

**TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE WEST VIRGINIA INSURANCE
COMMISSIONER**

**SERIES 10
PRIMARY CONTRACTOR LIABILITY**

§85-10-1. General.

1.1. Scope. -- This rule implements the provisions of W. Va. Code §23-2-1d, regarding the liability of a primary contractor for payments due to the workers' compensation commission by a subcontractor under certain circumstances. The provisions of this rule shall apply generally to all work done by contract; the person, firm, corporation or other legal entity, which lets a contract for such work shall be responsible primarily and directly for all premiums and related obligations upon the work. This rule, as amended, is applicable only to contracts that are entered into or extended on or after the effective date of this rule.

1.2. Authority. -- W. Va. Code §§23-1-1a; and 23-2-1d. Pursuant to W. Va. Code 23-1-1a(j)(3), rules adopted by the board of managers and the commission are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- May 27, 2005.

1.4. Effective Date. -- July 1, 2005.

§85-10-2. Purpose of Rule.

2.1. The purpose of this rule is to implement the provisions of W. Va. Code §23-2-1d, which was first adopted by the legislature during the 1993 session. The section was amended and reenacted by the legislature during the 1995 session. The section was further amended and reenacted by the legislature during the 2003 extraordinary session and became effective on July 1, 2003.

a. This section was amended and reenacted by the legislature, effective January 29, 2005, and provided that upon termination of the commission, the provisions of W. Va. Code §23-2-1d shall be applicable only to unpaid premiums due the commission or the old fund as provided in article two-c of chapter twenty-three of the Code of West Virginia. This rule is so modified to be consistent with the amended Code upon termination of the commission.

2.2. This rule imposes liability upon primary contractors, including owners and lessees under certain circumstances, for payments due and owing to the workers' compensation commission. These payments include premium taxes, premium deposits, late reporting and payment penalties, interest, and certain other penalties. This rule provides the procedures for certain employers to follow to avoid the imposition of this liability as well as the procedures by which the workers' compensation commission will impose this liability. The rule also offers guidance on the substantive application of the section.

2.3. This rule does not apply to any subcontractor who obtains and maintains without termination or default appropriate workers' compensation coverage from another state or jurisdiction for its employees who are regularly employed by the employer in the other state or jurisdiction and who will be involved in this state temporarily, that is, under a contract or project that will be completed within ninety days of its commencement by its worker or workers, in the performance of the work under the contract. The rule is only applicable to a subcontractor any of whose employees ought to be covered by workers' compensation coverage by the West Virginia workers' compensation commission. West Virginia coverage is required

for employees who are initially employed in West Virginia by an out-of-state employer merely temporarily to be involved in the performance of the work under the contract, regardless of the place of hire or the personal domicile of the temporary employee.

2.4. This rule is implemented in accordance with the stated intent of the Legislature that no contractor, whether a primary contractor, subcontractor or sub-subcontractor, escape or avoid liability for any workers' compensation premium, assessment or tax.

2.5. Applicability.

2.5.a. W. Va. Code §23-2-1d provides that primary contractors may become liable for the workers' compensation obligations of their subcontractors. In addition, W. Va. Code §23-2-1d provides a methodology whereby the primary contractor may avoid this liability.

2.5.b. This rule only applies to the liability imposed on the primary contractor and the avoidance of liability by the primary contractor under the provisions of W. Va. Code 23-2-1d.

2.5.c. This rule does not apply to any other theory of liability under which a primary contractor or any other legal entity or individual may become liable for the workers' compensation obligations of its subcontractors or others.

§85-10-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Executive Director" means the executive director of the West Virginia workers' compensation commission pursuant to W. Va. Code §23-1-1b.

3.2. "Contract" means an agreement of sufficient duration, oral or written, under which some service is to be performed. "Contract" shall include a deed for ownership or a lease of

rights for any coal, oil, gas, other minerals or timber under which some service is to be performed. A contract for the extraction or transportation of natural resources is a provision of services. A contract for the provision of goods is not a contract affected by this rule. For example, the service to be performed may be the construction of a house, the grading and laying of a roadway, the construction of an office building or store, the destruction of a building, the repair of buildings or equipment, or other activity. The contracting for the mere sale and purchase of goods is not an affected contract. However, if the contract provides for or requires for fulfillment the extraction of the coal, oil, gas, other minerals or timber, by the contractor, then the contract would be affected by this rule. Therefore, if the contracting party sells the coal, for example, any contracts it may enter with another employer to extract the coal or perform some other service such as equipment or premises maintenance or repair shall be a contract affected by this rule or by W. Va. Code §23-2-1d. In all instances, the exact terms of and the actual implementation of the contract must be examined.

3.2.a. Contracts affected by this rule are those which are entered into or extended on or after the effective date of this rule, as amended from time to time. It does not apply to any other contracts entered into or extended prior to that date.

3.2.b. Contracts affected by this rule are those for work or services for a period longer than thirty (30) days or contracts for consecutive periods of work that total more than thirty (30) days.

3.3. "Commission" means the workers' compensation commission as provided for by W. Va. Code §23-1-1.

3.4. "Good standing" with the commission means that the contractor or subcontractor has not defaulted on its obligations to make payments to the commission. Being in delinquent status, as provided for in W. Va. Code §23-2-5(b), is not equivalent to being in default and does not deprive the subcontractor of good standing. Delinquent status does not give

rise to the liability provided for by this rule. The term default is defined in W. Va. Code §§23-2-5(d), -5(e), -6, & -8. The term default also includes those situations under W. Va. Code §23-2-5(f)(2)-(4), where an employer returns to default status upon breaching a reinstatement agreement. If a subcontractor fails to meet the requirements of those sections, then it is in default and is not in good standing with the commission.

3.5. "Payments" that are obligations of the subcontractor for the purposes of this rule include the payment of premium taxes, the payment of premium deposits, late reporting and payment penalties, interest, administration charges and attorney fees and costs of actions.

3.6. "Primary contractor" means generally a person, partnership, corporation, or other legal entity, which is in the business of contracting or which regularly contracts with other parties for the performance by it of some service, including the extraction of natural resources. For example, the other party may be a home owner, a land owner, neighborhood association, the owner or tenant of a building, a municipality seeking the construction of a roadway, or any other entity seeking to have work done for it. A person, partnership, corporation, or other legal entity which is in the business of selling goods and not in the business of contracting for services is not a "primary contractor" for purposes of liability under this rule and W. Va. Code §23-2-1d. However, the owner or lessee of coal, oil, gas, other minerals or timber acting under deed or lease otherwise covered by this rule shall be a primary contractor acting under a primary contract whenever that owner or lessee is in the business of selling or extracting that asset or good and enters into a contract with another party for the purpose of extracting such coal, oil, gas, other minerals or timber. Furthermore, an owner is no less a primary contractor, and is defined as such, if he contracts with another party for the development of the property he owns whenever that owner is in the business of developing property. Rather, the totality of the circumstances surrounding the contract must be examined. For instance, a person might obtain his or her first contract in a line of work with the intention of starting a business in that field.

Such an initial contract would likely cause that person to be considered a primary contractor if a portion of the obligation under the contract is subcontracted to another.

3.7. "Subcontractor" means a person, partnership, corporation, or other legal entity who contracts with a primary contractor, owner or lessee, to directly perform all or part of the services to be rendered under the contract between the primary contractor, owner or lessee and a second or third party. Examples of contracts that are not subcontracts for the purpose of this rule include contracts solely to clean, repair or maintain the owner's, lessee's or primary contractor's own facility, home or machinery, such as janitorial services, domestic services, copier services or vehicle maintenance and so on in like instances. The subcontractor's contract must be directly with the primary contractor; that is, in a relationship where a primary contractor subcontracts with a subcontractor who in turn sub-subcontracts with a sub-subcontractor, then the relationship of primary contractor to subcontractor does not exist between the primary contractor and sub-subcontractor. In most circumstances, however, the subcontractor will be found to be a primary contractor with regard to the sub-subcontractor as in the example above. In order to determine whether the subcontractor is to be found to be a primary contractor, then the definition of primary contractor will have to be applied.

3.8. "Employee" means, and "subcontractor" does not mean, any independent contractor who does not maintain a separate business and who does not hold himself or herself out to and render services to the public, trade or industry, provided he or she is not himself or herself an employer subject to this law or has not complied with the provisions of this law, including the workers' compensation act, and shall for the purpose of this rule and act be an employee of any employer for whom he or she is performing services in the course of the trade, business, profession or occupation of such employer.

§85-10-4. Primary Contractor's Liability; Generally.

4.1. The liability of the primary contractor, under the provisions of W. Va. Code §23-2-1d, for the payments due to the workers' compensation commission by its subcontractors can arise in only two ways.

4.1.a. If the subcontractor is not in good standing with the commission on the first date on which it begins performance of its work under the contract, then the primary contractor will become liable for any payments due by the subcontractor to the commission after the subcontractor begins the performance of its work. The primary contractor will not be liable for the payments due to the commission by the subcontractor, which became due prior to the start of the subcontractor's work.

4.1.b. The second way in which the primary contractor can become liable to the commission for the subcontractor's payments is if the subcontractor loses its good standing with the commission after the subcontractor begins the performance of its work and throughout the life of the contract. That is, a subcontractor can be in good standing with the commission at the start of its performance under the contract, but later lose that good standing when it fails to make a report or a payment. In this situation, the primary contractor can become liable for the debts of the subcontractor to the commission unless the primary contractor takes certain actions. In this situation, the primary contractor becomes liable only for certain of the payments that become due after the default. The primary contractor is not liable for any payments that were due prior to that default except as provided for in subdivision 4.1.a. The determination of which payments the primary contractor becomes liable for is set forth in subsection 5.3.

§85-10-5. Avoiding Primary Contractor Liability.

5.1. In order to avoid liability under subdivision 4.1.a, the primary contractor must obtain a valid, current certificate of good standing for the subcontractor. The certificate of good standing can be obtained either from the commission or from the subcontractor. If the

certificate of good standing was issued for some earlier quarter than the calendar quarter immediately preceding the current quarter, then the certificate cannot be relied upon. The certificate of good standing is valid only if it is issued for the immediately preceding quarter; provided, however, since current premium tax payments are only due within thirty (30) days after a quarter ends, if a certificate of good standing is issued during the first month of any quarter, then it will be considered valid if issued, in whole or in part, for the next preceding quarter. In addition, if the proffered certificate of good standing is fraudulent on its face, then the primary contractor can become liable under subdivision 4.1.a.

5.2. In order to avoid liability under subdivision 4.1.b, the primary contractor must first give notice to the commission that the primary contractor wishes to be notified by the commission if the subcontractor defaults. The primary contractor must provide the commission with the subcontractor's and the primary contractor's correct name, address, and federal employers' identification number (FEIN) or its equivalent as well as the policy numbers that are assigned by the commission to the primary contractor and to the subcontractor. The primary contractor is encouraged to use the attached form for this purpose. While other forms of notice, including computer print-outs, will be accepted, such notices must contain, at a minimum, the information and signature requested in the form. The primary contractor may use additional sheets attached to the form to indicate other subcontractors who are working at the same job site. If the primary contractor's notice is accurate and complete, then, before liability can be imposed by the commission under the provisions of W. Va. Code §23-2-1d, the commission must notify the primary contractor of the subcontractor's default in order to provide an opportunity for the primary contractor to take corrective action. The liability then begins as specified in subdivision 5.3.b. Notice of default by the commission to the primary contractor is complete upon placing the notice in the first class United States mail, postage prepaid, and addressed to the primary

contractor at the address furnished to the commission by the primary contractor.

5.3. Determination of the beginning date of the primary contractor's liability under subdivision 4.1.b shall be accomplished as follows.

5.3.a. Before any employer attains default status, these actions must either occur or fail to occur as indicated. In the usual course for a usual employer account, payment is due by the last day of the month following the quarter for which payment is being made. For instance, for the first fiscal calendar quarter (July through September), the payment is due on or before October 31st. If payment is not made by that date, the commission is obligated to issue a delinquency notice to the employer informing it, among other things, that it is now delinquent and that payment must be made on or before the last day of the third month following the quarter for which payment is due. In the above example, payment would be due on or before December 31st. Failure to make payment by that date places the employer in default if the delinquency notice by the commission was timely made. The delinquency notice must be issued within sixty (60) days of the end of the quarter for which payment is due. In the above example, the delinquency notice must be issued on or before November 30th. These requirements are contained in W. Va. Code §23-2-5(b).

5.3.b. For purposes of primary contractor liability, in the example set forth in subdivision 5.3.a, the notice of default by the commission to the primary contractor cannot be issued until sometime in January. This is the beginning of the second quarter after the quarter for which payment is due. The subcontractor does not become default until December 31st and, thus, no notice of default could be issued before that date. According to W. Va. Code §23-2-1d(b)(2), unless the primary contractor takes corrective action, the primary contractor's liability would then begin with the first day of the third quarter following the end of the quarter for which payment is due; that is, for the quarter beginning on April 1st. The primary contractor's

liability for its contractor's payments begins with payments due in that third quarter. Payments that were due for the July through September quarter, payments that were due for the October through December quarter, and payments that were due for the January through March quarter are not the liability of the primary contractor under subdivision 4.1.b.

5.3.c. It sometimes occurs, for a variety of reasons, that the delinquency notice to the employer that is described in subdivision 5.3.a is not timely made within sixty (60) days. Should that happen regarding a subcontractor affected by W. Va. Code §23-4-1d, then the time period described in subdivision 5.3.b may be affected. W. Va. Code §23-2-5(b), is understood to require at least a thirty (30) day notice to the employer before it shall be in default status. If in the example set forth in subdivisions 5.3.a and 5.3.b, the delinquency notice was not issued until December 14th (i.e., the seventy-fifth day), then the payment in order to avoid default would not be due until January 13th (thirty days from the issuance of the late delinquency notice). Default would begin on January 14th. Even later issuance of the delinquency notice would move the default date back accordingly. In the event a notice of default is issued less than thirty (30) days before the end of the quarter, liability will not be imposed upon the primary contractor until the first day after the end of the next quarter. Accordingly, in the example set forth in subdivisions 5.3.a and 5.3.b, if the notice is issued between March 2nd and March 31st, the primary contractor's liability would not begin until July 1st.

5.3.d. If an employer is required to file its payroll report and pay its premium taxes on a basis other than quarterly, then the time periods for curing delinquencies and the primary contractor's notification of the subcontractor's default shall be accordingly adjusted.

5.4. The corrective action that a primary contractor can take to avoid subdivision 4.1.b liability is either to arrange payment of the amounts due to the commission prior to the start of the primary contractor's liability or to

terminate the subcontract prior to that date. Payments may be made by the subcontractor, the primary contractor, or other third party. A reinstatement agreement covering all of a subcontractor's periods of delinquency and default may be considered based upon the best interests of the fund.

5.4.a. The commission may enter into a reinstatement agreement with the primary contractor and subcontractor as co-signators. The primary contractor becomes liable for payment to the fund of the premium taxes as if the premium taxes were incurred by the primary contractor.

5.5. In the event that the primary contractor elects to terminate its subcontract, W. Va. Code §23-2-1d, provides that a subcontractor's failure to make required payments is good and sufficient cause to terminate the contract regardless of any contrary provision in the contract.

5.6. Exclusively for the purposes of W. Va. Code §23-2-1d, and of this rule, a certificate of good standing issued by the commission furnishes an irrebuttable presumption that the subcontractor is in good standing with the commission for the period in question. The presumption does not apply to any other section of chapter 23 of the W. Va. Code. Even if it is later determined that the certificate was issued in error, for any reason, the certificate prevents the imposition of the subdivision 4.1.a liability. For example, if clerical error resulted in the commission issuing a certificate of good standing for a subcontractor whose record with the commission clearly shows it to be in default, the certificate still operates to protect the primary contractor from liability. The erroneously issued certificate does not affect the subcontractor's own liability to the commission. Similarly, if the commission's records indicated that a subcontractor was in good standing and a certificate is then issued, then a later determination, which shows that the subcontractor was not in fact in good standing, does not invalidate the certificate with regard to the primary contractor. This is the case even if

the subcontractor acted fraudulently or criminally to conceal its actual record, unless the primary contractor acted in concert to aid the fraud.

5.7. Under this rule no liability will arise if all of the subcontractor's employees are appropriately and lawfully covered by another state's or jurisdiction's workers' compensation laws. Hence, if an Ohio employer provides workers' compensation coverage through the Ohio state fund to its employees who may be sent into West Virginia on a temporary or transient basis to work on a given contract, then neither this rule nor W. Va. Code §23-2-1d, are applicable. If any one of those employees is to be covered or must be covered by West Virginia's workers' compensation program, then the gross wages for that employee must be reported and premium taxes paid. In that case, all of the provisions of this rule would be applicable to such a subcontractor to the extent of the reportable gross wages.

§85-10-6. Extent of Liability.

6.1. The liability which the primary contractor incurs, under the provisions of W. Va. Code §23-2-1d, is the obligation to pay to the commission the true and correct amount of premium taxes, premium deposit, late reporting and payment penalties, and any interest thereon, as well as administrative charges and attorney fees and costs of any actions, that the subcontractor owes to the commission.

6.2. In determining the amount of payments due to the commission, the commission is not limited to the amounts of gross wages reported by the subcontractor. Rather, the commission may audit the wage records of the employer or other pertinent records and determine for itself the amounts owed to it. From this audit, the true and correct amount of premium taxes, premium deposit, interest and late reporting and payment penalties will be determined in calculating the primary contractor's liability.

6.3. Under the provisions of W. Va. Code §23-2-1d, the primary contractor is liable only

for the payments due from the subcontractor for those employees who are performing work under its contract. Payments for gross wages for employees who are engaged in other work for the subcontractor unrelated to the contract in issue will not become the liability of the primary contractor.

6.4. If the same employees of a subcontractor split their time among a number of jobs some of which are not related to the contract in issue, then the liability imposed by this rule extends only to payments due for the gross wages earned as a result of working under the contract in issue. It shall be the primary contractor's burden to prove that employee(s) of a subcontractor split time among jobs which were not related to its contract with the subcontractor.

6.5. If the subcontractor's default occurs because of a breach of a prior reinstatement agreement, then under the terms of the agreement the full amount of the liability becomes due. However, in this event, the primary contractor will not be liable for any portion of the reinstatement agreement's liability which arose prior to the term or extension of the contract including any interest due on the principal of the agreement which was earned during the term or extension of the contract after the effective date of this rule.

6.6. In the event that the primary contractor makes payment to the commission in the place of the subcontractor, then the primary contractor has a legal right to seek reimbursement or indemnification from the subcontractor for the amounts paid on its behalf to the commission. In addition, the primary contractor may recover its costs of action and attorney fees in seeking such reimbursement or indemnification. Such legal right is not subject to resolution by the commission. Recovery must be made from the subcontractor or through the state's judicial system.

§85-10-7. Collections Efforts.

In the event that the primary contractor does not readily make any payment due under this

rule, the commission is authorized to take collections actions for payments by the primary contractor under the provisions of W. Va. Code §23-2-5a. Reference to that section and the rules promulgated under it should be made by the primary contractor.

§85-10-8. Appeal Process.

Any primary contractor affected by this rule or W. Va. Code §23-2-1d, who wishes to contest any decision made by the commission may do so under the provisions of W. Va. Code §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration decision, a petition within thirty days of the primary contractor's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 CSR7, "Rules for Selected Hearings".)

§85-10-9. Severability

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.

**NOTIFICATION REQUEST
DEFAULT OF SUBCONTRACTOR**

The undersigned primary contractor hereby notifies the workers' compensation commission that it has entered into a subcontract(s) and that it desires to receive notice from the workers' compensation commission if the subcontractor(s) defaults on any payments due to the workers' compensation commission.

(Please provide the following information:)

PRIMARY CONTRACTOR'S NAME: _____

ADDRESS TO WHICH NOTICES ARE TO BE SENT: _____

PRIMARY CONTRACTOR'S POLICY NUMBER: _____

PRIMARY CONTRACTOR'S FEIN¹ NUMBER: _____

SUBCONTRACTOR'S COMPLETE FORMAL NAME (AND INCLUDE ANY TRADE NAME OR TRUE NAME OR A.K.A.)

SUBCONTRACTOR'S ADDRESS: _____

SUBCONTRACTOR'S POLICY NUMBER: _____

SUBCONTRACTOR'S FEIN¹ NUMBER: _____

GIVE A BRIEF DESCRIPTION OF CONTRACT INCLUDING WORKSITE(S):

EXPECTED LENGTH OF THE CONTRACT (BEGINNING DATE & ENDING DATE):

(Additional sheets may be attached for additional subcontractors.)

DATE: _____ SIGNATURE: _____

PRINTED NAME: _____

POSITION WITH PRIMARY CONTRACTOR: _____

¹ If employer does not have an FEIN, please provide social security number.