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1. [51 N.J.R. 533\(a\)](#)

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RULE PROPOSALS

Reporter

51 N.J.R. 533(a)

NJ - New Jersey Register > 2019 > MAY > MAY 6, 2019 > RULE PROPOSALS > LABOR AND WORKFORCE DEVELOPMENT -- OFFICE OF THE COMMISSIONER

Interested Persons Statement

INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of [N.J.S.A. 52:14B-3](#). An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at [N.J.A.C. 1:30-6.3](#). The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

Agency

LABOR AND WORKFORCE DEVELOPMENT > OFFICE OF THE COMMISSIONER

Administrative Code Citation

Proposed New Rules: [N.J.A.C. 12:4](#)

Text

Suspension and Revocation of Employer License for Non-Compliance with State Wage, Benefit, and Tax Laws

Authorized By: Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Authority: [N.J.S.A. 34:1-20](#).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2019-054.

A **public hearing** on the proposed new rules will be held on the following date at the following location:

Thursday, May 23, 2019

10:00 A.M.

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

2nd Floor, Large Conference Room

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by July 5, 2019, to:

David Fish, Executive Director

Legal and Regulatory Services

New Jersey Department of Labor and Workforce Development

PO Box 110-13th Floor

Trenton, New Jersey 08625-0110

Fax to: (609) 292-8246

Email: david.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing new rules at [N.J.A.C. 12:4](#) in order to implement [N.J.S.A. 34:1A-1.11](#) et seq. (the Act), which empowers the Commissioner of the Department (Commissioner) under certain circumstances to issue a written determination directing any appropriate agency to suspend or revoke any one or more licenses that are held by an employer who has failed to maintain and report a record(s) regarding wages, benefits, and taxes that the employer is required to maintain or report under State wage, benefit, and tax laws, and who has failed to pay wages, benefits, taxes, or other contributions or assessments as required by the State wage, benefit, and tax laws.

Proposed new N.J.A.C. 12:4-1.1 would set forth the purpose and scope of the chapter.

Proposed new N.J.A.C. 12:4-2.1 would include definitions of words and terms used throughout the chapter.

Proposed new N.J.A.C. 12:4-3.1 would address the Commissioner's actions and the employer's right to notice and an opportunity for hearing relative to an employer's first offense under [N.J.S.A. 34:1A-1.11](#) et seq.

Proposed new N.J.A.C. 12:4-3.2 would address the Commissioner's actions and the employer's right to notice and an opportunity for hearing relative to an employer's second offense under [N.J.S.A. 34:1A-1.11](#) et seq.

Proposed new N.J.A.C. 12:4-3.3 would address the Commissioner's actions and the employer's right to notice and an opportunity for hearing relative to an employer's third offense under [N.J.S.A. 34:1A-1.11](#) et seq.

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Proposed new N.J.A.C. 12:4-3.4 concerns application of [N.J.S.A. 34:1A-1.11](#) et seq., to employee leasing companies.

Proposed new N.J.A.C. 12:4-3.5 describes the statutory criteria for determining whether an employer has established a successor firm.

[page=534] As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement of [N.J.A.C. 1:30-3.3\(a\)](#)5.

Social Impact

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Regarding the social impact of the Act, the Statement to Senate Committee Substitute for S2773, the bill that would become the Act, indicates that among the purposes of the Act is to impose sanctions on "employers who gain unfair competitive advantage by employing workers 'off the books,' thus choosing to ignore recordkeeping requirements and evade the payment of legally-required wages, benefits and taxes." Inasmuch as the proposed new rules do implement the Act, they would, by extension, serve the same purpose and have the same social impact as the Act. Furthermore, it is the Department's belief that the proposed new rules would have a positive social impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. Finally, the proposed new rules would have a positive social impact in that they would establish a regulatory framework for the suspension or revocation of a license(s) under the Act and for the processing of appeals where a violation of the Act has occurred, thereby enabling the Department to effectively enforce the law.

Economic Impact

As indicated in the Social Impact above, the vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative economic impact might be felt would derive, in the first instance, from the Act, not the proposed new rules. That portion of the new rules that addresses the suspension or revocation of a license(s) by the Commissioner for violations of the Act would, of course, have a negative economic impact upon those employers who run afoul of the Act. Furthermore, the proposed new rules make clear that included among the licenses that the Commissioner "may" suspend or "shall" revoke under the circumstances described in the Act are agency permits, certificates, approvals, registrations, charters, or similar forms of permission to engage in a profession, trade, or occupation in New Jersey. Consequently, where a violation has occurred that would, under the Act, trigger the Commissioner's authority to suspend or revoke a "license," among the licenses that the Commissioner might suspend or revoke would be the employer's license to practice his or her chosen profession, trade, or occupation. As to the remainder of the new rules, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. It is the Department's hope that minimizing confusion as to these issues will avoid costs for those impacted by the Act of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Jobs Impact

The Department does not anticipate that the proposed new rules would result in either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would impact the agriculture industry in precisely the same way that it would impact any other industry which consists of employers, as that term is used within the Act; which is to say, covered agriculture industry employers would be required to comply with the Act and the proposed new rules, as would any other

covered employer. Neither the Act, nor the proposed new rules, differentiate among covered employers based on industry type.

Regulatory Flexibility Analysis

The proposed new rules would reflect a uniform application of the Act, as dictated by the Act itself, to all covered employers, including those which are small businesses, as that term is defined within the Regulatory Flexibility Act, [N.J.S.A. 52:14B-16](#) et seq. That is, under the Act, any employer, large or small, who has failed to comply with the reporting or recordkeeping requirements of any State wage, benefit, or tax law, and has failed to pay wages, benefits, taxes, or other contributions or assessments as required by any State wage, benefit, or tax law, may under certain circumstances be subject to a written determination of the Commissioner directing any appropriate agency to suspend or permanently revoke a license(s) held by the employer. The Department has no discretion to deviate from this statutory mandate.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing nor would they have any impact of the affordability of housing. The basis for this finding is that the proposed new rules pertain to the obligations of employers under State wage, benefit, and tax laws. The proposed new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain to the obligations of employers under State wage, benefit, and tax laws. The proposed new rules do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Regulations

Full text of the proposed new rules follows:

CHAPTER 4

SUSPENSION AND REVOCATION OF EMPLOYER LICENSE FOR NON-COMPLIANCE WITH STATE WAGE, BENEFIT, AND TAX LAWS

SUBCHAPTER 1. GENERAL PROVISIONS

12:4-1.1 Purpose and scope

- (a) The purpose of this chapter is to implement [N.J.S.A. 34:1A-1.11](#) et seq., which empowers the Commissioner under certain circumstances to issue a written determination directing any appropriate agency to suspend or revoke any one or more licenses that are held by an employer who has failed to maintain and report a record(s) regarding wages, benefits, and taxes that the employer is required to maintain or report under State wage, benefit, and tax laws, and who has in connection with the failure to maintain or report a required record(s), failed to pay wages, benefits, taxes, or other contributions or assessments as required by State wage, benefit, and tax laws.
- (b) This chapter applies to each employer covered under any one or all of the State wage, benefit, and tax laws.

(c) For the purpose of this chapter, the officers of a corporation and any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation.

(d) For the purpose of this chapter, the individual(s) responsible for management of a Limited Liability Company (L.L.C.) or Limited Liability Partnership (L.L.P.) shall be deemed to be the employer(s) of the employees of the L.L.C. or L.L.P.

SUBCHAPTER 2. DEFINITIONS

12:4-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Agency" means any agency, department, board, or commission of New Jersey, or of any political subdivision of New Jersey, that issues a license for purposes of operating a business in New Jersey.

"Commissioner" means the Commissioner of the Department of Labor and Workforce Development, or his or her designee.

"In connection with" means either related factually or causally, or discovered during the same investigation, a contemporaneous or a near [page=535] contemporaneous investigation, regardless of whether related factually or causally.

"License" means any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in New Jersey, and that includes, but is not limited to, the following:

1. A certificate of incorporation pursuant to the New Jersey Business Corporation Act, [N.J.S.A. 14A:1-1](#) et seq.;
2. A certificate of authority pursuant to [N.J.S.A. 14A:13-1](#) et seq.;
3. A statement of qualification or a statement of foreign qualification pursuant to the Uniform Partnership Act (1996), N.J.S.A. 43:1A-1 et seq.;
4. A certificate of limited partnership or a certificate of authority pursuant to the Uniform Limited Partnership Law (1976), [N.J.S.A. 42:2A-1](#) et seq.;
5. A certificate of formation or certified registration pursuant to the New Jersey Limited Liability Company Act, [N.J.S.A. 42:2B-1](#) et seq.;
6. Any license, certificate, permit, or registration pursuant to [N.J.S.A. 48:16-1](#) et seq.; [48:16-13](#) et seq.; the New Jersey Alcohol Beverage Control Act, 33:1-1 et seq.; 34:8-70; 34:8A-7 et seq.; 52:27D-130; 56:8-1.1 et seq.; or the Public Works Contractor Registration Act, 34:11-56.48 et seq.; and
7. Any agency permit, certificate, approval, registration, charter, or similar form of permission to engage in a profession, trade, or occupation in New Jersey.

"State wage, benefit, and tax laws" means:

1. N.J.S.A. 34:11-4.1 et seq.;
2. The New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq.;
3. The New Jersey State Wage and Hour Law, [N.J.S.A. 34:11-56a](#) et seq.;
4. The Workers' Compensation Law, [N.J.S.A. 34:15-1](#) et seq.;
5. The Unemployment Compensation Law, [N.J.S.A. 43:21-1](#) et seq.;
6. The Temporary Disability Benefits Law, [N.J.S.A. 43:21-25](#) et seq.;
7. [N.J.S.A. 43:21-39.1](#) et seq.; and
8. The New Jersey Gross Income Tax Act, [N.J.S.A. 54A:1-1](#) et seq.

SUBCHAPTER 3. VIOLATIONS; COMMISSIONER ACTIONS

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12:4-3.1 *First* offense--notification and follow-up audit

- (a) When the Commissioner finds that an employer has failed to comply with the reporting or recordkeeping requirements of any State wage, benefit, or tax law, and in connection with that failure to report or maintain records, has failed to pay wages, benefits, taxes, or other contributions or assessments as required by any State wage, benefit, or tax law, the Commissioner shall, as an alternate to, or in addition to, any other action taken in the enforcement of the State wage, benefit, or tax law, take the following two actions:
1. Notify the employer of the finding that he or she has failed to comply with a State wage, benefit, or tax law's reporting or recordkeeping requirement(s) and, in connection with that failure to report or maintain a record(s), has failed to pay wages, benefits, taxes, or other contributions or assessments as required by a State, benefit, or tax law; and
 2. Ensure that an audit of the employer or any successor firm of the employer is conducted not more than 12 months after the employer has been placed on notice of the Commissioner's finding under (a)1 above.
- (b) Notification to the employer under (a)1 above may occur within the body of the same document through which the employer is notified of the underlying violation(s) of a State wage, benefit, or tax law or through which the employer is notified of any assessment for unpaid wages, benefits, taxes, other contributions or assessments, or for penalties, fees, or interest under a State wage, benefit, or tax law.
- (c) For the purpose of this chapter, an employer will be considered to have failed to comply with the reporting or recordkeeping requirements of any State wage, benefit, or tax law when:
1. The employer fails to maintain or report a record required under any State wage, benefit, or tax law; or
 2. A record maintained or reported by the employer under any State wage, benefit, or tax law contains a material misrepresentation.

12:4-3.2 *Second* offense--suspension of license(s)

- (a) Where at the conclusion of an audit conducted under N.J.A.C. 12:4-3.1(a)2, the Commissioner finds that the employer or any successor firm to the employer has failed to comply with the reporting or recordkeeping requirements of any State wage, benefit, or tax law, and has failed to pay wages, benefits, taxes, or other contributions or assessments as required by any State wage, benefit, or tax law, the Commissioner:
1. May, after providing the employer or successor firm with a "Notice of Intent to Direct the Suspension of a License" under (c) below, and after affording the employer or successor firm with an opportunity for a hearing in accordance with the Administrative Procedure Act, [N.J.S.A. 52:14B-1](#) et seq., and [52:14F-1](#) et seq., issue a written determination directing any appropriate agency to suspend any one or more licenses that are held by the employer or successor firm, for a period of time determined by the Commissioner; and
 2. Shall ensure that an audit of the employer or any successor firm of the employer is conducted not more than 12 months after the date of the Commissioner's written determination under (a)1 above.
- (b) In determining the appropriate length of suspension, the Commissioner shall consider the following factors:
1. The number of employees for which the employer or successor firm failed to maintain or report required records and pay required wages, benefits, taxes, or other contributions or assessments;
 2. The total amount of wages, benefits, taxes, or other contributions or assessments not paid by the employer or successor firm;
 3. Any other harm resulting from the violation(s);

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4. Whether the employer or successor firm made good faith efforts to comply with any applicable requirements;
 5. The duration of the violation(s);
 6. The role of the directors, officers, or principals of the employer or successor firm in the violation(s);
 7. Any prior misconduct by the employer or successor firm; and
 8. Any other factors the Commissioner considers relevant.
- (c) When the Commissioner seeks to direct the suspension of an employer's license, the employer shall be furnished with a written notice indicating:
1. The Commissioner's intent to direct the suspension of a license(s) held by the employer;
 2. The license(s) sought to be suspended;
 3. The duration of the license suspension(s) sought;
 4. The violations of State wage, benefit, or tax law upon which the Commissioner relies in support of his or her intent to direct the license suspension(s); and
 5. That the employer shall have the right to appeal the license suspension(s) to the Commissioner within 15 days of receipt of the Notice of Intent to Direct the Suspension of a License.
- (d) The Notice of Intent to Direct the Suspension of a License shall be mailed, by regular mail and return receipt requested, to a corporate officer of record, partner, individual proprietor, or other responsible person.
- (e) If, after confirmation that the employer has been mailed the Notice of Intent to Direct the Suspension of a License, the employer has either failed to file a timely appeal or has expressly waived its right to appeal, the Commissioner shall issue a written determination directing any appropriate agency to suspend any one or more licenses that are held by the employer or successor firm.
- (f) All hearings conducted pursuant to this section shall be conducted in accordance with the Administrative Procedure Act, [N.J.S.A. 52:14B-1](#) et seq., and [52:14F-1](#) et seq., and the Uniform Administrative Procedure Rules, [N.J.A.C. 1:1](#).
- (g) Upon receipt of a written determination of the Commissioner directing an agency to suspend a license(s) pursuant to this section, and notwithstanding any other law or rule, the agency shall immediately suspend the license(s) of the employer in the manner directed by the Commissioner.
- 12:4-3.3 [Third](#) offense--revocation of license(s)
- (a) Where, at the conclusion of an audit conducted pursuant to N.J.A.C. 12:4-3.2(a)2, the Commissioner finds that the employer or any successor firm to the employer has failed to comply with the reporting or recordkeeping requirements of any State wage, benefit, or tax law, and has failed to pay wages, benefits, taxes, or other contributions or assessments as required by any State wage, benefit, or tax law, the Commissioner shall after providing the employer or successor firm with [page=536] a "Notice of Intent to Direct the Revocation of a License" under (b) below, and after affording the employer or successor firm with an opportunity for a hearing in accordance with the Administrative Procedure Act, [N.J.S.A. 52:14B-1](#) et seq., and [52:14F-1](#) et seq., issue a written determination directing any appropriate agency to permanently revoke any one or more licenses that are held by the employer or successor firm.
- (b) When the Commissioner seeks to direct the permanent revocation of an employer's license, the employer shall be furnished with a written notice indicating:
1. The Commissioner's intent to direct the permanent revocation of a license(s) held by the employer;
 2. The license(s) sought to be permanently revoked;

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3. The violations of State wage, benefit, or tax law upon which the Commissioner relies in support of his or her intent to direct the license revocation(s); and
 4. That the employer shall have the right to appeal the license revocation(s) to the Commissioner within 15 days of receipt of the Notice of Intent to Direct the Revocation of a License.
- (c) The Notice of Intent to Direct the Revocation of a License shall be mailed, by regular mail and return receipt requested, to a corporate officer of record, partner, individual proprietor, or other responsible person.
- (d) If, after confirmation that the employer has been mailed the Notice of Intent to Direct the Revocation of a License, the employer has either failed to file a timely appeal or has expressly waived its right to appeal, the Commissioner shall issue a written determination directing any appropriate agency to permanently revoke any one or more licenses that are held by the employer or successor firm.
- (e) All hearings conducted pursuant to this section shall be conducted in accordance with the Administrative Procedure Act, [N.J.S.A. 52:14B-1](#) et seq., and [52:14F-1](#) et seq., and the Uniform Administrative Procedure Rules, [N.J.A.C. 1:1](#).
- (f) Upon receipt of a written determination of the Commissioner directing an agency to permanently revoke a license(s) pursuant to this section, and notwithstanding any other law or rule, the agency shall immediately suspend the license(s) of the employer as directed by the Commissioner.

12:4-3.4 Employee leasing companies

- (a) The Commissioner may take action under N.J.A.C. 12:4-3.1, 3.2, or 3.3, against an employee leasing company as the co-employer of the employees of its client company, including, but not limited to, the issuance of a written determination directing that the employee leasing company's registration be either suspended or permanently revoked, provided that the Commissioner has not determined that the failure or continued failure to keep records regarding, and to pay wages, benefits, and taxes under State wage, benefit, and tax laws, was caused by incomplete, inaccurate, misleading, or false information provided to the employee leasing company by the client company.
- (b) In each instance where the Commissioner takes action under (a) above against an employee leasing company as the co-employer of the employees of its client company, the Commissioner may also take action under N.J.A.C. 12:4-3.1, 3.2, or 3.3, against the client company.

12:4-3.5 Presumption of successor firm

- (a) A rebuttable presumption that an employer has established a successor firm shall arise if the two parties share two or more of the following capacities or characteristics:
1. Performing similar work within the same geographical area;
 2. Occupying the same premises;
 3. Having the same telephone or fax number;
 4. Having the same email address or Internet website;
 5. Employing substantially the same workforce, administrative employees, or both;
 6. Utilizing the same tools, equipment, or facilities;
 7. Employing or engaging the services of any person or persons involved in the direction or control of the other; or
 8. Listing substantially the same work experience.

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