

No. 2236

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989



# ENROLLED

HOUSE BILL No. 2236

(By ~~Mr.~~ Del. Moore + Reid )



Passed March 3, 1989

In Effect From Passage

**ENROLLED**  
**H. B. 2236**

(By DELEGATES MOORE AND REID)

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[Passed March 3, 1989; in effect from passage.]

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AN ACT to amend and reenact sections fourteen and fifteen, article five, chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the requirement of the posting of bond or other security to secure the payment of wages and fringe benefits by employers engaged in construction work or in the severance, production or transportation of minerals; providing that certain employers may be exempted therefrom and limiting such exemption; requiring certain reports be filed with commissioner of labor with respect to bonds and the nature and content of such reports; the issuance of certain cease and desist orders by the commissioner and the authority of the commissioner with respect thereto; the manner in which such orders are to be issued and to be served upon the person affected thereby and the time within which such orders are to be served; providing for judicial review of orders and the venue of such appeals; the time within which such appeals must be taken and certain bonding and other requirements with respect thereto; prohibiting the threatening of or interfering with person authorized to enforce the provision of these sections; and providing penalties for violations.

*Be it enacted by the Legislature of West Virginia:*

That sections fourteen and fifteen, article five, chapter twenty-one of the code of West Virginia, one thousand nine

hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 5. WAGE PAYMENT AND COLLECTION.

§21-5-14. Employer's bond for wages and benefits.

1 (a) *Bond required.*—With the exception of those who  
2 have been doing business in this state actively and  
3 actually engaged in construction work, or the severance,  
4 production or transportation of minerals for at least five  
5 consecutive years next preceding the posting of the bond  
6 required by this section, every employer, person, firm  
7 or corporation engaged in or about to engage in  
8 construction work, or the severance, production or  
9 transportation (excluding railroads and water transpor-  
10 ters) of minerals, shall, prior to engaging in any  
11 construction work, or the severance, production or  
12 transportation of minerals, furnish a bond on a form  
13 prescribed by the commissioner, payable to the state of  
14 West Virginia, with the condition that the person, firm  
15 or corporation pay the wages and fringe benefits of his  
16 or its employees when due. The amount of the bond shall  
17 be equal to the total of the employer's gross payroll for  
18 four weeks at full capacity or production, plus fifteen  
19 percent of the said total of employer's gross payroll for  
20 four weeks at full capacity or production. The amount  
21 of the bond shall increase or decrease as the employer's  
22 payroll increases or decreases: *Provided*, That the  
23 amount of the bond shall not be decreased, except with  
24 the commissioner's approval and determination that  
25 there are not outstanding claims against the bond.

26 (b) *Waiver.*—The commissioner shall waive the post-  
27 ing of any bond required by subsection (a) of this section  
28 upon his determination that an employer is of sufficient  
29 financial responsibility to pay wages and fringe benefits.  
30 The commissioner shall promulgate rules and regula-  
31 tions according to the provisions of chapter twenty-nine-  
32 a of this code which prescribe standards for the  
33 granting of such waivers.

34 (c) *Form of bond; filing in office of circuit clerk.*—The  
35 bond may include, with the approval of the commis-  
36 sioner, surety bonding, collateral bonding (including

37 cash and securities), letters of credit, establishment of  
38 an escrow account or a combination of these methods.  
39 The commissioner shall accept an irrevocable letter of  
40 credit in lieu of any other bonding requirement. If  
41 collateral bonding is used, the employer may deposit  
42 cash, or collateral securities or certificates as follows:  
43 Bonds of the United States or its possessions, or of the  
44 federal land bank, or of the homeowner's loan corpora-  
45 tion; full faith and credit general obligation bonds of the  
46 state of West Virginia or other states, and of any county,  
47 district or municipality of the state of West Virginia or  
48 other states; or certificates of deposit in a bank in this  
49 state, which certificates shall be in favor of the state.  
50 The cash deposit or market value of such securities or  
51 certificates shall be equal to or greater than the sum of  
52 the bond. The commissioner shall, upon receipt of any  
53 such deposit of cash, securities or certificates, promptly  
54 place the same with the state treasurer whose duty it  
55 shall be to receive and hold the same in the name of the  
56 state in trust for the purpose for which such deposit is  
57 made. The employer making the deposit shall be entitled  
58 from time to time to receive from the state treasurer,  
59 upon the written approval of the commissioner, the  
60 whole or any portion of any cash, securities or certifi-  
61 cates so deposited, upon depositing with him in lieu  
62 thereof, cash or other securities or certificates of the  
63 classes herein specified having value equal to or greater  
64 than the sum of the bond. The commissioner shall cause  
65 a copy of the bond to be filed in the office of the clerk  
66 of the county commission of the county wherein the  
67 person, firm or corporation is doing business to be  
68 available for public inspection.

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

75 (e) *Action of commissioner.*—Any employee having  
76 wages and fringe benefits unpaid, may inform the  
77 commissioner of the claim for unpaid wages and fringe

78 benefits and request certification thereof. If the commis-  
79 sioner, upon notice to the employer and investigation,  
80 finds that such wages and fringe benefits or a portion  
81 thereof are unpaid, he shall make demand of such  
82 employer for the payment of such wages and fringe  
83 benefits. If payment for such wages and fringe benefits  
84 is not forthcoming within the time specified by the  
85 commissioner, not to exceed thirty days, the commis-  
86 sioner shall certify such claim or portion thereof, and  
87 forward the certification to the bonding company or the  
88 state treasurer, who shall provide payment to the  
89 affected employee within fourteen days of receipt of  
90 such certification. The bonding company, or any person,  
91 firm or corporation posting a bond, thereafter shall have  
92 the right to proceed against a defaulting employer for  
93 that part of the claim the employee paid. The procedure  
94 specified herein shall not be construed to preclude other  
95 actions by the commissioner or employee to seek  
96 enforcement of the provisions of this article by any civil  
97 proceedings for the payment of wages and fringe  
98 benefits or by criminal proceedings as may be deemed  
99 appropriate.

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

107 (1) A copy of the bond or other evidence of surety  
108 specifying the number of employees covered as provided  
109 under subsection (a) of this section, or notification that  
110 the posting of a bond has been waived by the commis-  
111 sioner; and

112 (2) A copy of the notice in the form prescribed by the  
113 commissioner regarding the duties of employers under  
114 this section. During the first two years that any person,  
115 firm or corporation is doing business in this state in  
116 construction work, or in the severance, production or  
117 transportation of minerals, such person, firm or corpo-  
118 ration shall on or before the first day of February, May,

119 August and November of each calendar year file with  
120 the department a verified statement of the number of  
121 employees, or a copy of the quarterly report filed with  
122 the department of employment security showing the  
123 accurate number of employees, unless the commissioner  
124 waives the filing of the report upon his determination  
125 that the person, firm or corporation is of sufficient  
126 stability that the reporting is unnecessary.

127 (g) *Termination of bond.*—The bond may be termi-  
128 nated, with the approval of the commissioner, after an  
129 employer submits a statement, under oath or affirma-  
130 tion lawfully administered, to the commissioner that the  
131 following has occurred: The employer has ceased doing  
132 business and all wages and fringe benefits have been  
133 paid, or the employer has been doing business in this  
134 state for at least five consecutive years and has paid all  
135 wages and fringe benefits. The approval of the commis-  
136 sioner will be granted only after the commissioner has  
137 determined that the wages and fringe benefits of all  
138 employees have been paid. The bond may also be  
139 terminated upon a determination by the commissioner  
140 that an employer is of sufficient financial responsibility  
141 to pay wages and fringe benefits.

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

1 (a) Any person, firm or corporation who knowingly  
2 and willfully fails to provide and maintain an adequate  
3 bond as required by section fourteen of this article is  
4 guilty of a misdemeanor, and, upon conviction thereof,  
5 shall be fined not less than two hundred dollars nor  
6 more than five thousand dollars, or imprisoned in the  
7 county jail not more than one month, or both fined and  
8 imprisoned.

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

16 years, or both fined and imprisoned.

17 (c) (1) At any time the commissioner determines that  
18 a person, firm or corporation has not provided or  
19 maintained an adequate bond, as required by section  
20 fourteen of this article, the commissioner shall issue a  
21 cease and desist order which is to be issued and posted  
22 requiring that said person, firm or corporation either  
23 post an adequate bond or cease further operations in this  
24 state within a period specified by the commissioner;  
25 which period shall be not less than five nor more than  
26 fourteen days. The cease and desist order may be issued  
27 by the commissioner at his own instance or at his  
28 direction, with or without application to or the approval  
29 of any other officer, agent, department or employee of  
30 the state or application to any court for approval thereof.  
31 Any person, firm or corporation who continues to  
32 engage in construction work or the severance, produc-  
33 tion or transportation of minerals without an approved  
34 bond after such specified period shall be guilty of a  
35 felony, and, upon conviction thereof, shall be fined not  
36 less than five thousand dollars nor more than thirty  
37 thousand dollars, or imprisoned in the penitentiary not  
38 less than one nor more than three years, or both fined  
39 and imprisoned. Any cease and desist order issued by  
40 the commissioner pursuant to this subsection may be  
41 directed by the commissioner to the sheriff of the county  
42 wherein the business activity of which the order is the  
43 subject, or to any officer or employee of the department,  
44 commanding such sheriff, officer or employee to serve  
45 such order upon the business in question within seventy-  
46 two hours and to make proper return thereof.

47 (2) Any other provision of law to the contrary notwith-  
48 standing, any person against whom a cease and desist  
49 order has been directed shall be entitled to judicial  
50 review thereof by filing a verified petition taking an  
51 appeal therefrom within fifteen days from the date of  
52 service of such order. Such verified petition shall be  
53 filed in the circuit court of the county wherein service  
54 of the order was completed, at the option of the  
55 petitioner, or, in the circuit court of Kanawha County,  
56 West Virginia. If the appeal is not perfected within such

57 fifteen day period, the cease and desist order shall be  
58 final and shall not thereafter be subject to judicial  
59 review. No appeal shall be deemed to have been  
60 perfected except upon the filing with the clerk of the  
61 circuit court of the county wherein the appeal is taken,  
62 of a bond or other security to be approved by the court,  
63 in an amount of not less than the amount of the bond  
64 otherwise required to be posted under the provisions of  
65 section fourteen of this article. The person so filing a  
66 petition of appeal shall cause a copy of the petition and  
67 bond or other posted security to be served upon the  
68 commissioner by certified mail, return receipt re-  
69 quested, within seven days after the date upon which the  
70 petition for appeal is filed.

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



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Frederick L. Parker*  
Chairman Senate Committee

*Bernard V. Kelly*  
Chairman House Committee

Originating in the House.

Takes effect from passage.

*Joel C. Mills*  
Clerk of the Senate

*Donald L. Hoff*  
Clerk of the House of Delegates

*Sam R. Tinsley*  
President of the Senate

*W. H. Allen*  
Speaker of the House of Delegates

The within *is approved* this the *17<sup>th</sup>*  
day of *March*, 1989.

*Walter C. Capron*  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/13/89

Time 2:10