

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

Do Not Mark In This Box

Form #3

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2005 FEB 10 P 3:04

FILED

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

AGENCY: West Virginia Division of Labor TITLE NUMBER: \_\_\_\_\_

CITE AUTHORITY: W.Va. Code 21-5F-4

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 RULE BEING PROPOSED: 30

TITLE OF RULE BEING PROPOSED: Nurse Overtime Complaints

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

**SCANNED**

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: 2-10-2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Labor

Building #6, Room B-749, State Capitol Complex

Charleston, WV 25305

LEGISLATIVE RULE TITLE: Nurse Overtime Complaints

1. Authorizing statute(s) citation W.Va. Code 21-5F-4

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

1-04-2005

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

Mail to affected parties.

c. Date of Public Hearing(s) or Public Comment Period ended:

2-7-2005



hearing for the taking of evidence and a general description of the issues to be decided.

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b. Date of hearing or comment period:

Comment period ended 02-07-2005

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

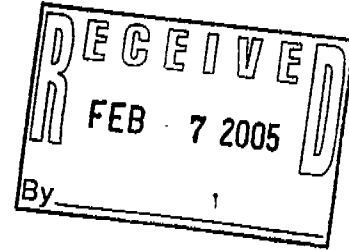


**Camden-Clark  
Memorial Hospital**

*For Your Lifetime*

cc-2/7/05  
JW/08  
800 Garfield Avenue  
P.O. Box 718  
Parkersburg, WV 26102  
(304) 424-2111

West Virginia Division of Labor  
Room B 749, Building # 6  
State Capitol Complex  
Charleston, WV 25305



February 4, 2005

To the West Virginia Division of Labor:

This letter is written in regards to the proposed changes to the West Virginia Nurse Overtime, Senate Bill 251.

We would like to express the following point of concern regarding overtime restrictions. In §42-29-4 Overtime Restrictions statement 4.1 *No nurse may be required to work beyond their regularly scheduled shift except in emergent situations.*

Our concern is that staffing is flexed according to volume in a 24 hour service, i.e. acute care, with staff assigned specific shifts with continuous coverage to ensure round the clock continuity of care. Our concern is that unanticipated prolonged surgical cases, complexity of procedure, complications and/or emergency cases where patient outcome may be compromised, may result in the staff's shift being extended beyond their scheduled hours.

In a highly specialized area it may not always be practical to provide extended coverage, nor call in additional staff without compromising the safety and outcome of care. Additionally, staffing the surgical services setting requires specialized training, and with the current nursing shortage, these staff may not be readily available.

In the RN Overtime ruling, allowances should be included to define events in which staff leaving will compromise patient care (surgical services, post-anesthesia recovery and OP surgery recovery), and which may be interpreted as abandonment of patient as defined in Professional Misconduct 19-9-5 in the West Virginia Nursing Code and Legislative Rules.

Please consider our concern for patient safety when reviewing the proposed revisions to this legislative ruling.

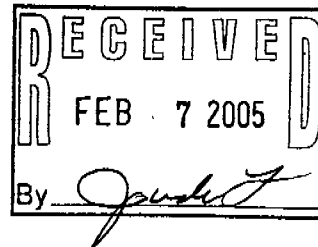
Lisa Fordyce RN MSHCA  
Director Peri-Operative Services

Phyllis Bradley RN MSHCA  
Director Staffing Support Services



100 Association Drive  
Charleston, WV 25311-1571  
(304) 344-9744  
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Web Page: www.wvha.org

February 7, 2005



Andrew Brown  
West Virginia Department of Labor  
1900 Kanawha Blvd., East  
Building 6, Room B-749  
Charleston, WV 25305

Dear Mr. Brown:

Beginning in 2002, the West Virginia Hospital Association has worked with members of the Legislature, the West Virginia Nurses Association, and our 73 hospital members, on a legislative initiative to restrict mandatory overtime for nurses in health care facilities. This was an intensive two-year process involving many affected parties. The final legislation, S.B 251 "Nurse Overtime and Patient Safety Act", represents an important accord built through negotiation, compromise, and cooperation between nurses and hospitals in West Virginia, with the leadership of knowledgeable and dedicated legislators. We are proud of this important achievement for health care in the State.

While we strove for complete clarity and agreement on principles, as with any legislation there are some ambiguous provisions that need further clarification for those who must implement the provisions of the law. We are pleased that the Department of Labor has begun the process to promulgate the legislative rule, Series 30 §42-29-1, et.seq. "Nurse Overtime Complaints". Since the legislation was adopted last year, the West Virginia Hospital Association has collected questions and concerns from hospitals around the state, that are reflected in the following comments on the proposed legislative rule.

**§42-29-3.12 Definition of "unforeseen emergent situation"**

The language in the proposed rule differs substantially from the language of the law by adding specific circumstances that inaccurately describes the range of unforeseeable situations in which overtime may be necessary to assure the safety and well-being of patients. The implications of the language contained in this section require careful consideration. The proposed language would permit mandatory overtime only in situations involving catastrophic events and clearly expands the restrictions to situations which are beyond the control of hospital management.

For example, the proposed language would prohibit a hospital from requiring a nurse to work overtime if other nurses scheduled to provide coverage for a shift in a particular unit would call in sick. Consider the dire consequences if an insufficient number of highly skilled specialty nurses failed, for any of the reasons listed in the rule (unscheduled sick leave, family emergencies or personal time), to report for duty as scheduled in a pediatric intensive care unit (PICU). The proposed language would prohibit the hospital from requiring another PICU nurse to work overtime. Flexibility is essential to assure patients receive critical nursing care in a situation which is beyond the hospitals' control.

We agree with the objective to reduce the use of mandatory overtime as much as possible, however, it would be infeasible to eliminate all such overtime. Under the law, hospitals must be able to defend the use of mandatory overtime if a complaint is made, and so there is an obvious incentive for hospitals to require mandatory overtime only in critical situations.

Furthermore, the proposed language in the rule suggests that *any and all management strategies* should be exhausted before mandating overtime. While there are many alternative management strategies for staffing a unit, some of these are unacceptable even in a last-minute situation, such as placing an untrained nurse in a highly specialized unit, or calling in an "agency nurse" to work in an environment to which they have not been oriented or are unfamiliar.

The language contained in the law was drafted in consideration of the many extenuating circumstances under which mandatory overtime may be necessary to assure the care and safety of patients. Some discretion must be afforded to hospitals to determine when mandatory overtime is the only safe option for assuring patient safety.

**AMDENDMENT: WVHA proposes that the language contained in §42-29-3.12 should be stricken and replaced with the language from W.Va. Code §21-5F-2. (5):**

"Unforeseen emergent situation" means an unusual, unpredictable or unforeseen circumstance such as, but not limited to, an act of terrorism, a disease outbreak, adverse weather conditions or natural disasters. An unforeseen emergent situation does not include situations in which the hospital has reasonable knowledge of increased patient volume or decreased staffing, including, but not limited to, scheduled vacations and scheduled health care worker medical leave.

#### **§42-29-4 Overtime Restrictions**

- 4.6** The language in this section requires that hospitals develop and maintain an overtime scheduling plan subject to review and approval by the commissioner. W.Va. Code §21-5F-1 et. seq. contains no such requirement. WVHA strongly objects to this new mandate in the proposed rule.

The adequacy of hospital staffing is determined by state and federal health regulatory bodies that conduct on-site surveys of hospital to determine compliance with Medicare/Medicaid certification and state licensure requirements. In addition, the Joint Commission on Accreditation of Healthcare Organizations provides oversight of hospitals. In West Virginia, the WVDHHR Office of Health Facilities Licensing and Certification determines compliance as an agent of the US Department of Health and Human Services. WVHA contends that the health care regulatory bodies responsible for assuring compliance with state and federal standards should have sole authority to judge adequacy of staffing as would be documented in a scheduling plan.

**AMENDMENT: WVHA proposes that because §42-29-4.6 exceeds the provisions of the law and is redundant with respect to already existing state and federal requirements, this section should be stricken in its entirety.**

#### **§42-29-5 Filing of complaints**

- 5.1** This section does not acknowledge that hospitals may also file a complaint against a nurse who does not comply with this law. The nurse and the hospital share responsibility in assuring that worker fatigue does not compromise patient safety. W.Va. Code §21-5F-3 (g) specifically restricts a nurse from exceeding a 16-hour work day within a 24 hour period, including time worked outside the immediate hospital, and requires that hours worked elsewhere be reported by the nurse when the 16-hour work cap would be exceeded:

W.Va. Code §21-5F-3(g): In the interest of patient safety, any nurse who works twelve or more consecutive hours, as permitted by this section, shall be allowed at least eight consecutive hours of off-duty time immediately following the completion of the shift. *Except as provided in subsections (b), (c) and (d) of this section, no nurse shall work more than sixteen hours in a 24-hour period. The nurse is responsible for informing the employer hospital of other employment experience during the 24-hour period in question if this provision is to be invoked.* To the extent that an on-call nurse

has actually worked sixteen hours in a hospital, efforts shall be made by the hospital to find a replacement nurse to work.

Furthermore, W.Va. Code §21-5F-4 clearly acknowledges the enforceability of the provisions of article 5F in its entirety:

W.Va. Code §21-5F-4 (a) Pursuant to the powers set forth in article one of this chapter, *the commissioner of labor is charged with the enforcement of this article*. The commissioner shall propose legislative and procedural rules in accordance with the provisions of article three, chapter twenty-nine-a of this code to establish procedures for enforcement of this article. These rules shall include, but are not limited to, provisions to protect due process requirements, a hearings procedure and an appeals procedure.

(b) *Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article* must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.1** The Division may accept complaints ~~alleging that a hospital has violated~~ of any violation of the Nurse Overtime and Patient Safety Act ~~by requiring overtime work~~ contrary to the provisions of W.Va. Code §21-5F-3. W.Va. Code §21-5F-1 et. seq.

**5.2.** This section stipulates that the Division of Labor may on its own initiative file a complaint. WVHA contends that this stipulation is unnecessary with respect to the Nurse Overtime and Patient Safety Act in that it serves only to provide a level of secrecy in how and by whom a complaint and subsequent investigation was generated, and clearly extends confidentially to third parties. This provision violates the integrity of the complaint and investigation process envisioned in the law, which is to provide an individual employee the right to refuse overtime.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.2.** All complaints 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** The proposed language is inconsistent with the law:

W.Va. Code §21-5F-4 (b) requires that:

*Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing.*

The proposed rule would allow the commissioner to provide notification upon determining the complaint has merit, and *not within the three days the complaint was filed*, as stipulated in the law. Determining if the complaint has merit requires some preliminary investigation, possibly an on-site review of records or interviews. Therefore, we believe this provision should be amended so as not to circumvent the requirement of notification that a complaint has been filed and an investigation may be initiated. The rule also does not stipulate that the complaint must be made within 30 days from the incident giving rise to the alleged violation. Finally, the language does not acknowledge that a complaint may also be filed against a nurse for violation of this law.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.3** Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing. ~~Within three 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 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.

Andrew Brown  
February 7, 2005  
Page 6

## §42-29-6 Investigations

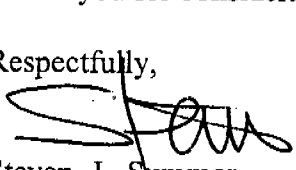
**6.1** In order to determine whether an employee violates the restrictions on the 16-hour work cap within a 24 hour period, it may also be necessary to empower the Department of Labor to examine personnel records and payroll records of other employers where the nurse has also worked on the alleged day of the violation.

**WVHA proposes the following amendment:**

**AMENDMENT: §42-29-6.1** 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 of the hospital or records of other employers where the nurse worked during the alleged violation 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.

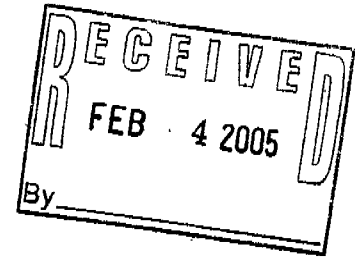
Thank you for consideration of these comments.

Respectfully,

  
Steven J. Sumner  
President & CEO

cc: House Judiciary Chairman Jon Amores  
Senate Judiciary Chairman Jeff Kessler  
House Rule-Making Review Committee Chairman Virginia Mahan  
Senate Rule-Making Review Committee Chairman Joe Minard

Patricia C. Moore  
Director, Behavioral Medicine Services  
Weirton Medical Center  
601 Colliers Way  
Weirton WV 26062



West Virginia Division of Labor  
Room B 749, Building 6  
State Capitol Complex  
Charleston, WV 25305

January 31, 2005

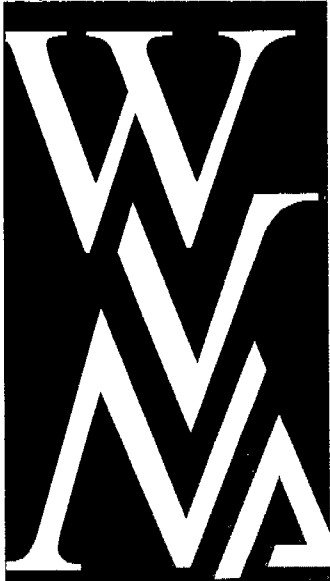
Regarding 42-29-3. Definitions.

- 3.12 Indicates that an "emergent situation" does not include unscheduled sick leave. Unscheduled sick leave does indeed cause an emergent situation regarding patient care needs.

For example: There are 2 nurses scheduled for a patient load of 10 patients. One nurse reports off due to illness. Calls are made to the remaining nurses. Nobody is willing or able to cover the shift. If mandating overtime is not an option, only one nurse is available to care for 10 patients.

This is a seriously dangerous scenario which, no doubt, will occur if mandating is not permitted for unscheduled sickness. Therefore, I am proposing that unscheduled sick leave resulting from nursing report offs be considered emergent if voluntary replacements cannot be scheduled.

Thank you for your time and consideration.



February 7, 2005

West Virginia Division of Labor  
Room B-749, Building #6  
State Capitol Complex  
Charleston, WV 25305

**Re: Public Comments On Nurse Overtime Complaints**

Dear Division of Labor:

The West Virginia Nurses Association (WVNA), on behalf of its membership, offers the following comments to proposed legislative rules at Title 42, Series 30, titled "Nurse Overtime Complaints."

With regard for the "Definitions" section of this rule, found at § 42-29-3:

3.1	The "Act" means the Nurse Overtime and Patient and Safety Act, W.Va. Code § 21-5F-1, et seq., and this rule.	WVNA supports this rule as proposed.
3.2	"Commissioner" means the commissioner of the West Virginia Division of Labor.	WVNA supports this rule as proposed.
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.	WVNA supports this rule as proposed.
3.4	"Division" means the West Virginia Division of Labor.	WVNA supports this rule as proposed.
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.	WVNA supports this rule as proposed.
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.	WVNA supports this rule as proposed.
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	WVNA supports this rule as proposed.

visit our website at:  
[www.wvnurses.org](http://www.wvnurses.org)  
or e-mail us at:  
[centraloffice@wvnurses.org](mailto:centraloffice@wvnurses.org)

	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.	<p>WVNA suggests that this proposed rule be altered to read as follows:          "Overtime" means, for the purpose of this rule, the hours worked in excess of an agreed upon, predetermined, regularly scheduled full-time or part-time work schedule, as determined by contract, established work scheduling practices, policies or procedures."</p> <p>This proposed definition is consistent with that used by the American Nurses Association.</p>
3.9	"Shift" means a routinely scheduled work period not to exceed twelve consecutive hours.	WVNA supports this rule as proposed.
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.	WVNA supports this rule as proposed.
3.11	"Twenty-four period" means the twenty-four hours immediately following a break of at least eight hours.	WVNA suggests adding the word "hour" between "Twenty-four" and "period," so that the phrase reads "Twenty-four hour period."
3.12	"Unforeseen emergent situation" means an unpreventable situation or circumstances which presents a clear and imminent risk to patient and employee	WVNA strongly approves of this rule as proposed. The legislative intent was that routine call-ins for

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	<p>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 personal shortage situation which could have been prevented through alternate management strategies.</p>	<p>sickness would not be considered as "unforeseen emergent situations."</p>
<p>3.13 (suggested addition)</p>	<p>"Staffing pattern" means a method or manner of scheduling employees for shifts, and procedures for filling vacancies or relieving nurses who have worked the permissible number of hours under these rules. For example, these rules do not permit surgical units to schedule procedures late in the afternoon, thereby forcing nurses to work overtime, rather than scheduling relief by nurse(s) with comparable training. For example, these rules do not permit an employer to mandate a nurse to accept additional shifts in lieu of hiring additional staff when a short-term staffing vacancy is known (such as maternity leave). For example, these rules do not permit a nurse to be scheduled for on-call time following sixteen hours of direct patient care.</p>	<p>WVNA suggests adding a definition for "staffing pattern," consistent with the proposed definition of this term as set forth at left.</p> <p>Under the authorizing statute at W.Va. Code § 21-5F-3(d), "nothing in this Act shall be construed to permit an employer to use a <i>staffing pattern</i> as a means to require a nurse to complete a procedure as a substitute for mandatory overtime." This proposed definition would clarify the meaning of "staffing pattern" as used in the statute.</p>

With regard for the "Overtime Restrictions" section of this rule, found at § 42-29-4:

<p>4.1</p>	<p>No nurse may be required to work beyond their regularly scheduled shift except in emergent situations.</p>	<p>WVNA suggests adding the word "unforeseen" between "in" and "emergent," so that the phrase reads "unforeseen emergent situations."        This suggested change is consistent with the</p>
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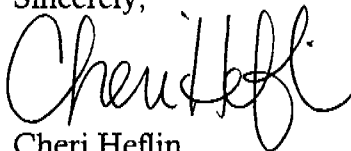
		authorizing legislation.
4.2	No nurse may be permitted to work in excess of sixteen consecutive hours in a twenty-four hour period, including voluntary overtime.	WVNA supports this rule as proposed.
4.3	A nurse is required to inform their employer of any and all hours worked for another employer/medical facility within the most recent twenty-four hour period.	<p>Under the authorizing statute at W.Va. Code § 21-5F-3(g), the nurse is only responsible for reporting other employment, "if this provision is to be invoked." WVNA's suggested rule, below, is consistent with this passage of the statute.</p> <p>WVNA suggests clarifying this rule as follows: "If an employer requests or attempts to mandate overtime that would result in the employee working more than sixteen hours in a twenty-four hour period, then the nurse is required to inform their employer/medical facility about the other employment. No grounds for a complaint shall exist if the employer/medical facility had no knowledge of an employee's other employment."</p>
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.	WVNA supports this rule as proposed.
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	WVNA supports this rule as proposed.

	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.	WVNA suggests adding the following language to this rule: "This plan shall include steps a hospital will follow should a nurse who was utilized via on-call need to be replaced so as not to exceed the sixteen-hour limit."
4.7 (suggested addition)	Every employer subject to the provisions of the Act and this rule shall designate an anonymous process for patients and nurses to make staffing complaints related to patient safety, which such process may be subject to review and approval by the commissioner.	WVNA suggests adding this provision to clarify the authorizing legislation.

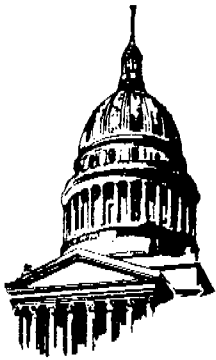
WVNA notes that the primary intent of this legislation was to limit the use of overtime. The bill's intent was to set a standard for "unforeseen emergent situations" which call for overtime, as opposed to foreseeable, preventable situations (call-ins for sickness) that are routine staffing matters and part of doing business.

Further, numerous complaints from nurses, especially those in operating room settings, highlight the need for a definition of "staffing pattern" to be added to this rule, as suggested above by way of several examples of situations that should not be permitted under this rule.

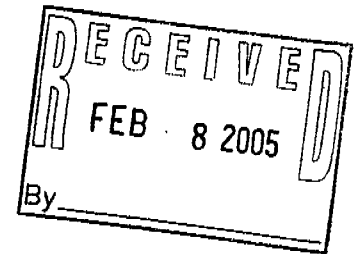
Sincerely,



Cheri Heflin  
Executive Director



The Senate of West Virginia  
Charleston



DAN FOSTER  
701 CRAWFORD RD.  
CHARLESTON 25314

BUS: (304) 388-5977  
RES: (304) 344-1060  
FAX: (304) 344-0909

January 25, 2005

West Virginia Division of Labor  
Room B 749, Bldg 6  
State Capitol Complex  
Charleston, WV 25305

Dear Sir:

Below are comments related to the Legislative Rule regarding Nurse Overtime Complaints filed January 4, 2005.

The definition of "on call time" and subsection 4.4 of Section 42 - 29-4 (Overtime Restrictions) are confusing as related to the intent of the bill.

The use of "on call time" was a significant compromise in this bill in that "on call time" was placed in a special category whereby pre-scheduled on call time (when the need to be present at the hospital should be uncommon) was not considered mandatory overtime, but using it as a pattern to substitute for mandatory overtime was not permitted.

There was also the understanding that in the unlikely situation that the nurse has to come into the hospital when she is on call, it would not be absolutely mandated that he or she could not work more than 16 hours, but the hospital is required to at least make efforts to find a replacement.

The bottom line regarding patient safety is that in this difficult situation that may come about rarely is – a fired nurse is better than no nurse.

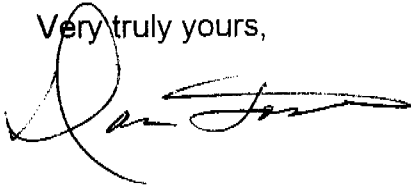
Suggested corrections for 42-29-3 Subsection 3.7:

"On call time means prescheduled time when the nurse is usually out of the hospital, but in an urgent medical situation, may be required to come into the hospital on infrequent occasions."

For 42-29-4 Subsection 4.4:

I would add to the suggested wording the following "and on call time when there is an urgent need to be in the hospital which should occur infrequently, does not lead to an absolute restriction or maximum permissible hours, but requires the hospital to make an effort to find a replacement if the maximum permissible hours will be exceeded."

Very truly yours,

A handwritten signature in black ink, appearing to read "Dan Foster", written over a large, stylized circular flourish.

Senator Dan Foster

DF/jrs

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

**Legislative Rule Making**

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

**Review Committee**

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.

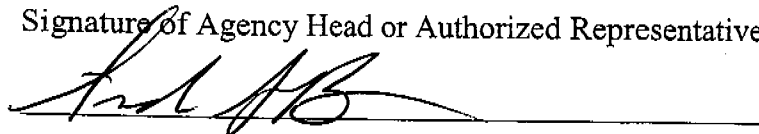
This estimate seeks to correct an un-funded mandate created by the passage of S.B. 251 during the 2004 Regular Session.

**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

### West Virginia Division of Labor Legislative Rule

#### Nurse Overtime Complaints

#### Series 30

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2005 FEB 10 P 3 01

FILED

#### **§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 hour 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 unforeseen 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. On-call time which is off premises and compensation is not required by federal or state law shall not be considered as time worked when calculating the maximum permissible hours to be worked.

4.4. On-call hours which are on the employer's premises or for which law required the employee to be paid compensation shall be considered as work time when calculating the maximum permissible hours to be worked.

4.5. A nurse shall be given a break of at least eight hours after working twelve consecutive hours. If the twelve hour maximum is reached during a scheduled shift, the break may be delayed until the end of the shift or the sixteen hour maximum as required by W.Va. Code §21-5F and this rule.

4.6. 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.

4.7. 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.

February 7, 2005

Andrew Brown  
West Virginia Department of Labor  
1900 Kanawha Blvd., East  
Building 6, Room B-749  
Charleston, WV 25305FILED  
2005 FEB - 7 P 2:47  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Dear Mr. Brown:

Beginning in 2002, the West Virginia Hospital Association has worked with members of the Legislature, the West Virginia Nurses Association, and our 73 hospital members, on a legislative initiative to restrict mandatory overtime for nurses in health care facilities. This was an intensive two-year process involving many affected parties. The final legislation, S.B 251 "Nurse Overtime and Patient Safety Act", represents an important accord built through negotiation, compromise, and cooperation between nurses and hospitals in West Virginia, with the leadership of knowledgeable and dedicated legislators. We are proud of this important achievement for health care in the State.

While we strove for complete clarity and agreement on principles, as with any legislation there are some ambiguous provisions that need further clarification for those who must implement the provisions of the law. We are pleased that the Department of Labor has begun the process to promulgate the legislative rule, Series 30 §42-29-1, et.seq. "Nurse Overtime Complaints". Since the legislation was adopted last year, the West Virginia Hospital Association has collected questions and concerns from hospitals around the state, that are reflected in the following comments on the proposed legislative rule.

### **§42-29-3.12 Definition of "unforeseen emergent situation"**

The language in the proposed rule differs substantially from the language of the law by adding specific circumstances that inaccurately describes the range of unforeseeable situations in which overtime may be necessary to assure the safety and well-being of patients. The implications of the language contained in this section require careful consideration. The proposed language would permit mandatory overtime only in situations involving catastrophic events and clearly expands the restrictions to situations which are beyond the control of hospital management.

*Andrew Brown*  
*February 7, 2005*  
*Page 2*

For example, the proposed language would prohibit a hospital from requiring a nurse to work overtime if other nurses scheduled to provide coverage for a shift in a particular unit would call in sick. Consider the dire consequences if an insufficient number of highly skilled specialty nurses failed, for any of the reasons listed in the rule (unscheduled sick leave, family emergencies or personal time), to report for duty as scheduled in a pediatric intensive care unit (PICU). The proposed language would prohibit the hospital from requiring another PICU nurse to work overtime. Flexibility is essential to assure patients receive critical nursing care in a situation which is beyond the hospitals' control.

We agree with the objective to reduce the use of mandatory overtime as much as possible, however, it would be infeasible to eliminate all such overtime. Under the law, hospitals must be able to defend the use of mandatory overtime if a complaint is made, and so there is an obvious incentive for hospitals to require mandatory overtime only in critical situations.

Furthermore, the proposed language in the rule suggests that *any and all management strategies* should be exhausted before mandating overtime. While there are many alternative management strategies for staffing a unit, some of these are unacceptable even in a last-minute situation, such as placing an untrained nurse in a highly specialized unit, or calling in an "agency nurse" to work in an environment to which they have not been oriented or are unfamiliar.

The language contained in the law was drafted in consideration of the many extenuating circumstances under which mandatory overtime may be necessary to assure the care and safety of patients. Some discretion must be afforded to hospitals to determine when mandatory overtime is the only safe option for assuring patient safety.

**AMDENDMENT: WVHA proposes that the language contained in §42-29-3.12 should be stricken and replaced with the language from W.Va. Code §21-5F-2. (5):**

"Unforeseen emergent situation" means an unusual, unpredictable or unforeseen circumstance such as, but not limited to, an act of terrorism, a disease outbreak, adverse weather conditions or natural disasters. An unforeseen emergent situation does not include situations in which the hospital has reasonable knowledge of increased patient volume or decreased staffing, including, but not limited to, scheduled vacations and scheduled health care worker medical leave.

### **§42-29-4 Overtime Restrictions**

- 4.6** The language in this section requires that hospitals develop and maintain an overtime scheduling plan subject to review and approval by the commissioner. W.Va. Code §21-5F-1 et. seq. contains no such requirement. WVHA strongly objects to this new mandate in the proposed rule.

The adequacy of hospital staffing is determined by state and federal health regulatory bodies that conduct on-site surveys of hospital to determine compliance with Medicare/Medicaid certification and state licensure requirements. In addition, the Joint Commission on Accreditation of Healthcare Organizations provides oversight of hospitals. In West Virginia, the WVDHHR Office of Health Facilities Licensing and Certification determines compliance as an agent of the US Department of Health and Human Services. WVHA contends that the health care regulatory bodies responsible for assuring compliance with state and federal standards should have sole authority to judge adequacy of staffing as would be documented in a scheduling plan.

**AMENDMENT: WVHA proposes that because §42-29-4.6 exceeds the provisions of the law and is redundant with respect to already existing state and federal requirements, this section should be stricken in its entirety.**

### **§42-29-5 Filing of complaints**

- 5.1** This section does not acknowledge that hospitals may also file a complaint against a nurse who does not comply with this law. The nurse and the hospital share responsibility in assuring that worker fatigue does not compromise patient safety. W.Va. Code §21-5F-3 (g) specifically restricts a nurse from exceeding a 16-hour work day within a 24 hour period, including time worked outside the immediate hospital, and requires that hours worked elsewhere be reported by the nurse when the 16-hour work cap would be exceeded:

W.Va. Code §21-5F-3(g): In the interest of patient safety, any nurse who works twelve or more consecutive hours, as permitted by this section, shall be allowed at least eight consecutive hours of off-duty time immediately following the completion of the shift. *Except as provided in subsections (b), (c) and (d) of this section, no nurse shall work more than sixteen hours in a 24-hour period. The nurse is responsible for informing the employer hospital of other employment experience during the 24-hour period in question if this provision is to be invoked.* To the extent that an on-call nurse

has actually worked sixteen hours in a hospital, efforts shall be made by the hospital to find a replacement nurse to work.

Furthermore, W.Va. Code §21-5F-4 clearly acknowledges the enforceability of the provisions of article 5F in its entirety:

W.Va. Code §21-5F-4 (a) Pursuant to the powers set forth in article one of this chapter, *the commissioner of labor is charged with the enforcement of this article*. The commissioner shall propose legislative and procedural rules in accordance with the provisions of article three, chapter twenty-nine-a of this code to establish procedures for enforcement of this article. These rules shall include, but are not limited to, provisions to protect due process requirements, a hearings procedure and an appeals procedure.

(b) *Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article* must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.1** The Division may accept complaints ~~alleging that a hospital has violated~~ of any violation of the Nurse Overtime and Patient Safety Act ~~by requiring overtime work~~ contrary to the provisions of ~~W.Va. Code §21-5F-3. W.Va. Code §21-5F-1 et. seq.~~

**5.2.** This section stipulates that the Division of Labor may on its own initiative file a complaint. WVHA contends that this stipulation is unnecessary with respect to the Nurse Overtime and Patient Safety Act in that it serves only to provide a level of secrecy in how and by whom a complaint and subsequent investigation was generated, and clearly extends confidentially to third parties. This provision violates the integrity of the complaint and investigation process envisioned in the law, which is to provide an individual employee the right to refuse overtime.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.2.** All complaints 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** The proposed language is inconsistent with the law:

W.Va. Code §21-5F-4 (b) requires that:

*Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing.*

The proposed rule would allow the commissioner to provide notification upon determining the complaint has merit, and *not within the three days the complaint was filed*, as stipulated in the law. Determining if the complaint has merit requires some preliminary investigation, possibly an on-site review of records or interviews. Therefore, we believe this provision should be amended so as not to circumvent the requirement of notification that a complaint has been filed and an investigation may be initiated. The rule also does not stipulate that the complaint must be made within 30 days from the incident giving rise to the alleged violation. Finally, the language does not acknowledge that a complaint may also be filed against a nurse for violation of this law.

**WVHA proposes the following amendment:**

**AMENDMENT §42-29-5.3** Any complaint must be filed with the commissioner of labor regarding an alleged violation of the provisions of this article must be made within thirty days following the occurrence of the incident giving rise to the alleged violation. Notification of the alleged violation must be forwarded to the hospital in question within three business days of filing. ~~Within three 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 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.

*Andrew Brown*  
*February 7, 2005*  
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### **§42-29-6 Investigations**

**6.1** In order to determine whether an employee violates the restrictions on the 16-hour work cap within a 24 hour period, it may also be necessary to empower the Department of Labor to examine personnel records and payroll records of other employers where the nurse has also worked on the alleged day of the violation.

#### **WVHA proposes the following amendment:**

**AMENDMENT: §42-29-6.1** 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 of the hospital or records of other employers where the nurse worked during the alleged violation 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.

Thank you for consideration of these comments.

Respectfully,

Steven. J. Summer  
President & CEO

cc: House Judiciary Chairman Jon Amores  
Senate Judiciary Chairman Jeff Kessler  
House Rule-Making Review Committee Chairman Virginia Mahan  
Senate Rule-Making Review Committee Chairman Joe Minard