

## DEPARTMENT OF LABOR AND EMPLOYMENT

### Division of Labor

## EMPLOYMENT VERIFICATION LAW RULES

### 7 CCR 1103-3

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

#### Rule 1 General Statement of Purpose and Definitions

1-1 The general purpose of these employment verification law rules, effective October 1, 2012, is to implement the provisions of § 8-2-122, C.R.S. These rules are adopted pursuant to the Division of Labor's authority in § 8-1-107(2)(p), C.R.S., § 8-1-103(3), C.R.S., and § 8-1-111, C.R.S.

#### 1-2 Definitions

- (A) "Director" means the Director of the Colorado Division of Labor, or his or her designee.
- (B) "Division" means the Division of Labor in the Colorado Department of Labor and Employment.
- (C) "Employer" means a person or entity that: transacts business in Colorado; at any time, employs another person to perform services of any nature; and has control of the payment of wages for such services or is the officer, agent, or employee of the person or entity having control of the payment of wages.
- (D) "Employment Verification Law" means § 8-2-122, C.R.S.
- (E) "Offense" means with reckless disregard, the failure of an employer to submit required employment verification law documentation to the Director, or with reckless disregard, the submission by an employer of false or fraudulent documentation to the Director. Each failure of an employer to submit required employment verification law documentation to the Director may constitute a separate offense. Each submission by an employer of false or fraudulent documentation to the Director may constitute a separate offense.
- (F) "Unauthorized alien" has the same meaning as set forth in 8 U.S.C. sec. 1324a (h) (3).

#### Rule 2 Documentation Requirements

##### 2-1 Employer Documentation Obligations

- (A) Each employer in Colorado, within twenty days after hiring a new employee, shall complete the documentation requirements of the employment verification law for every new employee hired on and after January 1, 2007.
- (B) The employment verification law documentation requirements consist of (1) an affirmation requirement, and (2) a requirement to copy the documents required by 8 U.S.C. sec. 1324a (copies of documents which establish the identity and employment eligibility of covered employees).
  1. Each employer in Colorado shall affirm that the employer has:
    - a. Examined the legal work status of such newly-hired employee;

- b. Retained file copies of the documents required by 8 U.S.C. sec. 1324a;
  - c. Not altered or falsified the employee's identification documents; and
  - d. Not knowingly hired an unauthorized alien.
2. Each employer in Colorado shall make and retain file copies of the documents required by 8 U.S.C. sec. 1324a. (copies of documents which establish the identity and employment eligibility of covered employees).
- (C) Employers shall only use the affirmation form created and approved by the Division in order to comply with the affirmation requirement. This required affirmation form is available from the Division or the Division's website.

## **2-2 Retention and Submission of Documentation**

- (A) Each employer in Colorado shall keep a written or electronic copy of the affirmation, and of the documents required by 8 U.S.C. sec. 1324a, for the term of employment of each employee.
- (B) Employers are not required to submit copies of the employment verification law documentation to the Director, unless specifically requested to do so by the Director.

## **Rule 3 Compliance Audits of Employers**

### **3-1 Compliance Audits**

- (A) Every employer may be subject to an employment verification law compliance audit by the Director. The purpose of compliance audits is to ensure that employers are fulfilling their obligation to adhere to the employment verification and documentation requirements specified in § 8-2-122, C.R.S. Compliance audits may originate from complaints, random selection, or situations where the Director has reason to believe that an employer has not complied with the employment verification law.
- (B) Upon the request of the Director, an employer shall submit documentation to the Director that demonstrates that the employer is in compliance with the employment verification law.
- (C) When the Director has reason to believe that an employer has not complied with the employment verification law, the Director shall request the employer to submit the documentation.

### **3-2 Complaint-Based Audits**

- (A) The Director shall accept written complaints for alleged violations of the employment verification law.
- (B) Written complaints shall be submitted to the Director using a form provided or specifically approved by the Director. The complaint shall include the complainant's signature, contact information, and basis for the complaint.
- (C) The Director shall take appropriate measures to ascertain the validity or basis of written complaints prior to contacting the employer. Such measures may include, but are not limited to:

1. Examining the information provided on the written complaint form and accompanying documents;
2. Interviewing the complainant;
3. Interviewing additional parties; and
4. Gathering and reviewing information about the employer and the employer's hiring, business, and documentation practices.

(D) The Director shall not accept anonymous complaints.

### **3-3 Random Audits**

- (A) The Director shall conduct random audits of employers in Colorado to obtain the documentation required by the employment verification law.
- (B) The Director shall utilize a reasonable statistical selection procedure to generate employers to be subject to a random audit.
- (C) Employers who have been subjected to a random audit shall not be subjected to a second or subsequent random audit within two years from the date the previous random audit was closed by the Director.
- (D) Employers who have been subjected to a random audit may be subject to a subsequent complaint-based audit or a subsequent audit when the Director has reason to believe that an employer has not complied with the employment verification law, at any time.

### **3-4 Audit Process**

- (A) Employers who have been selected for an audit shall be notified in writing of the audit by the Director via U.S. mail. In the event that the employer cannot be contacted via U.S. mail, or other circumstances exist which warrant the use of other contact methods, the Director shall utilize other methods to contact the employer.
- (B) The employer shall be provided in writing with information on the documentation required by the employment verification law, and information on the documentation the employer shall provide to the Director. The employer shall provide the Director with copies of the affirmation forms and copies of the documents required by 8 U.S.C. sec. 1324a for each new employee hired on and after January 1, 2007 and still in their employ as of the date of the audit letter sent by the Director.
- (C) The employer shall be given at least ten business days to respond in writing to the Director with the employment verification law documentation.
- (D) At the discretion of the Director, employers may be granted time extensions to respond to the Director with the employment verification law documentation.

### **3-5 Re-Audits**

- (A) The Director may re-audit employers who have been found to be in violation of the employment verification law in a previous audit.
- (B) If the Director re-audits an employer, the employer shall submit documentation to the Director that demonstrates that the employer is in compliance with the employment verification law for

employees who were newly hired during the period from the closure date of the previous audit and still in their employ as of the date of the re-audit letter sent by the Director.

#### **Rule 4 Compliance Determinations**

##### **4-1 Review of Documentation by the Director**

- (A) Upon receipt of an employer's employment verification law documentation, which has been submitted to the Director pursuant to the Director's request, the Director shall examine the documentation to establish whether it complies with the provisions of the employment verification law.
- (B) The Director's examination of an employer's employment verification law documentation submission may consist of investigating a variety of information and factors, including, but not limited to:
1. The existence of affirmation forms for all covered employees;
  2. The legibility, completeness, and accuracy of the information contained on affirmation forms;
  3. The authorship of information contained on affirmation forms;
  4. Whether affirmation forms were completed and dated within twenty days after hiring each new employee;
  5. The four components of the affirmation forms; whether an employer has properly affirmed that he or she has:
    - i. Examined the legal work status of such newly-hired employee;
    - ii. Retained file copies of the documents required by 8 U.S.C. sec. 1324a;
    - iii. Not altered or falsified the employee's identification documents; and
    - iv. Not knowingly hired an unauthorized alien.
  6. The consistency and accuracy of affirmation form data as compared to information provided in the copies of the documents required by 8 U.S.C. sec. 1324a. and from other sources;
  7. The legibility, completeness, and accuracy of the copies of the documents required by 8 U.S.C. sec. 1324a.

##### **4-2 Affirmation Form Substantive Violations**

- (A) Substantive violations of the affirmation form requirement include noncompliance with any of the following for each new hire covered by the law:
1. Retention of the completed affirmation form.
  2. Employee name on the form.
  3. Date of hire of the employee on the form.
  4. Employer name on the form.
  5. Employer signature on the form.
  6. Date of the employer signature on the form.
  7. All four components of the affirmation are present on the form:

- i. I have examined the legal work status of the newly-hired employee.
  - ii. I have retained file copies of the documents required by 8 U.S.C. sec. 1324a.
  - iii. I have not altered or falsified the employee's identification documents.
  - iv. I have not knowingly hired an unauthorized alien.
8. Date of the employer signature is within 20 days of the date of hire of the employee on the form.

(B) Backdating of the affirmation form is a substantive violation of the affirmation form requirement. Backdating occurs when an employer provides a date of signature on the form that is false or fraudulent. Providing backdated forms to the Division is the submission of false or fraudulent documentation to the Division with reckless disregard.

#### **4-3 Copies of Identity and Employment Eligibility Documents Substantive Violations**

Each employer in Colorado shall make and retain file copies of the documents required by 8 U.S.C. sec. 1324a. (copies of employee documents which establish identity and employment eligibility) for each new hire covered by the law. Substantive violations of this requirement include any failure to retain accurate, complete, and legible copies pursuant to 8 U.S.C. sec. 1324a for each new hire covered by the law.

#### **4-4 Evaluation of Overall Employer Compliance**

- (A) Employers must comply with two requirements for each new hire covered by the law: (1) the affirmation requirement and (2) the requirement to copy the documents required by 8 U.S.C. sec. 1324a. In every audit, the Division assesses employer performance on each of these two requirements for each new hire, and then aggregates the findings across all new hires to arrive at an overall compliance determination for the audit.
- (B) An employer whose documentation submissions are complete and accurate on 87.5% or more of all of the requirements for all new hires shall be classified as compliant.
- (C) An employer whose documentation submissions are complete and accurate on less than 87.5% of all of the requirements for all new hires shall be classified as non-compliant.

#### **4-5 Audit Closure**

- (A) After examining an employer's employment verification law documentation, which has been submitted to the Director pursuant to the Director's request, the Director shall notify the employer in writing of the Director's findings.
- (B) Employers shall be notified by the Director whether their documentation submission has fully complied with the law and of any additional action required by the employer.

### **Rule 5 Reckless Disregard and Employer Fines**

**5-1** The Director may issue fines as warranted by the employment verification law. The amount of a fine levied by the Director depends upon the totality of the circumstances and a variety of factors, which may include, but not be limited to:

- (A) The size of the employer;
- (B) The employer's good faith efforts to comply with the employment verification law;

- (C) The extent of the employer's documentation deficiencies;
- (D) Results of previous audits of the employer and history of compliance;
- (E) The employer's cooperation level and timeliness of responses; and
- (F) The seriousness of the violations observed.

**5-2** An employer who, with reckless disregard, fails to submit the documentation required by the employment verification law, shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense.

**5-3** An employer who, with reckless disregard, submits false or fraudulent documentation, shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense.

#### **5-4 Fine Scenarios**

The following circumstances or situations constitute reckless disregard under the employment verification law, and therefore warrant a fine as specified.

(A) **Failure to respond to the Division.** An employer who fails to respond to the lawful requests of the Director, or fails to submit any information to the Director upon request regarding employment verification law documentation, shall be considered to have acted with reckless disregard. The employer is subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense.

(B) **Repeated noncompliance.** An employer who was classified as noncompliant on a first or previous audit (but was not fined), and who is classified as noncompliant on a second or subsequent audit, shall be considered to have acted with reckless disregard and is subject to the following fine schedule:

\$150 per failed requirement per new hire for small sized employers.  
\$200 per failed requirement per new hire for medium sized employers.  
\$250 per failed requirement per new hire for large sized employers.

Good faith efforts by the employer, or a determination of bad faith, may mitigate or enhance the fines listed by 25%.

(C) **Repeated noncompliance involving previous fines.** An employer who was classified as noncompliant and fined on a first or previous audit, and who is classified as noncompliant on a second or subsequent audit, shall be considered to have acted with reckless disregard and is subject to the following fine schedule:

\$150-\$300 per failed requirement per new hire for small sized employers.  
\$200-\$400 per failed requirement per new hire for medium sized employers.  
\$250-\$500 per failed requirement per new hire for large sized employers.

Good faith efforts by the employer, or a determination of bad faith, may mitigate or enhance the fines listed by 25%.

(D) **Backdating of Affirmation Forms.** The backdating of any affirmation forms, regardless of the employer's overall compliance level or the extent of backdating, is the submission of false or fraudulent documentation to the Division with reckless disregard. An employer who

submits any backdated affirmation forms is classified as non-compliant, and is fined on a first audit according to the following schedule for each backdated form:

\$150 per backdated form for small sized employers.

\$200 per backdated form for medium sized employers.

\$250 per backdated form for large sized employers.

On a second or subsequent audit, the fines for backdated affirmation forms may be increased from the first or previous audit fine values in the event that the employer has a history of noncompliance involving fines in the previous audit(s). An employer is subject to the following fine schedule for such situations:

\$150-\$300 per backdated form for small sized employers.

\$200-\$400 per backdated form for medium sized employers.

\$250-\$500 per backdated form for large sized employers.

(E) **Situations Not Otherwise Specified.** An employer who violates the law with reckless disregard in circumstances or situations not explicitly specified in these rules shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense pursuant to § 8-2-122(4), C.R.S., and Rules 5-1, 5-2, and 5-3, as applicable. An employer who violates multiple sections of this Rule 5-4 is subject to fines for all of the violations.

#### **5-5 Appeal of Fines**

Employers who are fined by the Division shall be notified in writing of the fine, and shall be notified of their legal and appeal rights. Appeals by employers are governed by the Colorado Administrative Procedure Act, § 24-4-101, et seq., C.R.S.

#### **5-6 Employment Verification Cash Fund**

The moneys collected pursuant to the employment verification law shall be deposited in the employment verification cash fund, which is created in the state treasury. The moneys in the fund shall be appropriated to the Department of Labor and Employment for the purpose of implementing, administering, and enforcing the employment verification law. The moneys in the fund shall remain in the fund and not revert to the general fund or any other fund at the end of any fiscal year.

#### **Rule 6 Anti-Discrimination**

It is the policy of the Division that these rules shall be enforced without regard to race, religion, gender, ethnicity, national origin, or disability.

#### **Rule 7 Severability**

If any provision of these employment verification law rules or their application to any person or circumstance is held illegal, invalid, or unenforceable, no other provisions or applications of the rules shall be affected that can be given effect without the illegal, invalid, or unenforceable provision or application, and to this end the provisions of these rules are severable.

---

#### **Editor's Notes**

#### **History**

Entire Rule eff. 10/30/2009.