

Proposed Rules
of
Department of Labor and Workforce Development

Chapter 0800-07-01
License Suspension for the Employment of Illegal Aliens

Presented herein are proposed rules of the Department of Labor and Workforce Development submitted pursuant to T.C.A. §4-5-202 in lieu of a rulemaking hearing. It is the intent of the Department of Labor and Workforce Development to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within thirty (30) days of the publication date of the issue of the Tennessee Administrative Register in which the proposed rules are published. Such petition to be effective must be filed in the Legal Division, Department of Labor and Workforce Development located at 220 French Landing Drive, Nashville, TN 37243-1002, and in the Department of State, Eighth Floor, Tennessee Tower, William Snodgrass Building, 312 8th Avenue North, Nashville, TN 37243-0310, and must be signed by twenty-five (25) persons who will be affected by the rule, or submitted by a municipality which will be affected by the rule, or an association of twenty-five (25) or more members, or any standing committee of the General Assembly.

For a copy of the proposed rules, contact: Mary Ellen Grace, Director, Labor Standards Division, Department of Labor and Workforce Development, 220 French Landing Drive, Nashville, TN 37243-1002, (615) 741-2858.

New Rules

Table of Contents

- 0800-07-01-.01 Purpose.
- 0080-07-01-.02 Definitions.
- 0800-07-01-.03 Complaint.
- 0800-07-01-.04 Investigation and Proceedings Affecting License.
- 0800-07-01-.05 Contested Case Hearing and Proceedings.
- 0800-07-01-.06 Enforcement by License Suspension.
- 0800-07-01-.07 Copy Fee.

0800-07-01-.01 Purpose.

- (1) The purpose of these rules is to implement the amendments to Tennessee Code Annotated §50-1-103 regarding the employment of illegal aliens ("Act".) Under the Act, the Commissioner of the Department of Labor and Workforce Development is required to investigate complaints against persons who have knowingly employed, recruited or referred for a fee for employment an illegal alien. After the investigation, if there is substantial evidence that a person violated the Act, a contested case hearing shall be conducted pursuant to the Uniform Administrative Procedures Act, Tennessee Code Annotated §§4-5-101 et seq. to determine whether clear and convincing evidence shows that the person knowingly violated the Act. After the contested case hearing, if the person violated the Act, the Commissioner shall request an order consistent with Tennessee Code Annotated §4-5-320 requiring the appropriate regulatory board or local government with respect to business licensure pursuant to Title 67, Chapter 4, to revoke, suspend, or deny the person's license.

Authority: 2007 Tennessee Public Acts Chapter 529.

0800-07-01-.02 Definitions.

- (1) "ALJ" means an administrative law judge from the Administrative Procedures Division of the Office of the Secretary of State who shall preside over the contested case hearing.

- (2) "Commissioner" means the Commissioner of Labor and Workforce Development.
- (3) "Commissioner's Designee" means an individual who shall preside over the contested case hearing.
- (4) "Department" means the Department of Labor and Workforce Development.
- (5) "Employ" or "employment" means any work engaged in for compensation in money or other valuable consideration and for which a person paying the compensation for the work performed is required to file a W-2 wage and tax statement with the federal Internal Revenue Service.
- (6) "Illegal alien" means a person who is at the time of employment neither an alien who is lawfully admitted for permanent residence in the United States pursuant to the federal Immigration and Naturalization Act, compiled in 8 U.S.C. §1101 et seq., nor authorized to be employed by the federal Immigration and Naturalization Act or the United States Attorney General.
- (7) "Knowingly" means having actual knowledge that a person is an illegal alien or having a duty imposed by law to determine the immigration status of an illegal alien and failing to perform that duty.
- (8) "Lawful resident alien" means a person who is entitled to lawful residence in the United States pursuant to the federal Immigration and Naturalization Act.
- (9) "Lawful resident verification information" means the documentation that is required by the United States Department of Homeland Security when completing the employment eligibility verification form commonly referred to as the federal Form I-9. Documentation that later proves to be falsified, but that at the time of employment satisfies the requirements of the Form I-9, is lawful resident verification information.
- (10) "License" means any certificate, approval, registration or similar form of permission required by law.
- (11) "Person" means any individual, corporation, partnership, association or any other legal entity.
- (12) "Substantial evidence" means such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.
- (13) "UAPA" means the Uniform Administrative Procedures Act, Tennessee Code Annotated §§4-5-101 et seq.

Authority: 2007 Tennessee Public Acts Chapter 529 and Tennessee Code Annotated §§4-5-101 et seq.

0800-07-01-.03 Complaint.

- (1) If any state or local governmental agency, officer, employee or entity has reason to believe that a person has violated the Act, the agency, officer, employee or entity shall file a signed, written complaint with the Department.
 - (a) The complaint shall be on an approved form and shall contain the following:
 1. Sufficient information to identify the person filing the complaint and the person allegedly violating the Act, including their names and addresses; and

2. Detailed facts and circumstances that form the basis of the complaint, including relevant persons, dates, times, place(s), and copies of relevant documents.
- (2) The Department's Labor Standards Division shall receive all complaints from a state or local governmental agency, officer, employee or entity. For a complaint form, contact the nearest location:

Nashville (615) 741-2858;
Memphis, Knoxville and Chattanooga 1 (866) 588-6814;
Jackson (731) 423-5645;
Paris (731) 644-7410;
Cookeville (931) 525-1242;
Elizabethton (423) 543-6298; or
TTY (615) 532-2879 or 1 (800) 848-0298.

Authority: 2007 Tennessee Public Acts Chapter 529.

0800-07-01-.04 Investigation and Proceedings Affecting License.

- (1) Upon receipt of a complaint, an inspector shall conduct an investigation in an attempt to verify information regarding the immigration status of any employee of the person alleged to have violated the Act, and to determine whether a contested case hearing should be conducted.
- (2) The Commissioner may also designate other appropriate inspectors and/or investigators to respond to complaints and to verify information regarding the immigration status of any employee of the person alleged to have violated the Act.
- (3) The inspector or other designee of the Commissioner shall have reasonable access to the workplace of the person alleged to have violated the Act. Upon request and without delay, information and documents regarding any employee shall be provided to an inspector or other designee of the Commissioner in order to verify the immigration status of any employee.
- (4) Verification documentation may include, but is not limited to, lawful resident verification information consistent with requirements under the Immigration Reform and Control Act of 1986, and/or information provided by the person alleged to have violated the Act who used the federal electronic work authorization verification service provided by the United States Department of Homeland Security pursuant to the federal Basic Pilot Program Extension and Expansion Act of 2003.
- (5) During the investigation, the person alleged to have violated the Act shall specify the license(s) held including the number(s) that might be subject to suspension under the Act, and the identity/ies and address (es) of the regulatory authority/ies issuing the licenses.
- (6) No suspension of any license shall be lawful unless, prior to the docketing of the contested case hearing, the Commissioner gives notice by mail to the person alleged to have violated the Act of facts or conduct that warrant the intended action. The person alleged to have violated the Act shall be given an opportunity to show compliance with all lawful requirements for the retention of the license.
 - (a) If the Commissioner finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in his order, summary suspension of a license may be ordered pending proceedings for action. The appropriate regulatory authority/ies shall be notified accordingly.

- (b) If summary suspension is ordered, the Commissioner shall comply with the requirements of Tennessee Code Annotated §4-5-320(d).

Authority: 2007 Tennessee Public Acts Chapter 529 and T.C.A. § 4-5-320.

0800-7-1-.05 Contested Case Hearing and Proceedings.

- (1) After the investigation, if there is substantial evidence that a person violated the Act, the Commissioner shall cause the matter to be docketed for a contested case hearing pursuant to the UAPA, the Rules of the Tennessee Department of State, Chapter 0800-1360-4-1 and the rules provided herein.
- (2) Hearing Notice. A Notice of Hearing shall be sent to the person alleged to have violated the Act at least thirty (30) days prior to the date of the hearing. The Notice of Hearing shall designate the Administrative Law Judge ("ALJ") or Commissioner's Designee who shall preside over the hearing, the counsel representing the Commissioner, and shall include a general and brief explanation of the procedures and requirements for the proceedings. The Notice of Hearing shall comply with the requirements of Tennessee Code Annotated §4-5-307(b).
- (3) Representation and Interpretative Services. The opposing party is entitled to be represented by counsel or may represent itself. Persons that are corporations or any other state-certified entities (such as a limited liability company) shall be represented at the hearing by counsel. An owner, officer, or board member cannot represent a corporation or any other state-certified entity. [See Supreme Court Rule 9, Section 20.2(e)]. The ALJ or Commissioner's Designee and all departmental personnel shall take reasonable steps to provide access to reasonable interpretive services to assure that people who are not proficient in English can effectively participate at various stages of the proceedings and at the hearing.
- (4) Subpoenas. Upon request by either party, subpoenas shall be issued by the ALJ or Commissioner's Designee presiding over the hearing for the following:
 - (a) Production of documentary evidence or tangible things;
 - (b) Deposition of witnesses; and
 - (c) Attendance and testimony at the hearing.
- (5) Any subpoena issued pursuant to paragraph (4) of this rule shall state the name of the Department and the title of the action, and shall command each person to whom it is directed to attend and give testimony or produce documents or other tangible things at the time and place and for the party therein specified.
- (6) A subpoena shall be served by certified return receipt mail, by delivery service, or by personal service.
- (7) If a witness refuses to comply with a subpoena, the Commissioner may apply to the circuit or chancery court of the county of such person's residence as specified in Tennessee Code Annotated §4-5-311(b) for an order to compel compliance. Failure to comply with such order shall be punished as contempt of court as is provided in judicial proceedings.
- (8) Discovery. Each party has the right to review the agency record and to conduct reasonable discovery.
 - (a) A party may serve upon any other party a written request for the admission of the truth of any relevant matters of fact or the genuineness of any relevant documents described in the request or previously furnished. Each request shall be deemed admitted unless within

a period of thirty (30) days after service or within such time as the ALJ or Commissioner's Designee shall allow, the party who received the request provides a sworn statement denying the matters for which an admission was requested. The sworn statement shall set forth in detail the reason(s) why the party denied those matters or the party's objections on the grounds of privilege, relevancy or other proper basis for relief. Any objections shall be accompanied by a request for a hearing on the objections at the earliest practicable time.

- (b) If a party disobeys an order to respond to discovery, such disobedience may result in a default judgment or forfeiture of the opportunity to present evidence that otherwise would have been admissible.
- (9) Affidavits. Pursuant to Tennessee Code Annotated §4-5-313, copies of affidavits shall be furnished to the opposing party or its counsel at least ten (10) days, excluding Saturdays, Sundays, and holidays, prior to the hearing. The notice of filing shall provide that the opposing party or its counsel shall not be entitled to question any of the affiants unless the opposing party or its counsel properly notifies the opposing party or its counsel that cross-examination is desired. The notice shall designate whether the affiant is to be cross-examined at the hearing or by deposition. Unless the notice is properly filed within the time specified, which shall be seven (7) days, excluding Saturdays, Sundays, and holidays, after receipt or service, the right to cross-examination such affiant is waived. If the affidavit is introduced into evidence, it shall be given the same effect as if the affiant had testified orally.
- (a) Counsel for the Commissioner shall proceed, after duly giving notice of the hearing, by giving notice of filing of affidavits providing the factual basis for the violation of the provisions requiring documentation for employees as a condition of licensure, which shall be introduced as evidence at the hearing.
- (10) Evidence. Pursuant to Tennessee Code Annotated §4-5-313, evidence shall be introduced subject to the approval of the ALJ or Commissioner's Designee. The ALJ or Commissioner's Designee shall receive into evidence and give probative effect to evidence admissible in a court. When necessary to ascertain facts not reasonably susceptible to proof under the rules of court, other evidence such as affidavits and authenticated documents properly filed with notice to the opposing party or its counsel may be admitted if it is of a type commonly relied upon by reasonable prudent persons in the conduct of their affairs.
- (11) Witness and Exhibit List. At least seven (7) days, excluding Saturdays, Sundays, and holidays, prior to the hearing, each party shall be required to disclose the names and addresses of all proposed witnesses and a list of all proposed exhibits, and these shall be filed with the ALJ or Commissioner's Designee and served on the opposing party or its counsel. Copies of all exhibits, which are proposed to be offered, shall be made available to the opposing party or its counsel upon request made no less than five (5) days, excluding Saturdays, Sundays, and holidays, prior to the hearing.
- (12) Pre-hearing Motions and Briefs. All pre-hearing motions and briefs shall be filed with the ALJ or Commissioner's Designee no later than fifteen (15) calendar days prior to the hearing.
- (13) Pre-hearing Conference. Either party may request a pre-hearing conference by telephone or in person with the ALJ or Commissioner's Designee. Such request shall be made at least fifteen (15) days, excluding Saturdays, Sundays, and holidays, prior to the hearing. It lies entirely within the discretion of the ALJ or the Commissioner's Designee whether or not to grant such a request.
- (14) Failure to comply with any lawful order of the ALJ or Commissioner's Designee, necessary to maintain the orderly conduct of the hearing, shall be deemed a failure to participate and thereby be cause for holding the offending party in default.

(15) Order of Proceedings. This shall be the order of proceedings for the hearing of contested cases:

- (a) The ALJ or Commissioner's Designee shall call the hearing to order, give a brief statement of the nature of the proceedings, determine whether counsel represents the person alleged to have violated the Act, and if so, identify counsel, counsel for the Commissioner, and any other officials who may be present at the hearing for the record. If the person alleged to have violated the Act admits the violation(s), no further proof may be necessary, other than introduction of evidence pertaining to the proper remedy.
- (b) Witnesses. Either party shall be entitled to have the ALJ or Commissioner's Designee order all witnesses sequestered from the hearing room except during their testimony. Prior to sequestering the witnesses to the witness waiting room, the ALJ or Commissioner's Designee shall swear in the witnesses and instruct them that they are not to discuss the case or their testimony while the case is proceeding. The parties may have one appropriate individual, who may also be a witness, act as its party representative.
- (c) The ALJ or Commissioner's Designee may consider any preliminary motions, stipulations, or agreed orders, and may allow opening statements by the parties.
- (d) The Commissioner calls witnesses and questioning proceeds with direct examination, cross-examination by the person alleged to have violated the Act and any proper redirect and re-cross-examination as the ALJ or Commissioner's Designee deems appropriate. The parties shall be allowed to call appropriate rebuttal and rejoinder witnesses with examination proceeding as previously outlined. The ALJ or Commissioner's Designee shall permit closing arguments unless waived by the parties.

(16) Burden of Proof.

- (a) At the contested case hearing, the Commissioner shall have the burden of proof to show that the person violated the Act by clear and convincing evidence.

Authority: 2007 Tennessee Public Acts Chapter 529, T.C.A. §§ 4-5-307(b), 4-5-311(b), and 4-5-313.

0800-07-01-.06 Enforcement by License Suspension.

- (1) Upon a finding by an ALJ or Commissioner's Designee that the Commissioner has demonstrated that the person violated any provision of the Act by clear and convincing evidence, the following actions shall be imposed, as appropriate:
 - (a) Suspension for First Violation. For a first violation(s), the ALJ or Commissioner's Designee shall order that the regulatory authority/ies suspend the person's license(s) until the person shows to the satisfaction of the ALJ or Commissioner's Designee that the person is no longer in violation of the Act.
 1. To show that the person is no longer violating the Act, the person may submit a sworn statement to the ALJ or Commissioner's Designee stating that the person is no longer employing, recruiting, or referring for a fee for employment an illegal alien.
 2. Upon submission of the sworn statement, the ALJ or Commissioner's Designee shall immediately notify the appropriate regulatory authority/ies by issuing an order of compliance.

- (b) Suspension for Second or Subsequent Violations. For a second or subsequent violation occurring within three (3) years from the issuance of the first final order, the ALJ or Commissioner's Designee shall order that the regulatory authority/ies suspend the license(s) of the person for one (1) year. This action removes the person from practicing a profession and terminates the license(s) issued. The regulatory authority/ies shall not consider any petition for reinstatement or a new application for a license(s) from the person during the year. After the one (1) year, the person may request reinstatement or submit a new application to the appropriate regulatory authority/ies.
- (2) Notice of Appeal Rights. Pursuant to the UAPA, proper notification of rights to review and appeal shall be set forth on all orders of the ALJ or Commissioner's Designee. Appeal of a final order of the ALJ or Commissioner's Designee shall be by Petition for Judicial Review of Administrative Record filed in the Chancery Court for Davidson County, Tennessee within sixty (60) days after the entry date of the final order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the final order disposing of the petition.
- (3) Official record. An official record shall be made of the hearing and the proceedings, and counsel for the Commissioner shall have a court reporter present or a tape recording or similar electronic recording shall be made of all oral proceedings. All proceedings shall take place at a hearing room at the Department in Nashville. The records required under Tennessee Code Annotated §4-5-319 shall be maintained and stored at the Tennessee Department of Labor and Workforce Development, Labor Standards Division, 220 French Landing Drive, Nashville, Tennessee 37243-1002.

Authority: 2007 Tennessee Public Acts Chapter 529, T.C.A. §§ 4-5-317, 4-5-319, and 4-5-322.

0800-07-01-.07 Copy Fee.

- (1) Pursuant to the UAPA and the Public Records Act, upon request any citizen of the state of Tennessee may have a copy of the information in the agency record. The fee for a copy is twenty-five cents (\$0.25) per page.
- (2) Payment of the fee set forth in this rule shall be by check or money order made payable to "Treasurer, State of Tennessee." All fees for copies shall be prepaid. The Department shall not accept payment of fees in cash.

Authority: 2007 Tennessee Public Acts Chapter 529, T.C.A. §§ 4-5-218 and 10-7-503.

The proposed rules set out herein were properly filed in the Department of State on the 4th day of January, 2008, and pursuant to the instructions set out above, and in the absence of the filing of an appropriate petition calling for a rulemaking hearing, will become effective on the 30th day of May, 2008. (FS 01-02-08; DBID 2804)

Addendum
Economic Impact Statement

The Department's Labor Standards Division has prepared the following economic impact statement that is deemed to affect small businesses:

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

The Department's Labor Standards Division does not anticipate the enforcement provisions will pose significant detrimental impact on small business from the recordkeeping requirements because these obligations already exist under the federal laws. To the extent that small businesses employ illegal aliens, and derive economic benefits from exploiting persons willing to work without full bargaining power and lacking typical benefits offered by employers otherwise expected within the labor force, the added cost of doing business could be significant. Typically, small businesses such as restaurants, hotels, building contractors, grocers, vehicle repair garages, landscapers, other service industry businesses and small fabrication and assembly businesses will employ undocumented immigrants, paying them below-market wages. Because the economic burden that will inure to small businesses will remove illegal advantages they derive by circumventing existing federal laws, the proposed rules implementing the license suspension provisions would be justified. The Department's Labor Standards Division estimates that several thousand small businesses may be in violation of existing federal laws, but precise numbers are unavailable because of the clandestine nature of these practices.

2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

There are no additional recordkeeping obligations beyond those existing under the federal laws. The recordkeeping requirements of the new law are already in place and are expected of all law-abiding persons and businesses operating in the State of Tennessee. Documentation requirements for small businesses engaged in any employment addressed by the proposed rules will be largely unaffected. Businesses will be responsible for making all employment records available for review during the investigation of complaints. The investigations anticipated under the proposed rules, which will take place in response to a written complaint by an appropriate public agency, will seek proof of lawful residency through various permissible forms of documentation that employers already are required to maintain.

3. A statement of the probable effect on impacted small businesses and consumers.

The proposed rules are likely to deter small businesses from employing undocumented immigrants as widely and casually at levels existing before their implementation. The reporting requirements for small businesses are no greater than existing obligations, apart from the minimal cost associated with accountability and compliance when investigations do occur. The impact on the consumers will be in the form of added costs for goods and services as well as diminished availability of labor in certain types of businesses and in certain areas that have substantial numbers of undocumented immigrants in their employment.

4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

The current practice anticipates voluntary compliance by small businesses, and provides for compliance and reporting under federal enforcement that the General Assembly has concluded is not sufficiently comprehensive. Of the various mechanisms and processes by which enforcement could be regulated, the proposed rules are the simplest and least burdensome alternatives that could be imposed consistently with the formal due process mechanisms that might be required under the applicable provisions of both the United States and Tennessee constitutions.

There are several means available under the proposed rules for small businesses to demonstrate compliance with the legislative purpose to insure that an employer's employees are lawfully employed. The Department's Labor Standards Division will make every reasonable effort to inform all impacted or potentially impacted entities of the available options for demonstrating compliance, including the provision of forms already required under federal law and access to internet web sites that can verify compliance.

5. A comparison of the proposed rule with any federal or state counterparts.

The proposed rules will help enforce current obligations under federal law and will help deter violations of the documentation requirements that small businesses already are obligated to satisfy. The Attorney General has determined that the license suspension provisions do not conflict impermissibly with any existing federal law or rule. The additional requirements under the proposed rules will now require small businesses to make certain records available for inspection by inspectors of the Department's Labor Standards Division or other designees of the Commissioner. The proceedings governed by the proposed rules have reasonable deadlines in place to allow compliance with the documentation requirements.

6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

The exemption of small businesses from any or all of the provisions of the proposed rules would make enforcement of the law for license suspension for the employment of illegal aliens inapplicable to such businesses and would be counter to the intent of the law itself.