

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

FILED

2005 JAN -4 P 1:39

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative; CITE AUTHORITY W.Va. Code §21-5F-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 30

TITLE OF RULE BEING PROPOSED: Nurse Overtime Complaints

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 Feb. 7, 2005 AT 5:00 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

West Virginia Division of Labor

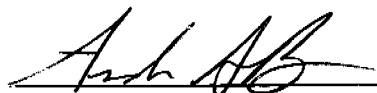
Room B 749, Building #6

State Capitol Complex

Charleston, WV 25305

(304) 558-7890 ext.# 112

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



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Nurse Overtime Complaints

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Division of Labor

Address: Room B-749, Building #6
State Capitol Complex
Charleston, WV 25305

Phone Number: 558-7890 Email: abrown@labor.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule was mandated by the passage of S.B. 251 during the 2004 Regular Legislative session. S.B. 251 carried a fiscal note for implementation and enforcement. There was no appropriation made relative to this bill resulting in an un-funded mandate. This estimate represents that original fiscal note.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$ 50,000	\$ 50,000	\$ 52,500
Personal Services	32,338	32,338	33,838
Current Expenses	9,982	9,982	9,982
Repairs & Alterations	-0-	-0-	-0-
Assets	-0-	-0-	-0-
Equipment	2,650	2,650	2,000
Other	5,030	5,030	6,680
2. Estimated Total Revenues			

Rule Title: Nurse Overtime Complaints

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

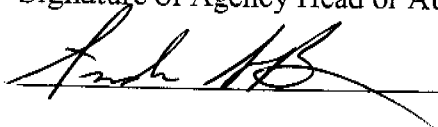
This estimate seeks to correct an un-funded mandate created by the passage of S.B. 251 during the 2004 Regular Session.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: 1-4-05

Signature of Agency Head or Authorized Representative



WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-3797

[HTTP://WWW.STATE.WV.US/LABOR](http://WWW.STATE.WV.US/LABOR)

BOB WISE
Governor



JAMES R. LEWIS
Commissioner

Circumstances

This rule is filed under the authority granted by W.Va. Code §21-5F-1 by the passage of Senate Bill 251 during the 2004 Regular Legislative session. Senate Bill 251 contained some errors/omissions. Those errors have presented some significant interpretation and enforcement problems. This rule attempts to correct those problems and clarify some confusing areas within the bill.

The rule is being filed at this time at the specific request of the Joint Committee on the Judiciary.

TITLE 42

FILED

**West Virginia Division of Labor
Legislative Rule**

2005 JAN -4 P 1:39

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Nurse Overtime Complaints

Series 30

§42-29-1. General.

1.1. Scope. This legislative rule governs the procedures for the handling of nurse overtime complaints against hospitals in accordance with W.Va. Code §21-5F-4 and W.Va. Code §29A-5-1 et seq.

1.2. Authority. W.Va. Code §21-5F-4.

1.3. Filing Date.

1.4. Effective Date.

§42-29-2. Application and Enforcement.

2.1. Application. This legislative rule applies to the West Virginia Division of Labor and all persons, firms or corporations governed or otherwise defined under the coverage of the West Virginia Code §21-5F-1 et seq.

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor in accordance with West Virginia Code §21-1-3 et seq.

§42-29-3. Definitions.

3.1. The "Act" means the Nurse Overtime and Patient Safety Act, W.Va. Code §21-5F-1 et seq., and this rule.

3.2. "Commissioner" means the commissioner of the West Virginia Division of Labor.

3.3. "Complaint" means the filing of allegations which indicate a violation of the Act or this rule and which requires an investigation by the division.

3.4. "Division" means the West Virginia Division of Labor.

3.5. "Hospital" means a facility licensed under the provisions of article five-v, chapter sixteen of this code, but does not include hospitals operated by state or federal agencies.

3.6. "Nurse" means a certified or licensed practical nurse or a registered nurse who is providing nursing services and is involved in direct patient care activities or clinical services, but does not include certified nurse anesthetists. Nurse managers are included with respect to their delivery of in-hospital patient care.

3.7. "On-call time" means time when the employee is off the clock and away from the employer's premises but the employer maintains certain restrictions as to the employee's use of that time. On-call time may exist while on the employer's premises but is always regarded as on the clock.

3.8. "Overtime" means, for the purpose of this rule, the hours worked in excess of an agreed upon, predetermined, regularly scheduled shift.

3.9. "Shift" means a routinely scheduled work period not to exceed twelve consecutive hours.

3.10. "Taking action against" means discharging; disciplining; threatening; reporting to the board of nursing; discriminating against; or penalizing regarding compensation, terms, conditions, location or privileges of employment.

3.11. "Twenty-four period" means the twenty-four hours immediately following a break of at least eight hours.

3.12. "Unforeseen emergent situation" means an unpreventable situation or circumstances which presents a clear and imminent risk to patient and employee safety. It includes, but is not limited to, acts of terrorism, disease outbreaks, natural disasters and catastrophic events (i.e. plane crash). Emergent situation does not include prescheduled vacation time, routine sick leave scheduled or unscheduled, family emergencies or other permissible personal time and any personnel shortage situation which could have been prevented through alternate management strategies.

§42-29-4. Overtime Restrictions.

4.1. No nurse may be required to work beyond their regularly scheduled shift except in emergent situations.

4.2. No nurse may be permitted to work in excess of sixteen consecutive hours in a twenty-four hour period, including voluntary overtime.

4.3. A nurse is required to inform their employer of any and all hours worked for another employer/medical facility within the most recent twenty-four hour period.

4.4. On-call time which is off premises shall not be considered as time worked when calculating the maximum permissible hours to be worked.

4.5. An employer is prohibited from taking action against a nurse who refuses an assignment of overtime in violation of W.Va. Code §21-5F or for any action by a nurse relative to his or her rights to refuse overtime assignments. The filing of a complaint is considered a nurse's right under the provisions of W.Va. Code §21-5F and this rule.

4.6. Every employer subject to the provisions of the Act and this rule shall develop and maintain an overtime scheduling plan which may be subject to review and approval by the commissioner.

§42-29-5. Filing of Complaints.

5.1. The Division may accept complaints alleging that a hospital has violated the Nurse Overtime and Patient Safety Act by requiring overtime work contrary to the provisions of W.Va. Code §21-5F-3.

5.2. All complaints to the Division shall be in writing. The Division may provide forms for the filing of complaints, however, complaints submitted in other forms shall be accepted by the Division. The Division, on its own initiative, may file complaints. The Division shall review each complaint to determine its merit and whether it should be dismissed, or subjected to any other action specified by this rule. A complaint without merit shall be dismissed with no further action.

5.3. Within three (3) days of the determination that a complaint has merit, the Division shall notify the hospital named in the complaint that the complaint has been filed. Upon receipt of the notification, the hospital named in the complaint has ten (10) days in which to respond to the complaint in writing. If, upon consideration of the complaint and the response, the Division determines that no violation of any applicable state law has occurred, the Division may dismiss the complaint through the issuance of a written order setting forth the basis for the dismissal. If, however, the Division determines that further review or other action is necessary, the Division may proceed as set forth in this rule.

§42-29-6. Investigations.

6.1. The Division and its authorized agents, employees, or authorized inspectors may independently investigate the basis for any complaint filed with the Division. During the course of an investigation, the Division or its authorized representatives may conduct a physical inspection of the hospital personnel records and payroll records to assess the merits of the complaint. If at any time during the course of an investigation it becomes apparent that no violation of any applicable state law has occurred, the Division may dismiss the complaint in the manner set forth in Section 5.3 of this rule.

6.2. The Division or authorized inspector shall file a written report with the commissioner as to his or her findings during the course of the inspection.

§42-29-7. Hearings.

7.1. The commissioner may, at any time after the receipt of a complaint, issue a written notice of his or her intent to conduct a hearing. The notice of intent shall be provided to all interested persons by certified mail at least twenty (20) days in advance of the hearing date. The notice shall include:

- (a) a statement of the time, place and nature of the proceeding; and
- (b) a statement of the subject matter of the proceeding including the issues in question.

7.2. All hearings shall be conducted in Charleston, West Virginia and in accordance with the provisions of W. Va. Code §29A-5 et seq., The Administrative Procedures Act-Contested Cases.

7.3 The commissioner may employ the services of an independent hearing examiner to conduct hearings. The examiner shall conduct all hearings in accordance with the provisions of this rule. The examiner shall submit proposed findings of fact and conclusions of law to the commissioner. The report may contain the examiner's recommendations for the final disposition of the complaint.

7.4. After the commissioner has received the hearing examiner's report, the commissioner may adopt, modify or reject the hearing examiner's findings, conclusions and recommendations. The commissioner shall issue a written order within thirty (30) days of the receipt of the hearing examiner's report. The order shall include a brief statement of its findings and conclusions, with specific references to principal supporting items of evidence as well as the reasons or basis for the order.

7.5. (a).The commissioner may order the resolution of the complaint by its dismissal or by the issuance of one of the following penalties:

1. For a first offense, a written public reprimand and an order to cease the unlawful practice;
2. For a second offense, a fine not to exceed five hundred dollars; and
3. For a third or subsequent offense, a fine of not less than two thousand five hundred dollars and not more than five thousand dollars for each violation.

(b). To be eligible to be charged with a second offense or third offense under the Act,

the subsequent offense must have occurred within twelve months of the prior offense.

7.6. Any person adversely affected by any action of the commissioner may appeal the action to the Circuit Court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business.

§42-29-8. Confidentiality of Records.

8.1. All investigations, complaints, reports, records, proceedings and other information received by the Division and related to complaints pursuant to this rule, including the identity of the complainant or respondent, are confidential and shall not be knowingly and improperly disclosed by any person, the commissioner or Division staff, except as follows:

(a) Upon a finding that probable cause exists to believe that a respondent has violated the provisions of the act, the complaint and all reports, records, non-privileged and non-deliberative materials introduced at any probable cause hearing held pursuant to the complaint are thereafter not confidential: Provided, that the confidentiality of the information shall remain in full force and effect until the respondent has been served with a copy of the statement of charges;

(b) Any subsequent hearing held in the matter for the purpose of receiving evidence or the arguments of the parties or their representatives shall be open to the public and all reports, records and non-deliberative materials introduced into evidence at the subsequent hearing, as well as the commissioner's orders, are not confidential;

(c) The complaint as well as the identity of the complainant shall be disclosed to a person named as respondent in any complaint filed immediately upon the respondent's request; or

(d) Where the commissioner or the Division is otherwise required by the provisions of the Act to disclose the information or to proceed in a manner that disclosure is necessary and required to fulfill the requirements.

8.2. If, in a specific case, the commissioner or Division finds that there is a reasonable likelihood that the dissemination of information or opinion in connection with a pending or imminent proceeding will interfere with a fair hearing or otherwise prejudice the due administration of justice, the commissioner or Division shall order that all or a portion of the information communicated to the commissioner or the Division to cause an investigation and all allegations of violations or misconduct contained in a complaint is confidential, and the person providing the information or filing a complaint is bound to confidentiality until further order of the commissioner.