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OFFICE OF THE WEST VIRGINIA
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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

CITE AUTHORITY: W. Va. Code 21-1B-3

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 31

TITLE OF RULE BEING PROPOSED: Verifying the Legal Employment Status of Workers

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Authorized Signature

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

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SERIES 31
VERIFYING THE LEGAL EMPLOYMENT STATUS OF WORKERS

OFFICE OF THE CLERK
WEST VIRGINIA
SECRETARY OF STATE

§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 may not hire unauthorized employees and may 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. "Employ" means to hire or permit to work for compensation.

3.6. "Fraudulent intent" means, for purposes of this rule, an employer who conceals, misrepresents or otherwise deceives the Commissioner in order to avoid the record-keeping requirements of W. Va. Code § 21-1B-4.

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

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

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

3.10. "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-1, *et seq.*

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

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

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

§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 shall 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 shall 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 subsection 5.1 of this rule, an employer shall document proof of each employee's legal status or authorization to work, which includes one of the following:

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

5.3. An employer shall 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 shall 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 the records are customarily maintained.

6.2. Employee records required by this rule shall 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 shall 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 shall produce the required records or documents within seventy-two (72) hours of receipt of the notice.

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

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 immediately provide written notification to the employer.

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

b. After the notification, failure by an employer to comply shall be considered a knowing violation of the provisions of W. Va.. Code §21-1B-1, *et seq.*

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

7.1. The Commissioner may access information maintained by the Bureau of Employment

Programs, the Department 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.

7.2. The Commissioner may provide information to the Bureau of Employment Programs, the Department 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. The Commissioner shall use any confidential or identifying information obtained 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.