

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: Department of Labor TITLE NUMBER: 42

CITE AUTHORITY: WV Code 21-5-13

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: V

TITLE OF RULE BEING AMENDED: Wage Payment and Collection Act

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: _____

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

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:

This Emergency Rule is being filed to bring into compliance the current rule with the provision of H.B. 2236 as passed by the 1989 Legislature. The existing rule is insufficient to address the 1989 amendment.

Use Additional Sheets If Necessary.


Commissioner of Labor

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF LABOR
CHAPTER 21-5
SERIES V

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OFFICE OF WEST VIRGINIA
LEGISLATIVE COUNSEL

Title: Wage Payment and Collection Act

Section 1. General

1.1 Scope - The following shall govern, clarify, and prescribe such actions of laying down authoritative directions to designate or order their use as a remedy to guide a firm, its officers, and employees under the Wage Payment and Collection Act of the Code of West Virginia, one thousand nine hundred thirty-one, as amended and reenacted, and further amended by adding new sections, designated sections one, six, seven, fourteen, fifteen and sixteen, passed on April 9, 1981, and in effect ninety days from passage; and further amended by adding to sections one, fourteen, fifteen, and sixteen and adding section seventeen, passed on April 7, 1987 and in effect ninety (90) days from passage, and further amended by adding to sections fourteen and fifteen, passed March 3, 1989, effective from passage.

1.2 Authority - W. Va. Code 21-5-13 and 29A-1-1.

1.3 Filing Date - January 20, 1988.

1.4 Effective Date - The effective date of these regulations shall be January 20, 1988, except as may be otherwise specified for amendments and additional Regulations hereafter adopted by the Department.

1.5 Application - these Regulations shall apply to employees and employers as defined by Chapter 21, Article 5, Section 1 of the Code of West Virginia.

1.6 Severability - If any provisions of these regulations or the application thereof to any employee, firm or corporation is held invalid, the invalidity shall not affect other provisions or applications of these Regulations which can be given effect without the invalid provisions or application and to this end the provisions of these Regulations are severable.

1.7 No Waiver - No provision of the act or regulations promulgated pursuant thereto may be waived by private agreement, and any attempted waiver is null and void.

Section 2. Definitions

2.1 Act - means the Wage Payment and Collection Act as embraced in the West Virginia Code, Chapter 21, Article 5.

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Leg. Rule, 21-5
Series V, Sec. 2

2.2 Appeal - means an application to the Commissioner for corroboration or decision.

2.3 Assignment or Order for Future Wages or assignment of Wages - means all forms, assignments, transfers, or sales of wages to another, either as payment or as security and whether stated to be revocable or nonrevocable except for deductions as defined herein.

2.4 Authorized Representative - means, and includes, the director and employees of the Wage and Hour Division of the Labor Department.

2.5 Bond - means a legal instrument which binds the maker to pay a legal obligation for money. Types of bonds are:

(a) Surety Bond - means a Bond whereby a third party insures or guarantees that the wages of an employer shall be paid to employees when such wages are due, and that if such employer fails or defaults in the payments of such wages when they are due, then the insuring party will pay such wages when due and shall seek redress from the defaulting employer.

(b) Collateral bond - means the pledge and/or deposit of cash, certificates of deposit, or other such certificates or securities owned by an employer, upon approval by the Commissioner, with the State Treasurer. The collateral of personal property may also include those specified assets set forth in Chapter 21, Article 5, Section 14(c). Upon the pledge and deposit of collateral bonding, the employer shall execute a promissory document whereby if the employer fails or defaults in the payment of wages due to his employees, that the State Treasurer has the authority to convert as much of the collateral assets to cash in order to pay the wages that are due and owing, all in accordance with Chapter 21, Article 5, Section 14(e) of the West Virginia Code.

(c) Escrow Bond - means money deposited with the State Treasurer in trust, said money shall be placed in an account in the name of the West Virginia Department of Labor and the employer. An employer who cannot provide either a Surety Bond or Collateral Bond must deposit with the West Virginia Department of Labor the amount of money set forth in Chapter 21, Article 5, Section 14(a) of the Code of West Virginia.

(d) Letter of Credit - means a signed agreement by a third party financial institution; i.e., a bank, savings and loan, or cash factoring business in the financial loan business to

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guarantee to the Department for the applicant firm a sum certain as a loan at a future time to the extent stated to serve as a bond guarantee and to be paid to the Department of Labor upon certification of wages due as provided in section fourteen, article five, chapter twenty-one of the Act. All letters of credit offered must clearly state that the credit is irrevocable.

(d) Letter of Credit - means a signed agreement by a third party reputable and solvent banking or other financial institution evidencing a line of credit sufficient to cover amounts required and established by the Department of Labor to serve as a bond guarantee and to be paid to the Department of Labor upon certification of wages and benefits due as provided in section fourteen, article five, chapter twenty-one of the Act. All letters of credit accepted must clearly state that the credit is irrevocable. The Commissioner of Labor must determine that all letters of credit accepted are valid, stable instruments of credit that will guarantee and secure payment of wages and fringe benefits in the event of wage and fringe benefit default by an employer.

2.6 Break periods and/or Rest Periods - means when authorized by an employer, break periods and/or rest periods which do not exceed twenty minutes' duration must be counted as hours worked.

2.7 Department - means the West Virginia Department of Labor.

2.8 Discharge - means any involuntary termination or the cessation of performance of work by employee due to employer action.

2.9 Employ - means to hire or permit to work.

2.10 Lay-off - means any involuntary cessation of an employee for a reason not relating to the quality of the employee's performance or other employee-related reason. An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels, or by mail if requested.

2.11 Transportation - means any method of moving goods or material from one point to another.

Section 3. Enforcement

3.1 Powers of the commissioner

(a) The Act charges the Commissioner with the administration of the West Virginia Wage Payment and Collection Act.

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Leg. Rule, 21-5
Series V, Sec. 3, 4

(b) Pursuant to the Act, the Commissioner may make and amend, alter or repeal general rules and regulations of procedure for carrying into effect all provisions of the Act, for obtaining statistical data respecting wages and payments, and to prescribe means, methods, and practices to make effective such provisions.

(c) The Act empowers the Commissioner to make such investigations and inspections and take any action, including bringing legal action, as authorized by the Act which in his judgement are necessary to administer, enforce, or collect claims due under the Act and these Regulations.

(d) The Commissioner will insure by periodic inspections by his designated representatives, that a copy of any of the required bonds is posted in a place accessible to employees affected thereby, or a copy of the notification that the bonding requirements have been waived by the Commissioner. Further, the commissioner shall cause a copy of the bond to be filed in the office of the clerk of the county commission of the county wherein the person, firm or corporation is doing business to be available for public inspection.

3.2 Inspection By Department - The Commissioner's representative shall, during reasonable hours, make such inspections of places of employment within this State to determine compliance with the Act and these Regulations.

3.3 Penalty for Violation - Any employer violating any provisions of these rules and regulations shall be subject to the penalties prescribed by 21-5-4, 21-5-5, 21-5-11, 21-5-12, 21-5-15, and 21-5-17 of the Act.

Section 4. Form of Records; Scope of Records

4.1 Form of Records - No particular order or form of records is prescribed. However, every employer who is subject to any of the provisions of the Act is required to maintain payroll and employment records for a period of not less than five years.

4.2 Content of Records - The written record or records with respect to each and every employee shall contain:

(a) Name in full, identifying symbol or number if such is used in place of name on any time, work or payroll record. This shall be the same name as that used for Social Security record purposes:

(b) Social Security number;

(c) Home address;

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- (d) Date of birth, if under 18;
- (e) Occupation or job classification;
- (f) Rate of regular pay and rate of overtime pay;
- (g) Hours worked each work day and total hours worked each workweek;
- (h) Method of calculating the percent of fringe benefits owed to an employee at any given time.

Section 5. Records of Retroactive Payments of Wages

5.1 The following procedure is to be used in recording retroactive wage payments:

(a) Record and preserve, as an entry on his payroll or other pay records, the amount of such payment to each employee, the period covered by such payment to each employee, and date of payment.

(b) Prepare a report of such payment, (i) Preserve a copy for his records, (ii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Commissioner of Labor within ten days after payment is made.

Section 6. Petition For Special Agreement - Records

6.1 Written Petition - Any firm, which due to peculiar conditions under which it must operate, desires authority to maintain records in a manner other than required in Section 4.00, et. seq., or to be relieved of preserving certain records for the period specified herein, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof.

6.2 Commissioner Determines Relief Sought - The Commissioner may grant the authority prayed for if it does not hamper or interfere with the enforcement of the provisions of the Act; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation.

6.3 Employer Must Comply With Regulations During Adjudication Period - The submission of a petition or the delay of the Commissioner in acting upon such petition shall not relieve any firm from any obligations to comply with regulations of this Act. However, the Commissioner shall give notice of the petition with due promptness.

Section 7. Place For Keeping Records

7.1 Records to be Kept - Each employer so required shall keep the records required by these regulations safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within seventy-two hours following written notice from the Commissioner.

7.2 Records to be Open to the Department for Inspection - All records of the employer shall be open to the Department for inspection, examination, copying, photographing, or otherwise reproducing, in order to insure compliance with the Act.

Section 8. When Wages Are Payable

8.1 Wage Payments by Railroad Companies - Every railroad company, authorized to do business by the laws of this State shall, on or before the first day of each month, pay its employees the wages earned by them during the first half of the preceding month, ending with the fifteenth day thereof; and on or before the fifteenth day of each month, pay the employees thereof the wages earned by them during the last half of the preceding calendar month.

8.2 Wage Payments by Employers Not Railroads - With the exception of railroad companies, every employer shall, at least once in every two weeks, pay at least all wages earned.

Such wages shall be paid in lawful money of the United States or checks or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such checks by employees for the full amount of wages, or by any method of depositing immediately available funds in an employee's demand or time account in any bank, credit union or savings and loan institution that may be agreed upon in writing between the employee and such person, firm or corporation, which agreement shall specifically identify the employee, the financial institution, the type of account and the account number.

Section 9. Employee Absent On A Payday

9.1 If at the time of payment, any employee shall be absent from his regular place of labor, and shall not receive his wages through a duly authorized representative, he shall be entitled to such payment at any time thereafter upon the proper paymaster at

the place where such wages are usually paid and where the next pay is due, and the proper mailing in the United States post office of such payment in time to reach the usual post office of the employee by the time aforesaid, in the usual course of mails, shall be in compliance with this regulation.

Section 10. Petition For Special Agreement - Paydays

10.1 Written Petition - Any firm, who due to peculiar conditions under which it must operate and upon a compelling showing desires authority to establish regular paydays less frequently than once in every two weeks as required in Section 8.2 of these Regulations, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof, provided that in no event shall the employee be paid in full less frequently than once each calendar month on a regularly established schedule. At the time of the filing of the petition, the employer shall include with the application a postage paid envelope addressed to each of the employees.

10.2 Hearing; Notification of Employees - The Commissioner shall hold a hearing upon any request for special agreement. The employees of the employer shall be given at least twenty days' notice of the time and place of hearing.

10.3 Commissioner Determines Relief Sought - The Commissioner may grant the authority for less frequent paydays upon a compelling showing of cause; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation.

10.4 Firm Must Comply With Regulations During Adjudication Period - The submission of a petition or the delay of the Commissioner in acting upon petition shall not relieve any employer from any obligations to comply with regulations of this Act. However, the Commissioner shall give notice of the petition with due promptness.

Section 11. Assignment of Wages

11.1 Documents of Assignment - Except as provided in this regulation, or otherwise provided by law, nothing will affect the right of an employee to assign part of his claim against his employer for wages. The employer must have an assigned authorization prior to deducting or withholding shortages from an employee's wages.

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Series V, Sec. 11

11.2 Example of Wage Assignment - The following wage assignment form shall be considered in presumptive compliance by the department:

STATE OF WEST VIRGINIA
COUNTY OF _____

I, _____ (employee) _____, hereby assign to _____ (creditor) _____
future wages due me from _____ (employer) _____ in the amount of \$ _____
which amount due to _____ (creditor) _____ together with the amounts previously
assigned totals \$ _____ the total amount due to said creditor by
this and previous assignments. Three-fourths of my earnings for each pay period
less deductions shall be exempt from all wage assignments. All my wages assign-
ments shall be paid in the order of the date I signed them. This assignment
shall be effective for a period of one year.

(employee)

Taken, sworn to and subscribed before me on this the _____ day of
_____, 19____.

Notary Public

My commission expires _____, 19____.

Accepted by _____ (endorsement by employer) _____ on this the _____
day of _____, 19____.

By _____ (employee or employer), (title)

County _____

11.3 Authorized Deductions Not Requiring Wage Assignment Form

(a) Authorized deductions for amounts required or allowed by law to be withheld, union or club dues, pension plans, payroll savings plans, credit unions, charities, or hospitalization or medical insurance shall not be required to be in any prescribed form.

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Leg. Rule, 21-5
Series V, Sec. 11, 12, 13

(b) Any employer who fails, to pay portions of wages in accordance with properly executed assignment, shall be liable for an amount equal to the amount such employer failed to pay. The employee shall not be subject to a suit for reimbursement from a party to whom the employer improperly paid the employee's wages.

Section 12. Agreements Contra To This Regulation Void

12.1 It shall be unlawful for any employer or railroad company to enter into or make any agreement with any employee for the payment of any such employee otherwise than as provided in this Regulation, except to pay such wages at shorter intervals than herein provided. Every agreement made in violation of this regulation shall be deemed to be null and void.

Section 13. Employee Separated From Payroll Before Payday

13.1 Discharge - An employee who is discharged shall be paid all wages including fringe benefits within seventy-two hours of the employee's final hour of employment.

13.2 Resignation - An employee who quits or resigns shall be paid all wages, including fringe benefits, no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee. If the employee gives at least one pay period's notice of intention to quit computed from the last moment of employment, the employer shall at the time of quitting pay all wages, including fringe benefits due the employee.

13.3 Lay-Off - An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels or by mail if requested.

13.4 Strike or Labor Dispute - An employee who is on strike or otherwise suspended as a result of a labor dispute, shall be paid all wages not later than the next regular payday through regular pay channels. If the employee so requests at least twenty-four hours before the last hour of employment before an impending strike or labor dispute, all accrued benefits shall accompany the payment of wages and fringe benefits, and shall be mailed or otherwise delivered to the employee.

13.5 Recovery of Employee - An employee may recover, in addition to the regular wages and fringe benefits, an amount equal to his wages without rendering any service therefor, for each day the employer is in default, up to thirty days. The payment of wages improperly withheld does not cure the default for that period the employer was in default.

Section 14. Notification To Employees, Records Maintained By Employers, And Posting of Notices Required

14.1 Notification of Employers; Pay - All employers shall at the time of hire notify their employees in terms of hour, day, month or year, including the term of employment, in writing of the rate of pay, overtime rate, fringe benefits amount and method of computing fringe benefits, and of the day, hour and place of payment. Any changes in such rate, time, term, or place shall be furnished to employees in writing or by posted notice in a place or places where all employees would observe it on a daily basis at least one full pay period prior to the effective date of such change.

14.2 Records of Deductions - The employer shall furnish to each employee an itemized statement of wages to include hourly rate, overtime rate, bonus, and incentive pay, plus the amount deducted from the employee's pay, including the amount and authority for which monies were deducted (e.g., withholding tax, state taxes, FICA, union dues, wage assignment, etc.).

14.3 Abstract of Wage act - The following abstract of the act shall be posted in a place accessible to all employees:

This employer is required to:

1. Have a payday at least once every two weeks (except railroad companies - semimonthly).
2. Pay in money, or in check or money orders on banks convenient to the place of work where arrangements have been made for cashing.
3. On discharge, pay all wages, including fringe benefits, within seventy-two hours of the last hour of employment.
4. On quitting, pay all wages, including fringe benefits, at the regular payday (except if one pay period's notice is given by the employee, all wages including fringe benefits must be paid at the time of quitting).
5. On lay-off or strike, pay all wages, including fringe benefits at the next regular payday (except if requested by the employee, all wages including fringe benefits must be paid by mail).
6. Notify his employees in writing at the time of hiring of the rate of pay and of the day, hour and place of payment and thereafter of any changes.

7. Make known to all his employees in writing or by accessible posted notice all employment practices, and policies with regard to vacation pay, sick pay, and other fringe benefits.

8. Furnish each employee with an itemized statement of deductions made from his wages for each pay period.

Employers engaged in construction work, or the severance, production or transportation (excluding railroads and water transporters) of minerals, must have demonstrated the ability to pay all wages and fringe benefits due employees, or must have posted a bond securing payment.

This employer may not:

1. Sell to any employee goods or supplies at prices higher than the current market value.

2. Deduct more than 25% of an employee's earnings under a wage assignment (excluding amounts required by law to be withheld, union dues, club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance).

3. Take a wage assignment unless it is notarized, specifies the total amount due, states that three-fourths of the wages are exempt, and contains the written acceptance of the employee.

4. Refuse to pay a deceased employee's relatives, wages owing up to \$800.

5. Refuse to pay the wages of the employees of his subcontractor who has failed to pay his employees.

6. May not coerce or compel, or attempt to coerce or compel an employee to purchase goods or services in payment of wages due him or to become due him.

Section 15. Collection Of Wages Due Through Action By The Commissioner

15.1 Action By The Commissioner - Pursuant to the Act, the Commissioner or his designated representative, upon the request of any person whose wages have not been paid in accordance with the law, may bring any legal action necessary to collect such claim.

15.2 Request By Claimant To Be In Writing - Request for the assistance of the Commissioner shall be made upon the forms as provided by the Commissioner.

Section 16. Bonding Procedures

16.1 General - Surety, collateral, escrow bonds, and irrevocable letters of credit as defined in Section 2.5 of these Regulations, are the only type bonding documents authorized by the Code.

16.2 Correspondence Relating to Bonds - Certified mail, return receipt requested, will be utilized for all correspondence pertaining to bonds or requested actions pertaining to bonds including applications for waivers.

16.3 Procedures for Bonds

(a) The Commissioner will forward to the employer evidence and/or receipt of the bonding document and cause to be filed such evidence and/or receipt with the clerk of the county commission in the county in which the employer operates said business.

(b) After receipt of the bond by the employer, the employer will comply with requirements of 21-5-14(f) of the Code. The number of additional copies of bonding evidence may be reproduced by the employer to meet the prescribed posting requirements of the Code.

16.4 Waiver of Bonding Requirements

(a) The Commissioner may shall waive the bonding requirements of this section upon his determination that an employer is of sufficient financial responsibility to pay wages and fringe benefits only in the most exceptional circumstances. In no event will the Commissioner be compelled to issue a waiver. Applications from firms requesting a waiver will be accepted if accompanied by notarized financial documentation in the form of financial statements presented in accordance with generally accepted accounting principles and will include: (1) a balance sheet [statement of financial position], (2) statement of revenues/expenses and (3) statement of change in financial position, and (4) related notes of financial disclosure. All such financial statements must cover two operating years. All joint venture operations shall be subject to the bonding provisions, if not in business for five years, unless waiver is achieved by the principal parties of the joint venture through waiver application approval by the commissioner of labor.

(b) Waivers will be granted for a period of six consecutive months. Inspections will be conducted by the Commissioner and where found that a firm is failing to maintain a sound financial

responsibility, the waiver will be withdrawn and the firm must furnish bond for wages and benefits pursuant to §21-5-14(a) of the Code.

16.5 Claim For Wages Against A Bond - When a claim for wages against an employer who has posted a bond is made, the Commissioner will cause an investigation of the employer's payroll records and have them submitted for his review and determination of wages. He will then have certification of the wages prepared and present same to the bonding company or the State Treasurer for payment of said wages.

16.6 Termination of Bond - As prescribed by §21-5-14(g) of the Code, and utilizing the procedures of Section 16.2, bonds may be terminated only when all requirements cited in the Code are met by the firms.

16.7 Contractors and Subcontractors to Notify Commissioner - It shall be the duty of a prime contractor to notify the commissioner in writing by certified mail within 10 days next following of all contract or subcontract agreements entered into with an employer and such contract or subcontract contemplates the performance of construction work or the severance, production or transportation of minerals as provided in §21-5-16 of the West Virginia Code.

The notification shall include: (1) employees name, (2) location of job site, and (3) employers principal business location. Said prime contractor shall continue to identify specific contracts and subcontracts at each jobsite in behalf of said principal contractor.

Section 17. Amendments to Regulations

17.1 Written Petition To Commissioner - Any person wishing a revision of any of these Regulations may submit to the Commissioner a written petition setting forth the changes desired and the reasons for proposing them.

17.2 Hearing On Petition - The Commissioner, upon inspection of the petition, and believing that the grounds are reasonable, may schedule a hearing with due notice to interested persons, or make other provisions for affording interested persons an opportunity to present data, views and arguments relating to any proposed changes.