WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989

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ENROLLED

HOUSE BILL No. 2236

(By Mr. Del. Moore & Reid)

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Passed March 3, 1989

In Effect from Passage
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.


(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 five consecutive years 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.

(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 commis-
seioner, 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 commis-
ioner 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 deemed
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 commis-
ioner; 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 two years 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 corpo-
ration 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 department of employment security 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 termi-
nated, with the approval of the commissioner, after an
employer submits a statement, under oath or affirm-
ation 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 commis-
sioner 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.

§21-5-15. 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 two hundred dollars nor
more than five thousand dollars, or imprisoned in the
county jail 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.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Tudor C. L. Parker  
Chairman Senate Committee

Bernard V. Kelly  
Chairman House Committee

Originating in the House.

Takes effect from passage.

Jerry A. Miller  
Clerk of the Senate

Donald L. Hoff  
Clerk of the House of Delegates

Larry T. Somers  
President of the Senate

Michael A. Busch  
Speaker of the House of Delegates

The within ......... bill approved this the 17th day of March, 1989.

Martin O’Malley  
Governor
PRESENTED TO THE
GOVERNOR
Date 3/3/89
Time 2:40