

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

Form #3

Do Not Mark In This Box

FILED  
2013 JUL 23 PM 3:32

OFFICE OF THE SECRETARY OF STATE

**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: 42

CITE AUTHORITY: W. Va. Code 21-5-13 and 21-5-14(b)

AMENDMENT TO AN EXISTING RULE: YES  NO

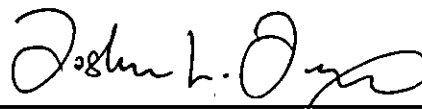
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: <sup>33</sup> \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: Employer Wage Bonds

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



- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 23, 2013

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

David W. Mullins, Commissioner

West Virginia Division of Labor

State Capitol Complex

Building 6, Room B-749

Charleston, WV 25305

304.558.7980 x 58025 (telephone) 304.558.2273 (fax)

david.w.mullins@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

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3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

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b. Date of hearing or comment period:

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

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d. Attach findings and determinations and reasons:

Attached 

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# WEST VIRGINIA DIVISION OF LABOR

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

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www.wvlabor.org

EARL RAY TOMBLIN  
Governor



DAVID W. MULLINS  
Commissioner

## Statement of Facts and Circumstances

and

## Summary of Proposed New Rule

### Title 42, Series 33

### Employer Wage Bonds

The current provisions concerning wage bonds are contained in the "Wage Payment and Collection Act" rule, Title 42, Series 5. The current rule has been in effect since 1990 and is in need of revision to reflect the Division of Labor's current practices with regard to enforcement of the wage bond provisions in Wage Payment and Collection Act, specifically W. Va. Code §§21-5-14 through 16, and the definitions set forth in W. Va. Code §§21-5-1(j), (k), and (n).

A new rule is being proposed rather than incorporating proposed amendments to Title 42, Series 5 because the Division believes that a separate rule makes the Division's enforcement responsibilities clearer for employers, for employees whose wages are secured by a wage bond, and for all individuals wanting to request a waiver of wage bond requirements, to request a release of a wage bond, or to file a claim when an employer defaults on its responsibilities to pay wages.

The proposed new rule includes the following:

- Definitions have been clarified or included for the following terms: adequate wage bond, bona fide benefit plan, claimant, covered activity, days, doing business in this state for 5 consecutive years, request for assistance, transportation, and wage bond.
- Provisions for employer responsibilities regarding the posting of a wage bond, clarifying when an employer engaged in a covered activity is exempt from posting a wage bond, and prime contractors' responsibilities when engaged in a covered activity .

- Provisions for the types of acceptable wage bonds, certain requirements for specific types of bonds, and the documents required for each type of bond

- Provisions for an employee or former employee whose wages are secured by a wage bond to request assistance from the Division.

- Provisions for the Division to place a hold on the employer's wage bond due to the wage claim, to investigate the wage claim, to make a demand on the employer to pay wages owed, and to make a demand against or obtain payment from a wage bond.

- Provisions for the Division to make payment from a wage bond to a bona fide benefit plan.

- Provisions for an employer to request a waiver of wage bond requirements, and the documents necessary to support a waiver request.

- Provisions for an employer to request a release of a wage bond, and the documents necessary to support a request for a release.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Employer Wage Bonds

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 revenues 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

Rule Title: Employer Wage Bonds

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: July 23, 2013

Signature of Agency Head or Authorized Representative

Joshua L. Jay

FILED

2013 JUL 23 PM 3: 32

WEST VIRGINIA  
SECRETARY OF STATE

**TITLE 42  
LEGISLATIVE RULE  
DIVISION OF LABOR**

**SERIES 33  
EMPLOYER WAGE BONDS**

**§42-33-1. General.**

1.1. Scope. -- This rule is for the enforcement of the wage bond sections of the Wage Payment and Collection Act, W. Va. Code §§21-5-14 through 21-5-16, concerning certain employers' responsibility to post a wage bond, the types of acceptable wage bonds, the procedures to request a waiver of the wage bond requirements, the procedures to request a release of a wage bond, actions by the Commissioner to pay employee wages from a wage bond, and actions by the Commissioner against an employer in violation of wage bond obligations.

1.2. Authority. -- W. Va. Code §§21-5-13 and 21-5-14 (b).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of former rule. -- This rule repeals and replaces Sections 2.5 and 2.11 (definitions of "bond" and "transportation") and Section 16 ("Bonding Procedures") of 42 CSR 5, "Wage Payment and Collection Act" filed March 29, 1990 and effective March 29, 1990.

**§42-33-2. Application and Enforcement.**

2.1. Application. This rule applies to the West Virginia Division of Labor and all persons subject to or otherwise within the purview of the wage bond sections of the Wage Payment and Collection Act, W. Va. Code §§21-5-1, and 21-5-14 through 21-5-16.

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

**§42-33-3. Definitions.**

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

3.2. "Adequate wage bond" means a bond in an amount that is at least equal to an employer's gross payroll for 4 weeks at full capacity or production plus 15% of that gross payroll.

3.3. "Authorized representative" means and includes the employees of the Division of Labor.

3.4. "Bona fide benefit plan" means a written plan, fund or program into which an employer pays irrevocable contributions to a trustee or third party pursuant to an insurance agreement, and whose purpose is to provide exclusively for the payment of benefits to employees.

3.5. "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 fringe benefits.

3.6. "Covered activity" means construction work, as defined in W. Va. Code §21-5-1(j), or the severance, production or transportation of minerals, as defined in W. Va. Code §21-5-1(k).

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

3.8. "Division" means the Division of Labor.

3.9. "Doing business in this state for 5 consecutive years," as used in W. Va. Code §21-5-14, means an employer with a business structure, entity or form that has remained the same for 5 consecutive years with the same employer identification number issued by the Internal Revenue Service.

3.10. "Request for Assistance" or "RFA" means a document submitted to the Division by a claimant alleging that he or she is owed unpaid wages or fringe benefits.

3.11. "Transportation" means any method, other than by rail or by water, of moving minerals, as defined in W. Va. Code §21-5-1(k), from one physical location to another.

3.12. "Wage bond" means a legally enforceable written instrument executed by an employer, payable to the Division, which the Commissioner can draw upon if the employer defaults on its obligation to pay employees their earned wages and fringe benefits.

**§42-33-4. Employer Responsibilities; Criteria for Employer Exemption; Prime Contractor Responsibilities; Required Posting of Notices.**

4.1. Unless otherwise exempt, an employer engaged in or about to engage in a covered activity shall furnish a wage bond to the Division.

4.2. An employer is exempt from posting a wage bond when the employer can document that the business has been continuously and actively engaged in the intended principal activity with employees for at least the 5 consecutive years immediately preceding the Division's evaluation of the employer's status.

4.3. A prime contractor engaged in a covered activity shall notify the Commissioner in writing by certified mail, return receipt requested, within 10 days of entering into a contract or

subcontract. The notification shall include the names of employees, the location of the job site, and the employer's principal address.

4.4. During the time period that an employer is required to have a wage bond in effect with the Division, the employer shall post a copy of the notice issued by the Commissioner either specifying the number of employees covered by the wage bond or stating that he or she has waived the employer's obligation to post a wage bond. The employer shall post the notice in a location readily accessible by employees.

**§42-33- 5. Types of Acceptable Wage Bonds; Required Forms.**

Subject to the Commissioner's acceptance and the Attorney General's approval as to form, the Commissioner shall accept the following types of wage bonds:

5.1. If an employer presents a check or money order as a wage bond, the Commissioner shall only accept these if the employer executes the form provided by the Division, authorizing the Commissioner to use as much of the cash bond assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

5.2. If an employer presents a certificate of deposit as a wage bond, the Commissioner shall only accept it under the following circumstances:

5.2.1. The issuing bank or credit union has a physical location in this State;

5.2.2. The issuing bank is insured by the Federal Deposit Insurance Corporation ("FDIC") or the issuing credit union is insured by the National Credit Union Administration ("NCUA");

5.2.3. The issuing bank or credit union agrees to automatically renew the certificate of deposit until it is released by the Commissioner's express written authorization;

5.2.4. The issuing bank or credit union executes the form provided by the Division, acknowledging that it will honor the Division's demand for payment of wages and fringe benefits upon an employer's default and that it will not allow the employer or anyone else to make any withdrawals against the certificate of deposit without the Commissioner's express written authorization; and

5.2.5. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the certificate of deposit assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

5.3. If an employer presents an irrevocable letter of credit as a wage bond, the Commissioner shall only accept it under the following circumstances:

5.3.1. The issuing bank is insured by the Federal Deposit Insurance Corporation ("FDIC") or the issuing credit union is insured by the National Credit Union Administration ("NCUA");

5.3.2. The issuing bank or credit union executes the form provided by the Division, acknowledging that it will honor the Division's demand for payment of wages and fringe benefits upon an employer's default and that it will not withdraw or cancel the letter of credit, or permit the employer to withdraw or cancel the letter of credit without the Commissioner's express written authorization; and

5.3.3. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the irrevocable letter of credit assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

5.4. If an employer presents a surety bond as a wage bond, it shall only be accepted under the following circumstances:

5.4.1. The bond is issued by an insurance company licensed by the West Virginia Offices of the Insurance Commissioner;

5.4.2. The employer and the surety execute the form provided by the Division, which shall include the following provisions:

5.4.2.a. A guarantee that the employer shall pay all wages and fringe benefits to employees when such are due;

5.4.2.b. If an employer fails or defaults in the payment of wages and fringe benefits when such are due, a guarantee that the surety will honor the Division's demand for payment of wages and fringe benefits; and

5.4.2.c. A guarantee that the surety will not withdraw or cancel the bond without written notification to the Commissioner, giving at least 60 days notice from the post-mark date of the intended cancellation, mailed by any delivery method that requires a signature verifying receipt.

5.4.3. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the surety bond assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

**§42-33-6. Employee Claim for Unpaid Wages or Fringe Benefits Against a Wage Bond; Investigation by the Division.**

6.1. An employee or former employee whose wages or fringe benefits are secured by a wage bond and who reasonably believes that he or she is owed unpaid wages or fringe benefits, shall submit a request for assistance ("RFA") to the Division, and shall provide the Division with any documents in support of such claim.

6.2. Upon receipt of an RFA, the Division shall place a hold on the employer's wage bond so that the bond is not eligible for release until all matters concerning the claim have been resolved.

6.3. The Division shall investigate the merits of the claim and shall make a determination about whether the employer has failed to pay wages or fringe benefits.

6.4. If the Commissioner determines that an employee has not been paid his or her wages or fringe benefits, the Commissioner shall make a written demand of the employer to pay the wages and fringe benefits that are owed.

6.5. If the employer does not make payment of the wages and fringe benefits or otherwise fails to respond to the demand within the time frame established by the Commissioner, the Commissioner shall certify the claim to the State Treasurer, the surety, or the bank for payment of the wages and fringe benefits from the wage bond.

**§42-33-7. Payment from Wage Bond Assets Directly to a Bona Fide Benefit Plan.**

The Division shall pay wage bond assets directly to a bona fide benefit plan only under the following conditions:

7.1. Pursuant to a court order; or

7.2. Pursuant to a written, notarized authorization executed by an employee or former employee.

**§42-33-8. Employer's Request to the Commissioner to Waive the Wage Bond Requirements.**

8.1. Upon receiving a request from an employer, the Commissioner may waive the wage bond requirements of the Act or this rule if he or she determines that the employer is of sufficient financial responsibility to pay wages and fringe benefits.

8.2. An employer seeking a waiver of the Act's wage bond requirements shall apply in writing to the Commissioner. The application shall include notarized financial statements prepared in accordance with generally accepted accounting principles covering at least the 2 most recent years of operation, and shall include the following documents:

8.2.1. A balance sheet or statement of financial position;

8.2.2 Statement of revenues/expenses;

8.2.3 Statement of change in financial position;

8.2.4. Related notes of financial disclosure;

8.2.5. Statement of the length of time the employer has been in business;

8.2.6. Statement of the length of time the employer has been in business in this State;

8.2.7. Statement of the length of time the employer has had employees;

8.2.8. If the employer is a subsidiary of a parent company, the name and address of parent company, and the names, titles and addresses of the parent company's officers and board members, if any.

8.3. After review of the waiver application, the Commissioner shall notify the employer in writing whether the request has been approved or denied.

8.4. If the Commissioner approves the waiver request, the Division shall review the waiver annually from the approval date.

8.5. The Commissioner, upon good cause, may withdraw or otherwise cancel the waiver and require the employer to post a wage bond as required by the Act and this rule.

8.6. The Commissioner may waive the wage bond requirements for the wages and fringe benefits of owners, members, partners or corporate officers upon receipt of a written application. The application shall include a sworn affidavit from each person covered in the waiver request, stating that the individual is a bona fide owner, member, partner or corporate officer holding at least a 20% share of the business.

#### **§42-33-9. Employer's Request to the Commissioner to Release a Wage Bond.**

9.1. An employer may apply to the Commissioner for the release of a wage bond after the employer has been doing business in this State, as defined in W. Va. Code §21-5-1(n), for 5 consecutive years.

9.2. To apply for the release of a wage bond, an employer shall include postage paid envelopes addressed to all employees as of the employer's most recent payroll and shall certify by sworn affidavit that one of the following has occurred:

9.2.1. The employer has ceased doing business in this State and all wages and fringe benefits owed to employees have been paid; or

9.2.2. The employer has been doing business in this State for 5 consecutive years without any change in the business structure, entity or form and all wages and fringe benefits owed to employees have been paid;

9.2.3. The employer is no longer engaged in a covered activity; or

9.2.4. The employer is still actively engaged in a covered activity but does not have employees.

9.3. Upon receipt of a sworn affidavit from an employer requesting the release of a wage bond, the Commissioner shall confirm that all wages and fringe benefits have been paid by the following:

9.3.1. Ensuring that the Division has no unresolved employee claims for wages or fringe benefits; and

9.3.2. Obtaining individual employee affidavits stating that they have received all wages and fringe benefits owed; or

9.3.3. Providing notice to the employees to contact the Commissioner if wages and fringe benefits have not been paid.

9.4. If the Commissioner determines that the wage bond may be released, he or she shall notify the State Treasurer, surety or bank in writing, authorizing the release of the bond.

9.5. If the Commissioner determines that the wage bond cannot be released, he or she shall notify the employer, including the reasons why the bond cannot be released.

# The Surety & Fidelity Association of America

1101 CONNECTICUT AVENUE, NW, SUITE 800, WASHINGTON, DC 20036 TEL: (202) 463-0600 – FAX: (202) 463-0606  
website: <http://www.surety.org>  
E-mail: [information@surety.org](mailto:information@surety.org)

July 9, 2013

RECEIVED  
JUL 15 2013  
WV DIV. OF LABOR

Via Electronic Mail and U.S. Mail

David W. Mullins  
Commissioner  
West Virginia Division of Labor  
State Capitol Complex  
Building 6, Room 749-B  
Charleston, WV 25305

**Re: Proposed New Rule  
Employer Wage Bonds  
Title 42, Series 33**

Dear Commissioner Mullins:

The Surety & Fidelity Association of America (“SFAA”) is a trade association of approximately 450 insurance companies licensed to write surety and fidelity bonds. SFAA member companies collectively provide the vast majority of surety bonds that are written in the United States. We submit comments regarding section 5.4 of the Proposed New Rule, which addresses the surety bond as a wage bond, particularly regarding the nature of the obligation. In addition, we recommend that the obligation to furnish a wage bond extend to all employers, rather than employers engaged in business for less than 5 years.

Section 5.4.2 states that the surety bond will guarantee “that the surety will honor the Division’s demand for payment of wages and fringe benefits upon an employer’s default . . . .” The nature of the obligation differs from the conditional guarantee typically found in a surety bond and differs from the nature of the bond obligation under the current regulation. Typically, a surety bond is a conditional obligation whereby the surety’s obligations are triggered upon the default of the bond principal. The surety typically guarantees that the bond principal will do something, and if not, coverage under the surety bond is available. Thus, in this case, the bond would guarantee the employer’s obligation to pay wages. If the employer fails to do so, the surety’s obligations are triggered and the Division may seek recovery. This is the formulation under the current regulation, which states that the surety bond guarantees that the “wages of an employer shall be paid to employees when such wages are due, and that if such employer fails or defaults in the payments of such wages when they are due, then the insuring party will pay such wages when due and shall seek redress from the defaulting employer.” W. Va. Code St. R. 42-5-

David W. Mullins

July 9, 2013

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2. The proposed rule does not guarantee the payment of wages by the bond principal but rather that the surety will honor a demand for payment. The proposed rule seems to suggest that the surety must pay upon the demand of the Division, regardless of the existence of a default. A demand obligation increases the risk and exposure to the surety. A surety addresses the increased risk by tightening its underwriting requirements. As a result, fewer applicants may be able to qualify for the bond. We recommend that the proposed regulation and bond form reflect the bond obligation that is in the current regulation.

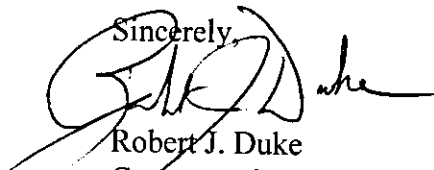
Proposed § 4.2 states that an employer is exempt from posting a wage bond if it has been "continuously and actively engaged in the intended principal activity with employees for at least 5 consecutive years." We recommend that all employers should be required to furnish a wage bond.

One of the primary functions of a surety bond is to prequalify applicants who demonstrate an ability to comply with a certain obligation, thereby avoiding losses. That is, unlike other types of insurance, a surety does not expect a loss when writing a bond, and it provides the bond only to those entities that it has determined are capable of performing the underlying obligation. In this case, if all employers were required to furnish a bond, the Division would obtain the benefit of the surety's prequalification. That is, the surety, in underwriting the employer, would assess the employer's financial ability to pay the required wages, and provide the bond only to those employers that could demonstrate the ability to do so. The Division loses this benefit of prequalification if it requires a bond only from those businesses that are relatively young.

In addition, limiting the bond requirement to a small pool of "new starts" significantly undercuts the availability of the bond. When a bond requirement applies generally, the surety is able to spread its risk of loss, and risk levels are capable of being underwritten prudently. However, if only select entities must provide the bond, the risk of loss is concentrated and significantly increased. A surety may find the level of risk associated with the bond requirement unacceptable and choose not to provide this type of bond.

We thank you for your consideration of our comments. We would be happy to discuss our comments further and to provide guidance regarding the drafting of a surety bond form.

Sincerely,



Robert J. Duke  
Corporate Counsel

**SUMMARY OF COMMENTS RECEIVED**  
**and**  
**AGENCY RESPONSES**

**Comments from The Surety & Fidelity Association of America**

The Surety & Fidelity Association of America ("SFAA"), a trade association of approximately 450 insurance companies licensed to write surety and fidelity bonds, submitted the following comments on the proposed rule:

1. The SFAA recommends that the obligation to furnish a wage bond be extended to include all employers rather than employers engaged in business for less than 5 years; and
2. The SFAA expressed a concern that section 5.4.2 seems to suggest that the surety must pay upon a demand from the Division of Labor, regardless of whether the employer has defaulted on its obligation to pay employees' wage.

**Agency Response**

1. The Division of Labor is not opposed to the SFAA's suggestion that the obligation to furnish a wage bond be extended to all employers doing business in West Virginia. However, certain sections of the Wage Payment and Collection Act, specifically W. Va. Code §§21-5-1 (j and k), 21-5-14(a and f), and 21-5-16, limit the obligation to post a wage bond to employers continuously engaged in construction work for less than 5 years and to employers continuously engaged in the severance, production or transportation of minerals for less than 5 years.

Before the SFAA's suggestion could be implemented, those sections of the statute would need to be amended.

2. The Division of Labor agrees that a surety's obligation is triggered only when an employee defaults on its obligation to pay employee wages.

In order to be more clear, section 5.4.2 has been revised to address the SFAA's concern.