# WEST VIRGINIA
# SECRETARY OF STATE
**KEN HECHLER**
# ADMINISTRATIVE LAW DIVISION
Form #2

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

## NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Bureau of Employment Programs Workers' Compensation Division TITLE NUMBER: 85CSR10

RULE TYPE: Legislative * ; CITE AUTHORITY W. Va. Code, §§21A-2-6(2); 21A-3-7(b) & -7(c); 23-1-1; 23-2-18

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Primary Contractor Liability

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

TITLE OF RULE BEING PROPOSED: ___

*Per W. Va. Code, §21A-3-7(c), this rule is not subject to Legislative review.

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 July 14, 1995 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Randall B. Suter
Counsel, Legal Services Division
Post Office Box 3922
Charleston, WV 25339-3922
(304) 926-5103

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

Andrew N. Richardson
Andrew N. Richardson
Commissioner

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

5.20

Bureau of Employment Programs
**Legal Services Division**
Post Office Box 3922
Charleston, West Virginia 25339-3922

**Gaston Caperton**
Governor

**Andrew N. Richardson**
Commissioner

May 25, 1995

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

Re: Filing of Proposed Legislative Rule, Title 85, Series 10; "PRIMARY CONTRACTOR LIABILITY"

Dear Secretary Hechler:

Please consider this letter to be my written approval of the above noted proposed rule.

Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 of the Governor, the Commissioner of the Bureau of Employment Program is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

Andrew N. Richardson
Andrew N. Richardson
Commissioner

Offices located at 4700 MacCorkle Avenue, S.E. • Telephone: (304) 926-5130 • Fax: (304) 926-5414

## FISCAL NOTE FOR PROPOSED RULES

Rule Title: Primary Contractor Liability; 85CSR10

Type of Rule: X Exempt Legislative ___Interpretive ___Procedural

Agency: Workers' Compensation Division, Bureau of Employment Programs

Address: Legal Services Division

Post Office Box 3922

Charleston, WV 25339-3922

Contact Person: Randall B. Suter, Legal Services Division,

Phone No. (304) 926-5130

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### 1. Effect of Proposed Rule

| | ANNUAL | | FISCAL YEAR | | |
|---|---|---|---|---|---|
| | INCREASE | DECREASE | CURRENT | NEXT | THEREAFTER |
| ESTIMATED TOTAL COST | $33,000 | $- | $32,250 | $30,250 | $30,250 |
| PERSONAL SERVICES | 30,000 | - | 30,000 | 30,000 | 30,000 |
| CURRENT EXPENSE | - | - | - | - | - |
| REPAIRS & ALTERNATIONS | - | - | - | - | - |
| EQUIPMENT | 2,000 | - | 2,000 | - | 500 |
| OTHER | 1,000 | 0 | 250 | 250 | 250 |

### 2. Explanation of above estimates:

Personal Services - for one employee
Equipment & Other - initial office furnishings and equipment and miscellaneous supplies
Other Next and Thereafter - Replacement costs of worn out items and loss of supplies.

### 3. Objectives of these rules:

To correct a long standing problem with regard to contractors not paying workers' compensation premiums, the rule will enlist primary contractor to give their assistance to the Division by ensuring that their subcontractors are in good standing. Otherwise, the primary contractors will be liable for their subcontractor.

**Rule Title:** <u>Primary Contractor Liability, 85 CSR 10</u>

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

The Workers' Compensation Division has a discounted deficit of 1.9 billion as of July 1, 1993. This rule will help in collecting premiums due to the Division.

**B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.**

The rule will not increase premiums for specific employers and will assist all employers by not allowing some employers to shift their costs to others. *

**C. Economic Impact on Citizens/Public at Large.**

Prevents some employers from shifting their costs to other employers thus preventing an unfair advantage in contract bidding.

**Date:** May 25, 1995

**Signature of Agency Head or Authorized Representative**

Andrew N. Richardson

**Andrew N. Richardson**
**Commissioner, Bureau of Employment Programs**

*Primary contractors will incur a record keeping expense through the need to collect a Certificate of Good Standing from their subcontractors and in submitting notification forms to the Division for all of their pertinent contracts.

# SUMMARY OF PROPOSED EXEMPT LEGISLATIVE RULE
## STATEMENT OF CIRCUMSTANCES
## PRIMARY CONTRACTOR LIABILITY

Title 85, Series 10

This legislative rule establishes the requirements and procedures to be followed by the Workers' Compensation Division and primary contractors in applying West Virginia Code, §23-2-1d. The code section makes primary contractors liable, under certain circumstances, for the debts of its subcontractors to the Workers' Compensation Division.

The rule defines the liability that can arise and the basis for imposing the liability. The rule also provides methods by which the primary contractor can avoid liability including the notification requirements by the division to the primary contractor and by the primary contractor to the division.

The current 85 C.S.R.10, "Primary Contractor Liability," became effective on January 1, 1995. W. Va. Code, §23-2-1d, was amended and reenacted by the Legislature during the 1995 session effective February 10, 1995. The amendments necessitated changes to the current rule.

The amendments to 85 C.S.R. 10 provides clarification of terms to be consistent with legislative action. The amendments provide substantive changes regarding the application of the provisions to contracts of a specified duration. The amendments further forgive compliance with the earlier version of the rule.

TITLE 85
EXEMPT LEGISLATIVE RULES
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

FILED
MAY 25 11 53 AM '95
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

SERIES 10
PRIMARY CONTRACTOR LIABILITY

§85-10-1. General.

1.1. Scope. -- This rule implements the provisions of West Virginia Code, §23-2-1d, regarding the liability of a primary contractor for payments due to the workers' compensation division by a subcontractor under certain circumstances. This rule is applicable only to contracts that are entered into or extended on or after the effective date of this rule.

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; and §23-2-18. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

§85-10-2. Purpose of rule.

2.1. The purpose of this rule is to implement the provisions of West Virginia Code, §23-2-1d, which was adopted by the legislature during the 1993 session. The section was **amended and reenacted by the legislature during the 1995 session and became effective on February 10, 1995.** ~~effective on January 1, 1994, however, for purposes of administration, the liability created by that section will not be enforced until the effective date of these rules.~~

**2.1.1. The rule which implemented the 1993 legislation became effective on January 1, 1995. This rule forgives compliance with the provisions of the earlier version of this rule effective January 1, 1995. The 1995 legislative**

**changes necessitated revisions to that rule which are incorporated herein.**

**2.2.** This **rule** ~~section~~ imposes liability upon primary contractors, under certain circumstances, for payments due and owing to the workers' compensation division. These payments include premium **taxes**, premium deposits, **late reporting and payment penalties,** interest, and certain **other** penalties. This rule provides the procedures for employers to follow to avoid the imposition of this liability as well as the procedures by which the workers' compensation division will impose this liability. The rule also offers guidance on the substantive application of the section.

2.~~2~~**.3.** This rule does not apply to any subcontractor who obtains and maintains without termination or default appropriate workers' compensation coverage from another state or jurisdiction for its employees who are regularly employed by the employer in the other state or jurisdiction and who will be involved in this state temporarily in the performance of the work under the contract. The rule is only applicable to a subcontractor any of whose employees ought to be covered by workers' compensation coverage by the West Virginia workers' compensation division. West Virginia coverage is required for employees who are employed in West Virginia by an out-of-state employer merely temporarily to be involved in the performance of the work under the contract, regardless of the place of hire or the personal domicile of the temporary employee.

§85-10-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Commissioner" means the commissioner of the bureau of employment programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

3.2.~~1~~. "Contract" means an agreement **of sufficient duration,** oral or written, under which some service is to be performed. A contract for the provision of goods is not a contract affected by this rule. For example, the service to be performed may be the construction of a house, the grading and laying of a roadway, the construction of an office building or store, the destruction of a building, the repair of buildings or equipment, or other activity. The contracting for the sale and purchase of goods, such as coal, is not an affected contract. However, if the contract provides for the extraction of the coal by the contractor where the coal is not being sold, then the contract could be affected by this rule. Conversely, if the contracting party sells the coal, any contracts it may enter with another employer to extract the coal or perform some other service such as equipment or premises maintenance or repair would not be a contract affected by this rule or by West Virginia Code, §23-2-1d. In all instances, the exact terms of and the actual implementation of the contract must be examined.

3.2.**1.**~~2~~. Contracts affected by this rule are those which are entered into or extended on or after the effective date of this rule. It does not apply to any other contracts entered into or extended prior to that date.

**3.2.2. Contracts affected by this rule are those for work or services for a period longer than thirty (30) days or contracts for consecutive periods of work that total more than thirty (30) days.**

3.3. "Division" means the workers' compensation division within the bureau of employment programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

3.4. "Good standing" with the division means that the subcontractor has not defaulted on its obligations to make payments to the division. Being in delinquent status, as provided for in West Virginia Code, §23-2-5(b), is not equivalent to being in default and does not deprive the subcontractor of good standing. Delinquent status does not give rise to the liability provided for by this rule. The term default is defined in West Virginia Code, §§23-2-5(d), -5(e), -6, & -8. The term default also includes those situations under West Virginia Code, §23-2-5(f)(2)-(4), where an employer returns to default status upon breaching a **reinstatement** ~~repayment~~ agreement. If a subcontractor fails to meet the requirements of those sections, then it is in default and is not in good standing with the division.

3.5. "Payments" that are obligations of the subcontractor for the purposes of this rule include the payment of premium~~s~~ **taxes**, the payment of premium deposits, **late reporting and payment penalties,** interest, and penalty premium~~s~~ **taxes**. It does not include the payment of benefits to an injured worker or to the health care providers of an injured worker by a self insured employer.

3.6. "Primary contractor" means a person, partnership, corporation, or other legal entity, which is in the business of contracting or which regularly contracts with other parties for the performance by it of some service. For example, the other party may be a home owner, a land owner, neighborhood association, the owner or tenant of a building, a municipality seeking the construction of a roadway, or any other entity seeking to have work done for it. A person, partnership, corporation, or other legal entity which is in the business of selling goods (such as coal, tim**b**er, aluminum or machinery) and not in the business of contracting for services is not a "primary contractor" for purposes of liability under this rule and West Virginia Code, §23-2-1d.

Rather, the totality of the circumstances surrounding the contract must be examined. For instance, a person might obtain his or her first contract in a line of work with the intention of starting a business in that field. Such an initial contract would likely cause that person to be considered a primary contractor if a portion of the obligation under the contract is subcontracted to another.

3.7. "Subcontractor" means a person, partnership, corporation, or other legal entity who contracts with a primary contractor to directly perform all or part of the services to be rendered under the contract between the primary contractor and a third party. Examples of contracts that are not subcontracts for the purpose of this rule include contracts solely to clean, repair, or maintain the primary contractor's own facility or machinery, such as janitorial services, copier services, or vehicle maintenance. The subcontractor's contract must be directly with the primary contractor; that is, in a relationship where a primary contractor subcontracts with a subcontractor who in turn sub-subcontracts with a sub-subcontractor, then the relationship of primary contractor to subcontractor does not exist between the primary contractor and sub-subcontractor. In most circumstances, however, the subcontractor will be found to be a primary contractor with regard to the sub-subcontractor as in the example above. In order to determine whether the subcontractor is to be found to be a primary contractor, then the definition of primary contractor will have to be applied.

§85-10-4. Primary contractor's liability; generally.

4.1. The liability of the primary contractor for the payments due to the workers' compensation division by its subcontractors can arise in only two ways.

4.1.1. If the subcontractor is not in good standing with the division on the first date on which it begins performance of its work under the contract, then the primary contractor will become liable for any payments due by the subcontractor to the division after the subcontractor begins the performance of its work. The primary contractor will not be liable for the payments due to the division by the subcontractor which became due prior to the start of the subcontractor's work.

4.1.2. The second way in which the primary contractor can become liable to the division for the subcontractor's payments is if the subcontractor loses its good standing with the division after the subcontractor begins the performance of its work and throughout the life of the contract. That is, a subcontractor can be in good standing with the division at the start of its performance under the contract, but later lose that good standing when it fails to make a report or a payment. In this situation, the primary contractor can become liable for the debts of the subcontractor to the division unless the primary contractor takes certain actions. In this situation, the primary contractor becomes liable only for certain of the payments that become due after the default. The primary contractor is not liable for any payments that were due prior to that default except as provided for in subdivision 4.1.1. The determination of which payments the primary contractor becomes liable for is set forth in subsection 5.3.

§85-10-5. Avoiding primary contractor liability.

5.1. In order to avoid liability under subdivision 4.1.1, the primary contractor must obtain a valid, current certificate of good standing for the subcontractor. The certificate of good standing can be obtained either from the division or from the subcontractor. If the certificate of good standing was issued for some earlier quarter than the calendar quarter immediately preceding the current quarter, then the certificate cannot be relied upon. The certificate of good standing is valid only if it is issued for the immediately preceding quarter; provided, however, since current premium **tax** payments are only due within thirty (30) days after a quarter ends, if a certificate of good standing is issued during the first month of any quarter, then it will be considered valid if issued, in whole or in part, for the next preceding quarter. In addition, if the proffered certificate of good standing is fraudulent on its face, then the primary contractor can become liable under subdivision 4.1.1.

5.2. In order to avoid liability under subdivision 4.1.2, the primary contractor must first give notice to the division that the primary contractor wishes to be notified by the division if the subcontractor defaults. The primary contractor must provide the division with the subcontractor's and the primary contractor's correct name, address, and federal employers' identification number (FEIN) or its equivalent as well as the risk numbers that are assigned by the division to the primary contractor and to the subcontractor. The primary contractor is encouraged to use the attached form for this purpose. While other forms of notice will be accepted, such notices must contain, at a minimum, the information requested in the form. The primary contractor may use additional sheets attached to the form to indicate other subcontractors who are working at the same job site. If the primary contractor's notice is accurate and complete, then, before liability can be imposed by the division, the division must notify the primary contractor of the subcontractor's default in order to provide an opportunity for the primary contractor to take corrective action. The liability then begins as specified in subdivision 5.3.2. Notice of default by the division to the primary contractor is complete upon placing the notice in the first class United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the division by the primary contractor.

5.3. Determination of the beginning date of the primary contractor's liability under subdivision 4.1.2 shall be accomplished as follows.

5.3.1. Before any employer attains default status, these actions must either occur or fail to occur as indicated. In the usual course for a usual employer account, payment is due by the last day of the month following the quarter for which payment is being made. For instance, for the first fiscal calendar quarter (July through September), the payment is due on or before October 31st. If payment is not made by that date, the division is obligated to issue a delinquency notice to the employer informing it, among other things, that it is now delinquent and that payment must be made on or before the last day of the third month following the quarter for which payment is due. In the above example, payment would be due on or before December 31st. Failure to make payment by that date places the employer in default if the delinquency notice by the division was timely made. The delinquency notice must be issued within sixty (60) days of the end of the quarter for which payment is due. In the above example, the delinquency notice must be issued on or before November 29th not November 30th. These requirements are contained in West Virginia Code, §23-2-5(b).

5.3.2. For purposes of primary contractor liability, in the example set forth in subdivision 5.3.1, the notice of default by the division to the primary contractor cannot be issued until sometime in January. This is the beginning of the second quarter after the quarter for which payment is due. The subcontractor does not become defaulted until December 31st and, thus, no notice of default could be issued before that date. According to West Virginia Code, §23-2-1d(b)(2), unless the primary contractor takes corrective action, the primary contractor's liability would then begin with the first day of the third quarter following the end of the quarter for which payment is due; that is, for the quarter beginning on April 1st. The primary contractor's liability for payments begins with payments due in that third quarter. Payments that were due for the July through September quarter, payments that were due for the October through December quarter, and payments that were due for the January through March quarter are not the liability of the primary contractor under subdivision 4.1.2.

5.3.3. It sometimes occurs, for a variety of reasons, that the sixtieth day delinquency notice to the employer that is described in subdivision 5.3.1 is not timely made. Should that happen with regard to a subcontractor affected by West Virginia Code, §23-4-1d, then the time period described in subdivision 5.3.2 may be affected. West Virginia Code, §23-2-5(b), is understood to require at least a thirty (30) day notice to the employer before it can be placed into default status. If in the example set forth in subdivisions 5.3.1 and 5.3.2, the "sixtieth day" delinquency notice was not issued until December 14th (i.e., the seventy-fifth day), then the payment in order to avoid default would not be due until January 13th (thirty days from the issuance of the late "sixtieth day" delinquency notice). Default would begin on January 14th. Even later issuance of the "sixtieth day" delinquency notice would move the liability date back accordingly. In the event a notice of default is issued less than thirty (30) days before the end of the quarter, liability will not be imposed upon the primary contractor until the first day after the end of the next quarter. Accordingly, in the example set forth in subdivisions 5.3.1 and 5.3.2, if the notice is issued between March 2nd and March 31st, the primary contractor's liability would not begin until July 1st.

5.4. The corrective action that a primary contractor can take to avoid subdivision 4.1.2 liability is either to arrange payment of the amounts due to the division prior to the start of the primary contractor's liability or to terminate the subcontract prior to that date. Payments may be made by the subcontractor, the primary contractor, or other third party. The division will not consider entering into a repayment agreement with the primary contractor or other third party which extends payment over time as a form of payment which satisfies this subsection. A **reinstatement** ~~repayment~~ agreement covering all of a subcontractor's periods of delinquency and default may be considered based upon the best interests of the fund.

5.5. In the event that the primary contractor elects to terminate its subcontract, West Virginia Code, §23-2-1d, provides that a subcontractor's failure to make required payments is good and sufficient cause to terminate the contract regardless of any contrary provision in the contract.

5.6. Exclusively for the purposes of West Virginia Code, §23-2-1d, and of this rule, a certificate of good standing issued by the division furnishes an irrebuttable presumption that the subcontractor is in good standing with the division for the period in question. The presumption does not apply to any other section of chapter 23 of the Code. Even if it is later determined that the certificate was issued in error, for any reason, the certificate prevents the imposition of the subdivision 4.1.1 liability. For example, if clerical error resulted in the division issuing a certificate of good standing for a subcontractor whose record with the division clearly shows it to be in default, the certificate still operates to protect the primary contractor from liability. The erroneously issued certificate does not affect the subcontractor's own liability to the division. Similarly, if the division's records indicated that a subcontractor was in good standing and a certificate is then issued, then a later determination, which shows that the subcontractor was not in fact in good standing, does not invalidate the certificate with regard to the primary contractor. This is the case even if the subcontractor acted fraudulently or criminally to conceal its actual record.

5.7. Under this rule no liability will arise if all of the subcontractor's employees are appropriately covered by another state's or jurisdiction's workers' compensation laws. Hence, if an Ohio employer provides workers' compensation coverage through the Ohio state fund to its employees who may be sent into West Virginia on a temporary or transient basis to work on a given contract, then neither this rule nor West Virginia Code, §23-2-1d, are applicable. If any one of those employees is to be covered or must be covered by West Virginia's workers' compensation program, then the **gross** wages for that employee must be reported and premium~~s~~ **taxes** paid. In that case, all of the provisions of this rule would be applicable to such a subcontractor to the extent of the reportable **gross** wages.

§85-10-6. Extent of liability.

6.1. The liability which the primary contractor incurs is the obligation to pay to the division the true and correct amount of premium **taxes**, premium deposit, **late reporting and payment penalties,** and any interest thereon that the subcontractor owes to the division. In addition, if a subcontractor does not pay any premium penalty **tax**, West Virginia Code, §23-2-5(f), that may be due the division, then the primary contractor may become liable for that penalty premium **tax** and interest thereon as well. The liability never includes the value of benefits paid to the injured employees or to their health care providers.

6.2. In determining the amount of payments due to the division, the division is not limited to the amounts of **gross** wages reported by the subcontractor. Rather, the division may audit the wage records of the employer or other pertinent records and determine for itself the amounts owed to it. From this audit, the true and correct amount of premium **taxes**, premium deposit, interest, **late reporting and payment penalties,** and penalty premium **taxes**, if any, will be determined in calculating the primary contractor's liability.

6.3. The primary contractor is liable only for the payments due from the subcontractor for those employees who are performing work under its contract. Payments for **gross** wages for employees who are engaged in other work for the subcontractor unrelated to the contract in issue will not become the liability of the primary contractor.

6.4. If the same employees of a subcontractor split their time among a number of jobs some of which are not related to the contract in issue, then the liability imposed by this rule extends only to payments due for the **gross** wages earned as a result of working under the contract in issue.

6.5. If the subcontractor's default occurs because of a breach of a prior **reinstatement** ~~repayment~~ agreement, then under the terms of the agreement the full amount of the liability becomes due. However, in this event, the primary contractor will not be liable for any portion of the **reinstatement** ~~repayment~~ agreement's liability which arose prior to the term or extension of the contract including any interest due on the principal of the agreement which was earned during the term or extension of the contract after **the effective date of this rule.** ~~January 1, 1994.~~

6.6. In the event that the primary contractor makes payment to the division in the place of the subcontractor, then the primary contractor has a legal right to seek reimbursement or indemnification for the amounts paid to the division from the subcontractor. In addition, the primary contractor may recover its costs of action and attorney fees in seeking such reimbursement or indemnification. Such legal right is not subject to resolution by the division. Recovery must be made through the state's judicial system. In the event that a penalty is imposed upon the primary contractor under the provisions of subsection 7.3 of this rule, such penalty payments are not collectable from the subcontractor by the primary contractor. The penalties are not paid in order to avoid or cure the subcontractor's default and are thus not recoverable from it.

§85-10-7. Additional penalties; limitations.

7.1. Under certain circumstances, the division will impose a penalty premium **tax** rate upon either the primary contractor or the subcontractor, or both. Under no circumstances shall the penalty imposed upon the primary contractor operate to make the primary contractor the de facto or the de jure employer of the subcontractor's employees. It is not the purpose of this rule or of West Virginia Code, §23-2-1d, to create or lessen any legal remedies that an injured employee of a subcontractor has or may have against the primary contractor or against the subcontractor employer. Neither this rule nor West Virginia Code, §23-2-1d, have any affect upon any relationship that the primary contractor has or may have with the employees of the subcontractor.

7.2. Imposition of the penalty premium **tax** rate upon the subcontractor shall be done solely as provided for in West Virginia Code, §23-2-5(f)(1).

7.3. The penalty premium **tax** rate may be imposed upon the primary contractor either under the terms of this subsection of this rule or under the standard provisions of West Virginia Code, §23-2-5(f)(1), for its independent default of its own obligations. The penalty premium **tax** rate, if imposed, shall be set at the level of one hundred ten percent of the amount of premium **tax** that would otherwise be due from the primary contractor based upon its own wage reports to the division. The penalty premium **tax** rate shall be imposed upon the primary contractor only if the primary contractor demonstrates a pattern of disregard for the duties imposed upon it by West Virginia Code, §23-2-1d. A pattern of disregard shall consist of the following:

7.3.1. If the primary contractor incurs liability under subsection 4.1.1 three or more times within any five (5) year period, then a pattern will be presumed; however, this presumption is rebuttable under the process set forth in section 9 of these rules.

7.3.2. If the primary contractor incurs liability under subsection 4.1.2 three or more times within any five (5) year period, then a pattern will be presumed; however, this presumption is rebuttable under the process set forth in section 9 of these rules.

7.4. It must be noted that, if a subcontractor was subject to a penalty premium **tax** rate at the time the contract was entered into and then defaults for any reason, then the primary contractor will be liable for the payments calculated by use of the subcontractor's penalty premium **tax** rate. In addition, if subsection 7.3 is invoked, then the primary contractor would be subject to paying the subcontractor's premium **taxes** at the penalty **tax** rate and would also have to pay its own ~~premiums~~ **taxes** at the penalty **tax** rate.

§85-10-8. Collections efforts.

In the event that the primary contractor does not readily make any payment due under this rule, the division is authorized to take collections actions under the provisions of West Virginia Code, §23-2-5a. Reference to that section and the rules promulgated under it should be made by the primary contractor.

§85-10-9. Appeal process.

Any primary contractor affected by this rule or West Virginia Code, §23-2-1d, who wishes to contest any determination made by the division may do so under the provisions of West Virginia Code, §23-2-17. That section requires the filing of a formal petition within thirty days of the primary contractor's receipt of notice of the disputed decision or action or, in the absence of such receipt, within sixty days of the date of the division's making such disputed decision or taking such disputed action.

§85-10-10. Severability

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.

## NOTIFICATION REQUEST

## DEFAULT OF SUBCONTRACTOR

The undersigned primary contractor hereby notifies the workers' compensation division that it has entered into a subcontract(s) and that it desires to receive notice from the workers' compensation division if the subcontractor(s) defaults on any payments due to the workers' compensation division.

(Please provide the following information:)

**PRIMARY CONTRACTOR'S NAME:** ______________________________

**ADDRESS TO WHICH NOTICES ARE TO BE SENT:** ______________________________

**PRIMARY CONTRACTOR'S RISK NUMBER:** ______________________________

**PRIMARY CONTRACTOR'S FEIN [1] NUMBER:** ______________________________

---

**SUBCONTRACTOR'S COMPLETE NAME:** ______________________________

**SUBCONTRACTOR'S ADDRESS:** ______________________________

**SUBCONTRACTOR'S RISK NUMBER:** ______________________________

**SUBCONTRACTOR'S FEIN [1] NUMBER:** ______________________________

**GIVE A BRIEF DESCRIPTION OF CONTRACT INCLUDING WORKSITE(S):** ____

______________________________________________________________

______________________________________________________________

**EXPECTED LENGTH OF THE CONTRACT (BEGINNING DATE & ENDING DATE:**

______________________________________________________________

(Additional sheets may be attached for additional subcontractors.)

DATE: ____________________ SIGNATURE: ____________________

PRINTED NAME: ____________________

POSITION WITH PRIMARY CONTRACTOR: ____________________

[1] If employer does not have an FEIN, please provide social security number.