu of a public hearing, comments concerning these proposed rules were to be filed on or before 5:00 p.m. on July 18, 1997.

2. A copy of the written comments received from the West Virginia Employment Lawyers' Association is attached.

3. The West Virginia Human Rights Commission, after due consideration of the comments received by the West Virginia Employment Lawyers' Association, seeks to modify its proposed rule, as more fully set forth below in the underscored and italicized language of the regulation:

§ 77-9-2. Definition

2.1. "Employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons, *regardless of the work schedules of the employees*, within the state at any time during the period of the complainant's employment within one calendar year preceding the date of the alleged discriminatory act.

4. The West Virginia Human Rights Commission asserts that this proposed amendment is consistent with the holding of the United States Supreme Court in Walters v. Metropolitan Educational Enterprises, Inc., 117 S. Ct. 660, 72 Fair Empl. Prac. Cas. 1211 (1997), adopting the "payroll method" of determining coverage under Title VII of the Civil Rights Act of 1964. The Commission also believes that this proposed amendment clarifies and simplifies the methodology for determining whether an entity is a covered employer under the Human Rights Act.

P & A
Pyles & Auvil

Attorneys At Law

1208 Market Street
Parkersburg, West Virginia 261
304 485-3058

July 16, 1997

Mary Kay Buchmelter
Deputy Attorney General
Civil Rights Division
Office of the Attorney General
812 Quarrier Street
L & S Building, Sixth Floor
Charleston, WV 25301

Re: Human Rights Commission's Proposed Regulation regarding the definition of employer under the Human Rights Act

Dear Ms. Buchmelter:

I am writing as Chair of the West Virginia Employment Lawyers' Association, to comment on the proposed "Rule Regarding the Definition of Employer under the West Virginia Human Rights Act", proposed for codification at West Virginia CSR § 77-9-2.

The West Virginia Employment Lawyers' Association is a statewide association of over 30 attorneys whose practices focus on the representation of individuals in discrimination and other types of wrongful discharge litigation. The West Virginia Employment Lawyers' Association is a recognized affiliate of the National Employment Lawyers' Association, a leading national private bar association of over 3,000 attorneys representing individuals in discrimination and related litigation. The West Virginia Employment Lawyers' Association's members routinely represent complainants in proceedings under the West Virginia Human Rights Act and before the West Virginia Human Rights Commission. The nature of the practice of members of the West Virginia Employment Lawyers' Association is such that they have both expertise and interest in the appropriate development of the law with regard to the West Virginia Human Rights Act and its invaluable protections against discrimination for citizens of the State of West Virginia.

On the whole, the West Virginia Employment Lawyers' Association strongly supports the proposed regulation set forth at West Virginia CSR § 77-9-2 regarding the definition of "employer" under the Act. This definition is consistent with the "payroll method" approach taken by the United States Supreme Court in Walters vs. Metropolitan Educational Enterprises, Inc., 117 S.Ct. 660 (1997). The "payroll method" of determining coverage has significant advantages to other methods of determining coverage under the Act, as recognized by the United States Supreme Court in Walters.

Perhaps the prime practical advantage to both employers and employees is the clarity and simplicity of determining whether and in what situations an employer meets the definition under the West Virginia Human Rights Act. Essentially, as set forth in the proposed regulation and as the United States Supreme Court has held, it would be the total number of persons employed by the employer within the State of West Virginia during the year preceding the alleged discriminatory act which would determine coverage. This is usually subject to objective verification through payroll records.

There is one clarification which the West Virginia Employment Lawyers' Association would recommend adding to the proposed regulation. This addition would make clear the fact that part-time employees are employees counting toward the total of 12 necessary for coverage under the Act. The language of the regulation including this addition suggested by the West Virginia Employment Lawyers' Association is as follows:

§ 77-9-2. Definition.

> 2.1. "Employer means the state, or any political subdivision thereof, and any person employing 12 or more persons, **regardless of the work schedules of the employees,** within the state at any time during the period of the complainant's employment within one calendar year preceding the date of the alleged discriminatory act.

The West Virginia Employment Lawyers' Association appreciates the work of the Commission in clarifying this important area of coverage under the West Virginia Human Rights Act.

Very truly yours,

Walt Auvil/lbo

Walt Auvil, Chairman
West Virginia Employment Lawyers Association

WA:rlo

cc: Elizabeth A. Pyles, Treasurer
Kay Bayless, Member