

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 7**

BY SENATORS TRUMP, CLINE, AND TAKUBO

[Originating in the Committee on the Judiciary;

reported on January 24, 2018]

1 A BILL to amend and reenact §21-5-1 and §21-5-12 of the Code of West Virginia, 1931, as  
2 amended, all relating to claims under the Wage Payment and Collection Act; defining the  
3 term “wages”; providing that no action may be brought for collection of accrued fringe  
4 benefits until written notice is provided by the employee, or his or her representative, to  
5 the employer; providing written notice requirements; providing mailing requirements;  
6 providing the employer an opportunity to cure the alleged violation; providing for expiration  
7 of the cure offer and cure period; providing a period for employer to remit payment as  
8 specified in the accepted cure offer; providing that a claim may be brought for failure of  
9 the employer to timely effect the accepted cure offer; providing that the statute of  
10 limitations shall be tolled; providing that the written notice is a jurisdictional prerequisite  
11 for accrued fringe benefit claims; providing an effective date; providing that the notice  
12 requirement is not applicable to claims exclusively for unpaid wages; requiring employers  
13 to notify their employees of the notice requirement; providing means of notice to  
14 employees; requiring the commissioner to issue rules to the extent necessary to effectuate  
15 employee notice; and providing that plaintiff is not entitled to liquidated damages or costs  
16 and attorneys’ fees under certain circumstances.

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

**ARTICLE 5. WAGE PAYMENT AND COLLECTION.**

**§21-5-1. Definitions.**

1 As used in this article:

2 (a) The term “firm” includes any partnership, association, joint-stock company, trust,  
3 division of a corporation, the administrator or executor of the estate of a deceased individual, or  
4 the receiver, trustee, or successor of any of the same, or officer thereof, employing any person.

5 (b) The term “employee” or “employees” includes any person suffered or permitted to work  
6 by a person, firm, or corporation.

7 (c) The term “wages” means compensation for labor or services rendered by an employee,

8 whether the amount is determined on a time, task, piece, commission or other basis of calculation.

9 As used in §21-5-4, §21-5-5, §21-5-8a, and §21-5-10 ~~and twelve~~ of this code, the term “wages”  
10 shall also include then accrued fringe benefits capable of calculation and payable directly to an  
11 employee: *Provided*, That nothing herein contained shall require fringe benefits to be calculated  
12 contrary to any agreement between an employer and his or her employees which does not  
13 contradict the provisions of this article.

14 (d) The term “commissioner” means the Commissioner of Labor or his or her designated  
15 representative.

16 (e) The term “railroad company” includes any firm or corporation engaged primarily in the  
17 business of transportation by rail.

18 (f) The term “special agreement” means an arrangement filed with and approved by the  
19 commissioner whereby a person, firm, or corporation is permitted upon a compelling showing of  
20 good cause to establish regular paydays less frequently than once in every two weeks: *Provided*,  
21 That in no event shall the employee be paid in full less frequently than once each calendar month  
22 on a regularly established schedule.

23 (g) The term “deductions” includes amounts required by law to be withheld, and amounts  
24 authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities,  
25 and hospitalization and medical insurance.

26 (h) The term “officer” shall include officers or agents in the management of a corporation  
27 or firm who knowingly permit the corporation or firm to violate the provisions of this article.

28 (i) The term “wages due” shall include at least all wages earned up to and including the  
29 twelfth day immediately preceding the regular payday.

30 (j) The term “construction” means the furnishing of work in the fulfillment of a contract for  
31 the construction, alteration, decoration, painting, or improvement of a new or existing building,  
32 structure, roadway, or pipeline, or any part thereof, or for the alteration, improvement, or  
33 development of real property: *Provided*, That construction performed for the owner or lessee of a

34 single family dwelling or a family farming enterprise is excluded.

35 (k) The term “minerals” means clay, coal, flagstone, gravel, limestone, manganese, sand,  
36 sandstone, shale, iron ore, and any other metallurgical ore.

37 (l) The term “fringe benefits” means any benefit provided an employee or group of  
38 employees by an employer, or which is required by law, and includes regular vacation, graduated  
39 vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses,  
40 sickness and accident benefits, and benefits relating to medical and pension coverage.

41 (m) The term “employer” means any person, firm, or corporation employing any employee.

42 (n) The term “doing business in this state” means having employees actively engaged in  
43 the intended principal activity of the person, firm, or corporation in West Virginia.

**§21-5-12. Employees’ remedies.**

1 (a)(1) No action may be brought pursuant to this article for the collection of accrued and  
2 unpaid fringe benefits until the employee, or a representative of the employee, has notified his or  
3 her employer of the alleged violation and the factual basis for the violation, including a good faith  
4 estimate of the amount of the claim, in writing and by certified mail, return receipt requested, to  
5 the employer’s registered agent identified by the employer at the office of the West Virginia  
6 Secretary of State or, if not registered with the West Virginia Secretary of State, then to the  
7 employer’s principal place of business.

8 (2) The employer shall have 10 days from receipt of the notice of the alleged violation by  
9 its agent or at its principal place of business to make a cure offer, which shall be provided to the  
10 employee’s counsel or, if unrepresented, to the employee by certified mail, return receipt  
11 requested.

12 (3) The employee has 10 days from receipt of the cure offer to accept the cure offer or it  
13 is deemed refused and withdrawn. If a cure offer is accepted, unless otherwise agreed to by the  
14 parties, the employer has seven days to remit payment as specified in the cure offer.

15 (4) Nothing in this section prevents an employee that has accepted a cure offer from

16 bringing an action under this article against an employer for failing to timely effect the cure offer.

17 (5) Any applicable statute of limitations is tolled for a 20-day period beginning the day the  
18 employer or its agent receives the notice of the alleged violation under §21-5-12(a)(1) of this code,  
19 or for the period the effectuation of the cure offer is being performed, whichever is longer.

20 (6) The written notice required under §21-5-12(a)(1) of this code is a jurisdictional  
21 prerequisite to any action brought under this article for claims accruing on or after the effective  
22 date of this subsection. The written notice required under §21-5-12(a)(1) of this code shall not  
23 apply to claims exclusively for unpaid wages.

24 (7) The employer shall notify its employees that the written notice requirement under §21-  
25 5-12(a)(1) of this code is a jurisdictional prerequisite to any action brought under this article for  
26 the collection of accrued and unpaid fringe benefits. Notice required under this subdivision shall  
27 be made by the employer to the employee either in writing or by posting notice in an employee  
28 common area. The commissioner shall publish guidance and make rules to the extent necessary  
29 to effectuate the purpose of this subdivision.

30 ~~(a)~~ (b) Any person whose wages or, subject to the requirements of §21-5-12(a) of this  
31 code of this section, fringe benefits have not been paid in accord with this article, or the  
32 commissioner or his or her designated representative, upon the request of such person, may bring  
33 any legal action necessary to collect a claim under this article. With the consent of the employee,  
34 the commissioner shall have the power to settle and adjust any claim to the same extent as might  
35 the employee.

36 ~~(b)~~ (c) The court in any action brought under this article may, in the event that any  
37 judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable  
38 attorney fees against the defendant: *Provided, That the plaintiff shall not be awarded liquidated*  
39 damages or costs and attorneys' fees if the plaintiff rejected the employer's cure offer and  
40 judgment is awarded to the plaintiff in an amount not more than 105 percent of the amount offered  
41 in the employer's cure offer. Such attorney fees in the case of actions brought under this section

42 by the commissioner shall be remitted by the commissioner to the Treasurer. The commissioner  
43 shall not be required to pay the filing fee or other costs or fees of any nature or to file bond or  
44 other security of any nature in connection with such action or with proceedings supplementary  
45 thereto, or as a condition precedent to the availability to the commissioner of any process in aid  
46 of such action or proceedings. The commissioner ~~shall have power to~~ may join various claimants  
47 in one claim or lien, and in case of suit to join them in one cause of action.