

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

Form #3

Do Not Mark In This Box

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2011 JUL 30 P 1:46

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

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

AMENDMENT TO AN EXISTING RULE: YES NO

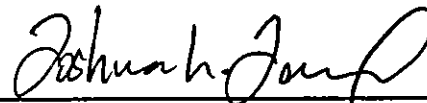
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 31

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: _____

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: July 30, 2014

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Labor
State Capitol Complex,
Building 6, Room B-749
Charleston, WV 25305
304.558.7890 x 58018

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 18, 2014

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

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 18, 2014

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)

July 30, 2014

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

John R. Junkins, Acting Commissioner

Division of Labor

State Capitol Complex

Building 6, Room B-749

Charleston, WV 25305

304.558.7890 x 58018 (phone) 304.558.2273 (fax) john.r.junkins@wv.gov

- 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)

Elizabeth Farber, Assistant Attorney General

State Capitol Complex

Building 6, Room B-749

Charleston, WV 25305

304.558.7890 x 58012 (phone) 304.558.2273 (fax) elizabeth.g.farber@wv.gov

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:

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

d. Attach findings and determinations and reasons:

Attached

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:

7-30-2014

Signature of Agency Head or Authorized Representative

Joshua L. Jurek

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

FILED

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SERIES 31
VERIFYING THE LEGAL EMPLOYMENT STATUS OF WORKERS

OFFICE WEST VIRGINIA
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.

Farber, Elizabeth G

From: Junkins, John
Sent: Tuesday, July 22, 2014 3:06 PM
To: Farber, Elizabeth G
Subject: FW: Rite Aid comments on proposed WV Division of Labor Title 42, Series 31 rules changes
Attachments: Rite Aid comments on proposed amendments to WVDOL Title 42 Series 31 rules.PDF

From: Mark Polen [<mailto:mpolen@lgcr.com>]
Sent: Tuesday, July 22, 2014 9:28 AM
To: Junkins, John
Cc: Markham, Peter G; Wohl, Gabriele; Pizatella, Jason C
Subject: Rite Aid comments on proposed WV Division of Labor Title 42, Series 31 rules changes

All,

I have attached the comments of our client, Rite Aid Corporation, in connection with the changes to the Title 42, Series 31 legislative rules being proposed by the Division of Labor. Through an unfortunate clerical error in Rite Aid's internal tracking system, the number "2" was inadvertently typed instead of a "1" when the comment due date was noted. As a result, Rite Aid's internal staff believed that the deadline for comments on this proposed rule was July 28, when it was actually July 18.

Given the fact that Rite Aid is less than two business days late in recording its comments due to this error, it's our hope that the comments can nevertheless still be considered. As these rules (and our now "informal" comments) will enter the legislative rule-making review process shortly anyway, it would seem reasonable if Rite Aid's comments be considered at this time despite the deadline having passed last Friday.

Thank you very much for your consideration and assistance. We do apologize for this oversight in missing the deadline and look forward to working with everyone in trying to address the concerns raised.

Mark

MARK POLEN
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• **GENERAL OFFICE**
30 Hunter Lane
Camp Hill, PA 17011

• **Telephone (717) 761-2633**

Mr. John R. Junkins, Acting Commissioner
West Virginia Division of Labor
State Capitol Complex, Building 6, Room B-749
Charleston, WV 25305

Re: Proposed Rule: Verifying the Legal Employment Status of Workers

Dear Mr. Junkins,

This letter is submitted on behalf of Rite Aid which is conducting business operations in West Virginia through its 104 licensed pharmacies. Current employment figures for Rite Aid are 827 full-time associates and 712 part-time associates. Our Poca Distribution Center is staffed by 257 associates. We value our long-standing business relationship with West Virginia and the opportunity to submit our comments to you concerning the proposed rule for verifying the legal employment status of workers.

Compliance with state and federal regulations is an extremely important matter for Rite Aid. In this regard, several matters have been noted in the proposed rule that result in possible confusion for employers in West Virginia concerning the verification procedure and documentation that is to take priority.

Our comments are directed to the following matters:

Proposed Rule §42-31-4 (4.1):

Under section 4.1, the proposed rule states that the employer shall verify all employees legal employment status **prior** to their first day of employment or prior to entering into a contract for employment of any individual. This appears to be in direct violation of the current Federal I-9 procedures that prohibit a potential employer from requesting to see employment eligibility verification documents before hire.

Additionally, there are potential issues that requiring this documentation before entering into a contract could place an employer in a situation where a hiring manager might be able to discriminate against an applicant because of the documentation the applicant is required to provide. Currently, the application used by Rite Aid asks "Do you have the legal right to work in the United States?" The applicant does not disclose their country of origin or resident status in order to avoid any possible basis, or allegation, that if country of origin or resident status is required to be disclosed at this point in the process, there is not any potential for discrimination.

Proposed Rule §42-31-4(4.2):

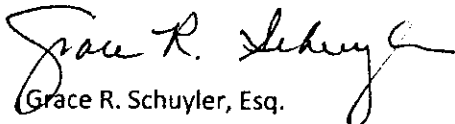
Under section 4.2, the proposed rule states that an employer shall not hire or continue to employ an unauthorized or undocumented worker. What is the procedure that will be required of employers for current employees? It is unclear whether this proposed rule will require employers to re-verify documentation on current active employees.

Proposed Rule §42-31-5(5.2):

In the subsections for section 5.2, the acceptable documents that constitute proof of an employee's legal employment status are specified. The listed documents that are acceptable for the West Virginia Division of Labor differ from the acceptable documents for E-Verify and the Federal I-9. Based on this, is there a new form and procedure that employers conducting business operations in West Virginia should use or do multi-state employers continue to use the Federal I-9 and E-Verify process for validation?

Thank you for the opportunity to share our concerns with you and request clarification of these matters. If you would like additional information or to discuss these issues with us, appropriate persons from our Human Resources Department are available to do so on a date and time convenient for you.

Respectfully submitted,



Grace R. Schuyler, Esq.

Director – State Government Affairs (West Virginia)

Rite Aid

30 Hunter Lane

Camp Hill, PA. 17011

Phone = (717) 975-5845

SUMMARY OF COMMENTS RECEIVED
and
AGENCY RESPONSES

Comment from Grace R. Schuyler

Ms. Schuyler comments that proposed rule §42-31-4.1 requires an employer to verify all employees' legal employment status prior to their first day of employment or prior to entering into a contract for employment. She states that requiring this verification prior to an employee's first day of employment or prior to entering into a contract for employment appears to be in direct violation of the current federal I-9 procedures that prohibit an employer from requesting eligibility verification documents before hiring or contracting with an employee.

Agency Response

A provision in the Verifying the Legal Employment Status of Workers Act, W. Va. Code 21-1B-3(b) states that "[e]mployers shall be required to verify a prospective employee's legal status or authorization to work prior to employing the individual or contracting with the individual for employment services." The proposed rule §42-31-4.1 is consistent with this statutory language, and other than minor modifications, is virtually identical to the current rule. The proposed rule requires an employer to verify employees' legal status prior to their first day of employment.

Therefore, no amendments have been made to the proposed rule.

Comment from Grace R. Schuyler

Ms. Schuyler comments that proposed rule §42-31-4.2 states that an employer shall not hire or continue to employ an unauthorized or undocumented worker. She states that she is unclear whether the proposed rule will require employers to re-verify documents for current, active employees and wants to know what procedures will be required for current employees.

Agency Response

A provision in the Verifying the Legal Employment Status of Workers Act, W. Va. Code 21-1B-3(a) states that "[i]t is unlawful for any employer to knowingly employ, hire, recruit or refer, either for him or herself or on behalf of another, for private or public employment within the state, an unauthorized worker who is not duly authorized to be employed by law."

In addition, W. Va. Code 21-1B-4 states that "[e]very employer, firm and corporation shall make such records of the persons he or she employs including records of proof of the legal status or authorization to work of all employees. Such records shall be preserved pursuant to the provisions of section five, article five-c of this chapter and shall be maintained at the place of employment."

The Act has been in effect since 2002. An employer who has complied with the Act's requirements has verified a current employee's legal status. As long as an employer retains the

required verification documents, there is no need to re-verify an employee's legal status or authorization to work.

Therefore, no amendments have been made to the proposed rule.

Comment from Grace R. Schuyler

Ms. Schuyler comments that proposed rule §42-31-5.2 lists the documents that are acceptable proof of an employee's legal status or authorization to work, but that this list differs from documents used for the federal I-9 form or for the federal E-Verify System. She also asks whether the federal I-9 form and the E-Verify process are acceptable.

Agency Response

If an employer uses the federal I-9 form or the E-Verify System to document an employee's legal status or authorization to work, and the employer offers this information to the Division of Labor, the Division accepts either form of documentation as long as the information is properly completed.

In addition, a provision in the Verifying the Legal Employment Status of Workers Act, W. Va. Code 21-1B-3(c) lists the documents that are acceptable as proof of an employee's legal status or authorization to work. The proposed rule tracks the statutory language.

Therefore, no amendments have been made to the proposed rule.