

WEST VIRGINIA DIVISION OF LABOR WAGE BOND REQUIREMENTS

As required by §21-5-14 of the West Virginia Wage Payment & Collection Act, all companies engaged in construction, mining, or the transportation of minerals within the state of West Virginia must register with the Division of Labor relating to state wage bond requirements.

EXEMPTIONS

There are several exemptions that will relieve a company from the requirement to post a wage bond. A company qualifying for such an exemption will not be required to post a wage bond once the exemption is reported to the Division of Labor. The exemption is reported using the Wage Bond Status Affidavit (*Form WBA1*), which is provided in this packet.

EXEMPTIONS

NOTE: Exemptions marked with an asterisk () may require additional supporting documentation.*

- *The Company's work is limited to the construction of single family dwellings and/or family farming enterprises.*
- *The Company does not have employees working within the state of West Virginia.*
- *The Company has been in business, with employees, in the state of West Virginia for a period of at least one year. **
- *The Company has been in business in another state for a period of five years. **
- *The Company has \$100,000.00 or more in available assets. **
- *The Company is a subsidiary of a parent company that has been in business for more than five years. **

WAGE BOND REQUIREMENTS

Any company that has employees working in the state of West Virginia that does not qualify for one of the above exemptions must post a wage bond with the Division of Labor for a period of up to one year.

To calculate the amount of bond needed, companies must determine their gross payroll amount for a period of 4 weeks in West Virginia at maximum capacity or production. Once the 4 week payroll amount is established, an additional fifteen percent of that amount must be added to determine the amount of bond required.

See example calculation below: *NOTE: Out-of-state companies determine the amount of wage bond required by entering the amount of their West Virginia payroll only.*

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|---|---|
| 1. 4 weeks' payroll in WV @ maximum capacity or production. | \$ <u>10,000.00</u> |
| 2. Enter 15% of the amount entered above. | \$ <u>1,500.00</u> |
| Total the amounts on Lines 1 & 2 to determine bond amount. | \$ <u>11,150.00 BOND AMOUNT REQUIRED</u> |

TYPES OF WAGE BONDS ACCEPTED

The Division of Labor accepts four types (or methods) of bonding, which are explained below. All bonds must be issued on a form prescribed by the Commissioner of Labor, all of which are provided in this packet. If needed, additional forms are also available from the Division of Labor's website.

Acceptable Bond Types:

1. Checks / Money Orders / Cash.
2. Irrevocable Letters of Credit.
3. Certificates of Deposit.
4. Surety Bonds.

Checks / Money Orders / Cash

Wage bonds posted in the form of a check, money order, or cash will either be deposited into an interest bearing, or non-interest bearing, account. The type of account that will apply is determined by the type of forms provided by the company. Cash bonds submitted with a Request to Invest form will be deposited into an interest bearing account in the State Treasury. Cash bonds submitted with only an Owner's Acknowledgment Form will be deposited into a non-interest bearing escrow account with the Division of Labor. The required forms for each type of account are listed below:

Interest Bearing Accounts:

Request to Invest Form
W-9 Form
Wage Bond Status Affidavit

Non-interest Bearing Accounts

Owner Acknowledgement Form
W-9 Form
Wage Bond Status Affidavit

Irrevocable Letters of Credit

All letters of credit must be issued by a United States Bank insured by the Federal Deposit Insurance Corporation (FDIC), or a credit union insured by the National Credit Union Administration (NCUA). The required forms are listed below:

Letter of Credit Form/ Employer Authorization (4 pages including employer authorization)
Wage Bond Status Affidavit

Cerificates of Deposit

Certificates of Deposit must be issued by a United States Bank insured by the Federal Deposit Insurance Corporation (FDIC), or a credit union insured by the National Credit Union Administration (NCUA), *which is physically located within the state of West Virginia*. All certificates of deposit must also be automatically renewable. §42CSR 33-5.2.1, §42CSR 33-5.2.2, §42CSR 33-5.2.3 The required forms are listed below:

Certificate of Deposit Form / Includes Bank and Employer Authorization Pages
Wage Bond Status Affidavit

Surety Bonds

Surety bonds may be issued by any insurance company licensed by the Office of the West Virginia Insurance Commission. When issued, the bond must carry a guarantee by the surety provider that it will not be cancelled or withdrawn without first providing 60 days' notice to the Commissioner of Labor. §42CSR 33-5.4.1, §42CSR 33-5.4.2

NOTE: There are two different types of surety bond forms, one for sole proprietorships and partnerships, and another for corporations, LLCs, and LLPs. Please make sure to use the form that matches your business structure. The required forms are listed below:

*Surety Bond Form for Sole Proprietors and Partnerships, including Owner Authorization Form
Surety Bond Form for Corporations, LLCs, and LLPs, including Owner Authorization Form
Wage Bond Status Affidavit*

NOTICE TO COMPANIES ISSUED A WAGE BOND CEASE & DESIST ORDER

IF YOUR COMPANY HAS BEEN ISSUED A CEASE & DESIST ORDER, YOU MUST ACHIEVE COMPLIANCE PRIOR TO THE EFFECTIVE DATE OF THE ORDER.

Compliance is achieved as follows:

1. Post a wage bond adequate to cover four weeks payroll in WV, plus an additional 15%.
2. Report a qualifying exemption to the Division of Labor.

As it may take several days to secure a new wage bond, companies should address the matter of obtaining a wage bond, or a wage bond exemption, as soon as the cease and desist order is issued to avoid a possible work stoppage. The Wage & Hour Section of the Division of Labor is available to answer questions relating to wage bond compliance 8:00 a.m. to 5:00 p.m. each business day. Contact information is as follows:

***West Virginia Division of Labor
Wage & Hour Section
1900 Kanawha Boulevard East, State Capitol Complex
Building 3, Room 200, Charleston, WV 25305
Phone: 304 356 3930 / 304 558 7890
Fax: 304 558 3797
Email: wageandhour@wv.gov***

West Virginia Wage Bond Requirements \$100,000.00 Asset Exemption

As of July 7, 2017, companies that hold at least \$100,000.00 in available assets may apply to the West Virginia Division of Labor for a wage bond exemption. To claim the exemption, a company must submit a completed Wage Bond Status Affidavit along with a separate statement supporting the value of its assets.

Supporting Information – To qualify for the exemption, a company must also provide an additional statement to the Division of Labor summarizing the value of its assets. As this type of information is available on balance sheets and financial statement summaries, companies that have this information readily available may simply provide a copy with their completed status affidavit. Companies that do not have access to that type of information may provide a list of specific assets that include a current value and the amount of indebtedness, if any, for each item. No specific format is required as long as all of the necessary information is provided. *Full financial statements are not required, nor requested.*

Acceptable Assets – Tangible property such as inventory, vehicles, equipment, machinery, real estate, buildings, accounts receivable, and cash accounts, etc., which are owned by the company requesting the exemption, qualify as assets. Intangible property that cannot be physically touched such as patents or a company's goodwill and reputation are not acceptable, nor are wage bonds already on file with the Division of Labor.

Available Assets - When an item is valued at \$100,000.00 but also serves as collateral on a loan, both the current value and the amount of indebtedness must be considered. For example, an item valued at \$100,000.00 that also serves as collateral on a loan with a balance of \$50,000.00 would have an available asset value of \$50,000.00.

Reporting Available Assets – To qualify for the exemption, a company must report a total of *at least* \$100,000.00 in available assets.

- Companies that have access to a current financial statement summary or balance sheet that reflects total assets and liabilities may simply provide a copy of that information along with their completed status affidavit.
- Companies that do not have a financial statement summary or balance sheet may claim the exemption by providing the Division of Labor with a list of assets. When reporting assets in this manner, the company must list the current value of each item as well as the amount of indebtedness for that item should it serve as collateral on a loan.

Item Description - Value \$100,000.00 / Loan Amt. (Liability) \$50,000.00 = \$50,000.00 Available Asset Value

EMPLOYER'S BOND FOR WAGES & BENEFITS

§21-5-14(a) Bond required. -- With the exception of those who have been doing business in this state actively and actually engaged in construction work, or the severance, production or transportation of minerals for at least one year next preceding the posting of the bond required by this section, every employer, person, firm or corporation engaged in or about to engage in construction work, or the severance, production or transportation (excluding railroads and water transporters) of minerals, shall, prior to engaging in any construction work, or the severance, production or transportation of minerals, furnish a bond on a form prescribed by the commissioner, payable to the state of West Virginia, with the condition that the person, firm or corporation pay the wages and fringe benefits of his or its employees when due. The amount of the bond shall be equal to the total of the employer's gross payroll for four weeks at full capacity or production, plus fifteen percent of the said total of employer's gross payroll for four weeks at full capacity or production. The amount of the bond shall increase or decrease as the employer's payroll increases or decreases: **Provided**, that the amount of the bond shall not be decreased, except with the commissioner's approval and determination that there are not outstanding claims against the bond. Provided, however, that if the employer, person, firm or corporation meets one of the following, then such employer, person, firm or corporation shall be exempt from the requirements of this subsection.

1. Has been in business in another state for at least five years.
2. Has at least \$100,000.00 in assets; or
3. Is a subsidiary of a parent company that has been in business for at least five years.

(b) **Waiver.** -- The commissioner shall waive the posting of any bond required by subsection (a) of this section upon his determination that an employer is of sufficient financial responsibility to pay wages and fringe benefits. The commissioner shall promulgate rules and regulations according to the provisions of chapter twenty-nine-a of this code which prescribe standards for the granting of such waivers.

(c) **Form of bond; filing in office of circuit clerk.** -- The bond may include, with the approval of the commissioner, surety bonding, collateral bonding (including cash and securities), letters of credit, establishment of an escrow account or a combination of these methods. The commissioner shall accept an irrevocable letter of credit in lieu of any other bonding requirement. If collateral bonding is used, the employer may deposit cash, or collateral securities or certificates as follows: Bonds of the United States or its possessions, or of the federal land bank, or of the homeowner's loan corporation; full faith and credit general obligation bonds of the state of West Virginia or other states, and of any county, district or municipality of the state of West Virginia or other states; or certificates of deposit in a bank in this state, which certificates shall be in favor of the state. The cash deposit or market value of such securities or certificates shall be equal to or greater than the sum of the bond. The commissioner shall, upon receipt of any such deposit of cash, securities or certificates, promptly place the same with the state treasurer whose duty it shall be to receive and hold the same in the name of the state in trust for the purpose for which such deposit is made. The employer making the deposit shall be entitled from time to time to receive from the state treasurer, upon the written approval of the commissioner, the whole or any portion of any cash, securities or certificates so deposited, upon depositing with him in lieu thereof, cash or other securities or certificates of the classes herein specified having value equal to or greater than the sum of the bond. The commissioner shall cause a copy of the bond to be filed in the office of the clerk of the county commission of the county wherein the person, firm or corporation is doing business to be available for public inspection.

(d) **Employee cause of action.** -- Notwithstanding any other provision in this article, any employee, whose wages and fringe benefits are secured by the bond, as specified in subsection (c) of this section, has a direct cause of action against the bond for wages and fringe benefits that are due and unpaid.

(e) **Action of commissioner.** -- Any employee having wages and fringe benefits unpaid may inform the commissioner of the claim for unpaid wages and fringe benefits and request certification thereof. If the commissioner, upon notice to the employer and investigation, finds that such wages and fringe benefits or a portion thereof are unpaid, he shall make demand of such employer for the payment of such wages and fringe benefits. If payment for such wages and fringe benefits is not forthcoming within the time specified by the commissioner, not to exceed thirty days, the commissioner

shall certify such claim or portion thereof, and forward the certification to the bonding company or the state treasurer, who shall provide payment to the affected employee within fourteen days of receipt of such certification. The bonding company, or any person, firm or corporation posting a bond, thereafter shall have the right to proceed against a defaulting employer for that part of the claim the employee paid. The procedure specified herein shall not be construed to preclude other actions by the commissioner or employee to seek enforcement of the provisions of this article by any civil proceedings for the payment of wages and fringe benefits or by criminal proceedings as may be determined appropriate.

(f) Posting and reporting by employer. -- With the exception of those exempt under subsection (a) of this section, any employer who is engaged in construction work or the severance, production or transportation (excluding railroad and water transporters) of minerals shall post the following in a place accessible to his or its employees:

(1) A copy of the bond or other evidence of surety specifying the number of employees covered as provided under subsection (a) of this section, or notification that the posting of a bond has been waived by the commissioner; and

(2) A copy of the notice in the form prescribed by the commissioner regarding the duties of employers under this section. During the first year that any person, firm or corporation is doing business in this state in construction work, or in the severance, production or transportation of minerals, such person, firm or corporation shall on or before the first day of February, May, August and November of each calendar year file with the department a verified statement of the number of employees, or a copy of the quarterly report filed with the bureau of employment programs showing the accurate number of employees, unless the commissioner waives the filing of the report upon his determination that the person, firm or corporation is of sufficient stability that the reporting is unnecessary.

g) Termination of bond. -- The bond may be terminated, with the approval of the commissioner, after an employer submits a statement, under oath or affirmation lawfully administered, to the commissioner that the following has occurred: The employer has ceased doing business and all wages and fringe benefits have been paid, or the employer has been doing business in this state for at least five consecutive years and has paid all wages and fringe benefits. The approval of the commissioner will be granted only after the commissioner has determined that the wages and fringe benefits of all employees have been paid. The bond may also be terminated upon a determination by the commissioner that an employer is of sufficient financial responsibility to pay wages and fringe benefits.

§21-5-14a. Insufficiency of bond; manner of distribution.

In the event that the claim of any employee or group of employees having wages and fringe benefits unpaid is in an amount in excess of the bond required in section fourteen of this article, the manner of distribution and order of priority of claims shall be as follows: Unpaid wages; unpaid fringe benefits; damages or expenses incurred or arising out of actual injury: **Provided**, That nothing contained in this section shall be construed so as to limit any other cause of action against any person, firm or corporation.

§21-5-15. Violations; cease and desist orders and appeals therefrom; criminal penalties.

(a) Any person, firm or corporation who knowingly and willfully fails to provide and maintain an adequate bond as required by section fourteen of this article is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five thousand dollars nor more than \$60,000.00, or imprisoned in the state correctional facility not more than one month, or both fined and imprisoned.

(b) Any person, firm or corporation who knowingly, willfully and fraudulently disposes of or relocates assets with intent to deprive employees of their wages and fringe benefits is guilty of a felony, and, upon conviction thereof, shall be fined not less than five thousand dollars nor more than thirty thousand dollars, or imprisoned in the penitentiary not less than one nor more than three years, or both fined and imprisoned.

c) (1) At any time the commissioner determines that a person, firm or corporation has not provided or maintained an adequate bond, as required by section fourteen of this article, the commissioner shall issue a cease and desist order which is to be issued and posted requiring that said person, firm or corporation either post an adequate bond or cease further operations in this state within a period specified by the commissioner; which period shall be not less than five nor more than fourteen days. The cease and desist order may be issued by the commissioner at his own instance or at his direction, with or without application to or the approval of any other officer, agent, department or employee of the state or

application to any court for approval thereof. Any person, firm or corporation who continues to engage in construction work or the severance, production or transportation of minerals without an approved bond after such specified period shall be guilty of a felony, and, upon conviction thereof, shall be fined not less than five thousand dollars nor more than thirty thousand dollars, or imprisoned in the penitentiary not less than one nor more than three years, or both fined and imprisoned. Any cease and desist order issued by the commissioner pursuant to this subsection may be directed by the commissioner to the sheriff of the county wherein the business activity of which the order is the subject, or to any officer or employee of the department, commanding such sheriff, officer or employee to serve such order upon the business in question within seventy-two hours and to make proper return thereof.

(2) Any other provision of law to the contrary notwithstanding, any person against whom a cease and desist order has been directed shall be entitled to judicial review thereof by filing a verified petition taking an appeal therefrom within fifteen days from the date of service of such order. Such verified petition shall be filed in the circuit court of the county wherein service of the order was completed, at the option of the petitioner, or, in the circuit court of Kanawha County, West Virginia. If the appeal is not perfected within such fifteen day period, the cease and desist order shall be final and shall not thereafter be subject to judicial review. No appeal shall be deemed to have been perfected except upon the filing with the clerk of the circuit court of the county wherein the appeal is taken, of a bond or other security to be approved by the court, in an amount of not less than the amount of the bond otherwise required to be posted under the provisions of section fourteen of this article. The person so filing a petition of appeal shall cause a copy of the petition and bond or other posted security to be served upon the commissioner by certified mail, return receipt requested, within seven days after the date upon which the petition for appeal is filed.

d) Any person who threatens any officer, agent or employee of the department or other person authorized to assist the commissioner in the performance of his duties under any provision of section fourteen of this article or of this section or who shall interfere with or attempt to prevent any such officer, agent, employee or other person in the performance of such duties shall be guilty of a felony, and, upon conviction thereof, shall be fined in an amount of not less than one thousand dollars nor more than three thousand dollars or imprisoned in the penitentiary not less than one nor more than three years, or both such fine and imprisonment.

§21-5-16. Contractors and subcontractors to notify commissioner.

Whenever a person, firm or corporation (hereinafter referred to in this section as "the prime contractor") contracts or subcontracts with an employer and such contract or subcontract contemplates the performance of either construction work or the severance, production or transportation (excluding railroads or water transporters) of minerals or any combination of the foregoing, then the prime contractor shall, within ten days next following the execution of such contract or subcontract, notify the commissioner in writing by certified mail, return receipt requested, of such contract, which notice shall include the employer's name, the location of the job site and the employer's principal business location: **Provided**, That if it is ascertained by the prime contractor from the commissioner that the commissioner has obtained the information required to be included in such notice from another agency of this state, then the filing of such notice by the prime contractor shall not be required. If the prime contractor is a firm, corporation or association, then any and all of the officers of such firm, corporation or association shall be responsible to see to the proper notification required by this section. If any prime contractor fails to give the notice required by this section when required to do so, such prime contractor is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than five thousand dollars.

§21-5-1. Definitions.

As used in this article:

- (a) The term "firm" includes any partnership, association, joint-stock company, trust, division of a corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, or officer thereof, employing any person.
- (b) The term "employee" or "employees" includes any person suffered or permitted to work by a person, firm or corporation.
- (c) The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: **Provided**, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.
- (d) The term "commissioner" means commissioner of labor or his designated representative.
- (e) The term "railroad company" includes any firm or corporation engaged primarily in the business of transportation by rail.
- (f) The term "special agreement" means an arrangement filed with and approved by the commissioner whereby a person, firm or corporation is permitted upon a compelling showing of good cause to establish regular paydays less frequently than once in every two weeks: **Provided**, That in no event shall the employee be paid in full less frequently than once each calendar month on a regularly established schedule.
- (g) The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.
- (h) The term "officer" shall include officers or agents in the management of a corporation or firm, who knowingly permit the corporation or firm to violate the provisions of this article.
- (i) The term "wages due" shall include at least all wages earned up to and including the twelfth day immediately preceding the regular payday.
- (j) The term "construction" means the furnishing of work in the fulfillment of a contract for the construction, alteration, decoration, painting or improvement of a new or existing building, structure, roadway or pipeline, or any part thereof, or for the alteration, improvement or development of real property: **Provided**, That construction performed for the owner or lessee of a single family dwelling or a family farming enterprise is excluded.
- (k) The term "minerals" means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metallurgical ore.
- (l) The term "fringe benefits" means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage
- (m) The term "employer" means any person, firm or corporation employing any employee.
- (n) The term "doing business in this state" means having employees actively engaged in the intended principal activity of the person, firm or corporation in West Virginia.