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## West Virginia Amends State Rule Verifying Legal Employment Status of Workers

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On July 1, 2015, a new legislative rule amending the procedures required for West Virginia employers to verify the legal employment status of their workers went into effect in West Virginia. Pursuant to section 21-1B-4 of the West Virginia Code, all employers are required to keep "records of proof of the legal status or authorization to work of all employees." However, the state of West Virginia has now amended this rule in a number of ways that may conflict with federal Form I-9 employment eligibility verification requirements.

All U.S. employers are required by federal law to verify each employee's eligibility to work in the United States by certifying the employee's documentation and completing Form I-9 within three business days of the employee's start date. In contrast, the amended West Virginia rule requires employers to verify legal employment status *prior to* the employee's first day of employment or prior to entering into an employment contract with any individual. This directly conflicts with the federal government's three-day period. As such, an employer that complies with the new West Virginia rule could open itself up to a discrimination claim under the federal unfair immigration-related employment practices provisions of the Immigration and Nationality Act (INA).

The West Virginia rule also specifies a list of documents that "shall" be accepted as proof of an employee's legal employment status, but this list does not align with the list of documents acceptable under federal requirements for completion of Form I-9. Furthermore, the West Virginia rule includes several ambiguous document descriptions (e.g., "a valid immigration or non-immigration visa including photo identification" and "a valid permit issued by the United States Department of Justice"), does not specify the origin of certain documents (e.g., "a valid birth certificate" or "a valid passport"), and includes an ambiguous "catch-all" provision that accepts "any other valid document providing evidence of legal employment status in the United States." Each of these aspects of the new law could lead to potential discrimination claims against employers.

Finally, the West Virginia rule requires employers to maintain each employee's records for "a period of at least 2 years after the employee has separated from employment." This provision potentially conflicts with the federal requirement that an employer must retain a completed Form I-9 for either three years from the employee's date of hire or one year after the date the employee is terminated, whichever is later. A West Virginia employer that complies with the state rule may in turn fail to comply with the federal requirement, which could result in hefty penalties issued by U.S. Immigration and Customs Enforcement.

Until conflicts between federal requirements and the new West Virginia rule are reconciled, employers should seek to comply with the federal Form I-9 requirements and ensure compliance with Form I-9 retention guidelines to avoid potential penalties issued by U.S. Immigration and Customs Enforcement.

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Caroline Tang practices in the Austin office of Ogletree Deakins. She has spent her entire career representing multinational corporations sponsoring foreign national employees, with a focus in the technology, engineering, telecommunications, and consulting industries. Caroline offers in-depth experience and extensive expertise in: Advising Fortune 500 corporations on immigration issues arising from corporate restructuring;Developing business immigration strategies to handle workforce...