

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

FILED

2009 SEP 24 PM 4: 06

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WorkForce West Virginia TITLE NUMBER: 96

CITE AUTHORITY: West Virginia Code §21A-1-4(d)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

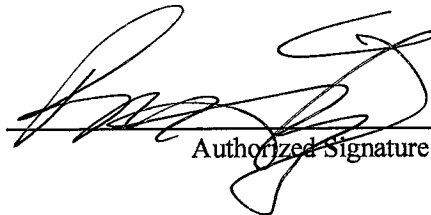
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 3

TITLE OF RULE BEING PROPOSED: Rule for Employer Violator System

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


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: September 23, 2009

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WorkForce West Virginia

112 California Avenue

Charleston, WV 25305 phone: (304) 558/3403

LEGISLATIVE RULE TITLE:

Rule for Employer Violator System

1. Authorizing statute(s) citation

West Virginia Code §21A-1-4(d)

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

August 5, 2009

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

none

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

September 8, 2009

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

Attached X No comments received

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

September 23, 2009

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

Mary Blaine McLaughlin, Senior Counsel
WorkForce West Virginia/ Legal Section
112 California Avenue
Charleston, WV 25305

phone: (304) 558-3403, fax: (304) 558-2468 mmclaugh@workforcewv.org

- 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)

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

The Law Office of Vincent Trivelli, PLLC

178 Chancery Row

Morgantown, West Virginia 26505

Phone (304) 291-5223 • Toll Free 1-866-266-5948

Fax (304) 291-2240 • E-mail: vmtriv@westco.net

August 31, 2009

Ms. Mary Blaine McLaughlin
WorkForce West Virginia
Legal Section
112 California Avenue
Charleston, West Virginia 25305

RECEIVED

SEP 2 2009

WORKFORCE WEST VIRGINIA
LEGAL SECTION
112 CALIFORNIA AVENUE
CHARLESTON, WV 25305

Re: Rule for Employer Violator System

Dear Ms. McLaughlin:

I am writing on behalf of the West Virginia State Building and Construction Trades Council, AFL-CIO and its division the Affiliated Construction Trades ("Trades Council") to provide comments on the recently proposed Rule for the Employer Violator System.

A review of the authorizing statute (West Virginia Code § 21A-1-4(d)) finds that the Legislature clearly intended that the Executive Director of the Workforce West Virginia establish an employer violator system to identify employers and those individuals who are in default on amounts owed to the Fund. In addition, the statute is designed to prevent employers and those "who own, control, or have a ten percent or more ownership interest, or other interest as may be defined by the executive director in any company" that is in default from obtaining or maintaining any license, certificate or permit issued by the state until the violator has paid all moneys owed to the fund or has entered into and remains in compliance with a repayment agreement. That is, the list of violators should include not only employers, as defined by the law, but those who own, control or have a ten percent or more interest (or other interest as defined by the Executive Director) in violating employers.

A review of the proposed regulation, however, finds that, as drafted, only defaulted employers who have had liens placed against their property are to be placed on the violators list. As drafted the proposal does not place those who own, control or have ten percent or more interest in any company that is in default on the violators. (Proposed § 96-1-4). In order to ensure that the proposal meets the mandate of the Legislature the Trades Council proposes the following changes to the proposed regulation.

Proposed §96-1-3 be amended to read as follows:

Page 2 of 2
Mary Blaine McLaughlin
Re: Rule for Employer Violator System
August 31, 2009

Pursuant to the provisions of W. Va. Code §21A-1-4(d), an agency may not grant, issue, renew or maintain any license, certificate or permit issued by the state with any employer or person who is in default with regard to unemployment compensation or is on the Violators List.

Proposed §96-1-4 be amended to read as follows:

Employer Violator List, Violator List or List of Violators.

a. When an employer has a lien filed against its property, its name will be placed on the violators list and only removed from the list when the lien is paid in full. This list, including those referenced in 4(b), is available to the public

b. When the Executive Director becomes aware that a person(s) owns, controls or has a ten percent or more ownership interest, or other ownership interest in any employer that has been placed on the Violators List he/she shall place such person on the Violators List and such person shall only be removed from the list when the violating employer is removed from the list.

By making these changes the Executive Director will bring the proposed regulation into compliance with the statute and the clear intention of the Legislature.

I appreciate your consideration of these comments. If you have any questions or concerns please feel free to contact me.

Yours truly,



Vincent Trivelli

Cc: Steve White, Director, ACT

September 17, 2009

Mr. Vincent Trivelli, Esquire
178 Chancery Row
Morgantown, West Virginia 26505

Re: Rule for Employer Violator System

Dear Mr. Trivelli:

This is to acknowledge your letter of August 31, 2009 and to provide a response to the West Virginia State Building and Construction Trades Council's comments on the proposed rule, 96 CSR 3, for the Employer Violator System.

First, the amended authorizing statute § 21A-1-4(d) of the West Virginia Code is designed to prevent violators "who own control or have a ten percent or more ownership interest or other ownership interest in any company from obtaining or maintaining any license, certificate or permit issued by the state until the violator has paid back all monies owed to the fund." This part of the statute cannot be supported by the rule due to the fact that the agency is not required by the Federal Government to collect such data for the administration of unemployment compensation.

Secondly, this provision conflicts with § 21A-10-11 of the West Virginia Code which states generally that information obtained by the agency that is connected with the administration of unemployment compensation may not be published or be open to public inspection so as to reveal the identity of the employing unit or the individual [§ 21A-10-11(b)]

Third, the confidentiality requirement of Federal Unemployment Compensation law is as follows:

- (a) Statute. Section 303(a)(1) of the SSA (42 U.S.C. 503(a)(1)) provides that, for the purposes of certification of payment of granted funds to a State under Section 302(a) (42 U.S.C. 502(a)), State law must include provision for such methods of administration as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

Legal Section (5107)

112 California Avenue, Charleston, West Virginia 25305-0112
Telephone: (304) 558-3403 • Fax: (304) 558-2468
• <https://www.workforcewv.org/>

*An agency of the Department of Commerce
An equal opportunity/program and auxiliary aids are available upon request to individuals with disabilities.
www.workforcewv.org*

- (b) Interpretation. The Department of Labor interprets Section 303(a)(1), SSA, to mean that "methods of administration" that are reasonably calculated to insure the full payment of UC when due must include provision for maintaining the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.
- (c) Application. Each State law must contain provisions that are interpreted and applied consistently with the interpretation in paragraph (b) of this section and with this subpart, and must provide penalties for any disclosure of confidential UC information that is inconsistent with any provision of this subpart.
(20 CFR 603.4)

Wherefore, only defaulted employers who have had liens placed against their property are to be placed on a public violators list, since the recorded lien has already made this information public.

By leaving the rule as written, the agency is not in violation or conflict with Federal or State law.

If you have any questions concerning this response, you are welcome to contact me at (304) 558-3403.

Very truly yours,



Mary Blaine McLaughlin
Senior Counsel for
WorkForce West Virginia
Unemployment Compensation Division

MBM/dlr

APPENDIX B
FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rule for Employer Violator System Title 96

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: WorkForce West Virginia

Address: 112 California Avenue
Charleston, West Virginia 25305

Attention: Mary Blaine McLaughlin, Counsel

Phone Number: (304) 558-3403 Email: mmclaugh@workforcewv.org

Fiscal Note Summary

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

There will be costs to set up the website, and at this time, we do not know how much those costs will be.

There will also be additional costs to mail notices to to all prospective employers who will be initially included on the violators list.

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	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets			
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Title 96

Rule Title:

~~Rule for Employer Violator System Title 96~~

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

Additional costs will be that of creating and maintaining the Employer Violator Website. At this time there is no estimated cost projection. Currently, staff is working on the collection of delinquent accounts. A small expense may be incurred for any hearings held. However, based on past experience we do not feel many hearings will be requested. Additionally, we anticipate that any costs incurred as a result of the rule will be offset by additional amounts collected from employers in default.

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.

This agency has no information on how much control or interest an employer has in a company and the Executive Director has no such statutory authority to define such interest or control of an employer. Wherefore, this condition can not be effectuated in the statute by this rule as a condition of preventing an employer from obtaining a license, certificate or permit.

Date: 9-24-09

Signature of Agency Head or Authorized Representative



SUMMARY OF FACTS AND CIRCUMSTANCES

West Virginia Code § 21A-1-4(d) passed April 11, 2009 and in effect from passage mandates an emergency rule to effectuate this subsection. The emergency rule mandates how the Executive Director of WorkForce West Virginia establishes an employer violator system or list to identify for the public and other state agencies individuals and employers who are in default on any assessment, surcharge, tax or penalty owed to the unemployment compensation fund. It also establishes due process rights for individuals and employers who are incorrectly placed on the employer violator list.

FILED

96 CSR 3

2009 SEP 24 PM 4: 06

LEGISLATIVE RULE

WORKFORCE WEST VIRGINIA

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 3

RULE FOR EMPLOYER VIOLATOR SYSTEM

§96-3-1. General.

1.1. Scope. -- This legislative rule is intended to set forth the procedures enabling the implementation of the provisions of West Virginia Code §21A-1-4(d) that establishes an employer violator system to identify individuals and employers who are in default on any assessment, surcharge tax, or penalty owed to the unemployment compensation trust fund.

1.2. Authority. -- West Virginia Code §21A-1-4(d). Emergency Legislative Rule requirements of West Virginia Code §29A-3-1 et seq, must be followed pursuant to the Acts of the Legislature, 3rd Executive Session, 1988, §29A-3A-16.

1.3. Filing date. --

1.4. Effective date. --

§96-1-2. Definitions.

The following terms and words have the meanings stated, unless the context clearly indicates otherwise.

2.1. "Agency" includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities, or public corporations.

2.2. "Employer" includes any individual or type of organization as defined in §21A-1A-14 of the West Virginia Code which has in its employ one or more individuals performing service within this State.

2.3. "Employer Violator List" includes any employer as defined above which has a lien filed against them by WorkForce West Virginia due to his or her default on any assessment, surcharge, tax or penalty owed to the unemployment compensation trust fund.

2.4. "Fund" means the unemployment compensation trust fund.

2.5. "Hearing" is defined in 96, CSR 2, Rule for Administrative Hearings.

2.6. "Code" means the West Virginia Code of 1931, as amended.

2.7. "License" is a document or permit certified which the employer must obtain in order for him or her to do business (ie. contractor's license, law license, doctor's license, timbering permit)

2.8. "Default", for purposes of the administration of chapter twenty-one-a of the Code means that an employer is in default when, after due notice, the employer fails to submit a required payment, interest thereon, or penalty, and has not entered into a properly executed repayment agreement with WorkForce West Virginia or has entered into an appropriate repayment agreement, but does not remain in compliance with its obligations under the repayment agreement.

For purposes of this rule, an employer who has failed to submit required payments, interest or penalties, or required quarterly reports by the required due dates is presumed to be in default.

2.9. "Division" means the division of unemployment compensation within WorkForce West Virginia.

2.10. "Employing unit" means an individual, or type of organization, including, any partnership, association, trust, estate, joint-stock company, insurance company, corporation (domestic or foreign), state or political subdivision thereof, or their instrumentalities, as provided in paragraph (B), subdivision (9) [§21A-1A-17(9)(B)] of the definition of "employment" in this article, institution of higher education, or that receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has in its employ one or more individuals performing service within this state. The presumptions of ownership or control contained in the Division of Environmental Protection's Surface Mining Reclamation Regulations promulgated under the provisions of §22-3-1 of the West Virginia Code are not applicable or controlling in determining the identity of employing units who are in default for the purposes of this subdivision.

2.11. "Grant" and "Issue" include not only the original issuance or granting of an approval document but also any transfer, assignment or sale of the document, if otherwise, allowed.

2.12. "List" means a paper or database identification of an employing unit that is in default with WorkForce West Virginia. The list, which will be created by WorkForce West Virginia, may be provided to the agency in the form of either a computerized database or other databases that the agency can access.

2.13. "Person" means any public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or county; any governmental agency; political subdivision; county commission; municipality; industry; public service district; partnership; trust; estate; person or individual; and group or persons or individuals acting individually or as a group or any other legal entity whatever.

2.14. "Repayment agreement" means a written agreement to pay in full all delinquent amounts owed to the Agency, including interest and penalties, under the provisions of chapter twenty-one-a of the Code, but does not include repayment agreements entered into prior to the effective date of this rule, unless the agreement is modified to include the provisions required in this definition.

2.15. "Review" means either to query a computerized database or list to determine if the applicant's name included is in default with the Executive Director with regard to the administration of Chapter twenty-one-a of the Code.

2.16. "WorkForce West Virginia" is the West Virginia Bureau of Employment Programs pursuant to §21A-1-4(b) of the West Virginia Code.

§96-1-3. General Prohibition.

Pursuant to the provision of West Virginia Code §21A-1-4(d), an agency may not grant, issue or renew any permit license or certification with an employer who is in default on any assessment, surcharge, tax or penalty owed to the unemployment compensation fund until such employer has paid back all moneys owed to the fund or has entered into or remains in compliance with a repayment agreement.

§96-1-4. Employer Violator List.

When an employer has a lien filed against its property, its name will be placed on the employer violator list and only removed from the list when the lien is paid in full. This list is available to the public.

§96-1-5. Timing of Review of License or Permit.

5.1. After an application is complete and no further changes may be made to it prior to its final approval and before it is issued, an agency shall review the list. This does not prevent a review prior to that time and notifying the applicant of the results.

5.2. If the applicant's name appears as being in default, an agency shall notify the applicant in writing, as in their normal course of business, that the agency has been informed that the applicant is in default with the Executive Director with regard to the administration of chapter twenty-one-a of the Code and that the approval document can not be issued until the applicant is no longer in default. A copy of the notice shall be sent to the Executive Director addressed as follows:

Director of Unemployment Compensation
WorkForce West Virginia
Unemployment Compensation
112 California Avenue
Charleston, West Virginia 25305

5.3. If the approval document is not issued, granted or renewed within fourteen calendar days of the review that caused notice to be given to the applicant under subsection 4.2 of this section, a new review shall be conducted.

5.4. If the applicant disagrees with WorkForce West Virginia's decision of placing his name on the default list, he may request a hearing under 96CSR2.

§96-1-6. Revocation.

6.1. Pursuant to the provisions of W. Va. Code §21A-1-4(d), an agency shall revoke any approval document of any employing unit whose account is in default with the Executive Director at the time the license, permit, contract, certificate or other authority is renewed.

6.2. If WorkForce West Virginia has reason to believe that an employing unit that is in default is conducting its business pursuant to an approval document with an agency, WorkForce West Virginia shall notify the agency to revoke the approval documents.

6.3. If the agency determines that the employing unit, that is the subject of the notification in subsection 5.2., is conducting its business pursuant to an approval document issued by the agency, the agency shall notify the employing unit in writing, as in their normal course of business, that the agency has been notified that the employing unit is in default with WorkForce West Virginia under the provisions of chapter twenty-one-a of the Code and that the approval document must be revoked. *The agency will have 90 days from the date of notification from WorkForce West Virginia to revoke the employing unit's license or until the employing unit is no longer in default.* A copy of the notice shall be sent to WorkForce West Virginia addressed as follows:

Director of Unemployment Compensation Division
WorkForce West Virginia
112 California Avenue
Charleston, West Virginia 25303

§96-1-7. Conditional Issue.

An approval document shall be conditionally issued or conditionally restored if revoked, if the applicant has entered into a repayment agreement with WorkForce West Virginia for payment in full of all payments, interests and penalties owed. If the applicant does not maintain continued compliance with the repayment agreement, WorkForce West Virginia shall notify the agency that the applicant is in noncompliance. Upon receiving the notice, an agency shall rescind the approval document.

§96-1-8. Request for Review.

When an employing unit's contract, license, permit, certificate or other authority is revoked or not issued or renewed due to its unemployment compensation account being in default with WorkForce and its name appearing on the employer violator list, the employing unit in default may request a review of the decision from the Director of the Unemployment Compensation Division at the address that follows.

Director of Unemployment Compensation Division
WorkForce West Virginia
112 California Avenue
Charleston, West Virginia 25305

§96-1-9. Severability.

If any provisions of this rule or the application thereof to any entity or circumstance is held invalid, such invalidity does 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.