



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-  
MAKING REVIEW COMMITTEE**

AGENCY: Labor TITLE-SERIES: 42-33  
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No  
RULE NAME: 42-33 Employer Wage Bonds

**PRIMARY CONTACT**

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

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

W. Va. Code §21-5-13 authorizes the Commissioner to propose rules to effectuate the purposes of the Wage Payment and Collection Act, which includes wage bond requirements for employers engaged in construction or the severance, production or transportation of minerals, and for handling violations when an employer has not complied with the wage bond requirements.

In accordance with its rule-making authority, the rule includes the following sections: definitions; employer responsibilities, criteria for employer exemptions, prime contractor responsibilities and posting of required notices; acceptable types of wage bonds and required forms; employee claim against a wage bond for unpaid wages and investigation by the Division; the payment of wage bond proceeds directly to a bona fide employee benefit plan; and requirements for the release of a wage bond by the Commissioner.

W. Va. Code §21-5-14(b) authorizes the Commissioner to propose rules that establish standards for granting waivers of the wage bond requirement to employers.

The rule includes a section on standards that an employer must follow when submitting a request to the Commissioner to waive the wage bond requirements.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/15/2017

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/17/2017

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The purpose of the rule is to comply with the Division's responsibilities for administering the wage bond requirements set forth in the Wage Payment and Collection Act, W. Va. Code §21-5-1 et seq.

The proposed rule incorporates the SB 224 amendments to the wage bond provisions in W. Va. Code §§21-5-14 and 21-5-15, passed during the 2017 regular legislative session. These include the following proposed changes: definition of the term asset; revision of the time period that a covered employer must post a wage bond from 5 years to 1 year; addition of the employer exemptions in W. Va. Code §21-5-14(a)(1-3)(as amended in 2017); update of the Division's procedures for the release of a wage bond; and some technical changes and corrections.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

SB 224, passed during the 2017 regular legislative session, amended W. Va. Code §21-5-14(a) by reducing the amount of time that a covered employer must post a wage bond from 5 years to 1 year and by adding 3 criteria that exempt an otherwise covered employer from posting a wage bond.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The proposed rule will have no impact on the costs or revenues of state government.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2017 Increase/Decrease (use "-")	2018 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	-	-	-
Personal Services	-	-	-
Current Expenses	-	-	-
Repairs and Alterations	-	-	-
Assets	-	-	-
Other	-	-	-
<b>2. Estimated Total Revenues</b>	-	-	-

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

TITLE 42  
LEGISLATIVE RULE  
DIVISION OF LABOR

SERIES 33  
EMPLOYER WAGE BONDS

**§42-33-1. General.**

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

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

1.3. Filing Date. -- ~~May 5, 2014.~~

1.4. Effective Date. -- ~~July 1, 2014.~~

1.5. Sunset Date. This rule shall terminate and have no further force or effect upon the expiration of 10 years from its effective date.

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

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

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

**§42-33-3. Definitions.**

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

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

3.3. "Asset" as used in W. Va. Code §21-5-14(a)(2) includes tangible property such as cash, inventory, real estate, buildings, accounts receivable, equipment, and similar items that are owned by the employer, minus the amount of the asset's indebtedness, if any.

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

3.4. "Bona fide benefit plan" means a written plan, fund or program into which an employer pays irrevocable contributions to a trustee or third party ~~pursuant to an insurance agreement. The~~ as long as

the plan's express purpose of the plan is to provide exclusively for the payment of benefits to employees.

3.5. "Claimant" means an employee or former employee who submits a request for assistance to the Division, alleging that he or she is owed unpaid wages or fringe benefits.

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

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

3.8. "Division" means the Division of Labor.

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

~~3.10.~~ 3.9. "Request for Assistance" or "RFA" means a document submitted to the Division by a claimant alleging that he or she is owed unpaid wages or fringe benefits.

3.10. "Termination," as used in W. Va. Code §21-5-14(g), is synonymous with cancellation, withdrawal, or release.

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

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

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

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

4.2. ~~When an employer engaged in a covered activity determines~~ In computing the necessary amount of a wage bond as required by W. Va. Code §21-5-14(a), ~~the an~~ employer may exclude the wages paid to any individual who owns at least a 20% interest in the business ~~in computing the amount of the bond.~~

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

4.3.a. that the employer has been doing business in this state, as defined in W. Va. Code §21-5-1(n), with the same employer identification number issued by the Internal Revenue Service, for at least one year immediately preceding the Division's evaluation of the employer's wage bond status; or

4.3.b. that the employer has been in business in another state for at least 5 years immediately

preceding the Division's evaluation of the employer's wage bond status; or

4.3.c. that the employer has at least \$100,000.00 in assets immediately preceding the Division's evaluation of the employer's wage bond status; or

4.3.d. that the employer is a subsidiary of a parent company that has been in business for at least 5 years immediately preceding the Division's evaluation of the employer's wage bond status.

~~4.4. A prime contractor engaged in a covered activity shall notify the Commissioner in writing by certified mail, return receipt requested, within 10 days of entering into a contract or subcontract. The notification shall include the names of employees, the location of the job site, and the employer's principal address.~~

~~4.5. During the time period that an employer is required to have a wage bond in effect with the Division, the employer shall post a copy of the notice issued by the Commissioner either specifying the number of employees covered by the wage bond or stating that the Commissioner has waived the employer's obligation to post a wage bond. The employer shall post the notice in a location readily accessible by employees.~~

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

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

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

~~5.2.1~~ 5.2.a. The issuing bank or credit union has a physical location in this State;

~~5.2.2.~~ 5.2.b. The issuing bank is insured by the Federal Deposit Insurance Corporation ("FDIC") or the issuing credit union is insured by the National Credit Union Administration ("NCUA");

~~5.2.3.~~ 5.2.c. The issuing bank or credit union agrees to automatically renew the certificate of deposit until it is released by the Commissioner's express written authorization;

~~5.2.4.~~ 5.2.d. The issuing bank or credit union executes the form provided by the Division, acknowledging that it will honor the Division's demand for payment of wages and fringe benefits upon an employer's default and that it will not allow the employer or anyone else to make any withdrawals against the certificate of deposit without the Commissioner's express written authorization; and

~~5.2.5.~~ 5.2.e. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the certificate of deposit assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

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

~~5.3.1.~~ 5.3.a. The issuing bank is insured by the Federal Deposit Insurance Corporation ("FDIC") or the issuing credit union is insured by the National Credit Union Administration ("NCUA");

~~5.3.2.~~ 5.3.b. The issuing bank or credit union executes the form provided by the Division, acknowledging that it will honor the Division's demand for payment of wages and fringe benefits upon an employer's default and that it will not withdraw or cancel the letter of credit, or permit the employer to withdraw or cancel the letter of credit without the Commissioner's express written authorization; and

~~5.3.3.~~ 5.3.c. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the irrevocable letter of credit assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

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

~~5.4.1.~~ 5.4.a. The bond is issued by an insurance company licensed by the West Virginia Offices of the Insurance Commissioner;

~~5.4.2.~~ 5.4.b. The employer and the surety execute the form provided by the Division, which shall include the following provisions:

~~5.4.2.a.~~ 5.4.b.1. A guarantee that the employer shall pay all wages and fringe benefits to employees when they are due;

~~5.4.2.b.~~ 5.4.b.2. If an employer fails or defaults in the payment of wages and fringe benefits when they are due, a guarantee that the surety will honor the Division's demand for payment of wages and fringe benefits; and

~~5.4.2.c.~~ 5.4.b.3. A guarantee that the surety will not withdraw or cancel the bond without written notification to the Commissioner, giving at least 60 days notice from the post-mark date of the intended cancellation, mailed by any delivery method that requires a signature verifying receipt; and

~~5.4.3.~~ 5.4.c. The employer executes the form provided by the Division, authorizing the Commissioner to use as much of the surety bond assets as necessary, upon the employer's default, to pay employee wages and fringe benefits that are due and owing.

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

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

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

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

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

6.5. If the employer does not make payment of the wages and fringe benefits or otherwise fails to respond to the demand within the time frame established by the Commissioner, not to exceed 30 days, the Commissioner shall certify the claim to the State Treasurer, the surety, the bank, or the credit union for payment of the wages and fringe benefits from the wage bond.

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

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

- 7.1. Pursuant to a court order; or
- 7.2. Pursuant to a written, notarized authorization executed by an employee or former employee.

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

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

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

- ~~8.2.1.~~ 8.2.a. A balance sheet or statement of the employer's financial position;
- ~~8.2.2.~~ 8.2.b. A statement of the employer's revenues and expenses;
- ~~8.2.3.~~ 8.2.c. A statement of any change in the employer's financial position;
- ~~8.2.4.~~ 8.2.d. Related notes of financial disclosure;
- ~~8.2.5.~~ 8.2.e. A statement of the length of time the employer has been in business;
- ~~8.2.6.~~ 8.2.f. A statement of the length of time the employer has been in business in this State;
- ~~8.2.7.~~ 8.2.g. A statement of the length of time the employer has had employees; and

~~8.2.8.~~ 8.2.h. If the employer is a subsidiary of a parent company, the name and address of the parent company, and the names, titles and addresses of the parent company's officers and members of the board of directors, if any.

8.3. After review of the waiver application, the Commissioner shall notify the employer in writing



whether the request has been approved or denied.

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

8.5. 8.4. The Commissioner, upon good cause, may withdraw or otherwise cancel the waiver and require the employer to post a wage bond as required by the Act and this rule.

8.6. 8.5. The Commissioner may waive the wage bond requirements for the wages and fringe benefits of owners, members, partners or corporate officers upon receipt of a written application. The application shall include a sworn affidavit from each person covered in the waiver request, stating that the individual is a bona fide owner, member, partner or corporate officer holding at least a 20% share of the business.

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

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

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

~~9.2.1.~~ 9.2.a. The employer has ceased doing business in this State and all wages and fringe benefits owed to employees have been paid; or

~~9.2.2.~~ 9.2.b. The employer has been doing business in this State for ~~5 consecutive years~~ 1 year without any change in the business structure, entity or form and all wages and fringe benefits owed to employees have been paid; or

~~9.2.3.~~ 9.2.c. The employer is no longer engaged in a covered activity; or

~~9.2.4.~~ 9.2.d. The employer is still actively engaged in a covered activity, but does not have employees; or

9.2.e. The employer has been in business in another state for at least 5 years; or

9.2.f. The employer has at least \$100,000 in assets; or

9.2.g. The employer is a subsidiary of a parent company that has been in business for at least 5 years; and

9.2.h. The employer has notified all employees working in West Virginia whose wages are or were covered by the bond that (1) the employer has applied to the Commissioner for a release of the wage bond and (2) if the employees have a wage claim they must promptly notify the Commissioner so that the Division can resolve the claims prior to releasing the bond.

9.3. Upon receipt of ~~a~~ an employer's sworn affidavit ~~from an employer~~ requesting the release of a wage bond, the Commissioner shall confirm that ~~all wages and fringe benefits have been paid~~ the Division has no unresolved or pending employee claims for wages or fringe benefits.

~~9.3.1. The Commissioner shall ensure that the Division has no unresolved employee claims for wages or fringe benefits.~~

~~9.3.2. The Commissioner shall obtain individual employee affidavits stating that they have received all wages and fringe benefits owed or the Commissioner shall provide written notice to the employees to contact the Division if wages and fringe benefits have not been paid.~~

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

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

9.6. The Commissioner may, on his or her own initiative, authorize the release or cancellation of a wage bond after determining that one of the conditions specified in subsections 9.2.a. through 9.2.h. has occurred.

9.6.a. The Commissioner shall notify the employer in writing that the wage bond is eligible for release.

9.6.b. After notification, if the employer does not respond to the Commissioner or otherwise take steps to reclaim its wage bond, the Division shall process the release or cancellation of the bond as unclaimed property.