

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

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John Sylvia
Director

January 8, 2018

The Honorable Ed Gaunch
Room 217W, Bldg. 1,
1900 Kanawha Boulevard East
Charleston, WV 25305

The Honorable Gary G. Howell
Room 213 E, Bldg. 1,
1900 Kanawha Boulevard East
Charleston, WV 25305

Dear Chairmen:

This letter report is in response to your request that the Performance Evaluation and Research Division (PERD) review the Division of Labor's (Division) compliance with the West Virginia Jobs Act. Specifically, you asked us to review the Division's compliance over the past 10 years with section five of the Act (§21-1C-5) regarding the collection of certified payroll data and waiver certificate data to be provided to the Division and compliance with the required reporting by the Division to the Joint Committee on Government and Finance. Additionally, you requested that we report on the quality of the information provided to the Division and internal controls of the Division's record keeping. Below are our findings and recommendations.

The Legislature created the West Virginia Jobs Act, W. Va. Code §21-1C, in 2001 to enhance employment of West Virginia residents. The Legislature, at that time, found "*the employment of persons outside the local labor market on public improvement construction projects contracted for and subsidized by the taxpayers of the State contributes significantly to the rate of unemployment and the low per capita income among qualified state residents who would otherwise be hired for these jobs.*" To increase the employment of West Virginians, the Act directs "*residents of local labor markets should be employed for the construction of public improvement projects which directly utilize taxpayer funding, in whole or in parts.*" The Act requires West Virginia employers who contract construction projects through "public authorities" for projects of \$500,000

or greater to hire 75 percent of employees from the local labor market which includes counties or portions of counties outside of West Virginia within 50 miles of the border.¹

The Jobs Act Has Not Been Implemented Since the Creation of the Article in 2001

As part of the Act, the Legislature mandated in W. Va. Code §21-1C-5 that the Division of Labor file annual reports each October 15th with the Joint Committee on Government and Finance to “*determine the effectiveness of the provisions of the article.*” PERD reviewed the Division’s compliance and found that it filed only one report in 2017 with the Joint Committee since the creation of the Act in 2001. In addition, a review of the Division’s annual reports finds no mention of Jobs Act enforcement efforts until 2011, which is ten years after the creation of the article.²

For the Jobs Act to work as defined by code, the Division and other entities must work together. According to Code, the Division was tasked with “*establishing procedures for the efficient collection of data.*” Public authorities are required to provide data regarding contracting construction projects within the state. According to Code, public authorities “*shall*” provide the Division copies of certified payrolls either by providing it directly or requiring the employer to provide this information detailing the number of employees, the county and state where employees reside, and the employee’s occupation. When employers are unable to meet the 75 percent local hiring requirement, they must obtain a waiver certificate from Work Force West Virginia indicating efforts to hire locally and provide copies or require the employer to provide copies to the Division.

The Commissioner acknowledges that the Division has not developed the necessary procedures to organize and collect data from public authorities. He further states that “*the Division has collected some data, but there is no record to indicate it collected and maintained all data mandated by W. Va. Code §21-1C.*” Additionally, he believes there is a failure on the part of most public authorities to hold contractors accountable and provide copies of both the certified payrolls and copies of waivers to the Division. One piece of evidence offered from the Division concerning public authorities’ compliance is the number of waivers requested from Work Force West Virginia by employers. From 2011 to 2017 Work Force WV issued only 12 waivers. Two waivers were issued in 2011. The remaining 10 waivers were issued from 2016 to 2017. Again, the record documents the activity regarding the Jobs Act starting in 2011 but followed by a four-year break. Given the inconsistency, it may indicate a failure on the part of public authorities to hold contractors accountable regarding Jobs Act requirements or that all contractors meet the 75 percent requirement. Another piece of evidence that speaks to the lack of information is the Division’s only report issued in October 2017 which contains information on only three employers.

¹ According to W. Va. Code §21-1C, “*public authority means any officer, board, commission or agency of the State of West Virginia and its subdivisions, including counties and municipalities.*” Additionally, projects involving federal funding are excluded from Jobs Act requirements.

² PERD reviewed Division of Labor Annual reports from 2002 through 2016. The annual report from 2006 was unavailable.

The Division does list a total of 1,572 Jobs Act inspections in its annual reports from 2011 to 2015. The Division of Labor's Commissioner indicates "From 2001 to 2016 *most of the Jobs Act inspections coincided with the Prevailing Wage inspections*" and not due to notification from public authorities as specified by Code. The Commissioner states since 2016, the Division is actively working to organize the collection of information, inform all agencies of the requirements, and drafting a procedural rule to assist in the collection of information. As part of the Division's efforts, it assessed penalties in four cases and collected \$27,900 since November 1, 2016, under the new Commissioner. Given that public authorities have not provided complete information to the Division and that many of the internal controls are still in development, the Legislative Auditor determines that the quality and reliability of information is lacking.

The Legislative Auditor concludes that to meet the intent of the Jobs Act and enhance employment in West Virginia, the Division must provide reports annually as required. Additionally, public authorities must comply with Code as required by providing notification of Jobs Act qualifying projects through the submission of certified payrolls and waiver certificates. Although Code allows the Division to fine employers not in compliance with Jobs Act requirements, nothing in Code provides the Division authority or control over public authorities to enforce compliance with the Jobs Act.³ To meet the intent of the Act, public authorities must first meet their responsibilities in monitoring employers and then work with the Division when necessary to enforce compliance through fines. The Division of Labor is unable to conduct the number of inspections necessary to identify every qualifying Jobs Act project. Public authorities must comply with the law, to ensure all required data are properly collected for submission to the Joint Committee to determine the overall impact of the Jobs Act. It is the opinion of the Legislative Auditor that to assist in the collection of information and enforcement of the Act the Legislature may consider developing a system of fines for non-compliant public authorities.

Sincerely,



John Sylvia

³ Legislation passed during the 2017 Special Session increased civil penalties from \$100 per day of violation to \$250 per each employee less than the required threshold of seventy-five percent per day of violation after receipt of notice. Continued violation can result in penalties of \$500 per each employee.

WEST VIRGINIA DIVISION OF LABOR

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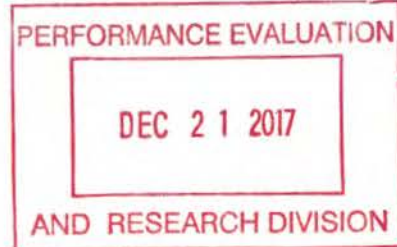
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December 21, 2017

Mr. John Sylvia, Director
Performance Evaluation and Research Division
West Virginia Legislature
1900 Kanawha Boulevard East
State Capitol Complex - Building 1, Room W-314
Charleston, WV 25305-0610



Dear Mr. Sylvia:

I am writing in response to your letter-report dated December 18, 2017 addressed to the Joint Committee on Government Operations and the Joint Committee on Government Organization, which requested that the Performance Evaluation and Research Division (PERD) review the Division of Labor's (Division) compliance over the past 10 years with section 5 of the West Virginia Jobs Act.

Thank you for this opportunity to provide the Division's response to your letter-report. Let me say at the outset that I was confirmed as the Division's Commissioner on November 20, 2017. Prior to that date, I was appointed as the Division's Acting Commissioner on November 1, 2016 and August 19, 2017.

My first involvement in overseeing the Division's compliance with its Jobs Act responsibilities began on November 1, 2016. Since that time, the Division has investigated 12 contractors engaged in construction of public improvements subject to the Jobs Act, and collected \$31,000 in civil penalties for violations of the Jobs Act. When payroll records were submitted incorrectly, the Division notified the public authorities, who in turn advised the contractors to submit payroll records that included the required information.

Since November 1, 2016, we have taken the following steps to comply with our Jobs Act responsibilities:

- Developed a flier outlining a public authority's responsibilities under the Jobs Act. This flier is available on the Division's website and is being distributed to public authorities during Jobs Act construction project site visits;
- Developed a flier outlining the responsibilities under the Jobs Act of contractors and subcontractors. This flier is available on the Division's website and is being distributed to contractors and subcontractors during Jobs Act construction project site visits;
- Filed with the Secretary of State a joint Jobs Act procedural rule with WorkForce West Virginia and with input from the Department of Revenue and Department of Transportation;

Mr. John Sylvia, Director
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- Along with members of the Departments of Commerce, Revenue, and Transportation, participated in the Governor's Jobs Act and Tax Compliance Task Force regarding recommended legislative amendments to the Jobs Act ¹ and developing enhanced procedures for inter-agency information-sharing for the implementation of the Roads to Prosperity program;
- Revised the Division's Jobs Act investigation report, created a new database to streamline data entry; and
- Requested input and guidance from the Legislative Auditor's office regarding the information to be included in the Division's annual report to the Joint Committee on Government and Finance.

While I acknowledge the Division's lack of compliance with its Jobs Act responsibilities in years past, I agree with the letter-report that public authorities must also first meet their responsibilities under the Jobs Act to monitor their public improvement projects, to notify the Division about pre-bid conferences, and to work with the Division to enforce contractors' compliance with hiring employees from the local labor market. Pursuant to W. Va. Code §21-1C-5(b), public authorities are required to file, or require the contractor to file, copies of certified payroll records and waiver certificates issued by Work Force West Virginia with the Division. Pursuant to W. Va. Code §21-1C-5(d), public authorities are charged with implementing the §21-1C-5(b) reporting requirements and including Jobs Act requirements in every contract or subcontract.

In achieving the goal of the Jobs Act and to put as many West Virginia residents as possible to work on public improvement projects funded with state, county or municipality funds, the importance of the public authorities' role cannot be overstated. In addition, public authorities can assist the Division in verifying contractors' compliance with the Jobs Act by sharing the information obtained by their on-site inspectors.

Finally, I can assure you and the Committee that the Division will henceforth provide the required annual reports to the Joint Committee on Government and Finance in a timely manner. Also, I would welcome any guidance that you or the Committee can offer regarding the information that you are interested in receiving.

Sincerely,



Mitchell E. Woodrum, Commissioner
Division of Labor

¹ The most important of these recommendations were included in HB 205 and passed on October 17, 2017 during the 2017 Second Extraordinary Session.