

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

Form #2

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2014 JUN 18 A 11:17

CLERK OF COURTS
CLERK OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §21-1B-3.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 31

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 18, 2014 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

John R. Junkins, Acting Commissioner

West Virginia Division of Labor

State Capitol Complex, Building 6, Room B-749

Charleston, WV 25305

Or by email to: john.r.junkins@wv.gov

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-2273

www.wvlabor.org

EARL RAY TOMBLIN
Governor



JOHN R. JUNKINS
Acting Commissioner

Statement of Facts and Circumstances

and

Summary of Proposed Amendments to Title 42, Series 31

Verifying the Legal Employment Status of Workers

The West Division of Labor proposes the following amendments and revisions to Title 42, Series 31 of the West Virginia Code of State Regulations to reflect the Division of Labor's current and proposed practices with regard to enforcement of the Verifying Legal Employment Status of Workers Act, W. Va. Code § 21-1B-1, *et seq.*

- The definitions of "business days," "seventy-two hours," and "valid document" have been added.
- The type and number of documents an employer needs in order to verify an employee's employment status.
- Clarification of the information the Commissioner may obtain from an employee.
- When and how the Commissioner may issue a citation to an employer for failure to respond to a Notice to Produce Records.

Other technical changes include the reformatting of the proposed rule.

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

Phone Number: 304.558.7890 x 58018 Email: john.r.junkins @wv.gov

Fiscal Note Summary

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

This proposed rule will have no impact on the costs or revenues of state government.

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	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: Verifying the Legal Employment Status of Workers

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.

N/A.

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.

N/A.

Date: 6/17/14

Signature of Agency Head or Authorized Representative

Heidi Borden

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

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2014 JUN 18 A 11:18

SERIES 31

VERIFYING THE LEGAL EMPLOYMENT STATUS OF WORKERS

SECRETARY OF STATE

§42-31-1. General.

1.1. Scope. -- This rule is for the enforcement of the Verifying Legal Employment Status of Workers Act, W. Va. Code §21-1B-1, et seq. 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 or undocumented employees and may be subject to criminal penalties ~~penalized~~ for doing so. The purpose of this rule is to clarify an employer's record-keeping responsibilities for the verification of employees' legal employment status or authorization to work, and actions by the Commissioner against an employer in violation of the Act's requirements.

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

1.3. Filing Date. ~~April 21, 2008.~~

1.4. Effective Date. -- ~~July 1, 2008.~~

§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. The "Act" or "the law" means the Verifying Legal Employment Status of Workers Act, W. Va. Code §21-1B-1, et seq.

3.2. "Business days" means, for purposes of the Act and this rule, any day other than Saturday, Sunday, or any legal holiday as set forth in W. Va. Code §2-2-1.

~~3.1:~~ 3.3. "Central record-keeping location" means the location where employment records are customarily maintained by the employer.

~~3.2.~~ 3.4. "Commissioner" means the Commissioner of the Division of Labor or his or her duly authorized representatives.

~~3.3.~~ 3.5. "Division" means the West Virginia Division of Labor.

~~3.4.~~ 3.6. "Employee" means any individual employed by an employer.

~~3.5.~~ 3.7. "Employ" means to hire, suffer, 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.~~ 3.8. "Government agency" means, for purposes of the Act and this rule, any agency of the United States, a state, or a political subdivision of a state.

~~3.8.~~ "License holder" is the employer.

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

~~3.10.~~ 3.10. "Proof of legal employment 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. "Seventy-two hours" means, for purposes of the Act and this rule, three business days.

~~3.11.~~ 3.12. "Unauthorized worker" means a person who does not have the legal right to be employed or is employed in violation of the law W. Va. Code §21-1B-1, et seq. and this rule.

~~3.12.~~ 3.13. "Undocumented worker" means an employee for whom an employer does not have the records required by W. Va. Code §21-1B-1, *et seq.*, and this rule.

~~3.13.~~ 3.14. "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.*

3.15. "Valid document" means a document that is unexpired on the date the employee was hired.

§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

employment status or authorization to work prior to their first day of employment or prior to entering into a contract for ~~services with~~ employment of any individual.

4.2. An employer shall not hire or continue to employ an unauthorized or undocumented worker.

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

5.1. An employer shall maintain 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 employment status, ~~or authorization to work, which includes one of the following:~~ The following documents shall be accepted as proof of an employee's legal employment status:

~~a:~~ 5.2.1. A valid social security card and a valid photo identification card issued by a government agency;

~~b:~~ 5.2.2. A valid immigration or non-immigration visa including photo identification;

~~c:~~ 5.2.3. A valid birth certificate and a valid photo identification card issued by a government agency;

~~d:~~ 5.2.4. A valid passport;

~~e:~~ A valid photo identification card issued by a government agency;

~~f:~~ 5.2.5. A valid permit issued by the United States Department of Justice;

~~g:~~ 5.2.6. A valid work permit or supervision permit issued to a minor child under the age of 18 years and authorized by the Division; or

~~h:~~ 5.2.7. Any other valid document providing evidence of legal ~~residence or authorization to work~~ employment status 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. During the course of an investigation to determine an employer's compliance with the Act and this rule, the Commissioner may ask an employee his or her name and the name of his or her employer.

~~6.2.~~ 6.3. An employer shall permit the Commissioner to inspect Employee ~~employee~~ records required by the Act and 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.

~~a.~~ 6.3.1. 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.~~ 6.3.2. 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~~ or 3 business days ~~of after~~ receipt of the notice.

6.6. 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~~ or 3 business day 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:

~~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.~~

§42-31-7. Issuance of a Citation for Employer's Failure to Produce Required Records or Documents.

7.1. If an employer fails to respond to a "Notice to Produce Records or Documents" or

otherwise fails to produce the records or documents required by the Act and this rule within the time frames set forth in section 6, the Commissioner may issue a "State of West Virginia Uniform Citation."

7.2. If the Commissioner issues a State of West Virginia Uniform Citation, he or she shall promptly file it with a magistrate or circuit court in the county where the employer's violation occurred.

§42-31-8. Confirming the Validity of an Employee's Legal Employment Status—~~or Authorization to Work~~; Limitations on the Use of Confidential or Identifying Information.

~~7.1.~~ 8.1. The Commissioner may ask the Bureau of Employment Programs, the Division of Motor Vehicles or any other state agency for assistance in confirming the validity of an employee's legal employment status ~~or authorization to work~~.

~~7.2.~~ 8.2. 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 employment legal status ~~or authorization to work~~.

~~7.3.~~ 8.3. The Commissioner shall use any confidential or identifying information obtained for the limited purpose of confirming the validity of an employee's legal employment status ~~or authorization to work~~.

~~7.4.~~ 8.4. 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.