



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Labor TITLE-SERIES: 42-37

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Jobs Act Procedures

CITE STATUTORY AUTHORITY: W. Va. Code §21-1C-5(e)

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/30/2018 4:30 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Mitchell E. Woodrum, Commissioner

ADDRESS: 1900 Kanawha Boulevard East, Capitol Complex
Building 3, Room 200, Charleston, WV 25305

EMAIL: mitch.e.woodrum@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

The rule includes a definition section, a section describing the responsibilities of public authorities under the Jobs Act, a section describing the responsibilities of employers under the Jobs Act, including the calculation of the 75% local labor market requirement, procedures for submitting a job order to WorkForce, and WorkForce's issuance of a waiver, a section on the Division's inspection and investigation of Jobs Act projects, a section on a notice to violation and a notice of penalty to an employer, including payment of a penalty and an informal presentation of views, a section on the Division's annual report to the Joint Legislative Committee on Government and Finance, and an appendix listing the counties and areas within the local labor market.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

With the recent legislative amendments to the Jobs Act, the proposed rule clarifies some definitions and adds some new definitions, clarifies procedures for the issuance of a notice of violation and a notice of penalty, and includes a provision for an employer to request an informal presentation of views after the issuance of a notice of violation or a notice of penalty.

Some technical corrections have also been made.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The proposed rule includes the violation provisions and the civil penalty provisions set forth in the Jobs Act. It is not possible to anticipate the economic impact of the Jobs Act on the revenues of state government because the number of employer violations of the Jobs Act and the resulting statutory civil penalties are unknown.

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

The proposed rule includes employer responsibilities to comply with the local labor market requirements set forth in the Jobs Act. It is not possible to anticipate the economic impact of the Jobs Act on the State or its residents because the number of public improvement projects with a value of \$500,000 or more that are funded entirely with state funds and the number of employers that hire an unknown number of residents from the local labor market are unknown.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2018 Increase/Decrease (use "-")	2019 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

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

See above explanations.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Elizabeth Farber -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 42
PROCEDURAL RULE
WEST VIRGINIA DIVISION OF LABOR AND WORKFORCE WEST VIRGINIA

SERIES 37
JOBS ACT PROCEDURES

§42-37-1. General.

1.1. Scope. – This rule establishes procedures for the efficient collection of data from employers and public authorities, procedures used by WorkForce West Virginia in issuing a waiver as prescribed in W. Va. Code §21-1C-4, procedures for the collection of penalties prescribed in W. Va. Code §21-1C-6, procedures for conducting inspections and investigations of public improvement projects for compliance with the Jobs Act, and procedures for the transmittal of data to the Joint Legislative Committee on Government and Finance.

1.2. Authority. -- W. Va. Code §21-1C-5(e).

1.3. Filing Date. -- ~~January 24, 2018.~~

1.4. Effective Date. -- ~~March 1, 2018.~~

§42-37-2. Definitions.

2.1. "Act" means the West Virginia Jobs Act, W. Va. Code § 21-1C-1, *et seq.*

2.2. "Certified payroll ~~records document~~" means ~~either the United States Department of Labor Form WH 347 or other comparable~~ a document that includes the name and address of the employer, identification of the payroll number and the work week ending date, the name of the project and project location, identification of the contract number, the names of employees, their work classification or job title, the physical address of employees' domicile or primary residence, including the county and state of the employees' residence, the day and hours worked, hourly rate of pay or salary, gross wages, federal and state withholding amounts, other authorized deductions, ~~and~~ net pay, and the employer's signed and dated certification stating that the information in the document is correct and complete.

2.3. "Commissioner" means the Commissioner of the West Virginia Division of Labor or his or her authorized representatives.

~~2.3~~ 2.4. "Division" means the West Virginia Division of Labor.

~~2.4~~ 2.5. "Executive Director" means the executive director of WorkForce West Virginia or his or her authorized representatives.

2.6. "From the local labor market" means an employee whose domicile or primary residence is located within the local labor market.

2.7. "Informal presentation of views" means the opportunity for an employer to meet with the Commissioner following the issuance of a notice of violation or a notice of penalty.

~~2.5~~ 2.8. “Job order” means the WorkForce West Virginia Job Order Details Form, ESD-102, that complies with W. Va. Code §21-1C-4(b).

2.9. “Notice of penalty” means the written notification to an employer setting forth the number of violations of the Jobs Act and the amount of the civil penalty to be paid to the Division.

2.10. “Notice of violation” means the written notification to an employer that the Division has determined that the employer is in violation of the Jobs Act, and that the employer will be subject to a civil penalty for continuing Jobs Act violations.

~~2.6~~ 2.11. “Qualified job applicant” means a prospective employee who has a current credential as required by the state of West Virginia to work on a construction project or as required by the contract with the public authority and who is ~~a resident of~~ from the local labor market.

~~2.7~~ 2.12. “Violation” means the employer’s failure to meet the local labor market requirements of section 4 of the Act or the employer’s failure to comply with the terms of a waiver issued by WorkForce West Virginia, and which is determined by the number of employees ~~that an employer needs~~ needed on a daily basis to meet the 75% local labor market ~~threshold~~ requirement.

~~2.8~~ 2.13. “Waiver” or “waiver certificate” means the written document issued by WorkForce West Virginia to an employer, after receipt of a properly completed job order, that states that WorkForce is unable to refer the number of qualified applicants requested, that there are no applicants available, and that the employer is permitted to fill a specific number of positions from outside the local labor market who meet specific criteria.

~~2.9~~ 2.14. “WorkForce West Virginia” or “WorkForce” includes all local offices located throughout the state and whose contact information can be found at workforcewv.org/about-us/contact-us.html.

§42-37-3. Responsibilities of Public Authorities.

3.1. A public authority that solicits bids for a public improvement and construction project subject to the Act shall include the following statements and information in the bid package:

3.1.a. Specification of the employer’s responsibilities under the Act;

3.1.b. The employer’s responsibility to submit weekly certified payroll records and waiver certificates, if any, to the public authority; and

3.1.c. Specification of credentials required to work on the construction project, including the employer’s WV Contractor License number and classifications.

3.2. A public authority shall notify the Division as soon as possible of construction projects that are or will be covered by the Act, including the start date of the project, the project location and contract number if available.

3.3. A public authority shall notify the Division at least 10 days in advance of all pre-bid meetings. This notification shall include the dates, times and locations.

3.4. When the project begins, the public authority shall submit certified payroll records and waiver certificates, if any, to the Division.

3.5. A public authority shall monitor the employer's compliance with the construction project contract, and shall promptly notify the Division of Labor, WorkForce, and the West Virginia Tax Department or other state agency, if applicable, of an employer's possible violations, including actions taken by the public authority to require the employer's compliance with its contractual obligations.

§42-37-4. Responsibilities of Employers; Calculation of the 75% ~~Threshold~~ Local Labor Market Requirement; Procedures for Submitting a Job Order to WorkForce; Issuance of a Waiver by WorkForce.

4.1. An employer shall employ at least 75% of employees from the local labor market, with 2 employees permitted from outside the local labor market.

4.2. An example of how to calculate the number of employees needed to meet the 75% ~~threshold~~ local labor market requirement ~~from the local labor market~~ when there are no waivers issued by WorkForce West Virginia is as follows:

4.2.a. The employer has 10 employees working on the project, excluding salaried supervisory personnel;

4.2.b. 10 employees minus 2 employees permissible from outside the local labor market = 8 employees subject to the 75% ~~threshold~~ requirement calculation;

4.2.c. $8 \text{ employees} \times .75 = 6 \text{ employees}$ that must be from the local labor market to comply with the Act.

4.3. An example of how to calculate the number of employees needed to meet the 75% ~~threshold~~ local labor market requirement ~~from the local labor market~~ when there are waivers issued by WorkForce West Virginia is as follows:

4.3.a. The employer has 12 employees working on the project, excluding salaried supervisory personnel;

4.3.b. WorkForce has issued 2 waivers: 12 employees minus 2 employees with waivers = 10 employees;

4.3.c. 10 employees minus 2 employees permissible from outside the local labor market = 8 employees subject to the 75% ~~threshold~~ requirement calculation;

4.3.d. $8 \text{ employees} \times .75 = 6 \text{ employees}$ that must be from the local labor market to comply with the Act.

4.4. If an employer is unable to hire at least 75% of employees from the local labor market, the employer must submit a properly completed Job Order to the nearest WorkForce office as soon as practical, but prior to starting work on the project to allow WorkForce to have 3 business days to respond to the Job Order and for the employer to interview prospective employees.

4.5. If WorkForce is unable to refer qualified job applicants to the employer within 3 business days after receipt of a properly completed Job Order, WorkForce shall issue a written waiver to the employer.

4.6. The waiver shall include the following information and statements:

4.6.a. The employer name and address;

4.6.b. The name of the employer's contact person and contact information;

4.6.c. The maximum number of employees that the employer may hire from outside the local labor market;

4.6.d. The specific terms and conditions, including credentials, that employees from outside the local labor market must have;

4.6.e. A statement that the waiver is not transferable and is only valid for an identified project at a specific location;

4.6.f. Effective dates of the waiver;

4.6.g. A statement that the waiver can be revoked or revised at any time if the employer fails to comply with the terms and conditions of the waiver, or if the waiver was issued due to incorrect or false or fraudulent information provided by the employer;

4.6.h. The signature of the Executive Director ~~or his or her authorized representative~~; and

4.6.i. The notarized signature of the employer, certifying that the employer fully understands the terms and conditions of the waiver and will at all times comply with the waiver.

4.7. WorkForce shall provide a copy of the waiver to the employer, to the public authority responsible for the public improvement project and to the Division.

§42-37-5. Inspection and Investigation by the Division.

5.1. The Commissioner may conduct routine inspections of any public improvement construction project to determine compliance with the Act.

5.2. A public authority and all employers engaged in the construction of a public improvement shall make employee and payroll records available to the Commissioner for inspection and investigation as he or she deems necessary and appropriate to determine compliance with the Act.

5.3. Upon receipt a written complaint alleging violations of the Act, the Commissioner shall investigate to determine the validity of the complaint.

§42-37-6. Notice to Employer of Violation of the Act; Notice to Employer of ~~Penalties~~ Penalty; ~~Collection of Penalties~~ Payment of Penalty; Informal Presentation of Views.

6.1. If, after inspection or investigation, the Commissioner determines that an employer has violated the Act and is no longer working on the public improvement project, he or she shall provide a written

notice of ~~violation penalty~~ to the employer and the public authority, setting forth the number of violations, ~~and the amount of the penalty that will be being imposed, if the employer continues to violate the Act,~~ and directing the public authority to withhold final payment to the employer until the employer has paid the penalty or the matter has been otherwise resolved.

6.1.a. The employer shall pay the penalty within 10 days of receipt of the notice of penalty.

6.1.b. If the employer fails to pay the penalty within 10 days of receipt of the notice of penalty, the Commissioner shall direct the public authority to withhold final payment to the employer until the employer has paid the penalty or the matter has been otherwise resolved.

~~6.2. After receipt of the notice of violation, if the employer continues to violate the Act, the employer shall be subject to a civil penalty of \$250 for each employee less than the required 75% threshold per day. If, after inspection or investigation, the Commissioner determines that an employer has violated the Act and is still working on the public improvement project or other Jobs Act projects, he or she shall provide a written notice of violation to the employer and the public authority, setting forth the number of violations and the amount of the civil penalty that will be imposed if the employer continues to violate the Act.~~

6.3. If the Commissioner determines that an employer is continuing to violate the Act after receipt of the notice of violation, he or she shall provide a written notice of penalty to the employer and the public authority. The employer shall be subject to a civil penalty of \$250 for each employee less than the required 75% threshold per day.

6.3.a. The employer shall pay the penalty within 10 days of receipt of the notice of penalty.

6.3.b. If the employer fails to pay the penalty within 10 days of receipt of the notice of penalty, the Commissioner shall direct the public authority to withhold final payment to the employer until the employer has paid the penalty or the matter has been otherwise resolved.

6.3.c. After 14 calendar days from receipt of the notice of violation, if the employer continues to violate the Act, the employer shall be subject to a civil penalty of \$500 for each employee less than the required 75% threshold per day.

6.4. Examples of the civil penalty calculation: an employer needs to have 6 employees from the local labor market to meet the required 75% threshold.

- Day 1: the employer has 5 employees from the local labor market = 1 violation.
- Day 2: the employer has 4 employees from the local labor market = 2 violations.
- Day 3: the employer has 6 employees from the local labor market = 0 violations.
- Day 4: the employer has 4 employees from the local labor market = 2 violations.
- Day 5: the employer has 6 employees from the local labor market = 0 violations.
- Day 6: the employer has 5 employees from the local labor market = 1 violation.

Total violations for the work week: 6 violations x \$250 = a civil penalty of \$1,500.

Total violations for the work week: 6 violations x \$500 = a civil penalty of \$3,000.

~~6.5. After 14 calendar days from receipt of the notice of violation, if the employer continues to violate the Act, the employer shall be subject to a civil penalty of \$500 for each employee less than the required 75% threshold per day. Within 10 days of receipt of a notice of violation or notice of penalty, an employer may submit a written request to the Commissioner for an informal presentation of views to discuss the violations or the penalty.~~

§42-37-7. Annual Report to the Joint Legislative Committee on Government and Finance.

The Division shall compile the following information, and submit it annually to the Joint Committee on Government and Finance by October 15th:

- ~~7.1. The name of the public authority, including the name and title of the project's contact person;~~
- 7.2. The name of the project, the project's start and completion dates, and the project location;
- ~~7.3. Whether the public authority's contract included the provisions required by the Act;~~
- ~~7.4. 7.3. Dates and results The number of the Division's inspections or investigations;~~
- ~~7.5. 7.4. The number of qualified applicants referred to the employer by WorkForce WV and the number of employees the employer reported hired to WorkForce;~~
- ~~7.6. 7.5. The number of waiver certificates issued by WorkForce WV;~~
- ~~7.7. 7.6. Whether the employer's payroll records complied with the requirements of the Act; and~~
- ~~7.8. 7.7. The number of violations and the amount of penalties collected.~~

APPENDIX

LIST OF LOCAL LABOR MARKET COUNTIES AND AREAS
WITHIN 50 MILES OF THE WEST VIRGINIA BORDER

DISTRICT OF COLUMBIA

KENTUCKY

Bath
Boyd
Breathitt
Carter
Elliott
Fleming
Floyd
Greenup
Johnson
Knott
Lawrence
Letcher
Lewis
Magoffin
Martin
Menifee
Morgan
Perry
Pike
Rowan
Wolfe

MARYLAND

Allegany
Anne Arundel
Baltimore
Carroll
Charles
Frederick
Garrett
Howard
Montgomery
Prince George's
Washington

NORTH CAROLINA

Alleghany
Ashe
Surry

OHIO

Adams
Athens
Belmont
Carroll
Columbiana
Coshocton
Fairfield
Gallia
Guernsey
Harrison
Hocking
Jackson
Jefferson
Lawrence
Mahoning
Meigs
Monroe
Morgan
Muskingum
Noble
Perry
Pickaway
Pike
Portage
Ross
Scioto
Stark
Summit
Trumbull
Tuscarawas
Vinton
Washington

PENNSYLVANIA

Adams
Allegheny
Armstrong
Beaver
Bedford

PENNSYLVANIA, continued

Blair
Butler
Cambria
Cumberland
Fayette
Franklin
Fulton
Greene
Huntingdon
Indiana
Juniata
Lawrence
Mercer
Perry
Somerset
Venango
Washington
Westmoreland
York

TENNESSEE

Johnson
Sullivan

VIRGINIA

Albemarle
Alleghany
Amherst
Augusta
Bath
Bedford
Bland
Botetourt
Buchanan
Carroll
Clarke
Craig
Culpeper
Dickenson
Fairfax
Fauquier
Floyd
Franklin
Frederick
Giles

VIRGINIA, continued

Grayson
Greene
Henry
Highland
Lee
Loudoun
Madison
Montgomery
Nelson
Orange
Page
Patrick
Prince William
Pulaski
Rappahannock
Roanoke
Rockbridge
Rockingham
Russell
Scott
Shenandoah
Smyth
Stafford
Tazewell
Warren
Washington
Wise
Wythe

WEST VIRGINIA

All counties