

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

### **Committee Substitute**

**for**

### **Senate Bill 656**

By Senators Woodrum, Stuart, and Jeffries

[Originating in the Committee on Government  
Organization; reported on February 22, 2023]

1 A BILL to amend and reenact §21-1B-2, §21-1B-3, and §21-1B-6 of the Code of West Virginia,  
2 1931, as amended; and to amend said code by adding thereto a new section, designated  
3 §21-1B-9, all relating to labor; verifying the legal employment status of all persons who  
4 come into their employ and to report their employment to the appropriate governmental  
5 agencies; providing definitions; using E-Verify, the electronic verification of federal  
6 employment authorization program of the Illegal Immigration Reform and Immigrant  
7 Responsibility Act of 1996; and providing that unauthorized workers employment  
8 prohibited.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 1B. VERIFYING LEGAL EMPLOYMENT STATUS OF WORKERS.**

**§21-1B-2. Definitions.**

1 "Alien" means any person who is not a citizen or national of the United States as described  
2 in 8 U.S.C. § 1101 et. seq., and any amendments thereto.

3 "Commissioner" means the labor commissioner or his or her designated agent.

4 "Employee" means any person directed, allowed, or permitted to perform labor or service  
5 of any kind by an employer. The employees of an independent contractor working for a business  
6 entity shall not be regarded as the employees of the business entity, for the purposes of this article.

7 "Employer" means any individual, person, corporation, department, board, bureau,  
8 agency, commission, division, office, company, firm, partnership, council or committee of the state  
9 government, public benefit corporation, public authority or political subdivision of the state or other  
10 business entity which employs or seeks to employ an individual or individuals and that registers  
11 with the Secretary of State.

12 "E-Verify" means the electronic verification of federal employment authorization program  
13 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Division  
14 C, Section 403(a); 8 U.S.C. § 1324a, and operated by the United States Department of Homeland

Security, or its successor program.

"Federal work authorization program" means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or an equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, under the Immigration Reform and Control Act of 1986 (IRCA), P.L. 99-603 or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); 8 U.S.C. § 1324a.

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware by documentation or action that the person's conduct is of that nature or that the circumstance exists. Failure to request or review documentation of an employee's legal status or authorization to work is deemed to be "knowingly".

"Lawful presence or lawfully present" means a person shall be regarded as an alien unlawfully present in the United States only if the person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c). No officer of this state or any political subdivision of this state shall attempt to independently make a final determination of an alien's immigration status. An alien possessing self-identification in any of the following forms is entitled to the presumption that he or she is an alien lawfully present in the United States:

(1) A valid, unexpired West Virginia driver's license.

(2) A valid, unexpired West Virginia nondriver identification card (if applicable).

(3) A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.

(4) Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.

(5) A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission

41 to the United States.

42 (6) A foreign passport issued by a Visa Waiver Program designated country with the  
43 corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the  
44 United States Department of Homeland Security indicating the bearer's admission to the United  
45 States.

46 "License" means any permit, certificate, approval, registration, charter, or similar form of  
47 authorization that is required by law and that is issued for the purpose of operating a business in  
48 this state.

49 "Records" means records that may be required by the Commissioner of Labor for the  
50 purposes of compliance with the provisions of this article.

51 "Unauthorized worker" means a person who does not have the legal right to be employed  
52 or is employed in violation of law or an alien who is not authorized to work in the United States as  
53 defined in 8 U.S.C. § 1324a(h)(3).

**§21-1B-3. Unauthorized workers; employment prohibited.**

1 (a) It is unlawful for any employer to knowingly employ, hire, recruit, or refer, either for him  
2 or herself or on behalf of another, for private or public employment within the state, an  
3 unauthorized worker who is not duly authorized to be employed by law.

4 (b) Employers shall be required to verify ~~a prospective~~ an employee's legal status or  
5 authorization to work ~~after prior to~~ after employing the individual or contracting with the individual for  
6 employment services but prior to three days after the employee's first day of work for pay, unless  
7 the employee will work for fewer than three days; then verification must occur no later than the first  
8 day of work for pay.

9 (c) For purposes of this article, proof of legal status or authorization to work includes, but is  
10 not limited to, a valid Social Security card, a valid immigration or nonimmigration visa, including  
11 photo identification, a valid birth certificate, a valid passport, a valid photo identification card issued  
12 by a government agency, a valid work permit or supervision permit authorized by the Division of

Labor, a valid permit issued by the Department of Justice, or other valid document providing evidence of legal residence or authorization to work in the United States.

(d) For purposes of enforcing the provisions of this article, and notwithstanding any other provision of this code to the contrary, the commissioner or his or her authorized representative may access information maintained by any other state agency, including, but not limited to, the Bureau of Employment Programs and the Division of Motor Vehicles, for the limited purpose of confirming the validity of a worker's legal status or authorization to work. The commissioner shall promulgate rules in accordance with the provisions of chapter 29A of this code to safeguard against the release of any confidential or identifying information that is not necessary for the limited purpose of enforcing the provisions of this article.

(e) As a condition for the award of any contract, grant, or incentive by this state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer shall provide documentation establishing that the business entity or employer is enrolled in the E-Verify Program. During the performance of the contract, the business entity or employer shall participate in the E-Verify Program and shall verify every employee that is required to be verified according to the applicable federal rules and regulations.

(f) No subcontractor on a project paid for by contract, grant, or incentive by this state, any political subdivision thereof, or any state-funded entity may knowingly employ, hire for employment, or continue to employ an unauthorized alien and shall also enroll in the E-Verify Program prior to performing any work on the project and shall verify every employee that is required to be verified according to the applicable federal rules and regulations.

(g) A contractor of any tier shall not be liable under this section when its direct subcontractor violates this section, if the contractor receives a sworn affidavit from the subcontractor signed before a notary that the direct subcontractor, in good faith, has complied with respect to verifying each of its employee's eligibility for employment, unless the contractor knows

the direct subcontractor is violating this section.

(h)(1) Upon the first violation of subsection (e) of this section by any business entity or employer awarded a contract by the state, any political subdivision thereof, or any state-funded entity, the business entity or employer shall be considered in breach of contract and the state, political subdivision thereof, or state-funded entity may terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Attorney General may bring an action to suspend the business licenses and permits of the business entity or employer for a period not to exceed 60 days, according to the procedures described in this section. The court shall order the business entity or employer to file a signed, sworn affidavit with the Attorney General within three days after the order is issued by the court stating that the business entity or employer has terminated the employment of every unauthorized alien and the business entity or employer will not knowingly or intentionally employ an unauthorized alien in this state. Before a business license or permit that has been suspended under this subsection is reinstated, a legal representative of the business entity or employer shall submit to the court a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this article and a copy of the Memorandum of Understanding issued to the business entity or employer at the time of enrollment in E-Verify.

(2) Upon a second or subsequent violation of subsection (e) of this section by any business entity or employer awarded a contract by the state, any political subdivision thereof, or any state-funded entity the business entity or employer shall be considered in breach of contract and the state, any political subdivision thereof, or any state-funded entity shall terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Attorney General may bring an action to permanently revoke the business licenses and permits of the business entity or employer according to the procedures described in this section.

(i)(1) Upon the first violation of subsection (f) of this section by a subcontractor, the state or

65 political subdivision thereof may bar the subcontractor from doing business with the state, any  
66 political subdivision thereof, any state-funded entity, or with any contractor who contracts with the  
67 state, any political subdivision thereof, or any state-funded entity after providing notice and an  
68 opportunity to be heard. Upon application by the state entity or political subdivision thereof, or  
69 state-funded entity, the Attorney General may bring an action to suspend the business licenses  
70 and permits of the subcontractor for a period not to exceed 60 days according to the procedures  
71 described in subsection (h) of this section. The court shall order the subcontractor to file a signed,  
72 sworn affidavit with the Attorney General within three days after the order is issued by the court  
73 stating that the subcontractor has terminated the employment of every unauthorized alien and the  
74 subcontractor will not knowingly or intentionally employ an unauthorized alien in this state. Before  
75 a business license or permit that has been suspended under this subsection is reinstated, a legal  
76 representative of the subcontractor shall submit to the court a signed, sworn affidavit stating that  
77 the subcontractor is in compliance with the provisions of this article and a copy of the  
78 Memorandum of Understanding issued to the subcontractor at the time of enrollment in E-Verify.

79 (2) Upon a second or subsequent violation of subsection (f) of this section by a  
80 subcontractor and upon application by the state entity or political subdivision thereof, or state-  
81 funded entity, the Attorney General may bring an action to permanently suspend the business  
82 licenses of the business entity or employer according to the procedures described in subsection  
83 (e) of this section. The determination of a violation shall be according to the procedures described  
84 in subsection (h) of this section.

85 (j)(1) A business entity or employer that establishes that it has complied in good faith with  
86 this section establishes an affirmative defense that the business entity or employer did not  
87 knowingly hire or employ an unauthorized alien.

88 (2) A subcontractor that establishes that it has complied in good faith with this section  
89 establishes an affirmative defense that the subcontractor did not knowingly hire or employ an  
90 unauthorized alien.

91 (k) The Secretary of State shall propose rules for legislative approval in accordance with  
92 §29A-3-1 et seq. of this code.

93 (l) Compliance with this section may be verified by the state authorities or law enforcement  
94 at any time to ensure a contractual agreement as provided for in this section is being met.

95 (m) The suspension of a business license or permit under subdivision 1 subsection (h) and  
96 subdivision 1 subsection (i) of this section shall terminate one business day after a legal  
97 representative of the business entity, employer, or subcontractor submits a signed, sworn affidavit  
98 stating that the business entity, employer, or subcontractor is in compliance with the provisions of  
99 this article and a copy of the Memorandum of Understanding issued at the time of enrollment in E-  
100 Verify to the court.

101 (n) No business entity, employer, or public employer may knowingly employ, hire for  
102 employment, or continue to employ an unauthorized alien to perform work within the State of West  
103 Virginia. Knowingly employ, hire for employment, or continue to employ an unauthorized alien  
104 means the actions described in 8 U.S.C. § 1324a.

105 (o) Effective January 1, 2024, every business entity or employer in this state shall enroll in  
106 E-Verify and thereafter, according to the federal statutes and regulations governing E-Verify, shall  
107 verify the employment eligibility of new hires through E-Verify. A business entity or employer that  
108 uses E-Verify to verify the work authorization of an employee shall not be considered to have  
109 violated this section with respect to the employment of that employee.

110 (p) On a finding of a first violation by a court of competent jurisdiction that a business entity  
111 or employer knowingly violated subsection (n), the court shall do all of the following:

112 (1) Order the business entity or employer to terminate the employment of every  
113 unauthorized alien.

114 (2) Subject the business entity or employer to a three-year probationary period throughout  
115 the state. During the probationary period, the business entity or employer shall file quarterly  
116 reports with the Attorney General of each new employee who is hired by the business entity or



employer in the state.

(3) Order the business entity or employer to file a signed, sworn affidavit with the Attorney General within three days after the order is issued by the court stating that the business entity or employer has terminated the employment of every unauthorized alien and the business entity or employer will not knowingly or intentionally employ an unauthorized alien in this state.

(4) Direct the applicable state, county, or municipal governing bodies to suspend any business licenses and permits, of the business entity or employer for a period not to exceed 10 business days specific to the business location where the unauthorized alien performed work.

(q)(1) Before a business license or permit that has been suspended under subsection (p) is reinstated, a legal representative of the business entity or employer shall submit to the court a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this article and a copy of the Memorandum of Understanding issued to the business entity or employer at the time of enrollment in E-Verify.

(2) The suspension of a business license or permit under subsection (p) shall terminate one business day after a legal representative of the business entity or employer submits a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this article and a copy of the Memorandum of Understanding issued to the business entity or employer to the court.

(r) For a second violation of subsection (n) by a business entity or employer, the court shall direct the applicable state, county, or municipal governing body to permanently revoke any business licenses and permits, held by the business entity or employer specific to the business location where the unauthorized alien performed work. On receipt of the order, and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses and permits held by the business entity or employer.

(s) For a third or subsequent violation of subsection (n), the court shall direct the applicable governing bodies to permanently suspend any business licenses and permits, of the business

entity or employer throughout the state.

(t) This section may not be construed to deny any procedural mechanisms or legal defenses included in the E-Verify program or any other federal work authorization program. A person or entity that establishes that it has complied in good faith with subsection (o) of this section establishes an affirmative defense that the business entity or employer did not knowingly hire or employ an unauthorized alien.

(u) In any court proceedings, the determination of whether an employee is an unauthorized alien shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an employee is an unauthorized alien. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

(v) Any business entity or employer that terminates an employee to comply with this section shall not be liable for any claims made against the business entity or employer by the terminated employee: *Provided*, That such termination is made without regard to the race, ethnicity, or national origin of the employee.

(w) If an employee of any agency of the state or any political subdivision thereof fails to suspend the business licenses or permits of any business entity or employee, as a result of a violation of this section, the agency shall be deemed to have violated subsection (n) of this code and shall be subject to being compelled to enforce this section by a writ of mandamus brought by the Attorney General in any court of competent jurisdiction.

(x) The Attorney General may also bring a civil complaint in any court of competent jurisdiction to enforce the requirements of this section and, further, shall respond to petitions by residents of this state as follows:

(1) Any resident of this state may petition the Attorney General to bring an enforcement action against a specific business entity or employer by means of a written, signed petition. A valid

petition shall include an allegation that describes the alleged violator or violators, as well as the action constituting the violation, and the date and location where the violation occurred.

(2) A petition that alleges a violation on the basis of national origin, ethnicity, or race shall be considered invalid and may not be acted upon.

(3) The Attorney General shall respond to any petition under this subdivision within 60 days of receiving the petition, either by filing a civil complaint in a court of competent jurisdiction or by informing the petitioner in writing that the Attorney General has determined that filing a civil complaint is not warranted.

(y) This section does not apply to the relationship between a party and the employees of an independent contractor performing work for the party and does not apply to casual domestic labor performed within a household.

(z) It is an affirmative defense to a violation of subsection (a) of this section that a business entity or employer was entrapped.

(1) To claim entrapment, the business entity or employer must admit by testimony or other evidence the substantial elements of the violation.

(2) A business entity or employer who asserts an entrapment defense has the burden of proving by clear and convincing evidence the following:

A. The idea of committing the violation started with law-enforcement officers or their agents rather than with the business entity or employer.

B. The law-enforcement officers or their agents urged and induced the business entity or employer to commit the violation;

C. The business entity or employer was not already predisposed to commit the violation before the law-enforcement officers or their agents urged and induced the employer to commit the violation; and

(aa) In addition to actions taken by the state or political subdivisions thereof, the Attorney General may bring an action to enforce the requirements of this section in the circuit court of any

195 county of this state wherein the business entity or employer does business.

196 (bb) The terms of this section shall be interpreted consistently with 8 U.S.C. § 1324a and  
197 any applicable federal rules and regulations.

**§21-1B-6. Denial of deductible business expense.**

1 (a) On or after January 1, 2008, no wages or remuneration for services paid to an  
2 unauthorized worker of \$600 or more per annum may be claimed and allowed as a deductible  
3 business expense for state income tax purposes by a taxpayer if the employer has been convicted  
4 under this article of employing, hiring, recruiting or referring the unauthorized worker. The  
5 commissioner shall notify the Department of Revenue of any conviction of an employer under this  
6 article and the department is to take the appropriate action against the taxpayer.

7 (b) No wage, compensation, whether in money, in kind, or in services, or remuneration of  
8 any kind for the performance of services paid to an unauthorized alien may be allowed as a  
9 deductible business expense for any state income or business tax purposes in this state. This  
10 subsection shall apply whether or not an Internal Revenue Service Form 1099 is issued in  
11 conjunction with the wages or remuneration.

12 (c) Any business entity or employer that knowingly fails to comply with the requirements of  
13 this section shall be liable for a penalty equal to 10 times the business expense deduction claimed  
14 in violation of subsection (a). The penalty provided in this subsection shall be payable to the West  
15 Virginia Tax Department.

**§21-1B-9. State or subdivisions prohibited from adopting policy or practice that limits or**  
**restricts the enforcement of federal immigration laws by limiting communication**  
**between its officers and federal immigration officials.**

1 (a) No official or agency of this state or any political subdivision thereof, including, but not  
2 limited to, an officer of a court of this state, may adopt a policy or practice that limits or restricts the  
3 enforcement of federal immigration laws by limiting communication between its officers and  
4 federal immigration officials in violation of 8 U.S.C. § 1373 or 8 U.S.C. § 1644, or that restricts its

5 officers in the enforcement of this article. If, in the judgment of the Attorney General of West  
6 Virginia, an official or agency of this state or any political subdivision thereof, including, but not  
7 limited to, an officer of a court in this state, is in violation of this subsection, the Attorney General  
8 shall report any violation of this subsection to the Governor and the State Auditor's Office, under  
9 the provisions of §5A-2-33 of this code, and that agency or political subdivision shall not be eligible  
10 to receive any funds, grants, or appropriations from the State of West Virginia until such violation  
11 has ceased and the Attorney General has so certified. Any appeal of the determination of the  
12 Attorney General as considered in this section shall be first appealed to the circuit court of the  
13 respective jurisdiction in which the alleged offending agency resides.

14 (b) All state officials, agencies, and personnel, including, but not limited to, an officer of a  
15 court of this state, shall fully comply with and, to the full extent permitted by law, support the  
16 enforcement of federal law prohibiting the entry into, presence, or residence in the United States of  
17 aliens in violation of federal immigration law.