

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Enrolled**

## **Senate Bill 718**

BY SENATORS TARR, SYPOLT, SWOPE, HAMILTON,

CLEMENTS, ROBERTS, NELSON, AND MARTIN

[Passed April 10, 2021; in effect from passage]



1 AN ACT to amend and reenact §11-13EE-2, §11-13EE-3, §11-13EE-5, and §11-13EE-16 the  
2 Code of West Virginia, 1931, as amended, all relating generally to the Coal Severance  
3 Tax Rebate; defining terms; providing for rebate of severance tax when capital investment  
4 made in new machinery and equipment directly used in severance of coal, or in coal  
5 preparation and processing plants; providing rules and procedures for claiming rebate and  
6 transfer to successors; and providing that changes clarifying application of rebate are to  
7 be applied retroactive to capital investments placed into service after the original effective  
8 date of this article.

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

**ARTICLE 13EE. COAL SEVERANCE TAX REBATE.**

**§11-13EE-2. Definitions.**

1 (a) *General.* — When used in this article, or in the administration of this article, terms  
2 defined in subsection (b) shall have the meanings ascribed to them by this section, unless a  
3 different meaning is clearly required by either the context in which the term is used, or by specific  
4 definition, in this article.

5 (b) *Terms defined.* —

6 (1) “Affiliated group” means one or more chains of corporations, limited liability entities, or  
7 partnerships, or any combination thereof, connected through the ownership of stock or ownership  
8 interests with a common parent which is a corporation, limited liability entity, or partnership, but  
9 only if the common parent owns directly, or indirectly, a controlling interest in each of the members  
10 of the group.

11 (2) “Base period” means the five-year period directly preceding the year the qualifying  
12 capital investment in new machinery and equipment was placed into service.

13 (3) “Base period annual average severance taxes” means the annual average of the State  
14 portion of severance taxes paid under §11-13A-3 of this code during the five-year period directly  
15 preceding the year the qualifying capital investment in new machinery and equipment was placed

16 into service. The annual average of the state portion of severance taxes is found by taking the  
17 cumulative total of the state portion of severance taxes paid from all mines operated within the  
18 State by the eligible taxpayer and dividing the aggregate cumulative total of the state portion of  
19 severance taxes by five.

20 (4) "Capital investment in new machinery and equipment" means:

21 (A) Tangible personal property in the form of machinery and equipment that is purchased  
22 on or after the effective date of this article and placed in service for direct use in the production of  
23 coal, when the original or first use of the machinery or equipment in this state commences on or  
24 after the effective date of this article;

25 (B) Tangible personal property in the form of machinery and equipment that is leased by  
26 the taxpayer and placed in service for direct use in the production of coal by the taxpayer on or  
27 after the effective date of this article, if the original or first use of the machinery or equipment  
28 commences in this state, with the taxpayer, on or after the effective date of this article and the  
29 machinery or equipment is depreciable, or amortizable, for federal income tax purposes and has  
30 a useful life of five or more years for federal income tax purposes.

31 (C) Tangible personal property in the form of materials used for infrastructure  
32 improvements to real property on or after the effective date of this article and placed in service for  
33 direct use in the production of coal, when the original or first use of the materials used for the  
34 infrastructure upgrades commences in this state on or after the effective date of this article. Such  
35 infrastructure upgrades include, but are not limited to, materials used for construction of haul  
36 roads or access roads, culverts, belt lines, and ventilation fans; and

37 (D) Repair or refurbishment costs to tangible personal property directly used in the  
38 production of coal that are incurred on or after the effective date of this article, which are  
39 capitalized for federal income tax purposes.

40 (5) "Coal mine" or "mine" includes:

41 (A) A "surface mine" or "surface mining operation" which means:

42 (i) Activities conducted on the surface of lands for the removal of coal, or, subject to the  
43 requirements of §11-13EE-14 of this code, surface operations and surface impacts incident to an  
44 underground coal mine, including the drainage and discharge from the mine. The activities  
45 include: Excavation for the purpose of obtaining coal, including, but not limited to, common  
46 methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining; the  
47 uses of explosives and blasting; reclamation; in situ distillation or retorting, leaching or other  
48 chemical or physical processing; the cleaning, concentrating or other processing or preparation  
49 and loading of coal for commercial purposes at or near the mine site; and

50 (ii) The areas upon which the above activities occur or where the activities disturb the  
51 natural land surface. The areas also include any adjacent land, the use of which is incidental to  
52 the activities; all lands affected by the construction of new roads or the improvement or use of  
53 existing roads to gain access to the site of the activities and for haulage; and excavations,  
54 workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles,  
55 overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage  
56 areas, processing areas, shipping areas and other areas upon which are sited structures,  
57 facilities, or other property or materials on the surface, resulting from or incident to the activities:  
58 *Provided*, That the activities do not include the extraction of coal incidental to the extraction of  
59 other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of  
60 minerals removed for purposes of commercial use or sale, or coal prospecting. Surface mining  
61 does not include any of the following:

62 (I) Coal extraction authorized pursuant to a government-financed reclamation contract;

63 (II) Coal extraction authorized as an incidental part of development of land for commercial,  
64 residential, industrial or civic use; or

65 (III) The reclamation of an abandoned or forfeited mine by a no cost reclamation contract;

66 and

67 (B) An “underground mine” which includes the shafts, slopes, drifts or inclines connected

68 with, or intended in the future to be connected with, excavations penetrating coal seams or strata,  
69 which excavations are ventilated by one general air current or divisions thereof, and connected  
70 by one general system of mine haulage over which coal may be delivered to one or more points  
71 outside the mine, and the surface structures or equipment connected or associated therewith  
72 which contribute directly or indirectly to the mining, preparation or handling of coal.

73 (6) "Coal mining operation" includes the mine and the coal preparation and processing  
74 plant.

75 (7) "Coal preparation and processing plant" means any facility (excluding underground  
76 mining operations) which prepares coal by one or more of the following processes: breaking,  
77 crushing, screening, wet or dry cleaning, and thermal drying.

78 (8) "Coal production" means the privilege of severing, extracting, reducing to possession  
79 and producing coal for sale, profit or commercial use and includes the processing of coal at a coal  
80 preparation and processing plant.

81 (9) "Commissioner" or "Tax Commissioner" are used interchangeably herein and mean  
82 the Tax Commissioner of the State of West Virginia, or his or her delegate.

83 (10) "Controlled group" means one or more chains of corporations connected through  
84 stock ownership with a common parent corporation if stock possessing at least 50 percent of the  
85 voting power of all classes of stock of each of the corporations is owned, directly or indirectly, by  
86 one or more of the corporations; and the common parent owns directly stock possessing at least  
87 50 percent of the voting power of all classes of stock of at least one of the other corporations.

88 (11) "Controlling interest" means:

89 (A) For a corporation, either more than 50 percent ownership, directly or indirectly, of the  
90 total combined voting power of all classes of stock of the corporation, or more than 50 percent  
91 ownership, directly or indirectly, of the beneficial ownership interest in the voting stock of all  
92 classes of stock of the corporation;

93 (B) For a partnership, association, trust or other entity other than a limited liability

94 company, more than 50 percent, ownership, directly or indirectly, of the capital, profits, or  
95 beneficial interest in the partnership, association, trust, or other entity;

96 (C) For a limited liability company, either more than 50 percent ownership, directly or  
97 indirectly, of the total membership interest of the limited liability company, or more than 50 percent  
98 ownership, directly or indirectly, of the beneficial ownership interest in the membership interest of  
99 the limited liability company.

100 (12) "Corporation" means any corporation, joint-stock company or association, and any  
101 business conducted by a trustee or trustees wherein interest or ownership is evidenced by a  
102 certificate of interest or ownership or similar written instrument.

103 (13) "Delegate" used in the phrase "or his delegate," when used in reference to the Tax  
104 Commissioner, means any officer or employee of the State Tax Department duly authorized by  
105 the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform  
106 the functions mentioned or described in this article.

107 (14) "Directly used or consumed in the production of coal" means used or consumed in  
108 those activities or operations which constitute an integral and essential part of the production of  
109 coal, as contrasted with and distinguished from those activities or operations which are simply  
110 incidental, convenient or remote to the production of coal.

111 (A) Uses of tangible personal property which constitute direct use or consumption in the  
112 production of coal include only:

113 (i) New machinery and equipment that is depreciable, or amortizable, for federal income  
114 tax purposes, that has a useful life of five or more years for federal income tax purposes, and that  
115 are directly used in the production of coal in this state;

116 (ii) Transportation of coal within the coal mine from the coal face or coal deposit to the  
117 exterior of the mine or to a point where the extracted coal is transported away from the mine;

118 (iii) Directly and physically recording the flow of coal during the production of coal including  
119 those coal treatment processes specified in §11-13A-4 of this code;

120 (iv) Safety equipment and apparatus directly used in the production of coal, or to secure  
121 the safety of mine personnel is direct use in the production of coal;

122 (v) Controlling or otherwise regulating atmospheric conditions required for the production  
123 of coal;

124 (vi) Transformers, pumps, rock dusting equipment and other property used to supply  
125 electricity or water, or to supply or apply rock dust directly used in the production of coal;

126 (vii) Storing, removal or transportation of economic waste, including coal gob, resulting  
127 from the production of coal;

128 (viii) Engaging in pollution control or environmental quality or protection activity directly  
129 relating to the production of coal; or

130 (ix) Otherwise using as an integral and essential part of the production of coal.

131 (B) Uses of tangible personal property which do not constitute direct use or consumption  
132 in the production of coal include, but are not limited to:

133 (i) Heating and illumination of office buildings;

134 (ii) Janitorial or general cleaning activities;

135 (iii) Personal comfort of personnel: *Provided*, That safety equipment and apparatus directly  
136 used in the production of coal or to secure the safety of mine personnel is direct use in the  
137 production of coal when the tangible personal property is depreciable, or amortizable, for federal  
138 income tax purposes and has a useful life of five or more years for federal income tax purposes  
139 when it is placed in service or use;

140 (iv) Production planning, scheduling of work or inventory control;

141 (v) Marketing, general management, supervision, finance, training, accounting and  
142 administration;

143 (vi) Measuring or determining weight, and ash content, water content and other physical  
144 and chemical characteristics of the coal after production;

145 (vii) An activity or function incidental or convenient to the production of coal, rather than

146 an integral and essential part of these activities.

147 (15) "Eligible taxpayer" means:

148 (A) Any person who pays the tax imposed by §11-13A-3 of this code on the privilege of  
149 producing coal for sale, profit or commercial use for at least two years before the capital  
150 investment in machinery and equipment is placed in service or use in this state; or

151 (B) A taxpayer that has experienced a change in business composition through merger,  
152 acquisition, split-up, spin-off or other ownership changes or changes in the form of the business  
153 organization from limited liability company to C corporation, or partnership, or from one form of  
154 business organization to a different form of business organization, may constitute an eligible  
155 taxpayer if the entity currently operating in this state was operating in a different form of business  
156 organization in this state at least two years before the capital investment in new machinery and  
157 equipment is placed in service or use in this state. In the case of business composition change  
158 through merger, acquisition, split-up, spin-off or other ownership changes the current business  
159 may constitute an eligible taxpayer if at least 50 percent of the business assets of such component  
160 were actively and directly used in coal production activity in this state for such two-year period. If  
161 less than 50 percent of the assets of the current entity were not actively and directly used in coal  
162 production activity in this state for such two-year period, then the current entity resulting from a  
163 business composition change through merger, acquisition, split-up, spin-off or other ownership,  
164 shall not constitute an eligible taxpayer.

165 (C) When the rebate applicant is part of a controlled or affiliated group, for purposes of  
166 determining the increase in the state portion of severance taxes paid, the increase in coal  
167 production tonnage, and the increase in full-time and full-time equivalent employment, the term,  
168 "eligible taxpayer" includes all members of the rebate applicant's controlled or affiliated group.  
169 Thus, the increase in the state portion of severance taxes is determined by subtracting the base  
170 period annual average severance taxes paid by the eligible taxpayer's controlled or affiliated  
171 group for all coal mined in this state from the state portion of severance taxes paid by the eligible

172 taxpayer's controlled or affiliated group for all coal mined in this state during the tax year for which  
173 the rebate is claimed. Likewise, the "eligible taxpayer's" total aggregate production tonnage and  
174 total employment figures referenced in §11-13EE-3(c)(1) and (2) are determined by reference to  
175 the controlled group or affiliated group's total aggregate production tonnage and total employment  
176 numbers across all mines operated by the controlled or affiliated group with in the state.

177 (16) "Full-time employee" means an employee who is compensated by an annual salary  
178 and who works, on average, at least 35 hours per week.

179 (17) "Full-time equivalent employee" means the quotient obtained by dividing the total  
180 number of hours for which hourly employees were compensated for employment over the 12-  
181 month period in question by 1,820.

182 (18) "Original use" means the first use to which the property is put by anyone in this state.

183 (19) "Partnership" includes a syndicate, group, pool, joint venture or other unincorporated  
184 organization through or by means of which any business, operation or venture is carried on, which  
185 is taxed under Subchapter K of the Internal Revenue Code, as defined in §11-24-3 of this code,  
186 and which is not a trust or estate, a corporation or a sole proprietorship. The term "partner"  
187 includes a member in such a syndicate, group, pool, joint venture or other unincorporated  
188 organization taxed under Subchapter K of the Internal Revenue Code.

189 (20) "Person" includes any natural person, corporation, partnership, limited liability  
190 company or other business entity.

191 (21) "Production of coal" means privilege of severing, extracting, reducing to possession  
192 and producing coal for sale, profit or commercial use and includes the processing of coal at the  
193 coal preparation and processing plant.

194 (22) "Property" means tangible personal property and is limited to new machinery and  
195 equipment that is depreciable or amortizable for federal income tax purposes and that has a useful  
196 life of five or more years for federal income tax purposes.

197 (23) "Property purchased or leased for business expansion" means:

198 (A) *Included property*. — Except as provided in subparagraph (B) of this section, the term  
199 “property purchased or leased for business expansion” means tangible personal property, but  
200 only if the tangible personal property was purchased, or leased and placed in service or use by  
201 the taxpayer, for use in West Virginia. This term includes only:

202 (i) Tangible personal property placed in service or use by the taxpayer on or after the  
203 effective date of this article, with respect to which depreciation, or amortization in lieu of  
204 depreciation, is allowable in determining the personal or corporation net income tax liability of the  
205 business, or its equity owners, under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which  
206 has a useful economic life at the time the property is placed in service or use in this state, of five  
207 or more years.

208 (ii) Tangible personal property acquired by written lease having a primary term of five  
209 years or more, that is depreciable or amortizable by the lessor, or lessee, for federal income tax  
210 purposes and that has a useful life of five or more years for federal income purposes when it is  
211 placed in service or use, and when the lease commences and was executed by the parties thereto  
212 on or after the effective date of this article, if used as a component part of a new or expanded coal  
213 mining operation in this state shall be included within this definition.

214 (iii) Repair or refurbishment costs to tangible personal property directly used in the  
215 production of coal that are incurred on or after the effective date of this article, which are  
216 capitalized for federal income tax purposes.

217 (B) *Excluded property*. — The term “property purchased or leased for business expansion”  
218 shall not include:

219 (i) Machinery and equipment owned or leased by the taxpayer and for which credit was  
220 taken or is claimed under any other article of this chapter for capital investment in the new  
221 machinery and equipment;

222 (ii) Repair costs, including materials used in the repair, unless for federal income tax  
223 purposes, the cost of the repair must be capitalized and not expensed;

- 224 (iii) Motor vehicles licensed by the West Virginia Division of Motor Vehicles;
- 225 (iv) Airplanes;
- 226 (v) Off-premise transportation equipment;
- 227 (vi) Machinery and equipment that is primarily used outside this state;
- 228 (vii) Machinery and equipment that is acquired incident to the purchase of the stock or
- 229 assets of the seller; and

230 (viii) Used machinery and equipment.

231 (C) *Purchase date*. — New machinery and equipment shall be deemed to have been  
232 purchased prior to a specified date only if:

233 (i) The machinery or equipment was owned by the taxpayer prior to the effective date of  
234 this article or was acquired by the taxpayer pursuant to a binding purchase contract which was in  
235 effect prior to the effective date of this article; or

236 (ii) In the case of leased machinery and equipment, there was a binding written lease or  
237 contract to lease identifiable machinery or equipment in effect prior to the effective date of this  
238 article.

239 (24) “Purchase” means any acquisition of new machinery or equipment, but only if:

240 (A) The machinery or equipment is not acquired from a person whose relationship to the  
241 person acquiring it would result in the disallowance of deductions under Section 267 or 707 (b) of  
242 the United States Internal Revenue Code, as defined in §11-24-3 of this code;

243 (B) The machinery or equipment is not acquired by one component member of a controlled  
244 group from another component member of the same controlled group; and

245 (C) The basis of the machinery or equipment for federal income tax purposes, in the hands  
246 of the person acquiring it, is not determined:

247 (i) In whole or in part by reference to the federal adjusted basis of the machinery or  
248 equipment in the hands of the person from whom it was acquired; or

249 (ii) Under Section 1014 (e) of the United States Internal Revenue Code.

250 (25) "Qualified coal mining activity" means any business or other activity subject to the tax  
251 imposed by §11-13A-3 of this code on the privilege of severing, extracting, reducing to possession  
252 and producing coal for sale, profit or commercial use including the treatment process described  
253 as mining in §11-13A-4(a)(1) of this code.

254 (26) "Qualified investment" means capital investment in new machinery and equipment  
255 directly used in the production of coal in this state that is depreciable, or amortizable, for federal  
256 income tax purposes and has a useful life for federal income tax purposes of five or more years  
257 when it is placed in service or use in this state.

258 (27) "Rebate" means the amount of rebate allowable under §11-13EE-4 of this article.

259 (28) "Related person" means:

260 (A) A corporation, partnership, association or trust controlled by the taxpayer;

261 (B) An individual, corporation, partnership, association or trust that is in control of the  
262 taxpayer;

263 (C) A corporation, partnership, association or trust controlled by an individual, corporation,  
264 partnership, association or trust that is in control of the taxpayer; or

265 (D) A member of the same controlled group as the taxpayer.

266 For purposes of this subdivision, the term "control," with respect to a corporation, means  
267 ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined  
268 voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect  
269 to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest  
270 in the principal or income of the trust. The ownership of stock in a corporation, of a capital or  
271 profits interest in a partnership or association or of a beneficial interest in a trust is determined in  
272 accordance with the rules for constructive ownership of stock provided in section 267 (c) of the  
273 United States Internal Revenue Code, other than paragraph (3) of that section.

274 (29) "State portion of severance taxes paid" means the portion of severance taxes due  
275 under §11-13A-3 of this code when computed at the 4.65 percent rate of tax.

276 (30) “Tangible personal property” means and is limited to new machinery and equipment  
277 that is depreciable, or amortizable, for federal income tax purposes and that has a useful life of  
278 five or more years for federal income tax purposes when it is placed in service or use in this state.

279 (31) “Taxpayer” means any person exercising the privilege of severing, extracting,  
280 reducing to possession and producing coal for sale, profit or commercial use coal, which privilege  
281 is taxable under §11-13A-3 of this code.

282 (32) “This code” means the Code of West Virginia, 1931, as amended.

283 (33) “This state” means the State of West Virginia.

284 (34) “United States Internal Revenue Code” or “Internal Revenue Code” means the  
285 Internal Revenue Code as defined in §11-24-3 of this code

**§11-13EE-3. Rebate allowable.**

1 (a) *Rebate allowable.* — Eligible taxpayers shall be allowed a rebate against a portion of  
2 severance taxes imposed by §11-13A-3 of this code on the privilege of engaging in the production  
3 of coal in an amount not to exceed 35 percent of the eligible taxpayer’s qualified investment in  
4 tangible personal property purchased or leased for business expansion, subject to the limitations  
5 in subsections (b) and (c).

6 (b) *Maximum rebate limited to 80 percent of increase above base period severance taxes.*

7 —The maximum amount of rebate allowable for any given tax year is limited to an amount not to  
8 exceed 80 percent of the increase in the state portion of severance taxes paid for coal mined at  
9 the specific mine where the qualified investment is made when compared to the state portion of  
10 severance taxes paid for coal mined at the specific mine where the qualified investment is made  
11 during the base period.

12 (c) *Additional Limiting Factors.* —

13 (1) In order to qualify for any severance tax rebate under this article in a given rebate year,  
14 the eligible taxpayer must meet the following requirements:

15 (A) No credit shall be allowed unless the aggregate total coal production tonnage from all  
16 mines operated by the eligible taxpayer in this state during the year for which the rebate or rebate  
17 carryover is claimed has increased above the annual average aggregate total coal production  
18 tonnage from all mines operated by the eligible taxpayer during the base period; and

19 (B) No credit shall be allowed unless the aggregate total number of full-time employees,  
20 along with full-time equivalent employees, at all mines operated by the eligible taxpayer in this  
21 state during the rebate year has increased above the annual average aggregate total number of  
22 full-time employees, along with full-time equivalent employees, at all mines operated by the  
23 eligible taxpayer in this state during the base period.

24 (2) The increase in the state portion of severance taxes paid against which the rebate  
25 may be taken is further limited by a factor, the numerator of which is the increase in coal  
26 production, measured in tons produced, at all mines operated by the taxpayer, the denominator  
27 of which is the increase in coal production, measured in tons produced, at the specific mine where  
28 investment is made: *Provided*, That in no instance may the factor exceed one. The increase in  
29 coal production is determined by subtracting the base period coal production, measured in tons  
30 produced, from the coal production, measured in tons produced, during the tax year for which the  
31 rebate is claimed.

32 (d) When the eligible taxpayer has produced coal in this state for two years before making  
33 the capital investment in new machinery and equipment, but was not in business during a full  
34 five-year base period, then the eligible taxpayer's base severance tax amount shall be the amount  
35 of state severance tax due under §11-13A-3 of this code on coal produced in this state during the  
36 most recent tax year prior to making the investment.

37 (e) No rebate shall be allowed under this article when credit is claimed under any other  
38 article of this chapter for capital investment in the new machinery and equipment. No credit shall  
39 be allowed under any other article of this chapter when rebate is allowed under this article for the  
40 capital investment in new machinery and equipment.

**§11-13EE-5. Claim for rebate.**

1           (a) After the severance taxes due for the taxable year are paid, a taxpayer may file a claim  
2 under this article for rebate of up to 80 percent of the increase in the state portion of the severance  
3 taxes paid under §11-13A-3 of this code.

4           (b) When the amount of rebate claimed exceeds 80 percent of the additional state  
5 severance tax paid as provided in subsection (a) of this section, the unused portion of the rebate  
6 amount may be carried forward and refunded by the Tax Commissioner after severance taxes  
7 due in subsequent years are paid: *Provided*, That the carryforward period may not exceed 10  
8 years from the date the capital investment in new machinery and equipment is placed in service  
9 or use in this state.

**§11-13EE-16. Effective date.**

1           The rebate allowed by this article is allowed for capital investment in new machinery and  
2 equipment placed in service or use in this state on or after July 1, 2019. As the changes in sections  
3 §11-13EE-2, §11-13EE-3, and §11-13EE-5 are intended to clarify the original intent and meaning  
4 of this article, the amendments to this article made during the 2021 legislative session are  
5 retroactive and shall be applied to any rebate claims made for all qualified investments placed  
6 into service after the original effective date of this article (July 1, 2019) for which no rebate claim  
7 has been previously made.

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

.....  
*Chairman, Senate Committee*

.....  
*Chairman, House Committee*

Originated in the Senate.

In effect from passage.

.....  
*Clerk of the Senate*

.....  
*Clerk of the House of Delegates*

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*President of the Senate*

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*Speaker of the House of Delegates*

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The within ..... this the.....  
Day of ....., 2021.

.....  
*Governor*