


Form #3

FILE

OFFICE NEW VIRGINIA
SECRETARY OF STATE


Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 27, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Labor
Room B-749, Building #6
State Capitol Complex
Charleston, WV 25305

LEGISLATIVE RULE TITLE: Verifying The Legal Employment Status of Workers

1. Authorizing statute(s) citation W Va. Code §21-1B-3

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 27, 2007

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) *or* Public Comment Period ended:

July 27, 2007

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached Comments Attach

No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 27, 2007

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Andrew A. Brown, Asst. to the Commissioner

West Virginia Division of Labor

Room B-749, Building #6

State Capitol Complex , Charleston, WV 25305

Ph: (304) 558-7890, ext.#112 FAX (304) 558-2273

abrown@labor.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'F'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

N/A

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

Response To Public Comments

One organization submitted comments to the proposed rule , Verifying the Legal Employment Status of Workers. The Affiliated Construction Trade Foundation submitted one comment/suggestion. Those comment and the Division's response is as follows:

1. The Foundation suggested that the word "identifying" be removed from the phrase "*Any confidential or identifying information*" in sections 7.3 and 7.4 of the proposed rule. The Foundation believes that the use of this word will overly restrict public access to information and documents obtained by the Division through the enforcement process. ***The Division has rejected this suggestion. The phrase "any confidential or identifying information" was taken directly from the statute, W.Va. Code §21-1B-3(d). Therefore, the phrase is proper and compliant with the statute.***

**AFFILIATED
CONSTRUCTION
TRADES FOUNDATION**

A Division of the West Virginia State Building and Construction Trades Council, AFL-CIO



Steve White

Director

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Charleston, WV 25301

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July 24, 2007

West Virginia Division of Labor
Attn: Andrew Brown
Room B-748, Building 6
State Capitol Complex
Charleston, WV 25305

RE: Proposed Rule - Title 42 Series 31

Dear Andy:

I am writing to offer a suggestion for clarification of the rule entitled Verifying the Legal Employment Status of Workers, Title 42 Series 31.

The use of the word "identifying" in sections 7.3 and 7.4 is unnecessary and could lead to overly broad restrictions on information access. For example, names of companies or individuals found in a licensing, payroll, or investigation document could now be considered identifying and redacted. This would be a serious and damaging consequence to our open records and government "sunshine" laws.

In Section 42-31-7 the rule describes how information which is gained from other state agencies must be kept confidential. I believe the intent of this section in the rule is to ensure any confidential data received from other agencies is only used for the purpose of confirming the validity of an employees legal status. However, the language as currently written may be open to misinterpretation and lead to an overly broad expansion of confidentiality beyond records and information received under this new code.

I would like to suggest removing the words "or identifying" in section 7.3 and 7.4. The remaining word "confidential" says it all.

Sincerely,

Steve White

Form #2

OFFICE OF THE
SECRETARY OF STATE

Review Committee

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Verifying The Legal Employment Status of Workers

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Division of Labor

Address: Building #6, Room B-749
State Capitol Complex
Charleston, WV 25305

Phone Number: (304) 558-7890 Email: abrown@labor.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The purpose of this program is to intended identify employers who illegally employ workers, pay wages in cash, and do not remit required payroll taxes/payments. It is impossible to provide increased revenue estimates, but the amount is expected to be significant.

This is a new rule promulgated for the enforcement of legislation which has been in a phase-in process for the most recent two years. The activity requires two office clerical positions and five field compliance officers. All positions will be occupied at the beginning of the 2008 fiscal year. This program has NO funding source. Its enforcement will require an appropriation of general revenue funds.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	335,940.00	335,940.00	350,000.00
Personal Services	280,340.00	280,340.00	290,000.00
Current Expenses	55,600.00	55,600.00	60,000.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title:

Verifying The Legal Employment Status of Workers

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

See summary above. This program has no funding source and will require a general revenue appropriation.

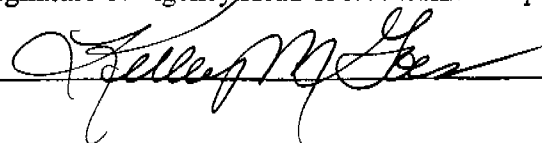
MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

NONE

Date: June 27, 2007

Signature of Agency Head or Authorized Representative



SUMMARY

This is a new rule. The rule is basically a procedural guideline for the compliance and investigative criteria under the requirements of W.Va. Code §21-1B, Verifying the Legal Employment Status of Workers.

The rule establishes compliance definitions relative to acceptable employee documentation and set procedure for addressing issues of non-compliance.

FILED

2007 JUL 27 PM 4: 25

**TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR**

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**SERIES 31
VERIFYING THE LEGAL EMPLOYMENT STATUS OF WORKERS**

§42-31-1. General.

1.1. Scope. -- Employers in West Virginia are responsible for verifying the legal employment status of their employees, and for properly reporting their employment status to appropriate government agencies. Employers cannot hire unauthorized employees and can be penalized for doing so. The purpose of this rule is to clarify an employer's record-keeping responsibilities for the verification of employees' legal status or authorization to work.

1.2. Authority. -- W. Va. Code §21-1B-3.

1.3. Filing Date. --

1.4. Effective Date. --

§42-31-2. Application and Enforcement.

2.1. Application. This rule applies to the West Virginia Division of Labor and to all employers who have employees working in the State of West Virginia.

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor.

§42-31-3. Definitions.

3.1. "Central record-keeping location" means the location where employment records are customarily maintained by the employer.

3.2. "Commissioner" means the Commissioner of the Division of Labor or his or her duly authorized representatives.

3.3. "Division" means the West Virginia Division of Labor.

3.4. "Employee" means any individual employed by an employer.

3.5. "Employer" means any individual, person, corporation, department board, bureau, agency, commission, division, office, company, firm, partnership, council or committee of state government, public benefit corporation, public authority, or political subdivision of the state or other business entity which employs or seeks to employ an individual or individuals.

3.6. "Employ" means to hire or permit to work for compensation.

3.7. "Fraudulent intent" means, for purposes of this rule, an employer's mental determination to conceal, misrepresent or otherwise deceive the Commissioner in order to avoid the record-keeping requirements of W. Va. Code § 21-1B-4.

3.8. "Government agency" means, for purposes of this rule, any agency of the United States, a state, or a political subdivision of a state.

3.9. "Knowingly" means, for purposes of this rule, an employer who fails to request, require or review the documents necessary to verify an employee's legal status or authorization to work.

3.10. "License" means any form of authorization required by the laws of this State in order to operate a business, including but not limited to any permit, certificate, approval, registration, or charter.

3.11. "License holder" is the employer as defined in this rule.

3.12. "Place of employment" means an employer's headquarters, central record-keeping location, or site of work.

3.13. "Proof of legal status" or "authorization to work" means the documents required by the Commissioner for the purpose of verifying an employer's compliance with the provisions of W. Va. Code § 21-1B.

3.14. "Records" means written information that documents an employee's legal status, employment status, or authorization to work.

3.15. "Unauthorized worker" means a person who does not have the legal right to be employed or is employed in violation of law.

3.16. "Undocumented worker" means an employee for whom an employer does not have the records required by W. Va. Code § 21-1B.

3.17. "Willfully" means, for purposes of this rule, an employer who voluntarily, and deliberately or intentionally disregards the provisions of W. Va. Code § 21-1B.

§42-31-4. Employer's Responsibility to Verify Employees' Legal Status or Authorization to Work; Employment of Unauthorized or Undocumented Workers Prohibited.

4.1. An employer must verify all employees' and all prospective employees' legal status or authorization to work prior to their first day of employment or prior to entering into a contract for services with any individual.

4.2. It is unlawful for an employer to knowingly employ, hire, recruit or refer any person for employment who is unauthorized or undocumented.

§42-31-5. Record-keeping Requirements; Content of Records;

5.1. An employer must have a written record of the name and address of each employee, the employee's rate of pay, hours of employment, payroll deductions, and amount of net pay for each pay period.

5.2. In addition to the requirements of § 5.1 of this rule, an employer must document proof of each employee's legal status or authorization to work, which includes one of the following:

- a. A valid photo identification card issued by a government agency;
- b. A valid social security card;
- c. A valid immigration or non-immigration visa including photo identification;
- d. A valid birth certificate;
- e. A valid passport;
- f. A valid work permit or supervision permit authorized by the Division;
- g. A valid permit issued by the United States Department of Justice; or
- h. Other valid document providing evidence of legal residence or authorization to work in the United States.

5.3. An employer must preserve each employee's records for a period of at least two (2) years after the employee has separated from employment.

§42-31-6. Records to be Open or Produced for Inspection by the Commissioner; Notice to Produce Records.

6.1. An employer must keep employee records in a safe and accessible manner at the place or places of employment, or at one or more established central record-keeping offices where such records are customarily maintained.

6.2. Employee records required by this rule must be open for inspection by the Commissioner at reasonable times for examination, copying, photographing or otherwise reproducing in order to determine an employer's compliance with W. Va. Code §§21 -1B-3 and 4.

6.3. a. If employee records are kept and maintained at a work site, an employer must make all records required by this rule available to the Commissioner immediately.

b. If all employee records are not immediately available, the Commissioner shall issue a "Notice to Produce Records or Documents" to the employer or to the individual designated by the employer to be in charge of the work site.

6.4. If employee records are kept and maintained at the place of employment other than the work site, or at a central records-keeping office other than the work site or place of employment, the Commissioner shall issue a "Notice to Produce Records or Documents" to the employer or to the individual designated by the employer to be in charge of the work site.

6.5. Upon issuance by the Commissioner of a "Notice to Produce Records or Documents," the employer must produce the required records or documents within seventy-two (72) hours of receipt of the notice.

a. After such notice, failure by an employer to produce the required records or documents within seventy-two (72) hours shall be deemed to be a knowing violation of the provisions of W. Va. Code §21-1B.

b. Upon a written request by an employer, and for good cause shown, the Commissioner may consider a time-limited waiver of the seventy-two (72) hour time frame.

6.6. Upon a determination by the Commissioner that any employee's documents are invalid or incomplete, the Commissioner shall forthwith provide written notification to the employer.

a. Upon receipt of such notification by the Commissioner, an employer must immediately take whatever actions as are necessary to thereafter comply with the provisions of W. Va. Code §21-1B.

b. After such notification, failure by an employer to so comply shall be deemed to be a knowing violation of the provisions of W. Va. Code §21-1B.

§42-31-7. Confirming the Validity of an Employee's Legal Status or Authorization to Work; Confidential or Identifying Information Protected from Disclosure.

7.1. The Commissioner is authorized to access information maintained by the Bureau of Employment Programs, the Division of Motor Vehicles, and any state agency, for the limited purpose of confirming the validity of an employee's legal status or authorization to work.

7.2. The Commissioner is authorized to provide information to the Bureau of Employment Programs, the Division of Motor Vehicles, and any other state agency, for the limited purpose of confirming the validity of an employee's legal status or authorization to work.

7.3. Any confidential or identifying information obtained by the Commissioner shall be used for the limited purpose of confirming the validity of an employee's legal status or authorization to work.

7.4. Any confidential or identifying information shall be redacted or otherwise expunged from any permanent record maintained by the Division and prior to any lawful request for the release thereof.

§42-31-8. Penalties for Knowingly Employing an Unauthorized or Undocumented Worker; Penalties for Failure to Produce Records.

8.1. Upon a determination by the Commissioner that an employer knowingly employs unauthorized or undocumented workers, the Commissioner may file criminal misdemeanor charges against the employer.

8.2. Upon a determination by the Commissioner that an employer has failed to make available or otherwise produce the records required by this rule within seventy-two (72) hours of receipt of a "Notice to Produce Records or Documents," or within some other time frame permitted by the Commissioner, the Commissioner may file criminal misdemeanor charges against the employer.

8.3. It is a separate violation for each employee for whom the employer does not have the records required by this rule.

8.4. Upon conviction of a first offense, an employer can be fined not less than One Hundred Dollars (\$100.00) but not more than One Thousand Dollars (\$1,000.00) for each violation.

8.5. Upon conviction of a second offense, an employer can be fined not less than Five Hundred Dollars (\$500.00) but not more than Five Thousand Dollars (\$5,000.00) for each violation.

8.6. Upon conviction of a third offense, an employer can be fined not less than One Thousand Dollars (\$1,000.00) but not more than Ten Thousand Dollars (\$10,000.00), or confined in jail for not less than thirty (30) days but not more than one (1) year, or both, for each violation.

8.7. An employer who knowingly provides false or fraudulent records concerning any employee's legal status or authorization to work to the Commissioner is guilty of a misdemeanor and, upon conviction, shall be confined in jail for up to one (1) year, or fined up to Two Thousand Five Hundred Dollars (\$2,500.00), or both, for each violation.

8.8. An employer who knowingly and with fraudulent intent disposes of in any way substantially all of the employer's assets for the purpose of evading the record-keeping requirements of W. Va. Code § 21-1B-4 is guilty of a misdemeanor and, upon conviction, shall be confined in jail for up to one (1) year, or fined up to Ten Thousand Dollars (\$10,000.00), or both, for each violation.

§42-2-9. Notification of Conviction to the Department of Revenue; Denial of a Deductible Business Expense.

9.1. The Commissioner shall notify the Department of Revenue when an employer has been convicted pursuant to W. Va. Code § 21-1B.

9.2. Any employer who has been convicted pursuant to W. Va. Code § 21-1B cannot claim or otherwise deduct wages or other remuneration of Six Hundred Dollars (\$600.00) or more paid to an unauthorized or undocumented worker as a business expense.

§42-2-10. Severability.

10.1. If any provision of this rule or its application to any person or employer be held invalid, such invalidity shall not be construed to invalidate any of the provisions not otherwise affected.