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

Form #3

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2015 JUL 31 P 3:11

OFFICE WEST VIRGINIA
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 21-5C-1, 21-5C-4 and 21-5C-6

AMENDMENT TO AN EXISTING RULE: YES x NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: Minimum Wages and Maximum Hours Standards Regulations

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

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.

Joshua L. Payne

Authorized Signature

QUESTIONNAIRE

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

DATE: July 31, 2015

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) West Virginia Division of Labor
State Capitol Complex
Building 6, Room B-749
Charleston, WV 25305

304.558.7890 x 58018

LEGISLATIVE RULE TITLE:
Minimum Wages and Maximum Hours Standards Regulations

1. Authorizing statute(s) citation

W. Va. Code 21-5C-1, 21-5C-4 and 21-5C-6

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

June 26, 2015

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

None.

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

July 27, 2015

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received _____

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

July 31, 2015

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

John R. Junkins, Acting Commissioner,West Virginia Division of Labor
State Capitol Complex,Building 6, Room B-749
Charleston, WV 25305

Telephone: 304.558.7890 x 58018

Fax: 304.558.2273
Email: john.r.junkins@wv.gov

g. **<u>IF DIFFERENT</u> 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)

Elizabeth G. Farber, Assistant Attorney General
State Capitol Complex,Building 6, Room B-749
Charleston, WV 25305

Telephone: 304.558.7890 x 58012

Fax: 304.558.2273
Email: elizabeth.g.farber@wv.gov

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~~

b. Date of hearing or comment period:

_____

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

_____

d. Attach findings and determinations and reasons:

Attached _____

WEST VIRGINIA DIVISION OF LABOR

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

Phone (304) 558-7890 • Fax (304) 558-2273

www.wvlabor.org

EARL RAY TOMBLIN
Governor

JOHN R. JUNKINS
Acting Commissioner

Statement of Facts and Circumstances

and

Summary of Proposed Amendments to Title 42, Series 8

Minimum Wages, Maximum Hours, and Overtime Compensation

The current rule, "Minimum Wages and Maximum Hours Standards Regulations," Title 42, Series 8, has been in effect since 1982. Revisions are needed to incorporate the Legislature's 2014 amendments to Sections 1, 2, and 4 of the Minimum Wage and Maximum Hours Standards Act, and to reflect the Division of Labor's current practices with regard to enforcement of the Act.

The proposed rule includes the following revisions and amendments:

• Section 3 in the proposed rule includes many new definitions, most of which clarify terms used in Sections 8, 11 and 12 of the rule. These Sections concern employee exemptions from the statute's coverage, criteria for the determination of compensable time, and criteria for employer credits against the minimum wage. Definitions in the current rule that are in the statute have been deleted.

• Section 3 on enforcement has been deleted in the proposed rule because the enforcement provisions are set forth in the statute.

• Sections 5 and 6 in the proposed rule incorporate the 2014 legislative amendments to the definition of employer in W. Va. Code 21-5C-1(d). Section 5 sets forth the criteria for determining when an employer is subject to the minimum wage provisions of the statute. Section 6 sets forth the criteria for determining when an employer is exempt from the overtime provisions of the statute.

• Section 6 concerning petitions for exceptions to record-keeping requirements has been deleted from the proposed rule because there is no authority for such an exception in the statute.

• Section 7 in the proposed rule expressly prohibits an employer from having an employee "volunteer" his or her services in any activity that is a regular part of the employee's job.

• Section 8 in the proposed rule sets forth the criteria for determining when an employee is exempt from the statute's coverage as set forth in the definition of "employee" in W. Va. Code §21-

5C-1(f). Exemptions for computer professionals, creative professionals, per diem employees of the Legislature, and seasonal white water rafting employees have been added to the proposed rule.

• Section 9 in the proposed rule on record-keeping requirements and the contents of employee records updates provisions that were in Sections 4, 5 and 11 and excludes items that are not required by the statute.

• Section 11 in the proposed rule on the determination of compensable time updates and clarifies provisions that were in Section 9.

• Section 12 in the proposed rule on employer credits has been revised to incorporate the 2014 statutory amendments on employer tip credits, which changed from a 20% credit to the employer to a 70% credit. The employer meal credit has been increased from $1.00 per day to $4.00 per day and from $0.125 an hour to $0.50 an hour.

• Sections 13 and 14 in the proposed rule concerning employee claims for unpaid wages or other violations of the statute expand the provisions that were in Section 12, and set forth the Division's current practices with regard to the investigation of employee claims.

• Section 13 concerning amendments to regulations has been deleted because these provisions have been superceded by the state Administrative Procedures Act.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Minimum Wages and Maximum Hours Standards Regulations

Type of Rule: [X] 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 58018 Email: john.r.junkins@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 have no 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: Minimum Wages and Maximum Hours Standards Regulations

Rule Title: Minimum Wages and Maximum Hours Standards Regulations

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: 7-31-15

Signature of Agency Head or Authorized Representative

Joshua L. Taylor

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

SERIES 8
MINIMUM WAGES, ~~AND~~ MAXIMUM HOURS, ~~STANDARDS REGULATIONS~~
AND OVERTIME COMPENSATION

§42-8-1. General.

1.1. Scope. -- ~~These~~ This ~~legislative~~ rules ~~and regulations for Minimum Wage and Maximum Hours Standards for Employees are promulgated pursuant to article five-c, chapter twenty-one of the Code of~~ sets forth criteria for employer and employee exemptions, determination of compensable time, employer credits and all other matters concerning minimum wages, maximum hours, and overtime compensation pursuant to W. Va. Code §21-5C-1, *et seq.*, ~~as amended, under authority of W. Va. Code §21-5C-6.~~

1.2. Authority. -- W. Va. Code §§ 21-5C-1(h), 21-5C-4 and 21-5C-6.

1.3. Filing Date. -- ~~December 31, 1982.~~

1.4. Effective Date. -- ~~December 31, 1982.~~

~~1.5. Severability. -- If any provisions of these Regulations or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of these Regulations which can be given effect without the invalid provision or application and to this end the provisions of these Regulations are severable.~~

§42-8-2. Application and Enforcement.

2.1. This rule applies to all persons, employers, and employees governed or otherwise within the purview of the Minimum Wages and Maximum Hours Standards for Employees Act, W. Va. Code §21-5C-1, *et seq.*

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

§42-8-~~2~~ 3. Definitions.

~~2.1.~~ 3.1. "Act" means the Minimum Wage and Maximum Hours Standard ~~Act~~ for Employees Act, W. Va. Code §21-5C-1, *et seq.* ~~passed February 8, 1966, and in effect ninety (90) days from passage, and amended March 8, 1980, to be effective June 1, 1980.~~

3.2. "Agriculture" means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j (g), section fifteen of the Agricultural Marketing Act, as amended, of the Code of the United States, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

~~2.2. "Appeal" means an application to the Commission for corroboration or decision.~~

~~2.3. "Authorized Representative" means, and includes, the director and employees of the Labor Division under his or her supervision~~.

3.3. "Bona fide sleep period," for an employee who is on duty for twenty-four (24) or more consecutive hours, means a regularly scheduled time period of eight (8) hours, provided that the employer furnishes adequate sleeping quarters for the employee, during which the employee can usually enjoy an uninterrupted night's sleep.

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 minimum wages, overtime wages, or alleging any other violation of the Act or this rule.

3.5. "Commission" means a sum of money paid by an employer to an employee when the employee performs or completes a certain task, such as the selling of a specified amount of goods or services, or for performing a specified service for the employer.

~~2.4. "Commissioner" means the Commissioner of Labor or his or her duly authorized representatives~~.

3.6. "Compensable time" means the time an employer requires, permits, or suffers an employee to work and for which the employee must be paid.

3.7. "Customarily and regularly" means work normally performed during every workweek, but does not include isolated or one-time tasks.

3.8. "Customarily recognized department or subdivision" means a unit within an employer's organization with permanent status and functions.

3.9. "Directly related to management or general business operations" means directly related to assisting with the running or servicing of an employer's business, including work in such areas as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network,

internet and database administration, legal and regulatory compliance, and similar activities.

~~2.6.~~ 3.10. "Director" means the ~~Wage and Hour Section Director appointed by the Commissioner as administrative head~~ director of the Wage and Hour Section, or his or her designee.

~~2.5. "Division" means the West Virginia Division of Labor.~~

~~2.7. "Diversified Employment" means work performed as both service and nonservice on any day.~~

3.11. "Director's review" means, upon a claimant's request, and subject to the Director's approval, a review of the results of the Division's investigation by the Director.

~~2.12. "The Law" or "This Law" means the West Virginia Minimum Wage and Maximum Hours Standards Act as embraced in W. Va. Code §21-5C-1 et seq.~~

3.12. "Discretion and independent judgment" means having the authority to: formulate, affect, interpret, or implement an employer's management policies or operating practices; carry out major assignments in conducting the operations of the business; perform work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; commit the employer in matters that have significant financial impact; waive or deviate from established policies and procedures without prior approval; negotiate and bind the employer on significant matters; provide consultation or expert advice to management; be involved in planning long - or short-term business objectives; investigate and resolve matters of significance on behalf of management; and represent the employer in handling complaints, arbitrating disputes or resolving grievances.

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

3.14. "Dual job employee" means an employee who performs work as both a service, or tipped, employee and a non-service, or non-tipped, employee for one employer.

~~2.10. "Employ" means to hire or permit to work.~~

~~2.8. "Employee" includes any individual employed by an employer.~~

~~2.9. "Employer" means the State of West Virginia, its agencies, departments and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee, and who employs during any calendar week six (6) or more employees in any one (1) separate, distinct and permanent location or business establishment, but shall not include an employer if eighty percent (80%) of his or her employees are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.~~

3.15. "Engaged to wait" means a period of inactivity during which an employee remains at work or on duty, is under the employer's direction and control, is unable to use the time effectively for his or her own purposes, and the waiting is an integral part of the employee's job even if he or she is not performing work-related tasks while waiting.

3.16. "Exempt employee" means an employee who is not covered by the Act and this rule.

3.17. "Fee basis" means a predetermined agreed amount of compensation for a single job, regardless of the amount of time required to complete the job.

3.18. "Field of science or learning" means and includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

3.19. "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.

~~2.11. "Full-time Employee" means any employee other than a "Student Worker" as defined in Subsection 2.17 of this section.~~

3.20. "Full-time student" means a student who is enrolled in the number of courses, credits, or hours established by the school to qualify as full-time.

3.21. "Hours worked" means, in addition to the Act's definition, the time an employee is under an employer's direction and control, even if the employee is not performing work-related tasks.

3.22. "Making sales" means and includes the selling, exchanging, contracting to sell, consigning for sale, shipping for sale, or other similar disposition of commodities or services.

3.23. "Management" means and includes such activities as interviewing, selecting, and training employees; setting and adjusting of employees' rates of pay and work schedules; directing the work of employees; maintaining production or sales records for supervising and evaluating employees' productivity and efficiency; recommending promotions or other changes in employees' status; handling employee complaints and grievances; disciplining employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees and property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

3.24. "Matters of significance" means a level of substantial importance or consequence of the work performed.

3.25. "Non-exempt employee" means an employee who is covered by the Act and this rule.

~~2.13.~~ 3.26. ~~"Non-service Employee"~~ "Non-service employee" means an employee ~~whose duties include preparation or cooking of food or beverage, washing of dishes, maintenance or cleaning of premises and all others~~ who does not customarily receive tips or gratuities in connection with his or her work.

3.27. "Non-work time" means the time during which an employee is completely relieved from duty and has not been engaged to wait.

3.28. "On-call time" means the time an employer requires an employee to remain on, or in close proximity to, the employer's premises, or at his or her home, so that the employee is not free to use the time as he or she wishes. If an employer only requires an employee to leave his or her contact information at home or with the employer, the employee is not working "on-call."

3.29. "Overtime" means compensation at one and one-half times a non-exempt employee's regular rate of pay for all time worked in excess of forty (40) hours in the employer's established workweek.

3.30. "Pay period" means a defined time frame established by an employer for which an employee receives a paycheck.

3.31. "Particular weight" means that an executive employee's recommendations regarding the hiring, firing, promotion or other changes in status of subordinate employees are frequently requested by, made to, and relied upon by the executive's superior or higher level manager.

~~2.14. "Part-time Basis"~~ 3.32. "Part-time basis" means a student worker who is employed twenty-four (24) hours or less in a workweek.

3.33. "Political subdivision" means and includes a county, city, township, village, school, sanitation, utility, irrigation, drainage and flood-control districts, and similar governmental entities that are created or authorized by statute.

3.34. "Primary duty" means an employee's principal, main, major or most important duty, as determined by the character of the employee's job as a whole.

3.35. "Regular rate" means the compensation an employer pays to a non-exempt employee for his or her work for no more than forty (40) hours worked in the employer's established workweek.

~~2.15. "Regulations" means regulations as defined by Section 1.1 of these rules.~~

3.36. "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.

3.37. "Salary" means a predetermined amount of pay that constitutes an employee's compensation for a pay period, and which is not subject to a reduction based on the quality or quantity of work the employee performs.

3.38. "Seasonal employee" means an employee who works less than seven (7) months in any one calendar year.

~~2.16. "Service Employee"~~ 3.39. "Service employee" means ~~a tipped employee~~ an individual who customarily receives tips or gratuities in connection with his or her work.

3.40. "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.

~~2.17. "Student worker" means an individual who has matriculated and participates in regular and prescribed courses at any recognized school, college or university~~.

3.41. "Volunteer" means a person who performs or offers to perform a service for an educational, charitable, religious, fraternal, public or similar non-profit agency or organization without compensation, provided that such services are not the same type of services which the individual is employed to perform for the agency or organization.

~~2.18. "Wage" means compensation due an employee by reason of his or her employment.~~

3.42. "Work day" means any continuous twenty-four (24) hour period within a workweek.

3.43. "Work requiring advanced knowledge" means work that is predominantly intellectual and requires the consistent exercise of discretion and judgment.

~~2.19. "Workweek" means a regular recurring period of one hundred sixty-eight (168) hours in the form of seven (7) consecutive twenty-four (24) hour periods~~.

~~**§42-8-3. Enforcement.**~~

~~3.1. These regulations shall be enforced as prescribed by W. Va. Code §21-5C et seq.~~

~~3.2. Powers of the Commissioner.~~

~~(a) The Commissioner is charged with the administration of the West Virginia Minimum Wage and Maximum Hours Standards Act.~~

~~(b) The Commissioner may make and amend, alter or repeal general rules and regulations of procedure for carrying into effect all provisions of the Act, for obtaining statistical data respecting wages and hours, and to prescribe means, methods and practices to make effective such provisions.~~

~~(c) The Commissioner may make such investigations and inspections and take any actions as authorized by the Act which in his or her judgment are necessary to administer and enforce the Act and these regulations.~~

~~3.3. Inspection by division.~~

~~(a) The Wage and Hour Section of the West Virginia Division of Labor is designated as the Commissioner's representative for the enforcement of these regulations; it shall have authority to make such inspections and to take such other actions as are required to enforce these regulations.~~

~~(b) The Commissioner's representative shall, during reasonable hours, make such inspections of places of employment within this State to determine compliance with the law and these regulations.~~

~~3.4. Penalty for violation. -- Any person, firm or corporation violating any provisions of these Rules and Regulations shall be subject to the penalties prescribed by W. Va. Code §21-5C-7.~~

§42-8-4. Establishment of a Workweek; Required Employee Notification of Changes; Required Posting of the Minimum Wage Poster.

4.1. An employer shall establish a workweek for all employees, consisting of seven (7) consecutive work days, totaling one hundred sixty-eight (168) consecutive hours.

4.2. A employer may establish a workweek that begins on any day of the week and at any hour of the day.

4.3. If an employer alters an employee's workweek, the employer shall provide the employee with at least one full pay period's notice of the change.

~~4.4. Posting of notices. -- Every employer, as defined in subsection (c), section one of the Act, or who as specified employee exemptions, as defined as subsection (f) of section one of the Act shall post and keep posted such notices pertaining to the applicability of the Act, as shall be prescribed and furnished by the Wage and Hour Section in conspicuous places in every establishment where employees are employed so as to permit them to observe readily such notices.~~

~~11.1. Notification to employees and posting of notices required. -- Every employer employing employees as defined by the law and these regulations shall notify employees and post notices as required by Section 4.2 of these regulations.~~

4.4. The Division shall develop an abstract of the Act, and shall make it available on the Division's website or provide it free of charge upon request. An employer shall keep the abstract posted in a place accessible to all employees.

§42-8-5. Employers Subject to the Minimum Wage Provisions of the Act.

5.1. The Division shall determine whether an employer is subject to the minimum wage provisions of the Act set forth in W. Va. Code §21-5C-2 and this rule on a case-by-case basis, according to the actual job duties performed by each employee and in consideration of past decisions under state and federal law.

5.2. Employers shall be subject to the minimum wage provisions of the Act if the employer employs six (6) or more employees during any calendar week in any one separate, distinct and permanent location and falls into one the following categories:

5.2.1. The State of West Virginia, its agencies, departments and all its political subdivisions;

5.2.2. Any individual, partnership, association, public or private corporation; or

5.2.3. Any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee.

§42-8-6. ~~Petition for exceptions.~~ Employers Exempt from the Maximum Hours and Overtime Provisions of the Act.

~~6.1. Written petition. -- Any employer who, due to peculiar conditions under which he or she must operate, desires authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified herein, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof.~~

~~6.2. Commissioner determines relief sought. -- The Commissioner may grant the authority prayed for if it does not hamper or interfere with the enforcement of the provisions of the Act; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation~~.

~~6.3. Employer must comply with regulations during adjudication period. -- The submission of a petition or the delay of the Commissioner in acting upon such petition shall not relieve any employer from any obligations to comply with~~ regulations of this Act. However, the Commissioner shall give notice of petition with due promptness.

6.1. The Division shall determine whether an employer is exempt from the maximum hours and overtime provisions of the Act set forth in W. Va. Code §21-5C-3 and this rule on a case-by-case

basis according to the Act's provisions and the provisions of any federal act relating to maximum hours and overtime compensation.

6.2. The following employers are exempt from the provisions of the Act as long as 80% or more of their employees are subject to any federal act relating to maximum hours and overtime compensation:

6.2.1. The State of West Virginia, its agencies, departments and political subdivisions; and

6.2.2. An individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee.

6.3. The Division shall determine whether 80% or more of an employer's employees are subject to any federal act relating to maximum hours and overtime compensation by considering first whether the employer is a covered enterprise as defined in federal law, and then, if the employer is not a covered enterprise, by considering the actual job duties of each non-exempt employee.

§42-8-7. Employer Use of Employee Volunteers Prohibited.

An employer may not require or permit an employee to volunteer his or her services in any activity that is a normal and regular part of the employee's job duties.

§42-8-8. ~~Specific exemptions and other special requirements.~~ Employee Exemptions from Coverage of the Act.

~~8.1. Records on exempt employees to be kept. -- Every employer operating under the complete exemptions of subsection (c), section one, article five-c, chapter twenty-one of the Act shall maintain and preserve records directly related to payrolls, as heretofore required, and also records shall be maintained and preserved by employers who employ persons defined as employees who are exempted under W. Va. Code §21-5C-1(f).~~

8.1. The Division shall determine whether an employee is covered by the Act and this rule based on the employee's actual, customary and regular job duties that he or she performs during any given workweek, and not based upon the employee's job title.

8.2. Pursuant to W. Va. Code §21-5C-1(f), if an employee is exempt from coverage of the Act and this rule, but spends 50% or more of his or her time performing work during a workweek that is not exempt, the employer shall treat the employee as non-exempt for all hours worked during that workweek.

~~8.2.~~ 8.3. ~~Employees of the United States. -- Any individual employed by the United States.~~

~~The individuals employed by the federal government means those who receive their wages or salary from any department or agency of the United States government but is not meant to include any employer as defined in W. Va. Code §21-5C-1(c), who, directly or indirectly, performs work for, contracts work (including subcontractors) or, in any manner whatsoever, furnishes employees to any department or agency of the United States government.~~ An employee of the United States is exempt from coverage of the Act as long as he or she is directly employed by an agency or department of the federal government.

~~8.3.~~ 8.4. ~~Voluntary service employees. -- Any individual engaged in the activities of any educational, charitable, religious, fraternal or nonprofit organization where the employer-employee relationship does not in fact exist, or where the services rendered to such organizations are on a voluntary basis.~~ An individual who is a volunteer is exempt from coverage of the Act.

~~(a) Employer-employee relationship shall be determined thusly: An employee is an individual employed by an employer and to employ means to suffer or permit to work. This definition is very broad and the relationship must be treated as a matter of economic reality, that which is necessarily real as to worker's material resources. There have been very few decisions on an independent contractor relationship, and this Act is not intended to destroy traditional common-law definitions of master and servant. Therefore, the law defines "Employ" as meaning to hire or permit to work.~~

~~(b) Educational, charitable, religious, fraternal and nonprofit organizations who fall within the scope of the Act and individuals who render services to such organizations on a voluntary basis are not included under the provisions of the Act. The word "Voluntary" means the action or deed of one's own free will without valuable consideration or legal obligation.~~

~~8.4.~~ 8.5. ~~Newsboys, shoeshine boys, golf caddies, etc. -- Newsboys, shoeshine boys, golf caddies, pin boys and pin chasers in bowling lanes. These occupations listed as exempt under the provisions of the Act are self-explanatory.~~ An individual who delivers newspapers, shines shoes, caddies at a golf course, or sets pins at a bowling alley is exempt from coverage of the Act.

~~8.5.~~ 8.6. ~~Traveling salesmen. -- Traveling salesmen and outside salesmen who are:~~ An individual engaged in making outside sales is exempt from coverage of the Act if he or she meets the following tests:

~~(a)~~ 8.6.1. ~~Employed salesmen and outside salesmen who are~~ The employee is customarily and regularly engaged away from ~~their~~ his or her employer's place or places of business; and ~~in:~~

~~(1) Marking sales within the meaning of selling, exchanging, contracting to sell, consignment for sale, shipment for sale or other disposition, or~~

~~(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by a client or customer; and~~

~~(b) Whose hours of work are of a nature other than that described in Section 8.5 of this regulation do not exceed thirty percent (30%) of the hours worked in the workweek by nonexempt employees of the employer: Provided, That the work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.~~

8.6.2. The employee's primary duty is in making sales, or in obtaining orders or contracts for services or for the use of facilities for which a client or customer pays consideration.

~~(c) This exemption does not include employees training to become traveling salesmen or outside salesmen who are not actually performing the duties of traveling salesmen or outside salesmen.~~

8.6.3. An individual who is training to work in outside sales but who is not independently working on his or her own is not exempt from coverage of the Act.

~~8.6.~~ 8.7. ~~Services performed by son, daughter, etc. -- Services performed by an individual in the employ of his or her parent, son, daughter or spouse are exempt.~~ An individual performing services for, or who is otherwise employed by, his or her parent, child, or spouse is exempt from coverage of the Act.

~~8.7.~~ 8.8. ~~Professional, administrative or executive employee. -- Any individual employed in a bona fide professional, executive or administrative capacity shall be recorded as exempt if he or she fulfills the duties of such capacity as defined thusly:~~ A learned professional employee is exempt from coverage of the Act if he or she meets all of the following tests:

~~(a) A professional employee is an individual whose primary duty consists of the performance of work:~~

~~(1) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or~~

~~(2) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends primarily on the invention, imagination or talent of the employee; and~~

~~(3) Whose work requires the consistent exercise of discretion and judgment in its performance; and~~

~~(4) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the~~

~~output produced or the result accomplished cannot be standardized in a given period of time~~.

8.8.1. The employee is compensated on a salary or fee basis at a rate equal to at least $455.00 per workweek, provided, however, that the salary or fee requirements of this provision do not apply to bona fide teachers or practitioners of law or medicine ;

8.8.2. The employee's primary duty is the performance of work requiring advanced knowledge;

8.8.3. The advanced knowledge is in a field of science or learning; and

8.8.4. The advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

8.9. A creative professional employee is exempt from coverage of the Act if he or she meets all of the following tests:

8.9.1. The employee is compensated on a salary or fee basis at a rate equal to at least $455.00 per workweek; and

8.9.2. The employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting, and the graphic arts.

8.10. A computer professional employee is exempt from coverage of the Act if he or she meets all of the following tests:

8.10.1. The employee is compensated either on a salary or fee basis at a rate not less than $455.00 per workweek or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

8.10.2. The employee is employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described in subsection 8.10.3; and

8.10.3. The employee's primary duty consists of the following or a combination of the following:

8.10.3.a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

8.10.3.b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or

8.10.3.c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

~~(b)~~ 8.11. An executive employee is ~~an individual whose primary duty consists of the management of an enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and 8.11. An executive employee is~~ exempt from coverage of the Act if he or she meets all of the following tests:

8.11.1. The employee is compensated on a salary basis at a rate of at least $455.00 per workweek;

8.11.2. The employee's primary duty is the management of the employer's organization, or the management of a customarily recognized department or subdivision of the organization;

~~(1)~~ 8.11.3. ~~Who~~ The employee customarily and regularly directs the work of two (2) ~~or more employees therein; and~~ full-time employees or the equivalent of two (2) or more full-time employees; and

~~(2)~~ 8.11.4. ~~Who~~ The employee has the authority to hire or fire other employees or ~~whose~~ the employee's suggestions and recommendations as to the hiring, ~~and~~ firing, ~~and as to the~~ advancement, ~~and~~ promotion ~~and~~ or any other change of status of other employees ~~will be~~ is given particular weight.

~~(3) Who customarily and regularly exercises discretionary powers.~~

~~(c)~~ 8.12. An administrative employee is ~~an individual whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his or her employer or his or her employer's customers; and~~ exempt from coverage of the Act if he or she meets all of the following tests:

8.12.1. The employee is compensated on a salary or fee basis at a rate at least equal to $455.00 per workweek;

8.12.2. The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

~~(1)~~ 8.12.3. ~~Who customarily and regularly exercises~~ The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

~~(2) Who regularly and directly assists a proprietor, or an employee employed in bona fide professional, executive or administrative capacity; or~~

~~(3) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; or~~

~~(4) Who executes under only general supervision special assignments and tasks provided in Section 8.7(a), (b) and (c), wherein the terms bona fide professional, executive and administrative employees have been defined and qualify under the immunity only in relation to W. Va. Code §21-5C-2 & 3.~~

~~8.8.~~ 8.13. ~~Employee in on-the-job training.~~ An individual employed for the purpose of on-the-job training is exempt from coverage of the Act for the duration of the training program if he or she meets all of the following tests:

~~(a) "On-the-Job Training" means a complete plan of terms and conditions for the employment and training of individuals which conforms to standards which are:~~

~~(b) Such plan shall be one which is registered, recognized and approved by either the area vocational education program as set forth in W. Va. Code §18-2B-1 or the Bureau of Apprenticeship and Training of the United States Department of Labor, or the Commissioner~~.

~~8.13.1. The employee is enrolled in a training program that is registered with and approved by a vocational education program pursuant to W. Va. Code §18-2B-1, *et seq.*, or the Commissioner;~~

8.13.2. The employee is enrolled in a training program that sets forth the terms and conditions for his or her training and employment, and that involves skills that are:

~~(1)~~ 8.13.1.a. Customarily learned in a practical way;

~~(2)~~ 8.13.1.b. Clearly identified with and commonly recognized throughout a specific industry or trade; and

~~(3)~~ 8.13.1.c. ~~Requires related instruction to supplement the work experience~~ Developed by participation in both classroom instruction and work experience; and

~~(4)~~ 8.13.3. ~~The keeping of appropriate records concerning~~ The training program maintains a written record of the employee's time and progress.

~~8.9.~~ 8.14. ~~Handicapped person in a sheltered workshop. -- Any person having a physical or mental handicap so severe as to prevent his or her employment or employment training in any training or employment facility other than a nonprofit sheltered workshop. Such a handicapped person whose earning capacity is impaired by such deficiencies may be served in accordance with the recognized rehabilitation program of a nonprofit sheltered workshop for the purpose of employment training. The said rehabilitation program is defined in W. Va. Code §18-10B et seq.~~: A physically or mentally disabled person is exempt from coverage of the Act if he or she is employed

by a nonprofit sheltered workshop or rehabilitation program that is operated pursuant to W. Va. Code §§18-10A-1, *et seq.* or 18-10B-1, *et seq*.

~~8.10.~~ 8.15. ~~Summer camp worker. --~~ Any individual employed in a boys or girls summer camp is exempt from coverage of the Act.

~~8.11~~. 8.16. ~~Person over~~ An individual who is at least sixty-two (62) years ~~receiving~~ old and who receives ~~age or survivors~~ benefits from the Social Security Administration ~~is a clearly defined explanation~~ is exempt from coverage of the Act.

~~8.12.~~ 8.17. ~~Person engaged in agriculture under the Federal FLSA. --~~ Any individual employed in agriculture ~~as the word agriculture is defined in the Federal Fair Labor Standards Act of 1938, as amended (29 USC 201 et. seq.). Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities defined as agricultural commodities which are defined in subsection (g), section fifteen of the Agricultural Marketing Act, as amended, of the Code of the United States. The raising of livestock, bees, fur-bearing animals or poultry and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market~~ is exempt from coverage of the Act.

~~8.13.~~ 8.18. ~~Firefighting for a state agency. --~~ Any individual employed as a firefighter by the ~~state or agency thereof. This does not refer to municipal, county, industrial or similar agencies who employ firemen or firefighters~~ State of West Virginia or one of its agencies is exempt from coverage of the Act.

~~8.14.~~ 8.19. ~~Ushers in theaters. -- Ushers in theaters~~ An individual employed as an usher in a theater is exempt from coverage of the Act.

~~8.15.~~ 8.20. ~~Student worker. -- Any individual employed twenty-four (24) hours or less who is a student in any recognized school or college~~. A full-time student enrolled in a recognized school or college is exempt from coverage of the Act if he or she is employed on a part-time basis. A full-time student who is employed for more than twenty-four (24) hours during a workweek is not exempt from coverage of the Act for all hours he or she works during that workweek.

~~(a) The purpose of this exemption is not to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry; and~~

~~(b) An individual so employed shall be bona fide student in a recognized school or college as set forth in W. Va. Code §18 et seq., or similar acts of other states.~~

~~8.16.~~ 8.21. ~~Local or interurban motorbus driver. --~~ Any individual who is employed by a

local or ~~interurban~~ inter-urban motorbus carrier is exempt from coverage of the Act.

~~8.17.~~ 8.22. ~~Salesperson. -- So far as the maximum hours and overtime compensation provisions of this law are concerned, any salesperson, partsperson or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling vehicles to ultimate purchasers.~~ An individual who works in sales or as a mechanic in a non-manufacturing business that sells vehicles, trailers, farm implements or aircraft, and related parts, is exempt from coverage of the Act.

~~8.18.~~ 8.23. ~~Employee under the regulations of DOT. -- Any employee with respect to whom the United States Department of Transportation has statutory authority to establish qualifications and maximum hours of service.~~ An employee whose qualifications and maximum hours of service are established by the United States Department of Transportation is exempt from coverage of the Act.

8.24. An individual employed on a per diem basis by either body of the West Virginia Legislature, or by any legislative committee or joint committee, is exempt from coverage of the Act.

8.25. An individual employed as a seasonal employee by a commercial whitewater outfitter is exempt from coverage of the Act.

§42-8-4 9. ~~Records to be kept by employers~~ Record-keeping Requirements; Contents of Employee Records; Employee Pay Stub Information.

~~4.1. Form of records; scope of records. -- No particular order or form of records is prescribed. However, every employer who is subject to any of the provisions of the Act is required to maintain records for a period of not less than two (2) years.~~

9.1. An employer shall maintain written payroll and employment records for exempt employees as required by W. Va. Code §21-5-9.

~~4.2. Content of records. -- The written record or records with respect to each and every employee shall contain~~:

9.2. An employer shall maintain written payroll and employment records for non-exempt employees that contain the following:

~~(a) Name in full, identifying symbol or number if such is used in place of name on any time, work or payroll record. This shall be the same as that used for Social Security record purposes;~~

9.2.1. The employee's full name;

~~(b) Home address~~;

9.2.2. The employee's home address;

~~(c) Date of birth, if under eighteen (18);~~

~~(d) Occupational or job classification~~;

9.2.3. The employee's occupational title or job classification;

~~(e) Sex (may be indicated by use of the prefixes Mr., Mrs., Ms. or Miss);~~

~~(f) Rate of pay~~;

9.2.4. The employee's regular rate of pay, whether hourly, by piece rates, by commission, etc;

~~(g) Hours worked each workday and total hours worked each workweek~~;

9.2.5. The employee's total hours worked each workday and total hours worked each workweek;

~~(h) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment, all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of day and beginning day of the workweek for the whole work force or establishment shall suffice. If any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees~~;

9.2.6. The time of day and the day of the week that the employee's workweek begins;

~~(i) Regular hourly rate of pay for any week overtime is worked and such overtime excess compensation as due under of the Act, W. Va. Code §21-5C-3~~;

~~(j) Total weekly straight-time earnings or wages and total overtime excess compensation which amount is over and above all straight-time earnings or wages thereby showing the total wages paid each pay period~~;

9.2.7. The employee's total weekly regular wages and total overtime wages earned each pay period;

~~(k) Total deductions, itemized, from wages paid each pay period~~;

9.2.8. The employee's itemized deductions for each pay period; and

~~(1) Date~~ The date of payment and pay period covered.

~~4.3. Records of retroactive payments of wages.~~

~~(a) Record and preserve, as an entry on his or her payroll or other pay records, the amount of such payment to each employee, the period covered by such payment and date of payment.~~

~~(b) Prepare a report of such payment, (i) preserve a copy for his records, (ii) deliver a copy to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Commissioner of Labor within ten (10) days after payment is made.~~

9.3. If an employer pays an employee using a piece rate schedule, a commissions schedule, or any schedule other than a regular hourly rate of pay, the employer shall include the written schedule in the employee's payroll and employment records.

9.4. If an employer takes a tip credit, meal credit or living quarters credit against an employee's wages, as set forth in Section 10 of this rule, the employer shall include a written record of the credits taken in the employee's payroll and employment records.

~~11.2.~~ 9.5. ~~Employees to be furnished with written accounting of wages paid. -- The firm~~ An employer shall furnish ~~the~~ each employees with a written pay stub for each pay period that the employee works that includes the employee's ~~accounting of sums deducted from each pay at the time each wage payment is made. This written accounting shall also state the~~ rate of pay, ~~the~~ overtime rate of pay, if any, ~~(if applicable) and~~ the units of time or rate ~~upon which~~ used to calculate his or her wages, ~~are calculated~~ and a statement of deductions made from his or her gross pay. If an employee consents to the direct deposit of his or her wages, the employer may furnish the pay stub electronically, by emial, or by giving the employee access to a database containing his or her pay stub information.

~~5.2. Wage rate tables. -- Wage rate tables and schedules of the employer which provide piece rates or other rates used in computing straight-time earnings, salary or wages, or overtime excess computation shall be kept and preserved.~~

~~5.3. Work time schedule. -- There shall be work time schedules or tables which establish the hours and days of employment of individual employees or of separate work forces.~~

~~5.4. Records of additions or deductions. -- Records of additions or deductions from wages paid shall be maintained as to date, amount and nature of the items which make up the total additions and deductions.~~

~~5.5. Written agreements or memoranda. -- Written agreements or memoranda summarizing the terms of oral agreements or understanding which pertain to any item under Section 6 of these regulations shall be preserved.~~

§42-8-~~7~~ 10. ~~Records to be kept and reserved for a period of not less than two (2) years. Place for keeping records~~ For Keeping Employee Records.

~~5.1. Records to be kept. -- All records of the employer directly relating to wages and hours of persons employed by him or her shall be kept and preserved.~~

~~7.1. Records to be kept. -- Each~~ 10.1. An employer shall keep the employee records required by ~~these regulations~~ 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~~ employee records are customarily maintained. ~~Where the records are maintained at a central record-keeping office, other than in the place or places of employment, such records shall be available within seventy-two (72) hours following written notice from the Commissioner.~~

~~7.2.~~ 10.2. ~~Records to be open to the Division for inspection. -- All~~ Employee records shall be open at reasonable times to the Division for inspection, examination, copying, photographing or otherwise reproducing ~~of all records directly relating to wages and hours of employment~~ in order to ensure compliance with the Act and this rule.

10.3. 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 seventy-two (72) business hours.

§42-8-~~9~~ 11. ~~Principles for determination of hours worked~~ Determination of Compensable Time for Non-Exempt Employees.

~~9.1. The workweek. -- The workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place.~~

~~9.2. Nonwork time. -- Periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own time are not hours worked.~~

~~9.3. Work time. -- The employee whose time is spent in physical or mental exertion under control and direction of the employer constitutes hours worked.~~

~~9.4. General work. -- General work not requested but allowed or permitted is work time.~~

11.1. An employer shall include all hours worked by an employee as compensable time. An employer may exclude non-work time from compensable time.

~~9.5. Preparation to work. -- Changing of clothes or washing when indispensable to the employee's work or is required by law, or rules or regulations or by rule of the employer constitutes hours worked.~~

~~9.6. Preliminary or postliminary activity. -- Changing of clothes or washing when by contract, custom or practice is a preliminary or postliminary activity constitutes hours worked.~~

11.2. Preliminary and postliminary activities. An employer shall include as compensable time the time an employee spends changing clothes or washing, when such activities are an indispensable part of his or her work, when such activities are required by law or by the employer for safety or production reasons, when required by contract, or by the custom and usage of a particular trade.

~~9.8. Mealtime. -- Bona fide meal periods are not work time.~~

~~9.9. Rest periods. -- Rest periods of short duration, running from five (5) to twenty (20) minutes, must be counted as hours worked.~~

11.3. Employee break time and meal time.

11.3.1. During a work day or shift of six (6) or more hours, an employer shall provide an employee with at least a twenty (20) minute meal time.

11.3.2. When an employer authorizes one or more employee break times or meal times of twenty (20) consecutive minutes or less during a work day, the employer shall treat the break time or meal time as compensable time.

11.3.3. When an employer authorizes one or more employee break times or meal times of thirty (30) consecutive minutes or more during a work day, the employer may treat the break time or meal time as non-work time as long as the employee is completely relieved of his or her work responsibilities. If an employee is not completely relieved of his or her work responsibilities during the break time or meal time, the employer shall treat the entire break time or meal time as compensable time.

~~9.10. On-call time. -- On-call time:~~

~~(a) An employee who is required to remain on-call on the employer's premises, or so close thereto, or at his or her home so that he or she cannot use the time effectively for his own purposes is working while on-call.~~

~~(b) An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with his employer where he may be reached is not working while on-call.~~

11.4. Employee on-call time.

11.4.1. When an employer requires an employee to be on-call, as defined in subsection 3.28 of this rule, the employer shall treat the on-call time as compensable time.

11.4.2. When an employer requires an employee to leave his or her contact information with the employer or with a person at the employee's home, and as long as the employee is free to use the time as he or she wishes, an employer may treat the time as non-work time.

~~9.11. Extended periods on duty - duty of twenty-four (24) hours or more:~~

~~(a) Where an employee is required to be on duty twenty-four (24) hours or more, the employer and employee may agree on a bona fide meal period and a bona fide regularly scheduled sleeping period of not more than eight (8) hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. Where no expressed or implied agreement to the contrary is present, the eight (8) hours of sleeping time and lunch periods constitute hours worked.~~

~~(b) If the sleeping period is interrupted by a call to duty, the interruption counts as hours worked. The entire period of interruption must be counted if the employee cannot get a reasonable night's sleep.~~

11.5. Employee on duty for extended periods of twenty-four (24) or more consecutive hours.

11.5.1. If the employer and employee have an express or implied agreement regarding the employee's scheduled meal times, break times and bona fide sleep periods, the employer may treat the meal times and break times of thirty (30) consecutive minutes or more and bona fide sleep periods as non-work time.

11.5.2. If the employer and employee do not have an express or implied agreement regarding the employee's scheduled meal times, break times and bona fide sleep periods, the employer shall include the employee's meal times, break times and bona fide sleep periods as compensable time.

11.5.3. When an employee's meal time or break time is interrupted by a call to duty, the employer shall count the entire meal time or break time as compensable time.

11.5.4. When an employee's bona fide sleep period is interrupted by a call to duty to the extent that the employee cannot get at least five (5) hours sleep during the scheduled sleep period, the employer shall count the entire sleep period as compensable time.

~~9.7. Waiting time. -- General waiting time will be counted as hours worked when based on the fact that the employee was engaged to wait.~~

11.6. Employee engaged to wait. If an employee has been engaged to wait by an employer, the employer shall include the time the employee is engaged to wait as compensable time.

11.7. Employee attendance or presentation at a training session, meeting, or lecture.

11.7.1. If an employer requires an employee to attend or to present material at a

training session, meeting, or lecture, the employer shall include as compensable time the time the employee spends attending or preparing for the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this rule.

11.7.2. If an employee chooses on his or her own to attend or to present material at a training session, meeting, or lecture, the employer may treat as non-work time, the time the employee spends attending or preparing for the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this rule.

11.8. Travel time when no overnight stay is required by the employer. If an employer requires an employee to travel when no overnight stay is required, the employer shall include the following as compensable time:

11.8.1. The time the employee spends traveling away from and returning to the employee's assigned work location; and

11.8.2. The time the employee spends traveling to perform his or her job assignments and responsibilities.

11.9. Travel time when an overnight stay is required. If an employer requires an employee to travel when an overnight stay away from the employee's home is authorized, the employer shall include the following as compensable time:

11.9.1. The time the employee spends traveling during his or her normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday or Sunday; and

11.9.2. The time the employee spends traveling either before or after his or her normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday or Sunday, except for the time that the employee spends as a passenger in an automobile or taxi, or on an airplane, train, boat, or bus. If the employee is performing work duties required by the employer while he or she is a passenger in an automobile or taxi, or on an airplane, train, boat, or bus, the employer shall treat this time as compensable time.

~~9.12. Principal activity. -- The term principal activity includes all activities which are an integral part of a principal activity~~.

§42-8-~~10~~ 12. ~~Credits~~ Criteria for Determining Employer Credits Toward the Minimum Hourly Wage; No Credit for Uniforms.

~~10.1. Gratuities. -- Statutory interference renders invalid any agreement or requirement that all gratuities be turned over to the employer. In determining the wage of a tipped employee, the amount paid such employee shall be deemed to be increased on account of the tips by an amount~~

~~determined by the employer, but not by an amount in excess of twenty percent (20%) except that in the case of an employee who shows to the satisfaction of the Commissioner that the actual amount of the tips received by him or her was less than the amount determined by the employer as the amount by which the wage paid him or her was deemed to be increased under this sentence, the amount paid such employee by his or her employer shall be deemed to have been increased by such lesser amount.~~

12.1 Tip credit.

12.1.1. An employer shall be entitled to take a tip credit equal to seventy per cent (70%) of the minimum wage for all hours worked by a service employee, as long as the service employee receives tips or gratuities equal to at least seventy per cent (70%) of the current minimum wage for all hours worked.

12.1.2. When a service employee spends more than twenty per cent (20%) of his or her time during a workweek performing duties for which he or she does not receive tips, such as cleaning or setting tables, making coffee, etc., an employer shall pay the employee at least the full minimum wage, without taking a tip credit, for the time the employee spends performing such duties.

12.1.3. An employer shall be entitled to take a tip credit equal to seventy per cent (70%) of the minimum wage for all hours worked by a dual job employee as a service employee, as long as the employee receives tips or gratuities equal to at least seventy per cent (70%) of the current minimum wage.

12.1.4. An employer shall pay a dual job employee at least the full minimum wage, without taking a tip credit, for all hours worked by the employee as a non-service employee.

12.1.5. In order to take the tip credit, an employer shall have written tip records completed by the employee and, in addition to the tip records, an employer shall have a record of the time worked by a dual job employee as a service employee.

12.1.5.a. The employee's report of tips shall specify the time period in which the tips were received, the amount of cash tips received, the amount of credit or debit card tips received, the amount of tips paid out, and the amount of net tips retained by the employee. The employee shall sign and date the report.

12.1.5.b. An employee may use IRS Form 4070, "Employee's Report of Tips to Employer," IRS Form 4070A, "Employee's Daily Record of Tips," or any other form that contains the information required by subsection 12.1.5.a of this rule.

12.1.6. An employer shall not be entitled to take a tip credit for a non-service employee.

12.1.7. If an employer permits tip-sharing or tip pooling, the employer shall divide the shared or pooled tips among only service employees and dual job employees working as service

employees, and shall ensure that the employees individually document the amount of tips paid out.

12.1.8. The employer shall not be entitled to receive any shared or pooled tips.

~~10.2. Meal allowance.~~

(a) The credit. -- A credit of one dollars ($1.00) per day shall be allowed for meals made available and eaten if an employee completes a workday of at least eight (8) hours.

~~(b) Proration. -- Less than an eight (8) hour day shall be computed on a prorated basis of twelve and five-tenths cents (12.5¢) per hour.~~

~~(c) Exemptions. -- No credit shall be allowed when an employee is under bona fide medical care related to dietary problems.~~

~~(d) No credit while employee is on leave. -- No credit shall be allowed while employees are on leave (sick, annual or holiday) when such leave is on a compensatory basis.~~

12.2. Meal credit.

12.2.1. When an employer makes meals available to an employee, if an employee completes a work day of at least eight (8) hours worked and if the employee eats an available meal, an employer may deduct four dollars ($4.00) per day as a meal credit from the employee's wages.

12.2.2. If an employee completes a workday of less than an eight (8) hours but eats an available meal, an employer may deduct fifty cents ($.50) per hour as a meal credit from the employee's wages.

12.2.3. An employer shall not deduct a meal credit if an employee does not eat a meal.

~~10.3. Living quarters. -- When an apartment is a compulsory condition of employment, employer must provide adequate living quarters, including heat, light and water and space for cooking, sleeping and toilet purposes for which the employer will receive credit not to exceed one third (1/3) of the minimum wage.~~

12.3. Living quarters credit.

12.3.1. When living quarters are a compulsory condition of employment, an employer shall provide adequate and habitable living quarters, which includes heat, light, toilet facilities, hot and cold running potable water, and space for cooking, sleeping, and bathing.

12.3.2. The employer may deduct thirty-three per cent (33%) of the hourly minimum wage from the employee's wages as a living quarters credit.

~~10.4. Uniforms. -- The cost of uniforms and their laundering, where the nature of the business requires the employee to wear a uniform, is found to be primarily for the benefit or convenience of the employer, and, therefore, this cost will not be recognized as reasonable and may not be included as a credit in computing wages.~~

12.4. Uniforms. When an employer requires an employee to wear a uniform, the employer may not take a credit against the employee's wages for the cost of the uniforms or their laundering.

§42-8-~~12~~ 13. ~~Collection of wages due through action by the Commissioner~~ Employee Claim for Unpaid Wages or Other Violation of the Act; Investigation by the Division.

~~12.1. Action by the Commissioner. -- Pursuant to W. Va. Code §21-5C-8 (b), the Commissioner or his or her designated representative, upon the request of any person whose wages have not been paid in accordance with the law, may bring any legal action necessary to collect such claim.~~

~~12.2. Request by claimant to be in writing. -- Request for the assistance of the Commissioner shall be made upon forms as provided by the Commissioner and executed by the claimant before an officer authorized by the laws of this State to take acknowledgements.~~

13.1. An employee or former employee who reasonably believes that he or she has been paid in violation of any provision of the Act or this rule, and who wants the Division to investigate his or her claim, may submit a request for assistance to the Division, and provide the Division with the necessary information and documents in support of such claim, including the following:

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

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

13.1.3. The claimant shall provide the amount of wages he or she reasonably believes the employer owes and why, or a statement explaining the employer's alleged violation;

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

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

13.1.6. 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; and

13.1.7. 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.

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

13.3. 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.

13.4. The claimant may request a Director's review, and subject to the Director's approval, the request may be granted.

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

13.6. 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.

13.6.1. 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.

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

13.7. 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 §§ 21-5C-6, 29A-5-1, *et seq.* and 42 CSR 20.

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

13.7.2. 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.

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

§42-8-14. Claimant's Responsibility to Enforce the Commissioner's Final Order for Wages Owed.

14.1. 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.

14.2. The claimant shall be responsible for seeking enforcement of the Commissioner's final order, by filing a petition in the Circuit Court or Magistrate Court of Kanawha County, or other county as permitted by statute.

~~**§42-8-13. Amendments to regulations.**~~

~~13.1. Written petition to commissioner. -- Any person wishing a revision of any of these regulations may submit to the Commissioner a written petition setting forth the changes desired and the reasons for proposing them.~~

~~13.2. Hearing on petition. -- The Commissioner, upon inspection of the petition and believing that the grounds are reasonable, may schedule a hearing with due notice to interested persons, or make other provisions for affording interested persons an opportunity to present data, views and arguments relating to any proposed changes.~~

COMMENTS RECEIVED FROM
THE WEST VIRGINIA CHAMBER OF COMMERCE (the "Chamber")
and
THE DIVISION OF LABOR'S (the "Division") RESPONSES

1. Comments by the Chamber

"¶ A. Applicable Standards

West Virginia Code 21-5C-6(a) initially empowered the DOL to 'promulgate emergency rules prior to January 1, 2015, to implement and administer the amendments made to this article in 2014.' As such, while the DOL is plainly empowered to and charged with the promulgation of rules to the Legislature, that delegation of authority was, at a minimum, prioritized by the Legislature to focus the Division's efforts on and pertaining to 'the amendments' to the Act present in H.B. 201 which were passed on May 21, 2014.

Further, to be enforceable, the rules must not exceed the scope of the law authorizing or directing the promulgation thereof. W.Va. Code 29A-3-15a (b)(1) and W.Va. Code §29A-3-15b (b)(1)."

See also Comments "¶ B. Portions of the Proposed Rule Plainly Exceed or Are Inconsistent With the Law Authorizing Their Promulgation . . .

1. The Scope of Proposed Rulemaking Exceeds the Authority Granted In the 2014 Amendments."

Response to ¶ A. by the Division

The Division has explicit statutory authority to revise the rule. "**It shall be the duty of the commissioner to . . . promulgate such rules and regulations, in accordance with chapter twenty-nine-a of the Code of West Virginia, 1931, as amended, as shall be needful to give effect to the provisions of this article.**" W. Va. Code § 21-5C-6(a).

While the Division agrees with the Chamber that it is both permitted and required to promulgate legislative rules, the Division disagrees with the Chamber's assertion that the legislative delegation of rule-making authority was "prioritized" to focus on the 2014 amendments to the exclusion of all other provisions of the statute. There is nothing in the statute that requires or suggests prioritizing the scope of the Division's rule-making authority.

Since at least 1975, the Legislature has expressly cloaked the Division with broad rule-making authority concerning the provisions of the entire statute. The 2014 amendment to W. Va. Code § 21-5C-6(a) did not in any way modify or prioritize the Division's rule-making authority, but

instead additionally authorized the Division to promulgate emergency rules (1) to implement the 2014 amendments to the statute and (2) to revise state standards to conform with federal law concerning employee exemptions if the Division made a finding that a conflict exists between state and federal standards.

The Chamber comments that the rule must not exceed the scope of the Division's authority regarding rule-making, citing W.Va. Code §§29A-3-15a (b)(1) and §29A-3-15b (b)(1).

These provisions in the Rule-Making Act of the State Administrative Procedures Act concern the disapproval of emergency rules by the Secretary of State and the Attorney General respectively.

The proposed rule filed for public comment on June 26, 2015 was neither intended to be nor filed as an emergency rule. While the proposed rule does include provisions concerning the 2014 amendments to the statute, its scope covers the entire statute as expressly permitted by the Division's general rule-making authority in W. Va. Code § 21-5C-6(a).

2. Comments by the Chamber

" ¶ B. Portions of the Proposed Rule Plainly Exceed or Are Inconsistent With the Law Authorizing Their Promulgation . . .

1. The Scope of Proposed Rulemaking Exceeds the Authority Granted In the 2014 Amendments."

The Chamber gives 14 examples (*see* B.1.a. through n.) of how the Division has attempted to "increase [its] regulatory authority and jurisdiction" in the proposed rule because the examples "do not appear to be directed by the 2014 Amendments. . ."

Response to ¶ B by the Division

These comments by the Chamber continue to assert that the Division is only authorized to include the 2014 amendments in its proposed rule.

The Division disagrees that its rule-making authority is limited to the 2014 amendments, and reasserts its response to Comment 1 above. Moreover, while the Division agrees with the Chamber that its examples do not have their basis in the 2014 amendments, most of the examples are either explicitly authorized by statute or are in the current 1982 legislative rule.

Since the Chamber repeats many examples it cites in ¶B ("Portions of the Proposed Rule Plainly Exceed or Are Inconsistent With the Law Authorizing Their Promulgation") in its ¶ C ("Conflicts and Inconsistencies with the Fair Labor Standards Act (FLSA)), the Division has provided more detailed responses under ¶ C.

a. Referring to 42-8-3.15 in the proposed rule, as seeking to define the term "engaged to wait." The current 1982 legislative rule has provisions for both "waiting time," which includes time an

employee is "engaged to wait" and "on-call time." *See* 42-8-9.7 and 42-8-9.10 in the current rule.

b. Referring to 42-8-3.21 in the proposed rule, as seeking to define the term "hours worked." The current 1982 legislative rule includes provisions for "non-work time," "work time," "general work," "waiting time," and "on-call time." *See* 42-8-9.2, 42-8-9.3, 42-8-9.4, 42-8-9.7 and 42-8-9.10 in the current rule.

c. Referring to 42-8-3.27 in the proposed rule, as seeking to define "non-work time." The current 1982 legislative rule includes provisions for "non-work time" and "on-call time." *See* 42-8-9.2 and 42-8-9.10 in the current rule.

d. Referring to 42-8-3.28 in the proposed rule, as seeking to define "on-call time." The current 1982 legislative rule includes provisions for "on-call time." *See* 42-8-9.10 in the current rule.

e. Referring to 42-8-3.32 in the proposed rule, as seeking to define "part-time basis." The statute includes a provision for an exemption for a student who is employed on a part-time basis. *See* W. Va. Code § 21-5C-1(f)(14). In addition, the current 1982 legislative rule includes provisions for a "student worker" who works 24 hours or less. *See* 42-8-8.15 in the current rule.

f. Referring to 42-8-4.4 in the proposed rule, as seeking to require an employer to post a minimum wage poster. The current 1982 legislative rule includes provisions for the "posting of notices . . . in conspicuous places." *See* 42-8-4.4 in the current rule. The poster is drafted by and supplied by the Division and is a brief abstract of the statute. The Division has supplied a minimum wage abstract poster to employers since at least 1981. In consideration of the Chamber's comments, the Division has amended the proposed rule to require the Division to develop the abstract and make it available on the Division's website or provide it free of charge upon request.

g. Referring to 42-8-5.1 in the proposed rule, as objecting to the Division's authority to determine whether an employer is subject to the minimum wage provisions of the statute on a "case-by-case" basis. The Division is clearly charged with administering and enforcing the provisions of the Act. *See* W. Va. Code § 21-5C-6. Whether an employer is subject to the minimum wage provisions of the statute is a fact-based analysis rooted firmly in the statutory definition of employer in W. Va. Code § 21-5C-1(e). In consideration of the Chamber's comments, the Division has amended the proposed rule to include consideration of past decisions under state and federal law

h. Referring to 42-8-5.2.2 in the proposed rule, as appearing to create a "legal fiction" for employees working at an employer's temporary location. The statutory definition of employer in W. Va. Code § 21-5C-1(e) includes an employer who employs "during any calendar week . . . six or more employees . . . in any one separate, distinct and permanent location or business establishment. . ." In consideration of the Chamber's comments, the Division has amended the proposed rule by adding a provision to 5.1. that states that the Division will consider past decisions under state and federal law when determining whether an employer is subject to the

Act. In addition, the Division has rewritten 5.2 to track the statutory language of the definition of employer.

i. Referring to 42-8-10.2 in the proposed rule, as expanding the Division's right to inspect and examine employee records. W. Va. Code § 21-5C-6(b) authorizes the Commissioner to examine payroll records relating to employees' wages and hours of employment. The proposed rule simply provides that the Division can inspect employee records to ensure compliance with the statute and the rule. The current legislative rule tracks the statutory language. *See* 42-8-7.2 in the current rule.

j. Referring to 42-8-10.3 in the proposed rule, as expanding the Division's right to inspect and examine employee records by requiring an employer to make records available within 72 business hours. The proposed rule is the same as the current legislative rule, but broken into 2 rules in the proposed rule (i.e., 42-8-10.1 and 42-8-10.3). *See* 42-8-7.1 in the current rule.

k. Referring to 42-8-11.2 in the proposed rule, as seeking to regulate the practice known as "donning" and "doffing." The statute authorizes the Division to define exceptions to "donning" and "doffing" by rule. *See* W. Va. Code §21-5C-1(h). In addition, the current legislative rule contains provisions concerning "preparation to work" and "preliminary and postliminary activity." *See* 42-8-9.5 and 42-8-9.6. The language in the proposed rule essentially restates the provisions in the current legislative rule.

l. Referring to 42-8-11.3 in the proposed rule, as seeking to address the compensability of break time and meal time. The current legislative rule contains provisions for "rest periods" and "mealtime." *See* 42-8-9.8 and 42-8-9.9. The provisions in the proposed rule are consistent with federal rules.

m. Referring to 42-8-11.4 through 11.9 in the proposed rule, as seeking to define the compensability of employee on-call time, employee attendance at training sessions or meetings, and employees on duty for extended periods of time. The current legislative rule contains provisions for "on-call time" and "employees on duty for 24 hours or more." *See* 42-8-9.10 and 42-8-9.11.

n. Referring to 42-8-13.7 in the proposed rule, as seeking to define the Division's administrative procedures according to the state Administrative Procedures Act. W. Va. Code § 21-5C-6(f) authorizes the Commissioner to enforce and administer the statute "in accordance with chapter twenty-nine-a of this code." The Division has historically relied on the provisions of the Contested Cases Act, W. Va. Code §29A-5-1, *et seq.* in resolving employee claims when the employer contests the findings of the Division's investigation. The provisions in the proposed rule regarding the Division's investigative process was intended to establish general guidelines for both an employer and an employee during an investigation into a wage and hour claim. The Division disagrees with the establishing the time frames as suggested by the Chamber.

3. Comments by the Chamber

"¶ C. Conflicts and Inconsistencies with the Fair Labor Standards Act (FLSA) . . .

2. Specific Provisions" - In Sections 3, 6, 8, 9, and 11 of the proposed rule.

Response to ¶ C by the Division

a. Rule 3.2, proposed definition of "Agriculture." The Chamber comments that the federal statutory definition of agriculture must be used. In consideration of the Chamber's objection to the definition in the proposed rule, the Division has amended the proposed rule by inserting the language from the definition of agriculture in 29 U.S.C. §203(f).

b. Rule 3.3, proposed definition of "Bona fide sleep period." The Chamber suggests modifying the definition in accordance with the federal rule set forth in 29 CFR §§785.22(a) and (b). In consideration of the Chamber's suggestions and in order to conform to the federal standards, the Division has amended the definition and added a provision in 42-8-11.5.4.

c. Rule 3.5, proposed definition of "Commission." The Chamber comments that the use of the term "fee" in the proposed definition is confusing. The Chamber suggests a modified definition, which the Division has largely incorporated.

d. Rule 3.9, proposed definition of "Directly related to management or general business operations." The Chamber suggest modifying the definition in accordance with the federal rule set forth at 29 CFR §541.201. In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition.

e. Rule 3.13, proposed definition of "Discretion and independent judgment." The Chamber suggests modifying the definition in accordance with the federal rule set forth at 29 CFR §541.202(b). In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition.

f. Rule 3.15, proposed definition of "Engaged to wait." The Chamber suggests modifying the definition in accordance with the federal rule set forth at 29 CFR §785.15. In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition.

g. Rule 3.21, proposed definition of "Hours worked." The Chamber objects to the proposed definition on the grounds that it is inconsistent with the statutory definition as W. Va. Code §21-5C-1(h), especially concerning time spent changing clothes, washing at the beginning or end of a shift, or similar activities. The statutory definition of "hours worked" permits the Commissioner to define "by rules and regulations" exceptions

concerning preliminary and postliminary activities. Proposed rule 11.2 addresses specific instances when preliminary and postliminary activities are compensable time, and is essentially the same as 42-8-9.6 in the current legislative rule. For these reasons, the Division is not deleting the rule as suggested by the Chamber.

h. Rule 3.22, proposed definition of "Making sales." The Chamber suggests modifying the definition in accordance with the definition in 29 U.S.C. §203(k) and 29 CFR 541.501. In consideration of the Chamber's suggestions and in order to conform to the federal standards, the Division has amended the definition.

i. Rule 3.23, proposed definition of "Management." The Chamber comments that the proposed definition "closely tracks" the federal definition found in 29 CFR §541.102, but has some "unnecessary omissions," and suggests replacing the proposed definition with the FLSA definition. The Division made some minor revisions to the FLSA definition and believes that any omissions do not affect the meaning of the proposed definition. For this reason, the Division is not making any amendments to the proposed definition.

j. Rule 3.26, proposed definition of "Non-service employee." The typo identified by the Chamber has been corrected.

k. Rule 3.27, proposed definition of "Non-work time." The Chamber comments that the proposed definition is "unnecessary and confusing," and suggests deleting it. The Division has amended the definition by eliminating the 30 minute provision.

l. Rule 3.28, proposed definition of "On-call time." The Chamber objects to the proposed definition because it "deviates from the federal definition and greatly expands it." The Chamber suggests modifying the proposed definition to mirror the federal definition in 29 CFR §785.17. In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition.

m. Rule 3.32, proposed definition of "Part-time basis." The Chamber objects to the proposed definition as too broad and on the grounds that the Division has no authority for it. The Chamber takes issue with the concepts of full-time employment and part-time employment. The Division's proposed rule concerns only part-time employment for a student worker, not for all workers. The Division has modified the proposed definition, clarifying that it applies only to a "student worker." The current legislative rule at 42-8-8.15 provides that a student worker is an "individual employed twenty-four (24) hours or less who is a student in any recognized school or college." In addition, 29 CFR §519.2 defines a "full-time student" as one "who receives primarily daytime instruction at the physical location of a bona fide educational institution, in accordance with the institution's accepted definition of a full-time student."

n. Rule 3.37, proposed definition of "Salary." The Chamber objects to including the word "fixed" in the proposed definition, and suggests the language in 29 CFR §541.602.

In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition to eliminate the objectionable word from the proposed definition.

o. Rule 3.41, proposed definition of "Volunteer." The Chamber suggests adding "public agencies" to the list of permissible organizations for whom an individual can volunteer, and clarifying certain language similar that found in 29 CFR §553.103 defining "same type of services." In consideration of the Chamber's suggestions and in order to conform to the federal standards, the Division has amended the definition.

p. Rules 6.2 and 6.3, concerning the proposed provisions on exempt employers. The Chamber objects to the phrases "covered by" in both proposed rules and suggests using "subject to" instead. The Division has amended the proposed definition as suggested. The Chamber also suggests revising proposed rule 6.3 to include "covered enterprise" in its determination process. The Division agrees with the Chamber's suggestion and has amended the proposed rule.

q. Rule 8.6.1, concerning the proposed outside sales employee exemption. The typo identified by the Chamber has been corrected.

r. Rule 8.8.1, concerning the proposed learned professional employee exemption. The Chamber suggests qualifying the salary basis requirement teachers and practitioners of law or medicine from the proposed rule, citing 29 CFR §541.303 and §541.304. The Division agrees with the Chamber's suggestion and has amended the proposed rule.

s. Rule 8.10.2, concerning the proposed computer professional employee exemption. The typo identified by the Chamber has been corrected.

t. Rule 8.11.2, concerning the proposed executive employee exemption. The Chamber suggests adding certain language to the proposed rule, consistent with 29 CFR §541.100(a)(3). In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition as suggested.

u. Rule 8.11.4, concerning the proposed executive employee exemption. The Chamber suggests a modification to the proposed rule, consistent with 29 CFR §541.100(a), by substituting the word "or" for "and." In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition as suggested.

v. Rule 8.12.3, concerning the proposed administrative employee exemption. The Chamber suggests a modification to the proposed rule, consistent with 29 CFR §541.200, by eliminating the phrase "the employer's." In consideration of the Chamber's suggestion and in order to conform to the federal standards, the Division has amended the definition as suggested.

w. Rule 8.17, concerning the proposed agricultural employee exemption. The Chamber suggests restoring the definition of agriculture as defined in the FLSA. The Division has amended the proposed definition of agriculture in 42-8-3.2 to conform to the FLSA definition. The Division does not believe it is necessary to amend proposed rule 8.17 since the proposed definition of agriculture has been amended.

x. Rule 8.20, concerning the proposed student worker exemption. The Chamber comments that there is no authority to require that a student be a "full-time" student. *See* response to comment m above. The current legislative rule at 42-8-8.15 provides that a student worker is an "individual employed twenty-four (24) hours or less who is a student in any recognized school or college." In addition, the Division relies on the federal rule, 29 CFR §519.2, which defines a "full-time student" as one "who receives primarily daytime instruction at the physical location of a bona fide educational institution, in accordance with the institution's accepted definition of a full-time student."

y. Rule 9.5, concerning the proposed furnishing of paystubs provisions. The Chamber suggests that the proposed rule is insufficient to address direct deposit of wages and electronic paystubs, and suggests adding language to address these circumstances. The Division has amended the proposed rule to incorporate the Chamber's suggestion.

z. Rule 11.1, concerning the proposed compensable time provisions. The typo identified by the Chamber has been corrected.

aa. Rule 11.2, concerning the proposed preliminary and postliminary activities provisions. The Chamber comments that the proposed rule "directly contradicts state law." The statutory definition of "hours worked" permits the Commissioner to define "by rules and regulations" exceptions concerning preliminary and postliminary activities. Proposed rule 11.2 addresses specific instances when preliminary and postliminary activities are compensable time, and is essentially the same as 42-8-9.6 in the current legislative rule. The Division is not deleting the entire rule as suggested by the Chamber. Instead, the rule has been amended and specifies that certain activities must be compensated when required by the employer for safety or production reasons. Preliminary and postliminary activities arise, for example, when an employee must change into a hazmat suit or other protective gear to perform his or her work.

bb. Rule 11.5.3, concerning the proposed interruptions of sleep provisions. The Chamber objects to the proposed rule because it is inconsistent with federal rules. The Division has revised the proposed rule in accordance with federal rules.

WEST VIRGINIA CHAMBER

July 27, 2015

VIA REGULAR MAIL & EMAIL
Mr. John R. Junkins, Acting Commissioner
West Virginia Division of Labor
State Capitol Complex
Building 6, Room B-749
Charleston, WV 25305

RE: Notice of Emergency Rule, W. Va. Code §21-5C-6(a)
Minimum Wages and Maximum Hours Standards Regulations

Dear Mr. Junkins:

Thank you for the opportunity to submit the following comments to the Division of Labor ("DOL") to consider in preparing a final proposal to our Legislature to implement Article 5C of the West Virginia Code dealing with "Minimum Wage and Maximum Hours Standards for Employees". W.Va. Code §23-5C-1, *et seq.* ("Act").

The West Virginia Chamber of Commerce represents businesses in every county in West Virginia, including many small and/or developing businesses. These businesses employ more than half of West Virginia's workforce and, collectively, constitute a major portion of the engine that drives our state's economy. In order to facilitate the continued operation and expansion of these businesses and to attract new businesses to our state, the West Virginia Chamber consistently advocates for public policies that improve West Virginia's jobs climate.

Our members have long recognized that having a wage and hour system that is fair and predictable in its outcome benefits both employers and employees. All of the employers and employees of our state are impacted by the Act and the corresponding proposed rules. Our members want to assist the DOL in achieving the legislative intent of ensuring employees are compensated in a fair manner for the labor they provide, and to ensure these proposed rules are articulated in a clear manner and consistent with the statutory revisions to the Act proscribed by the Legislature and signed by the Governor. We are concerned that the proposed regulations prepared by the DOL are likely to confuse many employers, including the vast number of small businesses that likely do not have sophisticated payroll departments and that portions of the proposed regulations may be unenforceable as they exceed the scope of the statutory revisions made by the Legislature.

On behalf of our members, we urge the DOL to consider the following:

A. Applicable Standards

West Virginia Code 21-5C-6(a) initially empowered the DOL to "promulgate emergency rules prior to January 1, 2015, to implement and administer the amendments made to this article in 2014." As such, while the DOL is plainly empowered to and charged with the promulgation of rules to the Legislature, that delegation of authority was, at a minimum, prioritized by the Legislature to focus the Division's efforts on and pertaining to "the amendments" to the Act present in H.B. 201 which were passed on May 21, 2014.

Further, to be enforceable, the rules must not exceed the scope of the law authorizing or directing the promulgation thereof. W.Va. Code 29A-3-15a(b)(1) and W.Va. Code §29A-3-15b(b)(1).

B. Portions of the Proposed Rule Plainly Exceed or Are Inconsistent With the Law Authorizing Their Promulgation

The DOL's initial rules were filed on November 19, 2014 as Emergency rules. Those proposed rules were withdrawn and the current draft was issued June 26, 2015 as proposed legislative rules. Interested parties have been advised that they may submit comments regarding the proposed rules by July 27, 2015. We have been able to identify the following concerns at this time.

1. The Scope of Proposed Rulemaking Exceeds the Authority Granted In the 2014 Amendments

The sole revisions to Article 5C of Chapter 21 of the West Virginia Code governing Minimum Wage and Maximum Hours Standards made during the 2014 regular session were to increase the minimum wage (and training wage), expand the scope of employers to whom the Statute applies and change the tip credit available to employers. Thus, the original 2014 Amendments made by HB 4283 were to 21-5C-1 (definition of employer), 21-5C-2 (minimum wage) and 21-5C-4 (credits).

In the second special session, HB 201 was passed in an effort to accommodate the Bill's potential conflict with federal law. However, more language was included in HB 201 than simply the revision to the definition of Employer in 21-5C-1(e) to restore the exemption for FLSA-covered employees for overtime purposes. In addition to what appears to be purely technical changes in 21-5C-1 and 21-5C-2, HB 201 also delayed the applicability of the change in the tip credit (21-5C-4) and of course added new language to 21-5C-6 regarding emergency rulemaking.

The two new sentences in 21-5C-6 are as follows:

(1) ***"The commissioner is authorized to promulgate emergency rules prior to January 1, 2015, to implement and administer the amendments made to this article in 2014."***

As noted above, the only substantive amendments to the Statute in 2014 related to the change in the definition of employer, change in the tip credit and increase in the minimum wage and training wages. Thus, to the extent that the proposed rule addresses issues including, but not limited to, establishment of a workweek, determination of compensable time (breaks and meal time, on call time, 24 hour shifts/sleep periods, engaged to wait, training sessions, travel time and rounding), trainees and volunteers and full-time students and many more, it is far outside the 2014 Amendments.

(2) **"If the commissioner makes a finding that a conflict exists between state and federal standards defining employee exemptions, the commissioner is further authorized to promulgate emergency rules prior to January 1, 2015 for the purpose of revising the state standards to conform with federal law."**

It is important to note that this authorizing provision is limited to employee exemptions. The proposed rule goes far beyond conforming state standards regarding employee exemptions with federal law. West Virginia Code §21-5C-6(a) specifically states "(i)f the commissioner makes a finding that a conflict exists between state and federal standards **defining employee exceptions**, the commissioner is further authorized to promulgate emergency rules prior to January 1, 2015, for the purpose of revising state standards to conform with federal law." Id. Plainly, the Legislature was directing the commissioner to create regulations "defining employee exceptions" to conform with the Federal Act as that should be the standard under the West Virginia regulation. The Legislature did not direct that the commissioner had authority or a directive to conform **all** of the extant federal Fair Labor Standards Act regulations into the West Virginia regulation. As such, it appears that the Division is undertaking a much broader regulatory effort under its general authority in W.Va. Code §21-5C-6(a) as limited by W.Va. Code §29A-1-1 *et seq.* to dramatically expand its regulatory authority and jurisdiction without identification of a justifying need for such expansion. The West Virginia Chamber is anxious to support the efforts of the Division, as determined by the Legislature, to harmonize the state law with federal law as originally directed with regard to employee exemptions. However, the Chamber is not supportive of the Division's effort to create a significant increase in regulation and jurisdiction which goes beyond the legislative directive in the 2014 Amendments, as evidenced by the proposed rule. The following portions of the West Virginia proposed regulations do not appear to be directed by the 2014 Amendments that are identified, in part, as authority for the regulation, but rather, evidence an effort to increase regulatory authority and jurisdiction.

a. Section 42-8-3.15 – This section seeks to define what the term "engaged to wait" means for purposes of defining an employee's entitlement to "on-call time" which

is a type of compensation that was not discussed or acted upon in the relevant 2014 Amendments.

b. Section 42-8-3.21 – This section seeks to define "hours worked" which is relevant to the definition of on-call time and entitlement to compensation for on-call time which is treated in other portions of the proposed regulation and is not supported by the 2014 Amendments.

c. Section 42-8-3.27 – This section seeks to define "non-work time" in an effort to define the parameters of entitlement to on-call compensation which is not the subject of the 2014 Amendments.

d. Section 42-8-3.28 – This section seeks to define "on-call time" in an effort to define the parameters of an employee's entitlement to compensation for on-call time which is not the subject of the 2014 Amendments.

e. Section 42-8-3.32 – This section seeks to define "part-time basis" as employment of 24 hours or less in a work week which is not readily apparent to be the subject of the 2014 Amendments.

f. Section 42-8-3.4.4 – This section creates a duty to require Employers to keep posted in a place accessible to all employees the minimum wage poster prepared and provided by the Commissioner. Beyond the fact that this portion of the regulation was not enabled by the 2014 Amendments, there is no suggested language recited which would be present in the poster that this regulation would require Employers to post, and thereby Employers are unable to make an informed decision regarding the propriety of the regulation as they do not know the content of the poster they would be required to post.

g. Section 42-8-5.1 – This section enables the DOL to determine an Employer's obligation with regard to the minimum wage provisions of the Act on a "case-by-case", or, *ad-hoc*, basis. This regulation appears to absolve the DOL of any encouragement to follow the principles of *stare decisis* in resolving adversarial claims under the statute and are not the subject of the 2014 Amendments.

h. Section 42-8-5.2.2 – This section appears to create a legal fiction that if an Employer has employees working at a location that is temporary or of limited duration such as a construction site the employee shall be treated as working at the Employer's permanent location. This definition appears to adjust through legal fiction the parameters of jurisdiction of the DOL as defined by the Act subject to the aforementioned legal fiction. This provision appears to be at odds both with the intent and letter of the 2014 Amendments and the Act itself.

i. Section 42-8-10.2 – This section would expand the rights of the DOL to inspect and examine records maintained by the Employer. The current regulation entitles the DOL to inspect only those documents directly relating to wages and

hours of employment. The proposed regulation would strike that limitation and require that all employee records be open for inspection at reasonable times to the DOL. This expansion of the duty of an Employer is not the subject of the 2014 Amendments.

j. Section 42-8-10.3 – This section seeks to expand the DOL's rights to compel inspection of employee records maintained by an Employer by requiring an Employer to make all employee records available to the DOL within 72 business hours of a request for such access. Beyond the fact that there is no statutory authority for requiring the production of such documents in the referenced authority, the timeframe articulated by the DOL (72 business hours) is unreasonable and somewhat ambiguous in that the term "business hours" is not defined by the regulation.

k. Section 42-8-11.2 – This section seeks to regulate the compensability of a practice known as "donning" and "doffing". There is no statutory authority in the 2014 Amendments that address the compensability of donning or doffing in the regulation.

l. Section 42-8-9-11.3.1-3 – These sections of the regulation seek to address the compensability of break time and meals and they are beyond the purview of the 2014 Amendments listed as authority for the regulation.

m. Section 42-8-11.4.1 thru 11.9.2 – These sections of the proposed regulation seek to define the compensability of employee on-call time, compensation for employee attendance at training sessions or meetings and compensability of employees on duty for extended periods of time. There is no statutory authority in the 2014 Amendments for the imposition of regulatory language in the 2014 Amendments.

n. Section 42-8-13.7.1-3 – This portion of the regulation seeks to define that the administrative procedures of the DOL are subject to the West Virginia Administrative Procedure Act. To the extent that this language is inconsistent with the text of the Administrative Procedure Act it is unjustifiable as that statute plainly has jurisdiction over administrative proceedings within the DOL. Moreover, in subsequent language in Section 42-8-13.5, the proposed regulation states that the Employer shall be entitled to a status conference upon request to the DOL in an apparent effort to address due process rights of an Employer within the administrative procedure of the DOL. (See also, Section 13.6.1 and Section 13.7.2 requiring service by certified mail or personal service). The West Virginia Chamber of Commerce would urge the DOL to consider when modifying the proposed regulation for ultimate submission to the Legislature more meaningful due process rights for Employers who are involved in administrative litigation with the DOL such as: (1) that the Employer be entitled to notice of and copies of all claims made for unpaid wages within 72 hours of their filing; and (2) that the Employer be entitled in the litigation process to review all documents

assembled by the State in its investigation and be served with the same at least three (3) weeks prior to a requirement that the Employer provide or file a statement of position regarding the claim which should be an opportunity the Employer is provided as of right under the regulation.

Even if the authority cited (the 2014 Amendments) did support the proposed regulations referenced above, and even with regard to the portions of the proposed regulations which appropriately seek to define employee exemptions as consistent with federal law, the proposed regulations would still likely engender confusion among the members of the Chamber seeking to comply with a final regulation as explained below.

C. Conflicts and Inconsistencies with the Fair Labor Standards Act (FLSA)

1. General Comments

West Virginia's Minimum Wage and Maximum Hours Standards for Employees law, W.Va. Code § 21-5C-1, *et seq.* (hereafter "MWMHS") is patterned after the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). The MWMHS borrows heavily from the FLSA in both form and substance. Historically, the West Virginia Division of Labor's ("Division") regulations have been drafted to be consistent with then-existing FLSA regulations and interpretive guidance. We certainly support the Division's goal of eliminating as much confusion and disparity as possible between the state and federal rules. Where the MWMHS regulations are identical to the federal regulations, employers can draw upon a large body of federal case law, regulations and agency opinions for guidance. The Chamber maintains the position that the state regulations should not deviate from the federal regulations unless the MWMHS requires such deviation. However, as described below, were the proposed rule approved by the Legislature, the goal we applaud above would be jeopardized. The content of the proposed regulations are inconsistent in several ways from the Federal Act and its regulations.

2. Specific Provisions

SECTION 3

a. Rule 3.2 (Definition of "Agriculture")
Proposed Rule 3.2 provides a new definition of "agriculture" which is not consistent with the MWHMS. The term "agriculture" appears in only one provision of the MWMHS. Section 21-5C-1(f) provides that "(f) 'Employee' includes any individual employed by an employer but shall not include: ... (11) any individual employed in agriculture **as the word agriculture is defined in the Fair Labor Standards Act of 1938, as amended[.]**" Therefore, the MWMHS requires that the federal statutory definition of "agriculture" be used. The proposed rule creates a new definition that is not the same as the FLSA definition. *Compare* 42 C.S.R. 8, § 3.2 *with* 29 U.S.C. § 203(f). Therefore proposed rule 3.2 should be deleted.

b. Rule 3.3 (Definition of "Bona fide sleep period") (W. Va. C.S.R. § 42-8-3.3):
The proposed rule defines "bona fide sleep period" for an employee who is on duty for

24 or more consecutive hours as a time period of 8 hours of uninterrupted sleep in adequate sleeping quarters provided by the employer. The use of the word **"uninterrupted"** makes the definition much more rigid when compared to the federal regulatory definition.

The federal Wage & Hour Division does recognize that there may be some interruptions from time to time during this 8 hour sleep period. That is why it essentially defines "bona fide sleep period" as an 8 hour period where the employee **"can usually enjoy an uninterrupted night's sleep."** (See 29 CFR § 785.22(a)) A reduction of hours is not permitted unless the employee gets at least 5 hours of sleep. (See 29 CFR § 785.22(b)) Also, current West Virginia regulation uses the following language: "can usually enjoy an uninterrupted night's sleep." (See W. Va. CSR § 42-8-9.11(a)) The entire period may be counted as hours worked if the employee cannot get a reasonable night's sleep. (See W. Va. CSR § 42-8-9.11(b)). Therefore, to be consisted with federal regulation and current West Virginia regulation, the Division should delete the word "uninterrupted" and follow the federal practice as set forth in 29 CFR § 785.22(b).

c. Rule 3.5 (Definition of "Commission")

Proposed Rule 3.5 defines "commission" as "a **fee** paid by an employer to an employee for transacting the employer's business or for performing a service for the employer." (emphasis added). The term "fee" in the definition is confusing. Payment on a "fee basis" typically refers to an agreed amount for a single job regardless of the time required to complete the job. (*See* 29 C.F.R. § 541.605 and Proposed Rule 3.17) Commissions, on the other hand, are typically paid in addition to other compensation. A sales commission, for example, is a sum of money paid to an employee upon completion of a task (not an entire job), usually selling a certain amount of goods or services. Employers often use sales commissions as incentives to increase worker productivity, and those commissions are often paid in addition to a base wage or salary. A better definition of "commission" would be "a sum of money paid to an employee upon completion of a task, such as the selling of a certain amount of goods or services." Such a definition would avoid confusion with the term "fee basis," and would prevent any fee paid to an employee for transacting business to be considered a "commission."

d. Rule 3.9 (Definition of "Directly related to management or general business operations").

The phrase "directly related to management or general business operations" is taken verbatim from the FLSA. *See* 29 C.F.R. § 541.201, *et seq.* However, the proposed rule defining that phrase deviates unnecessarily from the FLSA definition. First, the definition states that "'Directly related to the management or general business operations' means **directly assisting** with or overseeing the running or servicing of an employer's business...." (Proposed Rule 3.9) (emphasis added). However, the federal regulation states that "To meet this requirement, an employee must perform work directly **related to** assisting with the running or servicing of the business...." 29 C.F.R. § 541.201(a). "Directly assisting" is not the same as performing work "directly related to assisting." The proposed definition is unnecessarily narrower than the federal definition.

The proposed definition further deviates from the federal regulation by omitting several aspects of the "employer's business" that are included in the federal regulation, including tax, accounting, budgeting, auditing, insurance, advertising, marketing, employee benefits, and internet administration. All of these areas are parts of a typical business in this state. The MWMHS does not require that these areas be omitted, and their omission could be interpreted as meaningful and intentional. We therefore recommend that Rule 3.9 be modified to match the language of 29 C.F.R. § 541.201(b).

e. 3.13 (Definition of "Discretion and independent judgment")

The phrase "discretion and independent judgment" is also taken directly from the FLSA. *See* 29 C.F.R. § 541.202, *et seq.* However, the proposed rule that defines the phrase again deviates unnecessarily from the FLSA definition. For example, in the proposed definition, after the phrase "perform work that affects business operations to a substantial degree," the following additional phrase is omitted: "even if the employee's assignments are related to operation of a particular segment of the business." *See* 29 U.S.C. § 541.202(b). The omission of this phrase narrows the scope of the definition of "discretion and independent judgment."

The proposed definition also omits all of the following additional examples provided in the federal regulation:

> whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b). Again, nothing in the MWMHS requires that these areas be omitted, and their omission could be interpreted as meaningful and intentional. We see no good reason for removing these additional provisions. We therefore recommend that Rule 3.13 be modified to match 29 C.F.R. § 541.202(b).

f. Rule 3.15 (Definition of "Engaged to wait")

The phrase "engaged to wait" is taken from the FLSA interpretive rules. *See* 29 C.F.R. § 785.15. The Division's proposed definition of "engaged to wait" is "the time an employer suffers, permits or requires an employee to remain at work and under the employer's direction and control, even if the employee is not performing work-related tasks." (Proposed Rule 3.15) However, this definition omits an important aspect of the federal interpretive rule, which provides numerous examples, then explains that in all of the cases, a person is "engaged to wait" because "waiting is an integral part of the job." 29 C.F.R. § 785.15. Therefore, to maintain consistency with the federal interpretation, we

recommend that the following sentence be added to the definition: "An employee is engaged to wait only where waiting is an integral part of the job."

g. Rule 3.21 (Definition of "Hours worked")

The proposed definition of "hours worked" is overbroad and wholly inconsistent with the MWMHS. The statute provides at § 21-5C-2(h) the following definition of "hours worked":

> (h) "Hours worked" means the hours for which an employee is employed: Provided, That in determining hours worked for the purposes of sections two and three of this article, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by rules and regulations define.

Built into this definition is the *exclusion* from "hours worked" of numerous preliminary and postliminary activities that would fit into the Divisions proposed definition of "hours worked" in Rule 3.21. Proposed Rule 3.21 states that, in *addition* to the statutory definition, the phrase "hours works" means "the time an employee is under an employer's direction and control, even if the employee is not performing work-related tasks." This would include time spent changing clothes or washing at the beginning or end of a shift, and other similar activities. The Division has no power to create a definition of "hours work" that is inconsistent with the statute. Therefore Rule 3.21 should be deleted.

h. Rule 3.22 (Definition of "Making sales")

The proposed definition of "making sales" is unnecessarily narrow and inconsistent with the FLSA definition of "sale" or "sell." *See* 29 U.S.C. § 203(k). Under the proposed rule, "'making sales' means and includes the selling, exchanging, contracting to sell, consigning for sale, shipping for sale or other similar disposition **of an employer's merchandise or services.**" (Proposed Rule 3.22) (emphasis added). This rule unnecessarily restricts the term to "an employer's merchandise or services" whereas the FLSA contains no such restriction.

29 U.S.C. § 203(k) states that "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." The federal definition does not restrict "sales" to "an employer's merchandise or services." The federal regulations also do not contain such restrictions. *See* 29 C.F.R. § 541.501. We therefore recommend that the proposed rule be replaced with the definition contained in 29 U.S.C. § 203(k).

i. Rule 3.23 (Definition of "Management")

Proposed Rule 3.23, which defines "management," closely tracks the federal definition found at 29 C.F.R. § 541.102, but makes unnecessary omissions not required by the rule. We therefore request that the definition be replaced by the FLSA definition:

> §541.102 Management.
>
> Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

j. Rule 3.26 (Definition of "Non-service employee")

A typo should be corrected in this definition to change the word "do" to "does" between "who" and "not customarily."

k. Rule 3.27 (Definition of "Non-work time")

The proposed definition of "non-work time" is unnecessary and confusing. Proposed Rule 3.27 defines "non-work time" to mean "a time period of at least 30 minutes during which an employer has completely relieved an employee from duty and the employee has not been made to wait by the employer."

The proposed definition is unnecessary because any time that is not "hours worked" would be non-work time, regardless of the duration.

The proposed definition is also confusing. For example, if an employee completes a shift, then agrees to work a second shift that begins 20 minutes after the first shift ends, the time between shifts (during which he is completely relieved of duty) would be neither "hours worked" nor "non-work time" because it is not "a time period of at least 30 minutes."

As another example, a 25-minute commute to work would be excluded from the statutory definition of "hours worked," yet would not meet the definition of "non-work

time" because it is not a "time period of at least 30 minutes." Such non-work time would not fit within the proposed definition.

Accordingly, the Divisions should delete Rule 3.27 in its entirety.

l. Rule 3.28 (Definition of "On-call time)

The proposed definition of on-call time deviates from the federal definition and greatly expands upon it. The proposed rule states that "'On-call time' means the time an employer requires an employee to remain on, or in close proximity to, the employer's premises, **or at his or her home**, so that the employee is not free to use the time as he or she wishes." (Proposed Rule 3.28) (emphasis added). Under this definition, employees who are allowed to remain at their homes would be "on call" and entitled to compensation. (See Proposed Rule 11.4)

> The federal interpretation of "on-call" time, on the other hand, states:
>
> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." **An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.**

29 C.F.R. § 785.17 (emphasis added). Thus, under the federal interpretation, employees who are allowed to stay in their homes are not entitled to compensation for their time. *See* U.S. Dept. of Labor, Wage & Hour Division Fact Sheet #22 ("An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call.") The MWMHS does not require that on-call time spent at home be compensated, and such a change in the law would have a serious negative financial consequences for employers. As noted above, we believe the definition is beyond the purview of the authority supporting the proposed regulation, but even it were within the cited authority we would recommend that Rule 3.28 be revised to mirror 29 C.F.R. § 785.15.

m. Rule 3.32 (Definition of "Part-time basis")

Proposed Rule 3.32 defines "part-time basis" to mean "employment of twenty-four (24) hours or less in a workweek." It does not restrict the context of this definition to the area of student workers. The 1982 regulations defined the term to mean "**a student worker** who is employed twenty-four (24) hours or less in a workweek." (emphasis added). However, it is clear from the statute that the term "part-time" is only used in the context of an exemption for part-time students. The proposed rule could be understood to mean that no worker who works more than twenty-four hours may be classified by an employer as "part-time." The Division has no authority to create such a rule. Neither the MWMHS nor the FLSA define full-time employment or part-time employment. This is

a matter generally to be determined by the employer. Whether an employee is considered full-time or part-time does not change the application of the MWMHS or the FLSA. Therefore, we request that the language of the current (1982) Rule 2.14 be left unchanged.

n. Rule 3.37 (Definition of "Salary")

Proposed Rule 3.37 unnecessarily deviates from the FLSA's definition of substantially the same term. The proposed rule defines "salary" as "a predetermined **fixed** amount of pay that constitutes an employee's compensation for a pay period, and which is not subject to a reduction based on the quality or quantity of work the employee performs." (Proposed Rule 3.37) (emphasis added). The FLSA regulation does not require that a salary be a "fixed" amount, only a predetermined amount. 29 C.F.R. § 541.602 defines "salary basis" as an employee's regular receipt of "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." The addition of the word "fixed" could be taken to mean that a salary paid at two different predetermined rates (*e.g.* $1000 on even weeks and $1500 on odd weeks) would not meet the definition of "salary basis" under state law. Accordingly, we recommend that the word "fixed" be removed from the definition.

o. Rule 3.41 (Definition of "Volunteer")

Proposed Rule 3.41 defines volunteer in a narrower manner than the federal regulations. The proposed Rule 3.41 defines a "volunteer" as "a person who performs or offers to perform a service for an educational, charitable, religious, fraternal, or similar non-profit organization without compensation, and who is not otherwise an employee of the organization." The definition does not include public agencies as among those for whom one can volunteer. For example, a person who wanted to donate time as an EMT to a county ambulance authority would not be considered a volunteer under this definition.

Additionally, the definition unnecessarily restricts employees of such non-profit organizations from donating their time in capacities other than those in which they are employed. So, for example, if a secretary working for a school wanted to volunteer at the same school as a grief counselor, she could not do so. The 1985 amendments to the FLSA provide that employees may volunteer hours of service to their public employer or agency provided "such services are not the same type of services which the individual is employed to perform for such public agency." 29 C.F.R. § 553.103. This concept is clearly contemplated in Proposed Rule 42-8-7 ("An employer may not require or permit an employee to volunteer his or her services **in any activity that is a normal and regular part of the employee's job duties.**") (emphasis added).

Therefore, we would request that the proposed rule be revised to expressly include public agencies, and that the following phrase be added to the final sentence: "employed to perform the same type of services for which the individual volunteers."

SECTION 6

p. Rules 6.2 and 6.3 (Exempt employers)

Proposed Rule 6.2 provides that "the following employers are exempt from the provisions of the Act as long as 80% or more of their employees are **covered by** any federal act relating to maximum hours and overtime compensation:" (Proposed Rule 6.2) (emphasis added). Similarly, Proposed Rule 6.3 provides that "The Division shall determine whether 80% or more of an employer's employees are **covered by** any federal act relating to maximum hours and overtime compensation by considering the actual job duties of each non-exempt employee." (Proposed Rule 6.3) (emphasis added).

The proposed rule uses the phrase "covered by" instead of "subject to" as required by the MWMHS. The phrase "covered by" appears nowhere in the statute. With regard to employer exemptions, W.Va. Code § 21-5C-1(e) states:

> (e) "Employer" includes the State of West Virginia, its agencies, departments and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee; and who employs during any calendar week six or more employees as herein defined in any one separate, distinct and permanent location or business establishment: Provided, That prior to January 1, 2015, the term "employer" does not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him or her are **subject to** any federal act relating to minimum wage, maximum hours and overtime compensation: Provided, however, That after December 31, 2014, for the purposes of section three of this article, the term "employer" does not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him or her are **subject to** any federal act relating to maximum hours and overtime compensation.

W.Va. Code § 21-5C-1(e) (emphasis added). In *King v. West Virginia's Choice, Inc.*, 766 S.E.2d 387 (W.Va. 2014), the West Virginia Supreme Court ruled that the phrase subject to "in the exclusionary proviso of West Virginia Code § 21-5C-1(e) means under the authority of, or governed or affected by[.]" 766 S.E.2d at 391-392. Our Legislature carried forward that phrase in the 2014 amendment to section 21-5C-1(e). The Division has no authority to alter, restrict or expand the scope of the employer exemption through regulations. Accordingly, we recommend that the phrase "covered by" be changed to "subject to" in Proposed Rules 6.2 and 6.3.

In addition, Rule 6.3 improperly focuses exclusively on job duties of individual employees to determine an employer's exempt status. Under the MWHMS, an employer is exempt if 80 percent of its employees are "subject to" the FLSA. The most common way an employer will meet this 80 percent threshold is to show that it is an "enterprise engaged in commerce or in the production of goods for commerce" under 29 U.S.C. § 203(s). If it is a covered enterprise, then 100 percent of its employees are "subject to" the FLSA, and no further analysis of the job duties of individual employees is needed. *See King v. West Virginia's Choice, Inc.*, *supra*. Rarely, if ever, will the Division be required to examine the job duties of each of an employer's employees to determine whether the employer is exempt. Therefore, Rule 6.3 should be revised to state that "The Division shall determine whether 80% of the persons employed by an employer are subject to any federal act relating to maximum hours and overtime compensation by considering first whether the employer is a covered enterprise such that all of its employees are subject to a federal act, and then, if the employer is not a covered enterprise, by considering the actual job duties of each employee."

SECTION 8

q. Rule 8.6.1 (Outside sales exemption)

Proposed Rule 8.6.1 contains a typographical error. It states that "The employee is customarily and regularly engaged away from **their** employer's place or places of business[.]" (emphasis added) It should read "**his or her** employer's place or places of business[.]"

r. Rule 8.8.1 (Learned professional exemption)

Proposed Rule 8.8.1 provides a test for the learned professional exemption. It provides that "A learned professional employee is exempt from coverage of the Act if he or she meets all of the following tests: 8.8.1. The employee is compensated on a salary or fee basis at a rate equal to at least $455.00 per workweek[.]" (Proposed Rule 8.8.1)

Although this exemption is modeled after the FLSA, it omits an important exception from the salary basis requirement. Under the FLSA, the salary basis test does not apply to bona fide teachers, practitioners of law or medicine. 29 C.F.R. §§ 541.303, 541.304.

We therefore recommend that the following language be added at the end of proposed Rule 8.8.1: "provided, however, that the requirements of this provision 8.8.1 do not apply to bona fide teachers or practitioners of law or medicine."

s. Rule 8.10.2 (Computer professional exemption)

Proposed Rule 8.10.2 contains a typographical error. It refers to "duties described **is** subsection 8.10.3" instead of "**in** subsection 8.10.3."

t. Rule 8.11.3 (Executive exemption – Directs two (2) employees)

Proposed Rule 8.11.3 is part of the test for the executive exemption patterned after the FLSA executive exemption. The proposed rule states that "The employee customarily

and regularly directs the work of two (2) full-time employees..." The revision struck the words "or more" after the word "two (2)." This was likely a typographical error but needs to be corrected so that executives who direct the work of more than 2 employees will be covered by the exemption. This change will bring this provision in line with the FLSA exemption. *See* 29 C.F.R. § 541.100(a)(3). Accordingly, we request that the words "or more" be restored to the proposed rule.

u. Rule 8.11.4 (Executive exemption – Authority to hire and fire)

Proposed Rule 8.11.4 is another part of the test for the executive exemption patterned after the FLSA executive exemption. The proposed rule states that, in order to be an exempt executive, the employee must have "the authority to hire **and** fire other employees[.]" (Proposed Rule 8.11.4) (emphasis added). However, the FLSA test for executive exemption requires only that the employee have the authority to hire **or** fire. 29 C.F.R. §541.100 states that "(a) The term 'employee employed in a bona fide executive capacity' in section 13(a)(1) of the Act shall mean any employee: ... (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." It is not unusual in businesses for boards of directors to delegate either the power to hire or to fire employees, but not both. The FLSA rule recognizes this reality, and does not require an employee to have both powers to be considered an executive.

Accordingly, we request that the Division revise the phrase "hire and fire" in Rule 8.11.4 to "hire or fire."

v. Rule 8.12.3 (Administrative exemption – Matters of significance)

Proposed Rule 8.12.3 is part of the test for the administrative employee exemption patterned after the FLSA's administrative exemption. The proposed rule states that an administrative employee, in order to be exempt, must have a primary duty that "includes the exercise of discretion and independent judgment with respect to **the employer's** matters of significance." (Proposed Rule 8.12.3) (emphasis added). The phrase "the employer's" does not appear in the FLSA's test. The FLSA provides that an administrative employee is one "Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). The addition of the phrase "the employer's" before "matters of significance" unnecessarily restricts the scope of the exemption in a manner inconsistent with the second prong of the test. Prong two of the administrative exemption requires that the employee's primary duty be "the performance of office or non-manual work directly related to the management or general business operations of the employer **or the employer's customers**[.]" (Proposed Rule 8.12.2; *see also* 29 C.F.R. § 541.200(a)(2)) Thus, it stands to reason that where an employee is exercising "discretion and independent judgment with respect to matters of significance" to the employer's customers, then he should meet the third prong of the test. Accordingly, we recommend that the phrase "the employer's" be removed from proposed Rule 8.12.3 to bring it in line with the FLSA regulation.

w. Rule 8.17 (Agricultural employee exemption)

This proposed rule suffers from the same defect as Proposed Rule 3.2 (see above). The term "agriculture" is defined by the MWMHS at W.Va. Code § 21-5C-1(f), which states that "(f) "Employee" includes any individual employed by an employer but shall not include: ... (11) any individual employed in agriculture **as the word agriculture is defined in the Fair Labor Standards Act of 1938, as amended[.]"** In the Proposed Rule, the Division eliminated the statutory definition of agriculture. Accordingly, we recommend that the statutory definition be restored, so that the rule reads: "8.17 Any individual employed in agriculture as the word is defined in the Fair Labor Standards Act of 1938, as amended."

x. Rule 8.20 (Student worker exemption)

Proposed Rule 8.20 interprets the student worker exemption in a manner inconsistent with the MWMHS. The statute does not require that the student be a "full-time" student in order to be exempt. The statutory exemption excludes from the definition of "employee" "any individual employed on a part-time basis who is a student in any recognized school or college[.]" W.Va. Code § 21-5C-1(f)(14). Under the statutory definition, any part-time worker who is a "student in any recognized school or college," part-time or full time, should be exempt from the statute. The Division does not have the authority to materially alter the exclusion by adding additional criteria. Accordingly the words "full-time" should be deleted from the first sentence of Proposed Rule 8.20, and the entire second sentence should be deleted.

SECTION 9

y. Rule 9.5 (Furnishing of paystubs)

Proposed Rule 9.5 requires an employer to "furnish each employee with a written pay stub for each pay period[.]" Employers in West Virginia are increasingly relying on direct deposits for their wage payments. Such a system saves employers thousands of dollars per year in paper costs, and is environmentally responsible. When an employee agrees to enroll in direct deposit, no check is written to the employee, and thus no paystub is written, either. Larger employers often use payroll systems in which employees enrolled in direct deposit can access their payroll information online. Enrolled employees can access their pay stub information at any time from any computer or smart phone. We recommend that the rule be modified to expressly state that, "Where an employee has consented to direct deposit of wages, the paystub may be furnished electronically by email or by granting the employee access to a database containing the paystub information."

SECTION 11

z. Rule 11.1 (Compensable time)

Proposed Rule 11.1 contains a typographical error. It states that "An employer shall include all hours worked by an employee **works** as compensable time." The word "works" should be deleted.

aa. Rule 11.2 (Preliminary and postliminary activities)

Beyond the fact, as stated above, that this regulation exceeds the purview of the cited authority for the regulation, Proposed Rule 11.2 directly contradicts state law regarding compensability of preliminary and postliminary activities. W.Va. Code 21-5C-1(h) defines "hours worked" as follows:

> (h) "Hours worked," in determining for the purposes of sections two and three of this article, **the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday**, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by rules and regulations define.

W.Va. Code § 21-5C-1(h) (emphasis added). Proposed Rule 11.2, on the other hand, provides:

> 11.2. Preparation to work; preliminary and postliminary activities. An employer **shall include as compensable time the time an employee spends in preparing to begin work** at his or her place of employment, or in preparing to leave work at his or her place of employment, **such as changing clothes or washing**, when such activities are an indispensable part of his or her work, when such activities are required by law or by the employer, when required by contract, or by the custom and usage of a particular trade.

(Proposed Rule 11.2) (emphasis added). The MWMHS statute is consistent with the federal Portal-to-Portal Act, while the proposed rule is not. The Portal-to-Portal Act exempts employers from FLSA liability for claims based on "activities which are preliminary to or postliminary to" the performance of the "principal activities" that the employee is employed to perform. As the United States Supreme Court affirmed last December, it "has consistently interpreted 'the term "principal activity or activities" [to] embrace all activities which are an "integral and indispensable part of the principal activities."'". *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. ___ (2014), Slip Op. at

p. 5. The proposed rule would require compensation of far more than those activities that are "integral and indispensable" to an employee's principal activities. First, it would require compensation for activities that are merely an "indispensable part of his or her work," but not necessarily "integral" to the work. Perhaps more importantly, however, the proposed rule would require compensation for any "activities ... required ... by the employer." This sweeping language would require payment for such activities as post-shift security screenings that the Supreme Court unanimously held in *Busk* were non-compensable postliminary activities. Requiring compensation in West Virginia for any employer-required preliminary or postliminary activity is inconsistent with 21-5C-1(h) and decades of well-settled federal law. Nothing the MWMHS statute requires such a deviation, and in fact, the clear intent of the Legislature was to remain consistent with federal law in this area.

bb. Rule 11.5.3 (Interruptions of Sleep) Employee on Duty for Extended Period of 24 or More Consecutive Hours – Interruptions of Sleep (W. Va. C.S.R. § 42-8-11.5.3): This proposed rule states, in part, that when an employee's bona fide sleep period is interrupted by a call to duty, the employer must count the entire sleep period as hours worked. Thus, the employee would be compensated for the entire bona fide sleep period of 8 hours, even if the employee was only interrupted for 15 minutes.

Federal regulation calls for the employer to count only the actual interruption time as hours worked if the bona fide sleep period is not interrupted to such an extent that the employee cannot get a reasonable night's sleep. For enforcement purposes the federal Wage & Hour Division states that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is considered to be working time. (See 29 CFR. § 785.22(b)) Moreover, current W. Va. regulation does allow for some interruption in the 8 hour bona fide sleep period. (See W. Va. CSR § 42-8-9.11) Interruptions are counted as hours worked.

No explanation has been given as to why the Division no longer wants to follow its current regulation or does not want to be consistent with federal regulation. Group homes, hospitals, and other businesses that have employees on duty for extended periods of 24 or more consecutive hours will face increased wage costs. Employers will have to pay for the entire 8 hour bona fide sleep period for a simple 15 minute work-related interruption of sleep. West Virginia should follow federal regulation. To do otherwise, would put the state at a competitive disadvantage.

CONCLUSION

It is patently clear that the scope of the proposed regulation has both exceeded the authority defined by the 2014 Amendments to the Act and that portions of the regulation are inconsistent with federal law and regulation, West Virginia law and current regulation, or both. The implementation of the regulation as drafted would be vulnerable to court challenge and would cause immense confusion among Employers and would make it nearly – if not certainly – impossible for Employers to comply with both federal law and regulation and State law and regulation. Being able to rely upon the definitions and exemptions under the FLSA is critical to West Virginia Employers.

Therefore, on behalf of our members, the West Virginia Chamber requests that the DOL carefully consider these comments and take all action necessary to allow West Virginia Employers to comply with the Act in a timely and reasonable fashion. We must not overwhelm our Employers and small businesses with confusing and conflicting regulation or we risk putting our State at a competitive disadvantage, which will likely lead to job loss.

Sincerely,

Stephen G. Roberts,
President, West Virginia Chamber of Commerce

cc: Lawrence J. Malone, Governor's Office