

RESPONSE TO COMMENTS

TITLE 56, SERIES 19

SUBSTANCE ABUSE SCREENING, STANDARDS AND PROCEDURES

The West Virginia Office of Miners' Health, Safety and Training (OMHST) responds to the comments received as follows:

COMMENTS RECEIVED FROM CHRIS HAMILTON, PRESIDENT, WEST VIRGINIA COAL ASSOCIATION

Comment 1: We generally support the rule changes dealing with the proposed changes that effectively removes medical marijuana and CBD products as a defense to testing positive for THC.

Response: OMHST accepts this comment. Although OMHST recognizes that W. Va. Code §16-15-4 prohibits licensing agencies from disciplining a person who possesses a medical marijuana card solely because they use it; however, OMHST's primary responsibility is the safety of all coal miners. OMHST is very concerned about the safety of miners who use medical marijuana while working in a coal mine as well as the safety of coal miners working with a miner who uses medical marijuana. At the present time, OMHST leaves 56 C.S.R. §§19-5.13. and 5.13.2. as written.

Comment 2: We oppose the rule change requiring drug testing companies to register as Independent Contractors.

Response: OMHST rejects this comment. OMHST believes that requiring drug testing vendors to become drug testing contractors will provide a mechanism to allow OMHST to better regulate drug and alcohol testing in West Virginia coal mines.

Comment 3: Additionally, we would support a proposed rule change to require individuals who have had certifications suspended to complete an agency approved educational program on the dangers of drug addiction.

Response: OMHST rejects this comment. OMHST is currently looking at educational programs to be included in treatment agreements as well as at annual refresher training.

**COMMENTS RECEIVED FROM JAMES BROGAN,
PRESIDENT, MIS, INC.**

Comment 1: This is a good & much needed rule change!

Response: This comment requires no response; however, OMHST thanks Mr. Brogan for his time in reviewing the rule and his comment supporting the rule.

**COMMENTS RECEIVED FROM KELLI HARRISON,
VICE PRESIDENT, ANALABS, INC.**

Comment 1: Is it actually legal to deny coal miners the use of medical marijuana. They are not denied use of oxycodone, hydrocodone etc which are much worse.

Response: OMHST rejects this comment. Although OMHST recognizes that W. Va. Code §16A-15-4 prohibits licensing agencies from disciplining a person who possesses a medical marijuana card solely because they use it, OMHST's primary responsibility is the safety of all coal miners. OMHST is very concerned about the safety of miners who use medical marijuana while working in a coal mine as well as the safety of coal miners working with a miner who uses medical marijuana.

Comment 2: The 25% annually is actually half of what DOT requires. They require 50% which does give a better subsample of the employee pool.

Response: OMHST rejects this comment. Randomly drug testing 25% of the workforce annually has been in effect since 2013. OMHST sees no compelling reason to raise the percentage to 50%.

**COMMENTS RECEIVED FROM WILLIAM TUCKER,
REGIONAL MANAGER, DAVID STANLEY CONSULTANTS**

Comment 1: (56-19-5.4) I would suggest that Neurontin (Gabapentin) be added on the list of drugs to be tested for. Most companies test for this drug which has become highly abused and resulted in overdoses cases. Even though it is not currently tested for on the federal level five (5) states have declared it as a narcotic with West Virginia being one of the five. The office has decertified people for failing for this drug in the past.

Response: OMHT rejects this comment. The list of drugs that are to be included in a drug test are set forth in statute (W. Va. Code §22A-1A-1) and OMHST does not believe it should add new drugs without a change in the statute.

Comment 2: (56-19-5.13.1) I feel it will be a tremendous disservice to our coal miners to prohibit the use of Medical Marijuana. If they have a valid prescription for Medical Grade Marijuana then it should be no different than any other prescription medication. It should be left up to the MRO to determine if it is taken as prescribed. Just to list one example even though there are many that could be given if someone is suffering from epilepsy this is a proven drug to help with their treatment that has shown great results. There has never been a more addictive drug than the current opiates being prescribed. Most families are affected by a family member becoming a full blown drug addict after being prescribed opiates. I encourage you to ask yourself how many people that you have known became drug addicts after using marijuana? Again we are talking about medical marijuana and the many benefits that go with it. I would ask that you take a hard look at this issue. NOTE: Suboxone and Methadone that is being issued for opioid addiction is being abused as much as the opiates. Suboxone is one of the leading drugs that people are failing for on drug test.

Response: OMHST rejects this comment. Although OMHST recognizes that W. Va. Code §16A-15-4 prohibits licensing agencies from disciplining a person who possesses a medical marijuana card solely because they use it; however, OMHST's primary responsibility is the safety of all coal miners. OMHST is very concerned about the safety of miners who use medical marijuana while working in a coal mine as well as the safety of coal miners working with a miner who uses medical marijuana.

Comment 3: (56-19-7.2) I feel like the last sentence in this section should be taken out. The drug testing companies are going to be registered contractors with the agency and therefore they take on the same responsibilities as operators. The employers should not be responsible for what is in their contracts. Contracts can be changed at any given moment without the knowledge of employers.

Response: OMHST rejects this comment. The employer and drug testing contractor can determine who is responsible for the litigation costs by a contract between the two of them. However, if there is no contract shifting the litigation costs to the drug testing contractor, the employer should be the entity that is ultimately responsible.

Comment 4: (56-19-9.1.2 and 1.3) I think the old language was casier to interpret if the intent is still to be tested once a month after the 6 months of counselling has been completed.

Response: OMHST rejects this comment. OMHST believes the language is clear. The miner must undergo six months of treatment during the eighteen-month suspension period and be drug and alcohol tested one time per month during the six months of treatment.

**COMMENTS RECEIVED FROM KERRI McDANIEL,
PHR, ARCH LEER SOUTH**

Comment 1: I am in opposition to the addition of 5.13.1 and 5.13.2 as inclusion in this amendment. I will agree that THC and marijuana are an absolute harm to the workforce and you

don't want someone who is currently under the influence of those substances working, however with increasing momentum in legislation towards legalization in West Virginia, these policies need amended to include not the "IF" but the "WHEN" someone used marijuana / THC.

Similar to alcohol, the half-life of a "high" in your body from marijuana/ THC would not be noticed after a period of off time from work. For example, someone who drinks a few beers the night before a breathalyzer will not fail that breathalyzer the next morning, however someone who smoked marijuana the night before would fail a drug test / urinalysis screen the following day and the following week, even though they were not currently impaired at the time of testing.

One of the fallacies of the current testing system is that it doesn't test the "WHEN" of the THC and marijuana use. Mainstream testing using urinalysis is not to that level of sensitivity yet, however there are some prototypes on the market for a "marijuana breathalyzer" that would answer the "when" question rather than the "if". Ultimately, the drug rules are in place to protect an employee and their peers from active intoxication from any substances, so the "when" question becomes so important in this debate. Hound Labs (linked below) has done extensive research on this problem and developed a device that measures the "when" similar to an alcohol breathalyzer. This would also determine levels, so the arguments being made about THC in CBD products would essentially go away as well.

Response: OMHST rejects this comment. Although OMHST recognizes that W. Va. Code §16A-15-4 prohibits licensing agencies from disciplining a person who possesses a medical marijuana card solely because they use it; however, OMHST's primary responsibility is the safety of all coal miners. OMHST is very concerned about the safety of miners who use medical marijuana while working in a coal mine as well as the safety of coal miners working with a miner who uses medical marijuana.

COMMENTS RECEIVED FROM WILLIAM C. MEANS

Comment No. 1. On the cover page under the heading "Relevant Federal Statutes and Regulations," the proposal succinctly states, "NO."

This assertion is facially incorrect. Federal regulation 49 CFR Part 40 is expressly referenced in, and incorporated by reference into, multiple provisions of this document, including but not limited to proposed new section 3.20. In these quick comments, no effort is made to identify specific issues regarding the interplay between 56 CSR 19 and 49 CFR Part 40. To completely dismiss the possibility of conflicts, however, poses a substantial risk of misleadingly oversimplifying the analysis of this proposal.

(Some, but not necessarily all, issues deriving from 'relevant statutes and regulations' are raised more directly in the further comments below.)

Response: OMHST accepts this comment and has uploaded 49 CFR Part 40 into the supporting documents of the proposed rule on the Secretary of State's website. OMHST also e-mailed Mr. Means a copy of 49 CFR Part 40.

Comment No. 2: Also in the preface materials, under the heading "Economic Impact of the Rule on ... Residents," the presenter's summary response completely ignores the last sentence of proposed new section 7.2:

"If not set forth contractually between the drug testing contractor and the employer, any costs and fees associated with the testimony and related services of the drug testing contractor, collector, laboratory and medical review officer shall be the responsibility of the employer."

It is virtually incomprehensible that contracted drug testing personnel would voluntarily take on additional contractual duties without additional compensation. Accordingly, this proposed new

sentence would markedly, either directly or indirectly, increase costs for employers of WV coal miners. In other words, assuming that drug testing service providers would agree to amend existing contracts **at all**, which cannot be presumed, said service providers would certainly require additional compensation from the employers who use their services. Furthermore, if a cost-effective contract modification cannot be achieved, the employer has no leverage nor procedural mechanism to compel non-employee collectors, laboratorians, or MROs to make themselves available for testimony.

This issue is further exacerbated by the complexity of relationships among various parties. Section 7.2 imposes upon “the drug testing contractor” a duty to ensure that “its” collector, laboratory and MRO perform certain functions, including complying with administrative subpoenas. This language ignores the possibility -- even likelihood -- that the collector, laboratorians, and MRO are employees of more than one entity, which may not be in direct privity of contract with, or otherwise subject to the demands of, a single contractor. Indeed, any given employer might either employ or contract with several persons or entities to perform different functions. Some persons or entities might ostensibly be “drug testing contractors” for some purposes but not for other purposes. Redefining the interrelationships would be costly if not altogether impossible.

For the foregoing reasons, incorporating the proposed amendments into the Rule would result in substantial added cost to employers of WV coal miners, who have even less procedural ability than WVOMHST to compel responses to subpoenas.

Response: OMHST rejects this comment. OMHST has regulated the coal miner drug testing program since 2013. Only recently have medical review officers begun submitting invoices to OMHST for the MRO to testify. OMHST does not know why MROs have recently begun submitting invoices to the state; however, OMHST must presume they were getting paid by someone for testifying during all the previous years the drug program was in existence. OMHST

does not believe that this is now an expense that should be passed through to West Virginia taxpayers.

Comment No. 3: Proposed new sections 5.13.1 and 5.13.2 are at least arguably incompatible with the federal Americans with Disabilities Act and/or the West Virginia Human Rights Act. Is there a rational basis for treating a legal WV marijuana prescription differently than any other prescription? Perhaps, but -- if so -- let's put it on the record. Potential statutory/regulatory conflicts warrant scrutiny commensurate with the full legislative process versus the nominal debate of a legislative rulemaking process. Regardless of one's position, costly and time-consuming litigation could be avoided by having a thorough legislative history record, including perhaps amendment of the WVHRA if the legislature perceives incompatibility.

Response: OMHST rejects this comment. Although OMHST recognizes that W. Va. Code §16A-15-4 prohibits licensing agencies from disciplining a person who possesses a medical marijuana card solely because they use it, OMHST's primary responsibility is the safety of all coal miners. OMHST is very concerned about the safety of miners who use medical marijuana while working in coal mines as well as the safety of coal miners working with a miner who uses medical marijuana.

Comment No. 4: Proposed new section 7.1 purports to require employers to ensure that their drug testing contractors are registered with the WVOMHST pursuant to Title 36 Section 20.

The fundamental problem with this putative mandate is a failed premise. In Title 36 Series 20 of the WVCSR, an "independent contractor" (*i.e.*, a person or entity which is required to register) is defined as a "firm, corporation, partnership or individual that contracts to perform services or construction at a coal mine..." (emphasis added). Accordingly, any firm, corporation, partnership or individual which has NOT contracted to perform services "at the mine" (*i.e.*, anyone whose

function is performed somewhere other than the mine site, either in-state or out-of-state) is expressly excluded from 36 CSR 20's definition of a required registrant.

In short, proposed new section 7.1 seeks to pull itself up by the straps of boots which do not fit.

Notably, Title 36 Series 20 is itself a 2021 addition to the West Virginia Code of State Rules. And perhaps more tellingly, when presented, Title 36 Series 20 proclaimed itself “exempt” from legislative rulemaking scrutiny. Whether Title 36 Series 20 is entitled to such an exemption is a separate debate. For the moment, the real problem for WVOMHST is that it would be improper to treat an exempt interpretative rule as if it were an enabling statute passed by the legislature, and thereby expand the scope of administrative law. Doing so would raise serious issues of constitutional law.

Comment: OMHST rejects this comment. Section 3.10 of the proposed rule defines drug testing contractors as “any firm, corporation, partnership, or individual performing breath alcohol tests or ten (10) panel split sample urine drug tests pursuant to this rule.” Furthermore, OMHST believes that requiring drug testing vendors to become drug testing contractors will provide a mechanism to allow OMHST to better regulate drug and alcohol testing in West Virginia coal mines.



Koerber, Barry L. <barry.l.koerber@wv.gov>

Comments Proposed Drug Rule

Chris Hamilton <CHamilton@wvcoal.com>
To: "White, Eugene E" <Eugene.E.White@wv.gov>
Cc: "Koerber, Barry L" <Barry.L.Koerber@wv.gov>

Mon, Jul 26, 2021 at 3:05 PM

July 26, 2021

Director Eugene White
WV Office of Miners Health Safety and Training
Suite 2, 7 Players Club Office
Charleston, WV 26311

Dear Director White:

This is in response to your request for comments on the proposed amendments to Title 56, Series 19 Administrative Regulations Governing Substance Abuse Screening, Standards and Testing at Coal Mining Operations.

We generally support the rule changes dealing with the proposed changes that effectively removes medical marijuana and CBD products as a defense to testing positive for THC.

We oppose the rule change requiring drug testing companies to register as Independent Contractors.

Additionally, we would support a proposed rule change to require individuals who have had certifications suspended to complete an agency approved educational program on the dangers of drug addiction.

Thank you for the opportunity to comment on the proposed rule changes.

Chris Hamilton

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 1268K

White, Eugene E

From: misinc2@suddenlinkmail.com
Sent: Tuesday, July 13, 2021 8:37 AM
To: White, Eugene E
Subject: [External] Substance Abuse Screening, Standards and Procedures

CAUTION: External email. Do not click links or open attachments unless you verify sender.

This is a good & much needed rule change!

Respectfully submitted,

James Brogan
President
MIS, Inc.

Barry L. Koerber

From: Kelli Harrison <KHarrison@analabsinc.com>
Sent: Monday, July 26, 2021 10:27 AM
To: Barry L. Koerber
Cc: Cook, Danny R; Eugene White
Subject: RE: new regulation

Sure. Thanks

Kelli L Harrison
ANALABS
Vice President
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196 Dayton Street
Crab Orchard, WV 25827

From: Barry L. Koerber [mailto:Barry.L.Koerber@wvago.gov]
Sent: Monday, July 26, 2021 10:24 AM
To: Kelli Harrison
Cc: Cook, Danny R; Eugene White
Subject: RE: new regulation

Do you want to make these comments?

From: Kelli Harrison <KHarrison@analabsinc.com>
Sent: Monday, July 26, 2021 10:19 AM
To: Barry L. Koerber <Barry.L.Koerber@wvago.gov>
Cc: Cook, Danny R <Danny.R.Cook@wv.gov>; Eugene White <Eugene.E.White@wv.gov>
Subject: RE: new regulation

There are only things 2 things I would be concerned about.

1. Is it actually legal to deny coal miners the use of medical marijuana. They are not denied use of oxycodone, hydrocodone etc which are much worse.
2. The 25 % annually is actually half of what DOT requires. They require 50% which does give a better subsample of the employee pool.

What are your thoughts on these items?

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196 Dayton Street
Crab Orchard, WV 25827

From: Barry L. Koerber [<mailto:Barry.L.Koerber@wvago.gov>]
Sent: Monday, July 26, 2021 10:02 AM
To: Kelli Harrison
Cc: Cook, Danny R; Eugene White
Subject: RE: new regulation

Are you going to send in comments?

From: Kelli Harrison <KHarrison@analabsinc.com>
Sent: Monday, July 26, 2021 9:58 AM
To: Barry L. Koerber <Barry.L.Koerber@wvago.gov>
Subject: new regulation

Hi Barry,

I read over the new legislation which I understand mostly. I was wondering what the reason was for requiring registration of drug testing companies? Have you had issues with some?

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Comments on the proposed changes to the drug law



To: White, Eugene E

I would like to present these comments for consideration before you file the final rule.

56-19-5.4) I would suggest that Neurontin (Gabapentin) be added on the list of drugs to be tested for. Most companies test for this drug which has become highly abused and resulted in overdose cases. Even though it is not currently tested for on the federal level Five (5) states have declared it as a narcotic with West Virginia being one of the five. The office has decertified people for failing for this drug in the past.

56-19-5.13.1) I feel it will be a tremendous disservice to our coal miners to prohibit the use of Medical Marijuana. If they have a valid prescription for Medical Grade Marijuana then it should be no different than any other prescription medication. It should be left up to the MRO to determine if it is taken as prescribed. Just to list one example even though there are many that could be given if someone is suffering from epilepsy this is a proven drug to help with their treatment that has shown great results. There has never been a more addictive drug than the current opiates being prescribed. Most families are affected by a family member becoming a full blown drug addict after being prescribed opiates. I encourage you to ask yourself how many people that you have known became drug addicts after using marijuana? Again we are talking about medical marijuana and the many benefits that go with it. I would ask you take a hard look at this issue. NOTE: Suboxone and Methadone that is being issued for opioid addiction is being abused as much as the opiates. Suboxone is one of the leading drugs that people are failing for on a drug test.

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56-19-9.1.2 and 1.3) I think the old language was easier to interpret if the intent is still to be tested once a month after the 6 months of counselling has been completed.

Respectfully Submitted,

William Tucker, Regional Manager



Kerri McDaniel, PHR
Human Resources Manager
Sentinel / Leer South Mining Complex
Phone: (304) 314-5136
kmdaniel@archrsc.com

July 9, 2021

Director White:

in a phone discussion with Danny Cook and Barry Koerber earlier this week, they encouraged me to submit comments regarding the Amendments to the State Drug Testing Rule.

As the administrator onsite for all Drug and Alcohol policies at Arch Leer South, a facility that employs 500+ miners in Barbour County, I have seen firsthand how some of the rules that are currently in place can effect employment and a "good employee".

I am in opposition to the addition of 5.13.1 and 5.13.2 as inclusion in this amendment. I will agree that THC and marijuana are an absolute harm to the workforce and you don't want someone who is currently under the influence of those substances working, however with increasing momentum in legislation towards legalization in West Virginia, these policies need amended to include not the "IF" but the "WHEN" someone used marijuana / THC.

Similar to alcohol, the half-life of a "high" in your body from marijuana/ THC would not be noticed after a period of off time from work. For example, someone who drinks a few beers the night before a breathalyzer will not fail that breathalyzer the next morning, however someone who smoked marijuana the night before would fail a drug test / urinalysis screen the following day and the following week, even though they were not currently impaired at the time of testing.

One of the fallacies of the current testing system is that it doesn't test the "WHEN" of THC and marijuana use. Mainstream testing using urinalysis is not to that level of sensitivity yet, however there are some prototypes on the market for a "marijuana breathalyzer" that would answer the "when" question rather than the "if". Ultimately, the drug rules are in place to protect an employee and their peers from active intoxication from any substances, so the "when" question becomes so important in this debate. Hound Labs (linked below) has done extensive research on this problem and developed a device that measures the "when" similar to an alcohol breathalyzer. This would also determine levels, so the arguments being made about THC in CBD products would essentially go away as well.

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A subsidiary of Arch Resources, Inc.
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21550 Barbour County Highway
Philippi, WV 26416



Kerri McDaniel, PHR
Human Resources Manager
Sentinel / Leer South Mining Complex
Phone: (304) 314-5136
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I believe that from an employer and a regulatory agency's standpoint, the "when" is the biggest question of keeping employees safe.

Within that question and as a growing trend amongst the workforce, there are currently many substances that are "legal" that are causing a daily level of impairment in working but cannot be spoken against or used for adverse employment actions. Narcotics, opioids, and other painkillers are prescribed and taken every day, and employees can be impaired while on these substances but still pass a drug test and keep their employment. Additionally, while suboxone and methadone were originally intended to be used on a short term basis, we are seeing a growing trend in employee dependency on these prescriptions as well. These substances are potentially and exponentially more harmful to an employee and their peers than marijuana usage on employee off time.

The biggest concern with new amendments would be to stay ahead of upcoming legislation with these policy rollouts. 5.13.1 and 5.13.2 seem to be taking a step backwards in examining this more closely within the industry.

If you have any questions, please do not hesitate to contact me at my office (304) 314-5136.

Thank you for your time.

Links:

Hound Labs "Marijuana Breathalyzer" - <https://houndlabs.com/>

"How Long Does a Marijuana High Last" - <https://www.healthline.com/health/how-long-does-a-marijuana-high-last#duration>

Thank you,

A handwritten signature in black ink, appearing to read "Kerri McDaniel". The signature is fluid and cursive, with a large loop at the end.

Kerri McDaniel, PHR
Human Resources Manager

Wolf Run Mining LLC
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Sentinel / Leer South Mining Complex
21550 Barbour County Highway
Philippi, WV 26416

The following comments are submitted in response to that certain "Notice of Public Comment Period" which was filed with the Office of West Virginia Secretary of State on June 25, 2021 at 3:16:12 PM; by or on behalf of the Honorable Eugene White, Director of the Office of Miners' Health, Safety and Training; and regarding proposed amendments to Title 56 Series 19 of the West Virginia Code of State Rules.

1. On the cover page under the heading "Relevant Federal Statutes and Regulations," the proposal succinctly states, "NO."

This assertion is facially incorrect. Federal regulation 49 CFR Part 40 is expressly referenced in, and incorporated by reference into, multiple provisions of this document, including but not limited to proposed new section 3.20. In these quick comments, no effort is made to identify specific issues regarding the interplay between 56 CSR 19 and 49 CFR Part 40. To completely dismiss the possibility of conflicts, however, poses a substantial risk of misleadingly oversimplifying the analysis of this proposal.

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3. Proposed new sections 5.13.1 and 5.13.2 are at least arguably incompatible with the federal Americans with Disabilities Act and/or the West Virginia Human Rights Act. Is there a rational basis for treating a legal WV marijuana prescription differently than any other prescription? Perhaps, but – if so – let’s put it on the record. Potential statutory/regulatory conflicts warrant scrutiny commensurate with the full legislative process versus the nominal debate of a legislative rulemaking process. Regardless of one’s position, costly and time-consuming litigation could be avoided by having a thorough legislative history record, including perhaps amendment of the WVHRA if the legislature perceives incompatibility.

4. Proposed new section 7.1 purports to require employers to ensure that their drug testing contractors are registered with the WVOMHST pursuant to Title 36 Series 20.

The fundamental problem with this putative mandate is a failed premise. In Title 36 Series 20 of the WVCSR, an “independent contractor” (*i.e.*, a person or entity which is required to register) is defined as a “firm, corporation, partnership or individual that contracts to perform services or construction *at a coal mine...*” (emphasis added). Accordingly, any firm, corporation, partnership or individual which has NOT contracted to perform services “at the mine” (*i.e.*, anyone whose function is performed somewhere other than the mine site, either in-state or out-of-state) is expressly excluded from 36 CSR 20’s definition of a required registrant.

In short, proposed new section 7.1 seeks to pull itself up by the straps of boots which do not fit.

Notably, Title 36 Series 20 is itself a 2021 addition to the West Virginia Code of State Rules. And perhaps more tellingly, when presented, Title 36 Series 20 proclaimed itself “exempt” from legislative rulemaking scrutiny. Whether Title 36 Series 20 is entitled to such an exemption is a separate debate. For the moment, the real problem for WVOMHST is that it would be improper to treat an exempt interpretative rule as if it were an enabling statute passed by the legislature, and thereby expand the scope of administrative law. Doing so would raise serious issues of constitutional law.

Respectfully tendered this 16th day of July 2021 by electronic mail addressed to eugene.e.white@wv.gov

/s/ William C. Means

William C. Means
WV State Bar ID 8578
9542 North Preston Highway
Albright, WV 26519