

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2013 JUL 19 PM 2:23

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 21-5-9 and 21-5-13

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

TITLE OF RULE BEING AMENDED: Wage Payment and Collection Act

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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 19, 2013 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

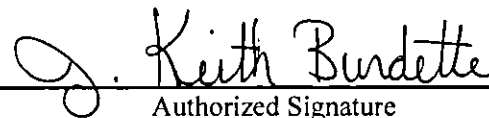
David W. Mullins

West Virginia Division of Labor
State Capitol Complex

Building 6, Room 749-B
Charleston, WV 25305

david.w.mullins@wv.gov

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


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WEST VIRGINIA DIVISION OF LABOR

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

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EARL RAY TOMBLIN
Governor



DAVID W. MULLINS
Commissioner

Statement of Facts and Circumstances

and

Summary of Proposed Amendments to Title 42, Series 5

Wage Payment and Collection

The current rule, "Wage Payment and Collection Act," Title 42, Series 5, has been in effect since 1990 and is in need of revision to reflect statutory amendments to the Wage Payment and Collection Act, specifically W. Va. Code §21-5-4(b) and (e), and to reflect the Division of Labor's current practices with regard to enforcement of the Act.

The proposed amendments to the rule include the following:

- Provisions concerning payment of final wages when an employee is terminated have been removed due to the passage of SB 355, which goes into effect on July 12, 2013.
- Provisions concerning the formula for calculating the amount of liquidated damages an employer may owe have been removed due to amendments made to W. Va. Code §21-5-4(e).
- Definitions have either been clarified or added for the following terms: assignment of wages, claimant, days, director's review, final order, garnishment, hours worked, illegal deduction, net wages, pay period, request for assistance, status conference, wages due, and work week.
- Provisions concerning the assignment of wages have been clarified to make clear that 75% of an employee's net wages are exempt from assignment, and that if the employee is subject to a wage garnishment, and the garnished amount leaves an employee with less than 75% of the employee's net wages, the employee's wages are protected from any other wage assignment.

- Provisions for an employee or former employee to request assistance from the Division to investigate an alleged violation of the Wage Payment and Collection Act.

- Provisions for the Division's process for investigating wage claims or other alleged violations of the Wage Payment and Collection Act.

- Provisions for a claimant to enforce a final order in circuit or magistrate court.

- Other technical changes are also proposed that eliminate redundant provisions from the rule that are in the Wage Payment and Collection Act.

- All matters related to wage bonds are in a separate proposed rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Wage Payment and Collection

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Division of Labor

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

Phone Number: 304.558.7890 x 58025 Email: david.w.mullins@wv.gov

Fiscal Note Summary

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

The proposed rule will not have any impact on the costs or revenue of state government.

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	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Wage Payment and Collection

Rule Title: _____

Rule Title: _____

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

N/A

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.

N/A

Date: June 19, 2013

Signature of Agency Head or Authorized Representative

J. Keith Burdette

**TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR**

2013 JUN 19 PM 2:28

**SERIES 5
WAGE PAYMENT AND COLLECTION**

§42-5-1. General.

1.1. Scope. -- This rule is for the enforcement of all matters concerning wage payment and collection pursuant to W. Va. Code § 21-5-1, *et seq.*

1.2. Authority. -- W. Va. Code §§21-5-9 and 21-5-13.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of former rule. -- This rule repeals and replaces 42 CSR 5, "Wage Payment and Collection Act" filed March 29, 1990 and effective March 29, 1990.

§42-5-2. Application and Enforcement.

2.1. Application. This rule applies to the West Virginia Division of Labor and all persons, employers and employees governed or otherwise within the purview of the Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq.*

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor.

§42-5-3. Definitions.

3.1. The "Act" or "the law," for purposes of this rule, means the Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq.*

3.2. "Assignment of wages" or "wage assignment" means a written document that complies with the requirements set forth in W. Va. Code § 21-5-3 (e) authorizing the transfer of a portion of a wage earner's wages to another.

3.3. "Break time" or "break period," when authorized by an employer, means a rest period of short duration, up to 20 minutes, that must be counted as hours worked.

3.4. "Claimant" means an employee or former employee who submits a request for assistance to the Division, alleging that he or she is owed unpaid wages, or alleging any other violation of the Act or this rule.

3.5. "Days" means calendar days unless otherwise stated.

3.6. "Director's review" means, upon a claimant's request, a review of the results of the Division's investigation by the Director of the Division's Wage and Hour Section or his or her designee.

3.7. "Discharge" means an involuntary termination of employment by an employer.

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

3.9. "Employ" means to hire, permit, or suffer to work.

3.10. "Final order" or "Commissioner's final order" means an order issued by the Commissioner which the employer either does not appeal pursuant to W. Va. Code 29A-5-4, or which has been upheld after the employer has exhausted his or her appeal rights pursuant to W. Va. Code §§29A-5-4 and 29A-6-1.

3.11. "Garnishment" or "wage garnishment" refers to a legal procedure in which an employee's wages are required by court order to be withheld by an employer for the payment of a debt.

3.12. "Hours worked" means the time an employee is under the control and direction of his or her employer.

3.13. "Illegal deduction" means a deduction made by an employer from an employee's wages without a valid wage assignment or without an employee's written authorization for union or club dues, pension plans, payroll savings plan, charitable contributions, insurance, hospitalization plan, or plans of a similar kind.

3.14. "Involuntary discharge" or "involuntary termination" means the termination of employment initiated by the employer.

3.15. "Lay-off" means an employee's involuntary cessation of work, whether temporary or permanent, for a reason not relating to the employee's job performance or any other employee-related reason.

3.16. "Net wages" means an employee's wages after deductions are taken out.

3.17. "Pay period" means the scheduled number of days for which an employee is paid,

which may or may not coincide with the day an employee is paid.

3.18. "Request for Assistance" or "RFA" means a form provided by the Division and submitted by a claimant alleging that he or she is owed unpaid wages or alleging any other violation of the Act or this rule.

3.19. "Status conference" means an employer's informal meeting with the Division regarding the status of the Division's investigation into an alleged violation of the Act or this rule.

3.20. "Voluntary termination" means a resignation initiated by the employee.

3.21. "Wages due" or "wages earned" means and includes all wages and fringe benefits accrued, if any, that are owed to an employee for all hours the employee is permitted, required or suffered to work, up to and including the fifth day immediately preceding the employer's regular pay day.

3.22. "Work week" means a regular recurring period of 168 hours made up of 7 consecutive 24 hour periods.

§42-5-4. Employer Responsibilities; Required Employee Notifications; Required Posting of the Wage and Hour Abstract.

4.1. An employer shall establish a work week, a pay period, and a pay day, and shall notify employees in writing or by a posted notice accessible to all employees of the same.

4.2. When an employer changes an employee's rate of pay, pay period, place or method of payment, time of payment, or any other term of employment, the employer shall furnish a written notice to the affected employee at least 1 full pay period prior to the effective date of such change.

§42-5-5. Contents of Employee Records.

5.1. An employer shall maintain payroll and employment records during an employee's employment and for a period of not less than 5 years from the date each record was created.

5.2. An employee's written record shall contain the following information:

5.2.1. Name in full, or identifying symbol or number if such is used in place of name on any record;

5.2.2. Social Security number;

5.2.3. Home address;

5.2.4. Date of birth, if under 18;

5.2.5. Occupation, title or job classification;

5.2.6. Rate of regular pay and rate of overtime pay, if applicable;

5.2.7. Hours worked each workday and total hours worked each workweek; and

5.2.8. Documentation of legal status or authorization to work, as required by W. Va. Code § 21-1B-1 *et seq.*

§42-5-6. Place For Keeping Employee Records.

6.1. An employer shall keep the employee records required by the Act and this rule in a safe, secure and accessible location at the place or places of employment, or at one or more established central record-keeping offices where such records are customarily maintained.

6.2. Employee records shall be open to the Division for inspection, examination, copying, photographing or otherwise reproducing, in order to ensure compliance with the Act and this rule.

6.3. When employee records are maintained at a central record-keeping office, other than in the place or places of employment, upon receipt of written notice from the Commissioner, an employer shall make employee records available to the Division within 72 business hours.

§42-5-7. Payment of Wages.

7.1. An employer shall pay all earned wages due to an employee on the employer's scheduled payday.

7.2. An employer's scheduled payday shall occur at least once every 2 weeks, and no later than 5 days after the end of the employer's established pay period.

7.3. An employer shall furnish an itemized statement of earnings to each employee on the employer's scheduled payday, to include the employee's hourly rate of pay, the number of hours for which the employee is being paid, the overtime rate of pay, bonus and incentive pay, and itemized deductions. When an employer pays an employee by direct deposit, the employer may furnish the itemized statement electronically, provided the employee has direct, immediate and convenient access to it.

7.4. If an employer's regular payday is on specific dates of the month, and the employer is closed for business on that date, the employer shall pay the employees on the day immediately preceding the regular payday when the employer is open for business.

§42-5-8. Petition For Special Agreement Concerning Payday Schedule or Frequency.

8.1. An employer who wishes to establish regular paydays other than at least once in every 2 weeks as required by W. Va. Code § 21-5-3, shall submit a written petition to the Commissioner, setting forth the reasons for the request and the proposed alternative payday schedule or plan.

8.2. An employer shall include postage paid envelopes addressed to each employee who would be affected by the proposed alternative payday schedule or plan with the petition.

8.3. The Commissioner may hold a hearing on the petition for a special agreement.

8.3.1. The Commissioner shall give at least 20 days written notice of the time and place of the hearing to all employees who would be affected by the proposed alternative payday schedule or plan.

8.3.2. Employees shall have the opportunity to submit written comments in lieu of attending the hearing.

8.4. After the hearing, the Commissioner shall issue a written decision to the employer, either approving, suggesting modifications, or denying the proposed alternative schedule or plan.

8.5. The Commissioner may modify the terms of the requested relief and may also later revoke the approved payday schedule or plan if it interferes with the enforcement of the Act or this rule.

8.6. An employer shall comply with the Act and this rule during the Commissioner's consideration of the petition, and the submission of a petition or the Commissioner's delay in acting upon such petition shall not relieve an employer from any obligations to comply with the payday requirements set forth in W. Va. Code § 21-5-3 and this rule.

§42-5-9. Assignment Of Wages.

9.1. An employer shall have a written wage assignment that conforms to the requirements set forth in W. Va. Code § 21-5-3 (e) prior to making any deductions, other than authorized statutory deductions, from an employee's wages.

9.2. Three-fourths or 75% of an employee's net wages shall at all times be exempt from assignment.

9.3. If an employer is served with a wage garnishment payable from an employee's wages, and if the garnished amount exceeds 25% of the employee's net wages, the employer shall not enter into a wage assignment with the employee while the garnishment is in effect, and shall immediately

terminate any on-going or active wage assignment.

9.4. The following wage assignment form, properly executed as set forth in W. Va. Code § 21-5-3 (e), shall be presumptively compliant with the Act and this rule:

STATE OF WEST VIRGINIA
COUNTY OF _____

I, (name of the employee), hereby assign to (name of the creditor or employer) future wages due me from (name of the employer) in the amount of \$_____, which amount due to (name of the creditor or employer), together with the amounts previously assigned, totals \$_____, the total amount due to (name of the creditor or employer) by this and previous assignments. I understand that three fourths of my earnings for each pay period, less deductions, are exempt from this and any other wage assignment I may have signed. All my wages assignments shall be paid in the order of the date I signed them. I also understand that this wage assignment shall be effective for no more than one (1) year from the date set forth below.

(Signature of Employee)

Taken, sworn to and subscribed before me on this the _____ day of _____, 20__.

Notary Public

My commission expires _____, 20__.

Accepted by (name of the employer) on this the _____ day of _____, 20__.

By (Signature and title of person authorized by employer)

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

9.6. If an employer deducts an authorized amount from an employee's wages pursuant to a

valid wage assignment or wage garnishment, but fails to pay to the designated creditor or authorized plan, the deduction is an illegal deduction from the employee's wages.

§42-5-10. Employee Claim for Unpaid Wages or Other Violation of the Act; Investigation by the Division.

10.1. An employee or former employee who reasonably believes that he or she is owed unpaid wages or that his or her employer has violated any provision of the Act or this rule, and who wants the Division to investigate his or her claim, shall submit a request for assistance ("RFA") to the Division, and provide the Division with the necessary information and documents in support of such claim, including the following:

10.1.1. The claimant shall provide his or her complete contact information, including updates when applicable;

10.1.2. The claimant shall provide the name, address and telephone number of his or her employer;

10.1.3. The claimant shall provide the amount of wages he or she reasonably believes is owed by the employer and why, or a statement explaining the employer's violation;

10.1.4. The claimant shall provide a brief description of the work he or she is performing or has performed;

10.1.5. The claimant shall provide copies of pay stubs, work schedules, personal calendars, or other documents that support the wage claim or other violation, if the claimant has these in his or her possession;

10.1.6. If applicable to the wage claim or other violation, the claimant shall provide a complete copy of the employer's written policies concerning the terms and conditions of employment, if the claimant has these in his or her possession;

10.1.7. If applicable to the wage claim or other violation, the claimant shall provide a complete copy of the employer's commissions policy, if the claimant has these in his or her possession.

10.2. The Division shall investigate the merits of the claim or violation and shall make a determination about whether the employer has violated any provision of the Act or this rule.

10.3. The Division shall notify the employer and the claimant of the results of its investigation, including the amount of wages owed to the claimant, if any.

10.4. The claimant shall be entitled to a director's review upon request to the Division.

10.5. The employer shall be entitled to a status conference upon request to the Division.

10.6. If the employer acknowledges or otherwise admits that the claimant is owed wages, but fails to pay the wages owed to the claimant within a time frame established by the Commissioner, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

10.6.1. The Division shall serve the employer with a copy of the Commissioner's order, either by certified mail, return receipt requested or by personal service, and shall be notified of his or her right to appeal the order.

10.6.2. The Division shall provide the claimant with a copy of the Commissioner's order.

10.7. If the employer contests the Division's determination, the employer shall be entitled to an administrative hearing, which shall be held in accordance with W. Va. Code §§ 21-5-11, 29A-5-1, *et seq.* and 42 CSR 20.

10.7.1. Pursuant to the administrative hearing, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

10.7.2. The Division shall serve the employer with a copy of the order, either by certified mail, return receipt requested or by personal service, and shall be notified of his or her right to appeal the order.

10.7.3. The Division shall provide the claimant with a copy of the Commissioner's order.

§42-5-11. Claimant's Responsibility to Enforce the Commissioner's Final Order for Wages Owed and for Liquidated Damages.

11.1. When the Commissioner's order becomes a final order, and if the employer fails to pay the claimant his or her wages owed as determined by the Commissioner, the Division shall notify the claimant.

11.2. The claimant shall be responsible for seeking enforcement of the Commissioner's final order, including any claim for liquidated damages as set forth in W. Va. Code §21-5-4(e), by filing a petition in the Circuit Court or Magistrate Court of Kanawha County, or other county as permitted by statute.