

**LEGISLATIVE RULE
TITLE 42
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. – March 23, 2018.

1.4. Effective Date. – March 30, 2018.

1.5. Sunset Date. This rule shall terminate and have no further force or effect on March 30, 2028.

§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" 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.

3.4. "Bona fide benefit plan" means a written plan, fund or program into which an employer pays irrevocable contributions to a trustee or third party as long as the plan's express purpose 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. "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. "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. "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. In computing the amount of a wage bond as required by W. Va. Code §21-5-14(a), an employer may exclude the wages paid to any individual who owns at least a 20% interest in the business.

4.3. An employer is exempt from posting a wage bond 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.

§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.a. The issuing bank or credit union has a physical location in this State;

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.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.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.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 an irrevocable letter of credit as a wage bond, the Commissioner shall only accept it under the following circumstances:

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

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

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

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.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.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 Proceeds Directly to a Bona Fide Benefit Plan.

The Division shall pay wage bond 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.a. A balance sheet or statement of the employer's financial position;

8.2.b. A statement of the employer's revenues and expenses;

8.2.c. A statement of any change in the employer's financial position;

8.2.d. Related notes of financial disclosure;

8.2.e. A statement of the length of time the employer has been in business;

8.2.f. A statement of the length of time the employer has been in business in this State;

8.2.g. A statement of the length of time the employer has had employees; and

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. 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.

8.5. 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. 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 1 year.

9.2. To apply for the release of a wage bond, an employer shall certify by sworn affidavit that the following has occurred:

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.b. The employer has been doing business in this State for 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.c. The employer is no longer engaged in a covered activity; or

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 an employers' sworn affidavit requesting the release of a wage bond, the Commissioner shall confirm that the Division has no unresolved or pending employee claims for wages or fringe benefits.

9.4. If the Commissioner determines that the wage bond may be released, he or she shall notify

the State Treasurer 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.