



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

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

AGENCY: Labor TITLE-SERIES: 42-05
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: Wage Payment and Collection

PRIMARY CONTACT

NAME: Mitchell E Woodrum Commissioner
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CITE STATUTORY AUTHORITY: W. Va. Code 21-5-9 and 21-5-13

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 and 21-5-9(6) give the Division of Labor Commissioner broad authority to promulgate rules "to the extent necessary to effectuate the purposes of," and as are "necessary and appropriate for the enforcement of," the Wage Payment and Collection Act.

Consistent with this broad authority, the proposed rule defines terms used in the Act or the rule, sets forth employer requirements with respect to notifications to employees on the terms and conditions of employment and changes thereto, identifies the required content and location of employee records, sets forth employer requirements for the payment of employee wages, including the provision of an itemized statement of earnings each payday, sets forth the requirements for an employer to petition the Commissioner for a special agreement concerning payday schedule or frequency, includes requirements for an assignment of wages for state employees and for non-state employees, and includes provisions for an employee to file a claim with the Division for unpaid wages or other violations of the Act.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/15/2018

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/16/2018

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?

None

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

See explanation above.

The proposed changes to the rule are to incorporate amendments made to the Wage Payment and Collection Act during the 2018 Regular Legislative Session.

These changes are (1) an amendment to the definition of "illegal deduction" to include a deduction made from an employee's wages when the employer does not comply with the statutory requirements of W. Va. Code §21-5-4(f) concerning employer provided property, (2) a new definition of "wages" to include the W. Va. Code §5-5-2 annual increment for state employees, and (3) new requirements concerning wage assignments by state employees who have been overpaid wages.

Some technical corrections have also been made.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

Two bills passed during the 2018 Regular Legislative Session that amended the Wage Payment and Collection Act.

HB 2546 amended W. Va. Code §21-5-4 by adding new provisions concerning employer provided property, and allowing the employer to deduct the cost of such property from an employee's final wages if the employee does not return the property.

HB 4368 amended W. Va. Code §21-5-3 by adding a new provision that allows a state employee who has been overpaid his or her wages to voluntarily authorize a wage assignment to repay the overpayment.

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 economic impact on the costs or revenues of state government.

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

The proposed rule will have no economic impact on the State or its residents.

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):

N/A

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.

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TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR

SERIES 5
WAGE PAYMENT AND COLLECTION

§42-5-1. General.

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

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

1.3. Filing Date. -- ~~April 15, 2016.~~

1.4. Effective Date. -- ~~May 1, 2016.~~

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.

§42-5-2. Application and Enforcement.

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

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

§42-5-3. Definitions.

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

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

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

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

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

3.6. "Director" means the director of the Wage and Hour Section, or his or her designee.

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

3.8. "Earned wages" means wages that are owed to an employee for all hours worked.

~~3.8~~ 3.9. "Employ" means to hire, permit, or suffer to work.

~~3.9~~ 3.10. "Final order" or "Commissioner's final order" means an order issued by the Commissioner which the employer either does not appeal pursuant to W. Va. Code §29A-5-4, or which has been upheld after the employer has exhausted his or her appeal rights pursuant to W. Va. Code §§29A-5-4 and 29A-6-1.

~~3.10~~ 3.11. "Garnishment order" or "wage garnishment order" refers to a legal procedure in which an employee's wages are required by court order to be withheld by an employer for the payment of a debt.

~~3.11~~ 3.12. "Hours worked" means the time an employee is under the control and direction of his or her employer, and includes the compensable time provisions of §42-8-11.

~~3.12~~ 3.13. "Illegal deduction" means a deduction made by an employer from an employee's wages without a valid assignment of wages, without complying with the provisions of W. Va. Code §21-5-4(f) concerning employer provided property, without a valid wage garnishment order, or without an employee's written authorization for union or club dues, pension plans, a payroll savings plan, charitable contributions, insurance, a hospitalization plan, or plans of a similar kind.

~~3.13~~ 3.14. "Net wages" means an employee's wages after deductions are taken out from an employee's gross wages.

~~3.14~~ 3.15. "Pay period" means the scheduled number of days for which an employee is paid, which may or may not coincide with the day an employee is paid.

~~3.15~~ 3.16. "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.

~~3.16~~ 3.17. "Status conference" means an employer's informal meeting with the Division regarding the status of the Division's investigation into an alleged violation of the Act or this rule.

3.18. "Wages," for state employees, includes the incremental salary increases pursuant to W. Va. Code §5-5-2.

~~3.17.~~ "Wages due" or "wages earned" means and includes all wages and fringe benefits accrued, if any, that are owed to an employee for all hours the employee is permitted, required or suffered to work, up to and including the twelfth day immediately preceding the employer's regular pay day.

~~3.18~~ 3.19. "Work week" means a regular recurring period of 168 hours made up of 7 consecutive 24 hour periods.

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

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

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

4.3. An employer shall keep posted in a place accessible to all employees an abstract of the West Virginia Wage Payment and Collection law prepared and provided by the Commissioner.

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

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

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

5.2.a. The employee's name in full, or identifying symbol or number in place of a name on any record;

5.2.b. The employee's home address;

5.2.c. The employee's date of birth, if under 18;

5.2.d. The employee's occupation, title or job classification;

5.2.e. The employee's rate of regular pay;

5.2.f. The hours worked each workday by the employee and the total hours worked each workweek by the employee; and

5.2.g. Documentation of the employee's legal status or authorization to work, as required by W. Va. Code §21-1B-1 *et seq.*

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

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

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

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

§42-5-7. Payment of Wages; Itemized Statement of Earnings.

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

7.2. The scheduled payday for a railroad company shall occur within the time periods specified in W. Va. Code §21-5-2. The scheduled payday for every employer other than a railroad company shall occur at least ~~once every 2 weeks~~ twice each month with no more than 19 days between paydays, unless otherwise authorized by special agreement as provided in section ~~eight~~ 8 of this rule.

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

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

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

8.1. An employer who wishes to establish regular paydays other than at least twice every month with no more than 19 days between paydays, as required by W. Va. Code §21-5-3, shall submit a written petition to the Commissioner, setting forth the reasons for the request and the proposed alternative payday schedule or plan.

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

8.3. The Commissioner shall notify all employees identified by the employer and provide each employee with an opportunity to respond to the petition.

8.4. The Commissioner may hold a hearing on the petition for the proposed alternative payday schedule.

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

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

8.5. Following the submission of the petition, the responses of the affected employees, and the holding of the hearing, if any, the Commissioner shall issue a written decision to the employer, either approving, suggesting modifications to, or denying the proposed alternative schedule or plan.

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

8.7. An employer shall comply with the Act and this rule during the Commissioner's consideration of the petition, and the submission of a petition or the Commissioner's delay in acting upon the petition does

not relieve an employer from any obligations to comply with the payday requirements set forth in W. Va. Code §21-5-3 and this rule.

§42-5-9. Assignment Of Wages; Wage Garnishment Order.

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

9.2. ~~For employees other than state employees, Three-fourths~~ three-fourths or 75% of an employee's net wages shall at all times be exempt from assignment.

9.3. If a state employee has been overpaid his or her wages, the employee may voluntarily enter into a written wage assignment to repay the overpayment. One-fourth or 25% of a state employee's net wages shall at all times be exempt from assignment.

~~9.3.~~ 9.4. If an employer is served with a wage garnishment order payable from an employee's wages, and if the garnished amount exceeds 25% of the non-state employee's net wages, or if the garnished amount exceeds 75% of the state employee's net wages, the employer shall not enter into an assignment of wages with the employee while the garnishment order is in effect, and shall immediately terminate any on-going or active assignment of wages.

~~9.4.~~ 9.5. Authorized deductions for amounts required or allowed by law to be withheld, such as union or club dues, pension plans, payroll savings plans, credit unions, charities, or a hospitalization or medical insurance plan, are not required to be in any prescribed form.

~~9.5.~~ 9.6. If an employer deducts an authorized amount from an employee's wages pursuant to a valid assignment of wages, a valid written authorization or a valid wage garnishment order, but fails to pay that amount to the designated creditor or authorized plan, the deduction is an illegal deduction from the employee's wages.

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

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

10.1.a. The claimant's complete contact information, including updates when applicable;

10.1.b. The name, address and telephone number of the claimant's employer;

10.1.c. The amount of wages the claimant reasonably believes is owed by the employer and why, or a statement explaining the employer's violation;

10.1.d. A brief description of the work the claimant is performing or has performed;

10.1.e. Copies of pay stubs, work schedules, personal calendars, or other documents that support the wage claim or other violation, if the claimant has them in his or her possession;

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

10.1.g. If applicable to the wage claim or other violation, a complete copy of the employer's commissions policy, if the claimant has them in his or her possession.

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

10.3. The ~~Division~~ Director shall notify the employer and the claimant of the results of ~~it's~~ the investigation, including the amount of wages owed to the claimant, if any.

10.4. The employer and the claimant shall be entitled to a status conference upon request to the ~~Division~~ Director.

10.4.a. At that time, the employer and the claimant shall have the opportunity to review all records collected by the Division during its investigation relating to the wage claim with respect to all portions of the investigation that the Division has not resolved in favor of the employer.

10.4.b. Within twenty (20) days of the conclusion of the status conference, an employer or the claimant may prepare and submit a written statement and/or evidence for consideration by the ~~Division~~ Director.

10.5. 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 specified in the written demand of the Commissioner, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

10.5.a. The ~~Division~~ Director 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 notify the employer of his or her right to appeal the order.

10.5.b. The ~~Division~~ Director shall provide the claimant with a copy of the Commissioner's order.

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

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

10.6.b. The ~~Division~~ Director shall serve the employer with a copy of the order, either by certified mail, return receipt requested or by personal service, and shall notify the employer of his or her right to appeal the order.

10.6.c. The ~~Division~~ Director shall provide the claimant with a copy of the Commissioner's order.