WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: **W. Va. Workers' Compensation Division Bureau of Employment Programs** TITLE NUMBER: **85**

RULE TYPE: **Exempt Legislative** CITE AUTHORITY: **§§21A-2-6(1) & -6(2); §§21A-3-7(b) & -7(c); §23-1-1; §23-2-4.**

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: **31**

TITLE OF RULE BEING PROPOSED:

EMPLOYEE LEASING AND CONTRACTED OPERATIONS

DATE OF PUBLIC HEARING: May 3, 2000 TIME: 10:00 a.m

LOCATION OF PUBLIC HEARING: **Charleston Civic Center**
200 Civic Center Drive
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH **X**

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: **Richard S. Stephenson**
BEP Legal Services Division
One Players Club Drive
Charleston, West Virginia 25311

WRITTEN COMMENT PERIOD WILL END ON May 3, 2000, AT 4:00 P.M.

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Compensation Programs Performance Council
W. Va. Bureau of Employment Programs

Authorized Signature

William F. Vieweg, Commissioner

4.40

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Employee Leasing and Contracted Operations

Type of Rule: X Exempt Legislative ___ Interpretive ___ Procedural

Agency: Workers' Compensation Division, W. Va. Bureau of Employment Programs

Address: 4700 MacCorkle Avenue, S.E.

Charleston, West Virginia 25304

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0	0	0	0	0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of Above Estimates:

No increases or decreases in costs are anticipated because the proposed rule merely clarifies and interprets existing statutory law and common law and provides unique requirements within the existing system for the reporting and payment of premium taxes for employers which are engaged in these employment arrangements.

3. Objectives of These Rules:

This exempt legislative rule provides for the adoption and implementation of rules to regulate employee leasing arrangements and contracted operation arrangements by employee leasing firms. The purpose of this rule is to regulate employee leasing firms engaged in employee leasing arrangements and contracted operation arrangements; to recognize or adopt the lent employee doctrine of law in which the general employer and the special employer are joint employers; to promote safety and health in the workplace; to prescribe special application and reporting and payment requirements; to provide a method to accurately calculate and assess the proper workers' compensation premium tax attributable to leased workers and contracted operation workers; and, to recognize and provide the protection of the workers' compensation act to each employer. The rule provides and is designed so that incurred experience is used in calculating loss experience to ensure that premium tax is paid commensurate with exposure and anticipated claims experience. The rule recognizes the extension and extends workers' compensation protection, which is provided to employee leasing firm employers, to client employers and to ensure that client employers are responsible for the safety of their operations. The rule does not apply to temporary help agencies. However, it does apply to any temporary help agency which engages also in providing leased workers or contracted operation workers in any employee leasing or contracted operation arrangement, or both, but such application of this rule is limited to those engagements.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

The adoption of this rule is expected to be revenue neutral. However, its provisions are expected to increase understanding of the law and procedures; and, with the promulgation of specific industry reporting forms, this rule should increase voluntary compliance by these employers with the reporting and payment requirements of the W. Va. Workers' Compensation Act.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

The adoption of this rule will impact only the employers of leased workers and contracted operation workers who are employed by employee leasing firms and their client employers. It should have a neutral financial impact on these employers; but it should improve knowledge of the legal status of their employments and the systems for reporting and ratemaking for those employments.

C. Economic Impact on Citizens/Public at Large.

No economic impact on these persons is expected.

Date: March 28, 2000

Signature of Agency Head or Authorized Representative:

William F. Vieweg, Commissioner & Chairman
W. Va. Bureau of Employment Programs
Compensation Programs Performance Council

TITLE 85
EXEMPT LEGISLATIVE RULE

WORKERS' COMPENSATION DIVISION
SERIES 31
EMPLOYEE LEASING AND CONTRACTED OPERATIONS

§85-31-1. General.

1.1. Scope -- This exempt legislative rule provides for the adoption and implementation of rules to regulate employee leasing arrangements and contracted operation arrangements by employee leasing firms.

1.2. Authority -- *W. Va. Code*, §§21A-2-6(1) & -6(2); §§21A-3-7(b) & -7(c); §23-1-1; and §23-2-4. Pursuant to *W. Va. 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 *W. Va. 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. -- ____________________.

§85-31-2. Purpose of Rule.

The purpose of this rule is to regulate employee leasing firms engaged in employee leasing arrangements and contracted operation arrangements; to recognize or adopt the lent employee doctrine of law in which the general employer and the special employer are joint employers; to prescribe special application and reporting and payment requirements; to provide a method to accurately calculate and assess the proper workers' compensation premium tax attributable to leased workers and contracted operation workers; and, to recognize and provide the protection of the workers' compensation act to each employer. The rule provides and is designed so that incurred experience is used in calculating loss experience to ensure that premium tax is paid commensurate with exposure and anticipated claims experience. The rule recognizes the extension and extends workers' compensation protection, which is provided to employee leasing firm employers, to client employers and to ensure that client employers are responsible for the safety of their operations. The rule does not apply to temporary help agencies. However, it does apply to any temporary help agency which engages also in providing leased workers or contracted operation workers in any employee leasing or contracted operation arrangement, or both, but such application of this rule is limited to those engagements.

§85-31-3. Definitions.

As used in this rule, the following terms, words and phrases have the meanings stated unless, in any instance where such term, word or phrase is used, the context expressly indicates that another meaning is intended.

3.1. "Client employer" or "lessee" means an entity that obtains one or more leased workers from an employee leasing firm or contracts with an employee leasing firm in a contracted operation arrangement.

3.2. "Contracted operation arrangement" means an arrangement where an employee leasing firm contracts to perform services for a client employer, which are long term or permanent in nature, such as the operation of a particular administrative or operational function of or incidental to the general business operations of the client employer.

3.3. "Contracted operation worker" means a person who is a lent employee who is employed by an employee leasing firm and is working for the benefit of a client employer under a contracted operation arrangement.

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

3.5. "Employee leasing arrangement" means an arrangement, under contract or otherwise, expressed or implied, where one business or other entity leases workers from another business or entity. Employee leasing arrangements include, but are not limited to, full service employee leasing arrangements, professional employer organization leasing arrangements, long-term temporary arrangements and any other arrangement which involves the allocation or sharing of employment responsibilities among two or more entities. For purposes of this rule, an employee leasing arrangement does not include an assignment of temporary help.

3.6. "Employee leasing firm" or "lessor" means an entity or any affiliate whose principal business is to provide workers to another entity to perform work in furtherance of the industry, service or business of the other entity at the business premises of or at locations designated by the other entity under an employee leasing arrangement or contracted operation arrangement.

3.7. "Entity" means and includes, but is not limited to, any person or individual, sole proprietor, firm, partnership, limited partnership, limited liability partnership, professional limited liability partnership, limited liability company, professional limited liability company, joint venture, association, corporation, professional or legal corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

3.8. "Firm" means and includes any business or other entity.

3.9. "Leased worker" means a person who is a lent employee who is employed by an employee leasing firm and is working for a client employer under an employee leasing arrangement.

3.10. "Lent employee" is a doctrine of law applicable to employment relationships which are defined and regulated by this rule and means an employee of an employee leasing firm or a temporary help agency, that is, the general employer under the "lent employee" doctrine, wherein the general employer lends the employee to a client employer, that is, the special employer under the "lent employee" doctrine, under an employee leasing arrangement, contracted operation arrangement or a temporary help assignment, where both employers may become subject to the provisions and protection of the workers' compensation act.

3.11. "Premium tax" means the amounts of money due from an employer to the division as a result of quarterly and other periodic assessments by the division under the provisions of the act in order to establish, maintain, and replenish the fund or funds and to pay the expenses of administration of the division. "Premium tax" includes, but is not limited to, amounts of: premium tax, premium tax deposit, interest and other penalties, assessed to an employer; and, also, that portion of self-insured premium tax assessed in arrears through benefit payorders to the employer for the employer's claimant employees or their dependents, on behalf of and for the benefit of the fund or funds as provided by law, assessed in arrears in lieu of direct, advance premium tax payments to the division.

3.12. "Regular or direct employee" means an employee who is not a leased worker or a contracted operation worker. This term also includes within its meaning any temporary worker as defined in this rule.

3.13. "Temporary help agency" means an entity or any affiliate whose principal business is to provide temporary workers to client employers and which hires its own employees and assigns them to client employers for a finite temporary time period to support or supplement the client employer's work force in special situations, such as employee absences, temporary skill shortages or seasonal workloads.

3.14. "Temporary worker" means a person employed by a temporary help agency to perform work for a client employer for a finite temporary time period to support or supplement the client employer's work force in special situations, such as employee absences, temporary skill shortages or seasonal workloads, where the client employer exercises no control over the hiring or assignment of the person by the temporary help agency.

3.15. "Workers' compensation act" or "act" means the West Virginia workers' compensation act at chapter 23 of the *West Virginia Code*.

§85-31-4. Employer determined; lent employee doctrine; joint employment; protection of the act.

4.1. The common law "lent employee" doctrine is recognized and applied by this rule.

4.2. A client employer shall be a joint employer of a leased worker or a contracted operation worker who is employed in the industry, service or business of the client employer through an employee leasing arrangement or a contracted operation arrangement with an employee leasing firm.

4.3. A leased worker or a contracted operation worker is an employee of an employee leasing firm and also becomes and is, concurrently, an employee of a client employer through an employee leasing or a contracted operation arrangement. Each joint employer is an employer of the worker, solely for the purposes of and as defined under the provisions of the workers' compensation act and rules, and each employer may have the benefit of the protection afforded to employers in good standing under the provisions of the act, while the employer is subject to and in compliance with the provisions of the act, this rule and the other rules of the workers' compensation division which are not in conflict with this rule.

§85-31-5. Application.

5.1. A business or other entity which provides leased workers or contracted operation workers who are subject to the workers' compensation act in this state to another business or businesses or another entity or entities pursuant to any employee lease or contracted operation arrangement shall make special application (hereafter "application") with the workers' compensation division.

5.2. The application shall require such information as is needed to carry out the purposes, provisions and administration of this rule and shall be made in form, forms or format prescribed by the division.

5.3. Any person or entity filing an application required by this rule is required to notify the division of any changes in any information provided pursuant to this rule within thirty (30) calendar days of such change.

5.4. The division shall prescribe such other forms as are necessary to promote the efficient administration of this rule.

5.5. Any employee leasing firm which was doing such business which was subject to the workers' compensation act in this state prior to the adoption of this rule shall make special application as an employee leasing firm within thirty (30) calendar days of the effective date of this rule.

§85-31-6. Reporting.

6.1. The employee leasing firm is responsible for and subject to the reporting and payment requirements of the act, for its employees who are leased to a client employer or who are working in a contracted operation arrangement, as well as, for its regular employees.

6.2. The employee leasing firm is required to file, in a separate periodic premium tax report for each client employer with which the employee leasing firm had an employee leasing or contracted operation arrangement during the reporting period, in form or format prescribed by the division, the following information for the reporting period:

(1) The name, business address and policy number of each client employer;

(2) The total gross wages payroll attributed to each client employer;

(3) The premium tax rate for each client employer;

(4) The calculated premium tax and premium tax deposit payment for each client employer;

(5) The name and social security number of each leased or contracted operation worker attributed to each client employer; and,

6.3 The employee leasing firm is required to file, in a separate premium tax report for itself and its regular employees, the total gross wages payroll attributed to its regular employees; the premium tax rate applicable to its regular employees; and, the calculated premium tax and premium tax deposit payment for its regular employees.

6.4. The employee leasing firm is required to file any other information which may be recognized as needed or required by the division to administer this rule.

6.5. The requirement that an employee leasing firm shall file a premium tax report and payment does not change or affect the requirement of the act and of the rules that the client employer shall file a premium tax report and payment for its employees who are not leased workers or contracted operation workers under this rule.

6.6 Any employee leasing firm which is subject to the provisions of this rule because it is engaged in any employee leasing arrangement or contracted operation arrangement with any client employer on the effective date of this rule or during the periodic reporting period prior to the first day of the next reporting period following the effective day of this rule, shall be required to file its first periodic report and payment under these provisions for leased and contracted operation workers for the reporting period which begins next after the effective date of this rule.

§85-31-7. Payment; delinquency and default.

7.1. The client employer shall be responsible for the payment of the premium tax, premium tax deposit, interest and penalties which are attributable to the leased workers who are provided to it and employed under any employee leasing arrangement and to the workers who are employed for the benefit of the client employer in any contracted operation arrangement.

7.2.1. Provided, that the client employer's responsibility for reporting and payment as required above is assigned by this rule to the employee leasing firm employer which provides the workers.

7.2.2. Upon the employee leasing firm's failure to timely report or pay as provided, both employers shall be delinquent and be provided notices of delinquency and be given an opportunity to cure the delinquency to avoid default as provided by section five, article two of the act, §23-2-5, *W. Va. Code*; to avoid the loss of the protection afforded by section six, article two of the act, §23-2-6, *W. Va. Code*; to avoid the attachment of the statutory lien provided by section five-a, article two, §23-2-5a, *W. Va. Code*; and, to avoid a violation of the criminal code as provided, among other provisions, by sections twenty-four e and h, article three, chapter sixty-one, *W. Va. Code*. If the delinquency is not cured, both employers shall be default, as to all of its employees, whether any employee is a leased worker; is a worker in a contracted operation; or, is an employee or worker of the client employer or the employee leasing firm who is regularly employed directly by it and neither leased in a leased worker arrangement nor employed in a contracted operation arrangement.

7.2.3. After notice of delinquency or default, upon the compliance by either employer with the reporting or payment requirements, or both, which caused the delinquency or default, such delinquency or default arising from such tardiness or failure to cure delinquency shall end as to both the joint employers. Compliance as to this duty regarding joint employment as defined and provided herein, shall not affect or cure any delinquency or default of the client employer arising from its employment of any employee or worker who is neither a leased worker nor employed in a contracted operation arrangement.

7.3. The employee leasing firm shall be responsible for the payment of the sum of the premium tax, premium tax deposit, interest and penalties due for each employee in each client employer arrangement for leased or contracted operation workers and due for the employee leasing firm's regular employees. However, no client employer shall be or become delinquent or default in the event or because the employee leasing firm fails to report timely or pay the premium tax and premium tax deposit for its regular employees.

§85-31-8. Classification of risk; loss experience assignment.

8.1. An employee leasing firm shall be placed into a premium rate risk classification and industrial code pursuant to the provisions of the workers' compensation act and rule, 85 C.S.R. 9, risk management.

8.2. For ratemaking purposes only, the claims experience and gross wages of the leased or contracted operation workers working for or for the benefit of the client employer shall be charged to the client employer.

8.3. The experience modification factor and premium tax rate for the client employer may be calculated using the combined claims experience for all leased and contracted operation workers and all regular or direct employees of the client employer. That experience modification factor and premium tax rate shall apply to all employees of the client employer, including its regular or direct employees and the leased and contracted operation workers; however, when the client employer is a self-insured employer then that experience modification factor and premium tax rate shall apply only to its leased and contracted operation workers, as if it were a regular subscriber.

8.4. The experience modification factor and premium tax rate of the employee leasing firm will be based on the claims experience and gross wages of the regular or direct employees of the employee leasing firm.

§85-31-9. Notification; no amendment or abrogation of employment law or employee rights.

9.1. The employers are responsible for compliance with the employment laws and tax laws affecting their employment relationships with employees whenever an employment is terminated so that one may commence or end any of the arrangements which are regulated partially by this rule. While compliance with those laws should insure that every employee knows who employs him or her, the employer shall further give immediate notice to each affected employee of any employee leasing or contracted operation arrangement in which he or she is employed by the employer. Notification shall be given in writing in form prescribed by the division and shall also be posted in a conspicuous place at the chief works of the client employer.

9.2. This rule is not intended to, nor does it, amend or abrogate any employment law or employee right under the law.

§85-31-10. Employers' excess liability fund; coal-workers' pneumoconiosis fund.

10.1. Each joint employer may insure itself for coverage under the employers' excess liability fund and the coal-workers' pneumoconiosis fund by separate subscription; however, each such subscription shall only provide coverage to the insured employer.

10.2. An insured subscriber to either or both of those funds shall report the gross wages of its regular employees and its leased workers or contracted operation workers and calculate the subscription premium tax and premium tax deposit due on the periodic reports prescribed by the division for each of those funds and shall pay the calculated amount to each subscribed fund as provided by the workers' compensation act and the rules adopted for each fund.

§85-31-11. Severability.

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